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The implementation of EU Discrimination Law in the Member States

Legal Transplanting and Compliance



Overview

- Non-Discrimination in different legal cultures
- Different modes and details of implementation
 - With typical problem fields
- Some positive aspects
- Conclusion

Non-discrimination in different legal cultures

- The Anglo-American world
- Continental Europe
 - (Roman and Germanic Countries)
- Scandinavian Countries
- Former socialist countries
 - (not one bloc any longer, of course)
- Do the directives mirror this diversity?

„The“ Anglo-American world

- Common law as common heritage
 - Less inclined to systemic considerations
- High proportion of „ethnic minorities“
- Home of “multiculturalism”
- Longstanding history of anti-discrimination law
 - Development in four stages

Continental Europe

- Constitutional approach to non-discrimination
- “republican” tradition (France) and tendencies to acculturate
- Implementing international covenants against discrimination via criminal law
- Reluctant implementation of some concepts

Scandinavian Countries

- Longstanding tradition in Gender Equality
 - Arguably geared towards mainstreaming and labour market participation
- The ombud tradition
- Less of a tradition in controversial adjudication

Former socialist countries

- Never were one „bloc“ really
- Often based on continental traditions
- „Socialist“ legacy: international law of (nominally) high relevance
- Partly specific „minority problems“
- Compliance with non-discrimination aquis as a condition for accession

Do the Directives mirror this diversity?

- The English legacy:
 - Single issue approach
 - Even the „umbrella directive“ 2000/78/EC contains specific provisions for most grounds
 - No differentiation along systemic categories of law
 - Focus on effective individual remedies
 - Stuck at the „third wave“ level
- The Dutch legacy (similar to Scandinavian tradition)
 - Pragmatism
 - Role for institutions and civil society

Different modes of implementation

- Ground specific versus general legislation
- Integrated versus specific legislation
 - Specific provisions for different fields of law ?
 - „Employment plus“ ?
- „Remedies“ and consequences
 - individual justice model and beyond
- Enforcement (incl. associations and „bodies“)

Ground specific versus general

- Different approaches
 - Specific enumeration of grounds (closed list)
 - Non-exhaustive list of „forbidden grounds“
 - General equality clause
- Most MS have reverted to legislation covering more than one ground
 - Notwithstanding „hierarchies of equality“
 - Non-exhaustive lists in Finland, Hungaria, Latvia, Poland and Slovenia

Hierarchies of discrimination grounds

- EU Law:
 - Racist discrimination deserves most attention
 - Gender follows suit (a large step behind)
 - Religion and belief & age enjoy weakest protection
- Most Member States copy EU-Law hierarchies
 - While alleviating the „discrimination“ of all grounds but race
 - The sexual orientation ground has proven most problematic
- Scandinavian Countries:
 - Pronounced „backlash“ in the realm of gender equality law

Integrated versus specific

- Pieces of legislation
 - Constitutional clauses (often prior to EU obligations)
 - Criminal law, employment law, and other specific
 - Anti-Discrimination Act or wider Act
- Forms of discrimination
 - Prohibitions differ across fields of law
 - Often, directives are copied
 - Sometimes, other concepts, such as assumed and associated discrimination, are added

Definition of discrimination

- Direct and indirect discrimination
 - Systemic approach or Community law approach
 - One of the most frequent fields of non-compliance
- Reasonable accommodation
 - May be integrated into indirect discrimination
 - May be required for religion as well
- Harrassment
 - Specific piece of legislation?
 - One of the more frequent fields of non-compliance

„Employment plus?“

- Non-discrimination law often seen as sub-category of employment law
 - Transgressing these boundaries?
- „Freedom of contract“ experienced as barrier
 - Notwithstanding strong welfarist traditions in consumer law
 - As anti-discrimination principle requires to restrict freedom to enter into a contractual relation
 - One of the fields of frequent, partly problematic, exceptions

Remedies

- General or specific approach
- Civil law remedies
 - Retroactive or prospective? Collective?
- Employment law remedies
 - „Reinstatement“? Collective?
- Administrative and criminal law remedies
 - Individual or public?
 - Future regulation? (Administrative)

Enforcement

- Specific procedures
 - Ombudsmen, administrative tribunals
- Court procedures
 - Individual and/or collective claims
 - Role of associations
- Burden of proof
 - Again, a field where problems of compliance are frequent

Some positive aspects

- Widening the scope of application
 - Not only for alleged race
 - Gender and disability are most often „raised“ to the same status
 - Also some examples of wider protection in relation to other grounds
- McColgan et al: Mapping Study in combating discrimination 2006



Conclusion

- Directives allow for a variety of implementation
- National traditions require different approaches
- Remaining stuck at some outdated stage of the US/UK development is not a positive vision
- Creative puzzle of different typologies preferable to convergence

