

Participation Opportunities: Perspectives for Inclusion of Marginalized Groups

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Presentation:

LGBT as a Part of Civil Society: Opportunities at the EU Level

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For a long time, the European Union has been, in the first place, an economic community as was also reflected in its previous name: European Economic Community – EEC.

With the increasing economic integration, however, there has been a growing recognition of the need for more common policies in the social field because these issues cannot be completely separated from each other.

There has been a growing acceptance that differences in national approaches and standards in the social field create barriers to trade in the single market. It has become clear that social aspects cannot be set aside and ignored in an economic union as they have a direct impact on issues such as competition and equal conditions in all countries. Obviously, countries with lower social standards have, in certain areas, an economical advantage compared with countries that have advanced social standards. So, there has been and there is a need to have at least common minimum social standards in all countries.

Toward a social union?

One aspect of creating fair and equal conditions of competition for all employers and companies throughout the Union is to have also harmonised provisions to prohibit discrimination against certain groups of the population. Take for example equal pay for women and men: Obviously, in countries where women could legally be paid less than men, companies would have an advantage towards other countries where such inequality is illegal. And this was acknowledged in the EU already in the 1970s when directives in that field were adopted. But of course, the same is valid for other groups, too.

In addition, continuing high levels of unemployment and the growth of poverty and social exclusion in the EU in the 1990s, have also contributed to an increased recognition that the

EU should address socio-economic problems. And moreover, non-governmental organisations (NGOs) active in the areas of social and human rights have become increasingly active in lobbying at the European level and have pressed for change.

Later, in promoting the European social model, the European Union has committed itself to fight social exclusion of certain exposed or vulnerable groups, also as part of the strategy to make the Union a more competitive and knowledge-based economy. Certain EU programmes are designed to address social inclusion of such groups and to create new job opportunities for them.

Another relevant factor in this context was the debate about EU citizenship. The Maastricht Treaty of 1993 had established such an EU citizenship, with every national of a member state becoming a citizen of the Union. This was rather of symbolic significance than of real value, as Union citizens would only have the limited civil and political rights defined in the founding Treaties.

However, one of these limited rights any EU citizen enjoys is the right to move freely and work within the whole territory of the Union. And this is one of the most basic rights. And again, there has soon been a growing acceptance that the freedom of movement could not be fully enjoyed by all citizens without addressing disparities in the level of protection against any form of discrimination.

This was already reflected in the Commission's White Paper on Social Policy in 1994, which stated that the Union must act to provide a guarantee for people against the fear of discrimination if it is to make a reality of free movement.

The European Parliament has played a significant role in pushing issues of discrimination and human rights onto the political agenda. It has adopted comprehensive resolutions highlighting the effect and extent of various forms of discrimination, including based on sexual orientation, and demanded action to combat it.

In the 1990s, racism and xenophobia have become hot issues. 1997 had been proclaimed by the EU "European Year against Racism". It has widely been accepted that these phenomena

are detrimental to the economic development. As is discrimination based on other grounds such as disability, age or sexual orientation.

Although some important steps have been taken, the absence of a specific legal base in the Treaties has been a significant obstacle to the adoption of substantive measures.

Article 13 EC Treaty

So, there was a strong move to change this in the second half of the 1990s. The next opportunity for such a change, after Maastricht, was the revision of the Treaties during the Intergovernmental Conference that had started in March 1996 and ended with the adoption of the Amsterdam Treaty in June 1997, which finally came into force on 1 May 1999.

And for lesbians and gays, this Treaty of Amsterdam was a real milestone: For the first time, discrimination on the grounds of sexual orientation was explicitly mentioned not only in a Treaty of the European Union, but in any international treaty.

However, this famous Article 13 in the EC Treaty¹ is not a free-standing provision that prohibits discrimination. Article 13 has no direct effect. What it does is to create the legal basis for the European Union to take action to combat discrimination, be it by enacting legislation or by other means, for example by establishing anti-discrimination programmes.

Any such legislation based on Article 13 has to be proposed by the Commission and, after consultation with the European Parliament, must be adopted by the Council with unanimity. This means that the role of the Parliament is limited. Amendments proposed by the Parliament can simply be ignored by the Council, which is composed by the governments of the member states. And unanimity in the Council means that any single government can veto any proposal based on Article 13.

¹ Article 13 EC Treaty states: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting 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."

There have been two attempts to change and replace this by qualified majority voting in the Council and co-decision procedure with the Parliament. But all the massive lobbying efforts of many NGOs, including ILGA-Europe, were finally unsuccessful and failed on both occasions, first in 2000 when Amsterdam was revised by the Nice Treaty, and recently when the future Constitution of the EU was drafted by the Convention on the Future of Europe. Regrettably, Article 13 has remained unchanged in this respect, and probably will remain so as it is very unlikely that the current intergovernmental conference which is dealing with the draft Constitution at the moment, will change this provision accordingly.

With the arrival of ten new member states next year, it will be completely unrealistic to expect 25 governments to agree unanimously to any substantial new anti-discrimination legislation at EU level.

Anti-discrimination directive

However, the EU, in the year 2000, has already adopted two directives and one programme to combat discrimination on the basis of Article 13. Already during the ratification process of the Amsterdam Treaty, the Commission had drafted these proposals. So they could be published as soon as the Amsterdam Treaty came into force in May 1999. And when in February 2000 the right-wing Freedom Party known for its racist, xenophobic and anti-Semitic rhetoric came into government in Austria, the shock it caused indeed speeded up the process of adopting the two draft directives. But not only were the directives adopted in record speed, they also contain some substantial protection from discrimination.

So, in June 2000, the Council adopted Directive 2000/43/EC “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”, and in November 2000, it adopted Directive 2000/78/EC “establishing a general framework for equal treatment in employment and occupation”.

However, the two directives are far from perfect. First of all, the areas to be covered by legal instruments at EU level can, of course, only be those where the Union has legal competence to legislate. So, the EU can only prohibit discrimination in those areas where it has such legal competence. But moreover, the Commission and the Council have chosen to cover different areas in the two directives and thus created a hierarchy in the protection from discrimination.

You could also say that they created discrimination in the fight against discrimination, which is indeed paradoxical.

While the so-called framework directive covering disability, age, religion and belief and **sexual orientation** as protected grounds is limited to employment and occupation, the race directive also covers the following other areas outside employment:

- social protection, including social security and health care
- social advantages
- education
- access to and supply of goods and services, including housing.

Why this? Well, there are various reasons for that. One certainly is that the Race Directive originates in the 1997 European Year against Racism, and it has always been intended that substantial anti-discrimination legislation should derive from this. When Article 13 finally came into force, there was of course an obligation to act for the other grounds, too. But obviously, some of these grounds, such as age or disability, would cause much greater repercussions if they were protected in a comprehensive way. If you take, for example, access to and supply of goods and services – here member states were certainly afraid of the far-reaching implications this would mean for disability. So, it was not so much “sexual orientation” that caused the problem here but rather disability and age.

This reservation of member states could also be felt recently with the draft directive proposed by the Commission to bring non-discrimination on the grounds of sex or gender up to the level which exists now for “race” and “ethnic origin”. The first draft has completely failed in the Council. For example, the insurance business is heavily opposed to apply the same schemes for women and men in life insurance. Yesterday, however, the Commission has published a new proposal.

But anyway, the two directives adopted in 2000 should be implemented by all member states this year and by all accession countries upon accession on 1 May 2004 at the latest.

I would like to stress that this employment framework directive will prohibit discrimination against lesbians, gays and bisexuals on the grounds of their sexual orientation at the workplace in 25 countries in Europe as of next year. For me,

therefore, this directive is the most important single piece of legislation for lesbians, gays and bisexuals in Europe so far and another historic achievement.

Concerning, the implementation, we have to notice, however, that only very few member states actually have met the deadline of 19 July this year for the implementation of the race directive and will meet the deadline of 2 December for implementation of the employment framework directive. This is an indication that member states have recovered from the shock of the Freedom Party entering the Austrian government and are not so keen anymore to combat discrimination. It is difficult to understand why some member states hesitate now to implement a directive which they have fully agreed to in the Council three years ago.

Other achievements

Another indication of the vanishing enthusiasm for the legal battle against discrimination is the fact that many member states will only implement the minimum requirements prescribed by the directives and will not go beyond them. For example, they could remove the hierarchy created by the directives by extending the protection in the areas outside employment also to the other grounds and groups, and even going beyond that, i. e. including areas not covered as they are outside EU competence.

Employment is certainly the most important area where discrimination occurs. However, there is no doubt that a lot of discrimination against lesbians and gays also exists in other areas – for example in access to goods and services, but also in health care. In most countries, laws regulating access to assisted insemination for example exclude single women, including lesbian women, or lesbian couples from this health service.

Before I am going to talk about *how* the LGBT movement has used all these opportunities offered at European level to influence legislation and policies, I want to mention another historic achievement: the EU Charter of Fundamental Rights adopted at the Nice Summit in December 2000. Its Article 21 prohibits any discrimination, inter alia, on the grounds of sexual orientation. Unlike Article 13, it is a free-standing prohibition of discrimination. However, there are some limitations attached to it, too. One is that it has no definite legal status, it is not yet binding. The Court of Justice in Luxembourg, however, is already taking the Charter into account when making decisions in cases taken to the Court. And it is intended

that the Charter will be included in the future Constitution of the European Union and thus become legally binding. The more significant flaw or restriction of the Charter is, however, that it is only applicable to EU institutions and member states when they apply EU law. The prohibition, therefore, does not cover discrimination in legal matters outside EU competence, such as for example criminal law and family law, the latter being an area where most legal discrimination occurs today.

Well, those are basically the most important legal issues ILGA-Europe has been and is dealing with at EU level: Article 13, the anti-discrimination directive, the Charter of Fundamental Rights and the future Constitution. In most of the cases, these matters are very complicated and mid-term, even long-term issues that need a lot of continuous monitoring and lobbying, both at the European and the national levels. And of course, ILGA-Europe has formulated a series of recommendations and demands in these fields.

ILGA-Europe

So let me finally introduce ILGA-Europe, the European Region of the International Lesbian and Gay Association. ILGA is a world wide umbrella of local, regional and national organisations fighting for equal rights of lesbian, gay, bisexual and transgender people. ILGA was founded in 1978, and it has always been very strong in Europe, with annual regional conferences for Europe and strong lobbying activities at European level, both at the European Community, the Council of Europe and the Organization for Security and Co-operation (OSCE), right from the beginning. It was only in December 1996, however, that the European Region was formally founded as an independent association, called ILGA-Europe.

The establishment of ILGA-Europe coincided with the debates, at EU level, of these important issues just mentioned: Article 13, the employment directive, and the Charter. It was extremely important that ILGA-Europe got involved in all these discussions to make sure that sexual orientation got expressly included in each of these legal instruments as a non-discrimination ground. It took only 2-3 years for ILGA-Europe to establish itself as *the* European LGBT organisation.

Lucky coincidence again, the European Union not only adopted the two before-mentioned anti-discrimination directives based on Article 13 but, as an additional measure, a vast

Community Action Programme to combat discrimination. In this programme running from 2001 to 2006, the European Union has earmarked almost 100 million euros to support the fight against discrimination. A couple of European NGOs, such as ILGA-Europe, are receiving core-funding under this programme to carry out their tasks. This has made it possible for ILGA-Europe to set up an office in Brussels in 2000 and to hire four full-time employees. Without Article 13 and without the action programme, it would have been impossible for the Commission to give core funding to ILGA-Europe, because again, the Commission can only act on issues and spend money in areas where there is a legal basis for the EU to act. So, ILGA-Europe was rather fortunate that such great opportunities were offered so soon after its founding. The organisation already received core funding from the European Commission in 2000, under the budget-line to cover preparatory measures for the action programme that started in 2001.

One important feature of ILGA-Europe is that it has members in almost all European countries, and it has strong member organisations in most EU member states and accession countries. Strong member organisations that are able to do the necessary lobbying work at the national level regarding all these political issues. Because one thing must be clear: It may be true that these days many things are decided in Brussels, as politicians always tell us, but it is still the representatives of the member state governments who make the decisions in Brussels. And this, they often forget to tell people. But hardly anything is decided in Brussels that member state governments have not agreed to. And this is the reason why it is so important, for any NGO sector, that lobbying at the EU level is supplemented and accompanied by advocacy work at the national level.

NGO alliance building

ILGA-Europe was amongst those NGOs that had arrived rather recently at the NGO scene in Brussels. Many well-established NGOs, including the European Women's Lobby, had already been active at EU level for many years. In 1995, NGOs working in the social sector had created a Platform of European Social NGOs, which ILGA-Europe joined in 1998. This was an important step and a crucial development because it allowed ILGA-Europe to have privileged access to the European Commission, to build alliances and to join forces with other NGOs and to tap into the Platform's resources, including financial resources before ILGA-Europe got its own funding from the EU. Today, the Platform comprises around 40 European

NGOs. They work for certain groups, such as people with disabilities, older people, youth or women; on certain issues such as homelessness, unemployment, social exclusion, immigration, racism; and include organisations such as the Red Cross, Caritas and other huge care and service providers.

ILGA-Europe's membership and involvement in this Social Platform was extremely beneficial. There has been a lot of cross fertilisation, issues such as multiple discrimination have been able to be effectively addressed, and it also helped promote the concept of mainstreaming which means in this context to raise the issue of LGBT equality in all contexts where appropriate.

And last but not least, the co-operation within the Platform also made it possible to focus together on issues of common concern. Indeed, other NGOs have been working with many of the issues relevant for ILGA-Europe, such as Article 13, the employment directive, the Charter, and recently the future Constitution.

For the future Constitution, the joint lobbying of European NGOs was done on an even broader basis. Four NGO families – besides the Social Platform, these are the Human Rights Group, the Green 8 (dealing with environmental issues), Concord (dealing with development issues) – joined together and formed the so-called Civil Society Contact Group that launched the so-called *act4europe* campaign to ensure that the concerns of civil society are heard in the context of drafting the future EU constitution. One of the common concerns actually was to create a legal basis for the so-called civil dialogue at EU level because until today there is no provision in the Treaties for a formalised consultation of NGOs. This specific lobbying, by the way, has resulted in Article 46 in the draft Constitution providing for an open, transparent and regular dialogue with representative associations of civil society.

Personally, I do support alliance building across NGOs, and from both my experience within ILGA-Europe and HOSI Wien, the lesbian and gay group I am working for in Austria, I can only recommend LGBT organisations and other NGOs to also look for partners and alliances at the local and national levels. This is really my credo.

NGOs interested in getting involved at European level or at least in having some link and connection with what is going on in Brussels, should look for their appropriate European

umbrella and, if possible, join it. The anti-discrimination programme is not the only opportunity to get funding for projects, there are many other programmes.

You will find detailed information on all these subjects in various publications of ILGA-Europe also available at our web-site: www.ilga-europe.org.

Other useful web-sites:

<http://europa.eu.int>

www.socialplatform.org

www.act4europe.org