From Rome to Amsterdam and beyond: reinforcement of protection

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I. From Rome to Amsterdam

In the early years of European integration, the fight against discrimination as such was not an item at the agenda of the European Communities.
The Treaty of Rome contained only two, very specific non-discrimination clauses: the ban on discrimination on the basis of nationality and the famous article 119 about equal pay for equal work for men and women.

Both provisions have to be seen as instruments for the building of a common market.
The non-discrimination clause referring to nationality prohibits discrimination between citizens of the member states. This is a logical consequence of the goals of free movement of goods, services, persons and capital within the Community. Third-country nationals were not protected by this provision. Their position inside the Union remains controversial until today – both legally and politically.
Equal pay for women and men was seen as a social condition necessary for the economic objective of fair competition - not as a question of fundamental rights. Nevertheless, equal treatment legislation has grown into a rather developed structure of nine directives reaching into all corners of employment and labour market policy and social security. It had and still has an enormously important influence on the legal position of female workers in the EU and determines the policy options of national governments. Sex equality legislation, however, has until now been an rather isolated body of EU-law, with few spill-over effects on other types of anti-discrimination law.

Until the early nineties, the fight against discrimination at large was seen as a question of human rights, that by definition was not to be handled by the EU and gladly left to the Council of Europe and especially to the ECHR , and to the United Nations with its political approach at a global level.
In the nineties, the issue of 'new' discriminations, i.e. discrimination on other grounds than sex, reached the European agenda. Rather quickly this resulted in them being giving their place in the Treaty of Amsterdam (TEC, article 13).

In my view, mainly three factors can explain this rapid change:

(1)
New social problems got political recognition as suitable case for treatment.
The problem of racism became too visible to be ignored by the EU any longer, be it only for its links with immigration and asylum policies and employment and labour market issues that had already reached the EU agenda. EU institutions became under pressure to promote integration of ethnic minorities.

(2)
Effective lobbying by NGO's, by the European Parliament and some coattail-riding.
A NGO coalition promoted the idea of a Directive against race discrimination and got widespread support from civil society and from the Commission and the European Parliament. Other interest groups joined in and added political legitimacy to the fight against discrimination esp. on the grounds of disability and sexual orientation. The European Parliament played an important role here. (eg. the Roth-report, February 1994).

(3)
Political entrepreneurship at the European Commission.
Officials at the European Commission for whom the issue of gender equality had lost its sex appeal, were looking for new challenges. They lend a sympathetic ear to NGO's lobbying to get new forms of discrimination on the EU agenda. They did their bit behind the screens and put out a helping hand by also financially supporting these new NGO networks.

The final result was the inclusion of Article13 into the TEC at the Amsterdam Summit. New social problems had come to the surface and got political legitimacy, helped by different political actors, promoting the interests of their constituencies, their professional clout or institutional scope. No member state could afford to oppose this proposal in the end, nobody wanting to be exposed as opposing anti-discrimination measures. But the governments of the member states kept their final say.

The reluctant consent of the member states, however, can been seen at least in two elements of the text adopted.
First, it brings only a legal basis for action, if member states wish to take such action. Article 13 has no direct effect, does not oblige member states to prohibit discrimination.
Second, the decision-making procedures might curtail too swift progress. The Council has to decide by unanimity and the Parliament has only an advisory role.

II. The two new Directives

This background also explains the quick start of launching concrete legislation. Awaiting the coming into force of the Amsterdam Treaty, the Commission already began preparing new legislation. After wide consultation among academics and NGO's, *inter alia* at a big conference in Vienna in December 1998, two draft directives were prepared, one on race discrimination and a second directive on discrimination on the basis of religion, disability, age and sexual orientation.

The young progressive Commissioner for Employment and Social Affairs, Ms. Anna Diamantopoulou therefore could make a quick take-off, by having the Commission adopting the drafts already in November 1999 and sending them to the Council and the Parliament.

The decision of the Commission to table two draft directives that differed in scope and in level of protection offered has been criticized a lot. This produced the so-called '*equality hierarchy*'. Even worse, sex discrimination was left aside for the moment, in my view a serious political and tactical misjudgement. I will come back to this in a moment.

The story of the very quick adoption of the two new draft Directives in 2000 has often been told. In February 2000, Jorg Haiders Freedom Party had joined the new coalition government

in Austria; this caused a lot of political embarrassment among political leaders in Europe. Both the Commission and the Council wanted to show the EU's political will to combat racism and xenophobia. The Portugese Presidency made finalizing the negotiations before Summer 2000 into a point of honour - and succeeded to get the Racial Equality Directive adopted on 29 June 2000. The other directive, the Framework Directive, covering the other grounds mentioned in Article 13 (with the exception of sex) followed in November of the same year – another example of the bandwagon effect.
The deadlines that the Council had set for itself gave the Parliament some negotiating power – remarkable because in this case its formal role was only a consultative one.

During this seminar, you will be examining substance of the two Directives from a legal point of view. I therefore will only make some remarks from a political perspective about the anti discrimination package as a whole.
The present situation in EU anti discrimination law reflects a picture of a hierarchy of discriminations, with race discrimination on top. Apparently, *some animals are more equal than others*. This is the so-called 'equality hierarchy': EU anti discrimination law itself discriminates between the various grounds of discrimination, in the material scope of the ban on discrimination, in the permitted exceptions and the enforcement mechanisms required. As a result, different groups enjoy a different standard of protection against discrimination.

The Directive against Racial Discrimination has a much broader material scope in comparison both with the existing body of sex equality legislation and (even more so) in comparison with the Framework Directive covering the other non-discrimination grounds (religion, disability, age and sexual orientation).
Race discrimination is prohibited in employment and social security, but also in social protection, health care, social advantages, education and in the access to goods and services. Sex discrimination is forbidden in employment and social security, the other discriminations only in employment.

Commissioner Diamantopoulou had announced already in 2000 her intention to table new legislation on sex discrimination outside the labour market, but had tremendous difficulties to get her colleagues at her side. She had to withdraw an earlier draft, that had included advertising and the media and taxation. Apparently, she had demanded too much and found the limits of Community competences and political realities on her way. The in-fighting between different units inside the Commission took more then three years. An earlier move to extend the protection against sex discrimination to the same areas as the protection against race discrimination would have been much more difficult to challenge. Now the momentum is gone and the political support for new legislation against discrimination has fallen apart. The recent proposal for a new Directive accepted by the Commission is limited to extending the scope of prohibited sex discrimination to the area of goods and services. This will correct the existing imbalance only in a very marginal sense.

The lagging behind of sex equality legislation is a political absurdity. Discrimination on the basis of sex (or gender) has been on the EU agenda for decades and it concerns in principle a larger group of citizens than does any other form of discrimination in Europe. Sex discrimination as a political issue apparently suffers from the 'dialectics of progress'.

In addition, the level of protection that the racial equality directive offers is higher than the protection by the framework directive. The latter lacks the obligation to establish a body for the promotion of equal treatment and contains more safeguard clauses and exceptions.

Taken together, all these differences create the impression that the EU has a pecking order of types of discrimination. This runs counter to the very concept of equality as a human right that in my view demands in principle affording an equal degree of protection from discrimination on different grounds. An anti discrimination law that in itself is discriminatory gives the wrong message.

Therefore, I am glad the Commission has announced for this Spring the publication of a Green Paper, in which stakeholders will be asked for their views on how to develop a coherent anti-discrimination policy and for alternatives for moving forward.
In my report on the human rights situation in the European Union, adopted by Parliament January 2003, I had asked the Commission to publish a White Paper on the EU's future strategy for equal treatment and to develop such a coherent approach. I still hope that will be the next step.

III. Beyond the Treaty of Amsterdam

In the meantime, we have witnessed the Convention on the Future of Europe finalizing its draft Constitution and the European Council failing to agree on it last December.
It is still unclear, if, when and how the European Summit wil be able to agree on a new constitutional treaty. When agreement will be reached, it is hightly unlikely that the articles on anti-discrimination policies will change. So, we are relatively safe in taking stock of the gains and losses realized.
Looked at from the prespective of the fight against discrimination, the draft Constitution contains some important steps forward, but also hold a big dissappointment. The dissapointment is that changing the cumbersome decision-making procedure has turned out to be very difficult. But, let´s count our blessings first.

1. *Equality* and *non discrimination* are explicitly mentioned among *the values* of the Union (Articles I-2). This is more then window dressing, because this article on values serves as a reference tool when it comes to accession by new member states and in monitoring the human rights record of current member states. The fight against discrimination is also explicitly mentioned as one of the Union's objectives (article I-3).

2. *The Charter of Fundamental Rights* is included in the Constitution (as Chapter II) Articles II-21 prohibits discrimination on a whole series of grounds, without any specific indication of the material scope of this provision. Politically speaking, such a clause in the EU constitution underpins a comprehensive approach against discrimination.

3. Non-discrimination has to be *mainstreamed* in all policy areas of the EU, including Justice and Home Affairs and the Common Foreign and Security Policy (Articles III – 2 and 3). This is a novelty.

4. Legislation against discrimination is still subject to unanimity in the Council, but the European Parliament has gained the new power of consent in stead of consultation. The right of consent can be a powerful instrument.

5. Non-legislative measures can be decided by qualified majority voting (QMV) in the Council plus co-decision of the European Parliament. This rule applies to so-called 'incentive

measures' including their 'basic principles'. We have to think how to exploit these new rules to the maximum possible extent.

6. And, last but not least, there is the famous *passerelle clause* (art. I-24.4). This clause allows for a change to the normal decision making procedures (QMV in the Council and co-decision by the EP) to be decided without changing the Constitution itself. An unanimous Council decision would do the job.

All this may seem rather technical, and indeed technical it is. Behind this, however, there is a political struggle to be seen..
European anti-discrimination legislation is a very touchy and delicate issue. It is central to the idea that the EU is or should be first and foremorst a community of values, in stead of only an internal market. No government likes to be seen as blocking progress when it comes to fighting discrimination. On the other hand, no government is very keen on loosing their final say on their own national anti-discrimination approach. Governments and European policy-makers are lobbied by business interest groups and by NGO representing minority groups.

The forces in favour of a coherent and more effective set of European norms against discrimination have much to gain form the new draft Constitution. The coalition of scholars, politicians and NGO's that fought art. 13 into the Amsterdam Treaty therefore must keep the pressure on. The fight against discrimination and unequal treatment can never be taken for granted. Seldom victories are won without any effort. Seldom people in power positions give in because we are behaving so nicely. The fight against discrimination in Europe has only just begun.

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