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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

