Intersecting Experiences: A Taboo? Safeguarding Disability and LGB Rights On the International, European, and National Levels

By

Dorottya Karsay

Submitted to

Central European University

Department of Legal Studies

In partial fulfillment of the requirements for the degree of Master of Arts

Supervisor: Professor Renata Uitz

Budapest, Hungary
2010

Abstract

Among groups at intersections lesbians, gays and bisexuals with disabilities are particularly vulnerable due to a triple taboo they face in society and further marginalized without a strong movement advocating for their rights and legal measures unfit to adequately protect them from discrimination.

Both the disability and the LGBT movements have so far failed to address the needs of LGB persons with disabilities as minority movements have also largely failed to incorporate the agenda of their subgroups onto their platform - perpetuating the marginalized position of those at intersections. This failure will be shown through examples of the Hungarian and Dutch movements.

Although there is also growing awareness of intersectional discrimination among lawmakers, an intersectional approach is rarely applied in practice in discrimination cases. Equality instruments in the UN, EU and the Council of Europe will be analyzed to point out the gaps. Good practice will also be revealed.

In addition to outlining possibilities of how law could provide more effective safeguards, the crucial role of advocacy movements will be highlighted in pushing for more awareness among lawmakers and also supporting and improving the lives of LGB persons with disabilities with non-legal tools the movements already possess and have the capacity to use.

Introduction

Lesbians, gays, and bisexuals[1] (LGB) with disabilities often face a triple taboo in mainstream society, within their communities, as well as by those who draft, adopt, and ratify anti-discrimination and human rights instruments that are aimed to protect them. Although not great in numbers, those at the intersection of disability and sexual minorities are often in a particularly vulnerable and marginalized position due to the triple taboo they are subject to.

Firstly, the sexual desires and needs of persons with disabilities (PWD) are a largely taboo per se. Progressive as the Convention on the Rights of Persons with Disabilities (CRPD) is on intersectionality, it is rather silent about sexuality as a whole, which reveals the taboo of sexuality and disability. The lack of recognition of PWDs' sexuality is also present within the broader disability rights movement, among families, and caretakers.

Secondly, non-conform sexual minorities are still subject to taboos today in most of contemporary societies. Therefore, since persons with disabilities are usually presumed to be heterosexual - if their sexuality is acknowledged at all - being a LGB person with disabilities can place a triple taboo on the individual. The three taboos are disability and sexuality, non-conform sexuality, and the two intersecting – thereby, creating a third, distinct and new taboo. Just as intersectional identities can be distinct,

1 The current thesis does not include in its scope trans persons with disabilities. Transsexuality is still currently classified as a gender identity disorder in the tenth edition of ICD (International Statistical Classification of Diseases and Related Health Problems. To be able go through gender reassignment therapy, trans people usually need to be medically diagnosed with gender identity disorder. Therefore, it would be too complex a task for the purpose of the current thesis to discuss transsexuals and lesbians, gays, bisexuals under the same umbrella as intersecting with disability. It would be especially troublesome considering the ruling CRPD paradigm of the social model, which attempts to do away with the previous medical model of disability.

intersectional discrimination and intersectional taboos that are its foundation are also unique in their forms and effects.

The CRPD perpetuates these taboos by keeping silent about sexual orientation – although its Preamble does explicitly mentions multiple discrimination, it omits sexual orientation as a protected ground. This silencing faced by sexual minorities greatly adds to the exclusion of LGB persons with disabilities. The lack of access to peers, a community, sexual education, and sex life that persons with disabilities often face, coupled with ignorance, prejudice and rejection from mainstream society as well as the community of caretakers, family, and advocates place those at the intersection of disability and sexual minorities in a particularly vulnerable position.

It will be argued in the current thesis that for the protection and empowerment of this group both law and advocacy movements need to push for their recognition and in doing so both legal instruments and movements are essential tools and could greatly strengthen each other. However, addressing intersectionality has faced barriers both in law and movements on national, regional, and international levels.

Advocacy movements have a crucial role in pushing for recognition and protection in larger society as well as in legal instruments. However, the community and movement of LGB PWDs is still too weak to be truly effective in advocacy. The examples of the Netherlands and Hungary will be used to illustrate the void in both the broader LGBT and disability movements and reveal the need for a platform taking on the needs of this particular group. It will be argued that there would be no need for a separate movement if the two broader communities integrated the perspectives of subgroups onto their own agenda.

Personal testimonies of gays and lesbians with disabilities will be cited to show the experience of triple taboo and marginalization in both communities as well as in mainstream society and to reveal how a sense of community could be greatly beneficial for this group. Interviews in this thesis contribute the existing body of research conducted by inter alia, Tom Shakespeare, Jenny Morris, Yvon Appleby, Kirsten Hearn. The interviews referred to in many of the articles written by these authors are recurring and were primarily conducted in the UK. The current thesis aims to add to this body of research with interviews conducted in the Netherlands and Hungary in the period of September – December 2010. The interviews included lesbians and gays with disabilities as well as representatives of the LGBT movement in Hungary and the LGBT disability movement in the Netherlands. The interviews with local NGOs and Disabled People's Organizations (DPOs) add a new element to studies on the topic.[2] The main barriers to provide an intersectional approach within movements will be outlined and examples will be provided based on the interviews in the two countries.

In the second half of the thesis, the legal safeguards provided for this group will be analyzed looking at human rights and anti-discrimination instruments. Equality instruments prohibit discrimination on a number of grounds, the most common grounds being sex, race, age, color, national, ethnic or social origin, language, religion or belief, political or any other opinion, property, birth, disability – these however vary from one jurisdiction to another. Disability has by now been included in most international, European, and national equality instruments. Sexual orientation on the other hand is a more sensitive ground, which has often been entirely omitted in equality instruments or

2 The above mentioned research projects include interviews with the target group and not the two movements.

relegated under the umbrella of ‘other status’. This is especially true older human rights instruments and national constitutions; therefore, these instruments should either be amended or the relevant court, authority, or equality body needs to recognize it as an analogous, protected ground. Thus, the group of LGB persons with disabilities often find themselves without adequate protections in these instruments, since sexual orientation is in itself a sensitive ground and also, because an intersectional approach is not commonly applied through these instruments.

Up until recently, human rights law and anti-discrimination instruments have rarely been applied to intersectionality cases, although most of these instruments could potentially encompass an intersectional approach on discrimination. Although most of them do not explicitly dismiss such a possibility, discrimination grounds are usually not linked together even if the discriminatory act is carried out on multiple grounds. Therefore, there is a gap between how these instruments could be used and how they are actually applied in practice.

There are also some procedural barriers to applying an intersectional approach; these include the issue of comparators, proof, and the strictly categorical approach of law – as well as the lack of guidance on how to overcome these. Since neither the initial broad nor the later narrow human rights approach emerging in the 1970s aimed to protect groups at intersections, they have both proved to be unfit to grant safeguards against intersectional discrimination. These barriers keep LGB persons with disabilities in a particularly vulnerable position, often without adequate legal protections.

There is an emerging trend however in both international human rights law and European and national equality instruments to address intersectionality. The Convention

on the Rights of Persons with Disabilities (CRPD) explicitly recognizes the unique protections needed with regards to gender and age intersecting with disability – although it lacks protections for other subgroups.[3] The equality Directives of the European Union also prove to be more and more aware of intersectionality, especially in the case of gender.[4] The EU has also commissioned a number of research projects in this area and therefore shows awareness of intersectional discrimination. Certain national equality frameworks are quite promising as well in opening up the list of protected grounds and allowing space for intersecting groups to be protected.[5]

This thesis argues that the potential of these instruments to address intersectional discrimination needs to be implemented and put into practice. Equality instruments must reflect the recognition of intersectionality, but there is also a need to translate this into reality and provide safeguards against intersectional discrimination – particularly in the case of especially vulnerable groups, such as sexual minorities with disabilities.

Suggestions will be offered including the call to push for the application of an intersectional approach both in law and advocacy movements also arguing that the two can strongly and mutually affect each other in pushing for a more inclusive approach. A number of recommendations will be made for the adjustment of legal frameworks. First, the benefits of non-exhaustive lists of protected grounds will be revealed as potentially

3 The Preamble of the CRPD mentions multiple discrimination; Article 6 and 7 address the special protection necessary for Women and Children with Disabilities.

4 There is a growing body of EU research to map the forms and effects of intersectional discrimination. The Proposed Equality Directive of 2008 addresses multiple dicsimination to a certain extent and the Equality Directives all mirror awareness of the need to provide special protections against discrimination for women, therefore a gender perspective is mainstreamed in all of them. However, as it will in Chapter 4.2, this move is largely based on economic rather than human rights considerations.

5 The Canadian, South African, and Hungarian examples will be shown in Chapter 4.3

opening a path for incorporating an intersectional approach. Second, the contextual rather than categorical view on discrimination will be shown through the South African and Canadian examples, where the protection of dignity outweighs a strict reliance on protected categories. Lastly, a call for amending national legislation will be made as well as articulating the need to complement existing international human rights law with soft law, such as General Comments, on integrating an intersectional approach. A more radical vision of a new convention, which would place intersectionality in its focus, will be discussed.

The current contexts on the international, European, and national levels, in which there is a growing awareness of intersectional discrimination, could be used as the right time to advocate for a clearer paradigm shift in policy and law to allow for application on the ground. By revealing the major barriers to applying an intersectional approach both in law and advocacy and offering solutions, this thesis aims to contribute to the paradigm shift that could empower and safeguard the rights of protected groups at intersections, such as lesbians, gays, and bisexuals with disabilities, who are particularly vulnerable to discrimination.

1. Triple Taboo: At the Intersection of Disability and Sexual Orientation

Lesbians, gays, and bisexuals with disabilities are often the embodiment of a triple taboo in contemporary societies. First, the sexual needs and desires of persons with disabilities are largely ignored by mainstream society and even those that are in daily contact with PWDs. This taboo can be traced back to ignorance, prejudice and often -

pure disgust. Secondly, sexual minorities themselves are also subject to silencing, discrimination, and homophobic attacks in most parts of the world today. Therefore, being gay, lesbian, or bisexual and a person with a disability at the same time is often the source of facing a triple taboo, which can take the form of unfavorable treatment. Intersectional discrimination, which in this case would be based on the grounds of both disability and sexual orientation at the same time, is different in its forms and effects from those forms of discrimination that are based solely on the single ground of sexual orientation or disability.[6]

This chapter will elaborate on the phenomenon of intersectional discrimination, followed by an analysis of the triple taboo faced by lesbians, gays, and bisexuals with disabilities. It will show that the intersection of these taboos place this group in a position of marginalization and exclusion.

1.1 Intersectional Discrimination

No individual sees themselves belonging to one group solely, placed in 'boxes', sharing every characteristic of a group with all its other members. Identities are multi-layered; they shift and change in time and space and very much depend on the context.[7] Depending on the context, some of our multiple characteristics and identities can shift in the foreground and others become temporarily less relevant. Similarly to how we experience our own identities, they are not so clear-cut from the outside, either.

> As much discriminatory disadvantage arises out of complex structural, systemic and institutional factors, it can not always be attributed to the acts of one

6 Pg. 171, Schiek, Waddington, Bell: Cases, Materials and Text on National, Supranational, and International Non-Discrimination Law. Oxford: Hart Publishing, 2007.

7 Pg. 134, Re-thinking Identity: The Challenge of Diversity. Ed. Katherine E. Zappone. Joint Equality and Human Rights Forum. 2003.

> individual, against another individual, on the basis of an individual ground. People do not see themselves, or others, as a product of their constituent, but discrete, identities and so much discrimination will arise out of a vague feeling that a person will not "fit in" rather than treatment with clearly identifiable grounds.[8]

Multiple discrimination occurs when more than one characteristic is the basis of the discriminatory act, either alternatively or simultaneously. Multiple discrimination can take several forms. First, a disabled lesbian can be refused employment because of their disability at one workplace, because of their sexual orientation at another one, and because of their gender at a third one. Second, when "one ground adds to discrimination on another ground", one can talk about compound discrimination.[9] Third, when two or more grounds simultaneously provide a basis for the discriminative act and they "operate inextricably as the basis of discrimination"[10], the person affected is the target of intersectional discrimination. This would be the case when employment is refused of the individual because of both their disability and sexual orientation at the same time.

1.2 Triple Taboo: LGB Persons with Disabilities

Parallels are often drawn between disability and non-conventional sexual identities on the basis of how they are perceived by mainstream society. Indeed, they do share some similarities in, inter alia, how they are often non-visible characteristics, how conformity is thus presumed unless otherwise stated, and how these characteristics are usually not

8 Pg. 37, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights Review, Vol. 1. 2008.

9 Pg. 16, Tackling Multiple Discrimination: Practices, Policies and Laws. Danish Institute for Human Rights. European Commission, 2007.

10 Pg. 25, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights Review, Vol. 1. 2008.

shared by family members.[11] Yet, it is dangerous to blend them as it has often been done in the case of race and gender, suggesting that the nature and effect of the oppressive forces of racism and sexism are in their bases the same. By constantly trying to prove the similarities, one obscures both experiences – in the cases of both race and gender and disability and sexuality.[12]

Instead of focusing on the similarities between sexual orientation and disability, it is, for the purpose of this work more interesting to rather look at the intersection of the two and discuss why this particular intersection is of crucial importance. As it will be argued in the following, the intersection of these two characteristics often represents a triple taboo, which in itself should call for a response from both within advocacy movements and law. However, both have failed to recognize the unique experiences of gays, lesbians, and bisexuals with disabilities and address their specific needs. Therefore, this group is particularly vulnerable to discrimination.

As far as the two movements are concerned, the existence of the triple taboo, a lack of awareness, and the insistence on homogeneity make it highly problematic for this group to be easily integrated in either the broader disability or the LGB movement. Such integration would be necessary however to provide a sense of community for the group and advocate for their rights to be protected and represented in equality instruments.

11 Pg. 2 Ellen Samuels: My Body, My Closet: Invisible Disability and the Limits of Coming-Out Discourse." GLQ: A Journal of Lesbian and Gay Studies. Vol. 9, 1-2 (2003). London: Duke University Press, 2003. .233-255.

12 Grillo and Stephanie M. Wildman: Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other Isms)." Duke Law Journal. Vol. 1991, No. 2. New York: Duke University School of Law. 397-412.

Furthermore, equality instruments on the international, European, and national levels have failed to incorporate recognition and protection for groups at intersections, especially in the case of sexual minorities with disabilities. Law will continue to fail to adequately protect this group unless human rights law and equality instruments contain intersectionality provisions – and more importantly, when the possibility to deal with intersectionality cases is implemented into practice.

Let us now look at the intersection of a number of taboos that determine how this intersection is experienced on the one hand, and viewed from these movements from the outside on the other. It will be shown how the triple taboos of disability and non-conform sexual identity contributes to the exclusion of this group both on the level of movements and law.

1.3 Disability and Sexuality

The sexuality of people with disabilities is still a taboo today. Persons with physical and intellectual disabilities are predominantly viewed asexual and childlike[13] by mainstream society, their own communities, families and often the very movement that is to advocate for their rights. In the case of persons with mental health problems the presumption is often the opposite and includes an image of over-sexual, uncontrollable, and dangerous individuals.

In both cases, the perception of the sexual desires, needs, and activity of PWDs is distorted and prejudicial and "a medical tragedy model predominates, whereby disabled people are defined by deficit, and sexuality either is not a problem, because it

13 This presumption in itself portrays a false picture about children's sexuality.

is not an issue, or is an issue, because it is seen as a problem".[14] It is presumed that PWDs do not have sexual desires and engage in any sexual activity or, if they do, it is often viewed with disgust or kept in silence and ignored. In the most radical case, people with disabilities are often forcibly sterilized. The 1927 US Supreme Court decision in *Buck v. Bell*, which was overturned by *Skinner v. Oklahoma* 15 years later, was reproduced in practice in World War II eugenics war against PWDs and is still practiced in many countries today.[15]

Forced sterilizations, abortions, and contraception of people with disabilities are common practice today in many parts of the world, especially in large institutions that are out of sight and control and facilitate mistreatment taking place. Therefore, while the sexual beings of persons with disabilities are necessarily acknowledged in these cases, their perception is distorted and based on the presumption that it should be controlled in any possible way.

Voices within the movement articulate a critique of non-disabled society's attitude:

> Society needs to change further, to recognize the many ways that those perceived as different are excluded, and to acknowledge that disabled people are fully sexual human beings, with hopes and desires and the right to fulfill them.[16]

However, even the disability movement has not set the topic of sexuality and sexual rights as a top priority on its agenda:

14 pg. 3, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

15 Skinner v Oklahoma did not explicitly overturn Buck v Bell, but it decreased the number of sterilizations, which continued to take place however for decades until the 1970s.

16 Pg. 43, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

> Sexuality is often the source of our deepest oppression; it is also often the source of our deepest pain. It's easier for us to talk about – and formulate strategies for changing – discrimination in employment, education, and housing than to talk about our exclusion from sexuality and reproduction[17]

In the discipline of disability studies sexuality is also largely ignored and if it does come up, it is usually focused on sexual violence targeting women with disabilities and largely looks at PWDs as heterosexual.[18]

1.4 Disability and Non-Conventional Sexual Identities

The taboo of non-conform sexual identities intersects with that of disability and sexuality resulting in a 'triple taboo' in the case of lesbians, gays, and bisexuals with disabilities. The intersectional taboo is just as distinct in its forms and impact as having intersectional characteristics and facing intersectional discrimination upon them. Therefore, the experiences and taboos of being disabled and being lesbian, gay, or bisexual do not add to each other when they intersect, but rather, construct a distinct experience and a distinct taboo.

There is a double and contradictory standard when it comes to setting the sexual norm for persons with disabilities. From outside the community, they are mostly viewed asexual. In how they are perceived from the outside, sexuality and disability can be very similar: "the labels of nondisabled and heterosexuality are always already presumed "unless otherwise stated" in contrast to other identities, such as race or sex".[19] If PWDs are actually recognized in having a sexual self, they are presumed to be heterosexual,

17 Finger 1992: 9, qtd in Shakespeare: Power and Prejudice: Issues of Gender, Sexuality, and Disability, in ed. Len Barton: Disability and Society: Emerging Issues and Insights, pg 192.

18 Pg. 4, Shakespeare. The Sexual Politics of Disability.

19 John Swain and Colin Cameron, qtd in Samuels, Ellen. "My Body, My Closet: Invisible Disability and the Limits of Coming-Out Discourse." GLQ: A Journal of Lesbian and Gay Studies. Vol. 9, 1-2 (2003). London: Duke University Press, 2003. .233-255

'unless otherwise stated'.[20] This view places a triple burden on LGB persons with disabilities in asserting their sexual identity. As an interviewee in the Re-Thinking Identity research project has stated, "the GP just wouldn't ask about your sexuality because [the GP thinks] disabled people don't have sex. If you were to announce 'I'm gay' they would probably just think that you were having an identity crisis, you were schizophrenic or seeking attention!"[21]

Yet, it is equally true that PWDs are not as strongly pushed towards a heteronormative standard, as those non-disabled – mainly due to the general lack of viewing PWDs as sexual. A quotation in Jenny Morris's work can shed light on this phenomenon: "I haven't had to face family reactions of 'Why haven't you got married' or society's reaction of 'Why haven't you got a man?' because I'm not expected to have one!"[22] Thus, as Appleby also suggests, coming out might work differently among PWDs, since there was never a heterosexual model or an actual sexual norm to live up to.[23] However, the lack of the heterosexual norm also relies on the assumption that PWDs have no sexuality and therefore coming out can be just as difficult in lack of such a heteronormative expectation.

To describe the mainstream perspective towards LGB PWDs, one can borrow Adrienne Rich's description of how lesbians are viewed by the patriarchal and heteronormative hegemonic order; her description is equally valid for a variety of

20 Pg. 153, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

21 Pg. 56, Re-thinking Identity: The Challenge of Diversity. Ed. Katherine E. Zappone. Joint Equality and Human Rights Forum. 2003.

22 Qtd in Morris 1989: 98-99, Appleby, Yvon. "Disability and 'Compulsory Heterosexuality'." Heterosexuality: A Feminism & Psychology Reader. Eds. Sue Wilkinson and Celia Kitzinger.London: Sage Publications, 1994. 266-270.

23 Pg. 22, Appleby, Yvon. "Out in the Margins." Disability & Society. Vol 9, No. 1, 1994.

'deviant' identities. Following Rich's argument that "the bias of compulsory heterosexuality, through which lesbian experience is perceived on a scale ranging from deviant to abhorrent or simply rendered invisible"[24], it is clear that the same statement is legitimate in describing the mainstream look on the intersection of non-conform sexuality and disability.

Personal accounts of disabled gays and lesbians provide important insight into this experience:

> As a "mad" lesbian woman I am treated like the ultimate threat to patriarchal society – a scourge in the community or a contamination […] Am I mad because I am lesbian in a heterosexual world? I mean, it's dangerous so I must be mad to choose it. Or am I lesbian therefore I am mad, i.e. it's a mental disorder or a sickness? Or am I lesbian because I am mad, i.e. I can't think straight? These parts of my "being" are so interwoven that I can't separate the strands.[25]

Invisibility has the potential to make groups, such as sexual minorities, vulnerable: "history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility".[26] The disabled community as a whole is often rendered invisible as well, which is greatly facilitated by the maintenance of large institutions in remote areas where persons with physical, intellectual, and psycho-social disabilities are hidden and thus silenced. Their sexuality is further hidden, denied, ignored, or rejected and in the case of sexual minorities, it is both society and law that has ensured this invisibility is maintained.[27]

Silence that surrounds the LGB disability community is one of the consequences of the tabooization of non-conventional sexuality and the sexuality of PWDs in general.

24 Pg 26, Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence." Blood, Bread, and Poetry: Selected Prose 1979-1985. New York: W. W. Norton & Company, 1986.

25 Quote from Pg. 157, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

26 Para 127, NCGLE v Minister of Justice, CCT 11/98, 9 October 1998. Constitutional Court of South Africa.

27 Pg. 212, Sylvia A. Law "Homosexuality and the Social Meaning of Gender". Wisconsin Law Review 187. 1988.

The two intersecting, results in triple taboo: the imperatives of compulsory heterosexuality and compulsory able-bodiedness emerge in the context of further abnormalities embodied in being LGB and disabled.[28]

It is through the existence of the 'abnormal' that norms gain legitimacy and set the rules for acceptable behavior and identity. Although both norms are impossible to be fully achieved – "mutual impossibility" -, both are constantly reassured and endorsed by a "panicked consolidation of hegemonic identities" in societal structures ending in an "inevitable comedy", as Judith Butler argues in Gender Trouble.[29] Yet, as Butler also points out, it is exactly the desperate longing for the norm that eventually allows some legitimate space for deviant abnormalities, since the norm only gains meaning through the existence of 'deviance'.[30]

Personal accounts of disabled gays and lesbians provide important insight into this experience and show that their often difficult position when it comes to gaining visibility and access to the LGB community. There is also a desperate need for recognition, belonging, and protection from movements and law.

'Coming out' as lesbian, gay, or bisexual and becoming visible for PWDs is much harder than for their non-disabled peers. Not only do they face more stigmatization for belonging to both 'deviant' groups in the eyes of society, but they also have much limited access to the LGB community.

Institutional living, which is in many countries the dominant setting for persons with disabilities, dependence on caregivers and family, who often might not or do not

28 Pg. 384, McRuer, Robert. "Compulsory Able-Bodiedness and Queer/Disabled Existence." The Disability Studies Reader. Ed. Lennard J. Davis. London: Routledge, 2010. 383-393.

29 Judith Butler, Gender Trouble, qtd in McRuer pg. 386-388.

30 Ibid.

want to come to terms with the person's sexual needs and wants, and the lack of community based supports can make it extremely difficult for LGB PWDs to come out and meet others in the LGBT community. It is often the case that LGB PWDs also lack support from both the mainstream LGB and the disability movement, which could otherwise both play a crucial role in reaching out to this group. There is a great need for acknowledgement and support, which are hardly gained from either movements, since they both fail to protect the subgroup of lesbians and gays with a disability.

In the following, I will analyze how the two movements have pushed this group to their very margins and thus have failed to address their specific needs and concerns. I will also argue that this void in the two movements has partly contributed to the lack of legal protections granted to this group at the intersection and the two together add to their.

2. Intersectionality and Minority Movements

In the following the hardships of subgroups within minorities will be analyzed through the examples of gays, lesbians, and bisexuals with disabilities and their representation in the broader disability and LGB movements. It will be revealed that their existing vulnerability and exclusion is further perpetuated by the lack of their representation in the two movements – as seen for instance in the CRPD approach to sexual orientation intersecting with disability and the lack of specific programs addressed to them in the two groups' advocacy and empowerment efforts.

The CRPD had the potential to mark a milestone in advocating for the rights of this particularly vulnerable group by acknowledging their existence and pushing for their protection and support; yet, it failed to accomplish this. Inclusion and participation being

the founding principles of the Convention, the drafting process was heavily influenced by the voices of persons with disabilities and Disabled People's Organizations (DPOs). A great number of civil society representatives joined the International Disability Caucus, a coalition of NGOs from around the globe formed to influence the drafting of the Convention. Furthermore, around 800 persons with disabilities were present at the Ad Hoc Committee's final session in August 2006.[31]

However, the final text of the Convention shows that in the midst of clashing political interests and points of view, some advocacy groups were better represented and thus more successful than others in pushing their agenda through. For instance, groups advocating for special protections for those at the intersections of gender and disability and age and disability achieved a crucial victory and set a hugely important precedent in ensuring that these intersectional experiences and needs are specifically addressed in a human rights treaty other than the Convention against the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention for the Rights of the Child (CRC). Their efforts resulted in special provisions on Women and Children with Disabilities[32] and several rights provisions having a gender and age perspective.

The powerful representation of these groups is exceptional, since groups at intersections have found it difficult to be represented in both rights instruments and minority movements. A clear example is that the needs of other groups are not adequately addressed in the CRPD. Such strong advocacy as in the women's lobby was an avenue that had not yet been available for LGB PWDs during the drafting, which

31 Pg 14, Marianne Schulze, "Understanding the UN Convention on the Rights of Persons with Disabilities." A Handbook on the Human Rights of Persons with Disabilities. July 2010.

32 Articles 5 and 6, CRPD

resulted in a clear lack of sexual rights and reference to sexual minorities in the CRPD. One reason for this gap in protection – in addition to the sensitive and tabooized nature of the topic - is that the representation of this subgroup within the broader disability community was not ensured among NGOs and DPOs participating in the drafting of the CRPD. Also, mainstream disability groups have not integrated an intersectional approach in their programs.

In the following chapter it will be argued that this group is not adequately represented by either the broader disability or the LGBT movement and since its own advocacy platform is not strong enough, they are often marginalized when it comes to pushing for their agenda. Generally, those at intersections face two main barriers. First, they often have to choose between their identities and join the respective movement: multiple identities usually do not fit any broad movement. Second, neither of the two movements addresses their particular needs if it does welcome them in the first place.

In the case of LGB PWDs these barriers exist in both the disability and the LGBT movements. In the following the main reasons underlying these barriers will be analyzed. Personal testimonies of gays and lesbians with disabilities will be presented as well as interviews with disability and LGBT organizations in Hungary and the Netherlands. The Hungarian examples will reveal patterns of marginalization in the two movements; the interviews from the Netherlands will provide insight into the beginnings of the LGB disability movement. Lastly, the role of movements will be highlighted in how they could potentially improve the lives of this particularly vulnerable group by pushing for their recognition, protection, and support.

2.1 The Disability Movement

The second half of the twentieth century brought along the emergence of the social model in disability studies and the birth of the disability movement per se.[33] The social model, which is the ruling paradigm of the CRPD, emerged as an alternative to the individual or medical approach to disability. The social model is based on the premise that impairments and barriers in society construct disability together and that discrimination, prejudice, and barriers are therefore the issue, not the impairment itself. Such barriers can be physical, such as inaccessible premises and social and attitudinal, such as the stereotypes and presumptions that persons with disabilities are dangerous, incapable, and needing others to act in their best interest. In the social model, the focus is on the social context and the interaction between the person and the society surrounding them. The solution for both the individual and society is the removal of barriers, as opposed to the medical model, where the problem is the individual and the solution is rehabilitation, medicine, and psychology.[34]

The disability movement has undoubtedly contributed to the positive experiences of a sense of belonging and coherence within the community and turned "self-pity and self-blame to anger and self-confidence" of persons with disabilities.[35] Self-confidence and self-love, which are essential for healthy relations of any individual towards love and sex, as Tom Shakespeare argues, have hugely been shaped by the impact of the

33 Pg. 3, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

34 Pg 8, Rannveig Traustadottir: Disability Studies, the Social model and Legal Developments, in: The UNCRPD: European and Scandinavian Perspectives. Boston: Martinus Nijhoff Publishers, 2009.

35 Pg. 3, Tom Shakespeare, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996

movement.[36] Such changes have not only directly affected the way persons with disabilities see themselves, but also how they have made those non-disabled perceive them.

The disability movement today is rather fragmented; division lines have inevitably emerged along the lines of types of disabilities.[37] Therefore, agendas may vary in the different segments of the broader movement. However, one aspect seems to be common in the movement as a whole: as Tom Shakespeare argues, it is generally true for the movement that its progressive approach in some fields does not extend to all areas, such as that of sexuality. As he points out, "being political and progressive about disability" is not a guarantor of similar thinking about sexuality in general and sexual minorities in specific. However, Shakespeare argues that this area is crucial for the movement to engage with in saying that "sexuality, the one area above all others to have been ignored, is at the absolute core of what we're working for".[38]

As Tom Shakespeare highlights, placing sexual rights on the agenda is crucial for two main reasons. First, it is necessary for persons with disabilities to gain such "validation and recognition" from within the movement; second, it is essential that the non-disabled world see PWDs as sexual beings and as such, they are "recognized, accepted, valued, and supported".[39]

Since the topic of sexuality is largely pushed in the background within the movement, those who belong to sexual minorities face a triple barrier. First, the barrier

36 Ibid.

37 Pg. 179, eds. Barnes, Colin, Geof Mercer, Tom Shakespeare. Exploring Disability: A Sociological Introduction. London: Polity Press,1999.

38 Pg. 206, Shakespeare, Tom. "Power and Prejudice: Issues of Gender, Sexuality, and Disability." Disability and Society. Emerging Issues and Insights. Ed. Len Barton. London: Longman, 1996. 191-215.

39 Pg. 207, Ibid.

of silence about sexuality, second, diverging from a heterosexual norm prevalent in society in general, and third, being a sexual minority within the broader group of PWDs. Thus, as Appleby phrases it in the title of her article, LGB PWDs are "out in the margins" – marginalized both within and outside the disabled community for being LGB on the one hand and being LGB and disabled on the other. Personal testimonies in Appleby's research reveal this experience: "[people in the disability community] can cope with one identity, they cannot cope with two, and they could not cope with that combined identity of who I was, which I think is very interesting".[40] In the following, testimonies of NGOs and lesbians with disabilities will be used to present the Hungarian context.[41]

Hungary

For the purposes of this thesis eight Hungarian disability organizations were contacted, including: the National Autistic Association (AOSZ), Soteria Foundation, National Federation of Disabled Persons' Organizations (MEOSZ)[42], Voice of Soul Association (Lélekhang), Hungarian Association for Persons with Intellectual Disability (ÉFOÉSZ), Hungarian Association of Deaf and Blind Persons (SINOSZ), Hungarian Federation of the Blind and Partially Sighted (MVGYOSZ), Hand in Hand Foundation (Kézenfogva Alapítvány). Interviews were conducted with two NGOs, the National Autistic Association and Soteria Foundation. Three organizations did not respond to the request for an interview (SINOSZ, MVGYOSZ, Hand in Hand); one requested a list of questions,

40 Qtd in 157, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

41 During the research period the LGBT and disability community were both approached to recommend interviewees who claim these intersectional idenitities. Interviews were conducted with only two lesbian women with disabilities. They have recommended 2 more individuals, one woman and one man, however, due to the lack of time no interviews were made with them.

42 Although it is not clear from its English name, MEOSZ is an organization of persons with physical disabilities.

but never responded to them (MEOSZ); two had to cancel the interview (ÉFOÉSZ, Voice of Soul). Voice of Soul answered that the topic was of no relevance to their work and they did not come across gays, lesbians, bisexuals through their work, but they were open to give an interview. Unfortunately, the interview had to be cancelled.

A lesbian woman with a physical disability was also interviewed. Kriszta[43], 35, lives and works in Budapest. She considers herself an exception among her peers with disabilities for having finished two universities, having a job, living independently in the community, and sustaining herself. Kriszta is well-known in the Budapest LGBT community for organizing LGBT events. She was asked about their involvement in the disability and the LGBT movement in Hungary and her views about how these movements perceived lesbians, gays, and bisexuals with disabilities. In the following the interviews with the two NGOs and Kriszta will be used to reveal some patterns in the Hungarian disability community and movement.

Lesbian, gay, bisexual PWDs are often outcasts within the community and the movement, similarly to others having intersectional characteristics and claiming those identities. There are a number of reasons why exclusion from mainstream society is reproduced within the narrower group of persons with disabilities and organizations uniting them. First, disability movements and groups might simply be unaware that they have LGB members and their needs should be placed on the agenda. The responses from Hungarian NGOs reveal that there is often no awareness within the movement that there are members of sexual minorities in the membership and certain topics should be

43 Kriszta is the interviewee's real name, which she consented to being used in this thesis.

placed on the agenda: “In our organization, this topic has never come up”[44], wrote an NGO representative as a response to a request for an interview.

Kriszta believes that since the sexuality of PWD’s is a taboo per se, homosexuality does not even occur to most people.

> Within both the community and the movement, sexuality is a taboo. It is not ‘proper’ and it is just unimaginable that someone is attracted to the same sex. The disabled community is not homogeneous; there is a hierarchy between PWDs, the caretakers, families, organizations. PWDs are a suppressed group; they are not looked at as adults and therefore as being sexual, let alone gay.

Second, there might be a recognition, but the experiences and needs of these members of the community are not part of the agenda, for there might be matters considered more pressing for the interests of the broader community. This point was also raised by an NGO: “Although we’ve come across this topic, we have not dealt with it in depth”.[45]

The National Autistic Association (AOSZ) has to a certain extent dealt with the topic homosexuality in their work. AOSZ is a parents’ organization and recently launched a program that addresses the topic of sexuality among the membership – parents. Homosexuality was raised in the sessions several times and discussed in length. AOSZ however does not have any similar programs that would involve persons with disabilities themselves. They do have some LGB members, whom they have directed to LGBT organizations and events. Out of the eight organizations they seemed to be the most aware that there are sexual minorities among their clients and the members – parents – should be involved in some programs discussing the area of sexuality and

44 Voice of Soul Association

45 ÉFOÉSZ

homosexuality. However, this project is only a minor segment of the organization's work, as there are more pressing issues to work on.

Kriszta highlighted the same phenomenon by saying that most disability NGOs focus on the most basic issues and there is no emphasis on sexuality. She quoted the Maslow pyramid and argued that the Hungarian disabled community needs to advocate for their needs being met on the very first levels of the pyramid; romantic relationships are certainly not on the list of priorities.

> You cannot even go to vote, since premises are not accessible, or have your basic needs satisfied, have someone clean, do the laundry, cook for you, if necessary. Even your basic needs are not met, so romantic relationships remain on the margins. The same happens in the movement – they need to work on the most basic things.

The same view was echoed by the two other NGOs. They thought there were more pressing needs in the Hungarian context: 24,000 persons with disabilities currently live in large institutions; 60-80,000 are under partial or plenary guardianship and are thus deprived of their right to vote, marry, enter into a contract, manage their finances and property, decide where and with whom they want to live, what kind of treatment they want to receive. Education and employment are mostly inaccessible – both when it comes to the physical environment or prejudices and stigma. Therefore, the areas of sexual rights and LGBT rights are looked upon as secondary – "luxury issues" as Kriszta also affirmed this view.

Lastly, in the core of silence might lay homophobia, which again goes back to Tom Shakespeare's point in recognizing that awareness about one issue does not necessarily lead to progressive views and dedication about others. As Kriszta put it, "gays are equally looked down upon in the disabled community as in mainstream society. I hear them say "faggot" and all that, it is a cursing word for them, too". In this

respect, as Jenny Morris has argued, “the disability movement mirrors the attitudes of mainstream society, having the same prejudices about sexual orientation and gender roles”.[46] In the following it will be revealed that there are rather similar barriers within the LGB movement, as well.

2.2 The LGBT Movement

LGB persons with disabilities are not only on the margins of the disability movement, but often of the LGB movement, as well. The reasons for a lack of addressing the needs of PWDs within the LGB community can also be traced back to the three points highlighted in the case of the disability movement. Accordingly, there is often no awareness that there are a significant number of persons with disabilities within the LGB community. This might be perpetuated by a great number of invisible disabilities, physical, intellectual, and psycho-social – as well as general silencing and stigmatization. As Kriszta said: “ We are invisible, because we cannot go out anywhere. You are stuck in an institution or in your own family and you cannot go anywhere by yourself. The most you can do is talk to people on online forums”.

Furthermore, it is equally true for the LGB movement that there are issues of higher priority to be addressed in the interest of the larger group – “disability is too much trouble for most lesbians and gays to be bothering with”.[47] Labrisz, which is a Hungarian lesbian association, also confirmed this view in an interview they gave for the purposes of this thesis. There is awareness of persons with disabilities within Labrisz as members

46 Pg. 59, Morris, Jenny. “Pride against Prejudice: A Personal Politics of Disability.” London, The Women’s Press, 1991.

47 Pg 163, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

of the organization know a small number of gays, lesbians, bisexuals with disabilities, but it is a marginal topic and Labrisz does not have any programs specifically addressing this group. Labrisz participated in a seminar about intersectionality organized by the EU and although greater awareness and enthusiasm followed, the actual implementation of practices mainstreaming intersectionality within the Association is difficult and has not yet taken place. There were several reasons mentioned by the Labrisz representative. Firstly, there are more pressing issues that the movement needs to deal with, such as the lack of anti-discrimination safeguards in the new Constitution, the ban on gay marriage, widespread homophobia against the community, and violence at Pride marches. Secondly, the usual and pressing matters leave no space and resources for the organization to take on new items on their agenda. Thirdly, Labrisz is only aware of a few LGB persons with disabilities and therefore has not perceived addressing their specific needs a pressing matter. Lastly, there is little cooperation between different movements – in this case, between Labrisz and disability organizations.

Multiple discrimination as such, said the representative of Labrisz, does come up at Hungarian LGBT events, mostly at events during Pride week, but no joint action is taken between movements after the events are over. When asked about the accessibility of Labrisz events' premises, Labrisz pointed out that the access of lesbians to mainstream clubs is an issue per se: there is fear that lesbian events will be rejected by venues out of homophobia in mainstream society. Therefore, they try to stick to places that have welcomed their events in the last few years - making sure they are physically accessible is not the most urgent issue.

Kriszta's is well aware of this standpoint:

> I would have been happy to integrate into the LGBT community - talk to and meet people - much earlier if I had felt and if they had stated I was welcome to join, come to parties and events, and if I had problems with accessibility, I could just call them. But there is a hierarchy of issues in the LGBT movement. Someone having a disability is a marginal issue. Groups in the movement are focused on legal issues, advocacy for the broader group and getting the diverse LGBT community as a whole on board.

Third, just as there is apparent homophobia in the disability movement, there is often disablism in the LGB movement.[48] With regards to physical disability, this phenomenon is often referred to as 'body fascism'; in the case of other disabilities, the same prejudices and stereotypes prevail in the LGB movement as in the broader society. Kriszta thinks that besides disablism there is also hesitance in the LGBT community when it comes to persons with disabilities and people prefer to keep their distance from the unknown and the abnormal. As Kriszta said, "there might be disability phobia; but if they drink enough, people come up to me at LGBT parties and they are friendly. Once this girl came up to me and said: "It's so great you are here", and I thought "Yeah, well, I organized the party".

However, there might be a fourth and unique reason for the LGB movement to be rather unwilling to address the intersectional issues of the two identities: not so long ago, homosexuality per se was labeled as a disability – a concept from which the movement would clearly aim to break away from. In the 1970s homosexuality was still labeled as a sickness; in the 1980s the International Classification of Impairments, Disabilities and Handicaps was still defining homosexuality as an impairment.[49] Clearly,

48 Pg. 387, McRuer, Robert. "Compulsory Able-Bodiedness and Queer/Disabled Existence." The Disability Studies Reader. Ed. Lennard J. Davis. London: Routledge, 2010. 383-393.

49 Pg. 154, Ibid.

it is not on the agenda of movement to be subject to continuing stigmatization and labeling as in the past.

In the Hungarian context, as Kriszta put it, there is also fear of misinterpretation and further stigmatization by mainstream society. Kriszta referred to the 2008 Pride campaign, which featured a poster with children on it and a slogan saying "As a child you stood up for a lot of things you didn't know much about! Now, this is about you! For yourself, you have to stand up!" Kriszta remembers the poster receiving so much criticism that it had to be withdrawn as the official campaign poster that year: the LGBT community was accused of pedophilia and lacking any reasonableness.[50] Some news magazines reported that even LGBT persons though the poster was too provocative.[51] Kriszta believes there might be fear in the movement that if they consciously and publicly integrate persons with disabilities, it might result in accusations of perversion by those who often target the community with such critiques.

However, this fear leaves those silenced, who are at the intersections of the two groups. The isolation that is often the outcome of the four factors combined pushes PWDs to the very margins of the community either in the form of silencing and invisibility or actual hostility. Interestingly, the movement thus reproduces a similar pattern of marginalization that targets them from the heteronormative mainstream society:

> It is a profound irony that the attitudes of many in the lesbian and gay community towards disabled people echo those of the heterosexual world towards lesbians and gays themselves. These types of feelings, combined with the generally

50 The article „Is this really the best way to promote the gay pride?" includes excerpts from a numer of articles published about the poster. Vastagbőr. 6 June 2008. Accessed 25 April 2011. http://vastagbor.blog.hu/2008/06/06/vajon_3_gyerek_a_legjobb_modja

51 "Even LGBT persons are shocked by the festival's poster with kids". Velvet. 6 June 2008. Accessed 25 April 2011. http://velvet.hu/sztori/plakatos0606/

> intimidating atmosphere of many lesbian and gay venues, and the insecurity of many disabled people, contribute to the isolation often experienced by disabled lesbians and gays."[52]

Other testimonies from Kirsten Hearn's research further affirm this experience:

> Issues of equality are not fashionable for the majority of the severely able-bodied, white, middle-class lesbian and gay communities […] we are […] not considered 'proper' lesbians and gays. Most of us do not look, act, move or communicate in what is considered to be a lesbian or gay way. We are outsiders in our own community and no one hesitates to let us know that.[53]

An account of a non-disabled lesbian woman further reaffirms this void in the community:

> The whole lesbian community in fact ought to be solid in the face of oppression which we have as being labeled apart, as a perverted group, a running sore, political irritant and unfit mothers and daughters. That should be a powerful unifier, but it isn't. In point of view of day to day reality the fact that she is in a wheelchair and most of us are not sets us apart, out paths do not cross" […] You almost had to be 'normal' to be 'abnormal'.[54]

These accounts reveal that disabled lesbians, gays, and bisexuals are often on the margins of both movements. The reasons in the two movements are quite similar: there is often no awareness, there are more pressing issues, there is apparent homophobia and disablism, paired with disease-phobia in the LGBT movement, and lastly, there is a lack of cooperation between the two movements. These lead to the agenda of both broader movements failing to recognize their experiences and address their needs.

It is the lack of integration within both broader movements that has contributed to the emergence of a unique space at the intersection of the two communities. In the following, the LGB disability movement will be introduced based on the positive example of the Netherlands.

52 Pg 164, Ibid.

53 Pg. 34, Hearn, Kirsten. "Disabled lesbians and gays are here to stay'". High Risk Lives. Tara Kaufmann and Paul Lincoln. Bridport: Prism Press, 1991.

54 Pg 23, Appleby, Yvon. "Out in the Margins." Disability & Society. Vol 9, No. 1, 1994.

2.3 The LGB Disability Movement

Sári[55], who was another interviewee for the purposes of the current thesis, revealed an interesting point about the need for intersectional movements. Sári is 22 and studies in Budapest. Sári is labeled as disabled for having autistic characteristics, but she refuses to identify with this label. As she said and Kriszta firmly agreed, there would be no need for separate groups to emerge at the intersection, if both movements were willing to integrate new points onto their agenda and admit that the two groups are not and do not have to be so homogeneous after all.

Recognizing this would be important and necessary to allow for space in which subgroups can have their own claims acknowledged and considered. Such a new approach would be generally beneficial for movements and could give way to intersectionality to be incorporated in their agenda.

As long as the two mainstream groups do not provide a space for the particular group of LGB PWDs and law also fails to acknowledge their and generally the experiences of groups at intersections, there is a strong need for a space that can accommodate the needs and advocate for the rights of this community. In some countries, such as the Netherlands and the UK, there are positive examples for the existence of such groups. In the UK the volunteer-run organization Regard is the leading platform for LGBT PWDs and in the Netherlands there are a growing number of such self-advocacy groups.[56] In the following, three of these groups, 'Homo en

55 Sári is not the real name of the interviewee.

56 http://www.regard.org.uk/

Handicap' and 'Pink Wheels' in Amsterdam and a COC[57] group in Maastricht will be introduced.

The Netherlands

'Homo en Handicap', 'Pink Wheels', and the Maastricht COC group were specifically established to provide a space for lesbians, gays, and bisexuals with disabilities in the Netherlands. The two former were created by persons with disabilities: Adam[58] a gay man with an intellectual disability and Monika, lesbian woman with a physical disability. 'Homo en Handicap' is a group for gays, lesbians and bisexuals mostly with intellectual disabilities; 'Pink Wheels' provides a space for gays, lesbians, bisexuals with physical disabilities. The Maastricht group was established by Mike, who has worked with PWDs as a social worker for years and his brother also has a disability. The group is for gays, lesbians, and bisexuals with a mental disability. In the following, the need for, the evolution of, and the objectives of these three groups will be described. It will be argued that they arose from a need within the subgroup to have a safe space and community for them and that they fulfill the objectives of empowering the members, providing a sense of belonging, and also advocating for a change in attitudes and practices towards lesbian, gay, and bisexual persons with disabilities – both in the two movements and communities and in mainstream society.

The need

57 Cultuur en Ontspannings-Centrum, or Centre for Culture and Leisure

58 Adam is not the interviewee's real name

Adam's accounts revealed a lack of sense of belonging and community in both the LGBT and the disability movement, which drove him to form his own group. Monika's[59] experiences however were more about explicit exclusion in both movements. Mike[60] formed the group as a response to a need identified by disabled members of COC Maastricht. All three stories reveal the need within the group of LGB persons with disabilities to have their own space.

Within the disability community, Adam often had negative experiences. Living in an institution in his twenties and early thirties, he was often treated with hostility and homophobia by fellow residents, staff of the institution, and mentors. Finding a safe and accepting space was difficult for him; he felt he did not fit in the gay community either. In his early twenties, he used to go out to gay bars, but was often turned down when people learned he was living in an institution.

Adam became involved in the LGBT movement in Harleem. After working with COC Haarlem, an LGBT organization, he felt the need to start his own group for his disabled peers, because he felt people would understand him better. He moved to Amsterdam 10 years ago and started his own group, 'Homo en Handicap', which is for gays, lesbians, and bisexuals with disabilities. Adam feels much more comfortable in his own group than in mainstream LGBT groups. Adam has also been active in disability organizations, but often had conflicts with other members and felt he was not listened to.

"Many times lesbians stay in the closet within the disability community, since it is usually presumed they are heterosexual and thus just friends" says Monika, who faced

59 Monika is not the interviewee's real name

60 Mike is not the interviewee's real name

much rejection from caregivers and nurses, several of whom decided to quit after they learned she was lesbian. In the LGBT community, Monika has also often felt she was "put aside" and other lesbians looked at her as if she was asexual. This was really painful for Monika, since she was not considered a potential partner.

Monika thinks the LGBT movement sees the need for intersectional subgroups and they know they have not been doing enough. Monika believes the LGBT movement is much more open than the disability movement, which is often supported by the church. Although some institutions are not funded by the church, she thought the mentality was often still there. Monika tried advertising her group through a disability website that offers events and projects – they explicitly refused to put anything about homosexuality on their site.

According to Monika when it comes to gays and lesbians with a physical disability, the LGBT movement is rather just lacking awareness, but the disability movement is often homophobic. Monika feels much more comfortable in the LGBT community and movement, because – she says - the disability movement is much more focused on problems and special needs. Monika also felt the lack of cooperation between the two movements and saw that as a huge gap. In Amsterdam, for instance, information is available about gay-friendly and disability-friendly places, but not about those that are open to both – there is no communication and cooperation between the two groups. To fill this void, Monika recently founded 'Pink Wheels' in 2010, a gay/lesbian group for people with physical disabilities, based in Amsterdam.

Mike on the other hand was already active in COC when he started a group for those at the intersection of disability and non-conform sexuality in Maastricht – as he

says, because several people indicated the need and COC then gave support. Several people came to the local COC office asking for such a group around that time.

Mike said his group did not really have any contact with disability groups – he was often openly rejected when homosexuality came up. However, the members of his group are usually active in disability groups, but cannot talk about their homosexuality. They usually have problems with homophobic verbal attacks as some call them “homo” and bully them. This often happens at their workplaces and makes the members very scared.

Mike says being free to talk about being gay is one of the most important aspects of the group. The members come to the meetings, because, as they say, “there is nothing else for us” and they don’t want to go to a gay bar alone. They also often say meeting others with the same problems is important to them. The most common problems they have are simply being scared – of not being accepted and being discriminated by peers, supporters, colleagues, parents. Their supporters also do not recognize and accept that they are gay and they do not feel safe with them. As Mike says, the group’s mission is to ensure people can meet each other and become strong enough to come out.

Evolution and Objectives

COC, which is the oldest LGBT organization in Europe, has a number of groups specifically for LGBT persons with disabilities. The first such group was established by Adam about 10 years ago. These groups function under the umbrella of COC, but they

are specifically targeted for the subgroup of disabled gays, lesbians, bisexuals. Adam believes that having these groups is essential for LGB persons with disabilities.

Adam moved to Amsterdam 10 years ago and started a group specifically for gays with disabilities. His group is mainly for people with intellectual disabilities, but there are some who have a physical disability. Today there are about 25-30 people coming to their meetings, which are every three weeks in Amsterdam. Adam says 17 such groups have been formed in the Netherlands since he started the first group. People attending other meetings usually take the idea back to their own cities and start their own group there. All these groups have one meeting a month and a lot of people go to multiple meetings.

3 years ago Adam's group started going to small institutions - with 20-25 persons with disabilities; many institutions do not welcome the idea of Adam's group. During their visits, members of the group talk about homosexuality and invite the residents to group's meetings. Due to the lack of money however, institution staff is often unable/ unwilling to accompany residents to meetings outside these institutions. As Adam revealed, people living in institutions, so called 'houses' often don't have access to information and Adam's group doesn't have access to them either. There is little money available for funding and the number of volunteers has dropped as well.

Adam's group has a clear vision, mission, and strategy. Their mission is to bring together people who have the same problems. Their vision includes quietness, a space, understanding, and empowerment between members and leaders and members. Their strategy includes being active: they bring people out of their isolation and thus empower them.

Monika founded ‘Pink Wheels’ in 2010 with the purpose of providing a space for gays, lesbians, bisexuals with physical disabilities. Her group does not fall under any broader group – she founded it because she did not feel that the needs of the subgroup were addressed in either the LGBT or the disability movement and that there was no space for this group in either of the two communities. Pink Wheels does not only provide a sense of community for this group, but it also has a clear agenda and program to contribute to social inclusion in Amsterdam.

The mission of the recently founded ‘Pink Wheels’ is to gain recognition and be seen, encourage people to accept themselves and influence both the LGBT and the disability community to make their groups accessible – as Monika said. In Amsterdam, where the group is based, there is no communication and cooperation between the two groups.

Monika was involved in organizing the 2010 Amsterdam Pride and achieved that there would be pink wheelchair boxes on the Pride website - she said such changes are desperately needed and they don’t require much energy and time. A pink wheelchair sign, she said, would solve a lot of problems for her peers: it could signal both physical and social accessibility. This would mean that places don’t just make their venues accessible because they are obliged to by law, but that they actually welcome wheelchair users. This could encourage other places to in fact be disability friendly and would lead to progress as a chain reaction.

Monika has a three-year plan with her group. In the first year she’s working on the website and wants to have a ‘Pink Wheels’ boat at the Canal Pride; in the second year she wants to put on an exhibition of portrays of gay disabled people to show that

they are attractive and beautiful; in the third year she wants to organize a symposium. In the meantime she wants to do more interviews with her peers – one of her interviews has been published recently -, posters, flyers, articles, meetings, workshops, discussions, sessions about flirting, self-defense, access. For all this however, she needs funding. If she gets it, she could work on her group projects in 20 hours per week. Funding however is currently available for disability and LGBT projects, but not for one that is both: they somehow don't fit any of the boxes.

Monika wants to have a lot of positive thinking in her group and not just discussions about hardships and problems. She said she didn't feel she was moving forward in the disability movement – whereas in her group she is constantly inspired and empowered and feels other people who indicate the need for such a group have the same feelings. She recently published an article and received 5 responses within an hour – one from a singer/ song writer woman, who wrote a song about the pink wheels group the following day. Monika says such feedback makes her feel empowered and strong and gives her energy and strength to keep working for this group – for a space that is so badly needed.

Mike's Maastricht group meets once a month and has 5-8 members. The members all have a mental disability and some also have physical disability. Group members are always accompanied by the supporters for the first couple of times and then some of them can come alone afterwards. 1-2 people live in institutions and the others live independently in the community. Mike often goes to 'houses' when supporters call him and meets people who would be interested in coming to the meetings. Right now, 2 people come from Maastricht and the others take the train or the

bus to come to the monthly meetings. Mike also placed posters and flyers in institutions, but those do not work that well. His group is also advertised on the COC website. The group's activities include cooking, walking in the city, going out to bars, going to parties, talking about homosexuality, and bowling. The group has had about 25 members in the last 10 years.

Personal testimonies from Tom Shakespeare's research also reveal that such groups provide a crucial sense of community and belonging that is essential for the members.

> I think the biggest thing was talking to other disabled lesbians and gay men, it was just wonderful, and I learned so much. At last I've got this forum where I can talk about what was happening without feeling like losing control, feeling not attractive, all that stuff. I could talk to other disabled lesbians and gay men and be understood.[61]

An interviewee in the Re-thinking Identity research also reaffirmed this view by saying that "it always helps to have contact with someone who has had a similar experience, whatever that is, be it being a stranger in a foreign land or being gay and disabled".[62]

Forming such a movement is essential for both the individual and the broader group of LGB PWDs in general. Such movements can reaffirm the members' identities by providing them recognition, legitimacy, and a sense of community. Both Adam and Monika stated that they felt empowered through their work with their groups. Feedback Monika receives from other LGB persons with disabilities continues to inspire her to

61 Pg. 180, Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. The Sexual Politics of Disability: Untold Desires. London: Cassel, 1996.

62 Pg. 62, Re-thinking Identity: The Challenge of Diversity. Ed. Katherine E. Zappone. Joint Equality and Human Rights Forum. 2003.

lead the group; Adam feels that as a COC ambassador, he is a role model for gays living with a disability.

Such groups can also break patterns of isolation and invisibility; they can balance the void in minority movements that heavily rely on homogeneity; they can also tackle discrimination. As argued before, invisibility is often in the core of exclusion both in mainstream society and the two respective communities. Visibility can break down discrimination by challenging the stereotypes that PWDs are asexual, childlike, or exclusively heterosexual and that the LGBT community is a homogeneous group.

> Those contesting society's imposed stereotypes of who they are carry the potential to challenge various patterns of oppression (such as racism, disablism, homophobia, sexism) within many groups. In this way, they participate in breaking patterns of discrimination precisely through willingness to claim their multiple identities.[63]

Last, but not least, they can also become a tool to advocate for changes in attitudes, practices, policy, and law. The program of 'Pink Wheels', the public appearance at the 2010 Canal Pride of 'Homo en Handicap' both have the potential to engineer social change through changing attitudes and pushing for acceptance, inclusion, and change. As the example of the strong women's lobby within the disability movement has revealed, intersectional advocacy groups can have a huge impact in ensuring that law effectively protects all the members within a protected groups and not only those that fit the artificial definition created by the categorical approach of law.

The examples of the Hungarian and Dutch movement reveal that there is a great lack in both the LGBT and the disability movement to address intersectional issues. However, this gap has not been filled in Hungary – as opposed to the Netherlands, where more and more groups and this intersection emerge. In the case of Hungary, this

63 Pg. 136, Ibid.

experience was reaffirmed by interviews with representatives of LGBT and disability organizations as well as Kriszta and Sári, who are both lesbians with disabilities. They both agreed that there is a failure in both movements to address the needs of this particular group – if they did however, there would be no need for a separate movement.

The Dutch examples reveal that the LGBT disability movement fills a great need in this intersectional community and the demand, which is so apparent, leads to the formation of more and more such groups. While some of these groups have emerged under the umbrella of the LGBT movement – none within the disability movement -, others - like Pink Wheels - are independent and do not have direct links with any of the two broader groups. In either case, these groups prove to be effective in providing a space for those at the intersection of disability and non-conform sexual identities and in responding to their needs. Therefore, they fill a gap, which legal instruments have often been unable to fill in the case of this vulnerable group.

In the following, the development of anti-discrimination law will be presented with an introduction to its grounds based framework and procedural barriers of a more context based approach. Then the evolution of intersectional frameworks will be presented with examples on the international and European level, also discussing a national EU framework to show how EU instruments work on the ground in the Member States's legal regimes.

3. Intersectionality and Equality Instruments

3.1 Overview

Equality and human rights law are mostly looked upon as reactive tools that try to correct structural inequalities, lasting injustice and protect from rights abuses that have systematically placed a burden on specific groups within societies. The first human rights treaties that were adopted in the early 1950s were also a response to the tragedies of the Second World War and signaled a promise made by the international community to respect, protect, and enforce these rights. It seems however that law has proved to be unable to formally recognize the complexity of identities, as it did not aim to do so in the beginnings, and thus provide more effective protection to certain groups. One may wonder whether equality law will ever be able to serve as a preventive measure: so far it seems that such laws have provided some protection to groups that have for long been among those discriminated, but failed to be general and flexible enough to be able to address the problems of newly recognized protected groups. Therefore, new kinds of abuses and rights violations have emerged in new contexts, targeting groups not yet protected – the structure and conceptual basis of old frameworks have prevented new claims from being adequately addressed. Law has proved to be problematic when new grounds have emerged, which is clearly reflected by conflicts on the national, regional, and international levels revolving around abuses targeting sexual minorities.

Most legal systems have also failed in responding to the need to provide effective protection against intersectional discrimination despite their potential to do so – as this

has not been an aim until very recently. While there is a reluctance to apply an intersectional approach to discrimination, there are also some misconceptions that have seemed to guide lawmakers so far. First, anti-discrimination law and especially equality litigation sees individuals as having one single characteristic that defines their identity – or one facet of their identity is always in the foreground when they are subject to discrimination. Second, it is presumed that discriminators carry out unfavorable treatment solely on one ground. Third, law supposes that those sharing one characteristic also share every other one and form a homogenous group; it thus presumed that they also require the same form and level of protection.[64] Law sets up mutually exclusive categories that form homogenous groups. Thus, interestingly, although equality legislation and human rights aim to ensure respect for diversity, it is denied within those groups that these legal tools should protect. As Justice Sachs of the South African Constitutional Court argues,

> uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference […] Equality therefore does not imply a leveling or homogenization of behavior, but an acknowledgment and acceptance of difference".[65]

These presumptions that equality law regimes and human rights law so heavily rely on bear two major consequences. Firstly, they fail to recognize the complexity of identities an individual might have. Law forces people into pre-made categories that provide a reductionist and over-simplified version of reality; law thus violates the dignity of and denies legitimacy to those persons or groups that fail to fit into these

64 Pg. 24, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights Review, Vol. 1. 2008.

65 Para 132, Justice Sachs, NCGLE v Minister of Justice, CCT 11/98, 9 October 1998, Constitutional Court of South Africa.

categories.[66] Therefore, and secondly, law carries in itself the danger of reproducing power structures and inequalities by suggesting that those who claim or are perceived to have multiple identities are not worthy or protection.[67] This is not only prevalent in the outcome of legal cases brought to court and revolving around the issue of intersectional discrimination, but also on the policy level. If law looks at certain groups in society as mutually exclusive and homogeneous, this view can inform policy making processes and can have a very dangerous impact on the local, national, regional, and international levels.[68] Lastly, while law is a tool against labeling, it also reproduces it in equality legislation and human rights instruments: some might receive adequate protection because one aspect of their characteristics is included on a list of protected grounds, but others – exactly those who are subject to multiple discrimination – will be left without adequate and appropriate protective measures.

Lists of Grounds

Most domestic, regional and international equality instruments have their own hierarchies of grounds within those that the instrument is aimed to protect. Sometimes this hierarchy is formal and explicitly stated. In other cases, the hierarchy is informal: although it is not written down in any instrument, practice shows that certain grounds are protected more carefully than others.

Although ranking grounds has its risks, it can be viewed as a justifiable action to try to protect those groups that have systematically and historically been disadvantaged

66 Pg 27, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights Review, Vol. 1. 2008.

67 Pg. 25, Ibid.

68 Pg. 27, Ibid.

and oppressed in a given community. The United States for instance is a unique example for applying three different tests in its constitutional rights cases and therefore formalizing the hierarchy between grounds on the constitutional level. Which of the three tests is used for judicial review depends on the ground involved in a constitutional rights case as first stated in the famous footnote four of the *US v. Carolene Products* case in 1938.[69] The level of scrutiny is greatly determined by the historic treatment of certain groups. Therefore, suspect groups - race, color, national or ethnic origin, and religion - are subject to strict scrutiny; quasi-suspect classes – gender and legitimacy – to intermediate scrutiny; all other groups - including sexual orientation and disability – are subject to the rational basis test. For instance, the US Supreme Court in case of *City of Cleburne v Cleburne Living Center, Inc.* applied a rational basis test, since the class involved in the case was persons with mental disabilities.[70] Any regulation however that is solely based on prejudice will automatically be declared unconstitutional, no matter which test is applied. In the case of sexual orientation the Supreme Court also uses a rational basis test, as in Romer v Evans, where the Court was reluctant to use any stricter test and review its standards applied.

Although not in a formalized and thus explicit way, EU regulations seem to rank race and gender as the most protected characteristics – the former given the makeup of the EU and the latter for economic reasons -, followed by age, disability, and sexual orientation. While gender, disability, age, and sexual orientation have been included as protected grounds in employment specific instruments only, the Race Directive also

69 304 U.S. 144 (1938), United States v. Carolene Products, http://supreme.justia.com/us/304/144/case.html

70 The Living Center filed a permit so that their home could be built in Cleburne, TX. The city refused to grant a permission. The case was brought to the Supreme Court and the Court found a 14th Amendment violation.

extends to social protection (e), social advantages (f), education (g), goods, services, and housing (h).[71] The new Equality Directive however might potentially change the hierarchy in incorporating all grounds into one equality instrument and also extending the scope beyond employment.[72]

While historical context and the objective of an instrument can justify the establishment of a hierarchy among protected groups, such a measure can place a number of groups at disadvantage. Firstly, groups that are not ranked as most deserving of protection will not enjoy the same level of legal safeguards with regards to their equality rights. Secondly, groups that have not yet been included in the list of grounds in a given instrument will greatly suffer in having the oppression and discrimination they face acknowledged and their rights safeguarded until a court or equality body provides them with protection and recognizes them as a protected group. In Canada, for instance, sexual orientation is not included as a protected ground in Section 15 of Canadian Charter of Rights and Freedoms – although the Charter is progressive for having included disability in 1982 -, but it has been recognized as an 'analogous ground' in several crucial judgments, such as in the *Egan v Canada*[73] case

71 Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of the Racial or Ethnic Origin, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML Accessed 2 September 2010.

72 "A New Multi-ground Directive Creates a Higher Level of Protection against Discrimination." Equal Rights Trust. 2 July 2008. http://www.equalrightstrust.org/newsstory2july2008/index.htm

73 Egan v Canada (1995) 2 S.C.R. 513. The applicant's partner was denied spousal allowence upon Egan's eligibility for pension when he turned 65. The couple had been together for 38 years, however, the Old Age Security Act did not recognize them as spouses, since they were from the same sex. The Supreme Court of Canada established that sexual discrimination is considered an anologous ground and the regulations of the Act violate the couple's equal protection under Section 15 of the Charter.

in 1995 and the *Vriend v Alberta* case[74] in 1998. The South African Constitutional Court has also found that unfavorable treatment based on analogous grounds – citizenship, marital status, HIV+ status - can constitute discrimination.[75] However, for these judgments, the non-exhaustive nature of the list of grounds as well as the progressive judicial attitude - such as that in Canada and South Africa - were both necessary.

Although law is a tool to ensure substantive equality, in jurisdictions where anti-discrimination instruments apply exhaustive lists and there is more judicial conservatism, it can often produce a counterproductive result by its very nature of relying on categories too much. As Justice Sachs of the South African Constitutional Court has phrased it, "at the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lessen human beings because they belong to a particular group" – yet, it often seems that law falls into its own trap exactly by creating a caste-like hierarchy of grounds. The analogy is very appropriate, since once a group is granted a certain rank it will most likely remain in that position regardless of the severity of the discriminatory faced by them.

Justice Cory in the Canadian *Vriend v. Alberta* case pointed out the following[76]:

> It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are "different' from us in some way should have the same equality rights that we enjoy. Yet as soon as we say any … group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of …society are demeaned. It is so deceptively injurious

74 Vriend v Alberta (1998), 1 S.C.R. 493. In this case the applicant was fired from a private religious college because of his sexual orientation. The Supreme Court of Canada found the case to be discriminatory on the analogous ground of sexual orientation.

75 LArbi-Odam v. MEC for Education, 1998 (1) SA 745 (CC), Harksen v. Lane NO and Others (CCT9/97) ZACC 12, Hoffmann v. South African Airways 2000 (11) BCLR 1211 (CC)

76 As referred to by Justice Ackermann in the NCGLE v Minister of Justice PARA

> to say that those who are handicapped or of a different race, or religion, or color or sexual orientation are less worthy.[77]

Justice Cory also argued that there is thus "the implicit message conveyed by the exclusion, that gays and lesbians [as an example] unlike other individuals, are not worthy of protection".[78] As he argued - and Justice Ackermann agreed -, such an exclusion or low ranking of certain groups results in the impediment of human dignity, a lack of legal protection, and provides justification for further acts of discrimination by leaving a space where it can take place unpunished. The only way to counter this is if protected groups are granted the same legal safeguards in case of discriminatory acts, which would entail applying "the same concepts, definitions and processes to all grounds".[79]

However, the group of the 'other' or 'analogous' is also problematic. Many equality instruments contain non-exhaustive lists of protected grounds by including 'other status' at the end of the list. The label of 'other status' is an attempt to leave space for newly emerging grounds on the one hand and also to protect groups that are often problematic when it comes to consensus in seeing the need to protect them. Therefore, the strength of this category is also its weakness. More precisely, by not specifically identifying which groups must be protected with particular attention, those that have traditionally and systematically lacked protection by the state might be exposed to the danger of not being safeguarded in the future, either. The clearest example is sexual orientation, which is often difficult to explicitly include in an equality

77 Justice Cory, Vriend v Alberta, 2 April 1998, para 69m qtd in para 22, Justice Ackermann, NCGLE v Minister of Justice, CCT 11/98, 9 October 1998. Constitutional Court of South Africa.

78 Para 102, Ibid.

79 Pg. 35, Uccellari, Paola: Multiple Discrimination: How Law Can Reflect Reality, in: The Equl Rights Review, Vol. One, 2008

instrument, but the non-exhaustive nature of the list of grounds provides the possibility of one day doing so, as seen in the Canadian examples.

Although equality instruments do not explicitly dismiss the possibility of including intersectional discrimination cases in their scope, what could be covered in theory usually does not translate into practice. The lack of applying an intersectional approach – despite the possibility to do so - poses threats to marginal groups having multiple characteristics. This is so especially when it comes to lower ranked grounds intersecting with each other. Therefore, groups at intersections should be entitled to the same legal protection as single groups. However, there are certain procedural barriers that make it difficult for groups at intersections to be equally protected by anti-discrimination instruments. These barriers will be analyzed in the following subchapter.

Procedural Barriers

In the following, the main procedural issues will be outlined and it will be analyzed why it is difficult to bring to court and win intersectionality cases.

In all discrimination cases, there needs to be a comparator involved. However, when multiple grounds are involved in a case, finding the right comparator might pose difficulties. In an intersectional discrimination case, if the applicant is an African-America lesbian wheelchair user, it is questionable whether the right comparator would be a white straight non-disabled woman, a white straight non-disabled men, etc. As the Ontario Human Rights Commission recognized, “an intersectional analysis would

recognize that comparisons must be used with great caution as an inappropriate comparison can lead to the dismissal of a case that should have been adjudicated".[80]

Another procedural barrier is the difficulty of proving discrimination in all the grounds claimed. Clearly, the more grounds are involved, the more complex it becomes to prove the case of unfavorable treatment on the basis of all of them. Therefore, while our imaginary claimant's case might be easily proven on the grounds of race, all the other three grounds would have to be proven to determine the discriminatory act for a successful intersectional discrimination judgment. Consequently, even legal professionals have tended to bring cases on a single-ground basis, choosing the strongest ground, despite the multiple grounds involved in the case, since this is the easiest way to win their cases.[81]

Interestingly, even the progressive Supreme Court of Canada suggested that a single-ground approach should be used in intersectionality cases - despite its argument to recognize intersectional discrimination per se. Justice L'Heureux-Dubé's dissenting opinion in the 1993 *Canada v Mossop* case[82] includes the following argument:

> It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination […] Categorizing such discrimination as primarily racially-oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.[83]

80 Pg. 3, "An Intersectional approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims". Ontario Human Rights Commission. 2001. Accessed Sept 2 2010.
http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts/pdf

81 Pg.27, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights

82 Qtd in pg 25, Tackling Multiple Discrimination, Canada v Mossop, dissenting opinion

83 Canada (Attorney General) v Mossop, 1993, 1 S.C.R. 554, Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1993/1993scr1-554/1993scr1-554.html

However, the last two sentences of the paragraph[84] point to quite the contrary:

> On a practical level, where both forms of discrimination are prohibited, one can ignore the complexity of the interaction, and characterize the discrimination as of one type or the other. The person is protected from discrimination in either event."[85]

This quote suggests that despite the recognition, the legal protection of multiple identities and discrimination based on multiple grounds are not a priority; the line between forms of discrimination stays obscure and lawyers often choose the easy way when bringing their cases to court. There is often not much willingness among lawmakers and lawyers to effectively safeguard against intersectional discrimination, although the option is available in a number of more progressive jurisdictions and there is a clear trend towards its recognition. In the following, it will be shown that several jurisdictions have found ways to protect against intersectional discrimination, which suggests that procedural barriers can be overcome after all. For more and more jurisdictions to ensure intersectional discrimination can be safeguarded against, there is a need for willingness, openness, and conscious steps lawmakers and judges need to take in this direction. In the following chapter, the evolution of the intersectional approach on the international and European levels will be presented. The relevant developments of international human rights law will be described, including a shift from the broad to the narrow approach of rights and lastly the intersectional approach found in the CRPD. Then, the most important EU instruments will be analyzed, followed by an example of Hungarian domestic legal framework.

84 The two sentences were completely left out in the Tackling Multiple Discrimination research report, suggesting the contrary of what Justice L'Hereux-Dubé in fact meant.

85 Canada (Attorney General) v Mossop, 1993, 1 S.C.R. 554, Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1993/1993scr1-554/1993scr1-554.html

3.2 The Emerging New Approach: Intersectionality on the Horizon

Protected Groups in International Human Rights Instruments

The failure to effectively protect vulnerable groups using human rights as a tool has been apparent since the very emergence of minority rights protections[86] after World War I and the beginnings of the global human rights movement after World War II and has not been resolved since.[87] The human rights movement has used two fundamentally different approaches throughout the last six decades in trying to provide adequate protection for certain groups such as those of racial minorities, women, children, migrants, and persons with disabilities – yet, neither has proven to effectively protect those affected by intersectional discrimination. While the first human rights instruments used a universal and broad approach, group-specific treaties have started to appear since the 1960s after the international community has recognized the need for special protection for certain groups. However, it can be argued that neither of the two approaches have succeeded in providing adequate and appropriate safeguards for specific protected groups.

The Broad Approach

The first international and regional human rights treaties emerged in the aftermath of the Second World War. After the systematic massacre of millions of persons belonging to

86 These included religious rights, such as freedom of religion, the right to establish, manage, and control religious institutions and establishments, and to exercise religion in these. Pg. 404, Gilbert, Geoff. Religio-nationalist minorities and the development of minority rights law. Review of International Studies (1999), 25, 389-410.

87Pg. 397, Gilbert, Geoff. Religio-nationalist minorities and the development of minority rights law. Review of International Studies (1999), 25, 389-410.

certain minority groups, the world vowed ‘Never Again’ and the international community made a promise to never allow for such acts to be carried out by states. The Universal Declaration of Human Rights in 1948, the European Convention of Human Rights in 1950, the International Covenant of Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights in 1966 all marked milestones in the global human rights movement that set out the objective to ensure human rights are respected, protected, and fulfilled by states for each and every human being in the world.

These conventions brought together a great variety of states who formed an international consensus that there was a need for subsidiary forms of human rights protection in addition to the national safeguards. States therefore agreed upon what human rights entailed and what obligations were thus imposed on states. However, the practical implementation of the majority of these rights and duties agreed upon is yet to take place in most parts of the world. Although it has become clear that states are often unwilling to act upon their duties and comply with human rights treaties they have ratified, it is also apparent that these conventions have gaps in their conceptual and procedural foundations.

It is hereby argued that the first human rights conventions that aimed to provide protection for all inevitably resulted in creating concepts and frameworks that were too general and broad and in practice failed to protect certain groups. The “one-size-fits-all” idea of the human rights movement entails describing actors – violator vs. victim -, problems, and solutions in general and abstract terms. Thus, the movement has created

through its vocabulary in which actors are distinct and mutually exclusive and an abstract and binaric world.

Such a simplistic understanding of reality often allows for general human rights theories to emerge and comprehensive international treaties to be drafted, signed and ratified by a variety of states. This has partly contributed to the popularity of the Universal Declaration of Human Rights, inter alia: the vague wording of some rights provisions made the declaration seem like a weak instrument that is mostly compiled of general principles rather than enforceable rights. Thus, while general wording might bring states together to reach a consensus favored by all, it might also render the effectiveness of a treaty weak.

Definitions and concepts that are too broad become at the same time too narrow, since they are defined and also, applied by a narrow group of actors/states/people. Therefore, supposedly general concepts are in fact often biased and subjective. Consequently, the broad approach has often left specific groups unprotected. The global human rights movement recognized this gap in the 1960s and tried to balance it with the narrow approach that aimed to protect particular groups.

The Narrow Approach

The general nature of the first human rights instruments has proved to be unable to acknowledge the specific experiences and address the particular needs of certain protected groups. Decades after the first conventions were adopted, the systemic discrimination, oppression, marginalization, and abuse of some groups still continued on the ground – despite the numerous advances in anti-discrimination law and policy. As a

result of ongoing discrimination against certain groups the international community recognized that targeted responses are required to ensure groups that have traditionally been victims of structural inequalities are protected through specific human rights safeguards.

This recognition as well as the strong presence of human rights actors, lobby and advocacy groups that have pushed for theme-specific treaties have all contributed to the emergence of conventions that address the particular needs of certain groups. The Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1965, the Convention on the Elimination of Discrimination of Women (CEDAW) in 1981, the Convention on the Rights of the Child (CRC) in 1989, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) in 1990, and the Convention on the Rights of Persons with Disabilities (CRPD) in 2006 all represent a crucial stance in the human rights movement that was necessary to be taken to ensure the specific needs of racial and ethnic minorities, women, children, migrants, and persons with disabilities are addressed through targeted measures. However, each of these treaties reveals that awareness about protected groups has not lead to awareness and action with regards to intersectionality – when these groups overlap.

In the following chapter, examples of gaps in international human rights law will be analyzed to argue that specialized conventions have also failed to recognize intersectionality and address the issue of intersectional discrimination. Therefore, those groups that have been recognized as needing special protection do not reappear as

subgroups in specialized conventions. This perpetuates the overly categorical and static approach of law that is unfit to accommodate intersectionality.

Protecting Groups at Intersections

The adoption of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1965 was a breakthrough in protecting vulnerable groups: it marks the turning point of the international community recognizing and acknowledging the specific experiences of certain groups and thus creating instruments that provide the special protection they needed. However, when a specialized convention emerges, it tailors human rights to the specific experiences of the group concerned without taking into the consideration subgroups within, which have also been recognized to be needing extra protection before. It might be an unrealistic expectation to find reference to subgroups in the first specialized treaties, however, the CERD should have set precedent for special protection granted for racial and ethnic minorities, the CEDAW for women, the CRC for children, the CRMW to migrants, and the CRPD for PWDs. Therefore, it could have been the case that these precedents ensure the already recognized groups reemerge in future specialized conventions as subgroups needing extra protection.

Yet, none of these conventions except for the CRPD follow this rule and CRPD also fails to protect each and every subgroup. The CERD does not contain any provisions about the subgroups of women, children, and persons with disabilities belonging to a racial minority; the CEDAW does not mention migrant or disabled women or those belonging to a vulnerable racial group; the CRC falls short of mentioning the special needs of girls or disabled children; the CRMW only uses the gender-neutral

noun “migrant” without addressing the difficulties faced by migrant women as well as those faced by migrant children and migrants with disabilities; the CRPD fails to acknowledge vulnerable racial groups and migrants within the larger disability community. Furthermore, none of them take on the protection of sexual minorities – being decades old instruments or because of the taboo and political pressure. Therefore, discrimination faces by those who claim multiple characteristics and fall under a number of vulnerable groups is not recognized in most of these treaties. This gap leaves the experiences and needs of groups at intersections unrecognized and fails to offer them adequate and effective protection.

The CEDAW mentions forms of oppression intersecting with gender in its non-binding Preamble and focuses on rural women in Article 14, but only with regards to a limited number of rights. The CERD, CRC, and the CRMW are even more problematic when it comes to taking specific subgroups into consideration. These failures leave certain groups at intersections that would require special safeguards, without legal protection. As a few examples, women in racial minorities continue to be unprotected by the CERD and CEDAW despite the numerous groups advocating for their rights that are violated in very different ways and extent than those of men belonging to racial minorities; children in racial minorities will also lack adequate protection by the CERD and the CRC in, for instance, schooling where the proliferation of segregated schooling practices around the globe should call for extra safeguards.

In international soft law, the first breakthrough which marks the recognition of the need to address intersectionality took place in 1995 when the Beijing Declaration Stated that equal enjoyment of their rights must be ensured for “all women and girls who face

multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people".[88]

In 2001 at the Durban Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance the participants adopted the following statement:

> We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, color, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.[89]

These recognitions have potentially influenced the drafting of the CRPD from its very early stages. Not only does the CRPD have a provision explicitly about multiple discrimination – although in its Preamble -, but it also mainstreams gender, age groups, and their specific concerns into several of its rights provisions. In the following chapter the CRPD approach to multiple discrimination will be analyzed, highlighting its progressive nature but at the same time revealing its shortcomings as well.

The CRPD Approach

The Convention on the Rights of Persons with Disabilities (CRPD) is considered to be one the most progressive human rights instruments on the international level. Firstly, it introduces a number of new rights, such as the rights to independent living, personal mobility, habilitation and rehabilitation.[90] Secondly, it applies and groundbreaking and

88 Para 32, Beijing Declaration, 1995

89 Pg. 5, Qtd in Tackling Multiple Discrimination: Practices, Policies and Laws. Danish Institute for Human Rights. European Commission. DG for Employment, Social Affairs and Equal Opportunities. Luxembourg: Office for Official Publications of the European Communities,2007.

90 Articles 19, 20, and 26 of the CRPD

innovative approach to existing rights in adjusting them to the needs and circumstances of persons with disabilities, through for instance, reasonable accommodations. Thirdly, it relies on inclusion and participation as its founding principles.

The CRPD is also the first UN convention that explicitly mentions multiple discrimination and also incorporates additional grounds into its rights provisions besides that of disability. However, the Preamble, which mentions multiple discrimination is non-binding and leaves sexual orientation off the list of grounds. Furthermore, the additional grounds in the rights provisions only cover age and gender – placing these two on the top of the ground hierarchy and leaving all other grounds in a secondary position.

Section (p) in the Preamble affirms that States Parties are

> *Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.[91]

It is unprecedented that this form of discrimination is recognized and addressed in a convention, both those relying on a universal and those on a specialized approach. Furthermore, the wording reveals that multiple discrimination can also be "aggravated", which means that it can be more severe in its causes, consequences, and legal responses it requires, than single-ground discrimination. This is a crucial milestone in human rights treaties and will hopefully mark the first step towards firmer steps in addressing multiple oppressions. Finally, the list of grounds is relatively lengthy in this provision and also non-exhaustive, which leaves space for the provision of newly emerging and recognized grounds.

91 (p) Preamble, CRPD, http://www.un.org/disabilities/default.asp?id=259

In comparison to other treaties, one can note that the CRPD adds age, ethnic and indigenous origin to, for instance, the lists included in Article 14 of the ECHR[92], Article 26 of the ICCPR[93], and Article 2 of the ICESCR[94]; ethnic and indigenous origin to Article 21 of the EU Charter[95]; indigenous origin, language, property, political or other opinion, birth status to Article 15 of the Canadian Charter[96] addressing discrimination and equality.

Yet, there are also a number of drawbacks of paragraph (p). Most importantly, multiple discrimination per se is only mentioned in the Preamble, which is not legally binding upon States Parties.[97] This bears the consequence that while it is for the first time recognized and explicitly mentioned, it has no binding force on states to ensure it is properly addressed on the national levels.

Second, although the list of grounds is more extensive than those in many other human rights treaties, it does not include sexual orientation. In this respect, the EU Charter is much more advanced, since it explicitly recognizes the need to address discrimination based on "sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited".[98] As far is national anti-discrimination tools are concerned, the Hungarian –in an effort to comply

92 Article 14, ECHR, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

93 Article 26, ICCPR, http://www2.ohchr.org/english/law/ccpr.htm

94 Article 2, ICESCR, http://www2.ohchr.org/english/law/cescr.htm

95 Article 21, EU Charter of Fundamental Rights, http://www.eucharter.org/home.php?page_id=28

96 Article 15, Canadian Charter of Rights and Freedoms, http://laws.justice.gc.ca/en/charter/1.html#anchorbo-ga:l

97 Section Three, Implementation Toolkit. ICRPD. http://www.icrpd.net/implementation/en/toolkit/section3.htm

98 Artcle 20, EU Charter of Fundamental Rights, http://www.eucharter.org/home.php?page_id=28

with EU equality directives -, South African, and Canadian equality laws, which will be described more in depth, are also positive examples.

Sex and Age in the CRPD

The CRPD is the first and only human rights instrument so far on the international level that incorporates responses to the phenomenon of multiple discrimination into its legally binding rights provisions as well as its non-binding Preamble. While the Preamble recognizes that multiple discrimination in general must be addressed, several rights provisions include specific references to the additional grounds: age and sex. In the following these provisions will be highlighted, followed by an analysis of the drawbacks of including only these two grounds.

The CRPD Preamble acknowledges that States Parties are "*recognizing* that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation".[99] The Preamble further states that the Convention is "*emphasizing* the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities".[100] In its General Principles gender equality is also highlighted.[101] Article 6 specifically addresses the particular experiences of women with disabilities and special safeguards to this group are also provided in a number of substantive rights provisions.[102] In addition to (p) in the

99 (q) Preamble, CRPD, http://www2.ohchr.org/english/law/disabilities-convention.htm

100 Preamble (s), CRPD, http://www2.ohchr.org/english/law/disabilities-convention.htm

101 Article 3 (e), CRPD, http://www2.ohchr.org/english/law/disabilities-convention.htm

102 Article 16 on Freedom of exploitation, violence, and abuse, Article 25 on Health, Article 28 on Adequate standard of living and social protection. Article 8 on Awareness-raising also includes a gender related provision in that it obliges states "to combat

Preamble, among the specific rights provisions listed previously, age is also highlighted together with sex in a number of rights provisions.[103]

However, highlighting two specific grounds, age and sex, which intertwined with disability can provide multiple grounds for discrimination, is rather detrimental when considering the issue of multiple discrimination in general. More precisely, highlighting two grounds out of the fifteen, which are listed in (p) of the Preamble suggests that these two intersecting with disability are more severe in their causes and consequences and thus require more protection. This not only poses a threat to those sharing the characteristics of the other grounds in the Preamble, but also renders the specialized conventions weaker, in specific the CERD and the CRMW, which have brought attention to the specific needs of those belonging to a racial minority and those who are migrants.

By implicitly and often informally creating a hierarchy of grounds, human rights instruments have the potential of perpetuating and upholding existing inequalities. While highlighting certain grounds advances the rights of some groups, it indirectly harms others by suggesting that they are not worthy of protection. Thus, those grounds that are listed in (p) of the Preamble, but are not specifically mentioned in the rights provisions that follow, are pushed in the background; this conveys the message that they are only of secondary importance following sex and age. “Race, color, […]

stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life”.102

103 Article 8 (1) b, Article 16 (2), and 16 (4). Furthermore, Article 7 addresses the specific experiences of children with disabilities and calls for special protections. Article 13 on Access to justice and 23 on Respect for home and the family also call for special safeguards.

language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, […] or other status"[104] are consequently put in the box of 'secondary grounds'. It must be reaffirmed that out of these grounds, the cases of 'race' and 'color' are of special significance, since these grounds are placed in a secondary role despite the international recognition of the need to prioritize them when it comes to protecting vulnerable groups – as the CERD would suggest.

Clearly, sexual orientation intersecting with disability is ranked even lower on the informal hierarchy, since it could only fit into the category of 'other status', if the respective State was willing to recognize it as a protected ground in the first place. As argued before[105], the category of 'other' or 'analogous grounds' can leave space for newly emerging grounds, but it can also be an umbrella ground for those characteristics, which have not been accepted by consensus as needing special protection. Such grounds are often problematic and sensitive, especially when the consensus needs to be international.

Marianne Schulze's comprehensive handbook to CRPD reveals that adding sexual orientation as a ground was supported by Canada, New Zealand, and the European Union among others, but it was opposed by a "significant number of states".[106] Schulze however, does not elaborate on the debate that preceded the final wording of this part of the Preamble and misses to identify States that were against the inclusion.

104 Preamble (p), Ibid.

105 Chapter 3.1

106 Pg. 30, Marianne Schulze: A Handbook on the Human Rights of Persons with Disabilities – Understanding the UNCRPD. July 2010.

Due to the opposition of certain States, the CRPD fails to provide protections to persons with disabilities who belong to sexual minorities. The women's lobby within the disability movement has achieved groundbreaking success by ensuring that women with disabilities are adequately protected in a number of provisions having a gender element in the CRPD. Therefore, it might be argued that if the group of LGB persons with disabilities had had a strong advocacy voice pushing for their needs to be addressed, they might have been recognized by the drafters as needing extra protection. However, such a movement was not present at the drafting, since in many countries – like Hungary - it is non-existent and in others it is not strong enough. In the following chapter EU instruments will be analyzed with regards to how they deal with the phenomenon of intersectionality and whether the particular group of LGB persons with disabilities can be included in their anti-discrimination instruments.

3.3 Intersectionality and European Law

Council of Europe: The European Convention on Human Rights

The 1950 European Convention on Human Rights includes a non-exhaustive list of protected grounds in Article 14 on non-discrimination, including: "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".[107] The ECHR signals a list of grounds that leaves space for any emerging protected groups under the umbrella of 'other

107 ECHR, http://www.hri.org/docs/ECHR50.html

status'[108] and potentially for an intersectional interpretation - although the European Court has not applied this approach yet.[109]

The European Convention is an interesting human rights instrument for the purposes of this thesis, since it does not include either disability or sexual orientation in its list of prohibited grounds of discrimination. However, both of these grounds have been recognized by the Court as falling under the scope of Article 14 as analogous grounds. Furthermore, both groups fall under the category of suspect groups, discrimination based on which require heightened scrutiny.[110]

For decades the Court did not receive admissible cases of disability discrimination, which also involved a substantive right in conjunction with Article 14.[111] The Court did however deal with cases brought by persons with disabilities, where a substantive right was violated. In these cases however violations were found of self-standing rights, such as Article 8 in *Molka v Poland* or Article 3 in *Price v the UK* were found to have been violated; the Article 14 framework was not applied.[112] In the 2009 *Glor v Switzerland* case113 however, disability was seen by the Court as falling under the Article 14 and the judges found a violation of Article 8 in conjunction with the non-

108 Pg.38, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights Trust

109 The Canadian Supreme Court however has recognized intersectional cases as falling under the umbrella of 'analogous ground'. Pg.38, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights

110 Pg. 659, Besson, Samantha. "Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?" Human Rights Law Review. Vol. 8, Issue 4. 2007. pp. 647-682.

111 Pg. 147, Schiek, Waddington, Bell: Cases, Materials and Text on National, Supranational, and International Non-Discrimination Law. Oxford: Hart Publishing, 2007.

112 Pg 147, Ibid. Molka v Poland Appl. No. 56500/00 and Price v UK Appl. No 33394/96.

113 The applicant was not admitted for military service due to his disability, but was then made to pay taxes for not performing the service. The Court found that the military service could have been carried out by the applicant through reasonable adjustments to his needs, since he did indeed wish to serve. The applicant was also discriminated in having to pay the taxes as opposed to those with more severe disabilities.

discrimination provision.[114] In 2010 the Court explicitly stated in the case of *Alajos Kiss v Hungary* that persons with disabilities have been "historically subject to prejudice with lasting consequences, resulting in their social exclusion" and are therefore "a particularly vulnerable group in society, who have suffered considerable discrimination in the past".[115] The Court then stated that consequently, the margin of appreciation is narrow if a State wants to restrict the rights of persons with disabilities and the State must therefore justify its act with "very weighty reasons".[116] The case set precedent for the clear recognition by the Court of persons with disabilities constituting a vulnerable group falling under the Article 14 protected groups – and affirmed that the "very weighty reasons" test must be applied in such cases.

Similarly to disability, the European Court dealt with a number of cases involving LGBT persons before it explicitly recognized sexual orientation as a prohibited ground of discrimination.[117] The 1981 *Dudgeon v the UK* or the 1999 *Smith and Grady v the UK* cases both involved violations of substantive rights – Article 8 - of gay men and lesbian women respectively, but Article 14 was not raised in any of the two cases.[118] These cases paved the way[119] to the 1999 *Salgueiro da Silva Mouta v Portugal* case in which the Court explicitly affirmed that unfavorable treatment cannot be justified solely on the

114 Pg 100, Handbook on European non-discrimination law. FRA.. 2011.
http://www.echr.coe.int/NR/rdonlyres/DACA17B3-921E-4C7C-A2EE-3CDB68B0133E/0/182601_FRA_CASE_LAW_HANDBOOK_EN.pdf

115 Para 42. Alajos Kiss v. Hungary

116 Ibid.

117 Pg 88, Schiek, Waddington, Bell: Cases, Materials and Text on National, Supranational, and International Non-Discrimination Law. Oxford: Hart Publishing, 2007.

118 Pg. 154, Oddny Mjöll Arnardóttir: Equality and Non-Discrimination under the European convention on Human rights.London: Martinus Nijhoff Publishers, 2003.

119 Ibid.

ground of sexual orientation as that would go against the Convention.[120] The Court applied the "very weighty reasons" test it established in *Salgueiro* in the 2003 *L. and V. Austria* case claiming that differential treatment based on the ground of sexual orientation can only be provided if there are particularly serious reasons justifying it.[121]

Intersectionality as a recurring approach of the Court to cases of discrimination has yet to emerge. Although such discrimination is very often apparent, the ECHR is similar to other equality instruments in lacking explicit protections against such unfavorable treatment. However, the Court's jurisprudence has revealed that there is space for progressive interpretation and the Court often adds to the strictly text-based understanding of the ECHR provisions. The Court seems to be ready to be flexible and adapt its standards in light of European consensus and societal developments. The recognition of disability and sexual orientation as analogous grounds to those already listed in Article 14 is a clear example of this tendency.

Furthermore, the Court's jurisprudence suggests that there is a potential of intersectional grounds being included as falling under the protection of Article 14 as the Court does not necessarily specify the ground based on which discriminatory treatment occurred.[122] The 1984 *Rasmussen v Denmark*[123] case is a good example: in this case the Court looked at the treatment granted to the husband and the wife without taking

120 Pg. 88-89. Ibid. The Salgueiro case (Appl. No 33290/96) was brought to the Court after the applicant was deprived of his right to parental custody over his daughter on the the ground of his sexual orientation.

121 Pg. 89 Ibid. L. And V. v Austria (Appl. No 39392/98) involved the applicants being sentenced to imprisonment and probation period because of their homosexual conduct with adolescents. The law in question did not punish the same acts with adolescents when the parties were heterosexual, or lesbian women.

122 Pg. 176, Ibid.

123 The Rasmussen v Denmark case (Application no. 8777/79) involved the different rules considering having access to a paternity test for the mother and the father of the child. In the case of fathers there was a time limit for the possibility to have a test done, whereas in the case of mothers the courts could decide whether the mother could ask for a paternity test for her child.

gender as a protected ground into consideration. It can be argued that such an approach to discrimination leaves a possibility to bring intersectional grounds under Article 14 of the Convention as the Court provided: "there is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive".[124] However, the Court has not yet applied this approach to a case of intersectional discrimination – hopefully it will apply judicial activism in this area as well.

European Union Instruments

In the following anti-discrimination safeguards for persons with disabilities and sexual minorities will be analyzed in EU equality instruments and their approach to intersectionality will also be revealed. The specific example of Hungary will be highlighted to show how a Member State can transpose EU instruments and what anti-discrimination safeguards will look like on the ground.

It is a great drawback, but an understandable feature of EU Equality Directives that their scope is rather limited and therefore cannot provide comprehensive protection to all vulnerable groups in all areas of life.[125] Firstly, the Directives deal with specific areas, such as employment or provision of services, since the EU equal treatment principles emerged in the context of employment and economic interests rather than human rights.[126] The 1957 Treaty of Rome included two sections on equal treatment: one laid down non-discrimination based on nationality[127] and the other established the

124 Para 34, Rasmussen v Denmark

125 Ibid.

126 Pg. 67, Kollonay-Lehoczky, Az Egyenlő Bánásmód Biztosításának Jogi Eszközei az Európai Unióhoz Való Csatlakoztás Nyomán, in. Munkaerőpiaci Tükör 2009, MTA. 67-81.

127 Article 12, Treaty of Rome; Article 12, Treaty of Amsterdam

principle of 'equal pay for equal work'.[128] However, both of these provisions were based on economic rather than human rights concerns.[129]

Therefore, in current EU Equality Directives there is no comprehensive look on discrimination, which leaves a great number of areas where such treatment might occur up to the Member States to deal with. This is especially problematic in the case of persons with disabilities, who are often entirely excluded from the sphere of employment. While the 2000/78/EC Employment Framework Directive establishes crucial standards relevant for PWDs in matters relating to the labor market[130], it does not ensure any human rights safeguards for those who have no access, chance, or even right to work because of the barriers they face due to their disability. In EU Member States unemployment rates of PWDs are extremely high still: they are twice as likely to be inactive than the non-disabled population in the EU.[131] While many are discriminated on the ground of disability during application, training, in promotion, work conditions, and job retention, tens of thousands of PWDs across Europe still live in large residential institutions or deprived of legal capacity – without meaningful and effective access to work or these instruments. Therefore, EU equality instruments are often not too helpful for persons with disabilities, since they only regulate certain areas, some of which are out of reach for this vulnerable group.

128 Article 119 in the Treaty of Rome; Article 141 in the Treaty of Amsterdam

129 Pg. 67, Kollonay-Lehoczky, Az Egyenlő Bánásmód Biztosításának Jogi Eszközei az Európai Unióhoz Való Csatlakoztás Nyomán, in. Munkaerőpiaci Tükör 2009, MTA. 67-81.

130 The Employment Directive establishes for instance the obligation to create reasonable adjustments in the area of employment for PWDs in an effort to turn formal into substantive equality.

131 According the Employment, Social Affairs, and Inclusion DG of the European Commission. Accessed 25 April 2011. http://ec.europa.eu/about/ds_en.htm

The EU is however the first supra-national body that has signed the CRPD[132] and was present at the negotiation and drafting process. During the sessions the EU Presidency represented the standpoints of EU Member States.[133] As revolutionary this step is by the EU, the ratification will only affect EU institutions and not the individual 27 Member States. Therefore, there is still a great need for EU equality instruments that directly affect States to have a more comprehensive look on discrimination, when it comes to both its areas and vulnerable groups it targets.

The same is valid for sexual minorities as EU instruments do not look at discrimination in general terms, but rather focus on certain areas. Therefore, some of these tools, such as the Employment Directive might be applicable in the case of sexual minorities in cases involving benefits for instance, but will largely leave them without effective safeguards for discrimination affecting them in other areas of life.

Furthermore, the EU framework highlights a small number of protected grounds – such as gender and race - that enjoy a higher level of safeguards than others. As the 2007 EC press release "50 years of EU gender equality law" reveals, thirteen directives have been adopted in the EU since 1957 to ensure equality between men and women – all in the sphere of employment.[134] This example clearly reveals the limited nature of the scope of EU equality instruments – both in the areas of discrimination and the groups to be protected.

132 The CRPD was ratified by the EU in December 2010. The CRPD is the first international human rights instrument that the EU has signed.

133 Pg. 120, Lisa Waddington: Breaking New Ground, in The UN CRPD: European and Scandinavian Perspectives, Boston: Martinus Nijhoff Publishers, 2009.

134 50 years of EU Gender Equality Law. Press Release, MEMO/07/426. European Union. 25/10/2007. Accessed Sept 2 2010. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/426

The first instance within the EU that marked the broadening of the scope of previous equality measures was Article 13 in the 1997 Treaty of Amsterdam on non-discrimination, which highlights the protected grounds of nationality[135], "sex, racial or ethnic origin, religion or belief, *disability*, age, or *sexual orientation*"[136]. This article led to the adoption of equality directives in the following years and also established an obligation that EU countries must tackle discrimination on these grounds; it thus led to the birth of equality instruments in the domestic frameworks.[137] Article 13 was the first ever mentioning of disability in the Treaty and largely affected the content of the Employment Directive three years later.[138]

The EU Charter of Fundamental Rights also includes the grounds of both disability and sexual orientation in Article 21. However, none of these articles cross-reference any other article on particular groups. Therefore, the Charter recognizes the importance of special protection for certain groups, but looks at them in isolation. This means that the presumption of homogeneity within the groups is prevalent, which results in very superficial protection to certain subgroups within the broader, protected group. Therefore, it can be said that likewise to international human rights conventions, equality provisions in the EC Treaty and the Charter fall short of recognizing the phenomenon of intersectional discrimination and thus fail to protect subgroups that possess more than one of the protected attributes.

135 Article 12, Ibid.

136 Article 13, Ibid.

137 Pg. 68, Kollonay-Lehoczky, Az Egyenlő Bánásmód Biztosításának Jogi Eszközei az Európai Unióhoz Való Csatlakoztás Nyomán, in. Munkaerőpiaci Tükör 2009, MTA. 67-81.

138 Pg. 122, Lisa Waddington: Breaking New Ground, in The UN CRPD: European and Scandinavian Perspectives, Boston: Martinus Nijhoff Publishers, 2009.

The EU uses a different approach from the Council of Europe in its ECHR by including exhaustive lists in the EC Treaty and the Charter of Fundamental Rights, providing special protection to certain groups only. However, similarly to the CRPD, the Preambles of EC non-discrimination Directives leave some space for intersectionality. When EU instruments do incorporate an intersectional approach, they usually do so only with regards to specific grounds and areas of discrimination – mostly gender and employment. Therefore, the EU applies a conscious employment- and usually gender-centered rather than intersectionality-aware approach.

The text of the proposed Equality Directive of 2008 seems to be the most promising piece of EU legislation in the area of equality law in recognizing the issue of multiple discrimination. The aim of this directive is to harmonize existing equality directives, provide protection to protected grounds falling outside of specialized directives, and to ensure the scope includes spheres outside employment. Consequently, the proposal lists a number of instruments both in the EU and on the international level, which address the needs and protection of particular groups.

The Proposal also mentions in the Consultation chapter that multiple discrimination has been identified as a problem area within the EU: "Attention was also drawn to the need to tackle multiple discrimination, for example by defining it as discrimination and by providing effective remedies".[139] This chapter also includes a reference to the EU study "Tackling Multiple Discrimination: Practices, Policies, and

139 Chapter 2: Consultation of Interested Parties and Impact Assessment, Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation {SEC(2008) 2180} {SEC(2008) 2181}. EURLEX. Accessed 2 September 2010. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT

Laws".[140] However, while this Directive could be a milestone in ensuring protection to intersecting groups, it falls short of providing solutions to the problem and only recognizes the need to do so: "These issues go beyond the scope of this Directive but nothing prevents Member States taking action in these areas".[141]

There are plenty of anti-discrimination efforts on the EU level that aim to improve the lives and human rights situation of vulnerable groups. However, most of the EU's equality instruments are limited in their scope – both in the areas and grounds of discrimination they cover - and therefore often leave persons with disabilities, sexual minorities, as well as groups at intersections without adequate and effective anti-discrimination safeguards.

Although there is clear awareness on the EU level about the phenomenon of intersectionality and numerous studies have been commissioned to map this area of discrimination, the actual equality tools have not yet been applied in such a way that they would provide adequate protection for groups at intersections. "Although the existence of cases of multiple discrimination is well known, present non-discrimination legislation is hardly apt to solve these issues"[142] – a statement which can easily be applied to EU equality instruments.

140 Ibid.

141 Ibid.

142 Pg. 171, Schiek, Waddington, Bell: Cases, Materials and Text on National, Supranational, and International Non-Discrimination Law. Oxford: Hart Publishing, 2007.

Hungary: The EU Framework Transposed

In the EU, four countries have explicitly recognized multiple discrimination in their domestic legal frameworks: Austria, Germany, Romania, and Spain. However, all four states fail to lay out specific guidelines as how to address the phenomenon with legal tools.[143] This common lack often discourages other claimants to bring their cases on multiple grounds.[144] In the following, the example of Hungary will be analyzed, pointing out that although the Constitution fails in this respect, Hungary's equality law, which was adopted in 2003 to transpose the EU Equality Directives, has the potential of addressing intersectionality as argued by the Advisory Body to its Authority. However, it will also be revealed transposing the Directives might not mean such a breakthrough as previously thought.

Article 70(A)*1* of the current Hungarian Constitution[145] ensures that the principle of non-discrimination is respected with regards to constitutional rights on the grounds of "race, color, sex, language, religion, political or other views, national or social origins, ownership of assets, birth or on any other grounds".[146] The non-discrimination provision keeps silent about sexual orientation and disability, due to the fact that the textual basis of the Constitution is from 1949. However, the Constitutional Court has recognized sexual orientation as falling under the umbrella of 'other status' in the 14/1995

143 Pg. 20, Tackling Multiple Discrimination: Practices, Policies and Laws. Danish Institute for Human Rights. European Commission. DG for Employment, Social Affairs and Equal Opportunities. Luxembourg: Office for Official Publications of the European Communities,2007.

144 As it will be revealed int he following chapter, this is also true for jurisdictions outside Europe.

145 The new Consitution in Hungary was adopted in April 2011 and will enter into force in January 2012.

146 Article 70(A)1, Constitution of Hungary, Magyar Közlöny. Accessed 2 September 2010. http://www.kozlony.magyarorszag.hu/pdf/1370

decision[147], which reaffirmed the definition of marriage in the Constitution as the union of opposite sex couples and in the 20/1999 decision[148], which decriminalized homosexuality.[149]

Article XV. of the new Constitution of 2011, which will enter into force in January 2012, includes disability as a protected ground, but continues to lack safeguards against discrimination on the grounds of age and sexual orientation, failing to comply with the EU Charter of Fundamental rights.[150] Both versions lack any mentioning of intersectionality, although they do not explicitly dismiss intersectional cases.

With regards to protecting the rights of persons with disabilities, Hungary has its own specialized equality act of 1998/XXVI on The Rights and Equal Opportunities of Persons with Disabilities and ratified the CRPD in 2007 as the first European Country. In 2003 the 2003/CXXV Act on Equal Treatment and Promotion of Equal Opportunities was adopted to ensure the domestic equality framework is in line with EU Equality Directives before Hungary's accession to the EU in May 2004.[151] The 2003 Act includes a non-exhaustive list of more grounds than the Constitution and adds in Article 8 disability and sexual orientation, among others, as prohibited grounds of discrimination.[152] The Act also established Hungary's national equality body, the Equal

147 13 March 1995. http://net.jogtar.hu/jr/gen/getdoc2.cgi?dbnum=1&docid=995H0014.AB

148 25 June 1999, http://net.jogtar.hu/jr/gen/getdoc2.cgi?dbnum=1&docid=995H0014.AB

149 pg. 10, Tamás Gyulavári, Három évvel az antidiszkrimincációs jog reformja után. EBH. 26 January 2007. Accessed 25 April 2011. http://www.egyenlobanasmod.hu/tanulmanyok/hu/Gyulavari_cikk_jan26.pdf

150 Hungarian Constitution, 25 April 2011. http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/mk11043.pdf

151 Pg. 1, András Kristóf Kádár. 'Az egyenlő bánásmódról szóló törvény kimentési rendszere a közösségi jog elveinek tükrében". Egyenlő Bánásmód Hatóság. http://www.egyenlobanasmod.hu/tanulmanyok/hu/kimentesirendszer.pdf

152 Article 8, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities. Hungary. Egyenlő Bánásmód Hatóság. Accessed 2 September 2010. http://www.egyenlobanasmod.hu/data/Act_CXXV_2003%20English.pdf

Treatment Authority in Article 13.[153] The work of the Authority has often been guided and complemented by the opinions of the Constitutional Rights and Ethnic and National Minority Rights Ombudsmen.[154] Most cases have been brought to the Authority on the grounds of national or ethnic origin, disability, and gender; most of the violations have been found on the grounds of disability – in four cases - and national or ethnic origin – 3 cases.[155]

Although the extensive list of grounds as well as the existence of a separate body in charge of equal treatment both mark a very positive state of affairs in the Hungarian equality legal regime, there are a number of gaps that need to be discussed. Firstly, the non-discrimination safeguards have not always been adequate as laid down in the 2003 law: despite the restriction of a basic right, the law applied a rational basis test until the exculpation rules were modified a few years after the adoption of the Act. Secondly, even in intersectional discrimination cases, a single-ground approach is applied in practice, despite the possibility and the public statement of the Authority's Advisory Body to bring intersectionality cases to the Authority. The 2005 *Háttér Társaság v Károli Egyetem* case sheds light on both issues.

The *Háttér Társaság v Károli Egyetem* case was brought to the Authority on the grounds of sexual orientation by an LGBT organization, Háttér Társaság a Melegekért.[156] The case involved a religious university and its official statement published online explicitly discriminating sexual minorities in the education of future

153 Article 13, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities. Hungary. Egyenlő Bánásmód Hatóság. Accessed 2 September 2010. http://www.egyenlobanasmod.hu/data/Act_CXXV_2003%20English.pdf

154 Pg. 7, Tamás Gyulavári, Három évvel az antidiszkrimincációs jog reformja után. EBH. 26 January 2007. Accessed 25 April 2011. http://www.egyenlobanasmod.hu/tanulmanyok/hu/Gyulavari_cikk_jan26.pdf

155 Pg. 11, Ibid.

156 Háttér Support Society for LGBT People, www. hatter.hu

teachers and professors of religion. The statement followed the expulsion of one of their students, who was openly gay. Although the applicant lost the case, the Supreme Court issued a number of crucial legal interpretations about anti-discrimination standards in the 2003 law. The Supreme Court revealed the discrepancy between the 2003 law and the Constitution in applying different standards when basic rights were involved.[157] This issue was also highlighted by the Minority Rights Ombudsman. The Court found that since the basic right to education was restricted in the case, the first and second instance courts should have applied a necessity – proportionality test as opposed to rational basis, which they did.[158] The law was then modified - therefore, despite the applicant's loss, the case bears significance in future discrimination cases.

Although the applicant - who happened to be disabled - was discriminated on the bases of his sexual orientation *intersecting with* his membership in a religious group, the case was brought to the Authority on one ground only. The failure of applying an intersectional approach in practice might be due to the lack of a formal acknowledgment of intersectionality cases in either the Constitution or the anti-discrimination act of 2003.

In the 2003 legislation, there is a lack of clarity about the challenging application of 'other status', which could potentially open up the way for an intersectional interpretation.[159] It is a rather progressive step however that the Advisory Body of Equal Opportunities issued a statement on the interpretation of 'other status' in 2010 and

157 József Kárpáti. Az Utolsó Próbatétel. Ítélet a Háttér Tásaság kontra Károli Egyetem Ügyben. Fundamentum. 2005 / Vol. 3. pp. 105-108.

158 Pg. 16, Tamás Gyulavári. Egyenlő Bánásmód Törvény – Célok és Eredmények. In Lejtős Pálya: Antidiszkrimináció és esélyegyenlőség. Szerk. Majtényi Balázs. L'Harmattan. 2009

159 Pg. 21, Judit Demeter, „Az egyenlő bánásmód sérelme miatt indult hatósági eljárások tapasztalatai". Egyenlő Bánásmód Hatóság.
http://www.egyenlobanasmod.hu/tanulmanyok/hu/DemeterJudit_az_egyenlobanasmod_serelme_miatt_indult_hatosagi_eljarasok_tapasztalatai.pdf

included a description of their approach to multiple discrimination. In Position no. 288/2.2010 on the Determination of Other Status, the Body stated the following:

> When there are more than one grounds referred to in the Act, identified as the bases of discrimination by the plaintiff, the grounds must be considered together, and the comparator in the case must be chosen with consideration to all of the grounds involved. In these cases the grounds intertwined that must be considered and not the 'other status'.[160]

Positions issued by the Advisory Body are guiding in the decisions made by the Authority. Yet, there have been no cases of multiple discrimination brought to the Authority as of today.

Therefore, although the Advisory Body supports the approach that multiple discrimination can be safeguarded against in the Hungarian anti-discrimination framework, cases brought to the Authority do not apply it in the same way. The reasons for this might be that finding the right comparator and proving all grounds were indeed the bases of discrimination place an extra burden on the applicant and such cases are rarely brought to the relevant authorities. However, the legal framework has the potential to bring intersectional cases before the Authority.

Transposing EU Equality Directives served the purpose to improve the situation of vulnerable groups in Hungarian society.[161] However, it is questionable whether significant progress has indeed been achieved on the ground and whether these groups face less discrimination. There has been an increase in the number of discrimination case brought to justice, but the growth has not been as significant as expected.[162] This is mostly due to the complicated nature of the Act as well as the timely and costly

160 Position 288/2/2010, Advisory Body of Equal Opportunities. April 9 2010. EBH. Accessed Sept 2 2010. http://www.egyenlobanasmod.hu/data/TTaf_201004.pdf

161 pg. 9, Tamás Gyulavári. Egyenlő Bánásmód Törvény – Célok és Eredmények. In Lejtős Pálya: Antidiszkrimináció és esélyegyenlőség. Szerk. Majtényi Balázs. L'Harmattan. 2009

162 Pg. 20, Ibid.

fashion cases are decided.[163] Furthermore, as practice reveals there are gaps that still keep emerging after years of the adoption of the law, such as those mentioned above or the discrepancy between the 2003 Act the specialized equality act of 1998/XXVI on The Rights and Equal Opportunities of Persons with Disabilities.[164]

In the following chapter some of the issues identified above will be discussed and recommendations will be offered to overcome them. The gaps in legal instruments and more importantly the lack of applying an intersectional approach in practice – both in law and movements will be addressed.

4. Recommendations to Ensure Protection to Groups at Intersections

In most of the equality instruments mentioned so far, there is no explicit dismissal of intersectionality cases. However, there is a gap between what these instruments could allow for and what has been materialized in practice. Both minority movements and those who apply legal tools to combat discrimination should be more pro-active in applying an intersectional approach in their work. In the following, recommendations will be presented on how to implement possibility – both in law and minority movements – into practice.

4.1 Applying an Intersectional Approach in Law

The recognition of how crucial it is to address multiple discrimination has been present for a relatively long time in academia and is more frequently placed on the agenda

163 Ibid.

164 Pg. 24, Ibid.

among policy and law makers. The EU is an apparent example of this trend: while the existing equality Directives have not yet responded to the issue adequately, on the level of EU-wide research the topic is definitely present. Furthermore, EU instruments do not exclude the possibility to deal with intersectional discrimination cases. There are also examples on the international level: while none of the legally binding conventions have pushed for applying an intersectional approach strongly enough, a number of soft law instruments, such as CERD and CEDAW General Recommendations and Concluding Observations, have acknowledged the need to address intersectionality.[165] Furthermore, the CRPD is the first international convention, which explicitly includes special protections for groups that have a number of characteristics, such as women, children, and the elderly with disabilities.

Most human rights and equality instruments do not explicitly dismiss the possibility of applying an intersectional approach in discrimination cases. Therefore, the next and necessary step to follow should be to harmonize the potential of an intersectional approach, progressive jurisprudence and what has been articulated in research with the actual implementation of human rights and anti-discrimination instruments. Such a step would have the potential to push towards amending national legal frameworks that could integrate an intersectional approach into their so far single-ground concept of discrimination.

The practical application of this approach will pose special difficulties in the case of groups at intersections that represent social taboos - such as sexual minorities with disabilities -, and therefore generate conflicts among lawmakers and the members of

165 Pg. 31, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights Review, Vol. 1. 2008.

the respective movements. There needs to be a change in attitude on the levels of both policy and law on the one hand and movements, on the other – openness for intersectionality and also to break down taboos.

Justice Sachs in the South African Constitutional Court case *NCGLE v Minister of Justice* notes that a contextual rather than category-based approach should be used in discrimination cases. This means that instead of looking at grounds in isolation working on the assumption that groups are homogenous and mutually exclusive, law should recognize that discrimination can function on the basis of intersecting grounds.[166] Justice Sachs further argues that it is equally harmful to rank rights and look at them as if their violations took place in isolation: rather, rights just as well as grounds are interlinked and if so, law should recognize this and treat them accordingly.[167] Such an approach to discrimination would be based of a more progressive understanding of identity and oppression, which has clearly been present – at least on the theoretical level.

Procedural solutions to addressing intersectionality have emerged in some jurisdictions, but have not yet been used in a great number of states, treaty bodies, and their instruments. It is essential that law and policy makers on national, regional, and international levels recognize the need to address intersectionality and follow the trend that has appeared in the anti-discrimination discourse and aims to safeguard against discrimination based on intersectional grounds. In the following chapter the most common and promising practices will be revealed that could – or do – handle

166 Para 113, NCGLE v Minister of Justice, CCT 11/98, 9 October 1998. Constitutional Court of South Africa.http://www.beatit.co.za/media/PDFs/NCGLE%20and%20others%20v-%20The%20Minister%20of%20Justice%20and%20others.pdf

167 Para 114, Justice Sachs, Ibid.

intersectionality in law, followed by two new approaches that have not yet been recognized as potentially opening new paths towards recognition and protection.

Other Status

Non-exhaustive lists of protected grounds in both international human rights law and domestic equality legislation have the potential to allow space for an evolutive understanding of or dynamic approach to intersectionality.[168] Based on this view, 'other status', 'other ground', or 'analogous ground' could encompass cases of intersecting grounds, which would be understood as one protected ground. Clear examples to this approach are the Canadian, the South African, and the Hungarian framework. In Canada, the Supreme Court found that "there is no reason […] why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s15(1)".[169] The Hungarian Equal Treatment Authority is guided in its judgments by the view of its Advisory Body that intersecting grounds should be dealt with as one unique ground.

However, although the space for a dynamic interpretation is given in a number of instruments, there has not been enough guidance provided and courts have not shown a willingness to apply this idea in practice. As Uccellari points out, there is a path that judges and lawmakers could choose, but there are no guidelines as how these new intersecting grounds should be recognized and then incorporated into the existing framework. This can potentially become an issue, since the mandate falls upon the

168 Pg. 38, Ibid.

169 Para 94, Law v. Canada, (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.
Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1999/1999scr1-497/1999scr1-497.html

judges to decide who will be covered under the umbrella of the 'other.' Uccellari suggests that this mandate can be abused and this method will not "be flexible enough to recognize grounds which are too far removed from the listed grounds or too multi-faceted for the comfort of the judges".[170]

Thus, a similar conclusion can be reached in the case of non-exhaustive and static lists of grounds: if there are no clear guidelines for identifying those who need to be protected, the system can easily be abused or misused despite its potential to provide effective protection to all groups. There is a clear need for judicial activism so that the potential of including intersectionality cases under the umbrella of 'other status' would be implemented in practice.

An alternative path to this approach would be based more on the contextual factors of a discriminatory act, focusing on the effect rather than on the ground the act was based on. The most effective approach that focuses on context rather than boxes seems to be the one based on dignity, applied in the South African and Canadian frameworks.

A Dignity-based Approach

Dignity as a central element in equality law offers a solution to the procedural issues that arise from intersectional discrimination and its incompatibility with the categorical approach of law. The dignity-based approach is definitely promising with regards to applying an intersectional approach in discrimination cases.

170 Pg 38, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal RightsReview, Vol. 1. 2008.

In the *Law v Canada* case Justice Iaccobucci established that the central element of discrimination is the violation to dignity and that there must be a purposive interpretation of section 15 applied in discrimination cases. Therefore, the purpose of this section is

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[171]

He argued in the majority opinion that three elements must be considered in discrimination cases: whether there has been differential treatment, on one of the protected grounds, with the purpose or effect of discrimination.[172] The test Iaccobucci introduced in the *Law* case relies on a contextual analysis of the case and as thus places the emphasis on the effect on the person's dignity rather than on the ground identified. As reaffirmed by *R v Kapp*, Law "employed human dignity as a legal test".[173]

However, it seems that a dignity-based approach has not offered a solution to intersectionality cases. In *R v Kapp* the Court found that dignity is too "abstract and subjective" of a concept and therefore in practice seems rather difficult to apply. It was also stated that this approach "has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to

171 Law v Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497. Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1999/1999scr1-497/1999scr1-497.html

172 Law v Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497. Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1999/1999scr1-497/1999scr1-497.html

173 Para 21, (indentation original), R v Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, Supreme Court of Canada, http://scc.lexum.umontreal.ca/en/2008/2008scc41/2008scc41.html

be"[174], which clearly suggests that for its beneficial application, the use of this approach must be supported by clear guidance.

Following the Canadian model, South African equality legislation also seems to have shifted from a strictly ground based approach to discrimination and has introduced through the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 a model based on dignity.[175] In *S v Makwanyane and Another* Justice O'Regan of the Constitutional Court of South Africa already stated in 1995 that

> The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3.[176]

As Justice Sachs argued in the *NCGLE v Minister of* Justice case three years later, Article 9 is also an example of dignity being the fundamental matter of concern when it comes to discrimination.[177] However, dignity in itself and in interaction with other rights is viewed differently by the court. While the latter is a much broader concept and its violation can affect anyone, the former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics.[178]

174 para 22, R v Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, Supreme Court of Canada, http://scc.lexum.umontreal.ca/en/2008/2008scc41/2008scc41.html

175 Pg.28, Paola Uccellari: "Multiple Discrimination: How Law Can Reflect Reality." The Equal Rights Review, Vol. 1. 2008.

176 Para 328, S v Makwanyane and Another, 1995 (3) SA 391 (CC). Constitutional Court of South Africa. http://196.211.206.107/za/cases/ZACC/1995/3.html

177 Para 121, NCGLE v Minister of Justice, CCT 11/98, 9 October 1998. Constitutional Court of South Africa. http://www.beatit.co.za/media/PDFs/NCGLE%20and%20others%20v%20The%20Minist-er%20of%20Justice%20and%20others.pdf

178 Para 124, Ibid.

In the latter case, dignity and equality go hand in hand and neither is ranked higher in importance than the other.[179] Accordingly,

> inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth, associated with membership of the group.[180]

Section 1(1) of the Act on Definitions describes "prohibited grounds" as the following:

> a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
> b) any other ground where discrimination based on that other ground-
> i) causes or perpetuates systemic disadvantage;
> ii) undermines human dignity; or
> iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);[181]

This means that if an act "perpetuates disadvantage" or "undermines human dignity" it can be considered a discriminatory act. The NCGLE v Minister of Justice constitutional rights case reveals that a two-stage test must be applied to see whether a discriminatory act occurred. First, the ground is either protected or if not listed as such, must be "based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons". Second, if the ground is protected, the discriminatory act will probably be unfair, whereas if it is not, the plaintiff will have to prove that it was.[182] In establishing whether an act is unfair, the basis of consideration is dignity.[183]

179 Para 125, Ibid.

180 Ibid.

181 Section 1(1), Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. Republic of South Africa. Accessed 2 September 2010. http://www.acts.co.za/prom_of_equality/whnjs.htm

182 Pg. 20, Justice Ackermann, NCGLE v Minister of Justice, CCT 11/98, 9 October 1998. Constitutional Court of South Africa.

183 Pg. 21, Ibid.

Thus, as Uccellari points out the South African approach pays more attention to the adverse effects of unfavorable treatment rather than trying to put people in boxes. Also, the Constitution of 1995 and the 2000 Act both operate based on the grounds appearing in other such instruments, but they also leave space for additional grounds that can be a combination of the existing ones and more importantly, provide a more flexible definition of discrimination. Consequently, intersectional identities can fall under the protection of the Act if they "can be shown to constitute a 'marker of disadvantage' or that it is an important element of a person's sense of self". This is a significantly more humane approach to a person's dignity and identity, than any of the previously listed legal regimes.

This framework recognizes that identities intersect within each individual that they can shift, that protected groups are not homogenous and share all characteristics, and that discrimination targeting subgroups within protected groups can have fundamentally different consequences. Thus, not only is this approach more humane, but it is also more realistic in recognizing the multiple identities individuals have and providing effective legal tools to tackle discrimination targeting such persons.

Instead of setting up parallels between violations of rights of each protected group, dignity appears as a unifying element. This view recognizes that the forces of racism, sexism, homophobia, xenophobia, disablism, and so forth, do not have to be seen similar and thus the experience faced by those targeted do not have to be obscured – as Grillo and Wildman suggest.[184] A more progressive, "situation-sensitive"

184 Grillo, Trina, Stephanie M. Wildman. "Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other Isms)." Duke Law Journal. Vol. 1991, No. 2. New York: Duke University School of Law. 397-412.

approach does not attempt to blend these experiences together and acknowledges that they can be very different; yet, it sees dignity as a unifying element in being violated. As Sachs argues, "the focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality".[185]

However, the Canadian R v Kapp case reveals that the dignity-based approach has its own dangers and might place the applicants in a difficult position. However, although this approach is more sensitive to intersectional cases than a categorical and static legal framework, its application has not resulted in effective protection for groups at intersections.

A New Convention and Soft Law

A separate convention on intersectionality would be greatly beneficial since it could at once do away with the categorical and hierarchical approaches of law that have struck barriers to safeguarding groups at intersections. However, most instruments could potentially use an intersectional approach and yet, they have failed to do so. Therefore, while a new convention or soft law could have a comprehensive look on intersectional discrimination per se, it would probably not immediately solve the reluctance to apply such an approach in practice.

Furthermore, such a convention would overrule decades of human rights victories in the global movement, by revealing that both the broad and narrow approaches applied by the international framework are unfit to address the needs of

185 Para 126, NCGLE v Minister of Justice, CCT 11/98, 9 October 1998. Constitutional Court of South Africa. http://www.beatit.co.za/media/PDFs/NCGLE%20and%20others%20-v%20The%20-Minister%20of%20Justice%20and%20others.pdf

individuals targeted by discrimination and that they have failed to try to do so. It would not only question the work of the global movement up to today, but would also jeopardize existing conventions. Therefore, yet another solution could be if existing instruments stayed in force, but the respective bodies ensured that they all apply a dynamic approach and recognize the need to incorporate intersectionality into their instruments. In some cases, this could mean amendments, optional or additional protocols and in others, treaty bodies could issue interpretations, general comments, and guidelines. So far, the Committees to the CERD and CEDAW have issued such pieces of soft law, however, neither of them addressed the issue of intersectionality as a whole, but rather the case of one specific group.

The CERD General Recommendation 25 on Gender Related Dimensions of Racial Discrimination address issues dealt with by the CERD in light of grounds covered in the CERD intersecting with gender and gender only. General Recommendation 28 of the Human Rights Committee also acknowledges intersectional discrimination, faced by women.[186] The CEDAW's General Recommendation 18 on Disabled Women highlights the intersection of gender and disability.[187]

As these examples reveal, soft law within the international framework has only addressed intersectionality to a very limited extent, that is, in relation to only a few grounds. While groups that have been mentioned in these General Recommendations are undoubtedly in a vulnerable position and require extra protection, other protected groups lack the same safeguards, which further perpetuates their marginalization.

186 General Comment no. 28, Equality of Rights Between Men and Women, Human Rights Committee, 2000. http://www1.umn.edu/humanrts/gencomm/hrcom28.htm, qtd. in Uccellari, pg. 31

187 General Recommendation no. 18, Disabled Women. CEDAW. 1991. http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm, qtd. Ibid,

Therefore, there is a great need for such instruments to be adopted that would deal with intersectionality in general, not highlighting certain groups and pushing others in the background. Clearly, the most beneficial option would be to both adopt a new convention and also to add to those already adopted to ensure that they do in fact apply an intersectional approach. If this was ensured in international, regional, and domestic instruments, groups at intersections would be effectively protected at last.

All of these changes and ideas could push for the application of an intersectional approach in practice in such cases in which for instance an LGB person with a disability is discriminated against. While such changes could greatly encourage relevant actors to apply such an approach, it is clear that most instruments could already allow for intersectional cases to be recognized and dealt with as they are. In lack of a clear dismissal of such cases and with the recommendations outlined above *law* could be effectively applied in intersectionality cases – even in those that involve particularly vulnerable groups subject to a number of taboos, such as LGB persons with disabilities. In the following subchapter some recommendations will be revealed on how minority movements could support this group – through their own ways or by pushing for legal changes.

4.2 Intersectionality and Minority Movements

Civil society has the potential and power to influence lawmakers and push for effective changes in legal protections. However, movements do not necessarily need to resort to legal protections and advocate for amendments of existing frameworks. They could use the tools already have at hand, including providing a sense of community for their members. With more active engagement in mapping the experiences and needs of

subgroups within their own community they could largely improve the lives of particularly vulnerable groups at intersections. This argument is valid in the case of disabled lesbians, gays, and bisexuals: the LGBT and the disability movements have an indispensable role in representing their needs and supporting them.

The most recent and apparent example of the power of the civil sector and self-advocacy groups in pushing for legal protections is the drafting of the CRPD: the International Disability Caucus brought together over seventy NGOs and DPOs from all over the world discussing priorities and the actual substance of the provisions.

Yet, the argument about the influence of advocacy groups on law can only be valid, if there is actually a group or movement that is advocating for the interests of those at the intersections. This point is supported by Uccellari's statement suggesting a lack of these groups in the case of LGB persons with disabilities, which places them in a particularly vulnerable position. As revealed in this thesis, neither the broader LGBT and disability, nor the group at their intersection – at least in the Netherlands, where it actually exists - are fit to tackle this challenge as of right now.

Two paths could be taken to empower the particular group of gays, lesbians, and bisexuals with disabilities and also, groups at intersections in general. First, the LGB and the disability movements need to place the needs of subgroups on their agenda - as suggested by the Hungarian interviewees to this thesis; if both advocated for the rights of the subgroup, they could even form alliances. However, this might be a utopian vision, since the main priorities of the LGBT and the disability movements do not overlap and they even oppose each other in some areas, such as support by the Church.

Therefore, the second path, which would include a strong and largely independent intersectional movement, might be more effective. Yet, both the Dutch and the Hungarian examples have revealed that the intersectional movement is very weak as of today. In Hungary, the intersectional movement and community are virtually non-existent and severely marginalized in both broader groups. In the Netherlands, there have been positive examples in the past few years and the movement is growing stronger and stronger. However, it is still rather weak to be able to push for recognition in legal instruments, such as the CRPD. As the CRPD drafting process has revealed, the strength of the women's lobby within the disability movement was essential for a gender perspective to be mainstreamed in CRPD provisions. For such successful advocacy and in order to represent the experiences and needs of LGB persons with disabilities, either the broader movements have to allow for space for such a change or the intersectional community must grow stronger.

The movements however could also apply non-legal tools in supporting the group at the intersection of disability and sexual minorities. More sexual education could be provided by either of the two movements for persons with disabilities in the first place, but also among caretakers, families, and institution staff. Sensitizing the relevant groups could be a tool that movements could apply in lack of effective legal protections – they might make a greater impact on the ground. Awareness-raising about the diversity of the LGBT community would also be greatly beneficial to support this group at the intersection. For such steps, it would be an important milestone if the two movements were able to found some common ground and recognize the overlaps between their communities. While this is generally true for all movements, it might pose difficulties in

the particular case of the LGBT and the disability movement as their interests and more importantly their financial supporters are often irreconcilable. However, such a realization and actual cooperation between movements could lift taboos, end silence, provide a community and support for this group. As the interviewees to this thesis revealed, their feeling of being excluded and silenced was often due to a lack of awareness in the two movements. Filling this gap as well as combating rejection in the two communities could be tasks that the movements could take on. If the integration of an intersectional approach became routine, the argument about more pressing needs would potentially lose its strength, too. While there always will be crucial issues to work on, leaving a subgroup at a particularly vulnerable positions should be seen as pressing enough for both movements to deal with.

5. Conclusion

Lesbian, gay, and bisexual persons with disabilities might be small in numbers, but they are easy targets of intersectional discrimination due to the triple taboo they face in mainstream society as well as in the LGBT and the disability communities and which results in their particularly marginalized position. Their vulnerability is further perpetuated by the lack of adequate support from the LGBT and the disability movements and effective safeguards in international, regional, and domestic equality frameworks.

Human rights and equality instruments have not yet been able to provide strong legal protection to intersectional groups – especially such a group that is as invisible as that of lesbian, gay, and bisexual persons with disabilities. While there are a number of procedural and conceptual barriers these instruments should first overcome, many of

them would be able to respond to intersectionality cases as there is no clear and explicit dismissal framed in them. Such a possibility should be applied in practice so that the gap between potential and implementation is bridge for the purpose of effectively protecting groups at intersections. The current thesis made recommendations using the examples of some domestic framework on how the procedural barriers could be shifted in existing instruments and also outlined the possibility of a new convention and soft law.

There is growing awareness of intersectional discrimination among lawmakers on the international, European, and domestic levels - mirrored by a growing body of research as well as more progressive instruments, such as the CRPD or a number of domestic frameworks. This trend as well as the recommendations outlined could lead to a paradigm shift in anti-discrimination safeguards and result in actual practice.

The thesis also argued that the role of minority movements is indispensable in pushing for such legal changes, but also in supporting the group of LGB persons with disabilities on the ground. It was found on the basis of interviews with members of the group as representatives of the LGBT and disability movements that there is very little support the two movements. Firstly, there is often no awareness of the group as its members are largely invisible. Secondly, there are more pressing issues for both movements to focus on and in lack of capacity they do not integrate an intersectional approach into their work. Thirdly, homophobia and disablism in mainstream society are often reproduced within the movements. Lastly, there is hardly any cooperation between the broader groups of sexual minorities and persons with disabilities.

The example of the Netherlands revealed that the intersectional movement which has been growing in the last few years fills the void created by the two larger movements by providing support and a sense of community for this particular group. Although this movement is not strong enough to push for revolutionary legal changes as of right now, their role is crucial on the ground. The thesis argued that minority movements could use non-legal tools to support the group at the intersection. Sensitizing trainings, sexual education, and awareness-raising could all be integrated into the work of two broader and the intersectional movement. Such a shift, which would require some form of cooperation between the two communities could combat taboos and therefore ease the invisibility and vulnerability of lesbians, gays, and bisexuals with disabilities.

If an intersectional approach was integrated into equality instruments and such an approach was applied in practice, effective legal protections could be provided for groups at intersections, such as LGB persons with disabilities. Furthermore, if the LGBT and the disability movements also placed more emphasis on supporting their own subgroups within the two larger communities, support, acceptance, and a sense of belonging could all significantly contribute to the breaking. The proposed shift in legal instruments as well as minority movements should complement and strengthen each other. Together they could ensure that the particularly vulnerable group of lesbians, gays, and bisexuals are effectively protected by law and supported by a strong community.

Bibliography

Secondary Sources:

"A New Multi-ground Directive Creates a Higher Level of Protection against Discrimination." Equal Rights Trust. 2 July 2008. http://www.equalrightstrust.org/newsstory2july2008/index.htm

"An Intersectional approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims". Ontario Human Rights Commission. 2001. Accessed Sept 2 2010. http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts/pdf

Appleby, Yvon. "Disability and 'Compulsory Heterosexuality'." *Heterosexuality: A Feminism & Psychology Reader*. Eds. Sue Wilkinson and Celia Kitzinger.London: Sage Publications, 1994. 266-270.

Appleby, Yvon. "Out in the Margins." *Disability & Society*. Vol 9, No. 1, 1994.

Arnardóttir, Oddny Mjöll. *Equality and Non-Discrimination under the European Convention on Human Rights*. London: Martinus Nijhoff Publishers, 2003.

Barounis, Cynthia. "Cripping Heterosexuality, Queering Able-Bodiedness: Murderball, Brokeback Mountain and the Contested Masculine Body." *The Disability Studies Reader*. Ed. Lennard J. Davis: London: Routledge, , 2010. 443-460.

Besson, Samantha. "Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?" Human Rights Law Review. Vol. 8, Issue 4. 2007. pp. 647-682.

Clare, Eli. "Stones in My Pockets, Stones in My Heart." *The Disability Studies Reader*. Ed. Lennard J. Davis. London: Routledge, 2010. 563- 573.

CRPD Implementation Toolkit. ICRPD. Disabled People's International. http://www.icrpd.net/implementation/en/index.htm

Demeter, Judit. „Az egyenlő bánásmód sérelme miatt indult hatósági eljárások tapasztalatai". Egyenlő Bánásmód Hatóság. http://www.egyenlobanasmod.hu/tanulmanyok/hu/DemeterJudit_az_egyenlobanasmod_serelme_miatt_indult_hatosagi_eljarasok_tapasztalatai.pdf

eds. Barnes, Colin, Geof Mercer, Tom Shakespeare. *Exploring Disability: A Sociological Introduction*. London: Polity Press,1999.

eds. Schiek, Dagmar, Lisa Waddington, Mark Bell. Cases, Materials and Text on National, Supranational, and International Non-Discrimination Law. Oxford: Hart Publishing, 2007.

"Even LGBT persons are shocked by the festival's poster with kids / A melegeket is kiakasztotta a kisgyerekes fesztiválplakát". Velvet. 8 June 2008. Accessed 25 April 2011. http://velvet.hu/sztori/plakatos0606/

Gilbert, Geoff. Religio-nationalist minorities and the development of minority rights law. Review of International Studies (1999), 25, 389-410. British International Studies Association.

Grillo, Trina, Stephanie M. Wildman. "Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other Isms)." *Duke Law Journal*. Vol. 1991, No. 2. New York: Duke University School of Law. 397-412.

Gyulavári, Tamás. "Három évvel az antidiszkrimincációs jog reformja után". / Three Years After the Reform of the Anti-Discrimination Law". EBH. 26 January

2007. Accessed 25 April 2011. http://www.egyenlobanasmod.hu/tanulmanyok/hu/Gyulavari_cikk_jan26.pdf

Gyulavári, Tamás. "Egyenlő Bánásmód Törvény – Célok és Eredmények" / „Equal Treatment Act – Goals and Results". In Lejtős Pálya: Antidiszkrimináció és esélyegyenlőség. Szerk. Majtényi Balázs. L'Harmattan. 2009. pp. 9- 24.

Handbook on European Non-Discrimination Law. Fundamental Rights Agency. 2011. http://www.echr.coe.int/NR/rdonlyres/DACA17B3-921E-4C7C-A2EE-CDB68B0133E/0/182601_FRA_CASE_LAW_HANDBOOK_EN.pdf

Hearn, Kirsten. "Disabled lesbians and gays are here to stay'". *High Risk Lives*. Tara Kaufmann and Paul Lincoln. Bridport: Prism Press, 1991.

"Is this really the best way to promote gay pride? / Vajon ez a legjobb módja a melegfelvonulás reklámozásának?". Vastagbőr. 6 June 2008. 25 April 2011. http://vastagbor.blog.hu/2008/06/06/vajon_3_gyerek_a_legjobb_modja

Kádár, András Kristóf. „Az egyenlő bánásmódról szóló törvény kimentési rendszere a közösségi jog elveinek tükrében". Egyenlő Bánásmód Hatóság. http://www.egyenlobanasmod.hu/tanulmanyok/hu/kimentesirendszer.pdf

Kárpáti, József. „Az Utolsó Próbatétel. Ítélet a Háttér Tásaság kontra Károli Egyetem Ügyben."/ „The Last Challenge. Judgment in the Háttér v. Károli University Case. Fundamentum." 2005 / Vol. 3. pp. 105-108.

Kennedy, David. The International Human Rights Movement: Part of the Problem? Harvard Human Rights Journal. Vol. 15, Spring 2002. http://www.law.harvard.edu/students/orgs/hrj/iss15/kennedy.shtml

Kollonay Lehoczkyné, Csilla. „Az Egyenlő Bánásmód Biztosításának Jogi Eszközei az Európai Unióhoz Való Csatlakozás Nyomán." *Munkaerőpiaci Tükör 2009*. MTA Közgazdaságtudományi Intézet Országos Foglalkoztatási Közalapítvány. 67-81.

Law, Sylvia A. "Homosexuality and the Social Meaning of Gender". Wisconsin Law Review 187. 1988.

Lejtős Pálya. Antidiszkrimináció és esélyegyenlőség. Recenzió. In Fundamentum: Az Emberi Jogok Folyóirata. 2010/1. pp 100-102.

Lewis, Bradley. "A Mad Fight: Psychiatry and Disability Activism." *The Disability Studies Reader*. Ed. Lennard J. Davis. London: Routledge, 2010. 160-179.

McRuer, Robert. "Compulsory Able-Bodiedness and Queer/Disabled Existence." *The Disability Studies Reader*. Ed. Lennard J. Davis. London: Routledge, 2010. 383-393.

Morris, Jenny. "Pride against Prejudice: A Personal Politics of Disability." London, The Women's Press, 1991.

Re-thinking Identity: The Challenge of Diversity. Ed. Katherine E. Zappone. Joint Equality and Human Rights Forum. 2003.

Rich, Adrienne. "Compulsory Heterosexuality and Lesbian Existence." *Blood, Bread, and Poetry: Selected Prose 1979-1985*. New York: W. W. Norton & Company, 1986.

Samuels, Ellen. "My Body, My Closet: Invisible Disability and the Limits of Coming-Out Discourse." *GLQ: A Journal of Lesbian and Gay Studies*. Vol. 9, 1-2 (2003). London: Duke University Press, 2003. .233-255

Schulze, Marianne. “Understanding the UN Convention on the Rights of Persons with Disabilities.” *A Handbook on the Human Rights of Persons with Disabilities*. July 2010.

Shakespeare, Tom, Kath Gillespie-Sells, Dominic Davies. *The Sexual Politics of Disability: Untold Desires*. London: Cassel, 1996.

Shakespeare, Tom. “Power and Prejudice: Issues of Gender, Sexuality, and Disability.” *Disability and Society. Emerging Issues and Insights*. Ed. Len Barton. London: Longman, 1996. 191-215.

Tackling Multiple Discrimination: Practices, Policies and Laws. Danish Institute for Human Rights. European Commission. DG for Employment, Social Affairs and Equal Opportunities. Luxembourg: Office for Official Publications of the European Communities,2007.

Traustadóttir, Rannveig. “Disability Studies, the Social Model and Legal Developments”. The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives. Ed. Oddny Mjöll Arnardóttir and Gerard Quinn. Boston: Martinus Nijhoff Publishers, 2009.

Uccellari, Paola. “Multiple Discrimination: How Law Can Reflect Reality.” *The Equal Rights Review*, *Vol. 1*. 2008

50 years of EU Gender Equality Law. Press Release, MEMO/07/426. European Union. 25/10/2007. Accessed Sept 2 2010. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/426

Waddington, Lisa: “Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European

Community". The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives. Ed. Oddny Mjöll Arnardóttir and Gerard Quinn. Boston: Martinus Nijhoff Publishers, 2009.

Primary Sources:

Act XXVI of 1998 on the Rights and Equal Opportunities of Persons With Disabilities. Hungary. Jogtár. Accessed 2 September 2010. http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV

Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities. Hungary. Egyenlő Bánásmód Hatóság. Accessed 2 September 2010. http://www.egyenlobanasmod.hu/data/Act_CXXV_2003%20English.pdf

Beijing Declaration and Platform for Action. UN. Fourth Wolrd Conference on Women. 1995. http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf

Canadian Charter of Rights and Freedoms of 29 March 1982. Department of Justice. Accessed 2 September 2010. http://laws.justice.gc.ca/en/charter/1.html#anchorbo-ga:l_I-gb:s_15

Canadian Human Rights Act of 1985, 1996 Amendment. ILO. Accessed Sept 2 2010. http://www.oit.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=55999

Charter of Fundamental Rights of the European Union 2000/C 364/01, Official Journal of the European Communities. European Parliament. Accessed 2 September 2010. http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Consolidated Version of the Treaty Establishing the European Community, 24 December 2002. Official Journal of the European Communities. Accessed 2

September 2010. http://www.lisbon-treaty.org/wcm/component/docman/cat_view/202-treaties/210-ec-treaty-consolidated-version-2002.html

Constitution of Hungary. The Electric Law Library. Accessed 2 September 2010. http://www.kozlony.magyarorszag.hu/pdf/1370

Constitution of Hungary. 25 April 2011. Magyar Közlöny, volume 43. http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/mk11043.pdf

Constitution of the Republic of South Africa of 4 December 1996. South African Government Information. Accessed 2 September 2010. http://www.info.gov.za/documents/constitution/1996/96cons2.htm#9

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). UN. 1979/1981. http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm Accessed 2 Sept 2010.

Convention on the Elimination of All Forms of Racial Discrimination (CERD). UN. 1955/1965. Accessed 2 Sept 2010.

Convention on the Rights of Persons with Disabilities (CRPD). UN. 2006/2008. Accessed 2 Sept 2010. http://www.un.org/disabilities/default.asp?id=259

Council Directive 2000/43/EC of 29 June 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of the Racial or Ethnic Origin. EURLEX. Accessed September 2 2010. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML

Council Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation. EURLEX. Accessed 2

September 2010. http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32000L0078&model=guichett

Council Directive 2004/113/EC of 13 December 2004, Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services. EURLEX. Accessed 2 September 2010. http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:en:NOT

Equal Treatment Act of 2 March 1994. The Netherlands. Commissie Gelijke Behandeling. Accessed 2 September 2010. http://www.cgb.nl/artikel/equal-treatment-act

Equal Treatment (Disability and Chronic Illness) Act of 3 April 2003. The Netherlands. Commissie Gelijke Behandeling. Accessed 2 September 2010. http://www.cgb.nl/artikel/equal-treatment-disability-and-chronic-illness-act

Equal Treatment in Employment (Age Discrimination) Act of May 2002. The Netherlands. The Netherlands. Commissie Gelijke Behandeling. Accessed 2 September 2010. http://www.cgb.nl/artikel/equal-treatment-employement-age-discrimination-act

European Convention on Human Rights (ECHR). Council of Europe. 1950. Accessed 2 Sept 2010. http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

General Comment no. 28, Equality of Rights Between Men and Women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10. Human Rights Committee, 2000. University of Minnesota Human Rights Library. Accessed 2 Sept 2010. http://www1.umn.edu/humanrts/gencomm/hrcom28.htm

General Recommendation no. 18, Disabled Women. CEDAW. 1991. Accessed 2 Sept 2010. http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm

International Covenant on Civil and Political Rights (ICCPR). UN. 1966/1976. Accessed 2 Sept 2010. http://www2.ohchr.org/english/law/ccpr.htm

International Covenant on Economic, Social, and Cultural Rights (ICESCR). 1966/1976. Accessed 2 Sept. http://www2.ohchr.org/english/law/cescr.htm

Position 288/2/2010, Advisory Body of Equal Opportunities. April 9 2010. EBH. Accessed Sept 2 2010. http://www.egyenlobanasmod.hu/data/TTaf_201004.pdf

Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. Republic of South Africa. Accessed 2 September 2010. http://www.acts.co.za/prom_of_equality/whnjs.htm

Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation {SEC(2008) 2180} {SEC(2008) 2181} of 2 July 2008. EURLEX. Accessed 2 September 2010. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT

Treaty of Amsterdam. 1997. Accessed 2 Sept 2010. http://www.eurotreaties.com/amsterdamtreaty.pdf

Treaty of Rome. 1957. Accessed 2 Sept 2010. http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf

Cases

Alajos Kiss v Hungary. Application No. 38832/06. ECHR. May 2010. Accessed 2 Sept 2010. http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=868214&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Canada (Attorney General) v Mossop, 1993, 1 S.C.R. 554, Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1993/1993scr1-554/1993scr1-554.html

Dudgeon v the UK, *Application no. 7525/76. ECHR. 22 October 1981.* Accessed 25 April 2011. http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=dudgeon&sessionid=71591300&skin=hudoc-en

Egan v Canada, [1995] 2 S.C.R. 513, Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1995/1995scr2-513/1995scr2-513.html

Glor v Switzerland, *(Requête n^{o} 13444/04. ECHR. 30 April 2009.* Accessed 25 April 2011. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=glor%20|%2013444/04&sessionid=71591315&skin=hudoc-en

Háttér Társaság v Károli Egyetem, EBH 2005/1216. Egyenlő Bánásmód Hatóság.

Law v Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497. Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1999/1999scr1-497/1999scr1-497.html

L. and V. v Austria, *Applications nos. 39392/98 and 39829/98. ECHR. 9 January 2003.* Accessed 25 April 2011. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=39392/98&sessionid=71591300&skin=hudoc-en

Molka v Poland, Application no. 56550/00. ECHR. 11 April 2006. Accessed 25 April 2011. http://vlex.com/vid/molka-v-poland-26770885

NCGLE v Minister of Justice, CCT 11/98, 9 October 1998. Constitutional Court of South Africa. http://www.beatit.co.za/media/PDFs/NCGLE%20and%20others%20v%20The%20Minister%20of%20Justice%20and%20others.pdf

Price v the UK, *Application no. 33394/96. ECHR. 10 July 2001. Accessed 25 April 2011.* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=PRICE&sessionid=71591300&skin=hudoc-en

Rasmussen v Denmark, *Application no. 8777/79. ECHR. 28 November 1984. Accessed 25 April 2011.* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Rasmussen&sessionid=71595780&skin=hudoc-en

R v Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, Supreme Court of Canada, http://scc.lexum.umontreal.ca/en/2008/2008scc41/2008scc41.html

S v Makwanyane and Another, 1995 (3) SA 391 (CC). Constitutional Court of South Africa. http://196.211.206.107/za/cases/ZACC/1995/3.html

Salgueiro da Silva Mouta v Portugal, *Application no. 33290/96. ECHR. 21 December 1999. Accessed 25 April 2011.* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Salgueiro%20|%20da%20|%20Silva%20|%20Mouta&sessionid=71591300&skin=hudoc-en

Smith and Grady v the UK, Applications nos. 33985/96 and 33986/96. ECHR. 27 September 1999. Accessed 25 April 2011. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Smith%20|%20Grady&sessionid=71591300&skin=hudoc-en

United States v Carolene Products, 304 U.S. 144 (1938). United States Supreme Court. http://supreme.justia.com/us/304/144/case.html

Vriend v Alberta, [1998] 1 S.C.R. 493, Supreme Court of Canada. http://csc.lexum.umontreal.ca/en/1998/1998scr1-493/1998scr1-493.html

461/2010, EBH, Equal Treatment Authority, Hungary. Accessed Sept 2 2010. http://www.egyenlobanasmod.hu/zanza/461-2010.pdf

810/2010, EBH, Equal Treatment Authority, Hungary. Accessed Sept 2 2010. http://www.egyenlobanasmod.hu/zanza/804-2010.pdf

1245/2010, EBH, Equal Treatment Authority, Hungary. Accessed Sept 2 2010. http://www.egyenlobanasmod.hu/zanza/1245-2010.pdf

960/2010, EBH, Equal Treatment Authority, Hungary. Accessed Sept 2 2010. http://www.egyenlobanasmod.hu/zanza/960-2010.pdf