Discrimination Based on Sexual Orientation

Presentation by Daniel Borrillo at the Trier seminar, 5-6 October 2009

Within the overall perspective of the legal guarantees granted to minorities in Europe, the question of sexual orientation, which provides specific protection for homosexual men and women, adds a new dimension to public anti-discrimination measures. From the first application made to the European Human Rights Commission in 1955 until the drafting of Article 13 in the Treaty of Amsterdam in 1997, various political agencies – public bodies, non-governmental organisations, plaintiffs, consumers, intellectuals, etc. – turned the "homosexual question" into a veritable public challenge in the construction of a citizens' Europe.

Not until the more classical issues such as racism, anti-Semitism and xenophobia had been tackled did discrimination on the grounds of sex, and later on the grounds of sexual orientation, become a concern addressed by the traditional legal instruments for protecting human rights. The initial phase of judicial action – organised primarily around individual applications filed with the bodies for implementing the European Convention on Human Rights – was followed by a phase of declarations, with principles being promulgated by political authorities such as the Council of Europe and the European Parliament. However, it was only in the late 1990s that a real programme of political action was launched, fully embedded within the agenda of the European Commission.
The introduction of sexual orientation into Community law[1] was the result of almost thirty years of international developments. The 1970s brought a political sea change which made it possible to start addressing homosexuality in a new way. In 1977, just as a constitutional article prohibiting discrimination based on sexual orientation was being incorporated into the Charter of Quebec, the Human Rights Commission in Strasbourg decided to admit an application from a homosexual citizen. Ever since 1979, when the Parliamentary Assembly of the Council of Europe adopted its first report on discrimination against homosexuals, the "gay question" has remained a recurrent theme in debates surrounding European policies. Over the years, the inherent principles of fundamental personal rights (including sexuality) have gradually made their appearance as an integral part of Community law. The European Court of Justice contributed to this in negative form (refusing to assimilate discrimination on the grounds of sex into discrimination on the grounds of sexual orientation, and we shall come back to this), and the European Parliament in a positive fashion (placing the issue within a political dimension and inviting anti-discriminatory measures), with both of them playing a major role in the matter. However, the introduction of the new clause relating to discrimination on the grounds of sexual orientation was above all the result of campaigning by gay and lesbian associations[2] and by closer alliances between these and the traditional human rights associations.

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[1] The Treaty of Amsterdam was the fruit of the Intergovernmental Conference from March 1996 to June 1997. It entered into force on 1 May 1999 following ratification by the 15 Member States of the Union. Directive 2000/78 crystallised this process of integrating sexual orientation as a category to be protected against forms of discrimination in employment and occupation.

[2] Notably the *International Lesbian and Gay Association,* ILGA (cf. "Equality for Lesbians and Gay Men: a relevant issue in the civil and social dialogue", ILGA-Europe report, 1998). Other groups, such as Stonewall (UK), IGLYO (International Gay and Lesbian Youth Organisation), Gay and Lesbian Parent Coalition International, Gay and Lesbian Equality Network, and Egalité (Equality for Gays and Lesbians in the European Institutions), have been among the architects of antidiscriminatory policy towards homosexuals.

From the raising of the problem to its acknowledgment in the policies of institutions via its legal rationalisation (enacted in a long process of interaction between individuals, associations and legal agents), the socio-political construction of the concept of sexual orientation reflects and reveals deep transformations within the paradigmatic matrices in which the freedom of the individual is embedded. Considered a breach of law (from technical offence to crime) under all the penal codes of Europe until the 1980s, homosexuality is nowadays not merely tolerated, but has been progressively protected, as a manifestation of sexual pluralism, from any discriminatory intervention on the part of states and/or individuals, first in the field of employment and occupation and later in other areas, such as free mobility for same-sex couples and entitlement to survivors' pensions for widowed gays.
This profound turn-around and the political consequences it entails have informed the prospects for European public action to combat discrimination towards lesbians, gays and bisexuals.

The treatment of sexual orientation as a prohibited ground for differentiation appeared to be the culmination of an initial legal and political stage, its hallmarks being ECHR's activities in the process of decriminalising homosexuality and the declarations of principle from the Council of Europe. Nevertheless, these decisions in their totality did not constitute a genuine public policy because, as Muller & Surel observe, "before there can be a public policy, there has to be a general framework for action, a structure of meaning". This framework was produced by the European Union when it included sexual orientation in a constituent treaty for the first time. Henceforth sexuality was to be treated like any other personal characteristic.
This process of decriminalising and demedicalising homosexuality gave way to an as yet incomplete inequality policy, insofar as the family life of gays and lesbians is still not fully recognised in Community law.

Discrimination on the grounds of sexual orientation in Community law[*]

The debate and political action around protection for gays and lesbians are inscribed within the fluid spectrum of the movement for women's equality. Unlike the more classical anti-discrimination policies (religion, race, nationality…), during the period when an international strategy for safeguarding fundamental freedoms was formulated after the Second World War, no provision was devoted to protecting people from forms of discrimination based on their sexual orientation, despite the fact that homosexuals had also ranked among the victims of Nazi violence.

Given the timidity of court practice, the general legal provisions remained inadequate, if not utterly sterile, for a long time to come. It is only over the last thirty years that protection from discrimination based on sexual orientation has taken shape. Via the indirect route of recourse to classical notions of "privacy" or "freedom of expression", via appeals for application of the equality principle and via the specific introduction of the concept of sexual orientation in the

[*] Sexual orientation is defined as affective and sexual desire, an erotic attraction that may be directed towards persons of the same sex (homosexual sexual orientation), persons of the other sex (heterosexual sexual orientation) or towards either sex without distinction (bisexual sexual orientation). I shall not address transsexuality or transvestism at this point. These phenomena relate to another issue linked to apparent gender or dress codes and not to sexual orientation in the true sense. Furthermore, sexual orientation does not cover situations such as paedophilia, incest or prostitution, as these phenomena concern the broader question of freedom and sexual violence. Sexual orientation may mean sexual and/or affective behaviour but also the sexual identity that serves subjectively to define a personality. Sexual orientation may be seen as chosen behaviour (akin to religious freedom) or as a predetermined states (akin to race). Regardless whether it is a practice, an attitude, an attraction, a state or a real or imagined identity, sexual orientation must be protected with equal rigour whatever the circumstances.

Treaty of Amsterdam, both the Council of Europe and the European Union are engaged today in constructing a legal domain of protection for sexual orientation.

A radical change has occurred in a short space of time: from being an offence, homosexuality has not only become legally permitted behaviour, but any hostility displayed towards gays and lesbians is now penalised under European law. Whereas until the early 1980s the European Court of Human Rights (ECHR) was still justifying the full-fledged criminalisation of homosexual relations between consenting adults, that same Court now condemns this very criminalisation (as unjustified interference by the state in people's private lives). What is more, homophobia is on its way to being prosecutable. What we are witnessing here is a gradual process: first, justification of the full criminalisation of homosexuality between consenting adults in the private sphere; then decriminalisation of this fact while still insisting that tolerating homosexuality is by no means the same as condoning or acknowledging it; then condemnation of differences in treatment, and finally the first signs of recognition for "family life".

I don't have time to analyse the evolution of case-law from the European Court of Justice. Instead I shall concentrate exclusively on Community law.

For a long time Community law displayed no interest at all in the fate of gays and lesbians, a situation traditionally dealt with by the Court in Strasbourg. This situation changed perceptibly on 30 April 1996, when a transsexual woman succeeded in convincing the Court of Justice[3] of the European Communities (ECJ) that her dismissal had constituted discrimination on the grounds of her sex[4]. If the concept of discrimination on grounds of sex could protect transsexuals, it was tempting to imagine that such protection might equally extend to gays, lesbians and bisexuals. That was the line of argument pursued by the legal counsel to Lisa Grant, a lesbian who decided to apply to the ECJ invoking Article 119 of the Treaty of Rome on equal treatment for the sexes.[5]
The ECJ's Advocate General, following the arguments of the plaintiff's lawyer, held that the notion of discrimination on the ground of sex could equally embrace discrimination based on sexual orientation. However, the ECJ concluded that the discrimination that had occurred was based not on sex but on sexual orientation, a category that did not yet feature in Community law at that time. This interpretation by the ECJ drew attention to the need for specific instruments for protection from discrimination based on sexual orientation. This was the path adopted by the new Treaty of Amsterdam of 20 October 1997 when it introduced sexual orientation as one of the prohibited grounds.

Although French law had granted homosexuals protection from discrimination since 1985, the input from Directive 2000/78 was major in several respects. First and foremost, it added the concept of sexual orientation alongside the more ambiguous notion of 'mœurs' (*mores*), although the latter completes the toolset in that it enables judges to impose penalties for other forms of discrimination, such as those founded on sexual practice: sadomasochism, swinging, libertinage…
Prompted by the Directive, implemented through Laws 2001-1066 of 16 November 2001 and 2002-73 of 17 January 2002, the French system introduced the concept of indirect discrimination and adjusted the burden of proof. Moreover, psychological harassment became a prosecutable offence and associations were given the right to instigate legal proceedings on behalf of victims.

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[3] Case *P v. S and Cornwall County Council*.

[4] And hence in breach of Directive 76/207 on equality in employment.

[5] A similar argument was employed by the lawyer of a gay employee of the British Royal Navy when claiming discrimination on the ground of sex and demanding the application of Article 5 of Directive 76/207/EEC (discriminatory terms of dismissal).

The creation in France of the Equal Opportunities and Anti-Discrimination Commission (HALDE) in 2004 further advanced the fight against forms of discrimination based on sexual orientation. HALDE has generated substantial casuistic resources, thereby rounding off the formal instrumentation of the justice system.

Beyond protection for the homosexual individual, contours are emerging for protecting the life of same-sex couples. The *Maruko* ruling of 1 April 2008 was the first occasion that excluding the surviving partner of a civil partnership (Germany) from a private widow's pension scheme was considered to be discriminatory, after the ECJ held that this situation was analogous to that of a married couple. The impact of the *Maruko* ruling will depend on the particular legal situation pertaining in each Member State and to what extent it recognises marriage or forms of shared living similar to that institution. One concrete repercussion of the *Maruko* ruling has already been expressed in the draft directive of 2 July 2008 on combating discrimination in fields other than employment and occupation, although the proposal clearly states that "this Directive is without prejudice to national laws on marital or family status, including on reproductive rights". The EU's lack of direct competence in matters of family law, and the legal somersaults that the ECJ has to perform in order not to offend the sensitivities of Member States, makes the evolution of equality for same-sex couples and homoparental families a difficult undertaking. There seems to be an idea that the lives of LGBT citizens can be split down the middle, with protection granted them as employees (and possibly in the near future as consumers or users of public administration), but refused to them as members of a couple.
The fraught application of Directive 2004/38 of 29 April 2004 to obtaining residence permits for same-sex partners (when one partner is an EU citizen and the other is not) in a Member State which recognises some form of civil partnership bears witness to a dual reticence: that of Member States to implement Community law and that of the Commission to enter into conflict with any national authorities that have proven to be particularly niggardly about issuing residence permits.

Prospects

The adoption of Community directives and the formulation of common action programmes for all countries in the European Union have committed the Member States to real political action to combat discrimination towards gays and lesbians. However, over and above the substantive basis, it is just as vital to establish joint activities to combat and punish incitation to homophobic hatred. Such a policy would fill a gap in the strategy to combat the exclusion of gays and lesbians on the individual plane and make it more effective.[6]
As to family life, the thorny issue of marriage and homoparenthood will continue to daunt Community law, and the ECJ will sooner or later be obliged to cast aside its ambivalence on this question, not least because the disparities between national legislation undermine the free mobility of gay and lesbian citizens and their families. Unfortunately, the guidelines adopted by the Commission on 2 July 2009 (designed to improve the poor transposition of Directive 2004/38/CE into national laws) do not clarify the position of same-sex couples who have engaged in a civil partnership where one is a non-Community citizen. More concerned by fraud, marriages of convenience and other offences than by the abuse committed by Member States who do not apply the directive when it comes to gay and lesbian couples, the Commission has not shown any

[6] In this spirit, there is a need to expand Council of Europe Recommendation R(97)20 of 30 October 1997 on "hate speech".

sensitivity at all to this kind of problem. The indirect recognition of same-sex unions in Community law via the rules on free mobility stumbles very clearly against its limits at this point.
Discrimination on the ground of sexual orientation shifted initially from criminal to civil law: decriminalisation was followed by a stage of recognition of fundamental rights for gay and lesbian individuals. Today a further shift is taking place from personal law towards family law. It is in this sphere that the principal examples of discrimination remain. As the exclusive territory of member States, family law constitutes a discriminatory machine that the European authorities seem loath to frustrate. Nevertheless, the imperative of free mobility is a constant reminder of the need to acknowledge the discrimination of which gays and lesbians remain victims in their conjugal and family lives.