

Systemic discrimination in the EU: rethinking the tools of anti-discrimination law

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Introduction

- France has just adopted a class action suit to litigate issues on discrimination.....
- **Law n° 2016-1547, Nov. 18 2016 on the modernization of Justice XXI Century**
- It gives us the opportunity to reflect on what is the nature of collective discrimination
- Sum of different individual claims?
- Or
- Covers specific nature of collective discrimination: systemic discrimination in light of Law in the EU and in Member States

Outline

- 1) What is systemic discrimination?
- 2) Progressive transformation of EU and national antidiscrimination law
- 3) Revisiting European and national case law through the lens of systemic discrimination
- 4) Tools to expose and target systemic discrimination
- 5) Strategic litigation and the use of the concept of systemic discrimination
- 6) Conclusion

What is systemic discrimination?

Definition abroad: US, Canada,
Proposed definition in France...

Example of the glass ceiling:based on different grounds?

Example of job segregation in the workplace

What is systemic discrimination?

In Europe?

In Member states?

Progressive Transformation of antidiscrimination Law:

- The move from intentional direct discrimination to indirect discrimination
- Multiple grounds and multiple discrimination
- Procedural challenges: individual/collective

Revisiting European and national case Law through the lens of systemic discrimination

- Equal Pay EU Case Law: a move towards detecting equal pay for work of equal value (structural analysis), CJEU April 8 1976 *Defrenne Case C-43/75*
- and
- Disparities in wages linked to the the nature of work (part time/full time) ECJ March 31 1981 Paula Jenkins, Case C-96/80
- EUCJ Oct. 20 2011, Brachner Case C-123/10 : systemic discrimination in the welfare states: pension benefits
- EUCJ July 17 2008 Coleman C-303/06: systemic discrimination detected through the grounds of discrimination
- EUCJ July 13 2016 Case C-188/15 EUCJ March 3 2016, Aff. C-147/15
- pending: banning of the veil in private companies

Revisiting European and national case Law through the lens of systemic discrimination

- Exclusion of a worker on maternity leave from a vocational training course March 6 2014 Napoli Case C-595/12
- Case Law on age discrimination in collective bargaining agreements and pay scales (a mixed bag)

Revisiting national case Law through the lens of systemic discrimination

- Sex Segregation in jobs, Soc. June 6 2012 N° 10-21489 : managers/non managers (indirect discrimination based on sex)
- Harassment in certain jobs (restaurant cooks, racist comments): Soc. Sept. 22 2015 N° 14-11563
- Protection of undocumented workers: domestic workers (indirect discrimination based on origin): Soc. April 10 2013 n° 11-26986
- Direct Discrimination in disability benefits within a collective bargaining agreement: Soc. October 8 2014 n°13-11789
- Indirect discrimination based on health status in internal procedures, Soc. Feb. 12 2013 N° 11-27689
- Direct Discrimination through racial profiling 1^{er} civ. Nov. 9 2016 n°15-25210
- Analogies between grounds: union, age and sex discrimination in employment (glass ceiling)

Tools to expose or target systemic discrimination

- Shift of the burden of proof and the need for statistics on groups?
- Class action: financial remedies and injunctions to stop the discriminatory practices in the future

Tools to expose or target systemic discrimination

- Positive action, parity rules, gendermainstreaming
- Harassment as Discrimination
- New grounds in Member States: residence, economic vulnerability?

Strategic Litigation and the use of the concept of systemic discrimination

- Understanding the articulation between direct/indirect discrimination?
- Disrupting traditional tort Law: the focus on the effects of discrimination (no intention, no victim, no single author, no single company)
- Requiring the objective and reasonable justification of rules, decisions and practices

Strategic Litigation and the use of the concept of systemic discrimination

- Exposing the articulation between discrimination Law and welfare state policies
- Exposing beyond the person, the rights of groups/dynamics: individual harm and group effect
- The issue of relative disadvantage /symetric grounds: what groups are more disadvantaged? EUCJ July 17 2014 C-173/13 Leone
- Systemic discrimination perpetuates past structural discrimination and requires analysis of the causes of discrimination in the future

Strategic Litigation and the use of the concept of systemic discrimination

- Exposing modes of job evaluation, collective bargaining discrepancies from past disparities in job classification between men and women, construction of job profiles for recruitment
- Compliance mechanisms, equality bodies outside of judges....as monitors of systemic discrimination

Conclusion

- A way forward?
- If we reflect on Antidiscrimination Law as a discipline of Law with concepts, based on international and national norms of different value, rules of evidence and goals, reflecting on the challenges of systemic discrimination gives meaning, coherence, logic, order to antidiscrimination policies, legislation and case law as transformative law

Thank you!!

- Mercat-Bruns, Marie. *Discrimination at Work: Comparing European, French, and American Law*. Oakland: University of California Press, 2016. Free e-book to download
- doi: <http://dx.doi.org/10.1525/luminos.11>