



# APPLYING EU ANTI-DISCRIMINATION LAW

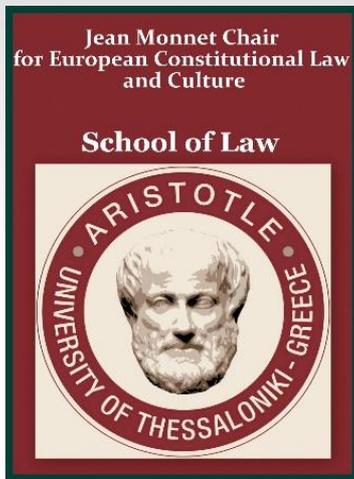
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**Equality  
Law**



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**Discrimination on grounds  
of gender identity and  
sexual orientation in EU law:  
main features and CJEU case law**



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# The constitutional foundations of anti-discrimination law

## Article 2 TEU

- The Union is founded, inter alia, on the values of equality and respect for human rights, including the rights of persons belonging to minorities,
- in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

## Article 3 TEU

- The Union shall offer its citizens an area of freedom without internal frontiers,
- of vital importance for the free movement of family members
- para 3: the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women.'

## Article 6 TEU

- the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles
- common to all Member States and
- it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms
- and as they result from the constitutional traditions common to the Member States, as general principles of [EU] law

## Article 21 EU Charter of Fundamental Rights

1. Any discrimination based on any ground such as sex, race, colour, 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.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

# Legal grounds for taking action in primary EU law

## Article 10 TFEU

- ‘in defining and implementing its policies and actions, the Union shall aim to combat discrimination based on **sex**, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**.’

## Article 19 TFEU (formerly 13 TEC)

- Procedure to be followed by the Union for the legislative measures in this field
  - These provisions, for combating discrimination based on sexual orientation, were initially established in the Amsterdam Treaty (1999)
  - And within the competences conferred to it

# ECHR and other international law

## ❑ European Convention on Human Rights

- ❖ article 8 (right to respect for private and family life)
- ❖ in combination with article 14 (prohibition of discrimination)
  - general prohibition of discrimination,
  - both direct and indirect, in regard to any other rights of the European Convention and Protocols
- ❖ Protocol 12
  - a stand-alone general equality provision

❑ *See also Yogyakarta Principles (2006)*

# The test of the ‘analogous situation’

- ❖ to determine whether the applicants can be compared
  - ❖ with another group of people
  - ❖ who are treated more favourably
- ❑ Aristotelian formula: ‘likes should be treated alike’
  - ❑ discrimination occurs also when
    - ❖ states ‘fail to treat differently persons whose situations are significantly different’ (‘Thlimmenos’ v Greece)

# The ECtHR case law (a)

- ❖ Dudgeon v. the United Kingdom (1981)
  - laws criminalizing same-sex sexual acts in Northern Ireland were in violation of Article 8 in conjunction with Article 14
- ❖ Karner v. Austria (40016/98) of 2003
  - the applicant was denied the right to succeed to a tenancy after the death of his male unmarried partner,
  - while an unmarried different sex partner would have been allowed to do so
- ❖ Goodwin v. UK (28957/95)
- ❖ Schalk & Kopf v. Austria (30141/04) of 2010
  - Stable and long-term same-sex relations are protected as family life
  - But there is no European consensus on same-sex marriage
  - Therefore national scope of discretion

# The ECtHR case law (b)

- ❖ Gas and Dubois v. France (25951/07) of 2012;
- ❖ Vallianatos v Greece (29381/09, 32684/09)
  - Exclusion of same-sex couples from partnership: violation of ECHR article 8
- ❖ Orlandi and Others v. Italy (26431/12)
  - Lack of legal recognition of same-sex unions in Italy violated rights of six couples married abroad
- ❖ Oliari v Italy (18766/11 36030/11)
  - Lack of legal recognition of same-sex relations: violation of ECHR article 8
- ❖ Taddeucci and McCall v. Italy (2016)
  - on unmarried same-sex couples
  - acknowledging for the first time that an unmarried same-sex couple is discriminated against when not allowed to attain rights and benefits attached to marriage



# **TRANSgender persons in EU law and the case-law of the Court of Justice of the Union**

# Trans at work

- ❑ In 1989 the European Parliament adopted
  - ❖ Resolution on trans rights
  - ❖ Remained non legally binding
- ❑ The European Court of Justice (ECJ) provided protection to trans persons at a very early stage
  - ❖ Discrimination on grounds of sex also covers cases of gender reassignment
  - Discrimination on grounds of gender identity is discrimination on grounds of sex
  - Very important, since at first only gender based equality was protected
- ❑ European legislator 2012
  - ❖ Revision of the directive on Equal Treatment aiming to include discrimination based on gender identity

# ECJ case-law on Trans: P v. S and Cornwall

- ❑ Trans are protected by gender equality law
- ❑ Advocate General Tesouro
  - ❖ The Directive on Equal Treatment provides for protection not only in the case where a woman is discriminated against a man
  - ❖ But also for all those cases in which the 'gender' criterion is critical
  - ❖ Without special justification for discrimination
- ❑ The Court
  - ❖ did not follow the entirety of the Advocate General's line of argument in its reasons for judgement,
  - ❖ but in the final judgement
  - ❖ It rejected the argument of historic interpretation that the legislator did not intend to provide for protection from discrimination against trans persons

# ECJ case-law on Trans: P v. S and Cornwall: the comparison

## □ The Court:

- ❖ the scope of the Directive cannot be limited only to the fact that the person belongs to one of the two sexes
- ❖ it should be expanded to include discrimination on grounds of sex and gender reassignment
- ❖ **comparison**: discrimination shall be taken to occur where the applicant is treated less favourably than another person in a comparable situation but belongs to the other sex
- ❖ it did not accept the argument made by the British government to compare P to another trans who changed from female to male but
- ❖ compared her to a man who had no intention to proceed to gender reassignment

# ECJ case-law on Trans: pensions

## □ **K.B** Case (2004) (Request for preliminary ruling)

- ❖ article 141 TEC (on equal treatment between men and women) and Directive 75/117/EEC
- ❖ trans man (with no legal sex change) was not entitled to widowhood pension in the UK, where back then legal sex change was not provided for and therefore marriage possibility was not provided for either,
- ❖ ECJ: This legislation infringes both ECHR and article 14 TEC

## □ **Richards** Case (2006) (Request for preliminary ruling)

- ❖ refusal to grant retirement pension at the age of 60 to trans with no legal sex change (UK)
- ❖ ECJ= article 4(1) of the Directive also covers trans woman → is entitled to retirement pension at the age of 60, just like the rest of women, and not at the age of 65, which is the retirement age for men

# ECJ case-law on Trans: inability of gender reassignment at marriage

## □ MB\* Case

❖ MB = **born and legally** man married (to a woman)

- was recognized as woman in her passport and driving license, issued by the authorities in the United Kingdom
  - harmonizes his sex, but not legally,
  - because it required the existence of marriage annulment (same-sex marriage was not allowed in the UK then)
- Contrary to the Richards case, Mrs. MB was, pursuant to the 2004 law on sex recognition, capable of changing her legal sex
  - but in order to do this, she had to sacrifice her marriage and she preferred to keep the latter instead of enjoying the former

❖ **She asks for pension at the age of 60 as a woman**

□ Advocate General Bobek : the requirement to be unmarried, which in reality is applicable only for trans persons so that they shall have access to retirement, is contrary to article 4 para 1 Directive 79/7

\*C-451/16, *MB v. Secretary of State for Work and Pensions*, judgement 28.06.2018

# MB Case (CJEU judgement)

- ❑ CJEU says: it is not required to answer the question if
  - ❖ in general, the legal recognition of gender reassignment may depend on marriage annulment earlier to that gender reassignment' (para 28)
  - ❖ jurisdiction of the Court to proceed to specific control
  - ❖ and due to the still national competence on family status issues
  - ❖ is , eventually, in favour of the applicant in the main proceedings
- ❑ 'article 4, paragraph 1, of the Directive 79/7, which implements the **principle of prohibition of discrimination based on sex** in the field of social security,
- ❑ **shall be observed by the member states each time they exercise their competence in family status issues'** (para 31)

# MB Case (CJEU reasoning)

- ❑ Discrimination = treatment less favourable
  - ❖ Compared to a person who proceeded to gender reassignment after his marriage
- ❑ Comparability of situations
  - ❖ Not in a general and abstract way but
  - ❖ in a particular and specific way
  - ❖ They are comparable here
- ❑ Exemption only
  - ❖ to the cases which are listed in an exhaustive manner in this Directive,
  - ❖ none of this is applicable in the specific case
  - contrary to art. 4 (1) (α) case, in combination with art. 3 (1)(α), 3<sup>rd</sup> case, and 7 (1)(α) of the Directive 79/7/EEC



# **Discrimination on grounds of homosexuality in EU law**

# Discriminations based on gender?

- Contrary to what ECJ recognized about trans,
- It does not accept that discriminations to the detriment of homosexuals either as individuals or as couples
- constitute discrimination based on gender
  
- Why is this important?
- Why **isn't** this right?

Nationality (of member state)

Racial and ethnic origin

Gender

Education

Social insurance, goods and services

Employment

Religion, disability, age, sexual orientation

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# **CJEU CASE LAW ON DISCRIMINATION AGAINST PERSONS IN SAME-SEX RELATIONS**

# Lisa Grant (1998) and D v. Council (2001)

## ❑ Same-sex couples and non equal remuneration

## ❑ Difference between this case and P case

- ❖ In P case the Court could have also compared the applicant (trans M-W) to a woman who had proceeded to gender reassignment (W-M) but it did not
- ❖ In Grant case, it chose this way without explaining the reason why,
  - whereas the choice to compare the applicant to a man who has a stable relationship with with a woman is even more evident and unbiased than the trans case
  - discrimination based on sex or based on gender reassignment?
    - based on gender combination
    - and the combination still concerns the gender!

# Legislative protection after Amsterdam: Directive 2000/78

- ❑ The Amsterdam Treaty (article 13 TEC, article 19 TFEU)
- ❑ Anti-discrimination legislation amidst two separate directives
  - ❖ the ‘Directive on racial equality’ 2000/43
    - (implementation of the principle of equal treatment for persons irrespective of racial or ethnic origin in **several sectors** of social life)
  - ❖ and Directive 2000/78/EC on equal opportunities in **employment** as part of labour law
    - general framework for **equal treatment in employment and occupation**, irrespective of several features, such as disability, religion, beliefs, age and sexual orientation
    - Article 1 of Directive 2000/78 provides:
      - ‘The purpose of this directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or **sexual orientation, in the field of employment and occupation**, with a view to promoting the principle of equal treatment in the member states.’

# The scope of Directive 2000/78/EC (art. 3)

- ❑ 1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
  - ❖ (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
  - ❖ (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
  - ❖ (c) employment and working conditions, including dismissals and pay;
  - ❖ (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
- ❑ 2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless person concerned.
- ❑ 3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
- ❑ 4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces

# Comparison of Directives 2000/43 and 2000/78

- ❑ Wider protection based on race and ethnic origin
  - ❖ More fields
  - ❖ Obligation of authorities supervising equality
  - ❖ Fewer allowed exemptions

# Commission Proposal 2008 for a new Directive

- ❖ 'horizontal directive' or 'directive on multiple fields other than employment'
  - Proposal for a Council directive on the implementation of the principle of equal treatment of persons irrespective of religion or beliefs, disability, age or sexual orientation {SEC (2008) 2180} SEC (2008) 2181}, / \* COM / 2008/0426 final - CNS 2008/0140
- ❖ On discrimination in the public and private sector
  - in the field of social protection, including social insurance and health care,
  - of social advantages,
  - of education ,
  - of access to and supply of goods and services to the public, including housing
- ❖ 'without prejudice to national laws' on family status and reproduction rights, which means that there shall be a broad margin of national appreciation.
- ❖ Pending

# Broad interpretation of “employment” in Directive 2000/78

## ❑ On its scope

- ❖ E.g. widowhood pension in employment programme is ‘salary’

## ❑ Despite recital 22

- ❖ (22) This Directive shall be without prejudice to national legislations on family status and the benefits depending on it.

## ❑ And article 3 § 3

- ❖ 3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

## ❑ Direct discrimination based on sexual orientation

- ❖ If partners in registered partnership are excluded
- ❖ While being in comparable situation to married persons
- ❖ On the specific benefit/ pension/ etc



# **CJEU CASE-LAW AFTER AMSTERDAM AND DIRECTIVE 2000/78**

# Types of cases

## Remuneration and pensions

- C-267/06, *Tadao Maruko v Versorgungsanstalt* (2008)
- C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg* (2011)
- C-124/11, *Dittrich and others v Germany* (2012)
- C-267/12, *Hay v Crédit Agricole Mutuel* (2013)
- C-443/15 *Parris* (2016) [*Pensions in combination with marriage and age discrimination*]

## Employment

- C-81/12, *Asociația ACCEPT v CNCD* (2013)

## Exclusion of homosexuals from blood donation

- C-528/13, *Léger* (2015)

## Asylum and evidence of homosexuality

- C-199/12, C-200/12 and C-201/12, *X, Y and Z* (2013)
- C-148/13, C-149/13 and C-150/13, *A, B and C* (2014)
- C-473/16, *F v. Hungary* (2018)

## Free movement

- C-673/16 *Coman* (2018)

# CJEU/ECJ Case-law based on Directive 2000/78 (Equal treatment in employment and occupation)

## Maruko

### ❑ **Maruko** (2008): comparability between marriage and partnership

- ❖ Preliminary ruling by administrative court in Munich
- ❖ Without marriage, but in partnership (Lebenspartnerschaft)
- ❖ No widowhood pension
- ❖ The Court =
  - in the case where marriage and partnership are comparable according to national law
  - especially in the sector of benefits provided to surviving spouses/partners
  - then the legislation which excluded those who are in partnership
  - constitutes direct discrimination on the grounds of sexual orientation

# CJEU/ECJ Case-law based on Directive 2000/78: Römer

## □ Römer (2011)

### ❖ The Court clarified that

- the situations which must be regarded in accordance with the principle of equal treatment shall not have to be 'identical'
- Provided that they are comparable and,
- the assessment of this comparability shall not be done in a general and abstract manner,
- but in a specific and clear way in the light of the relevant benefit

# *Dittrich, Klinke and Müller Cases (2012)*

- ❑ In the light of the *Maruko* and *Römer* cases,
  - ❖ the German Bundesverwaltungsgericht (federal administrative court),
  - ❖ in subsequent cases concerning the grant or not of sickness benefit to registered partners of federal employees,
  - ❖ was confined, in its request for preliminary ruling
  - ❖ to ask ONLY whether the character of the specific benefit was subject or not to article 157 TFEU
  - ❖ admitting the comparability of the two situations (marriage and registered partnership)

➤ C-124/11, *Dittrich*, C-125/11 *Klinke* and C-143/11 *Muller v Bundesrepublik Deutschland* 6 Dec. 2012, ECLI:EU:C:2012:771.

# *Dittrich, Klinke and Müller Cases (2012): comparability of marriage and registered partnership*

- ❑ the referring court **Bundesverwaltungsgericht** clarifies that
  - ❖ in case where the benefit in question falls within the scope of Directive 2000/78,
  - ❖ the applicants of the case in the main proceedings are entitled to the benefit requested
  - ❖ In particular, under the said Directive, equal treatment between employees with registered partner and spouses would be de rigueur,
    - since, concerning the benefit requested, namely the allowance paid to employees in the event of illness
    - the situation of registered partners, of the one part, and of spouses, of the other part, is comparable.
- ❑ the referring court was doubtful
  - ❖ whether the benefit in question should be considered remuneration within the meaning of article 157 TFEU,
    - and therefore falls within the scope of Directive 2000/78,
  - ❖ or benefit in the framework of the general public system of social security or social protection,
    - or similar benefit not falling within the scope of that Directive.

- C-124/11 *Dittrich*, C-125/11 *Klinke* and C-143/11 *Muller v Bundesrepublik Deutschland* 6 ΔΕΚ 2012

# CJEU/ECJ Case-law based on Directive 2000/78: Hay (2013)

## □ Hay (2013):

- ❖ more favourable treatment of exclusively heterosexual marriage
  - is equivalent to direct discrimination based on sexual orientation
- ❖ Limitating the benefits to married only employees,
  - where marriage is legal only between persons of different sex,
  - constitute direct discrimination based on sexual orientation

# Interim conclusion on civil partnerships

- ❑ The States are not obliged by EU law to provide legal protection to same-sex couples
  - ❖ Cf, however, ECHR case-law, Valianatos, Oliari etc.
- ❑ However, if national law introduces such an institution
  - ❖ E.g. partnership
  - ❖ Comparability is specifically checked
  - ❖ concerning the specific benefit

# ECJ Case-law based on Directive 2000/78

- ❑ **Asociația ACCEPT (2013):** homophobic reason and future employment
  - ❖ the Court broadened the range of protection
  - ❖ so that the cases where there can be no comparison shall be covered
  - ❖ because there may not be discrimination to the detriment of a specific homosexual,
  - ❖ but such an action (and reason) which creates **a climate favouring discrimination against homosexuals**
  
- ❖ Compare Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Ferijn NV* [2008] ECR I-05187 CJEU (on ethnic origin and race) (article 8 Directive 2000/43)

# ECJ Case-law based on Directive 2000/78

## ☐ C-443/15 Parris (2016):

- ❖ the claim to be married before 60<sup>th</sup> birthday
- ❖ to be entitled to pension
- ❖ does not constitute discrimination

# Excluding homosexuals from blood donation

## ❑ *Léger case*: excluding homosexuals from blood donation

### ❑ Article 21 of the Charter of Fundamental Rights

- ❖ principle of prohibiting discrimination on the grounds of, inter alia, sexual orientation
- ❖ principle of proportionality
- ❖ Court = ‘permanent exclusion from blood donation of all the group of men who have sexual relations with other men is **proportional only if there are no less restrictive methods** to ensure high level protection for the health of the beneficiaries’
- ❖ ECJ has left the national court to decide based on the principle of proportionality
  - C-528/13, *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, Judgment of the Court (Fourth Chamber) of 29 April 2015

# Asylum (and methods of proving homosexuality)

## ❑ X, Y and Z (2013):

- ❖ Homosexuals can receive asylum if homosexuality is standardized criminally and is truly punished in their country of origin

## ❑ A, B and C (2014)

- ❖ taking of evidence of refugee status in cases of application for asylum on the grounds of sexual orientation
- ❖ Court: means of proof
  - similarly to homosexual acts, submitting the applicants to possible 'tests' in order to prove their homosexuality or even the presentation of evidence by the applicants, such as films with their acts,
  - would violate human dignity (article 1 EU Charter of FR)
  - National authorities are not even entitled to receive such evidence based on the free will of the applicant
  - given the fact that this acceptance would encourage other applicants to provide the same and this would, de facto, lead to requiring such evidence

## ❑ F v. Hungary (2018)



# Free movement of same-sex partners

❑ Directive 2004/38/EC

❑ *Coman* Case C-673/16

- ❖ Romanian citizen **married** legally to a citizen of the USA in Belgium,
- ❖ Romania (the host member state) refuses to issue residence permit to the American husband of the Romanian citizen
- ❖ Request for preliminary ruling before the Court
  - the concept of spouse of article 2 (2)(a) of the Directive 2004/38 / EC, in combination with articles 7, 9, 21 and 45 of the EU Charter of FR
  - also includes the citizen who is not EU citizen but **is same-sex spouse of EU citizen???**
  - Advocate General Wathelet: the term 'spouse' also includes same-sex spouses
    - *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Judgment of the Court (Grand Chamber) of 5 June 2018, ECLI:EU:C:2018:385

# Coman Judgement (C-673/16)

## ❑ Directive 2004/38 article 3 par. 1

❖ ‘for all citizens of the Union who travel or live in a member state other than the one they hold the nationality, as well as their family members..’

→ it does not apply in the case of Coman of Romanian nationality

## ❑ However, the right of free movement and residence of European citizens (article 21 TFEU)

- ❑ With respect to the right of art. 7 EU CFR (8 ECHR)
- ❑ which also entails the protection of their personal and family life
- ❑ in case this has, first, been set up and established in other member-state
- ❑ residence permit requirements for indigenous citizens of the Union
  - ❑ must not be stricter than the ones provided in Directive 2004/38
  - ❑ the Directive provisions must be implemented in a proportional way

# Coman Judgement, concept of spouse

## □ The Court said:

- ❖ personal status is still under national competence
- ❖ it is not affected by EU law
- ❖ HOWEVER, first of all, the term 'spouse' in the Directive 2004/38
  - is neutral regarding the sex
  - and additionally, contrary to the recognition of registered partnership, it does not refer to national legislation
  - the obligation of a member state to recognize the marriage between two people of the same sex
    - exclusively for granting the derivative right of residence to the spouse of the European citizen
    - it affects neither marriage nor national identity. It neither threatens the public order of the member state concerned (para 45-46)

# E.B., C-258/17 (15 January 2019)

## ☐ Reference for a preliminary ruling

- ❖ concerning Social policy (Equal treatment in employment and occupation)
- ❖ and Directive 2000/78/EC (Article 2)
- ❖ Attempted act of same-sex indecency committed by a civil servant (**ex-policeman**)
- ❖ **EB was sacked in 1976 for sexual indecency with minors and lost 25% of his police pension**
- ❖ Disciplinary sanction adopted in **1975** = Compulsory early retirement accompanied by a reduction in the pension entitlement
- ❖ **the CJEU ruled that Austria must compensate E.B.,**
  - Who was owed his lost pension, going back to 2003
  - by reason of Article 2 of Council Directive 2000/78/EC
  - Discrimination on grounds of sexual orientation
  - Effects of the application of Directive 2000/78/EC on the disciplinary sanction

# How can the different treatment of trans and homosexuals by the ECJ / CJEU be explained?

Why didn't ECJ/CJEU keep a homogeneous attitude internally?

discrimination based on legal sex is inherent in the exclusively heterosexual marriage

different moral and philosophical attitude to transsexuality and homosexuality:

1<sup>st</sup> (philosophical)

- Transsexuality does not undermine the deeply rooted bipolarity, discrimination and division of roles between women and men given the fact that a trans simply wants to take over the role of their psychological gender

2<sup>nd</sup> (pragmatic) explanation:

the financial cost is much higher since there are much more homosexuals than trans

# Thank you for your attention

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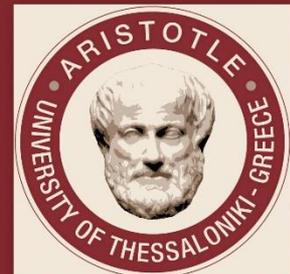
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