

**A TRADITION OF
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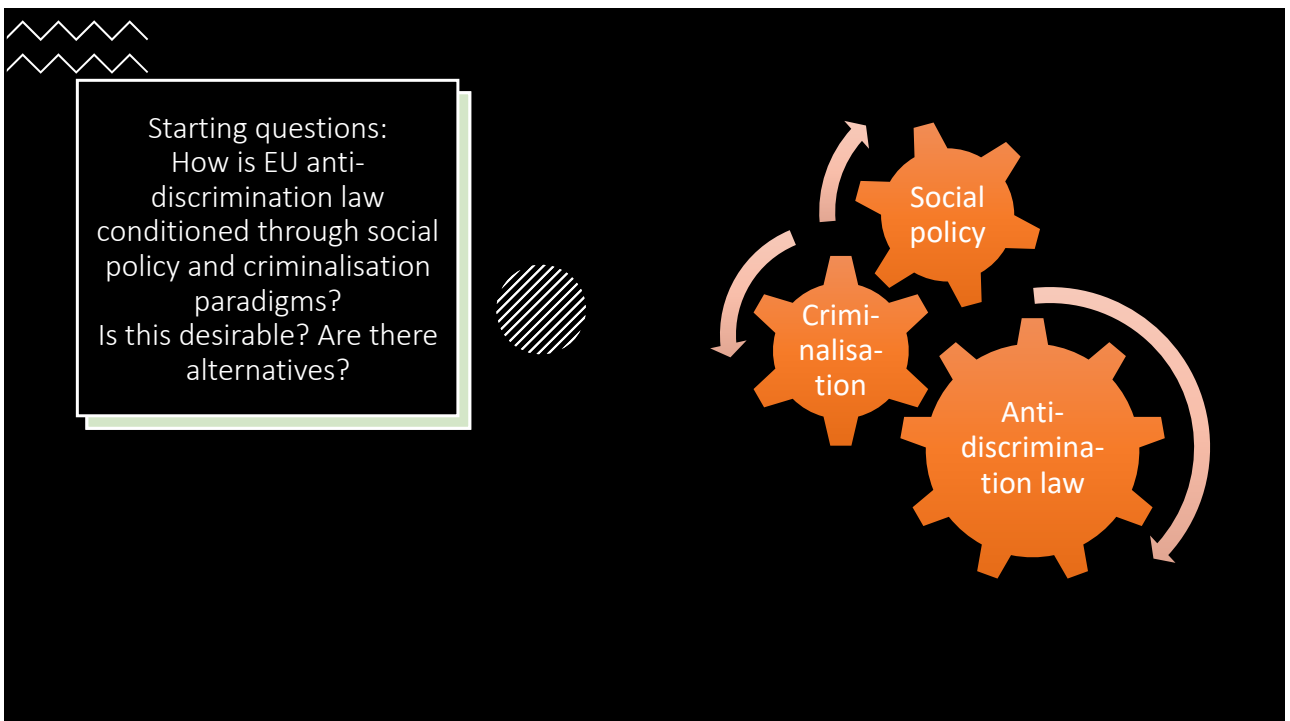
EU anti-discrimination law as a field
in its own right – overcoming
socialisation and criminalisation?

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Anti-discrimination law & policy

- **Global and EU dimensions**
 - Global anti-discrimination law as encapsulated in UN conventions part of the human rights discourse
 - Response to “new social movements”- civil rights movements, but also more established ones
 - EU arguably has instrumental approach to the field, as allowing it to find a hook into (national) social policy, and more recently into national criminal law
- **Purposes / mission notoriously contested**
 - Liberal notions: protecting individuals from disadvantage (Kaitan) and/or stigmatisation (Solanke)
 - Social notions: addressing social harm (Blackham), protecting those historically disadvantaged (McColgan)
 - My own: addressing ascribed otherness as stratifier, also protecting individuation

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What are the main aims?

- Redistribution or Recognition ? (N Fraser)
 - Identity claims as central, while social inequalities should be overcome, identities to be maintained.
- Positional difference (I M Young)
 - producing hierarchies and durable inequalities through division of labour and normalisation Combating oppression (A McColgan)
- Overcoming disadvantage derived from ascribing otherness – in other words: traditional main social cleavage (class) not central (Schiek)
- Overall: addressing social reality, which means effects on markets, not only in the public sphere

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What is anti-discrimination policy?

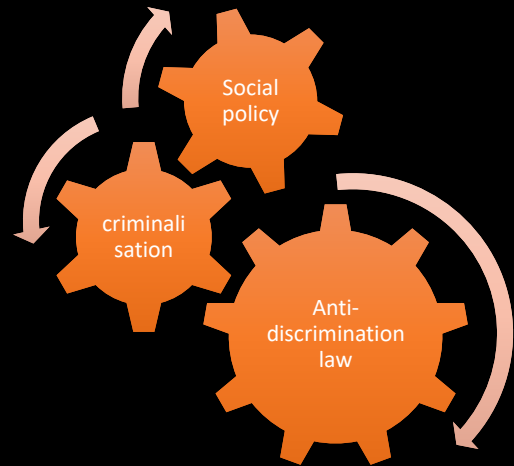


Constitutional guarantee of equality before the law
Another field of social law

Best served by criminalisation strategy

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Back to the question



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• EU ADL as social policy

- Origin in Equal Pay (gender) and free movement of persons
 - The market-derived social side of the EU?
- Aligned to social policy in liberal welfare states closely linked to individual rights as opposed to redistribution
- ➔ EU ADL as a set of directives aiming to shape employment, housing, education, social services (gender equality and non-discrimination directives)
- ➔ Critique e.g. Somek (2011): ADL redefines social policy as market – focused instead of market-containing



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Social policy conditioning Anti-discrimination law



Legacy of liberal welfare states



Using Anti-Discrimination Law
to achieve social policy aims



Generating agency for new
identities



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Legacy of liberal welfare states



Clashes between ADL and Social Policy

- ADL tends to stress individual rights, and not social compromises based on a collective approach. Clashes between ADL and social policy may result in enhancing nation state / Union dichotomy
- Example age discrimination:
 - Age related provisions on social policy aim at regulating life-cycles, a core function of welfare states
 - Banning age discrimination by contrast promotes a flexibility agenda
 - Clashes may be the source of the refusal of Danish courts to follow the Ajos ruling (ECJ 19 04 2016 C-441/14 EU:C:2016:278)

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Case Law Examples



Using Anti-Discrimination Law
to achieve social policy aims

Case C-389/20 CJ v Tesorería General de la Seguridad Social

- AG Szpunar 21 09 2021, ruling 24/2/2022
- Whether Spanish law violates Directive 79/7/EEC by excluding domestic workers from unemployment insurance and resulting benefits on the grounds that domestic workers are overwhelmingly female.

ECLI:EU:C:2016:917 n Case C 395/15, Mohamed Daouidi

- Whether dismissal on the occasion of an injury constitutes disability discrimination.
- This is a Moroccan worker in Spain – not consideration of ethnicity ???

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Where does
this leave
class?

→ Socio-economic disadvantage part of British discrimination law, but only for the public sector

→ what does this do to discrimination law?

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Beyond social policy



Generating agency for new identities

- Gender equality beyond the narrow confines of employment law:
 - Directive (EU) 2022/2381 – gender balance in board rooms
- Addressing discrimination by Artificial Intelligence
 - Identified as limit of current framework in policy and literature
 - Clearly of relevance to the credit and housing market, but also of wider import
- A progressive response to identity claims?
 - ADL as protecting the opportunities to change identity, or claim several at the same time, now and / or in the future
 - ADL aligned to Union Citizenship



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• EU ADL as criminal law

- Origin: Incitement to Racial Hatred in national law viewed as required by CERD (Ireland one of the exceptions here) post WWII
- From 2008 EU followed suit: EU Framework Decision on Combating certain forms and expressions of racism and xenophobia by means of Criminal Law [2008/913/JHA]
- Also Victims Rights Directive (2012/29/EU) stressing violence against women, female genital mutilation, including violence because of gender identity and gender expression, and demanding non-discrimination of crime victims – all in the recitals, next to combat of terrorism
- Code of Conduct on countering illegal hate speech online (June 2016)
- Several demands to increase the efficiency of this branch of ADL



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Disadvantages of criminalising discrimination: offender protection

Indirect discrimination cannot be captured (as it lacks intent)

Pursuing (sexual) harassment results in revictimisation

Burden of proof reversal is excluded

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Example: (sexual) harassment – article 2 Dir 200/43, 2000/78, 2006/56 – slight variation

- **Unwanted verbal, non-verbal or physical conduct (of a sexual nature)**
- **Related to protected ground**
- **Purpose or effect of violating the dignity of a person**
- **And (in particular if) creating an intimidating, hostile, degrading, humiliating or offensive environment**
- **National law exemption**



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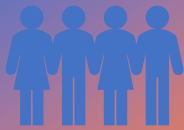
Academic critique

- The cumulation of dignity and equality results in a criminal law mindset, seeking to discredit the "victim" and protect the perpetrator
- Disregards the power relation

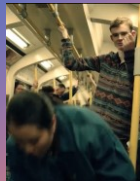
[Hellum, 2023, with reference to Numhauser-Henning 2022, Idem & Laulom 2013]

Addition by me: the challenge (and opportunity) is to define the employer/service provider as perpetrator, who did not provide an environment free from harassment

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Legitimate space for criminalisation

- Addressing racial, gender-based and abilist violence
- Including violence by the police and other state institutions
- Addressing hate speech




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Does “specific purpose ADL” leave an empty promise?

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Anti-discrimination law and policy as an area in its own right

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