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Re: "CRPD General discussion on art. 27" – concerning public procurement and non-discrimination as well as the need for comprehensive anti-discrimination legislation at the national level

This submission may be published on the CRPD website on the General Comment.

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Naturally the Committee has a focus on disability and discrimination, however, many of the underlying problems are inherent in all types of discrimination. To achieve equality an overall, and not separate, approach needs to be taken as to the discrimination protections warranted.

While the proposals concerning the general comment are significant, complementing them with a focus on these universal equality needs necessitates a more comprehensive focus on key elements that should be included within national equality laws.

Some key problems with equality legislation generally:

* A focus on equality silos (e.g. sex, race, disability, sexual orientation). This often supports a hierarchy between the grounds with an emphasis on the separate grounds rather than equality as a human right.
* Given the lack of cohesion between equality interests, opponents are able to limit the effectiveness of the legislation adopted through the failure to adopt measures that deal with procedural issues like the “loser pays” rule applied in much of Europe.
* All too often it turns out that there is little cost risk in violating the laws even when claims are successful, as too little attention is paid to enforcement and remedies.
* This also means that policymakers in Europe have been extremely hesitant about complementary tools that could increase the cost risks of discrimination, such as anti-discrimination clauses in public procurement contracts.

**Public procurement and non-discrimination**

Page 9 of the “Outline for the preparation of a General Comment on Article 27 of the CRPD (the right to work and employment)” mentions the idea of public procurement in the context of affirmative action. The idea of positive treatment concerning companies owned by disabled persons or companies that have a minimum number of disabled people employed is an interesting one.

Nevertheless, my recommendation would be that the Committee as a first step recommends the introduction of anti-discrimination clauses covering all discrimination grounds. One example would be an updated version of the clause I proposed for inclusion in a government regulation to the Swedish government in my government inquiry *The Blue and Yellow Glass House – Structural Discrimination in Sweden* (Det blågula glashuset – strukturell diskriminering i Sverige SOU 2005:56, at <https://www.regeringen.se/49bb01/contentassets/0cf1e0d4944d469bb237b6b0945d08fe/det-blagula-glashuset---strukturell-diskriminering-i-sverige-del-1---missiv-t.o.m.-kapitel-4>).

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 referred to are § 16:9 of the Swedish Penal Code and the Swedish 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.

Swedish law covers all EU discrimination grounds including disability. The Swedish legislation not only prohibits discrimination, it also requires employers to take active measures to promote equality on all these grounds. One major problem is in the lack of enforcement efforts by the Swedish Equality Ombudsman, along with unclear sanctions, which means there are basically no cost risks for a business to ignore the law, and even if found to be in violation of the law, the damages awarded are negligible. The regulation proposed above gives businesses a clear incentive to focus on the need to develop and carry out active measures, if for no other reason than avoiding discrimination claims. Even if the enforcement of the discrimination prohibition and follow-up of active measures is minimal, the clause above provides an important incentive that businesses understand – the risk of losing public contracts. In Sweden, public contracts amount to about SEK 700 billion annually.

A regulation was finally adopted by the Swedish government, but in a much weaker version than the above proposal, see Regulation on anti-discrimination conditions in public contracts (*Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt* at <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2006260-om_sfs-2006-260>). The regulation adopted is more of a recommendation with no clarity as to the clause to be used and no clear risk of sanctions built into the regulation.

If those who would benefit from a broader anti-discrimination clause – such as the disability movement, the women’s movement, the anti-racist movement and the LGBT movement – were able to work together to establish a clause like the one above in all public contracts at the national level or even the local level, it might make it easier to also gain support in turn for more specialized ideas like the ones in the General Comment under discussion.

In discussing public procurement, the General comment could also emphasize the importance of examining the aim of the public procurement contract at hand. For example, public entities need to ensure that accessibility and universal design requirements related to building contracts are included in the contracts.

Another issue would be the importance of putting bidders on notice that those who have violated the laws against discrimination will be excluded. Even in countries with weak enforcement, this kind of public notice could be somewhat effective, especially if combined with anti-discrimination clauses such as the one above.

As I see it, in Europe there is generally only a minor cost risk even if the discrimination can be proven in court. If e.g. businesses risked losing their contracts if they violate the national laws against discrimination; that would provide a clear incentive to avoid violations of the national laws, hopefully in a proactive manner. Regardless of the ground at issue, the primary problem is not getting affirmative action into place, but getting e.g. employers to realise that disregarding fully qualified people due to irrelevant factors such as disability is not a good idea. Also, often the most important affirmative action takes place when an employer uses the power that they have to proactively seek to expand their workforce, i.e. using the discretion that employers always have to make the "right" choices.

**A comprehensive UN model law against discrimination**

## Something that would help empower civil society, and thereby influence States, is a model law against discrimination that had support the UN level in regard to race, sex and disability. Some of the factors that such a model could take into account are mentioned below.

***Remedies – damages, equitable remedies***

Courts and other bodies making determinations as to whether discrimination has occurred need to have the authority to determine sanctions and remedies that are both monetary and equitable. For example, in Sweden, even if an individual discrimination case concerning recruitment is intentional or seems to be part of a larger pattern of structural discrimination, only normative damages (and not even economic compensation is available as there is no employment) are available. If on the other hand a court has the authority to issue an equitable remedy such as an order that the employer needs to report back to the court in a year concerning its recruitment results, this might be more effective in promoting behavioral change. This could lead to employers being more amenable to forward-looking settlements that include not only monetary damages for the individual but also the adoption of preventive measures such as anti-discrimination training for senior staff, testing of recruitment processes, or a review of qualification profiles for different positions.

The Ontario Human Rights Code provides a variety potential remedies that can be determined by the Ontario Human Rights Tribunal. Some examples of remedies are: monetary compensation (money), a non-monetary award (human rights training for the respondent’s employees, building an accessible entrance), or an order to promote future compliance with the Code, (develop human rights policies, training). According to the Code, public interest remedies can be ordered by the Tribunal even if they were not requested in the complaint:

Orders of Tribunal: applications under s. 34

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. 2006, c. 30, s. 5.

Orders under par. 3 of subs. (1)

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested. 2006, c. 30, s. 5.

Note that a Tribunal can even order the employer to offer the discriminated applicant a job.[[1]](#footnote-1) This is an important potential remedy. This does not seem to be the case in most countries.

It is important to note that employers seem to become more interested in and more serious about instituting proactive and preventive measures, once they are involved in an individual case. While individual complaints as well as proactive duties/measures are independently important, they also need to be seen as complementary issues.

## ***Allocation of costs of attorneys and trial fees***

Almost all civil law countries apply the rule that the losing party pays the prevailing party’s trial and attorney costs and fees. This is clearly an economic deterrent for plaintiffs, particularly in countries in which the discrimination damages awarded are minimal.

A different direction can be found in the main rule in the US, that parties pay their own costs – win or lose. In addition, in human/civil rights cases, the rule in the US is that the defendant pays the plaintiff’s cost if the plaintiff is successful, and where the plaintiff is not successful, each party bears their own costs. The losing party pays rule in civil law systems such as the one in Sweden also allows courts to essentially punish plaintiffs for bringing claims. This in turn limits the possibility of developing meaningful case law as generally only those with the power to discriminate can afford to go to court. Five discrimination cases reached the Swedish Labour Court in 2020. Four of them involved disability. Essentially all of the disability cases lost. Two of the four involved a private party who took on the risks of taking the case to court. In one case the losing party was ordered to pay the winning party’s legal costs in the amount of about SEK 233 000 (Labour Court 2020 no. 9) and about SEK 212 000 (Labour Court 2020 no. 58). Also, for employers and government agencies, the legal costs are either tax deductible business expenses or paid directly by the agency. Many discrimination claims, even when there is access to reliable evidence, are not brought due to the economic risks that would be taken by plaintiffs who often are already economically-vulnerable. Some plaintiffs in Sweden have decided to take their claims instead to small claims court, with very limited damages, as each party then has to pay their own trial costs.

Furthermore, the laws in some cases allow successful plaintiffs to have the court include an award of costs, i.e. the lawyer’s costs. This can be particularly important in cases where the expected outcome is an equitable remedy (an injunction or an order to do something), such as in the US. Disability Rights Advocates (DRA) works primarily with lawsuits focused on requiring various actors to live up to the accessibility requirements in e.g. the ADA or similar legislation rather than on lawsuits focused on damages awards.

These types of issues need to be addressed in regard to comprehensive laws against discrimination.

## ***Class actions***

The possibility of bringing class action suits provides the possibility of combining the claims into a larger action, minimizing the economic risks to plaintiffs, possibly increasing the interest of the lawyers/NGOs/public interest law firms in bringing the claims and the interest of defendants in settling cases. Employers who have e.g. systematically underpaid women and/or minorities and/or disabled persons will pay much more attention to a class action than to claims by individuals. In addition, the economic risks for such conduct become greater. Not all individuals affected by the conduct will bring claims, and not all claims will be successful. However, if a class can be created, most of those affected by the conduct will be involved. The same would apply to service providers, landlords, etc. Class actions provide a tool for dealing with systemic/structural discrimination as compared to the filing of individual claims. If the potential remedy for an individual case is e.g. EUR 100, very few discriminated persons will file a case, few lawyers would be interested, and the discriminator would probably ignore the issue. However, if there are 1 000 persons in the class, and the potential of EUR 100 000, much more attention would be paid by all of the involved parties.

## ***Legal assistance and aid***

In an ideal world, there should be somewhere that individuals can turn to receive basic legal advice for free. In addition, access to free or low cost legal representation is often essential.

The US EEOC, which has the duty to investigate every charge filed, has a hotline for individuals to call and receive advice. In contrast, the Swedish Ombudsman has almost per capita as many complaints filed, but no duty to investigate and primarily only offers general advice as given on its website. In 2019, in spite of its broad mandate and substantial budget, only four lawsuits were filed by the Swedish Ombudsman.

As to legislation concerning legal assistance and aid in discrimination cases, Ontario previously had a Human Rights Commission (OHRC) and the Human Rights Tribunal of Ontario (HTRO). Ontario found a gap between the work of the OHRC and the HTRO concerning the legal advice and assistance needed by discriminated persons. This led to the establishment of the Human Rights Legal Support Centre (HRLSC). This is an independent agency, funded by the Government of Ontario, to provide legal services to individuals who have experienced discrimination. The HRLSC provides advice and assists individuals to file human rights applications as well as by representing applicants at mediations and hearings at the Human Rights Tribunal of Ontario. Not everyone gets representation, but many do. In principle this allows the Commission to focus more on policy issues, which can but do not necessarily involve individual cases.

The lack of or at least limited legal aid is a serious issue in most countries. At least in theory legal aid systems tend to focus on those who lack resources or have limited resources. This generally applies to those most at risk of discrimination. At the same time, legal aid does not seem to be sufficient to provide support in discrimination cases. In general, there have been cutbacks in legal aid over the years in e.g. Sweden and the UK. Both systems were considered relatively expansive when they were established 50-60 years, as they were also intended to cover the middle class. This is no longer the case due to both inflation as well as cutbacks. Furthermore, as a relatively new field, discrimination law has been considered with skepticism by legal aid systems. It has also been too easy to assume that the establishment of equality bodies, whether promotional or quasi-judicial, somehow removes the need for qualified legal advice and representation. An equality body can complement the general legal system, but cannot become a substitute, particularly given its nature as a government body.

## ***Strategic litigation***

A vibrant civil society is necessary as a stimulus and check on government power in the field of equality, particularly with respect to proposing legislation and strategic litigation. One of the earliest, most visible and successful examples of the changes that can be wrought by civil society is that the of the NAACP LDF, which in particular, pursued a litigation strategy to end the system of apartheid and legal discrimination on the basis of race in the US.

Strategic litigation is not uncommon in any country. Those with power (employers, unions, government agencies etc.) seldom have difficulties in resorting to strategic litigation if it serves their purposes. Testing and challenging the limits of local, national or international legislation is one such purpose. For such actors, the risks can be minimal as the legal costs are either a business cost or a government expense. At the same time, there is some equality of arms when these actors are dealing with each other. However, for those with less power, including limited economic resources, strategic litigation (as well as other litigation) was seldom tried and came at a substantial cost risk. The NAACP litigation strategy, after many years, showed that even the less powerful could establish a voice in the courts as well as the legislature.

The strategy led not only to the *Brown v Board of Education* decision as well as many other cases; it also prepared the NAACP and others in terms of legislative advocacy. The civil rights movement, including the NAACP, had clear ideas about what anti-discrimination law should look like, the remedies, and the enforcement including establishment of equality bodies, both at the state and national levels. The laws were not the products of the NAACP, but their influence was substantial. And once the laws were adopted, the NAACP and others also became part of the enforcement process, as a healthy competition/complement to the equality body. Another lesson for civil society was that in order to win, you have to risk losing. The NAACP LDF has been an inspiration to others such as women, the disabled and the LGBTQ interests in establishing equivalent LDFs. DREDF (Disability Rights Education & Defense Fund, https://dredf.org) and DRA (Disability Rights Advocates, https://dralegal.org) are two important examples in the disability field.

Concerning the development of the details in legislation and in particular case law that has clarified the rights in legislation, much of the substance in later laws in Europe seems to have been dependent on ideas developed in case law in the US and Canada. Civil society in the form of e.g. the NAACP LDF was not waiting for new legislation or for government agencies to move in the right direction, they were asking the courts to interpret the laws in the right direction. Some examples are the development of a shifting of the burden of proof, indirect discrimination and sexual harassment as a form of sex discrimination. Public interest lawyers, together with some academics as well as civil society mobilization provided an important catalyst. In the US and in Canada it is also possible that the backdrop of civil rights/human rights provided middle-aged white male judges an added realization that the cases involved fundamental democratic rights that even they had an interest in. At least the equality silo driven laws in Europe/Sweden seem to have made it easier for the courts to deal with equality law as laws for special interests rather than as issues concerning fundamental human rights.

Due to a recognition of the need to develop case law in relation to e.g. the equality provisions of the Charter (and understanding the less litigious nature of Canada as compared to the US), Canada included equality issues as part of the Court Challenges Programme (CCP). The CCP provides funding that is necessary to the development of certain types of test cases. Civil society has had substantial influence on the administration of the CCP as well as actually bringing or intervening in the cases taken to the courts. While the program has its critics, it seems to have been a substantial success, given its longevity and the decision of the current government to restart the programme.

In part due to the CCP, civil society in Canada has built up its capacity to participate in enforcement. The Council of Canadians with Disabilities, ARCH Disability Law Centre

and the Women’s Legal Education and Action Fund (LEAF) are some examples. The US NAACP LDF was a key source of inspiration. Similarly, other NGOs have built up their advocacy both in terms of legislation as well as litigation.

Today, there is a great deal written about strategic litigation, but in Europe much of the discussion is left in the hands of equality bodies rather than discriminated groups. This is unfortunate in that anti-discrimination laws need a body of case law in order to affect norms, while the equality bodies, even those with broad mandates and substantial funding, seem confused about their role. Without a healthy competition between equality bodies and civil society organizations willing to undertake litigation, there is a substantial risk that the case law will develop all too slowly even if the legislation itself sounds fairly robust. The Canadian example shows that a complementary tool is needed in order to support the effective development of strategic litigation.

**Summary**

The focus above is on the need to strengthen national laws against discrimination through a multi-ground human rights focus. States have generally adopted relatively weak laws against discrimination. A UN model law against discrimination that sets out standards concerning all grounds in relation to e.g. damages and equitable remedies, allocation of attorney’s fees and trial fees, class actions, legal assistance and aid and strategic litigation (particularly by civil society) would provide civil society at the national level with an important advocacy tool. This could be particularly formidable if this is complemented with the approach recommended concerning anti-discrimination clauses in public contracts. This is because such clauses do not generally require new legislation, but they do require a political will at the national or the local level.

Currently, the weaknesses of more general discrimination legislation, also leads to less effective legislation concerning the rights of disabled persons. Conversely, assuming a strong human rights approach can be achieved in discrimination legislation, this will in turn strengthen the work that is more particularly focused on the rights of disabled persons.

1. Steps to Justice, Your Guide to Law in Ontario, What if I'm not hired because an employer discriminates against me?, <https://stepstojustice.ca/questions/employment-and-work/what-if-im-not-hired-because-employer-discriminates-against-me-0>, accessed 20 August 2020. [↑](#footnote-ref-1)