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Policy Brief - GERMANY

The project aims

EMILIE PROJECT OVERVIEW

EMILIE examines the migration and integration experiences of nine EU Member States and attempts to respond to the new challenges that multiculturalism is facing in Europe in the early 21st century. EMILIE studies three important areas: Education; Discrimination in the workplace; Voting rights and civic participation, in Belgium, Denmark, France, Germany, Greece, Latvia, Poland, Spain and the UK. EMILIE aims to:

- track the relationship between migration-related diversity and citizenship, i.e. multicultural citizenship, across these EU countries; and
- identify whether multicultural citizenship is emerging in Europe, and if so what distinctive patterns and types can distinguished.

Case studies

EMILIE conducted three policy-related case studies in each country. The first set of case studies focused on education policy and the measures and practices adopted in dealing with cultural diversity in secondary education. The second set of case studies assessed the implementation of the EU 2000 Anti-Discrimination Directives in the different national contexts. And the third set of case studies investigated voting rights and overall issues of political participation and representation of migrant communities and ethnic minorities in the countries studied.

Definitions

(Multicultural) Citizenship: The notion of citizenship requires a self-governing political community in which individuals have rights and correlative duties enforced by law but are likely to also have a sense of shaping and being shaped by a public space that goes beyond law and politics. Multicultural citizenship debates ask how citizenship can be fully enacted for and by individuals that are culturally diverse.

Methods, data and period of reference

Each case study focuses in the last twenty year period (from 1989 till today). Data collected include policy documents, media coverage, scholarly studies, statistical data, qualitative interviews with key informants, and where it has been possible discussion groups with civil society actors and policy makers.

Focus

The project is concerned with migration-related cultural diversity and not with historical, native ethnic minorities. Special attention is paid to religious diversity and issues concerning Muslim migrants as their integration in European societies has been approached as increasingly challenging in these EU Member States.

Main findings

Discrimination of migrants in the German labour market: Legal structures that are still in place in the German labour market result in various forms of institutional discrimination towards migrants' employment opportunities. Migrants remain over-represented in low skill, low paid, and precarious jobs, and 'non-German' residents are more affected by unemployment than native Germans. Moreover, there is evidence that migrant employees and visible minorities tend to be disadvantaged in job recruitment procedures regardless of their professional qualifications and face discrimination in their work place.

Anti-discrimination law: The Industrial Relations Act (of 1952, 1970 and 2001) provides certain legal protection for discrimination in employment in the private sector. However, the first all-emcompassing German anti-discrimination law was put into force in August 2006 and incorporated the RED directives [i.e. the Racial Equality directive (2000/43/EC of 29/06/2000) and the Employment Equality directive (2000/78/EC of 27/11/2000)]. The number of court cases on issues of discrimination in the labour market on the grounds of ethnicity, 'race', religion or belief is relatively low. This is a result of the low level of awareness and information concerning the aforementioned legislation by employers, employees, and judges, as well as the lack of adequate support towards victims considering filing a claim.

Problems of implementation: Awareness of ethnic, 'racial' or religious discrimination in society is poor. There is no systematic official registration of cases of discrimination. In the past, anti-discrimination policies have been implemented on a small scale, mainly by NGOs with insufficient institutional support. The Federal Antidiscrimination Authority that is entrusted with the implementation of the law – although an independent authority – is closely affiliated with the Federal Minister for Family Affairs, Senior Citizens, Women and Youth. The board has a restricted budget and a small number of personnel. The anti-discrimination law itself requires significant reform in order to be adequately implemented.

Discrimination in the labour market and at the work place

Country of origin, length of stay, and residence status appear to be key factors that affect migrants' access to the legal labour market. Only German citizens, migrants referred to as 'privileged foreigners' who hold a special work permit; and citizens from EU-countries or the European Economic Area have free access to the labour market. Third-country-nationals are granted equivalent access to employment only after they have consolidated their work contract or residence permit. Other third-country-nationals can obtain a work permit for a specific job provided that there is no job applicant from one of the above groups. Asylum seekers and 'tolerated' refugees are generally prohibited from working during their first year in Germany; in the case of 'tolerated' refugees (*Duldung*), they are prohibited to work if suspected to be hiding their identity in order to prevent their deportation. Migrants without legal documents are generally excluded from legal work.

The legal framework that regulates certain vocational professions does not formally recognise vocational qualifications acquired in other countries, thereby essentially excluding or rendering access to certain professions more difficult for migrants.

Indirect forms of discrimination can be identified in several federal states (*Länder*). For instance, a seemingly neutral legislation which prohibits the display of any religious symbols in public service professions, particularly affects Muslim women wearing a headscarf. As a result, it excludes numerous Muslim teachers from working in their profession.

In spite of social and professional achievements that they may have accomplished, overall, migrants remain over-represented in low skill, low paid, and precarious jobs. Migrants without legal documents are in the most precarious situation as they are subject to labour exploitation and no employment or social security protection.

It is difficult to prove discrimination in the recruitment process. However, there is evidence that:

- Allegedly neutral application tests indirectly disadvantage migrants as their specific skills, and competences are not taken into account;
- People with a migration background and members of visible minorities are often rejected when applying for an apprenticeship or a job because of their 'foreigner' status, their names or their clothes (headscarves, *hijabs*).

There is little room for recourse against implicit or explicit forms of discrimination occurring during the recruitment process as trade unions and work councils have very limited possibilities of interfering at this stage of pre-employment.

Finally, as regards discrimination in the work place or in promotion procedures there is evidence that:

- Employees with a migration background and visible minorities suffer from verbal abuse by co-employees, employers and customers, and also from unfair allocations of work (e.g. are more often assigned to do cleaning and other menial tasks);
- They have lower prospects of promotion, are disadvantaged in further-education programmes and are dismissed sooner than ethnic German employees. People with Muslim backgrounds or those of African origin are affected the most.

The German General Equal Treatment Law (AGG) and its critique

The German General Equal Treatment Law (AGG) is the first comprehensive German legislation to have the sole objective of supporting equal opportunity and preventing and sanctioning discrimination. It came into force on August 18, 2006, more than three years after the deadline for transposition of the EU Race Equality Directive and there was strong opposition to it during the debates in the run-up to its adoption.

The AGG partly goes beyond the requirements of the EU-directives: It includes all six criteria of discrimination ('race'/ethnic origin, gender, religion/worldview, handicap, age, sexual identity/orientation) not only for labour law, but also for civil law, and vests the Federal Antidiscrimination Authority with the responsibility of applying all of these criteria. However, the law is deficient and imprecise in parts, and some incompatibilities with the EU-directives have been already criticised by the European Commission, by NGOs, trade unions and lawyers' organisations.

Main problems in anti-discrimination policy implementation

The main critiques regarding legislation on discrimination in the labour market refer to:

- The short deadlines provided within which to file a claim;
- The limitation of NGOs' right to participate in legal proceedings in order to defend victims of discrimination essentially contradicts the EU directive. As such, the strict definition of Anti-discrimination organisations (i.e. having a minimum of 75 members and a non-profit making status) needs to be abolished.
- The burden of proof regulation is problematic as neither the victims, nor the independent or municipal counselling offices, nor the Federal Antidiscrimination Authority are given any entitlement to access data from local or state authorities, or from private companies.
- The provision that churches can insist upon only hiring members of their own religious community as staff has been considered to be contrary to the EU-directive 2000/78/EC, Art. 4(2).
- The fact that 'language' is not included as a category of discrimination as it is not clearly an element of the category 'ethnic origin'.
- There is insufficient support for a counselling network;
- The Federal Antidiscrimination Authority has a relatively weak position.

The AGG law carries little relevance in court cases where there are no precedents of discriminatory behaviour of employers or colleagues. This is a result of the low level of awareness of both discrimination itself and the legal provisions of the AGG among (potential) victims, relevant policy makers, lobby groups and professionals.

Individuals are reluctant to file law-suits, primarily due to psychological barriers. Second, victims of discrimination need more time than the period presently defined by the law in order to decide on and subsequently prepare a law-suit. Third, due to financial barriers individuals subject to discrimination refrain from going to court. Nevertheless, self-awareness among people with a migration background is growing over the last few years and the EU-directives and the existing national legislation have gradually provided 'empowering' instruments for migrants.

Employers are reluctant to endorse legal provisions on anti-discrimination. Employers' associations are open to voluntary agreements and diversity strategies but oppose the idea of obligatory anti-discrimination measures. Moreover, research suggests that the main representatives of these associations are convinced that discrimination is overall absent in German companies.

In the past, trade unions and work councils excluded and discriminated against migrant workers through their decision-making structures. In 2006, the Confederation of German Trade Unions decided to attach more importance to the issue of racism, xenophobia and migration. Since then, trade unions are requested to implement 'cultural mainstreaming' and 'intercultural orientation' initiatives. However, this request is often 'buried' under more pressing practical issues and is still met with a lot of scepticism among functionaries and on the ground.

The Federal Antidiscrimination Authority mainly tries to pass across a 'soft' approach on equal treatment to businesses by arguing that diversity management is economically advantageous, or be presenting 'equal treatment as added value'. This strategy alone, however, is not sufficient for an effective implementation of the AGG, and the promotion of an anti-discrimination culture. Furthermore, the Federal Antidiscrimination Authority does not engage sufficiently in the development of a support infrastructure for (potential) victims.

Moreover, the 'horizontal approach' of the Federal Antidiscrimination Authority – being able to simultaneously deal with cases of multiple types of discrimination – is ambitious particularly as its powers are severely restricted by the legal obligation to forward such cases to the jurisdiction of respective Federal Commissioners. Furthermore, it downplays discrimination on the grounds of 'race', ethnicity or Islamophobia rendering it even harder to raise substantial support against such phenomena.

Also, lawyers and judges are reluctant to engage with the new law and its cases. Individual legal court proceedings showed the reluctance or even resistance of judges in acknowledging the possibility of multiple discriminations.

Media coverage of the AGG has been negative in most cases. A broad state or media campaign in favour of anti-discrimination policies has not taken place yet.

Finally, the law is ineffective in many segments of the labour market, such as in the cleaning, home caring, service or construction industry, that are characterised by a substantial lack of social rights and highly insecure labour relations. One reason for this is that the AGG does not

Recommendations and key messages

- NGOs active in this field should continue their efforts to raise awareness about anti-discrimination principles and the existing legislation as levels of awareness continue to be low. Moreover, targeted efforts should be made towards potentially more vulnerable population groups.
- Relevant agents such as the Federal Antidiscrimination Authority, private and public employers, trade unions, work councils, lawyers and judges, need to improve awareness and training on the new law and foster support for individuals who might be subject to discrimination.
- The Federal Antidiscrimination Authority is recommended to broaden its strategic focus, and in doing so, to provide support to those potentially subject to discrimination. Public authorities need to build up and support an infrastructure of counselling all over the country. They also need to develop mechanisms for the systematic registration of cases of discrimination.
- The Federal Antidiscrimination Authority needs further competences in this field and requires more extensive human and financial resources to fulfil its role successfully.
- The work of NGOs, local authorities and work councils that are already successfully active in this field should be acknowledged and supported by state authorities through additional financial resources where possible. In addition, structures and initiatives that will allow these organisations and local levels of government the possibility to increase their networking potential and share expertise and experience in these areas would also be valuable.
- Programmes offering free legal aid to victims of labour market discrimination should be provided across Germany.
- A broad state and/or media campaign in favour of anti-discrimination and equal rights policies is advised in order to increase social awareness.

Recommendations for reforming the legal framework

- Evaluation mechanisms need to be developed that will assess the extent of dissemination of information about the AGG within companies, and the implementation of company counselling services.
- Generally, efforts should be directed to improve the protection of migrants with insecure residence status. Social rights should be extended to all workers in order to reduce vulnerability to discrimination in the labour market.
- The AGG itself needs revision on the critical points listed in the relevant section above.

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For more information on the Social Sciences and Humanities Research Programme of the European Commission please see:

http://ec.europa.eu/research/social-sciences/index_en.html