

Concurrence of discrimination: sexual orientation and civil status

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As discrimination grounds 'sexual orientation' and 'civil status' have some things in common. Both refer to characteristics of persons as well as of relationships (additionally 'sexual orientation' refers also to characteristics of intimate feelings and of erotic activity). Both are not explicitly included in most international lists of forbidden grounds of discrimination.

The only relevant grounds in this context listed by the main human rights treaties are 'sex', 'birth' and 'other status' (articles 2 and 26 of the International Covenant on Civil and Political Rights; article 2 of the International Covenant on Cultural Economic and Social Rights; article 14 of the European Convention on Human Rights; article 2 of the African Charter on Human and Peoples' Rights; the American Convention on Human Rights talks of 'sex', 'birth' and 'other social condition' in article 1; all these are based on article 2 of the Universal Declaration of Human Rights). The Treaty establishing the European Community will soon (after the Treaty of Amsterdam) have an article 141 (replacing article 119) referring to 'male and female workers', as well as a new article 13 (previously know as 6a) explicitly referring to 'sex' and 'sexual orientation', but still omitting civil status. The various EC directives on equal treatment do refer to 'marital or family status', but only as examples of indirect sex discrimination. Most countries of the European Union now have anti-discrimination legislation referring to sexual orientation (France, Denmark, Sweden, Ireland, Netherlands, Finland, Spain, Luxembourg; see Waaldijk 1993, p. 79-81, and Wintemute 1997, p. xi and 266), but as far as I know only the Netherlands has legislation with 'civil status' as an independent ground (see the General Equal Treatment Act, articles 1 to 7; the corresponding provision of the Penal Code, articles 429quater, does not refer to 'civil status').

Furthermore, both grounds are highly controversial given the dominance of religions that favour (at least for the purposes of sex, procreation, domestic arrangements, etc.) a particular civil status and a particular sexual orientation. And for both no clear consensus exists as to what variations are covered by the terms.

Sexual orientation is closely linked to sex-as-gender: it is about the sex/gender of actual or preferred (emotional-sexual) partners (Wintemute 1997, p.6-7). Homosexual orientation is about partners of the same sex/gender; heterosexual orientation is about partners of different sexes/genders; and bisexual orientation is about partners of either sex/gender.

It has also been suggested that there are 'sexual orientations' that are not linked to sex-as-gender, but only to sex-as-erotic-activity (e.g. paedophilia, sado-masochism, etc.). Analytically or linguistically, that does not make sense (the resulting confusion is being enhanced by using the ambiguous word 'sexuality' as a synonym for 'sexual orientation', which unfortunately is gaining popularity among Anglo-American lesbian and gay activists). However, it may be politically useful to include these phenomena in the term 'sexual orientation' (surprisingly the European Court of Human Rights has included sado-masochist preferences, if not acts, in the term 'sexual orientation'; *Laskey, Jaggard and Brown*

v. the United Kingdom, judgement of 19 February 1997, par. 36). Conversely, the term can also be stretched so as to include transsexuality and cross-dressing, phenomena that are not linked to sex-as-erotic-activity (see for example Heinze 1995, p. 59-60). Given the inclusion of transsexuality in the term 'sex' by the Court of Justice of the EC (*P. v. S. and Cornwall County Council*, judgement of 30 April 1996, case C-13/94) as well as by national courts (e.g. Court of Appeal of Leeuwarden, 13 January 1995, *Nederlandse Jurisprudentie* 1995, nr. 243) and by the Dutch Equal Treatment Commission (opinions 98-12 and 98-32), it is hardly necessary anymore to include it in 'sexual orientation'.

Civil status primarily refers to whether or not someone is (or was) married to someone else (marital status). Consequently (il-) legitimacy (being born in or outside marriage) also counts as a civil status (Heringa 1994, p. 41). In a wider sense the term is sometimes also used to refer to other family law statuses or even to nationality.

As forbidden ground for discrimination 'civil status' shares a curious aspect with 'nationality': they have been created by law and their very purpose is to facilitate the unequal treatment of persons. Accordingly unequal treatment on the basis of civil status carries a semblance of justification (even human rights treaties support the idea that getting married should be socially and legally relevant). Nevertheless, the European Court of Human Rights has held that 'very weighty reasons' would have to be put forward before a difference of treatment on the ground of nationality (*Gaygusuz*, judgement of 16 September 1996, par. 42) or illegitimacy (*Inze*, judgement of 28 October 1987, *Series A*, Vol. 126, par. 41) could be regarded as compatible with the European Convention. The only other ground for which the Court has so far required 'very weighty reasons' is sex (*Abdulaziz*, judgement of 28 May 1985, *Series A*, Vol. 94, par. 78; *Schuler-Zgraggen*, judgement of 24 June 1993, *Series A*, Vol. 263, par. 67; *Burghartz*, judgement of 22 February 1994, *Series A*, Vol. 280-B, par. 27). It may safely be assumed that the Court would say the same about race. The common characteristic of these *suspect* grounds is that for most people they are inescapable givens. This certainly is true for the civil status of illegitimacy. Therefore it may be argued that other civil statuses which are involuntary given to the persons concerned should also be ranked as *suspect* grounds of discrimination. Thus in the case of someone with a same-sex partner the status of not being married would be a *suspect* ground, requiring very weighty reasons of justification.

Given the still complete ban on same-sex marriage (in itself discrimination on the basis of sex/gender and of sexual orientation, although even the Dutch Supreme Court did not draw that conclusion, *Hoge Raad* 19 October 1990, *Nederlandse Jurisprudentie* 1992, 129, but perhaps the Hawaii Supreme Court will in the pending case of *Baehr v. Lewin*), direct discrimination against unmarried individuals (i.e. against non-marital relationships) always amounts to indirect discrimination against homosexual relationships. It also amounts to indirect discrimination against homosexual individuals (who are not banned from marriage, but from marrying a person of their preferred gender). In the Netherlands this is gradually becoming more accepted in case law (see for example the judgement of the Court of Appeal of Amsterdam of 6 May 1993, *Nederlandse Jurisprudentie* 1994, nr. 681; and the Dutch Equal Treatment Commission's opinions 96-52 of 20 June 1996 and 97-38 of 14 April 1997, great improvements on its hesitant opinion 95-42 of 23 November 1995, *Rechtspraak Nemesis* 1996, nr. 550; still hesitant is the main Dutch court for immigration cases, *Rechtbank Den Haag*, 23 October 1997, *Migrantenrecht* 1997, nr. 130).

Conversely, it could be claimed that direct discrimination against homosexuals or against same-sex relationships amounts to indirect discrimination against the unmarried. In

situations where either sexual orientation or civil status is excluded from a list of forbidden grounds for discrimination, it may therefore be practical to argue indirect discrimination on the other ground.

But even where both grounds are included in the list (or implied by the open ended character of the list), something can be gained from arguing indirect sexual orientation discrimination in cases of direct civil status discrimination. Complaints about discrimination against unmarried couples have been frequently dismissed on the basis of arguments which seem not completely irrational as far as heterosexual couples are concerned: cohabitantes are deemed to have chosen not to get married; in the absence of marriage it would be difficult to establish who is with whom; like being married, living together outside marriage carries a more or less balanced bundle of advantages and disadvantages. Such arguments may sometimes be considered to offer sufficient justification for treating unmarried heterosexuals less favourably than married heterosexuals. But in relation to (unmarried) homosexuals they do not justify anything: they have not been able to choose (not) to get married; they have been denied a legal mechanism to prove their 'being together'; and they might have preferred the other bundle.

Precisely because of the marital bundle of legal consequences and because of the evidential value of marriage (not to mention its symbolic meanings), it can be argued that the prohibition of discrimination based on sexual orientation (about which a consensus is growing in the western world) requires national legislatures to provide same-sex couples with a similar choice of civil statuses as is available for different-sex couples.

In some jurisdictions (Denmark and Greenland, Norway, Sweden, Iceland, the Netherlands and Hawaii) a new civil status has recently been created for that purpose: the status of registered partner. This status entails almost all of the legal consequences of being married. (Given the symbolic importance of marriage, it is doubtful whether this compromise of 'same rights, different status' effectively ends the anti-homosexual discrimination of marriage law.) Consequently the civil status of not being married has lost most of its legal meaning: people now are either married, or registered, or neither married nor registered. Although in one country – the Netherlands – different-sex partners are admitted to registered partnership (since January 1998; during the first three months 409 heterosexual couples registered their partnership), this new status is basically a homosexual equivalent to heterosexual marriage (in the three months since January 1998, 304 female and 522 male couples registered their partnership in the Netherlands; since 1989 around 2000 same-sex couples have registered their partnership in Denmark). Because of this (predominantly) homosexual nature of registered partnership, any distinction with marriage does not only amount to direct discrimination based on civil status but also to direct discrimination based on sexual orientation. (This conclusion is of particular relevance in jurisdictions where civil status discrimination is not explicitly prohibited.) The main distinctions between partnership and marriage made in the Scandinavian and Dutch laws relate to foreign partners, to the position of children, and to pensions for widows and widowers. Such distinctions cannot be justified by the traditional justifications for the unfavourable treatment of non-marital relationships (see above).

As civil status illegitimacy seems to be on the way out (as a criterion in inheritance law it was virtually invalidated by the European Court of Human Rights in its *Marckx* judgement of 13 June 1997, *Series A*, Vol. 31; as a legal term it was abolished in Dutch law on 1 April 1998). Biology is becoming a more important criterion in classifying children than whether or not their parents were married.

However, where *biological* ties are absent between a child and at least one of the persons who are bringing it up, the sex, sexual orientation and/or civil status of (the relationship of) these persons is still often decisive for the treatment of the child. The persons who are in fact bringing up a child, may be called *social* parents. Three situations of non-biological social parenting can be distinguished: a child is being brought up by a new partner of its father or mother (step-parenting), or a child is born without biological input of the partner of its mother (this situation arises typically from artificial insemination, and can be called co-parenting), or a child is brought up by others than its father and mother (foster-parenting). Whereas children in (married) heterosexual families can (through adoption or otherwise) see their step-, co- or foster-parents become full *legal* parents, this is generally not possible for a child in a family of same-sex parents. The absence of legal parenthood in such situations can lead to all kinds of disadvantages for the child, for example with regard to maintenance, inheritance, orphan's allowances, etc. These disadvantages may be challenged as indirect discrimination based on the sex, sexual orientation or civil status of the relationship of the social parents. I submit that they can also be challenged as *direct* discrimination based on the civil status of the child: that of not being a legal child of one or both social parent(s). Whether or not one counts as a legal child of a social parent, should be included in the notion of civil status. The *Marckx* judgement (see above) has demonstrated that discrimination between different legal categories of biological children should be countered. In the interest of children it is equally important to fight discrimination between different legal categories of social children.

Points for discussion:

1. Civil status should be seen as a suspect discrimination ground (requiring very weighty reasons for justification) in all situations where the person discriminated against has not opted voluntarily for that particular status.
2. Discrimination between marriage and registered partnership should be seen as direct discrimination on the basis of sexual orientation.
3. Parenthood (i.e. whether or not one counts as a legal child of one's social or biological parent) should be recognised as civil status.

E. Heinze, *Sexual Orientation: A Human Right*, Dordrecht: Martinus Nijhoff 1995. [A.W. Heringa, *Algemene wet gelijke behandeling*, Deventer: Kluwer 1994.

K. Waaldijk, 'The legal situation in the member-states', in: K. Waaldijk & A. Clapham (eds.), *Homosexuality: a European Community Issue*, Dordrecht: Martinus Nijhoff 1993, p. 71-130.

R. Wintemute, *Sexual Orientation and Human Rights*, Oxford: Clarendon 1997.

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