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Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive

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Citation

Waalwijk, C., & Bonini-Baraldi, M. T. (2006). *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*. The Hague: T.M.C. Asser Press.
Retrieved from <https://hdl.handle.net/1887/16528>

Version: Not Applicable (or Unknown)
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Note: To cite this publication please use the final published version (if applicable).

Chapter 7

CONCLUSIONS¹

Uncertainty has long characterised the position of many lesbian women, gay men and bisexuals. Could they live openly according to their sexual orientation? Would it be safe if they did, would it lead to violence or criminal prosecution, to exclusion or isolation, to expulsion from school or housing, to loss of employment or career, etc.? Until recently, the law in most European countries did not provide much help to diminish these uncertainties.

Therefore, and as legal certainty is a central criterion for the good implementation of European Community directives in general and equal treatment directives in particular, the main conclusions of this book will be presented here in the key of legal certainty. There are nine conclusions, which will be elaborated below:

1. Sexual orientation discrimination is now legally forbidden in the European Union. This means that a lot has changed in a couple of decades.
2. Sexual orientation discrimination is now forbidden at many levels: at the level of international human rights law, at the levels of primary and secondary European Union law, in some countries at constitutional level, in almost every country at the level of national legislation, and often also at regional level.
3. The Employment Equality Directive and its implementation can be useful additions to the existing international and constitutional prohibitions of discrimination, which usually tend to be vertical and vague.
4. The complexity and fragmentation of anti-discrimination law may jeopardise legal certainty.
5. Hardly any Member State has fully complied with all the requirements of the Directive, two Member States have not yet implemented the Directive at all, and in one Member State sexual orientation discrimination is only implicitly forbidden.
6. On some points the Directive itself is rather vague, and many Member States, by deviating from the Directive on numerous points, have still fur-

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ther jeopardised the legal certainty that the Directive and its implementation should have brought.

7. The concept of sexual orientation as used in the Directive (and by the European Court of Human Rights) refers to something that is so private that no one can be required to reveal it, and simultaneously so vital that everyone has the right to live openly according to it. Most, though not all, countries seem to recognise the legal implications of this dual character of sexual orientation.
8. There are all kinds of reasons (in some countries more than in others) as to why the 'general framework for equal treatment' established by the Directive and the national measures meant to implement the Directive, would not on their own create real legal certainty. Further improvements to the Directive, to the quality of its implementation, and to its legal context are needed; also necessary are changes in popular attitudes and actual practices.
9. The specific case law of the European Court of Human Rights with respect to sexual orientation – and some good practices and certain points of near-consensus of the Member States – should inspire the Court of Justice when judging on issues that were left vague in the Directive itself.

7.1 TWO DECADES OF CHANGING LAW

One conclusion of this book on sexual orientation discrimination in the European Union is simple: sexual orientation discrimination is now legally forbidden in the European Union. This means that a lot has changed in a couple of decades.

Some twenty years ago, only one Member State had introduced a legal prohibition of sexual orientation discrimination, while still avoiding the use of the word 'sexual' or 'homosexual'.² And although the European Parliament in 1984 had passed its first resolution on sexual orientation discrimination,³ only by the beginning of the nineties had it started to become evident that sexual orientation was indeed an issue in EC law.⁴ By 1993 a handful of Member States had legislated explicitly against sexual orientation discrimination.⁵

² France in 1985 and 1986 (using the word *mœurs*), see 3.3 and 4.2.1 above.

³ See 2.1.3 above.

⁴ In 1991 the notion of sexual orientation made it into an official text of the European Commission on harassment (see 2.1.3 above), and simultaneously the Commission decided to fund a study that in 1992 resulted in the report *Homosexuality: A Community Issue*, which was later published in book form (Waldijk & Clapham 1993).

⁵ See 3.4 and 3.7 above.

In 1998, the Court of Justice of the European Communities had to decide its first case involving sexual orientation, *Grant v. South West Trains Ltd.*, and found that sexual orientation discrimination (or more precisely, discrimination based on the sex of Lisa Grant's female partner) was not covered by the EC's prohibitions of sex discrimination.⁶ By that time the number of Member States that had adopted some national legal rules against sexual orientation discrimination had doubled.⁷ In the same year the first prohibition of sexual orientation discrimination was inserted into binding EC legislation: the Staff Regulations for officials of the Communities.⁸ At that stage it was still not clear whether the European Convention on Human Rights also protects against sexual orientation discrimination, although since 1981 the European Court of Human Rights had consistently held that a total prohibition of sexual contact between persons of the same sex violates the right to respect for private life.⁹

The main breakthrough came in 1999. On 1 May of that year the Treaty of Amsterdam entered into force, inserting a new article 13 into the EC Treaty and thereby giving the Council of the EC the power to 'take appropriate action to combat discrimination based on [...] sexual orientation'.¹⁰ And on 21 December 1999 the European Court of Human Rights for the first time, in the case of *Salgueiro da Silva Mouta v. Portugal*, applied the right to non-discrimination to a case involving sexual orientation.¹¹ A few months earlier the same Court had found that the dismissal of members of the armed forces on grounds of homosexuality amounted to a violation of the right to respect for private life.¹²

After this, things moved quickly. On 27 November 2000 *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (hereafter the Directive) was adopted,¹³ and in response to this

⁶ ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] ECR I-621.

⁷ See 3.4 and 3.7 above.

⁸ See 2.1.3 (and 2.1.6) above.

⁹ ECtHR 22 October 1981, *Dudgeon v. UK*, appl. 7525/76, *Series A*, nr. 45; ECtHR 26 October 1988, *Norris v. Ireland*, appl. 10581/83, *Series A*, nr. 142; ECtHR 22 April 1993, *Modinos v. Cyprus*, appl. 15070/89, *Series A*, nr. 259.

¹⁰ See 2.1.1 above.

¹¹ ECtHR 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96, *Reports of Judgements and Decisions* 1999-IX. The UN Human Rights Committee had already done so on 31 March 1994, in the case of *Toonen v. Australia*, Communication 488/1992, [1994] *Interights International Human Rights Law* 27.

¹² ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96 and 32377/96; ECtHR 27 September 1999, *Smith and Grady v. UK*, appl. 33985/96 and 33986/96, *Reports of Judgements and Decisions* 1999-VI. See also ECtHR 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535/99, 48536/99 and 48537/99.

¹³ The full text of the Directive is reproduced as an annex in this book.

Directive almost all Member States, including the ten that joined the European Union in 2004 and the two countries that are set to join in 2007 or 2008, enacted or amended legislation against sexual orientation discrimination (in employment).¹⁴ The prohibition of sexual orientation discrimination found its way into the *Charter of Fundamental Rights in the European Union* (article 21), and into the *Treaty establishing a Constitution for Europe* (article II-81).¹⁵ Meanwhile, the European Court of Human Rights produced a series of judgements in which the prohibition of sexual orientation discrimination was applied to various aspects of sexual orientation, including homosexual conduct¹⁶ and same-sex relationships.¹⁷ The importance of that jurisprudence was increased considerably by the entry into force of the Twelfth Protocol to the European Convention on Human Rights,¹⁸ although so far this only applies to a limited number of Member States of the Council of Europe.

7.2 DISCRIMINATION PROHIBITED AT MANY LEVELS

The result of all these developments is that sexual orientation discrimination is now forbidden in the field of employment, in the field of human rights, and in several other fields. This is the case at many levels: at the level of international human rights law, at the levels of primary and secondary European Union law, in some countries at constitutional level,¹⁹ in almost every country at the level of national legislation,²⁰ and often also at regional level.²¹ This is a *second conclusion* of this book.

¹⁴ See 3.3 above.

¹⁵ See 2.1.1 above. In the Constitution for Europe, which is not (yet) ratified, combating sexual orientation discrimination is also mentioned in articles III-118 and III-124.

¹⁶ ECtHR 9 January 2003, *S.L. v. Austria*, appl. 45330/99, *Reports of Judgements and Decisions* 2003-I; ECtHR 9 January 2003, *L. & V. v. Austria*, appl. 39392/98 and 39829/98, *Reports of Judgements and Decisions* 2003-I; ECtHR 10 February 2004, *B.B. v. UK*, appl. 53760/00; ECtHR 3 February 2005, *Ladner v. Austria*, appl. 18297/03; ECtHR 26 May 2005, *Wolfmeyer v. Austria*, appl. 5263/03; ECtHR 2 June 2005, *H.G. and G.B. v. Austria*, appl. 11084/02 and 15306/02; and ECtHR 19 January 2006, *R.H. v. Austria*, appl. 7336/03.

¹⁷ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX. This example was soon followed by the UN Human Rights Committee on 29 August 2003, in the case of *Young v. Australia*, Communication 941/2000.

¹⁸ See 2.1.1 above.

¹⁹ See 3.2 above (only Portugal, since the summer of 2004, explicitly mentions sexual orientation in its constitutional prohibition of discrimination).

²⁰ Germany is the one exception inside the European Union, while Latvia is the only Member State which does not yet mention sexual orientation *explicitly*. See 7.5 below.

²¹ For example in Belgium, Germany and Austria (see 4.1 and 4.2.1 above).

This multi-level nature of the prohibition of sexual orientation discrimination has several implications, some positive (because of the complementarity of discrimination prohibitions),²² some problematic (because of the complexity of equality law).²³

7.3 THE COMPLEMENTARITY OF DISCRIMINATION PROHIBITIONS

The various international, European, national and regional prohibitions of discrimination vary according to their field of application, according to their concept of discrimination and according to the grounds they cover. For example article 2 of the International Covenant on Civil and Political Rights and article 14 of the European Convention on Human Rights is only applicable to discrimination by public authorities in the enjoyment of specifically mentioned human rights. Article 26 of the International Covenant and the Twelfth Protocol to the European Convention, however, forbid discrimination by national public authorities in any field, because they see equal treatment as a human right in itself. Article 21 of the Charter of Fundamental Rights in the European Union applies to discrimination by any of the institutions and bodies of the Union or by a Member State when implementing European Union law.²⁴ Most national constitutional prohibitions of discrimination also only apply ‘vertically’ (that is: only to public authorities, and not ‘horizontally’ between private persons/entities).

The international and European prohibitions of discrimination mentioned above have in common with most constitutional clauses on non-discrimination, the fact that as a result of their open-ended list they cover all possible grounds. Nevertheless, it is not certain in each Member State that sexual orientation is indeed covered by the general constitutional prohibition of discrimination.²⁵ Another characteristic of most of the general prohibitions of discrimination mentioned above, is that they do not outlaw all differentiations based on a forbidden ground, but only *unjustified* differentiations on such a ground. This makes them into rather vague principles, as is to be expected in the fields of constitutional and international law.

Compared to most of the prohibitions of discrimination found in constitutions and international human rights documents, most national anti-discrimination laws (like most EC equal treatment directives) are much more specific. In

²² See 7.3 below.

²³ See 7.4 below.

²⁴ See article 51 of the EU Charter.

²⁵ See 3.2 above.

general they only apply to one or more fields and to one or more grounds. Often, they also use a concept of direct discrimination that is much stricter: any disadvantageous differentiation in the relevant field(s) based on any of the listed grounds is unlawful, unless it is covered by a specific exception.

In this way, the EC equal treatment directives, and the various national anti-discrimination laws, should be a useful addition to the vague international and constitutional prohibitions of discrimination. They also do this in another way: they do not only cover public sector discrimination, but ‘horizontal’ discrimination by private employers and other private persons and entities as well.

A third conclusion of the book concerns this complementarity: the Directive and its implementation can be useful additions to the existing international and constitutional prohibitions of discrimination, which usually tend to be vertical and vague.

Whether the Directive and all national measures adopted to implement it, actually fulfil this double promise, is a different question altogether.²⁶

7.4 THE COMPLEXITY OF EQUALITY LAW

The coexistence of general and specific prohibitions of discrimination at four or more levels makes equality law a complex area of law. This complexity is aggravated further by the fact that lawmakers at several levels have chosen to differentiate between the different grounds of discrimination. For example, the EC directives on sex discrimination and the Racial Equality Directive (2000/43/EC) require a wider protection against sex and racial discrimination than the Employment Equality Directive requires against sexual orientation discrimination. Similarly, several countries have adopted separate sets of rules for sex, race, sexual orientation and other forms of discrimination. These rules are often spread out over different codes of law, acts of parliament, administrative regulations, etc. (sometimes even for one and the same ground in one and the same field). The result is that for many people (including lawyers) it has become rather difficult to get an accurate picture of all the international, European, national and regional rules that might apply to a particular case of discrimination. This in itself may jeopardise legal certainty. It may also lead to conflicting or contradictory laws, to gaps between the laws, and to unnecessary problems for persons who are discriminated against on multiple grounds or on a ground between different other grounds.

Think for example about discrimination against transgender people. Transsexuality and gender reassignment are covered by the ground ‘sex’, accord-

²⁶ See 7.6 below.

ing to the Court of Justice of the EC in the case of *P v. S and Cornwall County Council*.²⁷ Whether discrimination based on other forms of transgenderism (like transvestism or intersexuality) would also be classified as sex discrimination by the Court of Justice, is not completely certain, although it would certainly make sense.²⁸ Moreover, those who discriminate against transgender people do not always accurately distinguish between sex/gender, gender identity, gender expression, sexual orientation, disability, etc. Which law(s) should the victim in such a case invoke, which lawyer(s) should be consulted, which book(s) should be read?²⁹

A *fourth conclusion* of this book, therefore, must be that the complexity and fragmentation of anti-discrimination law may jeopardise legal certainty.

7.5 A CERTAIN IMPLEMENTATION OF THE DIRECTIVE

Legal certainty is an important aspect of the rule of law. And the rule of law is one of the founding principles of the European Union to which recital 1 of the Directive makes reference.

The principle of legal certainty is also a central notion in the case law of the Court of Justice of the EC when assessing whether or not a Member State has correctly implemented a Directive.³⁰ Directives must be implemented 'with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'.³¹ The principle of legal certainty is closely linked to the principles of effective judicial protection and of full effect, 'in particular in the sense of producing effects in practice'.³²

It is with these strict requirements in mind that the authors, and the experts on whose reports chapters 4 and 5 are based, have assessed the quality of the implementation of the Directive in the Member States. The outcome of that assessment,³³ and a *fifth conclusion* of this book, is that hardly any Member State has fully complied with all the requirements of the Directive, that two Member

²⁷ ECJ 30 April 1996, Case C-13/94, *P v. S and Cornwall County Council* [1996] ECR I-2143.

²⁸ See 2.1.2, 2.1.7 and 4.2.2 above.

²⁹ This book does not aim to cover the topic of discrimination on grounds of gender identity or gender expression. It has been written by, and with the collaboration of, lawyers who are mainly experts with respect to sexual orientation issues, and is largely devoted to a Directive that does not cover the grounds of gender identity and gender expression.

³⁰ See Prechal 2005, 75.

³¹ See 2.2.1 above for the ECJ's case law.

³² Prechal 2005, 75.

³³ See 4.7 and 5.6 above.

States have not yet implemented the Directive at all, and that in one Member State sexual orientation discrimination is only implicitly forbidden. In Luxembourg and Germany legislation to implement the Directive still needs to be discussed and adopted. It should be noted however, that the Penal Code in Luxembourg, and the Industrial Relations Act and the Personnel Representation Act in Germany do contain some rules against sexual orientation discrimination in employment.³⁴ In Latvia there is still no mention of sexual orientation in the implementing legislation, but an open-ended clause has been interpreted as covering it.³⁵

7.6 LEGAL UNCERTAINTY

Above we have seen that the public authorities (including public employers) of all Member States are already subject to general prohibitions of 'unjustified' discrimination contained in international human rights treaties. And public authorities in many Member States are also subjected to a similarly vague constitutional prohibition. In several legal systems the international and/or constitutional principle of non-discrimination also has an impact on, or a parallel in, certain general open norms of private law and labour law (for example the principle of pre-contractual 'good faith', or the rule against 'unfair' dismissal).

The main benefit that an anti-discrimination law can add to situations in which such general, vague and open norms already apply, is legal certainty. For all concerned (employers, employees, job applicants, people considering applying for a job, personnel officers, trade unions and other interest groups, lawyers, etc.) it would be very useful to know more or less precisely in which circumstances it is lawful, and in which unlawful, to differentiate on the basis of certain grounds, and to know what remedies and sanctions would apply in case of unlawful discrimination.

Does the Directive help to provide this (additional) level of legal certainty?

In some ways, yes, it does. For example, article 3(1) of the Directive puts beyond doubt that it applies not only to the public sector but also to the private sector, and that basically all aspects of employment (from training and recruitment to dismissal) must be covered. Article 2(2) gives a very factual definition of direct discrimination, without any room for justification. And article 11 in very clear and precise terms requires protection against victimisation. Nevertheless at least seven countries have failed to properly implement article 11,³⁶ at least one

³⁴ See 4.1 above.

³⁵ See the beginning of 5.2 above.

³⁶ See 6.3.3 above.

Member State provides a possibility for justifying direct discrimination,³⁷ and at least ten have failed to cover all required aspects of employment in their legislation on sexual orientation discrimination.³⁸

While on other important points the Directive is rather vague. Article 3(1) of the Directive, for example, is not very clear about which forms of occupation other than employment and self-employment should be covered, and which aspects of self-employment should be included. Article 2(2) allows for an 'objective' justification of indirect discrimination, provided that the aim is 'legitimate' and the means are 'appropriate' and 'necessary'. Article 2(3) defines the concept of harassment, but also allows the concept to 'be defined in accordance with the national laws and practice of the Member States'. Moreover, article 17 of the Directive does not specify which types of sanctions need to be made available and to whom they should be applicable. It only says that the sanctions 'must be effective, proportionate and dissuasive' and that they 'may' include the payment of compensation to the victim.

These vague articles of the Directive do not provide full legal certainty to the individuals concerned, although the flexibility they entail might sometimes be unavoidable and indeed useful. In some respects these articles might appear as invitations to the Member States to further reduce the potential impact of the prohibition of discrimination. And it seems that some Member States have indeed done just that. For example no less than sixteen countries have not or not fully covered self-employment in their implementing legislation.³⁹ Six countries have narrowed down the definition of indirect discrimination further than seems permitted under the Directive, while eight countries have deviated from the Directive's definition of harassment in a way that may, or may not, be allowed.⁴⁰ As regards sanctions, all Member States may be falling short of the required minimum.⁴¹

In addition, the wording of some of the exceptions that the Directive allows, is rather vague. With respect to sexual orientation, this is particularly true for article 4(1), which allows national exceptions for 'genuine and determining occupational requirements'. It is very difficult to imagine jobs for which a particular sexual orientation could legitimately be seen as such a determining requirement.⁴² Therefore it is worrying that no less than twenty-one countries have chosen to transpose this possible exception into their national laws on sexual

³⁷ See 5.2.1 above.

³⁸ See 6.3.1 above.

³⁹ *Idem*.

⁴⁰ *Idem*.

⁴¹ See 4.5.4, 4.5.5, 5.4.1, 6.3.3 and the beginning of 5.4 above.

⁴² See 4.4.4 above.

orientation discrimination.⁴³ This only suggests that there would be certain jobs for which gays and lesbians need not apply. Further legal uncertainties flow from the implementation of article 4(2), which allows for specific exceptions that permit religion or belief based employers to differentiate on grounds of religion or belief. Contrary to the express wording of article 4(2), at least ten Member States have omitted to explicitly exclude other grounds (such as sexual orientation) from the reach of this exception.⁴⁴ Article 4(2) is one of a few exceptions that only figure in the Employment Equality Directive and not in the Racial Equality Directive. Another is article 2(5), which allows for exceptions that 'in a democratic society, are necessary for [...] the maintenance of public order [...] and for the protection of the rights and freedoms of others'. It is possible that all nine Member States that have introduced an exception based on article 2(5) may have exceeded the limits of that article.⁴⁵

Some Member States have gone even further, by introducing exceptions which no (clear or vague) provision in the Directive allows. The main example (apparently inspired by a non-binding recital of the Directive) can be found in Ireland and Italy, where the implementing legislation allows differentiations based on marital status, even if they amount to unjustified indirect sexual orientation discrimination.⁴⁶

It is of course possible that the national courts (if necessary after being prompted by the Court of Justice of the EC) will ensure that these deviations from the Directive will be ignored or repaired by consistent (harmonious) interpretation (that is interpretation in conformity with the Directive).⁴⁷ In the meantime however, neither the (potential) victims of discrimination, nor the employers concerned, can have a clear understanding of the national anti-discrimination law on these points.

A *sixth conclusion* can therefore be, that on some points the Directive itself is rather vague, and that many Member States, by deviating from the Directive on numerous points, have still further jeopardised the legal certainty that the Directive and its implementation should have brought.

7.7 THE SPECIFIC CHARACTER OF SEXUAL ORIENTATION

With respect to sexual orientation, legal certainty has a specific relevance that it does not have with respect to most other grounds of discrimination.

⁴³ See 6.3.2 above.

⁴⁴ *Idem*.

⁴⁵ *Idem*.

⁴⁶ See 6.3.1 above.

⁴⁷ See Prechal 2005, 180-181.

This follows from two specific characteristics of sexual orientation.

Firstly, unlike sex and race, someone's sexual orientation can often remain hidden, and unlike nationality and age, someone's sexual orientation can hardly be proved or disproved. Therefore it is good thing that the Directive and almost all countries prohibit discrimination 'on the ground of sexual orientation' – and not only discrimination against someone because of 'his or her' sexual orientation.⁴⁸ This means that discrimination based on a mistaken assumption about someone's sexual orientation should also be covered, and that someone claiming to be a victim of sexual orientation discrimination should never be required to reveal or even prove his or her sexual orientation. This seems to be recognised in almost all countries.⁴⁹ It also follows from the right to privacy, as guaranteed by various national and European laws. The right to privacy and the prohibition of sexual orientation discrimination combined, should also lead to the conclusion that it is a forbidden form of discrimination to reject a job applicant on the ground that he or she has refused to give a (correct) answer to a question about sexual orientation.⁵⁰

Secondly, unlike sex and race (but like religion), sexual orientation is not only about being 'it', but also about living 'it'. The three main aspects of sexual orientation – preference,⁵¹ behaviour,⁵² relationships⁵³ – have all been recognised by the European Court of Human Rights in its case law on the principle of non-discrimination.⁵⁴ The UN Human Rights Committee and the Court of Justice of the EC have also classified discrimination between same-sex and different-sex relationships (of the same status) as a form of sexual orientation discrimination.⁵⁵ In most Member States the notion of sexual orientation in the laws implement-

⁴⁸ See 6.3.1 above.

⁴⁹ See 6.3.1 and 6.3.3 above.

⁵⁰ This is already recognised in a few countries, see 4.3.6 above.

⁵¹ ECtHR 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96, *Reports of Judgements and Decisions* 1999-IX.

⁵² ECtHR 9 January 2003, *S.L. v. Austria*, appl. 45330/99, *Reports of Judgements and Decisions* 2003-I; ECtHR 9 January 2003, *L. & V. v. Austria*, appl. 39392/98 and 39829/98, *Reports of Judgements and Decisions* 2003-I; ECtHR 10 February 2004, *B.B. v. UK*, appl. 53760/00; ECtHR 3 February 2005, *Ladner v. Austria*, appl. 18297/03; ECtHR 26 May 2005, *Wolfmeyer v. Austria*, appl. 5263/03; ECtHR 2 June 2005, *H.G. and G.B. v. Austria*, appl. 11084/02 and 15306/02; and ECtHR 19 January 2006, *R.H. v. Austria*, appl. 7336/03.

⁵³ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX.

⁵⁴ See 3.2 above.

⁵⁵ UN Human Rights Committee, 29 August 2003, *Young v. Australia*, Communication 941/2000; ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] ECR I-621, para. 47.

ing the Directive is similarly interpreted as not only covering sexual preference, but also (same-sex and different-sex) relationships and behaviour.⁵⁶ There also seems a near-consensus, at least in the old Member States, that discrimination because of someone's coming out as lesbian, gay or bisexual is also a form of sexual orientation discrimination.⁵⁷ This wide interpretation of the notion of sexual orientation is important so as to make it possible for people to live openly according to their homosexual, bisexual or heterosexual preference – and still be protected by the laws against sexual orientation discrimination.⁵⁸

This makes it possible to draw a *seventh conclusion*. The concept of sexual orientation as used in the Directive (and by the European Court of Human Rights) refers to something that is so private that no one can be required to reveal it, and simultaneously so vital that everyone has the right to live openly according to it. Most, though not all, countries seem to recognise the legal implications of this dual character of sexual orientation.

7.8 REAL LEGAL CERTAINTY?

Legal certainty is more than the enactment of clear, precise and specific rules that do not contradict higher rules. To capture this wider notion, scholars in the field of Law & Development have introduced the concept of 'real legal certainty':

'Real legal certainty implies that:

1. a lawmaker has laid down clear, accessible and realistic rules;
2. the administration follows these rules and induces citizens to do the same;
3. the majority of people accept these rules, in principle, as just;
4. serious conflicts are regularly brought before independent and impartial judges who decide cases in accordance with those rules;
5. these decisions are actually complied with.'⁵⁹

As with respect to combating sexual orientation discrimination most of Europe can still be considered as being in a phase of 'development', this notion of 'real legal certainty' may help to understand the current (legal) situation.

We have seen above that the Directive, and consequently much of its implementation, is not as *clear* as it could be. In fact, the Employment Equality Direc-

⁵⁶ See 4.3.1, 4.3.3 and 6.3.1 above.

⁵⁷ See 4.3.2 above.

⁵⁸ The legal certainty for employers, on the other hand, is served by the near-consensus (at least in the old Member States) that the term sexual orientation only covers homosexual, heterosexual and bisexual orientations. See 4.2.2 and 4.3.1 above.

⁵⁹ See Otto, Stoter & Arnscheidt 2004, 123.

tive has a greater number of vague provisions than the otherwise rather similar Racial Equality Directive.⁶⁰ The *accessibility* of European and national anti-discrimination law is furthermore reduced by its complexity and fragmentation.⁶¹ That brings us to the question of whether or not the rules of the Directive and of the national implementing laws are *realistic*. It should be pointed out that in several countries the prohibition of sexual orientation discrimination has to function in a legal context in which some homosexual activity still amounts to a criminal offence without heterosexual equivalent. And in a greater number of countries the law still differentiates on a large scale between same-sex and different-sex partners.⁶² Is it realistic to expect that employers and other citizens will readily abstain from something that the law of their country continues to do, namely discriminating on grounds of sexual orientation?

It falls outside the scope of this book to assess whether in each country the public authorities follow the rules that implement the Directive. Little is known about this second part of the definition of 'real legal certainty'. One might hope that governments do their best to make public employers give a good example to other employers. It is also interesting to note, that several countries have given the task of enforcing the anti-discrimination rules in part to such *administrative bodies* as the labour inspectorate, the public prosecutor, a national human rights body, or indeed a specialised equality body.⁶³ Most of these bodies have certain (binding or non-binding) sanctions at their disposal,⁶⁴ but also other communicative means to induce employers and other citizens to abide by the anti-discrimination laws.⁶⁵

Does the legal prohibition of sexual orientation discrimination enjoy *popular support*? In each of the fifteen old Member States a majority of the population (varying between 69% and 92%) seems to be opposed to sexual orientation discrimination, although the majority believing that 'others' are opposed to such discrimination is already somewhat smaller (between 61% and 76%).⁶⁶ In contrast, a majority of the population in five of the twelve new and future Member States does not seem to want homosexuals as neighbours.⁶⁷ And even in several old Member States the popular acceptance of homosexuality appears rather lim-

⁶⁰ See 7.7 above.

⁶¹ See 7.4 above.

⁶² See 3.7 above.

⁶³ See 4.5.1, 4.5.2 and 5.4.2 above.

⁶⁴ See 6.3.3 above.

⁶⁵ See Ytterberg 2006.

⁶⁶ See 3.1 (table 3) above.

⁶⁷ Namely: Hungary, Lithuania, Romania, Poland and Bulgaria; see 3.1 (table 1) above.

ited.⁶⁸ These survey results indicate that there are still strong anti-homosexual attitudes which could restrict the willingness of large parts of some populations to follow the legal prohibitions of sexual orientation discrimination. Interestingly, however, there does not seem to be a correlation between on the one hand anti-homosexual opinions in a particular country and on the other tardiness and shortcomings in the implementation of the Directive.⁶⁹

The fourth element of the concept of 'real legal certainty' is the *role of courts*. This book has shown that it has so far been rare that a case of alleged sexual orientation discrimination reaches a court, let alone a superior court.⁷⁰ This may of course change, once the various implementing laws are fully 'settled in'. The Directive contains several elements which should make it easier for victims of discrimination to take a case to court. Therefore it is worrying that so many countries are falling short in correctly implementing the Directive's provision on protection against victimisation, on shifting the burden of proof, and/or on the role in court of interest groups.⁷¹ There may be several reasons why a victim of discrimination, and especially a victim of sexual orientation discrimination who does not want to 'publicise' his or her own orientation, would choose not to go to court. Therefore the availability of a specialised equality body (or a human rights body that hears discrimination cases) can be really useful. The Employment Equality Directive (unlike the Racial Equality Directive) does not require such a body to be set up in each country with respect to sexual orientation discrimination. Nevertheless, in eighteen countries a specialised body is competent to deal with such discrimination.⁷²

To what degree the decisions of courts, and the binding or non-binding decisions of specialised bodies, in discrimination cases are actually complied with, would be a subject for further research.

So an *eighth conclusion* of this book is that there are all kinds of reasons (in some countries more than in others) as to why the 'general framework for equal treatment' established by the Directive and the national measures meant to implement the Directive, would not on their own create *real* legal certainty. Further improvements to the Directive, to the quality of its implementation, and to its legal context are needed; also necessary are changes in popular attitudes and actual practices. All this will require an active role of governments and parliaments,

⁶⁸ Especially Portugal, Greece, Ireland and Italy (and also Northern Ireland); see 3.1 (table 2) above.

⁶⁹ See 6.4 above.

⁷⁰ See 3.4 above.

⁷¹ See 6.3.3 above.

⁷² *Idem*.

of courts and lawyers, of specialised bodies and other public authorities, of employers and employees, of interest groups and the media, of homosexuals and heterosexuals, etc.

7.9 LAW-MAKING AT MANY LEVELS – INSPIRATION AND GUIDANCE

The legal prohibition of sexual orientation discrimination in Europe is still developing at many levels. In Germany and Luxembourg legislation implementing the Directive will finally be debated and adopted,⁷³ further implementation laws will be adopted in Latvia and the Czech Republic, and with a view to making the whole of national anti-discrimination law more coherent, legislative reviews are taking place in the Netherlands, Sweden and the United Kingdom.⁷⁴

The Court of Justice of the European Communities has already had to decide its first case involving the Directive,⁷⁵ and no doubt it will get more cases in which it might clarify obscurities in the Directive, or condemn Member States for shortcomings in their implementing laws. On 18 January 2006 the European Parliament has passed a Resolution on Homophobia in Europe, in which it urges the Commission to ensure the correct implementation of the Employment Equality Directive, and to come up with a proposal for a directive with the same level of protection against sexual orientation discrimination as is already provided in the Racial Equality Directive.⁷⁶ The European Commission is considering which countries to take to the Court of Justice for failure to correctly implement the Directive.⁷⁷ In 2006 the European Commission will report on the state of implementation of the Directive, and if necessary come up with proposals to revise and update the Directive.⁷⁸ Furthermore, new sexual orientation cases are currently making their way to the European Court of Human Rights.

The multi-level character of the field of anti-discrimination law adds to the chaotic and fragmented nature of the field. However, this multi-level area of law is also characterised by complementarity, inspiration and guidance. Yes, the Directive requires a certain implementation in national law, and yes, the Court of Justice of the EC will determine whether or not any national implementation

⁷³ See 4.1 above.

⁷⁴ See Numhauser-Henning 2004/2005, 8-9; and Cohen 2004/2005, 57.

⁷⁵ ECJ 22 November 2005, Case C-144/04, *Mangold v. Helm*. See 2.1.2 and 3.2 above.

⁷⁶ European Parliament Resolution on Homophobia in Europe, 18 January 2006, P6_TA-PROV(2006)0018, online at www.europarl.eu.int.

⁷⁷ See 6.2 above.

⁷⁸ See the Commission's Communication of 1 June 2005: *Non-discrimination and equal opportunities for all – A framework strategy*, COM(2005) 224 final, p. 4 (online at http://europa.eu.int/comm/employment_social/fundamental_rights/eyeo/ey_en.htm).

meets the standards of the Directive. But no, these top-down mechanisms are not the only ones at play here.

We have seen that some of the concepts used in the Directive (such as ‘sexual orientation’), are getting an interpretation at national level that is inspired by or at least in conformity with the case law of the European Court of Human Rights.⁷⁹ No doubt the Strasbourg Court will go on to produce judgements on sexual orientation discrimination and related topics that will guide both the Court of the Justice in Luxembourg and the national courts and legislators in their interpretation of the Directive. But the future interpretation of the Directive in the Court of Justice can also be inspired by the consensus or near-consensus that can be found on certain points in the national legislation of the Member States (think of the notion that it is wrong to ask a job applicant about his or her sexual orientation),⁸⁰ and by the good practices of some of them (think of sanctions that are truly ‘effective, proportionate and dissuasive’).⁸¹

So a *ninth conclusion* of the book can be that the specific case law of the European Court of Human Rights with respect to sexual orientation – and some good practices and certain points of near-consensus of the Member States – should inspire the Court of Justice when judging on issues that were left vague in the Directive itself.

Furthermore, the good practices of some countries (going beyond the minimum requirements of the Directive) may well inspire other countries. Just as more and more countries are voluntarily choosing to make a specialised body competent to deal with cases of sexual orientation discrimination, it could be expected that more and more countries will extend their anti-discrimination legislation beyond the field of employment.⁸² That, in turn, could inspire the law-makers of the European Union to make a directive that requires the same level of legal protection against discrimination for all grounds, thus making anti-discrimination law less complex and less fragmented.

And all this would simply be part of the general development that Europe has seen for over forty years now. European countries are gradually removing sexual orientation discrimination from criminal law, and increasingly from family law, too, and from the many fields that depend on family law,⁸³ while they are also using the law to combat sexual orientation discrimination outside the law.⁸⁴

⁷⁹ See 7.7 above.

⁸⁰ See 6.3.1 above.

⁸¹ See 6.3.3 above.

⁸² See 3.6 above.

⁸³ See 3.7 above.

⁸⁴ See 3.3 and 3.6 above.

They do this partly in response to pressure from the European Union and/or the European Court of Human Rights, partly in response to social developments and political pressure from interest groups, and partly from following each other's examples.

It all contributes to creating the much desired certainty that you can live freely and openly – and without discrimination – according to your own sexual orientation.

