Casting Stones in the Blue and Yellow Glass House

Equality measures for Sweden! – Ideas for Europe?

NOT FOR PUBLICATION. Yet!

This is basically a translation into English of an excerpt from the Swedish government inquiry – THE BLUE AND YELLOW HOUSE: STRUCTURAL DISCRIMINATION IN SWEDEN (SOU 2005:56) of the section proposing the use of anti-discrimination clauses in public contracts in chapter 13.

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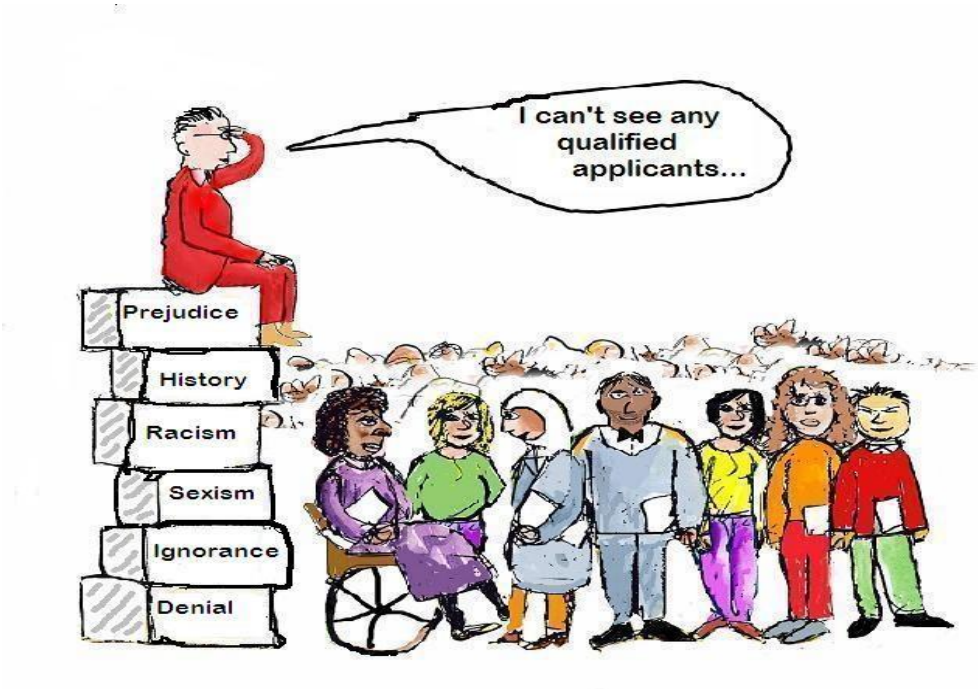

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CHAPTER 13 Introduction

Several years ago I headed a government inquiry into structural discrimination/institutional racism in Sweden. This work resulted in the inquiry entitled *The Blue and Yellow Glass House: Structural Discrimination in Sweden* (*Det blågula glashuset: strukturell diskriminering i Sverige* SOU 2005:56). The most effective measures have a focus on discrimination, rather than on the ground. This is in particular the starting point for the proposal for the use of an anti-discrimination clause in public contracts. Such clauses need to cover all grounds – including disability. At the same time it is also important to ensure that accessibility issues are covered by the contract itself. However, this was not the focus of the clause proposed in the Glass House.

Up until the time that the Glass House was published, many who worked in the fields of immigration, integration, minority rights, ethnic diversity and non-discrimination etc. often seemed to lack ideas as to what could be done to promote equality and counteract discrimination. At best they talked about strengthening the laws against discrimination – while at the same time being sceptical in regard to law as a vehicle for social change. At worst there was an overly simplified focus on changing attitudes through education – particularly about other cultures, religions and peoples.

There seemed to be little research on the idea that social change that involves the promotion of equality, both in theory and in fact, takes place in a context where there is an interplay between research, civil society mobilization and law and public policy.

While not having the time to carry out such research, I was nevertheless able to develop and recommend a number of measures that could be carried out in Sweden, both at a national and local and regional level. These measures and the thrust behind them were based on an analysis of the measures that exist in various countries that are assumed to be effective.

In response to the policymakers who seemed to have little idea as to what could be done to counteract racism and discrimination, I ended up recommending more than 40 measures. Beyond establishing that there are

a wealth of measures that can be undertaken, I hoped to indicate to the groups that are the targets of racism and discrimination that there are measures that they can unite behind. This in itself, mobilisation of the targets of discrimination, is a factor that I have assumed is necessary for ensuring that policymakers not only adopt measures but actually implement them.

Since I finished the inquiry, I have participated in conferences and seminars not only in Sweden but throughout Europe. The focus has usually been on an analysis of change, the need to bring pressure on policymakers, the need to mobilize the targets and the need to focus on the introduction and implementation of concrete measures. The positive response in European contexts has led me to conclude that the analyses that apply to Sweden, as well as the measures proposed, to a large extent can inspire similar analyses and measures throughout Europe.

The proposal for a government regulation requiring anti-discrimination clauses in public contracts

Structural discrimination due to ethnic or religious belonging is primarily a question of the ethnic power relations that exist in a society. **This applies to disability discrimination as well.** These power relations are based on the society's handling of and ability to deal with the "others" – in this case the ethnic and religious minorities. Who is affected and how varies to a certain extent from country to country, but the main tendencies are the same.

Based on the knowledge, reports and experiences that I have gathered, both in Sweden and in other countries, I have concluded that there are three important factors that contribute to the development of effective measures against structural discrimination.

These factors are

- Clear political leadership in the work against discrimination
- A strong civil society movement against racism and discrimination **OR EG DISABILITY DISCRIMINATION**
- Effective legislation and other complementary measures for equality and against discrimination.

These conclusions are mainly based on an analysis of the work with gender equality policy in Sweden, and the work on equality concerning ethnicity, gender and disability in Great Britain, Canada and the US.

I conclude that these three factors clarify the existing policy weaknesses in Sweden and thus the measures that need to be implemented. It is important to note that these measures are not independent of each other but that they affect, strengthen and combine with each other. There is no single magic solution involved in counteracting structural discrimination. At various levels within society, both greater and smaller measures are needed, both in terms of policy and operational methods.

There have been various questions about the dividing line between measures designed to counteract discrimination at the individual level and those that are aimed at counteracting discrimination at the institutional/structural level. These questions are based on the belief that there is a clear borderline between the individual and structural levels. However, in my view discriminatory actions are carried out by individuals within the framework of a structure, which in turn recreate the structure. It could be said that there is an interplay between individuals and structures. I see this interplay as a flow where individuals form structures, and structures form individuals.

I have also concluded that even if there are differences between various power structures (for example, the gender power structure and the ethnic power structure) and various discrimination grounds, there are also similarities and clear indications that the power structures intersect and interact and depend on the existence of the different structures. In line with this it can be noted that the development of effective measures has often been related to a more comprehensive view of discrimination. This comprehensive view has led to a situation where the targets of various types of discrimination have been able to contribute to the formulation of better legal tools as well as the placement of demands in regard to those

with the power to discriminate. It is these countries (Canada and the US) that have cleared the path for the development of a shift in the burden of proof, higher demands for damages, equality plans, affirmative action and anti-discrimination clauses in public contracts.

One of my conclusions is that the inability to see the common interest between grounds has been one of the major factors in the weak development of legislation and other tools for counteracting discrimination in Sweden.

This is why, for example, it is only recently that a more serious connection between equality and public contracts has developed in Sweden. At least during the 1980s and early 1990s, gender equality was the only focus, which meant that there was never enough political pressure to put it on the agenda. A major change has occurred once anti-discrimination clauses started to be presented that covered all grounds of discrimination covered by the law. While their effectiveness can be questioned, it is today much harder for policymakers to openly reject the connection between equality and public contracts.

Clear political leadership

The preceding immigrant policy and the current integration policy have failed, in my view, in regard to placing demands concerning equality and equal rights and opportunities, respectively, in a central role. During the period covered by the earlier immigrant policy, the introduction of laws against ethnic discrimination in working life was rejected due to the reasoning that ethnic discrimination did not occur within Swedish workplaces. The denial of discrimination has been particularly strong. Sweden has fought against racism and discrimination – in other countries.

The reason that politicians long denied the relevance of ethnic discrimination in Sweden and refrained from putting discrimination into focus, is the connection to power. If discrimination and the realization of equal rights are put into focus, it is necessary that those who lead this process are willing to challenge those with the power to discriminate and the power to counteract discrimination. This in turn would mean that the actions of employers, unions, civil servants and politicians are put into focus. The same reasoning applies to disability discrimination as well.

Empowerment

In countries that have developed a more effective work against structural discrimination, there are not only stronger institutional actors but also stronger actors in civil society that represent the targets of discrimination. They have played an important role both in placing demands for change, helping to formulate the measures adopted, and contributing to implementation and follow-up of those measures.

Effective measures carry cost risks
Earl Warren, Chief Justice of the US Supreme Court (1953–1969) made the following comment on the relation between attitudes and behaviour:

There was ‘an invidious view which is now held by many: you can’t wipe out racial discrimination by law, only through changing the hearts and minds of men’. Warren disdained that as ‘false credo. True, prejudice cannot be wiped out, but infliction of it upon others can’. (Cray, 1997:107)

The idea expressed by Warren is that effective laws and other measures can lead to a change in behaviour, in other words many individuals can be convinced to refrain from applying her/his open or underlying prejudices – if there sufficiently high costs or cost risks related to the behaviour. This is the lesson that can be learned from the US since the 1960s. Behaviour has changed as cost risks have become more apparent – whether in the form of damages or anti-discrimination clauses in public contracts.

Proactive measures

Anti-discrimination clauses in national public contracts

I propose: that the government adopt a regulation that specifies that all government contracts shall contain an anti-discrimination clause which specifies that the government authority retains the right to cancel a contract in cases where the contractor fails to follow the laws against discrimination.

The laws in the US against discrimination in combination with the clauses in federal contracts for promoting equality (contract compliance/affirmative action) have had measurable positive effects

concerning the improvement of the position of white women and ethnic minority men and women on the labour market. (Leonard J. *The Impact of Affirmative Action on Employment*, Working Paper No. 1310, National Bureau of Economic Research, March 1984, abstract and p 14. Leonard J. (1985) *The effectiveness of equal employment law and affirmative action regulation*. Working Paper No. 1745, National Bureau of Economic Research. Leonard J. (1994) "Use of Enforcement Techniques in Eliminating Glass Ceiling Barriers", Report to the Glass Ceiling Commission.) This also seems to apply to Canada. In England, similar clauses have had positive effects. Given the enormous economic resources that are at issue in regard to public contracts in any country, it is highly probable that businesses are sensitive to the demands that are placed in public contracts. This will be particularly true if it is clear that the clauses have not been introduced mainly for their symbolic value.

This can be compared to the interest in following the requirements of e.g. the Swedish Law on gender equality on the labour market. The relevance of workplace gender equality plans to gender equality can be questioned against the background of a 1999 Sweden Statistics report *Jämställdhetsplanernas betydelse för jämställdheten*). The law requires employers with 10 or more employees to produce an annual gender equality plan. In 1999, according to Sweden Statistics only 22% of the covered private employers had a gender equality plan. The private employers had the following distribution in regard to the number of employees: 10-49 employees 17%, 50-199 42%, 200 or more 71%. The equivalent figure for public sector employers was 73%. It is easy to draw the conclusion that employers who want to participate in the public procurement process will become very sensitive to the requirements of the law once an anti-discrimination clause is put into public contracts. The number of plans will definitely increase. However, it should be kept in mind that the existence of a plan does not necessarily lead to anything.

The value of Swedish national public contracts amounts to more than 100 billion Swedish Crowns annually (about 10 billion Euros). Even if the clauses only lead to more effective efforts against discrimination among a portion of the companies involved, the overall effects should be substantial in regard to those who today are the targets of discrimination.
The government needs to introduce an anti-discrimination clause into all public contracts. The best means for doing this is through a government regulation that specifies the minimum contents of such a clause that all government authorities are required to use. The issue has been under

discussion for many years. As a rule government authorities have either done nothing or have introduced clauses that at best have a minimal symbolic value. Leadership is required. Such a regulation would also put all businesses on notice concerning the contents and meaning of such a clause. Instead of proposing the more extensive demands placed in Canadian and US public contracts my proposal is the minimum that should be accepted. However, its effects should be evaluated in a few years to determine if more extensive demands are needed. I have formulated the following regulation.

All government authorities shall include the following anti-discrimination clause in all public contracts:

§ 1. The supplier shall throughout the contract period, in his business activities in Sweden, follow the applicable anti-discrimination laws. The laws currently referred to are Article 141 of the EU Treaty, § 16:9 of the Swedish Penal Code, and the Discrimination Act (2008:567).

§ 2. The supplier, during the contract period, has a duty, at the request of the contracting entity, to provide a written report concerning the measures, equality plans etc., that have been undertaken in accordance with the duties specified in § 1. The report shall be submitted to the contracting entity within one week after a request is made unless some other agreement has been reached in the individual case.

§ 3. In his or her contracts with sub-contractors, the supplier shall apply the same duty to them as is specified in paragraph 1 above. The supplier shall be responsible to the contracting entity for a sub-contractor's violation of the anti-discrimination laws specified in paragraph 1. The supplier shall also ensure that the contracting entity can upon request be informed of the sub-contractor's measures, plans etc. in accordance with paragraph 2.

§ 4. As it is of very substantial importance to the contracting entity that its suppliers live up to basic democratic values, a violation of the duties in §§ 1-3 shall constitute a significant breach of the contract. The contracting entity therefore has the right to cancel the contract if the supplier or a sub-contractor violates the conditions in paragraphs 1-3. However, the contract will not be cancelled if the supplier

immediately remedies the situation or undertakes other measures with the purpose of achieving compliance with the laws specified in paragraph 1, or if the violation is considered to be insignificant.

The model for this regulation is the clause that was adopted by the Stockholm City Council 24 January 2005.

The Stockholm Executive Council declaration 2005:7 is entitled: The use of Stockholm's public contracts as a means to counteract discrimination – proposal for an anti-discrimination clause. The Stockholm clause is expected to send a clear signal to contractors that compliance with Swedish anti-discrimination law is required. The undertaking of the contractor is to apply to all of the contractor's business activities and all contracts regardless of if they involve goods, services or some combination. The clause also applies to sub-contractors. The clause also establishes the city's right to follow up the contractor's ongoing compliance with the laws. Finally, the clause specifies that the city retains the right to cancel the contract in cases where the contractor violates the clause. At the same time the city emphasizes that its main purpose is not cancellation of contracts but the creation of an incentive to comply with these laws in a manner that underlines the importance of the issue. For example, in the US, even though the clauses seem to have led to substantial effects on improved labour market opportunities for white women and ethnic minority men and women, very few contracts have actually been cancelled. The same applies to Canada.

The government needs to issue a regulation that sends the same clear signal in regard to all national contracts that has been sent by the Stockholm city government to its various divisions as well as to the contractors that want to do business with Stockholm.

The proposal here is the result of a long policy process in which various ideas have been the subject of discussion and analysis (Lappalainen P. Integrationsverket. (2000) *Ingen diskriminering med skattemedel! Avtalsklauser mot diskriminering vid offentlig upphandling – No discrimination with public funds! Anti-discrimination clauses in public contracts*).

The issue has been the subject of two other government inquiries. The introduction of such clauses was already proposed in *Räkna med mångfald!* (SOU 1997:174) as a complementary measure to a new law

against ethnic discrimination in working life. This inquiry pointed out that it was possible to specify in a contractual clause that a supplier/contractor guarantees that they will carry out active measures to promote ethnic diversity as specified by law as well as undertaking to follow the existing anti-discrimination laws in regard to employees and job applicants as well as customers. Additional investigation was recommended so that a more unified proposal could be developed. It was assumed that it would be better for contractors if there was a single basic clause used in all national public contracts rather than be faced with a multitude of clauses that vary depending on which government authority the contractor is dealing with.
Later in *Mera värde för pengarna* (*More value for the money* SOU 2001:31 s. 21) the public procurement committee pointed out, among other things, that:

"There is no doubt that social clauses, for example in the form of anti-discrimination clauses, can be included in public procurement contracts. One condition is that they have been included in the bidding process (förfrågningsunderlaget) and that the clauses are not themselves discriminatory. The limitation that exists is that such clauses cannot be "exported", i.e. they cannot be applied to business activities that are outside the country in which the contracting unit is located."

The committee pointed out that an anti-discrimination perspective could even be brought into other parts of the contracting process. However, I have concluded that these other parts of the contracting process are not currently suitable for a uniform analysis or reform. At the same time it would naturally be positive if different contracting units introduce an anti-discrimination perspective into, for example, the specifications related to the focus of the contract. These types of issues can be more contract specific. Ensuring accessibility for the disabled is important in regard to building contracts while bilingual services can be important in regard to health services that are contracted out to the private sector. It is also a well-known fact that, for example, a number of the breakthroughs concerning the development of computer programs that are accessible in regard to various disabilities were the result of the demands placed in a huge public procurement contract in the US.

To summarize, it should be enough for now if the government introduces a uniform clause in all national public contracts. Other steps beyond this should be developed by the authorities themselves given due regard to the specifics of their tasks and the particular contract.

As a result of the inquiry above, the government proposed an amendment of the law on public procurement (LOU) so that the law itself states that contracting units can include clauses of this type in their contracts. The amendment, which clarifies but does not change current law, had no equivalent in any directive (Prop. 2001/02:142 s. 44). The bill declared that ”the government finds it to be of particular importance that the contracting units exercise this right to introduce anti-discrimination clauses into their public contracts.” (Ibid.)

In an interpretive communication (15 October 2001), the Commission of the European Communities clarified its view concerning the possibilities for integrating social considerations into public procurement (KOM [2001] 566). In the summary the commission states that:
“It is especially during the execution of the contract, that is, once the contract has been awarded, that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives. Contracting authorities can require the successful tenderer to comply with contractual clauses relating to the manner in which the contract is to be performed, which are compatible with Community law. Such clauses may include measures in favour of certain categories of persons and positive actions in the field of employment.” (Interpretative Communication of the Commission COM(2001) 566 final, p 3)

This conclusion is a continuation and clarification of the line of thinking that the commission has been developing for many years. Already prior to the presentation of the public procurement committee’s findings, the government had given the Swedish Public Procurement Board (NOU) the task (2002-01-17) of developing examples of anti-discrimination clauses that can be used in public contracts. The NOU was also given the additional task (2002-03-27) of investigating the consequences for small businesses of the use of such clauses. (NOU 2002:1)

The NOU presented its report and proposed clause on 31 May 2002 (NOU 2002).

The NOU:s view of its own proposed clause
“According to the government, examples of clauses should be produced that are in compliance with Swedish public procurement law and the requirements of EC law. However, the NOU concluded that there doubts

concerning the interpretation of EC law and the legal basis for the use of e.g. anti-discrimination clauses" (NOU 2002:29).
The NOU pointed out its doubts concerning the commission's interpretation of the possibilities for integrating social considerations into public procurement. This was in particular in regard to the EC-court's Beentjes decision (fn 37 Case 31/87, Gebroeders Beentjes BV v. the Netherlands) and the French school case (fn 38 Case C-225/98, Commission v. France).

In other words, the government's proposal for an amendment concerning social clauses is based on the commission's interpretive communication concerning the possibilities for integrating social considerations into public procurement (KOM [2001] 566). Furthermore, the NOU asserts that the commission has wrongly interpreted the EC court's case law. There is therefore a risk, according to the NOU, that interpretations put forth by the Swedish government as well as the commission will not last. "This means in turn that the NOU:s proposed clause currently is based on an insecure legal basis". (NOU 2002:29)

EU:s public procurement directives
Today there should no longer be any doubts about the possibility of using an anti-discrimination clause within the framework of EU law. According to article 26 in the new public procurement directive: (fn 38 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004). There is an equivalent article (article 38) in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004)).

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

The ombudsmen against discrimination

The opinions of the ombudsmen in regard to the problems with the NOU proposal for anti-discrimination clause were summarized in a report sent on 2002-07-04 from the Ombudsman against discrimination due to sexual orientation (HomO) to the Finance Ministry. Among other things, the report points out that the NOU "failed to take into account the views put forth by HomO and the other ombudsmen in earlier coordination meetings with the NOU". The ombudsmen pointed out that that the NOU clause included a number of limitations that were unnecessary from a legal point of view. These limitations would mean that the clause would at best have a symbolic value. The ombudsmen's criticism led to the development of a more extensive clause that the ombudsmen and the Swedish Integration Authority agreed would be used in their public contracts. (fn 39 Presented at the Conference on Anti-discrimination clauses in public contracts at the Ombudsman against ethnic discrimination (DO), 6 May 2003.) Their proposal is examined later in this text.

Their clause clearly specifies the right to cancel the contract in cases where discrimination has occurred, that the clause covers the supplier's entire business and is to apply to sub-contractors. Furthermore, all of the anti-discrimination laws applicable in Sweden are included within the reach of the clause.

The inquiry's conclusions

The clause used by the city of Stockholm represents a reasonable balance of interests. It has mainly been influenced by the ombudsmen's clause while at the same time including the NOU:s requirement of a clear right to follow up the results related to the clause. The clause which I propose is more than merely a symbolic act. It should thus have the expected preventive effects. It should lead to a greater interest on behalf of companies in Sweden's laws against discrimination. This in turn should lead to an improved position on the labour market for those who today are disregarded due to irrelevant regard being given to such factors as sex, ethnicity, religion, disability and sexual orientation. (Even age in the future.) The clause should also contribute to an improvement in the quality of public contracts as the basic requirement of the anti-discrimination laws is that employers shall not disregard the most qualified job-seekers and employees due to irrelevant factors such as sex, ethnicity, religion, disability and sexual orientation.