



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 add 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),

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
- <u>Recognition of discrimination</u>: liability requires recognition (infringement on dignity)
- Sanctions (criminal, civil), recommendation (soft law)
- <u>Remedies</u> (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

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?)

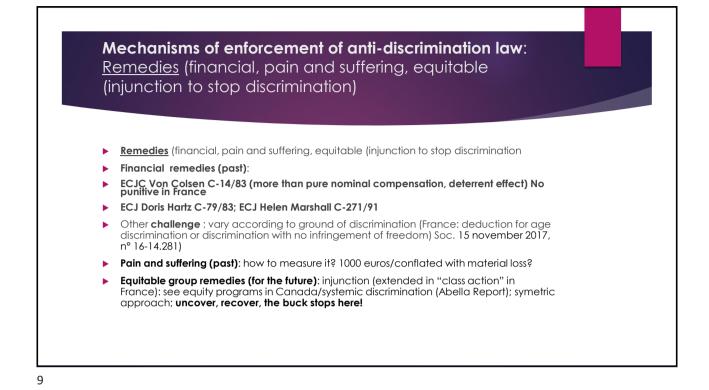


Mechanisms of enforcement Recognition of discrimination:

- 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)

Mechanisms of enforcement of anti-discrimination law <u>Sanctions</u> (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 Members 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)





	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







