



LGBT Rights in the EU: *Main Features and CJEU Case Law*

A guest lecture for the Academy of European Law (ERA)
within an online seminar for members of judiciary
“Applying EU-Anti-Discrimination Law”,

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1

Today

- 1) “Sexuality” as discrimination grounds in EU law
- 2) Relevant secondary EU law:
“Framework Equality” Directive (2000)
- 3) Relevant CJEU case law on the grounds of:
 - (a) Gender identity and sexual orientation;
 - (b) Relevant cases outside the scope of secondary law
- 4) What are the limits, failures, and prospects?



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“Sexuality”

Relevant secondary law

Relevant CJEU case law

Limits, failures, prospects

2

“Sexual orientation” as discrimination grounds in EU law

Overview of *sexuality / sex identity* in European context:

- Judeo-Christian repression of sexuality → Renaissance → Enlightenment and → Modernity;
- Setting up a secular medicalized “homosexual” subject;
- WWII and post-war period: from criminalization to same-sex marriages.



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Relevant secondary law

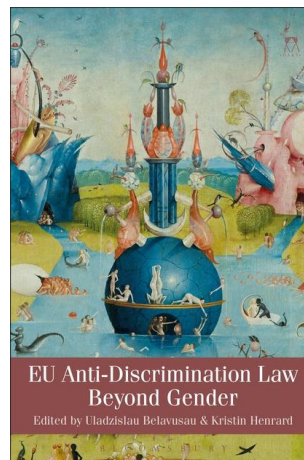
Relevant CJEU case law

Limits, failures, prospects

3

“Sexual orientation” as discrimination grounds in EU Law

- Rome, 1957 – EEC Treaty: European integration was meant to serve exclusively a commercial purpose;
- The only exception is “sex equality” (Art. 119 EEC), which laid down an activist way for the CJEU to foster gender equality;
- While the Court has been episodically engaged into other grounds, shaping EU anti-discrimination law (embracing “sexuality”) became possible only after the Treaty of Amsterdam (1997).



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Relevant secondary EU law: introducing the 2000 Equality Directives

- *Sex:*

Directive 2006/54/EC (a.k.a. “Equal Treatment” or “Gender/Sex Equality” Directive);

- *Racial and ethnic origin:*

Directive 2000/43/EC (a.k.a. “Race Equality Directive”, or RED)

- *Religion, disability, age, and sexual orientation:*

Directive 2000/78/EC (a.k.a. “Framework Equality Directive”, or FED)

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Forms of discrimination

As of 2000 a new generation of Directives:

- ✓ Direct discrimination;
- ✓ Indirect discrimination;
- ✓ Harassment;
- ✓ Instruction to discriminate.



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Unequal material scope of the Equality Directives (RED & FED)

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

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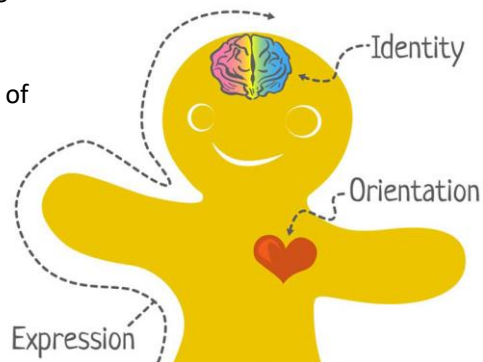
Relevant CJEU case law

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7

Sexual orientation in EU anti-discrimination law

- Sex equality in EEC Treaty (1957)
- Art. 19 TFEU – Framework Equality Directive 2000/78/EC
Citizenship Directive 2004/38/EC
- Council Directive 2004/83/EC of 29 April 2004 on refugees
- EU Charter of Fundamental Rights



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Gender & Sexuality in EU Law pre-Amsterdam (before 1997)

C-13/94 *P v S and Cornwall County Council* (1996)

- The case concerned a trans woman from the United Kingdom, referred to as 'P' in court proceedings, who was dismissed from her post after informing her employers that she was undergoing gender reassignment;

C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* (2004)

Transsexual partner not entitled to a survivor's pension payable solely to a surviving spouse;

C-249/96 *Grant v. South-West Trains Ltd.* (1998)

- Refusal of travel concessions to cohabitantes of the same sex.

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Has the FED (Framework Equality Directive 2000) made a difference?

Moving the dividing line: C-267/06 *Maruko* (2008):

- The surviving partner of a homosexual partnership registered in Germany is refused a widowers pension because he was not married to his partner.
- Only heterosexual partners can marry in Germany → Indirect discrimination on grounds of sexual orientation?
- CJEU: *direct* discrimination – without any further explanation (probably because the German regulation excluded all homosexuals, i.e. no homosexual could ever marry).

Similar case law:

C-147/08 *Römer* (2011) – supplementary benefits

C-267/12 *Frédéric Hay* (2013) – marriage bonus



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C-81/12 Asociația ACCEPT v. CNCD (2013):

Parties

The Accuser



- an LGBT rights organization
- Major lobbyist for de-criminalization of homosexuality in Romania
- Organizer of LGBT events (GayFest)

The Accused



- A populist politician, G. Beccali
- “Patron” of the Steaua Football club
- Involved in shady land-transactions, but also an MP

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C-81/12 Asociația ACCEPT v. CNCD (2013):

Events of the case

February 2010

*“Not even if I had to close Steaua down could I accept a homosexual on the team. Maybe he’s not a homosexual. But what if he is? There’s no room for gays in my family, and [FC Steaua] is my family. (...) **This isn’t discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose.** Even if God told me in a dream that it was 100 percent certain that the player wasn’t homosexual I still wouldn’t take him. Too much has been written in the papers about him being a homosexual. (...) He could be the biggest troublemaker, the biggest drinker. . . but if he’s a homosexual I don’t want to know about him.”*

The player in question was **not** hired by the club

For a detailed analysis of this case, see U. Belavusau, [A Penalty Card for Homophobia from EU Non-Discrimination Law](#), *Columbia Journal of European Law*, 21, 2, 2015.

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C-81/12 *Asociația ACCEPT v. CNCD* (2013): Events of the case

March 2010



=> Harassment; Written Warning



=> Direct Discrimination

- ACCEPT: Becali, 'de jure' decision maker
- Steaua: Becali, no employer involvement

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The Luxemburg trilogy

Three judgments by the Court of Justice on similar matters of racist/ homophobic speech akin to direct discrimination in the employment context



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The Luxemburg trilogy

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C-54/07 *Feryn* (2008)

- No plaintiff involved
- Belgian seller/installer of doors publicly stated that he wouldn't employ persons of Moroccan origin
- Court found that this 'speech act' is likely to dissuade certain candidates from submitting their candidature and accordingly hinders their access to the labour market direct discrimination in respect of recruitment
- Direct discrimination found in the absence of a concerned complainant from the affected minority

"Sexuality"

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

- "Patron" of the Steaua Football club said he would never accept a homosexual player
- Court declared that an entity may be liable for its non-de jure representative committing direct discrimination
- Established that NGOs can invoke discrimination claims

Relevant secondary law

3

C507/17, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford* (2020)

- Senior lawyer at an Italian firm stated that he would not hire/work with a homosexual colleague (no vacancies at the time)
- Question of whether a local LGBTI organization (an association of lawyers) had standing to bring a lawsuit for damages → Court concluded that this was allowed under the FED
- Building on *Feryn* and *Asociația ACCEPT*, the Court finds direct discrimination → such discriminatory statements influenced applications and access to the job market

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Guiding principles: when do discriminatory statements present a sufficient link with "access to employment" in accordance with the Court's case-law?

- 1) The status and capacity of the person making the statements must be examined.
- 2) The nature and content of the statements made must be considered.
- 3) The context in which the statements were made is also relevant.
- 4) Last, it is important to consider the extent to which the nature, content and context of the statements made may discourage persons belonging to the protected group from applying for employment with that employer.



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C-443/13 *David Parris* (2016)

- FED's time's scope
- FED's intersectionality - Age + Sexual Orientation?



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Missed opportunities for the Court based on the material limits of the FED

Case C-528/13 *Léger* (2015)

- Blood donation for *MSM* (=men who have sex with other men)
- Beyond employment law (FED's *ratione materiae*)
- See U. Belavusau, [Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship](#), *European Journal of Risk Regulation*, 4, 2016.



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C-637/17 *Coman* (2018)

- Recognition of the same-sex marriage (registered in Belgium) in Romania
- Beyond FED: [EU Citizenship Directive 2004/38 EC](#) – content of the term “spouses”
- Inspiration from US Supreme Court: [Obergefell v. Hodges](#) (2015)
- For concise analysis, see U. Belavusau, [The Federal Rainbow Dream: on Free Movement of Gay Spouses under EU Law](#), *Verfassungsblog* (5 June 2019)



(Key & Peele, US comedians)

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Influence of Comparative Law on the CJEU’s Jurisprudence

- European Court of Human Rights / Council of Europe
- US Supreme Court
- Emancipation laid down in national legislations

For a detailed analysis, see D. Kochenov & U. Belavusau, [After the Celebration: Marriage Equality in EU Law Post-*Coman* in Eight Questions and Some Further Thoughts](#), *Maastricht J. of Eur. & Comp. Law*, 27(5), 2020. 549-572.



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C-490/20 *V.M.A. v Stolichna Obsthina, Rayon 'Pancharevo'*

- A pending case that concerns a child born in Spain to a same-sex couple with Bulgarian and British citizenship
- The child cannot obtain Spanish or British nationality due to citizenship laws and is being denied Bulgarian citizenship as the authorities refuse to issue a birth certificate with two same-sex parents
- Baby Sara has therefore been deprived of Bulgarian and European citizenship and is at risk of statelessness
- Constitutes a breach of the fundamental principles of the EU: violates the right to freedom of movement, the right to private and family life, and the right to non-discrimination?



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21

Limits, Failures and Prospects of 2000 EU Equality Directives (RED & FED)

- **Sexual Orientation**
 - Limited material scope of FED;
 - Resistance of Member States to implement FED and Citizenship Directives adequately;
 - Concealment of sexuality by plaintiffs in Member States with predominant homophobia, evidenced in both a pressing social embarrassment for individuals and groups advancing sexual emancipation, and a climate of physical and verbal violence.
 - Unequal status and activities of Equality Bodies (under RED) in Member States.
 - Issues affecting the burden of proof, indirect discrimination & access to remedies

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22

Thank you for attention!



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For further references, see:

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