

This absurd legislative proposal should disappear from the agenda

By Frits Bolkestein¹

A baker was asked to bake a cake with a message on top that read: “Support homosexual marriage”. The baker responded that he would be more than happy to bake a cake, but that he didn’t want to use those specific words as his religion, Christianity, did not condone homosexual marriage. If the “Equal Treatment Directive” of 2008 had been adopted unanimously, this course of action would have put the baker at risk of having to pay a high fine.

This European directive is stated to oppose discrimination on the grounds of religion or belief, disability, age or sexual orientation. It mainly deals with the provision of goods and services, including housing living space, but does not deal with the work environment.

The first problem with this legislative proposal is that the cases of discrimination it refers to do not have a cross-border effect. Where there is no cross-border effect, there is no mandate for the European Commission to act. And it is not as though ‘discrimination’ has not received a lot of attention in the past, both at national and European levels. So if until now it has not been necessary to make a new law, then why do we need it now? In other words: this law goes against the principle of subsidiarity.

Art. 5 of the Treaty on European Union states that subsidiarity is one of the fundamental principles of the Union. This means that the Union can only act to be more effective than the Member States acting individually at a national or local level. However, the cases of discrimination this law aims to tackle will all be issues of local competence. That is why the Union, and particularly European Commission, cannot get involved. There is no legal basis for the “Equal Treatment directive”.

The argument for European Union intervening in this case is that in some Member States, the anti-discrimination laws are deficient, and such deficiencies would be resolved by enacting the directive. Perhaps it is the case that the Bulgarian law on discrimination does not have quite the same sophistication as the equivalent Dutch law. However, this in itself is not a valid reason for the EU to begin the process of creating a new directive. The Bulgarians will have to address their own legislation. This is another aspect of the principle of subsidiarity: it protects European diversity.

¹ Translation by ADF International and approved by Frits Bolkestein.

Without this principle, European law would fill all the corners and holes of the Dutch society, even the sea at rising tide on the Dutch coast line.

A second example: a man wants to rent out his house. Living space is mentioned in the "Equal Treatment directive". There are 3 candidates: a Salafi (Muslim), a person from a sect that worships the Moon and a normal Dutchman with children. Only the normal Dutchman can be easily rejected given that the Muslim and Moonie will be protected by the "Equal Treatment Directive". Another question: may a Christian printer refuse to print Islamic literature?

And further on the Moonie: the law prohibits discrimination on the basis of "religion or conviction". The Moonies would have such a 'conviction'. And it's not only them who would be considered to have a 'conviction', the neo-Nazi's would have one too.

A second, deeply concerning problem with the "Equal Treatment Directive" is the reversal of burden of proof. The directive suggests that one of the ways citizens will discriminate is by intimidation.

This would not include intimidation in the workplace, but in the provision of goods and services, including housing. Who determines if there is intimidation? The claimant, if they feel intimidation has occurred. And then the person accused of intimidation must prove his or her innocence. Not only does this go against the basic principle of the presumption of innocence ("everyone is innocent until proven guilty") but it will also be very difficult to show that a person has not been intimidating because the claimant can always insist that they felt intimidated.

These two fundamental objections – infringement of the principle of subsidiarity and reversal of burden of proof – are sufficient to make this directive disappear in the black hole of history. But there are two more disturbing details. Firstly, associations that are inclined to take up strategic litigation could either assist a plaintiff to initiate legal proceedings, or even start court proceedings themselves. Would they do that for free? Well, where a claim is successful, the claimant is likely to receive compensation, and of course there is nothing to prohibit the association from claiming part of the compensation in exchange for support provided. Secondly, member states will need to create equality bodies that monitor how citizens treat each other. After all, bureaucracy also needs to play its part.

The European Commission interferes too regularly and this directive is a clear example of that. Luckily, Commissioner Timmermans stated in his press conference on 19-05-2015: "better regulation is one of my top priorities". Small businesses share the concern that: "Brussels and its institutions are not always creating regulations that they understand or can apply (...) Better regulation is taking care of "accomplishing the ambitious goals in the most effective way"."

From January first, the Netherlands will take over the presidency of the European Union. It is a great opportunity to get rid of this absurd piece of legislation from the agenda.

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