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How to enforce and render effective anti-discrimination law: Mechanisms of enforcement, access to justice, etc.

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Framing the issue

- ▶ Effectiveness of European Equality law?
- ▶ National measures for enforcing equality law in light of European legal standards:
- ▶ As noted by Professor C McCrudden (1993), **our first reaction could be to include all of the provisions to promote substantive equality** instead of formal equality, beyond more specific practical tools to enforce and render effective anti-discrimination law....such as promoting positive action
- ▶ We will stick to a **less broader framework of analysis** of enforcement and effectiveness which still encompasses procedural and some substantive measures
- ▶ **Also in practice**, enforcement and effectiveness must be measured in light of the treatment of the **different grounds** of discrimination. **The laws of procedure and evidence** in Member States are decisive to the proper enforcement of antidiscrimination law.

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Introduction: both pragmatism and ideals

- ▶ Anti-discrimination law, as any **binding legal framework**, requires enforcement mechanisms and ways to ensure its effectiveness.
- ▶ **EU law reflects these high standards in terms of full application and effectiveness:**
- ▶ 1) * The interpretation by the CJEU of equality law often makes reference to the need for a « **full effect** » of the directive, « effectiveness of a provision would be impaired », Mangold C-144/04 §78 ; case law drawing from Simmenthal C-106/77, §21
- ▶ * « No limits to interpretation that deprive the directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee », CJEU Coleman C-303/06
- ▶ 2) The EU Charter of fundamental rights (article 47: The respect of fundamental rights in the EU must be effective. This means that when a person's rights are violated, he or she has the **right to an effective remedy** before a tribunal. Also entitled to a **fair and public hearing** within a reasonable time by an independent and impartial tribunal. Possibility of being **advised, defended and represented**. **Legal aid** shall be made available to those who lack sufficient resources in so far as such aid is **necessary to ensure effective access to justice**.
- ▶ What are the **necessary tools** to enforce anti-discrimination law? Are they **specific** to equality norms? It is a mixed bag: **some general and some specific** to equality law
- ▶ What are the **means to evaluate and guarantee** a certain level of **effectiveness** of antidiscrimination law? No real benchmark (no eradication of discrimination, less/more litigation a sign?, more inclusion (inclusiveness index),

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Outline: beyond the symbolic, an array of tools and evaluations

- ▶ **1) Defining** the terms: enforcement and effectiveness
- ▶ **2) Mechanisms of enforcement of anti-discrimination law:** norms are mostly binding
- ▶ Recognition of discrimination: liability requires recognition (infringement on dignity)
- ▶ Sanctions (criminal, civil), recommendation (soft law)
- ▶ Remedies (financial, pain and suffering, equitable (injunction to stop discrimination)
- ▶ Mediation and Reconciliation (without side-tracking justice)
- ▶ **3) Measuring Effectiveness of anti-discrimination law:** detecting and eliminating the barriers to full effectiveness of EU and national law
- ▶ From within (victims/perpetrator): Access to Justice (individual/group), Prevention and Compliance versus Organizational Innocence, Self-testing, Training legal actors (implicit bias)
- ▶ From the outside (beyond the parties): Public Monitoring, NGO vigilance and name and shame, Equality Bodies and guidelines, Testing, Digital Platforms, Comprehensive National policies

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Defining the terms: enforcement and effectiveness

- ▶ **Enforcement** of anti-discrimination law:
- ▶ It is **the act of compelling observance of or compliance** with a law, rule, or obligation. It is an action which covers a panoply of approaches to ensure the correct application of the law
- ▶ **Different in nature** (civil, criminal, administrative); **Different in level of legal constraints:** strict sanctions, recommendation (non binding)
- ▶ And can produce **different outcomes: top down such as** financial, equitable remedies (injunctions) through litigation, mediation or reconciliation processes (**bottom up process**, more personal justice?)

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Defining the terms: enforcement and effectiveness

- ▶ **Effectiveness** of anti-discrimination law is an **evaluation** (Allott, 1991). It can be understood from a narrow or broad perspective depending on the law promoting equality: it can be the degree of compliance.
- ▶ If the law is **preventive**: it is designed to **discourage behavior** which is disapproved of, so the goal is to see if the behavior is diminished or absent (self-testing for ex)).
- ▶ If the law is **curative**, operating **ex post facto to rectify** some failing or injustice or dispute, the goal is to see if the law serves to achieve these ends (litigation and mediation to **react** to discrimination).
- ▶ If the law is **facilitative**, providing formal recognition, regulation and protection of an institution of the law : the idea is to see if the institution is insulated from attack (contract, company, access to marriage/parenthood). In this perspective, effectiveness of antidiscrimination law can have a **transformative dimension**; protecting institutions while extending their scope and **inclusiveness** (work life balance directive, French law of December 2021 on economic and professional equality and inclusion (parity)

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Mechanisms of enforcement

Recognition of discrimination:

- ▶ Liability in case of discrimination requires recognition (infringement on dignity)
- ▶ « Money can't buy everything.... »
- ▶ Judgment of the Court (Grand Chamber) of 15 April 2021, **Case C-30/19**
Diskrimineringsombudsmannen v Braathens Regional Aviation AB
- ▶ Articles 7 and 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, read **in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a national law which prevents a court that is seised of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed **without however recognising the existence of that discrimination.**** It is for the national court hearing a dispute between private persons to ensure, within its jurisdiction, the judicial protection for litigants flowing from Article 47 of the Charter of Fundamental Rights by disapplying as necessary any contrary provision of national law.
- ▶ Discrimination affects the **essence of the person** (mental, physical, humiliation, harmful rejection of identity must be redressed by an act of acknowledgement, not just compensation)

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Mechanisms of enforcement of anti-discrimination law

Sanctions (criminal, civil), recommendation (soft law)

- ▶ European barometer:
- ▶ Case law refers to "**effective, proportionate and dissuasive remedies**".
- ▶ See Recital 35 Directive 2006/54 Recast Gender Equality: Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive.
- ▶ Logic: Repression versus tort law
- ▶ Some Member states have **criminal** sanctions (France art. 226-1 Crim Code) **Challenge:** indirect discrimination and implicit bias.
- ▶ **Civil liability:** decision **null and void** and awarding damages (ex: over a whole career)
- ▶ **Challenge:** no cap in French law but difficulty to make whole and not always punitive damages)
- ▶ Recommendations : not binding (Defender of Rights) but can be used as amicus curiae in court (cases on new concepts racial harassment)

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Mechanisms of enforcement of anti-discrimination law: Remedies (financial, pain and suffering, equitable (injunction to stop discrimination))

- ▶ **Remedies** (financial, pain and suffering, equitable (injunction to stop discrimination
- ▶ **Financial remedies (past):**
- ▶ **ECJ: Von Colson C-14/83 (more than pure nominal compensation, deterrent effect) No punitive in France**
- ▶ **ECJ Doris Hartz C-79/83; ECJ Helen Marshall C-271/91**
- ▶ Other **challenge** : vary according to ground of discrimination (France: deduction for age discrimination or discrimination with no infringement of freedom) Soc. 15 november 2017, n° 16-14.281)
- ▶ **Pain and suffering (past):** how to measure it? 1000 euros/conflated with material loss?
- ▶ **Equitable group remedies (for the future):** injunction (extended in "class action" in France); see equity programs in Canada/systemic discrimination (Abella Report); symmetric approach; **uncover, recover, the buck stops here!**

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2) Mechanisms of enforcement of anti-discrimination law: Mediation and Reconciliation (without side-tracking justice)

- ▶ **Mediation or ombudsmen process:** external and independent process with same procedural safeguards without circumventing right to trial
- ▶ Challenge: trend in other countries (arbitration clauses in hiring process). US new Law ("Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021"); not applied to fundamental rights violation
- ▶ **Reconciliation and restorative justice:** an alternative but not an exclusive option: « repairing a hostile environment » for survivors
- ▶ See studies on group harm and violence/comparative studies

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Measuring Effectiveness of anti-discrimination law: detecting and eliminating the barriers to full effectiveness of EU and national law

- ▶ In terms of inclusion, if the goal is to measure effectiveness of anti-discrimination, a **functional** way is to use a **paradigm** from disability law
- ▶ Goal of legal actors and norms should be **to detect and eliminate the barriers to full effectiveness** of EU and national anti-discrimination law: **fixing the problem, not solely focusing on the people**
- ▶ This means:
- ▶ **From within institutions and from outside:** structural change requires different points of entry

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Measuring Effectiveness of anti-discrimination law: detecting and eliminating the barriers to full effectiveness of EU and national law : from within

- ▶ From within :
- ▶ Access to Justice (individual/group), Strategic Litigation (next presentation): ECJ Pontin Oct 29 2009 C-63/08
- ▶ Prevention and Compliance versus Organizational Innocence: Transformative change versus Diversity measures as a defense or laundering process (simulating a corrective measure, charter, showcasing diversity, individual sanction, no broad change of practice)
- ▶ Self-testing: who? How? Use of evidence (outsourcing tests promotion, recruitment, access to goods and services)
- ▶ Training legal actors (implicit bias): police officers, labor inspectors, judges (making actors own equality law, win/win implementation through awareness raising (no fault perspective of systemic discrimination)); new directive on violence against women

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Measuring Effectiveness of anti-discrimination law: detecting and eliminating the barriers to full effectiveness of EU and national law: from the outside

► From the outside :

Public Monitoring (quantitative and qualitative) : Wage Indicators, DA Guidelines, Labor Inspectors, Unions (Whistleblowing), Digital Platforms (anonymous), Testing (researchers)

Civil Society monitoring and class action: NGO vigilance and « name and shame »

Independent constitutional authorities and EU monitoring: Equality Bodies (other presentation) and preventive **guidelines**

Comprehensive National policies (a continuum) and Inclusive Cities (mainstreaming territorial antidiscrimination policies and sustainability)

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Conclusion

- In a nutshell, enforcement and effectiveness of antidiscrimination law in Europe is **variable**. **Rise in litigation: sign of success or not?**
- Prohibition of **overt** discrimination is globally better enforced? ...As compared to more **subtle forms** of discrimination (indirect, systemic, intersectional).
- **Ambivalence** in the enforcement and effectiveness of antidiscrimination law:
- **Areas of resistance:** political backlash against minorities, other fundamental rights (liberties, freedom), other tools (defamation law, fundamental rights of organizations)
- **Areas of progression:** International norms (Istanbul convention/Greio countries reports, ILO, UN norms and monitoring) and new proposals for EU directives (other tools used against violence or for wage transparency?)

► **Thank You!!**

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Bibliography:

- ▶ M. Mercat-Bruns, D. Oppenheimer, C. Sartorius, *Comparative Perspectives on the Enforcement and effectiveness of antidiscrimination law: challenges and innovative tools* Springer 2018
- ▶ *Intersectional Discrimination and its critique*: what's the point? RDT May **2022** (to be published/French)
- ▶ *The history of the construction of systemic discrimination in Canada*: the emergence of a right to inclusion, RDT **2022**, p. 184
- ▶ M Mercat-Bruns (Ed), *New modes of detection and prevention of discrimination and access to justice*: class action and systemic discrimination; algorithmic discrimination and bias; social networks and sexual harassment, *Société législation comparée* 2020