

The right to non-discrimination on the ground of sexual orientation: An Analysis of the ECJ's jurisprudence as it stands today

Marco Cellini¹, CNR-IRPPS

Abstract

This paper explores the right to non-discrimination on the grounds of sexual orientation from the perspective of the European Union. In the first part, it analyses how Member States address the issue and EU citizens' perception of the topic. Then, using ECJ case law, the article analyses EU legislation and how it interacts with national systems, highlighting the means by which EU citizens can act in order to have their rights respected. The paper also explores the gaps present in EU legislation and how these gaps could affect the realisation of the rights bound to EU citizenship. The paper concludes that, despite the presence of important gaps and limitations deriving from the Treaties, the European Union's institutions and in particular, the European Court of Justice play a fundamental role in the expansion and respect of these rights.

Keywords

right to non-discrimination, sexual orientation, European citizenship's rights, LGBT rights, Directive 2000/78/EC, ECJ Case law C-81/12.

Introduction

The European Union is often perceived by public opinion as just a set of rules and obligations but the institution of European citizenship, in addition to providing obligations, protects a variety of rights that continue to be little known and consequently often fail to be exploited, because of the lack of knowledge regarding their nature and scope.

Alongside the best-known rights such as freedom of movement, the active and passive right to vote in municipal elections in the Member State of one's residency, the right to petition before the European Parliament, etc., provided directly by Article 20, paragraph 2 of the Treaty on the Functioning of the European Union (TFEU), European citizenship through Article 19 paragraph 1 also provides a number of other rights deriving from subsequent legislation of European institutions and consolidated by the Court of Justice of the European Union (ECJ).

The right to non-discrimination on the ground of sexual orientation represents one of these rights.

In this regard, paragraph 1 of Article 19 of TFEU provides that: "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

¹ Intern at CNR-IRPPS, Italian National Research Council, Institute for Research on Population and Social Policies, Via Palestro 32 - 00185, Rome, Italy, Email: marcocellini@yahoo.es



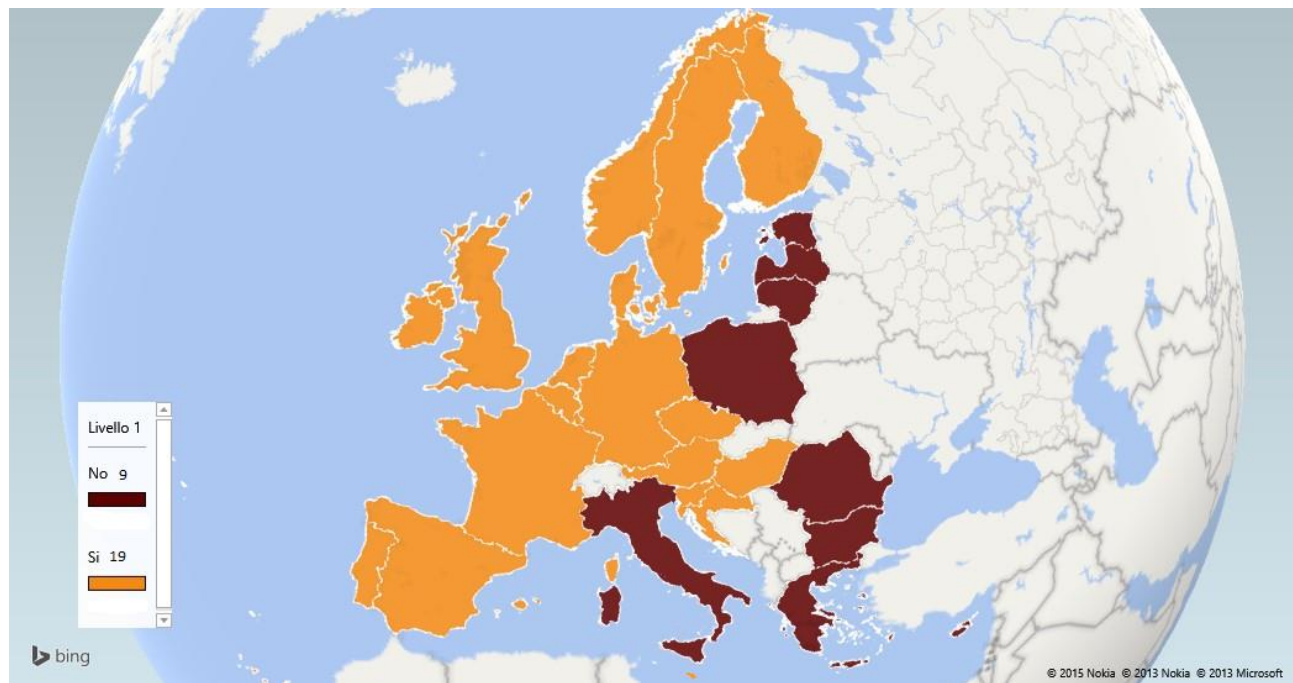
This article, therefore, states that the European Union can adopt legislation aimed at combating the above-mentioned discrimination, as long as it falls within its areas of responsibility.

For this purpose, the Council approved Directive 2000/78/EC on 27 November 2000 establishing a general framework for equal treatment in employment and occupation. This directive is extremely important as it protects European workers from any form of discrimination resulting from sex, age, race, sexual orientation etc.

With regards to the protection of the right to non-discrimination on the ground of sexual orientation, the directive represented an important novelty as many European states did not at the time have the adequate legislation. With the aim of ensuring harmonisation between Member States, the EU thus became a major driver for the protection of this right. However, at the present state of evolution, the EU faces significant limitations in attempting to expand social rights linked to European citizenship. These limitations, arising from the treaties and by the fact that the EU can intervene only in its areas of competence, give rise to situations in which there are significant disparities between the various Member States. This is particularly true for the situation of LGBT rights, where significant disparities exist between different Member States, as well as differences in the sensitivity and the approach taken by citizens towards this issue.

With respect to the rights granted by the various Member States, for example, we can see how just a few states have legislation allowing homosexual couples to register a civil partnership that allows them to enjoy protections similar to those provided by marriage, as shown by Figure 1.

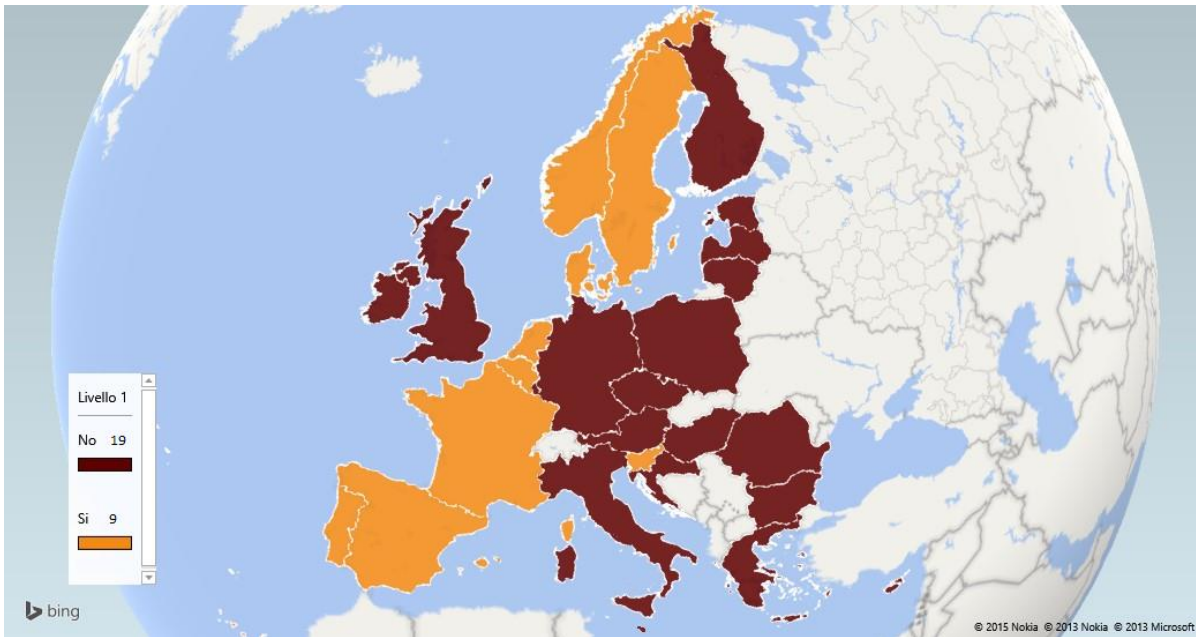
Figure 1: States that recognise civil partnerships for gay, lesbian, bisexual and transgender couples



Source: Map created by the author based on the analysis of national legislation in the field of same-sex registered partnership.

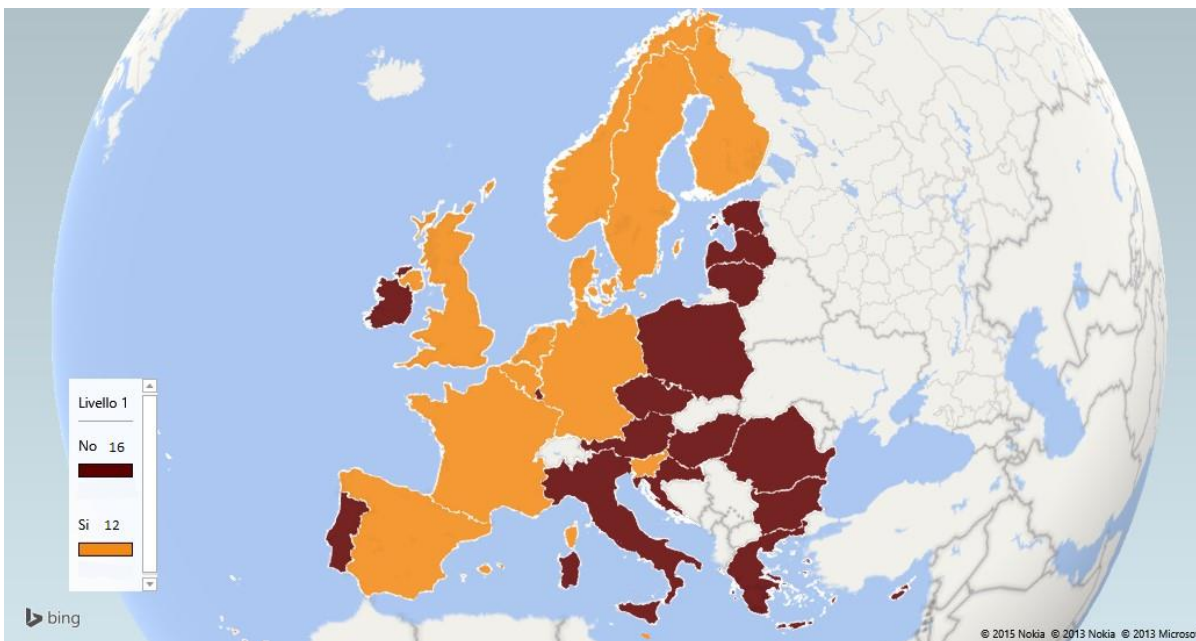
Moving on to the possibility of marriage or adoption, we can see that the number of states that provide and allow for such cases is even smaller. Figure 2 and Figure 3 show these data.

Figure 2: States that allow marriage between same-sex couples



Source: Map created by the author based on the analysis of national laws relating to same sex marriage

Figure 3: States that allow same-sex couples to adopt children



Source: Map created by the author based on the analysis of national legislation on adoptions for same-sex couples.

Regarding the sensitivity of the topic and how EU citizens perceive it, the majority of the European population, as shown by the Eurobarometer survey, is not in favour of either marriage or the possibility of adopting. In fact, 56% of the population declares itself unfavourable to the possibility of same-sex couples marrying, and 68% are unfavourable to the possibility of same-sex couples adopting a child.

Even data gathered by the European Social Survey (ESS) shows the persistence of attitudes against homosexuality. When responding to the question, "should gay men and lesbians be free to live their lives as they wish?" the proportion of people in disagreement with this statement varied from 14.2% in 2002 to 19.6% in 2012 while the proportion of those who said they agreed fluctuated from 68% in 2002 to 60.9% in 2012 (Table 1). As we can see, not only the proportion of people opposed to homosexuality in the broadest sense remain quite high, but it has even increased over the past decades when the issue has become more clearly debated. This increase could depend by the fact that the question was a generic question, asking people if LGBT should be free to live their private life as they wish, so it is possible that with the increase in fighting for LGBT rights, which occurred in the last decade, people have start to consider the question in the light of these fights and it is possible that people supporting LGBT freedom in their private life do not support these freedoms when they evolve into public freedoms like the possibility of marriage or adopting a child.

Table 1: ESS Survey, answers to the question "Should gay men and lesbians be free to live their lives as they wish?"

Year	Agree	Indifferent	Do not agree	Do not know	No answer
2002	68.0	14.1	14.2	3.7	0.2
2004	62.5	15.1	17.4	4.7	0.1
2006	62.2	15.2	17.6	4.9	0.1
2008	58.3	15.3	20.4	5.7	0.3
2010	61.4	15.0	18.3	5.2	0.2
2012	60.9	14.1	19.6	5.3	0.1

Source: R Jowell and the Central Co-ordinating Team, *European Social Survey 2002/2012: Technical Report*, London: Centre for Comparative Social Surveys, City University (2012).

In such a context, the work done by EU institutions plays a crucial role, not only in the development of a legislation capable of reducing discrimination based on sexual orientation, but also in the education of citizens toward tolerance and non-discrimination in general.

Thus, the role played by the ECJ at the European level, extensively interpreting EU legislation, is crucial in the affirmation of LGBT rights, which political processes and actors are often reluctant to move forward with.

This attitude is not confined to EU institutions and can be seen at national level where tribunals and domestic courts are often protagonists in the expansion of rights and the regulation of legal situations that governments for various reasons are not able or do not have the will to deal with.

In these cases, there is a tension between the domain of the demos (i.e. the sovereignty of the people reflected in the laws enacted by representative agents) and the domain of the courts that often, especially with respect to this issue, come into conflict with the first. Facing the immobility of national legislators that in a democracy often comes from the opposition of the



majority in recognising certain rights, judicial powers, through the broad interpretation of the law, succeed in bridging the gaps present in their judicial systems.

The attitude of the ECJ toward some social rights is a good example of this kind of tension.

European rules and their relationship to national rules

EU institutions began to discuss discrimination on the basis of sexual orientation in the mid-1990s (Hiebl, 2012). In 1994, the European Parliament presented a number of recommendations on the abolition of all forms of discrimination based on sexual orientation and a resolution on the equal rights of LGBT people².

In contrast to the positions taken by the Parliament, however, discrimination based on sexual orientation continued without the EU institutions issuing any regulatory action, since the treaties failed to provide any legal basis that would allow the EU to introduce appropriate rules in the field.

The situation changed in 1999 with the entry into force of the Amsterdam Treaty, after which the EU became equipped with the legal powers to intervene in this area. Article 13 of the Amsterdam Treaty (now Article 19 TFEU) states: "The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

The Amsterdam Treaty then endowed the Council with the power to adopt legislation on equal treatment not only in the traditional areas, namely equal treatment between men and women; and non-discrimination on grounds of nationality, but also on discrimination against LGBT people.

Based on that article, the Council adopted Directive 2000/78/EC in 2000, which established the rules on equal treatment regarding among other cases, sexual orientation.

Finally, from the perspective of EU law, the entry into force of the Lisbon Treaty incorporating the European Charter of Fundamental Rights in the *acquis* of the Union and equated it to the TEU and the TFEU, therefore converting the Charter into a source of primary EU law, strengthened the right to non-discrimination. In fact, Article 21 of the Charter provides that "Any discrimination based on the grounds of... sexual orientation shall be prohibited".

Directive 2000/78/EC establishes a general framework for the protection of the right to non-discrimination in the workplace and arose as an EU attempt to reconnect, in this area, the different national laws of the Member States and to push the states who do not have appropriate legislation to issue it.

From the point of view of the protection of this right at the national level, explicit legislation is required that allows implementation into the national legal system. All Member States therefore were under the obligation to change their existing laws or, as in some cases, enact new ones, with the obligation to adjust these by December 2003 (Anne Weyembergh and Sinziana Carstocea, 2006) for the EU-15, by 2004 for the EU-10 and by 2007 for Bulgaria and Romania³. Member States are also required to periodically send a report to the European Commission with which they show the progress of the

² Official Document of the board: OJ 1994 C 61/40, A3-0028 / 94.

³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee Of Regions on the application of Directive 2000/78 / EC of 27 November 2000 establishing a general framework for equal treatment in employment and working conditions.[SEC (2008) 524]



transposition of European legislation. The Commission in turn has the task of drafting a regular report with which it evaluates Member States on the status of the implementation and protection of the rights guaranteed by the Directive.

The Commission's last report, published in January 2014, shows that to date, the transposition process is complete in all 28 states⁴. Nevertheless, as expressed by this same report by the Commission and as apparent from the Asociația Accept case (below Accept), some difficulties remain and there is a need for states to maintain constant vigilance on compliance with the prohibition of discrimination.

For these reasons, the European Parliament continues to raise the problem of LGBT discrimination in the workplace as well as in their private and family life and, on the 9 June 2015, adopted a Resolution on the EU strategy for equality between woman and men in which it also address the issue of LGBT rights. With this text, the European Parliament: "Calls on the Commission to draw up and adopt a new separate strategy for Women's Rights and Gender Equality in Europe aimed at creating equal opportunities and based on the priority areas of the previous strategy with a view to ending all forms of discrimination;... ..underlines that the new Women's Rights and Gender Equality Strategy must thoroughly take into account the multiple and intersectional forms of discrimination as referred to in Article 21 of the Charter of Fundamental Rights... ..and develop specific actions to strengthen the rights of different groups of women, including women with disabilities, migrant and ethnic minority women, Roma women, older women, single mothers and LGBT"⁵. The European Parliament also recommended that: "as the composition and definition of families change over time, family and work legislation be made more comprehensive with regard to single-parent families and LGBT parenting"⁶. Lastly, the EU Parliament called: "on the Commission to create incentives for competent training in the critical use of the media in the Member States to encourage the questioning of stereotypes and structures and to share best practice examples so as to review the ways in which roles have been stereotyped in the educational material used to date; calls on the Commission, in this connection, to support programmes to raise awareness of stereotypes, sexism and traditional gender roles in the education and media sector as well as to carry out campaigns for positive female and male role models; emphasises in this regard that combating bullying and prejudice against LGBTI persons in schools...⁷".

The case

To illustrate the way in which the European Union protects the right of non-discrimination on the basis of sexual orientation, we will use a judgment concerning a case in which the European Court of Justice was called upon to interpret the scope of that right, protected by Treaties and secondary law.

The judgement concerns a dispute between Accept, a non-governmental organization that aims to promote and protect the rights of lesbian, gay, bisexual and transgender (LGBT) persons and the Consiliul Național pentru Combaterea Discriminării (the CNDC), that is the Romanian National Council against Discrimination. The dispute concerns a decision made by the CNDC who partially rejected a complaint filed by Accept against a public statement, issued by a person understood by the public to be the manager of a professional football team. In this statement, he stated that the football club he presided over had excluded the possibility of hiring a homosexual footballer.

⁴ Joint report on the application of Directive 2000/43 / EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and directive 2000 / 78 / EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

⁵ European Parliament resolution of 09 June 2015 on the EU Strategy for equality between women and men post 2015

⁶ Ibidem

⁷ Ibidem



Before turning to the judgment, the relevant legislation, and its interaction with national laws and therefore with the citizens of the Member States, we will briefly describe the facts of the case.

The case: Asociația Accept against Consiliul Național pentru Combaterea Discriminării

During an interview, Mr Becali, shareholder and manager of FC Steaua football club, whilst referring to the possibility of transferring a professional footballer of alleged homosexual tendencies to his team, released a declaration in which he announced that he would never allow his team to hire a homosexual player. Mr Becali justified his argument by claiming that it was not about discrimination and that no one could force him to hire a specific person.

Citing Mr Becali: "Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Rather than having a homosexual on the side, it would be better to have a junior player. This is not 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 X was not a homosexual I still would not take him. Even if [player X's current club] gave him to me for free I would not have him! He could be the biggest troublemaker, the biggest drinker ... but if he's a homosexual I don't want to know about him."

In light of these statements, the absence of a disassociating statement from the football team, and the fact that because of these statements the contract with the player referred to during the interview was never signed, Accept formally presented a complaint to the CNCD against Mr Becali and FC Steaua for the violation of the principle of equality in recruitment and direct discrimination based on sexual orientation.

The CNCD, after analysing the case, decided that the case in question did not fall within the scope of an employment relationship since Mr Becali was not an employer nor was in charge of hiring players at FC Steaua. The CNCD also decided that in any case the statements in question were to be regarded as harassment including discrimination, as having the purpose and the effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment. Finally, taking into account that the decision was taken at a distance of six months after the facts had occurred, in keeping with Romanian law, the CNDC only gave Mr. Becali a warning.

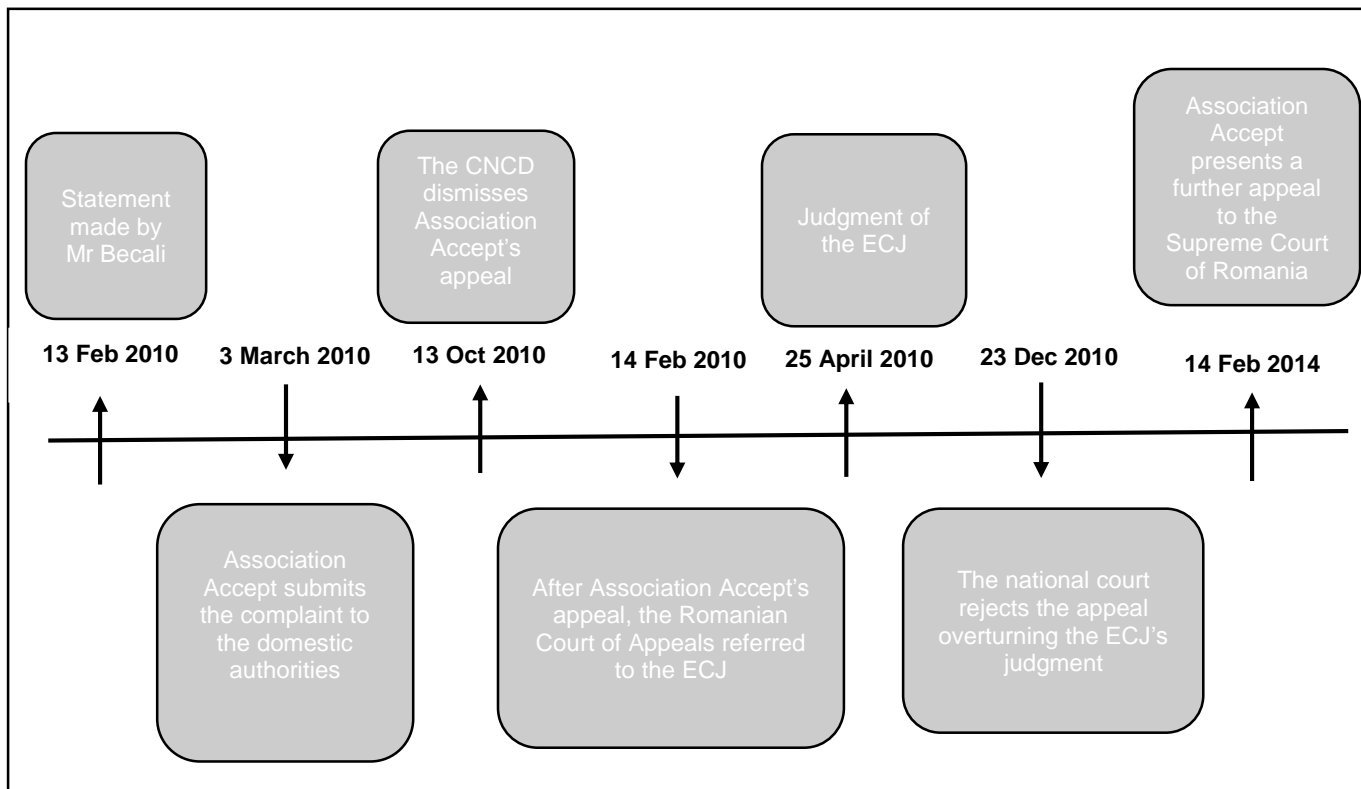
Accept appealed to the Bucharest Court of Appeal against the judgment of the CNDC, which decided to suspend the judgement and to refer the question to the ECJ.

The decision of the European Court of Justice

Before analysing the decision of the ECJ in further detail, it is useful to illustrate the timing of the procedure. Taking into account the timing of the dispute's resolution is important, as the protection of rights is effective only when the Court is able to restore in a timely way the violation of the right. Figure 4 shows the evolution of the case.



Figure 4: Timeline of the internal and European judicial processes for the Case C - 81/12



Source: Elaboration of the author.

The judgment that analysed here is an appeal for a preliminary ruling. This means that national courts, which are called upon to settle the dispute in question, decide to turn the case to the European Court of Justice so that the latter can give a correct interpretation of European legislation.

When a national court presents an appeal for preliminary ruling, in essence, it asks the ECJ to answer a series of questions about the correct interpretation of European law on which the national court has doubts.

But which questions did the national court decided to present to the ECJ?

Table 2: List of questions presented to the European Court of Justice by the National Court

Questions for Preliminary Ruling
1. If the directive 2000/78/EC can be applied in cases where statements such as those of this case comes from a shareholder of a football team who, despite being perceived as "main leader", does not legally have the right to decide who to hire and who not to.
2. To what extent Mr Becali's statements can be considered a form of direct or indirect discrimination
3. To what extent the burden of the proof, with respect to the existence of a discrimination, lies with FC Steaua
4. If the impossibility for the CNCD to impose a sanction after the expiry of the limitation period is incompatible with Directive 2000/78/EC

Source: Judgment of the ECJ, Case C - 81/12.

With the judgment of April 25, 2013, the Court answered the questions clarifying the points that had been raised by the national court.

First, the Court made it clear that according to its own jurisprudence, the existence of direct discrimination does not assume that there is necessarily a complainant who claims to have been discriminated⁸. Also it made clear that Directive 2000/78/EC does not preclude that an association having a legitimate interest in respect of the dictates of the directive may start legal proceedings, even in the absence of a natural person for which the association is acting.

In this regard, in previous judgments the Court had already had occasion to clarify that according to Article 2, paragraph 2, letter a) of Directive 2000/78 "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1". The Court therefore reiterated that an action that does not produce immediately its effect on a specific person can also be considered direct discrimination.

With regard to the first two questions, after careful analysis, the Court stated that: "facts such as those from which the dispute in the main proceedings arises are capable of amounting to facts from which it may be presumed that there has been...discrimination".

Moreover, the fact that Mr Becali did not have the authority to legally bind the football team was not sufficient to prevent the directive from being applied to the present case. The simple fact that Mr Becali, a case also made by the CNCD, is considered and perceived as the "*patron*" of the team would be sufficient to allow the application of the Directive, especially noting that the leadership of the aforementioned team had never distanced itself from Mr Becali's statements and instead had formally supported them.

With respect to the third question, in which the CNCD was essentially asking whether the fact that the burden of proof was for FC Steaua would affect the right to privacy, in the case in which the team had to make the names of homosexuals players recruited in the past, the Court answered that in the present case, the fact of having or not hired homosexual players in the past was not the only evidence that the defendants could advance and that, in any case, it would not be enough. The court noted that alternative evidence, for example, could have been a distancing of FC Steaua from Mr Becali's statements.

With regards to the last question, the Court noted that if the national court could verify the presence of discrimination, the witness should be punished in an effective, proportionate and dissuasive way. In cases where national legislation prevents the effectiveness of the sanction (in this case, given that the release of the statements by Mr Becali and the decision of the CNCD had overran the limitation period of six months, CNCD had only been able to impose a non-pecuniary sanction), the national legislation must be interpreted in a way as close as possible to the European legislation.

In essence, the Court upheld the right of Accept association finding in Mr. Becali's behaviour a possible violation of European rules.

Practical application and implications

Although the EU's founding treaties do not provide a formal binding precedent (*stare decisis*) mechanism, the Court's jurisprudence plays an important role in European law and thus also in Member States' domestic law. In fact, its sentences

⁸ See Directive 2000/43 / EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22), the judgment Feryn , cit., points 23 to 25.



and procedure show a marked tendency by the Court to seek a constant and uniform evolution of European law and a confirmation in this regard could be found in the fact that, the Court often cites and harks back to its jurisprudence in judgements.

It is for this reason that sentences such as the one at issue in the previous section are extremely important for the development and respect of the rights concerning every European citizen.

When a European citizen has their rights violated and national courts are called upon to decide, they must take into account both the EU law and the Court's jurisprudence in which the latter explains and interprets the scope of European law.

How can citizens assert their EU rights?

If a European citizen believes that their rights recognized by EU law have been violated, s/he should first initiate a prosecution under domestic law before the competent national court. The judge in question, according to European standards, must comply with the rule of the primacy of the EU law, which states that EU law takes precedence over domestic law. This rule has the consequence that when the national court is called upon to rule on any matter, it will always have to take into account EU law and may override domestic rules contrary to EU law⁹.

The national court, when it is not certain of the correct interpretation of EU law or when requested by the parties to the controversy, may initiate the preliminary ruling procedure before the ECJ. The preliminary ruling procedure, as we have seen, allows the ECJ to clarify the scope of the right and its correct interpretation. To ensure that citizens' rights are not threatened due to the choice of the national court not to use the preliminary ruling procedure and to prevent a misinterpretation of the law from being consolidated within Member States, if the national court called upon to decide is a court of last resort, namely the last degree of judgment possible under national law, the judge in question has an obligation to initiate the preliminary ruling procedure.

The ECJ thus has the power to intervene in national proceedings by interpreting national legislation in accordance with EU law. The judgments of the Court, even if addressing specific cases, have binding power both to the national judge who brought the indictment, and towards all the judges of the Member States, which will have to comply with the interpretation of the ECJ.

Through these procedures therefore, every citizen has the opportunity to assert their rights linked to European citizenship against any Member State.

A concrete example of the effects of the ECJ's judgments in national systems

An example of this protection mechanism, which shows in an exemplary manner how judgments of the ECJ are reflected in the domestic law of Member States, is demonstrated by the sentence of the Italian Court of Bergamo, Employment Division, of August 6, 2014¹⁰.

The process stemmed from the lawyer Carlo Taormina's report, from the Association Advocacy for LGBT Rights Rete Lenford. The complaint was filed as a result of a number of suspected homophobic statements, made by Taormina during a

⁹ This rule, which is not reflected in the treaties, was introduced by the European Court of Justice through its case-law on the occasion of the judgment in the case "Costa against Enel" (see judgment 6-64 Costa against Enel, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0006:EN:PDF>). The ruling is an excellent example of the importance of the Court in the development of European law.

¹⁰ Tribunale Bergamo, sez. lavoro, sentenza 06.08.2014, <http://www.altalex.com/download.php?idnot=68849&idstr=0&n=0&t=pdf>



radio program in which, in short, he claimed that he would never hire homosexual workers in his law firm. Rete Lenford sustained that the situation represented a violation of the right of non-discrimination on the grounds of sexual orientation.

The accused, Taormina, defended himself in the course of the proceedings by arguing that his statements were "*purely abstract*" and therefore no discrimination had taken place. He also denied the fact that at the time of the interview he was recruiting staff and argued that the statements had been issued on a personal basis as a private citizen and not as an employer.

The Italian judge, after analysing the facts, first cited Directive 2000/78/EC and in particular Article 1, according to which the directive: "aims to establish a general framework for combating discrimination based on religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in Member States the principle of equal treatment".

The judge then cited the legislative Decree 216/03, which implemented the European directive into national law. Article. 2, paragraph 1, of the decree, in fact, states that: "principle of equal treatment means the absence of any direct or indirect discrimination because of religion, belief, disability, age or sexual orientation" and that the presence of direct discrimination exists "when, for religion, belief, disability, age or sexual orientation, a person is treated less favourably than another is, has been or would be treated in a similar situation"¹¹.

Having made these premises, the judge went on to explain and argue his decision.

First, citing the judgment C-81/12 *Asociația Accept* and noting how it "is apt to include as discrimination also a conduct that, if only at the abstract level, prevents or makes it more difficult access to employment," the judge, referring to the ECJ judgment, held that discrimination is not affected by the absence of a person directly discriminated and that in this case the statements of Taormina were discriminatory in the sense that they could have the effect of impeding access to employment, dissuading homosexual professionals from applying for a place at his office, especially, considering that lawyer Taormina was a famous professional at the national level.

The judge clarifying, finally, that the burden of proof was on to the defendant, argued that the proof offered by Taormina was not sufficient to prove his innocence and therefore decided that the statements made by him "must be considered as integrating the hypothesis of direct discrimination". For these reasons, the judge ordered the lawyer Taormina to publicise the judgment, at its expense, in a national newspaper, and to pay compensation of 10,000 Euros to Rete Lenford.

This judgment helps us to understand the importance of EU law and how it can be used by all European citizens to assert their rights. Sentences like this also show the importance of the ECJ not only in the interpretation of EU law, but also in the consolidation and at the same time in the expansion of the law itself. The ECJ, in fact, through its jurisprudence manages to expand European law by filling gaps that may occur in a relatively young legal order such as that of the EU.

Right to non-discrimination vs right to freedom of expression

The right to non-discrimination on the grounds of sexual orientation, as every right to non-discrimination, is becoming more and more like one of the fundamental rights of modern democracies.

¹¹ Implementation of Directive 2000/78 / EC on equal treatment in employment and occupation, Legislative Decree 09.07.2003 No. 216



In this regard, we note how states have in some cases started to equip their legal systems with rules prohibiting discriminatory attitudes toward LGBT people. As highlighted above, concerning the right of non-discrimination on the basis of sexual orientation, has happened in Europe thanks to the work done by the EU institutions and in particular by the ECJ, and this has occurred despite the contrary attitudes of a substantial part of the European population. As shown by ESS data, in fact, in 2012, only 60.9% of respondents agreed with the statement: "gay men and lesbians should be free to live their lives as they wish", which at the end is a generic question. It would be interesting to check whether the percentages remain the same going from a general question to a more direct question on specific rights such as the ability to marry or adopt a child.

However, in this respect the aforementioned tension between the domain of the demos and the domain of the courts is evident, and this tension lies in the fact that courts often show themselves more progressive than the population of the Member States, entering in some cases into conflict with the feelings of the population itself. This often happens at the national level too.

Many countries have in fact adopted, in their national systems, laws that criminally punish discrimination based on sexual orientation (Fish 2012). Below, Table 3 shows which countries have adopted similar legislation.

Table 3: List of countries that have adopted criminal legislation against discrimination based on sexual orientation

Country	Law	Year
Austria	Art. 283 of the Austrian Criminal Code	2012
Belgium	Art. 22 of the Anti-discrimination Act of 2007	2007
Cyprus	Art. 51 A of the Criminal Code of Cyprus	2006
Croatia	Art. 125 of the Croatian Criminal Code	2004
Denmark	Section 266 b (1) of the Danish Criminal Code	1995
Estonia	Art. 151 and 152 of Estonian the Criminal Code	2006
Greece	Art. 79 paragraph 3 of the Greek Criminal Code	2013
Malta	Art. 82A of the Maltese Criminal Code	2012
Spain	Art. 510 of the Spanish Penal Code	1996
France	Art. 20-21 of Title III of the Law 1486/2004	2004
Ireland	Prohibition of Incitement to Hatred Act 1989	1989
Lithuania	Article 170 of the Criminal Code of Lithuania	2009
Holland	Art. 137c-137d of the Dutch Penal Code	2003
Portugal	Art. 240 of the Portuguese Penal Code, Law 59/2007	2007
Romania	Art. 317 of the Romanian Criminal Code and art. 19 of the Decree No.137 / 2000	2000
Sweden	Chapter 16 paragraph 8 of the Swedish penal code	1970
Northern Ireland	Part III of the Public Order 1987 as amended by Order No. 2/2004	2004
United Kingdom	Public Order Act 1986 c.64 (07/11/1986), Part 3A	1986

Source: Pesce (2012).

In this context, it is questionable whether the right to non-discrimination is likely to collide with the right to freedom of expression and in some cases to limit the latter. For example, the Catholic Church in Italy has long fought to avoid a criminal law against homophobia from being passed, arguing that such legislation would be detrimental to freedom of opinion and expression¹². Similar reasons have been put forward by all the detractors of this kind of legislation. The fear seems to be tied to the possibility of being criminally prosecuted only for expressing personal ideas, for example being prosecuted for telling a joke about homosexual persons.

¹² Redazione Uaar, "Omofobia: La Differenza Tra Discriminazione E Libertà D'espressione," A Ragion Veduta, accessed April 15, 2015, <http://www.uaar.it/news/2013/08/17/omofobia-differenza-tra-discriminazione-liberta-espressione/>.



These reasons, however, appear not to be reflected in reality, the laws of the various European countries, in fact, do not punish the simple fact of expressing an opinion against LGBT people, rather they prosecute and punish those who are the protagonists of acts of violence, incitement to violence and discrimination based on sexual orientation.

In other words, while telling a joke about LGBT people is not considered a crime by any European legal order, use of violence or incitement of others to do so, or directly or indirectly discriminate a person just for reasons related to being LGBT is punished with more or less stringent penalties by various national systems.

The main difference therefore lies in the consequences that a certain conduct can have on society and, happens in general in the law, freedom of expression, like any other individual freedom has the inherent limitation of respecting freedoms of others. Moreover, this also happens with other forms of discrimination such as those based on religion, race, sex, etc.

To make one last example, while it is permissible to make jokes or use sarcasm about the fact that a person has a different skin colour from ours, to say publicly that black people should be abused for the very fact of being black is a violation of anti-discrimination laws, in some cases criminally punishable. This is because while the first situation does not seem to have direct consequences of any kind, the second would have the effect of inciting others to violence against people and so create a danger to public order and to society in general.

Conclusions

As we have seen, the institution of European citizenship in addition to providing duties, includes a series of rights which all European citizens can enjoy and the right to non-discrimination on the basis of sexual orientation is just one of them.

Since its creation as an international organisation predominantly economic in nature, the EU has gradually evolved into a supranational structure regulating important aspects of people's lives and has gradually removed several areas from the member states' spheres of competence.

This gradual evolution has also had a significant impact on the institution of European citizenship and the rights, both political and social, that over time have been connected to it such as the right to non-discrimination introduced by the Amsterdam Treaty in 1999 or the right of citizens' initiative (Nicoletti et al.2014).

However, despite the efforts made, both by the European institutions and the ECJ, there are still many disparities in the protection of civil rights within the various Member States.

In particular the protection of the right to non-discrimination on the basis of sexual orientation, considered here, shows significant dissimilarities between the different states. As we have seen, for example, only some Member States regulate and provide in their national system the institution of civil union or marriage between persons of the same sex and even lower is the number of states that allow and regulate the possibility of adoption by same-sex couples. Furthermore not all states have specific laws for the protection of this right outside employment law, an area in which the EU has forced its members to harmonise under Directive 2000/78 / EC.

The EU and particularly the European Parliament have repeatedly encouraged Member States to bridge these differences (without, however, obtaining great success outside employment law over which the EU has jurisdiction provided by the Treaties). In this regard Article 8 and Article 10 of the European Parliament's resolution of 26 April 2007 on homophobia in Europe respectively recited: "the European Parliament [...] reiterates its call to all Member States to propose laws that exceed discrimination suffered by same-sex couples, and asks the Commission to make proposals to ensure that the principle of



mutual recognition is also applied in this area in order to ensure freedom of movement for all persons in the EU without discrimination"; "the European Parliament [...] Condemns the discriminatory remarks by political and religious leaders targeting homosexuals, since they fuel hate and violence even if later withdrawn, and asks the respective organizations' hierarchies to condemn them".

The European Parliament resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015 reiterated the issue, calling on the Commission to act in order to fill the gap.

Despite these calls, the fact that family law on the one hand and criminal law on the other are excluded from the range of competence of the EU makes it unable to oblige Member States to respect these kinds of recommendations or to adopt legislation appropriately designed for it, with its only power being to propose the definition of common standards, which are not binding on Member States. This means that outside of employment law, currently the EU cannot in any way protect the right of non-discrimination on the grounds of sexual orientation.

Situations like this can represent real obstacles that prevent European citizens from fully enjoying their rights by creating major gaps between the rights provided by the Treaties on the one hand and the rights which can actually be enjoyed on the other. For example, a same-sex couple which has registered a civil union in a Member State where this is provided, may be discouraged from moving and looking for a job or creating a new economic activity in a country that does not have this kind of recognition. In the case of a move, the couple in question would not in fact have access to all the rights related to the registration of the union, which would be granted in the state of origin. In such a case this could represent a breach in freedom of movement as well as the violation of the right to family life protected by the ECHR and incorporated into EU law by the Treaty of Lisbon.

These gaps represent an obvious and important limitation of EU, which despite the undeniable level of evolution it has had, essentially remains a sophisticated international organisation that must respect limits to its powers decided by sovereign states and expressly provided for by the Treaties. The most immediate solution to fill gaps of this kind, in theory, would be a reform of the Treaties that extends the matters within the competence of the EU so as to enable it to take action regarding the harmonisation of the rights at issue in the Member States' legal systems.

The evolution of the EU towards a federal system, proposed and advocated by leading scholars¹³ and organisations like the Spinelli Group (movements and NGOs such as the Union of European Federalists (UEF), the Young European Federalists, the European Federalist Movement, and others are just some examples of civil society organizations that are fighting for a change of EU in a federal direction), which for years have been protagonists in the development of proposals for the reform of the treaties who have as their ultimate goal the creation of a European federal state, may be the best answer to the problem of gaps present in the EU. A reform of this kind, in fact expanding the remit of the EU and the ECJ, would allow the European institutions to solve the problems bound to the current presence of different levels of rights protection within the Member States.

However, such a solution provides that Member States agree to a modification of the Treaties, which according to the current rules require a long series of conferences and the unanimous agreement of all Member States, which have always been reluctant to see such a transformation of the Union. For this reason, all in all, of great importance are EU citizens, who

¹³ Such as: Andrew Duff, spokesman for Constitutional Affairs for the Alliance of Democrats for Europe (ALDE) and President of the Liberals and the Union of European Federalists (UEF); Alberto Martinelli, Professor Emeritus of Political Science and Sociology of the University of Milan, Lucio Levi, president of the European Federalist Movement



through political participation, associations, NGOs and other forms of political activism may put pressure on Member States so that they decide to expand the powers of EU at the expense of national sovereignty.

Another strategy to fill these gaps, perhaps less effective but surely less politically onerous for member states, could be the expansion of the EU Parliament's powers. The EU parliament, in fact, has repeatedly show greater willingness than any other organ of the Union in trying to bridge these kinds of gaps between member states. However, although the role of the European Parliament in legislative activity has been considerably expanded over the years, it still does not have the right of legislative initiative, which is in fact almost entirely left to the Commission.

Hence, also considering that currently the parliament is the only European Union body directly elected by citizens, a reform of the Treaties in the direction of ensuring that the parliament has a greater weight in the legislative process and, above all, the right to propose the approval of legislation binding on Member States could resolve some of the problems deriving from the gaps present in the European Union.

Ultimately one has to wonder if this kind of change can be accepted and welcomed by the European demos as a whole. A Eurobarometer survey developed in 1996 in this regard showed that, among the EU-15, the majority of the respondents, 45%, declared itself in favour of such a kind of evolution while 15% claimed to be contrary and finally the 40% expressed no preference. It would be interesting in this regard to repeat this type of survey to see how and to what extent, after twenty years, the preferences of European citizens have changed.



Bibliography

"Il rinvio pregiudiziale alla Corte di giustizia: dalla pratica alla teoria," *Questione Giustizia*, accessed March 27, 2015, <http://www.magistraturademocratica.it/mdem/qg/articolo.php?id=101>.

Bastianon Stefano, "Calcio Professionistico E Discriminazioni Fondate Sulle Tendenze Sessuali," *Rivista Di Diritto Sportivo*, 2014, <http://aisberg.unibg.it/handle/10446/31177>.

Bettetini Andrea, "Persona, Matrimonio E Famiglia nell'Unione Europea: Dall'istituzione Al Contratto (e Ritorno?)," *Quaderni Di Diritto E Politica Ecclesiastica* 10, no. 1 (2002): 63–92.

Caligiuri Andrea, "La Parità Di Trattamento Tra Uomo E Donna in Materia Di Sicurezza Sociale: Profili Di Diritto Comunitario," *Rivista Del Diritto Della Sicurezza Sociale* 8, no. 1 (2008): 209–24.

Croce, Mariano, "Desiring what the law desires: a semiotic view on the normalization of homosexual sexuality." *Law, Culture and the Humanities* (2014): 1743872114553070.

Croce, Mariano, Quod Non Est in Actis Non Est in Mundo: Legal Words, Unspeakability and the Same-Sex Marriage Issue (October 09, 2014). Available at SSRN: <http://ssrn.com/abstract=2579559> or <http://dx.doi.org/10.2139/ssrn.2579559>.

Di Francesco Matteo and Arlotta Mirella, "Parità Dei Diritti Pensionistici per Le Unioni Omosessuali Registrate (Corte Di Giustizia, Grande Sezione, 10 Maggio 2011, Causa C-147/08). Con Note," *Rivista Del Diritto Della Sicurezza Sociale* 11, no. 3 (2011): 799–818.

Drydakis Nick, "Sexual Orientation Discrimination in the Labour Market," *Labour Economics* 16, no. 4 (August 2009): 364–72, doi:10.1016/j.labeco.2008.12.003.

Fabeni Stefano and Toniollo Maria Gigliola, *La Discriminazione Fondata Sull'orientamento Sessuale* (Roma, Ediesse, 2005), https://www.cgil.it/Archivio/NuoviDiritti/documenti/nuovidiritti_00001.pdf.

Fiorita Nicola, "Le Direttive Comunitarie in Tema Di Lotta Alla Discriminazione, La Loro Tempestiva Attuazione E L'eterogenesi Dei Fini," *Quaderni Di Diritto E Politica Ecclesiastica* 12, no. 2 (2004): 361–80.

Hiebl Christina, "2: 0 for Registered Partnership: Sexual Orientation Discrimination and the ECJ," *Pecsi Munkajogi Kozlemanyek* 5 (2012): 61.

Kilpatrick Claire, "The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture," *Industrial Law Journal* 40, no. 3 (September 1, 2011): 280–301, doi:10.1093/indlaw/dwr011.

Moschel Mathias, "Germany's Life Partnerships: Separate and Unequal," *Colum. J. Eur. L.* 16 (2009): 37.

Nicoletti Paola et al., "La Sensibilizzazione Ai Diritti Di Cittadinanza Europea," 2014, <http://isfoloa.isfol.it/handle/123456789/800>.

Pasquarelli Federico Grillo, "CORSO DI DIRITTO ANTIDISCRIMINATORIO La Discriminazione Dei Lavoratori Con Disabilità Nei Luoghi Di Lavoro," accessed March 4, 2015, <http://www.ordineavvocatorino.it/sites/default/files/documents/RELAZIONE%20DOTT%20GRILLO-Discriminazione%20dei%20lavoratori%20disabili.pdf>.

Pesce Francesca, Omofobia e diritto penale: al confine tra libertà di espressione e tutela dei soggetti vulnerabili. *Diritto Penale Contemporaneo*, (2012).



Redazione Uaar, "Omofobia: La Differenza Tra Discriminazione E Libertà D'espressione," A Ragion Veduta, accessed April 15, 2015, <http://www.uaar.it/news/2013/08/17/omofobia-differenza-tra-discriminazione-liberta-espressione/>.

Weyembergh Anne and Cârstocea Sînziana, eds., *The Gays' and Lesbians' Rights in an Enlarged European Union*, Series "Etudes Européennes" (Brussels: Éditions de l'Université de Bruxelles, 2006).



Teaching Material

A. Role Play

Before the presentation of the case study, the assignment of learning material is suggested so students can become familiar with the issues of the argument itself.

The role-play could be carried out by a simulation of the judgment in which some students act as case law protagonists such as:

- The parties involved in the litigation,
- the Advocate-General and the ECJ.

In particular students could be divided in 5 groups, four of which (the defendants, the General Advocate and the ECJ) could be composed of two students each and the fifth composed by the rest of the students. The fifth group could act like a jury. A moderator, who could be one of the organisers of the event, is necessary in order to organise the role play.

The simulation could be done by firstly allowing the defendants to set out their arguments reason, then the Advocate General would make preliminarily observations, the jury give an opinion and finally let the court decide the judgement.

The role-play will give the students the possibility to argue their thoughts. For this reason before each mentioned step there should be two pause points; the first to let the students discuss and point out their own thoughts and the second to describe the real facts and the real decisions.

B. Films and Literature

Movie: Philadelphia

The film tells the story of a young homosexual lawyer affected by AIDS and the difficulties encountered in the workplace and in society in general. Specifically he argues that he has been fired because of his sickness and because the sickness reveal his homosexuality. It is therefore a case of workplace discrimination.

Movie: Pride

The film tells the story of a London based organization of young LGBT men and women in 1983-1985 which decides to raise funds to support the long miners' strike brought on by the political choices of the British Prime Minister Margaret Thatcher. They connect with a miners' community in a small Welsh town. Through the difficulties of being accepted by a reality so different from theirs, namely that of the miners, these young people are able to change the way their situation is viewed by the population and in turn get the support of the miners in their fight for civil rights.

Book: Things Change

Things Change. Coming Out Stories, Conflicts, Love And Friendships That Save Life, is a book that through the first-person accounts of LGBT people recounts the difficulty of being accepted and of living peacefully their own lives.

Book: Defendant Oscar Wilde

This book tells the story of the trial of Oscar Wilde in which he was convicted in a trial for sodomy in the years when being gay in Britain was illegal and punishable by law.

