

Anti-discrimination law: a new discipline in private law?

Marie Mercat-Bruns
Sciences Po Law School/CNAM

 This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Introduction

- Why this sudden reflexion on antidiscrimination law as a discipline ?
- New French class action (2016) targets discrimination in all fields of law in France: employment, public sector, contracts....
- French national report on the economic cost of discrimination (France Stratégie)
- Explosion of prohibited grounds of discrimination adopted through legislation and fear of lack of social cohesion
- Preliminary query: What is the difference between a new field of law and a new legal academic discipline?
- Oct. 2015: National Symposium of Defender of Rights on 10 years of antidiscrimination law: Chief Justice of the French Supreme Court recognizes the wide scope of antidiscrimination law (labor law, consumer law, health law...):
- « The fight against discrimination is the new frontier applying the proportionality test that has invaded our law as a standard of appreciation of tolerable infringements on the principle of equality »

Introduction

Preliminary query: What is the difference between a new field of law and a new legal academic discipline?

- The notion of field/branch of law:
 - It is a « subset of identifiable rules in the law of the French Republic », « a segment of a specific legal order » (Jeammaud) divided in different subjects (civil law, criminal law, administrative law).
- The notion of legal academic discipline:
 - « The whole range of knowledge pertaining to legal questions in a specific sector of law and solutions that could be drawn from the applicable legal rules (these rules can belong to different fields of law) ». For example, labor law is a a field of law and a legal academic discipline (Le Friant, Lyon-Caen, Jeammaud). Antidiscrimination law can also be conceptualized as both a field and an academic legal discipline to increase the array of knowledge in this area of law.

OUTLINE OF PRESENTATION

- I- Antidiscrimination Law, a new field/branch of law?
 - Increasing scope of antidiscrimination in private law
 - Analogy between antidiscrimination law and environment law: values, principles, tools and bodies for regulation
- II-Antidiscrimination Law, a new legal academic discipline?
 - Resistance to antidiscrimination law as a discipline
 - Relevance of antidiscrimination law as a discipline

I- A new field/branch of law?

- 1) Increasing scope of antidiscrimination in private law:
 - Variable scope in civil, administrative and labor law: results from an interdisciplinary study on the implementation of antidiscrimination by judges and institutions in France and the Netherlands for the Defender of Rights and Ministry of Justice.
 - Diversification of the case law and decisions of the Defender of Rights: in a wide range of issues in banking law, insurance law, generally access to goods and services. A constant query on the right to objective justifications in law.

I- A new field/branch of law? Analogies

- 2) Analogy between antidiscrimination law and environment law: values, principles, tools and bodies for regulation
- Emergence of specific canons of antidiscrimination law?
- « A field of law consists of a body of knowledge with the intent to classify, to describe, to comment, to organize, to grasp similarities and oppositions and to uncover a legal order » (Lyon-Caen).
- Analogies are fruitful: environmental law

I- A new field/branch of law? Analogies

- Environmental law as a comparator:
- Scientific expertise can enrich a field of law but its main goal is to demonstrate a coherent body of law:
- Objective of environmental law « to set principles, design instruments and define values ».
- The changing nature of rules: from prohibition of dangerous practices to tools for management.
- Objective of antidiscrimination law: principles, instruments and values.
- The changing nature of rules: from prohibition of unequal treatment to diversity management.

I- A new field/branch of law? Analogies

Environmental law:

From sanctions of dangerous activities for the planet to positive actions inspired by public policy techniques to balance the protection of nature with values of conservation compatible with economic development

Antidiscrimination law:

From sanctions linked to human rights violations to a more global view of the stakes in different areas (public, societal, economic):

New tools such as shift of burden of proof, injunction for future relief in class action procedures, positive actions and gendermainstreaming in European law

I- A new field/branch of law? Analogies

- New principles have emerged in environmental law:
 - Majors crisis (contamination) and global warming have required new principles: polluter pays principle, the precautionary principle, and the duty to inform and participate...
- New principles have emerged in antidiscrimination law :
 - Equal pay gap, conflicts on religious neutrality, gender issues, migrant crisis,
 - security measures with terrorism have boosted discussion on new standards in
 - France: living together (vivre ensemble), reflection on grounds and contours of
 - identity, transgender issues, racial profiling, social cohesion, reasonable accommodation, harassment as discrimination and the meaning of dignity....

I- A new field/branch of law? Analogies

- Environmental law and Antidiscrimination Law permeate the hierarchy of legal norms:
- International and european norms (UN treaties and directives)
- Constitutional Norms (Right to well being (health), dignity, equality and liberty)
- Legislative Norms and Administrative Rules and regulations
- Bodies with increased powers to monitor, regulate and implement law:
- Governmental Agencies, Independant Bodies, and NGOs

II- A new legal academic discipline? Resistance

The question of the legitimacy of such a discipline must first be fleshed out....

A) Resistance to antidiscrimination law as a discipline: twofold

- 1) Antidiscrimination ignores fundamental categories of private law (in labor law: the worker, substantive rights, subordination rather than domination...)
- 2) Antidiscrimination law only contributes in the construction of groups of stigmatized victims (excessive subjectivity, invasion of privacy, enhanced divisiveness and multiculturalism...)

II- Antidiscrimination law: a new legal academic discipline? Relevance

- B) Relevance of antidiscrimination law as a discipline: threefold
- 1) Antidiscrimination law : a legal discipline that rethinks categories of private law
- 2) Antidiscrimination law: a legal discipline that informs the proceduralization of law
- 3) Antidiscrimination law : a legal discipline that highlights certain features of French law

II- Antidiscrimination law: a new legal academic discipline? Relevance

- 1) Antidiscrimination law : a legal discipline that rethinks categories of private law
- Relevance of the intrinsic logic of antidiscrimination law as an approach to transparency of decisionmaking power and coherence of legal rules (social partners and public authorities) through applying standards for justification of categorizations and proportionality tests.
- Relevance to question gaps in implementing tort law, contract law, labor law...

II- Antidiscrimination law: a new legal academic discipline? Relevance

- 2) Antidiscrimination law: a legal discipline that informs the proceduralization of law
- Antidiscrimination law proceeds to frame and safeguard the relative autonomy of the legal subject in the exercise of his/her rights (consent) in light of public policy interests for health and security.
- Antidiscrimination law grasps directly or indirectly the possible conflict of interests between the autonomy and fundamental rights of the worker and fundamental rights and interests of companies.

II- Antidiscrimination law: a new legal academic discipline? Relevance

- 3) Antidiscrimination law : a legal discipline that highlights certain features of French law
- Within the European framework, building a new discipline facilitates the need to seek ownership of this new area of the law and its creative potential in each Member state.
- This increased visibility of antidiscrimination law and the impetus to articulate and understand the use of concepts (indirect discrimination, parity, testing, discrimination without comparison, grounds like economic vulnerability, loss of autonomy...) is necessary to consolidate the internal coherence of this body of law, promote certain aspects of its circulation abroad or engage in constructive dialogue in the EU and global context.