

# Prohibiting discrimination... or not really ?

by [Malin Björk](#)

The European Union does not know which way to go – just that it is not prepared to take any big leaps forward...

When the Amsterdam Treaty was adopted as the basis for the European Union process, the possibilities to improve EU legislation banning different forms of discrimination were strengthened. While equality between women and men to some extent had been on the EU agenda since the 70s (only referring to equality in relation to employment though), the new provisions in the Amsterdam Treaty meant that it was possible to put forward EU legislation against discrimination on some other grounds. In the reality of people's lives there are of course numerous grounds for oppression, but the only ones that the EU Treaty recognises (so far) are listed in the (in)famous Treaty Article 13 - "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". According to Article 13, new legislation could also address discrimination in all and any area of life – not only in the area of employment ! Needless to say, expectations were high.

And some progress has been made, but there are differences in terms of what level of protection against discrimination people have through the current EU legislation. Today, the legislation prohibiting discrimination based on 'racial and ethnic origin' goes the furthest, followed by legislation against 'sex'-based discrimination. The remaining grounds of discrimination (religion or belief, disability, age or sexual orientation) have a less important protection in current EU legislation. Many migrants organisations and anti-racist movements, associations and networks gathering people that work for the rights of disabled, lesbians, and gays, have therefore been demanding additional EU legislation to improve the rights and protection for a large number of people living in the EU.

## A One-catch-all Legal Outfit ?

In the process of advocating for new and better legislation, the big strategic choices for many associations were whether to demand an EU law (Directive) that gathers all grounds of discrimination in one and the same legal text (the one-catch-all approach), or whether to demand different Directives for the different discrimination grounds.

If it was politically possible to have several far reaching specific Directives – one for each ground of discrimination – that recognise that different types of discrimination also require specific measures - most associations and networks active in the field, trying to influence the EU policy-makers, would most probably go in that direction. Specific laws would give visibility to different inequalities, naming them, and identifying the injustices further than a more generic text does. However, the reality is that there is

simply not enough political will to really look closer and be more specific about the different forms of oppression – and even less on how they interact and intersect !

More for strategic reasons than because of a desire or belief that one piece of legislation is the best thing in absolute terms (if there ever is any such thing as absolute terms in EU pragmatico-pragmatic multilateral politics ?), most organisations advocated for a one-catch-all Directive, agreeing that one directive would stand a better chance to be adopted rather than fighting through legislation one by one. The International Lesbian and Gay Association (ILGA) – Europe for example judged the chances minimal to get a specific new EU Directive prohibiting discrimination of lesbian, gays, and transgender persons through the political process. And rightfully so ! However, it seems like a catch-all Directive - covering ‘sexual orientation’, grouped together with other grounds of discrimination such as disability, age, and religion and belief – would have a real possibility to be accepted. And this is currently probably the only strategic possibility to achieve new and better protection for LGBT persons in Europe.

Just before the summer a new proposal for EU legislation, prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation was finally presented by the European Commission. The proposed Directive, championed by the Czech Commissioner in charge of equality politics, Vladimir Spidla, has quite a wide scope, and aims to prohibit discrimination in the fields of social protection, social advantages, health care, education, and access to and supply of goods and services.

### **Exemptions, exemptions, exemptions...**

But (surprise, surprise ?) the exemptions are, to say the least, significant. To give but some examples, discrimination against disabled persons is compromised by the clause of ‘disproportionate burden’ and ‘fundamental alteration’, which means that measures to avoid discrimination should be taken unless they impose a ‘disproportionate burden’ or require ‘fundamental alteration’ of social protection and education systems, health care, etc. This obviously opens up for arbitrary interpretations. There are also restrictions to the right to equality for disabled people in several areas, such as in education and in access to financial services. Moreover, the proposed legislation allows for unequal treatment on the grounds of marital and family status. In practice this means that LGBT persons and their children still can be treated differently (i.e. discriminated against) when it comes to civil rights such as adoption, partnership, marriage laws, and reproductive rights. Another exemption is that in matters of nationality or matters related to immigration, the antidiscrimination legislation would not apply. And as with the gender equality directive, there are important exemptions that in practice allow for banks and insurance companies to continue to use discriminatory formulas in offering their services...we wouldn’t want to upset the big financial players, would we ?

Another key critique against the proposed text is that it is far too vague, and that it gives room for all kinds of interpretations on what is and what is not actually a discriminatory practice in Europe. For

example, given the vagueness on the provisions on equality for disabled persons, and the lack of clarity of what all the exemptions actually mean, it seems as if the disability groupings will have to spend the next ten years in courts around Europe to try to clarify what rights the new Directive actually ensures. And the ones that ultimately have the right to interpret what the text means are 27 appointed judges in the European Court of Justice – all white, and out of which currently only 3 are women (I believe this to be a record by the way).

### **Consequences of a one-catch-all approach ?**

With the new proposal for a common EU anti-discrimination Directive that covers several grounds of discrimination, it is clear that the EU is moving towards a common legal framework for all forms of discrimination. It is hard to see today what this move will actually mean in the longer run when it comes to the effectiveness of politics and actions against inequalities.

A common legislative framework does encourage also an institutionalisation of this approach, where gender equality bodies, anti-racist monitoring mechanisms, and other equality mechanisms would/could be merged together in one institution. In the best of scenarios, this change would increase the institutional capacity and create opportunities to make some reality out of the more academic perspectives on ‘inter-sectionality’ – promoting the understanding that people’s realities are not unidimensional, but that we live in different contexts in which different power asymmetries are at play, creating an intersection, a contextual situation of discrimination/oppression (or privileges) that can be based on colour, class, gender, abled-bodiness or disabled bodiness, etc. If this would be the consequence of a common legal framework, then we will be better equipped to respond to people’s real needs and lives.

But given that the political ambition and intentions behind the EU anti-discrimination legislation are light-years away from such a process, I am convinced that there will be no mandate or capacity whatsoever for this kind of potentially transformative politics. So we are left with a much less seducing (but more realistic) scenario, where the One-catch-all legislative strategy is simply a streamlining process, where all ‘problematic’ persons and ‘issues’ are brought together in one well-contained bin. Where implementation measures are limited to sweeping equality-for-all campaigns, and where the legal proceedings will continue to breed a compartmentalised understanding of inequalities.

Maybe there is also a scenario somewhere in between ? In my view, the reality and the impact of the new legislative framework will depend less on the institutions (equality bodies or courts) and more on the actions taken by the broader movements, networks, and associations that can put pressure on all players when it comes to implementation of the EU antidiscrimination measures, and going even further, towards the establishment of more pro-active EU equality seeking politics.