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EU non-discrimination law and policy – a future mandate?

Abstracts

Unlocking the true 'social' potential of EU non-discrimination law

Colm O'Cinneide

EU non-discrimination law occupies an increasingly prominent place within the social agenda of the EU. As Alexander Somek has argued, while social policy has been 'the sick man of public policy on the Community level', non-discrimination law 'represents that field of Community social policy which has been steadily successful since its inception'. However, the relationship between non-discrimination law and the wider sphere of the EU's social agenda is not wholly unproblematic.

Non-discrimination law has been accused by various commentators of three sins in particular: i) it promises to provide social justice for subordinated social groups, but struggles to deliver due to in-built limits on its redistributive reach; ii) it places excessive reliance on judicial norm-generation; and iii) it serves to legitimate existing market-orientated law and policy. This paper argues that much of this critique is exaggerated. In particular, it overlooks the manner in which in non-discrimination law is capable of addressing specific forms of inequality that other modes of social regulation fail to combat. The fact that non-discrimination law was not historically part of the regulatory arsenal of the post-war European welfare state should not blind us to its true potential in the contemporary world.

However, non-discrimination law will only make a substantial contribution to the forging of a new social policy agenda for Europe if its purpose and objectives are clarified. In Somek's words, non-discrimination law needs to 'self-correct' for the possibility that it can in certain circumstances destabilise certain forms of social regulation. To do so, it needs to be interpreted as designed to break down existing patterns of 'subordination' within European society. It remains to be seen whether this reading of non-discrimination will be adopted consistently across Europe.

Is European Discrimination Law breaking up old Labour Law and Traditions?

Daniel Cuypers (presenter) and Christian Bayart

In the nineteen-sixties of the past century a Belgian labour minister and former trade union leader would still be allowed to say: "Women should not hassle".

But many Belgian women, like Mrs. Defrenne, found their way to Luxemburg thus generating European case law approved by the European legislator. Without support from European labour law it seems that their quest would never have met with the same success. It took four decades and litigation to stamp out most forms of direct and indirect gender discrimination in a dynamic interaction and dialogue between Luxemburg and national courts.

The spill-over effect of new European discrimination legislation in the beginning of the 21st century was not cheered on by general legal public opinion in many continental member states. Several citizens and lawyers argued that Europe was aiming too high and acting as a moral crusader. At the moment European discrimination law is implemented, but it is obvious that judges are very cautious in their progress. Discrimination law does not meet the expectations of many.

The obvious Anglo-Saxon origin of discrimination law is one of the main causes of difficult reception of discrimination law in continental legal systems. In Belgium trade unions claimed to be the champions of equal treatment of workers. Collective bargaining was the main (almost exclusive) highway to more equality, both formally (wage levels) and substantively (redistribution of profits). It seems that many functions of discrimination law in Anglo-Saxon countries in fact substituted for gaps in EPL (Employment protection law) (e.g. dismissal law). If needs are met through labour protection legislation, why an additional need for European discrimination law?

The rather individualistic approach of discrimination law conflicts with the more collective approach of traditional continental labour law. Notions of equality are colliding at the very moment that Europe is breaking up national labour law systems in the name of European free movement, flexicurity and cutbacks. Briefly: Europe stands at the wrong corner of the debate, breaking old comfortable national shelters of solidarity.

The conflict between European and national labour law should not be belittled.

The growing divergence between European (privileged workers) and nationals is causing growing focus (political and scientific) on "reversed discrimination for nationals". Instead of levelling up some standards of national law, labour law seems to settle in the "incomparable situation" of national and European labour law.

National labour systems, like the Belgian system, are deeply rooted in a national tradition of citizenship. Solidarity and citizenship are very closely linked.

We clearly need not only a discussion on very practical problems, but also on the fundamentals and the future of national labour law as it is broken up by European discrimination law.

Gender equality law and policy for 15 of for 27? Lessons from post-communist Czech Republic

Barbara Havelková

The paper draws on research on the effectiveness of sex equality and antidiscrimination law in the Czech Republic. It looks into how new member states, especially post-communist, central European ones, might have different needs with regards to equality and antidiscrimination law than their Western counterparts.

Arguably, Western European anti-discrimination has moved from a 'formal' emphasis on antidiscrimination and elimination of 'different treatment', to 'positive duties' and 'substantive' or 'transformative' understanding of equality. The paper argues that the development in post-communist states was in many ways opposite to the West, and, as a result, they can be seen as 'out of sync' with the West.

In the State Socialist period, equality was understood 'substantively'– it was context-based and strived for real-life equality. And it was also 'transformative' in the socio-economic sense – it aimed at redistribution, eradication of poverty and economic levelling. There were four important caveats, however. These policies were redistributive only – they were not concerned with respect for cultural harms, identity or diversity. They were also overwhelmingly collective – individual empowerment, autonomy and choice were not an issue. They were substantive and transformative with regards to class, but not other discrimination grounds, especially not gender; and because of a blindness to pa-

triarchy, no understanding of structural gender disadvantage existed. Finally, an enforceable antidiscrimination right was missing.

I argue that all of these deficiencies have been largely carried over into Transition. Although the lack of constitutional and statutory guarantees was remedied, equality and anti-discrimination can still be seen as a 'weak' right - antidiscrimination law has no history to draw on and substantive equality is seen as tainted by the communist project and discredited. Both are perceived as a threat to liberty. As a consequence, although EU equality acquis was reluctantly transposed, it is not being effectively implemented. Ordinary courts have been especially reluctant to decide for claimants and have not applied doctrines of direct and indirect effect, where it would have been appropriate. This constitutes a breach of EU law obligations, but has not had infringement consequences for the Czech Republic.

So what are the lessons for EU equality and antidiscrimination law? The paper will tentatively suggest and discuss the following:

- Specific measures addressing material and cultural gender inequalities need to be kept, as they can't be replaced by gender-mainstreaming (which is an entirely formal exercise in the post-communist context).
- The antidiscrimination rights agenda is still important and should continue to be pushed alongside more transformative policies aiming at systemic change.
- Institutionally, attention should be paid to implementation in the broad sense – not just transposition, but application and enforcement too. Reporting has been an important tool; but should the compliance assessment for infringement be strengthened too?
- There have been instances where the mandatory or non-mandatory character of EU law was a decisive factor in whether a provision was implemented (positive action). In other instances, even clear obligations were disregarded. What are the lessons for the use of hard or soft law in the equality and antidiscrimination area?

EU social policy and the Irish experience: A case of EU gender non-discrimination law in Ireland

Mary Ellen Lyons

This paper will discuss and analyse the place of EU non-discrimination law, in particular gender related non-discrimination law, in a social Europe and its role in implementing social rights in the EU. To do this, this paper has chosen Ireland as a case study. Ireland is an interesting case to study the impact of gender non-discrimination law as when Ireland joined the EU it was a conservative, patriarchal society heavily influence by the teachings of the Catholic Church. Ireland will thus act as a research site in order to gauge not only the impact of EU gender non-discrimination law on Irish public policy but also its effectiveness in actually tackling gender discrimination and improving conditions at member state level in a country that in many ways was not ready for the changes that EU legislation brought. This analysis is done from a political science perspective that uses Europeanisation as a theoretical model which allows for the analysis of the impact of EU directives at a domestic level. This is necessary as it is important to look beyond the creation of directives at EU level and look at their impact on domestic public policy and the resulting effectiveness of this policy in creating social rights at member state level. Due to this discussion and analysis we can begin to answer the question of whether or not these directives have been capable of achieving a viable social policy approach at EU level that has led to the furthering of social rights at member state level. As a result of what is learned from this analysis at member state level this paper can begin to offer suggestions on the future direction that EU non-discrimination law and policy should take.

Pregnancy and precarious employment: why the public law dimension is key to the future mandate of EU non-discrimination law

Dr. Charlotte O'Brien and Dr. Liz Oliver

The clash between migrant worker rights to welfare and non-discrimination rights on the grounds of pregnancy exposes friction between EU non-discrimination law and social policy. This paper interrogates the protection afforded to pregnant migrant workers throughout the EU. We argue firstly that the free movement framework creates gendered gaps through which migrants are deliberately allowed to fall; and secondly that the 'broken promise' of flexicurity has failed to deliver for those in the most precarious forms of employment. The deep gender tilts in EU law, particularly welfare coordination, require a strong public law dimension to accompany any private legal developments in combatting discrimination, particularly where EU migrant workers move frequently in and out of employment.

The residence Directive 2004/38 provides for a number of situations in which a migrant can retain worker status and retain full rights of equal treatment with nationals, including temporary incapacity related to sickness, but not child bearing. This exclusion, rooted in the discriminatory belief that pregnancy is a badge of the benefit tourist, results in a 'pregnant repellant' effects of the directive - once one assumes the risk of pregnancy, one assumes the risk of destitution. The only way to head off this risk is to return to one's home state on discovering the pregnancy.

The pregnancy lacuna in the EU residence Directive 2004/38 could finally now reach the ECJ via an on-going English case. However, legislative intervention may be necessary to plug the lacuna, since the ECJ may defer to Member State forecasts of floods of migrants 'in an advanced state of pregnancy, [who] work for a week' in order to get entitlement to benefits (The Court of Appeal in JS v Secretary of State for Work and Pensions, para 25).

Union authorities must address the pregnancy gap if EU citizenship and movement rights are to be equally enjoyed by men and women throughout the Union. While the position of pregnant women has long been a marker for the limits of EU citizenship, this explicit exclusion from protection highlights the tense, contradictory nature of the EU's equal treatment policies, and a failure to thoroughly 'mainstream' gender equality into its own legal frameworks.

The limitations of mainstreaming are also apparent when looking at the EU employment law package. Precarious employment is gendered and disrupts established legal norms in the area of employment law. However the atypical worker directives have failed to deliver anything new for precarious workers. Labour lawyers have highlighted the importance of closer links between employment law and social security law as key to adapting employment law to the context of precarious employment. The facts of JS reveal a 'model' flexible EU worker. This individual moves between various jobs, higher education and agency work. However, her pregnancy makes her already precarious position precipitous, thanks to her encounter with EU social security coordination provisions.

The EU Race Directive: failure or success? A proposal of mechanisms to evaluate its effectiveness

Sara Benedi Lahuerta

Twelve years after the adoption of the Race Equality Directive (2000/43/EC, hereinafter 'RED') the time has come to evaluate its impact on citizens' lives. Figures on the number of complaints filed or the number of cases brought before a court or tribunal are often used to evaluate the effectiveness of equality law. However, this does not reflect its real impact of the law for several reasons. Statistics about litigation only show the number of times that the law has been breached and the victim has sought redress. Therefore, they do not take into account situations where the law has been applied

successfully on a daily basis or where the law has been breached but the victim has not reported the action. Lack of awareness and underreporting are especially high in the field of anti-discrimination law because victims are unaware of their rights, they do not know how to report discriminatory actions or they do not have enough confidence in the legal system. For instance, in a recent survey of the Fundamental Rights' Agency of the EU, more than 60% of the respondents did not know that discrimination in access to employment is unlawful.

In this paper I will argue that four types of elements should to be taken into account to evaluate the effectiveness of anti-discrimination law, namely: (1) the role of Member States in promoting equality through awareness raising measures or positive action; (2) the moral beliefs and social values (e.g. is discrimination considered socially acceptable?); (3) the victims' perspective and its willingness to report discriminatory actions and (4) the legal system's barriers to access legal remedies or to promote alternative dispute resolution mechanisms.

Building on different theories about regulation, I will make the distinction between formal and informal uses of rules. On this basis, I will argue that whilst the analysis of legal effectiveness has traditionally been focused on the study of litigation figures and complaints' statistics (formal uses), spontaneous and unstructured (informal) uses are also relevant for the analysis of the RED's effectiveness. These concepts will be used to draw indicators for evaluating the application of the RED in practice and assessing whether beyond its symbolic value, it has the power of bringing social change and having real effects.

Positive Action in EU Non-Discrimination Law: Too Far or Still Not Far Enough?

Dr. Panos Kapotas, LSE

During the last decade EU non-discrimination law has witnessed an exponential growth in scope and status within the European edifice. With the elevation of equal treatment into a foundational principle of the Union after Amsterdam and the steady flow of new equality directives emanating from Brussels, European institutions have strengthened the normative arsenal of the Union in an effort to root out inequalities and eliminate social exclusion. Gender equality has been at the forefront of this process and the aim of combating female underrepresentation in the European labour market has been right at the top of the EU policy agenda for quite some time. In this legal and political climate positive action has slowly but steadily gained momentum as the spearhead par excellence of gender non-discrimination policies. Article 157 (4) TFEU is often regarded as the normative turning point that signals a shift from formal to a more substantive conception of equality, given that it openly recognises the legitimacy of national positive action schemes aimed at reducing vertical and horizontal female underrepresentation. And according to a significant portion of the literature the CJEU, after some initial hesitation, has followed suit and adopted this shift from formal to substantive equality, confirming that positive action is in principle a legitimate means to achieve full gender equality in practice.

Despite the surge of optimism that these developments have justifiably provoked, reality falls far below expectations and the aim of full gender equality in practice remains elusive. Female underrepresentation continues to be severe in many employment cadres across the Union and the glass ceiling is still a long way from being broken. This paper seeks to explore the reasons behind this failure and determine the extent to which the problem is primarily doctrinal. A thorough analysis of the CJEU case-law on positive action will demonstrate that the celebrated shift from formal to substantive equality has not actually been realised. Against the backdrop of a legal framework that is at once ambitious in its aims and cautious in the obligations it may create for Member States, the CJEU continues to handle positive action as a weapon of last resort in the fight for gender equality in national labour markets. Although the Court has clearly moved away from a strict formal equality approach,

its rationale and methods when considering the legitimacy of gender quotas in employment remain formulaic and, as a result, undermine the potential effectiveness of positive action in addressing female underrepresentation in the short term. This notwithstanding, the future of EU gender equality law really rests at the hands of the political institutions that have the power to transform the face of the European labour market by introducing a positive state obligation to meet specific targets in addressing severe underrepresentation of women at the national level.