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Article

Discrimination in Comparative Perspective: Policies and Practices

Valérie Amiraux¹ and Virginie Guiraudon²

Abstract

This introduction to a pluridisciplinary comparative analysis of European antidiscrimination policies and practices provides a critical assessment of current European empirical developments and the analytical issues that they raise. The authors' argument builds upon the tension between the improvement of the protection of rights to equal treatment and the intensification of xenophobia in the European Union. Can proequality policies developed in a hostile context make a difference? The first part of the introduction provides an analytical framework to account for the emergence and implementation of an antidiscrimination policy framework in the European Union. The second part assesses the limits of this new paradigm in particular as far as the categorization and measurement of discrimination are concerned. It focuses on the broader impact of the development of antidiscrimination policies and jurisprudence and on the way "vulnerable populations" have made use of it.

Keywords

discrimination, equality, Europe, race, ethnicity, gender religion, EU law, measurement, ethnic monitoring, ethnic disadvantage, comparative politics

Nondiscrimination now stands as a key fundamental right in Europe and has been the object of many legislative acts, transposed from the European to the national levels (Howard, 2005). From a political point of view, "discrimination" has become the new lens through which European policy makers who seek to promote equality and justice in

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¹University of Montreal, Canada

²National Center for Scientific Research, Lille, France

Corresponding Author:

Valérie Amiraux
 Email: Valerie.amiraux@umontreal.ca

plural societies view the fight against inequalities (Koppelman, 1996; Sabagh, 2007). As a result, the legal apparatus to address discrimination has been enhanced, becoming more and more sophisticated (de Schutter, 2006). These developments have also affected the way vulnerable populations, represented by associations, interest groups, or individuals, can protest against discrimination: gain protection and recognition, and in some cases obtain compensation because they have been the victims of unequal treatment based on their race, ethnic origin, gender, religion, sexual orientation, or disability. Discrimination can thus be seen as one of the major policy paradigms that emerged throughout the Europeanization process (Geddes & Guiraudon, 2007). Yet since the 1990s, the term *discrimination* has appeared in numerous contexts, well beyond the legal sphere.

In fact, in the European and North American academic contexts, discrimination is no longer an object of study reserved to legal scholars. Sociologists, political scientists, anthropologists, psychologists, and economists are now conducting research in this area. Discrimination has evolved into a federative topic for social scientists interested in studying the politics of difference. Studying discrimination helps to assess the impact of multiculturalism and integration policies in their many aspects, with an emphasis on comparative and interdisciplinary research (Bleich, 2002; Jain, Sloane, & Horwitz, 2003; Ringelheim, 2007; Sowell, 2004). To contribute to further research on the questions raised by the salience of the concept of discrimination, we coorganized an international conference at the Robert Schuman Center for Advanced Studies of the European University Institute in Florence in 2006. "The Construction of Boundaries: Reflections on Discrimination Law and Policy in Contemporary Europe" brought together European and North American scholars from different disciplines whose work examines discrimination and policy responses in a comparative perspective. They were asked to critically address the use of various concepts (race, ethnicity, religion, and discrimination). A primary aim was to develop better analytical tools and reflect on the methods used to engage in cutting-edge empirical research.

Based on articles from this conference as well as additional contributions, we have identified three key issues that are addressed in this issue:

1. *The added value of antidiscrimination law* is addressed from a variety of different perspectives, namely, legal theory, public and international law, and labor law, by B. de Witte and L. Mason.
2. *Antidiscrimination law in practice* is examined following its implementation in various policy sectors and use by different types of movements. The articles written by a sociologist, a political scientist and an anthropologist (V. Sala Pala, E. Lépinard, and J. Bowen, respectively), all emphasize the need for a comparative approach to understand the different dynamics at play depending on the issue (religion, gender, race/ethnicity) and the context (from Canada to Indonesia through Europe).
3. *The experience of discrimination and the actual measurement of disadvantage* are both a challenge for social scientists and a controversial necessity for policy makers. The contributions focus here on how to conceptualize and

operationalize discrimination and on the various methodologies available to measure disadvantage and discrimination (in particular the article by J. Veenman). Empirical studies by a sociologist and an economist (K. Phalet and A. Lefranc, respectively) also provide some key insights into the social and spatial determinants of "ethnic disadvantage" in Belgium and France.

This issue, which showcases cutting-edge scholarly research, should help answer policy-relevant questions: How can we account for EU antidiscrimination law? What is its potential, and what are its limits, in various contexts? Is it the solution for those who experience discrimination? How would we know if it were? How could we measure it? In a nutshell, our comparative pluridisciplinary approach provides tools to assess the law, its relevance, and its effects.

In this introduction, we provide a critical assessment of current European empirical developments in the area of antidiscrimination. On the one hand, official policies in Europe have shifted away from encouraging the assimilation of visible minorities towards a pluralist approach, in which the goal of integration is represented by the promotion of equal opportunity coupled with the recognition of cultural diversity in an atmosphere of mutual tolerance between the majority societies and the minority communities. On the other hand, after 9/11, alleged racial identities are more and more coupled with cultural markers, thus increasing the social cost of presenting oneself as a member of a specific visible/vulnerable community. Discrimination, in a sense, is proscribed, yet on the rise. This introduction builds upon the tension between, on the one hand, the improvement of the protection of rights to equal treatment, and, on the other hand, the intensification of racism and xenophobia in the European Union. The first part provides an analytical framework to account for the emergence and implementation of an antidiscrimination policy framework in the European Union. The second part focuses on the broader impact of the development of antidiscrimination policies and jurisprudence and on the ways "vulnerable populations" have made use of it.

European Antidiscrimination Law: A Far-Reaching Agenda Now Facing Implementation Challenges

Among the empirical developments that this journal issue addresses, in particular through the articles by B. de Witte and L. Mason, is the emergence of a European Union policy banning discrimination on the basis of race, ethnicity, and religion (as well as sexual orientation, age, and disability). This occurrence is remarkable because, before the 1997 Amsterdam Treaty, policies directed at ethnic minorities had mainly remained a national or local prerogative, international and European human rights protection in this area having proven limited in practice. EU policy emerged amidst contrasting national policy paradigms and, thus, required extensive change of national institutions and debates on issues that had not yet been acknowledged (Geddes & Guiraudon, 2004, 2007).

In this section, we succinctly outline the contours of the EU antidiscrimination policy domain and account for its emergence. In addition, we highlight the challenges of implementation at the national and subnational level. In a nutshell, our reading is that EU legislation is far-reaching thanks to the strategies of a small group of Euro-savvy nongovernmental experts. It was adopted rapidly because of the political will to respond to the presence of the far-right party of Jörg Haider in the Austrian government coalition. The same actors are not, however, influential at the national level, and political will is lacking. There are also institutional constraints to changing the situation on the ground. Still, there are signs of endogenous dynamics of change since the directives were transposed and of incremental change through the nonbinding policy instruments of benchmarking and monitoring. Of course, implementation is a challenge for all public policies; this has been well known at least since J. Pressman and A. Wildavsky wrote their 1973 book *Implementation: How Great Expectations in Washington Are Dashed in Oakland* . . . ; and it constitutes an entire subfield of EU studies. The main objective here is to map out the policy process at different levels of government and different policy stages in this area.¹

European supranational legislation prohibiting discrimination has existed since the 1957 Treaty of Rome that created the European Economic Community (later the European Union). Direct and indirect discrimination against Community nationals using their right of free movement to work in another member state have been explicitly prohibited, with some exceptions.² Discriminating against women in ways that contravened Article 119 (now Article 141) of the Treaty of Rome on equal pay for equal work was also prohibited. The jurisprudence of the European Court of Justice with respect to free movement of workers and gender equality has been abundant (Cichowski, 2007; Guild, 1999). The 1997 Amsterdam treaty added new provisions to combat discrimination including on grounds of race and ethnicity, religion, handicap, age, and sexual orientation, thus including new groups as potential and likely victims of discrimination (Article 13). Two directives were adopted in 2000, namely, a "race directive" combating discrimination on the ground of race or ethnicity in a number of areas (e.g., housing, employment, education and training, and the provision of goods and services) and a directive combating all forms of discrimination in employment.³ The directives covered both direct and indirect discrimination and allowed scope for "positive action," including in areas such as housing where there was no prior Treaty competence. The EU legislation is novel in the way it favors the achievement of substantive equality and expands the notion of indirect discrimination—defined as the fact that apparently neutral laws and practices disadvantage persons from specific groups. It introduces notions such as harassment and victimization. Finally, it sets up procedural guarantees for making those rights effective (e.g., shifting the burden of proof in procedures) and requires the creation of national equality bodies to promote antidiscrimination initiatives and monitor implementation.

From 2000 to 2006, a European Community action program⁴ with a budget of €100 million focused on developing nonlegal instruments, that is, comparative measures of discrimination, which would allow for the monitoring of various groups targeted in

Article 13, such as ethnic and religious minorities. A substantial part of the €257 million of European Community funding in the area of employment and social solidarity known as the PROGRESS program is dedicated to fighting discrimination as well as promoting diversity (23%) and promoting gender equality (12%).⁵ Much larger sums were spent through the European Social Fund as part of the European Employment Strategy and the social inclusion process. The EQUAL initiative (2001-2008) was set up to fight discrimination and exclusion on the basis of gender, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. The EU contribution to EQUAL of €3.274 billion was matched by national funding and supported hundreds of projects in each member state in a decentralized fashion.

In brief, both legislative acts—mainly directives requiring transposition into the national laws of the member states—and funding programs to support projects promoting equality are affecting national policies on discrimination. The Commission, the institution in charge of monitoring the implementation of EU policies, finances multinational teams of lawyers and social scientists to achieve this goal. For instance, the European Network of Legal Experts in the Non-Discrimination Field has conducted a number of comparative studies and produces the biannual report *European Anti-Discrimination Law Review*. The Migration Policy Group, the same Brussels-based organization that was involved in the Starting Line Group proposal for a Treaty article against discrimination in the 1990s, manages the network. As in other policy areas, EU insiders and outsiders collaborate to further supranational policy agendas. In the antidiscrimination field, there has been an effort to also decentralize the monitoring of compliance to national independent agencies (the equality bodies required by the directives). Finally, there have been continued efforts on the part of the Commission to generate comparative indicators of discrimination among vulnerable groups and assess how well the latter are doing over time, across sectors, and across member states. This has been the case in spite of national controversies and inertia on the part of national statistics agencies.⁶ This is typical of the benchmarking exercises that have developed in the field of EU social policy and others since the 2000 Lisbon Council summit (Bruno, Jacquot, & Mandin, 2006). The Commission can also rely on the reports of the Vienna-based EU Fundamental Rights Agency (FRA)—formerly the EU Monitoring Center on Racism and Xenophobia (EUMC) set up in 1997. This EU agency coordinates the RAXEN network, which involves regular reporting by national correspondents known as "focal points." In sum, EU institutions have enacted a comprehensive policy package that combines hard and soft law (legally binding and nonbinding instruments) and a range of tools to ensure compliance with EU objectives, including independent agencies and substantial funding for monitoring that is emblematic of the current EU "new modes of governance" as noted by de Búrca (2006).

There was great excitement among scholars when EU antidiscrimination policy was introduced. As de Witte (2009) puts it, it is "the spearhead of [the EU] broader fundamental rights policy agenda" to the extent that it received specific attention in the form of follow-up legislation. Fundamental rights in postwar Europe had traditionally been the concern of the Council of Europe and the Strasbourg-based European Court

of Human Rights, which applies the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and its five protocols. However, Article 14 on discrimination could only be used in conjunction with another article of the Convention, and the burden of proof is on the applicant. Legal scholars have also regularly criticized the Court as inadequate to address structural discrimination, as it examines individual cases.⁷ This is typically an issue that the Roma have faced in Europe. The European Roma Rights Centre, an NGO that uses strategic litigation, was frustrated in its efforts as procedures were long and outcomes unsatisfactory, until November 14, 2007, when the Grand Chamber of the European Court of Human Rights ruled that Roma children had been segregated in Czech schools in *HD and others vs. Czech Republic* in a way that constituted a discriminatory violation of their right to education (Article 14 & Article 2, Protocol One of the European Convention of Human Rights). In fact, the judgment makes extensive reference to EC law and nonbinding reports and opinions on Roma education in the respondent state. This shows that EU antidiscrimination policy is now influencing actors within other supranational institutions.

There were other reasons why scholars took interest in the development of antidiscrimination policy. There had been several attempts to shift competence to the EU with regard to the integration of migrants, yet all had failed. In the 1980s, the European Court of Justice Commission had annulled a Commission 1985 decision calling for consultation on issues regarding the integration of non-EU citizens (known as third country nationals) for lack of a Treaty basis. In the early 1990s, nongovernmental organizations, in particular the European Union Migrants' Forum, a federation of migrant associations financed by the European Commission, called for a "European citizenship" status for third country nationals. This decoupling of citizenship and nationality was rejected during the Inter-Governmental Conference leading to the 1992 Maastricht Treaty, as member states considered citizenship as a core prerogative of nation-states that they could not relinquish.

Throughout the 1990s, the political climate seemed to turn against migrants and their descendants in an ever-growing number of member states, with national xenophobic parties gaining ground and EU-level cooperation on immigration and asylum focusing mainly on restricting access and rights to non-Europeans. The adoption of Article 13 in 1997 was therefore the first substantial success for initiatives meant to better the situation of ethnic minorities. The European Union had also shied away from the thorny issue of its internal national minorities, focusing rather on those in candidate countries in East and Central Europe. Only one month after the adoption of Article 13, which offers ethnic minorities protection against discrimination within the EU, the European Commission declared that "respect for minorities" would be a condition for states wishing to join the EU. The eight countries of Central and Eastern Europe needed to comply with Article 13 and show that certain groups, especially the Roma, would be protected from discrimination. An EU *external* concern for national minorities converged with an *internal* recognition of the discrimination by migrant-origin ethnic minorities (de Witte 2002).

So how can we account for the adoption of Article 13 and secondary legislation (the 2000 directives)? Concomitant research (Favell 2001; Geddes 2000; Guiraudon

2001) emphasized the success of initiatives by lobby-like structures whose EU savvy included interpersonal relations with the members of relevant Directorate Generals such as Employment and Social Affairs, the knowledge of emerging agendas that they could exploit to carve out a space for new policy issues, and more generally a knowledge of EU law and institutional dynamics. This was the case of the Migration Policy Group, which mobilized a group of Anglo-Dutch lawyer-activists who combined a strong commitment to antidiscrimination legislation with a high level of EU-related technical know-how and coordinated the Starting Line Group founded in 1992 that asked for the inclusion of an antidiscrimination article in the Treaty. It proved to be a successful campaign, because Article 13 greatly resembles their original proposal, and EU institutions along with 300 other signatories rallied in favor of it. The Starting Line group's success is not only explained by its organizational structure but also by the fact that its members drew from legal resources surrounding market integration, namely, the principles of nondiscrimination and equal treatment, to call for provisions located in the EU's first pillar. They argued that the absence of antidiscrimination provisions impeded the operation of the single market by, for instance, acting as a barrier to movement by people of immigrant and ethnic minority origin who feared racist discrimination when exercising EU rights. They also linked their proposal to the "social exclusion" policy frame that was developing in the early 1990s (Geddes 2001). This frame was more successful than the "citizenship" frame that migrant organizations of the EU Migrants' Forum had used.

Negotiations at the EU level based on Article 13 accelerated when, in February 2000, a coalition government was formed in Austria with the extreme-right party of Jörg Haider receiving 6 of 10 full ministerial posts. In some key member states (France and Germany), antidiscrimination is synonymous with anti-racism and resonates with postwar attempts to fight the ideas of the extreme right rather than, as in the United Kingdom, with the management of visible migrant minorities. The initial policy linkage between the antidiscrimination package and the Austrian far right ensured not only that the dossier would be given priority but also that the Austrian delegation would be extremely cooperative during the negotiations. The same can be said of the German delegation, which was fearful of being associated with Austria. Most participants in the subsequent negotiations mentioned the fact that Community legislation and jurisprudence on gender equality provided a frame of reference for the directive on racial discrimination. The reference to gender equality was, however, partly misleading with respect to at least one crucial point: indirect discrimination. Member states gather statistics on the basis of gender but, with the exception of the United Kingdom, not on the basis of race. The race directive was adopted in record time. This prevented input from potential opposition (employers and national bureaucratic actors) while giving weight to the European Parliament (whose opinion was needed for the race directive to come into force) that had shown a willingness to pursue the kinds of ideas advanced by migrant lobby groups (see Geddes and Guiraudon, 2004, for further details).

Still, the fact that the group that spearheaded the initiative for Article 13 did not build upon nation-centered movements and used a frame that only resonated in the United Kingdom and the Netherlands meant that, at the national level, there would be

an uphill battle to render Article 13 effective in practice and to have national actors adopt this antidiscrimination policy paradigm. Moreover, the policy lobbyists who knew Brussels well had no social or organizational base that they could activate at the national level when seeking to socialize actors into a new (imported) policy model. Thus, their initial success did not imply an easy implementation *in practice* of the EU law based on Article 13. Indeed, antidiscrimination law requires judicial activism on the part of NGOs, yet national NGOs did not partake in the Brussels-based initiatives. The two processes (shifting competence to the EU and seizing upon EU legal opportunities) may well involve different actors that never enter into contact with one another. The groups that lobbied for antidiscrimination provisions wished to induce reform through a reframing of existing policies. Yet a change of frame at the EU level is unlikely to result in changes in national perceptions of the issue if the frame has multiple possible meanings or is a catchall concept—as is often the case in EU policies (“social exclusion,” “sustainable development,” etc.).

There is considerable variation in the ways in which member states have complied (on convergent trends, see Bell 2008). This should not come as a surprise given the variety of *ex ante* situations and the various dynamics that may or may not be related to EU antidiscrimination policy. Various kinds of issues have been at the core of national debates: in Germany, the directive has been considered to go against constitutional principles such as private property and autonomy, whereas in France opposition to data collection that would define ethno-racial categories to measure discrimination has been fierce.⁸ There are quite a few potential factors that could explain variation in the Europeanization of antidiscrimination policy. Here we would like to highlight those that seem to us of particular importance and that are addressed by various contributors in this special issue.

A first factor to consider is the variety of *legal cultures* and the attitudes of the actors involved in the enactment of the litigation side of the policy, in particular lawyers and judges but also trade unions, employers, public authorities, equality bodies, and legal aid groups engaging in strategic litigation. As the first two articles in the issue show, there are different views within the legal field on the potential of EU law, yet both B. de Witte and L. Mason agree that there will be a need to change the way actors apprehend discrimination cases and to convince them to engage with new procedures and change their practices. Training of judges and lawyers is necessary, but so is raising awareness among actors representing labor in industrial relations that have a structural bias against dividing the unity of “labor” and a preference for collective bargaining rather than litigation. Business has an interest in avoiding litigation and engaging in “diversity management” to show their good will. This is the case argued by their human resources departments (Dobbin & Kelly, 2007), yet this may be done in a superficial and inefficient manner (Kalev, Dobbin, & Kelly, 2006; Wrench, 2007). In this respect, equality bodies have a key role to play, because they can focus resources either on persuasion and mediation or on judicial referrals and condemnation of practices. These issues are debated within the network of equality bodies (Equinell), yet we can expect a period of soul-searching for the new bodies.

Second, *mobilization cultures* vary across Europe. The strategies of nongovernmental organizations will be key, in conjunction with the aforementioned equality bodies, in actually using the opportunities opened up by EU developments in the antidiscrimination field. Strategies include coalition building, the choice of issues and frames, and the repertoires of action. Carlo Ruzza (2007) has studied the varying ways in which antiracist movements positioned themselves with respect to EU policy lobbying. Previous work on mobilization for gender equality also suggests differences in the degree to which groups will seize upon EU law (Alter & Vargas, 2000; Tesoka, 1999). We can also expect that former dissensions within movements will be heightened by the intrusion of European frames in national ones (Lépinard, 2008). The relationship between different movements claiming equality also will affect the potential dynamics of contention in this area. In fact, E. Lépinard’s article in this issue shows that activists face dilemmas when mobilizing around sensitive issues as ethnicity and religion. Canadian feminists were treading on treacherous grounds when they contested an Ontario decision to allow religious councilors to settle family disputes and had to be careful not to turn their feminist struggle into an anti-Islam campaign. Regarding intersectionality, whereas in some countries associations representing different constituencies within the equality movement have become accustomed to working together during past struggles, this is not always the case. For instance, national and local gay and lesbian associations involved in the struggle against AIDS in France have long helped migrant initiatives (e.g., Act-Up), as they see themselves all as minorities in danger and “dangerous classes”. In contrast, in the Netherlands, politician Pim Fortuyn, who led his party to electoral victory although he was murdered shortly before polling day, institutionalized his gayness as a sign of his progressive politics in opposition to the alleged homophobia and misogyny of Moroccan and Turkish migrants. Industrial relations, that is, the modes of conflict resolution between labor and business, are yet another factor affecting mobilization that varies greatly across Europe. One can expect difference in the ways relevant social partners in each country, region, and sector will take on this new agenda of antidiscrimination.

Third, *integration cultures*, the national “philosophies of integration” (Favell, 2001) that shape public policy and pervade public discourse, intervene in the implementation of discrimination legislation. A clear example discussed in this issue is the question of the measurement of discrimination and the definition of the categories that are relevant in collecting data to do so (Sabbagh & Peer, 2008). “Methodological nationalism” (Wimmer & Glick-Schiller, 2002), which refers to the naturalization of the nation-state and the territorial limitation of social science within its boundaries, characterizes this domain as many other areas of science and policy that inform public statistics. The problem is acute when it comes to categories involving nationality, race, or ethnicity because their history coincides with the development of national bureaucracies and seek to register and control population movements (Noiriel, 1996; Spiro, 2005). Furthermore, in many European countries, the dominance of public funding in research has led social science categories to be dominated by policy choices and political debates (Favell, 2003). In this context, the official categories used to

measure "ethnicity" if they exist are typically of the "groupist" kind to use Brubaker's (2006) expression: They treat ethnic groups as substantive entities with objective commonalities. In spite of the possible policy and legal uses of "ethnic monitoring" (Ringelheim & de Schutter 2009), this concept, which does not even translate in some European languages, is very controversial in most EU states. In brief, the policy tools meant to assess the efficiency of antidiscrimination law meet with resistance or inertia in such a way as to compromise the implementation of EU law.

In July 2008, the Commission adopted a proposal for a directive that provides protection from discrimination beyond the workplace (social protection, including social security and health care, education, and access to and supply of goods and services) on the grounds not covered by the 2000 race directive (age, disability, sexual orientation, and religion or belief). If successful, this would complete the EU legislative arsenal in this area. Yet it is unclear whether the political will is present, and in fact, open opposition came from important member states such as Germany. Much as Mithridates of Pontus became immune to poison, current European leaders now seem impervious to xenophobic declarations that until recently still outraged them. Some national leaders have been vocal against antiracism for some time. Italian Premier Silvio Berlusconi refused to sign a proposal for a Council framework decision on combating racism and xenophobia tabled in 2001.⁹ Back in power for the third time with far-right parties in his coalition, he called for the fingerprinting of all Roma on Italian soil, including minors, and later ignored the condemnation of the European Parliament, the Council of Europe, and the UN in the summer of 2008. In early September of the same year, two weeks before the first EU conference on the Roma, the European Commission through its justice, liberty and security commissioner said that the Roma census was not a violation of EU law against ethnic discrimination (Latham, 2008). In brief, the implementation of current European antidiscrimination law is challenging and future developments uncertain.

Besides its potential, which will be discussed in the articles that follow, EU law has raised important questions, to which we will now turn: Is this the relevant way to tackle the complex issue of discrimination? What are the limits of this legal approach?

Discrimination in Europe: What Has Been Left Aside?

In 2008, tolerance and equality, not to mention liberal democracy, had become the dominant characteristics of the EU political ecology. In the second part of the introduction, we focus on a question that brings us back to the national level of analysis and comparative perspectives: Is the antidiscrimination European framework adequate to promote equality and a better cohesion of European societies? In other words, if inequality and racism persist in Europe, should we blame the legal framework or the "incompetence" of the actors, considering that some (women or gays, for instance) have been more successful than others (e.g., Muslims or Roma)? Our critical assessment of the limits of the hegemonic rights-based approach aims at questioning the fact that institutionalizing discrimination is the best way to fight racism and racial inequality in the EU member states. If the European project wants to increase equality

among EU citizens, how can the antidiscrimination legal tools intervene efficiently when dealing with new forms of racism that have in particular emerged following 9/11? Our arguments draw on the particular difficulty of defining categories and developing efficient tools to assess where discrimination is most pervasive in European societies, including the issue of measurement. This section of our introduction questions more specifically the social relevance of some legal-political categorizations according to both the types of experience of discrimination and the sites where it takes place.

Discrimination is a process of drawing a distinction, a process that cannot be defined as good or as bad *per se* until the ground on which the distinction is drawn is declared to be illegal. The concept of discrimination has thus become a potentially powerful resource since it became a juridical notion. As we explained earlier, given the range of grounds and the direct and indirect dimension of discrimination, there is no room for any forms of inequality in most social sectors. Nevertheless, for the victims going through this process of distinction, their pragmatic experience entails various dimensions that happen to be difficult to disentangle. Multiple belongings and identities collide in the narratives constructed by victims of discrimination, whereas background variables such as social class, ethnicity, and gender have interactive effects and affect the successful trajectories of individuals at work or at school, for instance (Dekkers, Bosker, & Driessen, 2000; Gimenez, 2001). These narratives referring to discrimination as a complex and intersectional experience have in particular been explored in studies on ethnic minority women embedded in "interlocking systems of oppression" (Hill Collins, 1990). Broadly speaking, different dimensions of inequality connect and conflict with each other, giving birth to multidimensional structures of inequality that happen to be, for instance in economics, quite stable (Mc Call, 2001).

Most of the recent works by sociologists and lawyers on discrimination, in Europe and beyond, emphasize this complex dimension of discrimination as experience of unequal treatment and state the necessity of elaborating on a model of "complex equality" to try to come to terms with it. Most of them draw on extensive case studies showing the growing complexity of the experiences lived by individuals subjected to discrimination. The legal reading, having prioritized certain sectors of social life (employment, education, health) coupled with specific categories, fails to fairly address these complex or multiple dimensions of discrimination. To take on the initial proposal by Crenshaw (1989, 1991), the single-axis approach of equality ignores the complex ties binding, for instance, race and gender. Multiple discrimination has yet to find proper place in public policies, because intersections are visible to no one besides the victims. To be heard as a victim, one basically has to fit into one of the existing categories that map the field of antidiscrimination policies. The use of proxy (in our case, race, ethnicity, gender, sexual orientation, ethnic origin, etc.) cannot be avoided as it works as a probabilistic indicator of other potential characteristics intervening in discriminatory practices. It thus appears necessary to refer to the categories that are critical to evaluate the specific existence of discrimination. The problem stems globally from the overinclusiveness of proxies, such as in the case of race, ethnicity, or gender. By giving legal forces to these categories, a

"strategic essentialization" is produced, which forces one to be part of a group to be heard and seen (Schauer, 2006). Moreover, the failure to address intersectional experiences of discrimination strongly limits the capacity of victims to advance their claims (Amiriaux, 2006). This difficulty in tracing the borders or assessing the intersectional dimension of discrimination is well illustrated by the specificity of religious discrimination. It illustrates the confusion and overlaps that occur in concrete situations, religion being one of the categories intersecting with gender and race in most of the headscarf controversies in EU member states. Muslims figure as a perfect example of the interactive dynamics operating between multiple variables that somehow lead to an "ethnicization" or "racialization" of religious characteristics (Modood, 2007; Phillips, 2007¹⁰). Muslim women wearing the headscarf embodying the climax of the complex inequalities challenging antidiscrimination tools (Amiriaux, 2007a, 2007b; Malik, 2008). As J. Bowen's comparative contribution to this issue reminds us, both internal (internal restrictions on the rights of believers that originate from their own religious community) and external religious discrimination (equal rights and capacities to practice religion) provide good illustrations of normative grounding for antidiscrimination laws (what he calls "religious fairness"), for they tell us which sorts of discriminations are to be tolerated or condemned both in secular and nonsecular contexts.¹¹

The experience of discrimination ends up being misrepresented, whereas the deepest structures of inequality are maintained through the single-axis reference to one category or to the other. The growing explicit concern with categorization in the field of discrimination is connected with what some authors have called the cognitive turn in the study of ethnicity and the necessity to develop more "complex knowledge structures than categories . . . in research on ethnicity" (Brubaker, Loveman, & Stamatov, 2004, p. 32). The literature in the discrimination area has started to focus on the intertwining of systems of domination by focusing on gendered forms of daily and covert racism (Essed, 1996). Seen as an individual experience of inequality of various intensity, the notion of discrimination in the judicial and policy arenas does not indeed do justice to the complexity of its social relevance. From a sociological perspective, a pragmatist perspective should be favored by emphasizing the criteria defining the situations, the circumstances, the tiny contextual variations that interfere with the experience at the moment it occurs, and the categories that are used by the actors when the action is being carried out, by focusing on situation as the unit under observation when collecting data. In this context, gender, for instance, happens to be divisive rather than inculinary of different profiles of female victims of discrimination. In discussions where women from ethnic or religious minorities are involved, implicit hierarchies between categories of motives for discrimination give credits to new forms of racism and strengthen the competition between sets of norms (justice and security, freedom of religion and freedom of speech, freedom of religion against gender equality).¹² The recent decision taken by the province of Ontario to ban religious arbitration for family matters offers an illuminating case study of this tension between gender equality and religious rights in the Canadian context. E. Lépinard insists in this issue that, although Canadian feminists successfully invested the legal arena, at both the level of practice, with litigation and

lobbying, and the theoretical level, their positioning during the 2001 Ontario debates over Islamic tribunals and the possibility of a "religious parallel justice" missed the point of intersectionality. Gender equality won over minority rights.

Thus far, antidiscrimination policies in the EU have relied mostly on a rights-based solution that has spawned an institutional, Brussels-based culture of equality. The limits of the rights-based approach to discrimination when addressing broader issues of racism in Europe is another main emphasis of the social sciences research dynamics on discrimination. It arises from the intellectual and political difficulty of dealing with the following reality: Whereas the juridical and political resources for the promotion of equality are developing in the EU, racism and hostility towards specific minorities such as Jewish and Muslim populations are increasing.¹³

But the multiplication of EU programs and policy initiatives has not really led to the development of an "antidiscrimination ethos" able to shape the way Europeans discuss equality and justice transnationally.¹⁴ The social fluidity of discrimination contrasts with the boundaries of its legal existence. This brings us to a discussion of the ability of law to seriously tackle injustice in its social dimension. As a matter of fact, another key statement that we wish to make in this introduction relates to the social opportunities and innovative claims the antidiscrimination policy frame has opened up for targeted as well as untargeted groups. In short, the input of the antidiscriminatory frame of reference has been of little help in the constitution of new alliances among groups that had not been accustomed to thinking of their different causes in common terms. Legal changes have been significant, especially in terms of the impact on the creation of comprehensive legal packages, which has been transferred from the European to the national level. Even though national courts in European countries have been reluctant to recognize that constitutional rights (such as the right to equality) are directly binding on private persons, the European human rights model today is constitutionally committed to antidiscrimination provisions (de Witte, this issue). Antidiscrimination policies have helped the shaping, framing and formulation in juridical and legal terminology of claims that were in most cases kept silent. This rights-based approach revealed itself to be but limited. Indeed, as European lawyers explain, the enforcement of antidiscrimination law proceeds mostly by mean of individual claims in the EU (de Witte, 2009).¹⁵ The emergence of a "culture of rights" around the issue of difference and discrimination is contemporary of the polarization of social conflicts around issues of ethnic and cultural differences, alongside social ones. Ideally, discrimination could have worked as a regulatory tool in a context where official integration policies have shifted away from an assimilationist position towards a pluralistic one, that is, emphasizing simultaneously the promotion of equal opportunity and the protection of cultural diversity (Barry, 2001). This opens up a new horizon of expectations in terms of recognition, respect, and dignity that, up to now, have not really been translated into systematic strategies of litigation. Of course, national spaces have been differently receptive to the opportunities offered by the EU discriminatory frame, as was noted earlier. Central to determining such receptivity is the interplay between the political culture of mobilization and the ways minorities perceive themselves as ethnic or racial

or as members of religious groups. For instance, in France, a connection between the March 2004 law banning religious signs in public schools and the resources of the indirect discrimination provisions has not been made, although at least two vulnerable populations, Sikhs and Muslims, have undergone the experience of exclusion from school (Amiriaux, 2008). The only way to get a voice as a person or a group that suffers discrimination, is to go to court, that is, to develop a "strategy of litigation."¹⁶ This is sustained by the fact that through the implementation of the EU directives, generic norms have been translated into legal categories. But the encoding process has remained rather limited to "explicit" cases of discrimination, either where inequality is obvious and supported by a political campaign (gender equality in employment, for instance), or where statistical data can prove it. But antidiscrimination as a dominant frame for shaping equality in the EU has proven unable to assess the daily racism that ends up producing situations of discrimination by failing to recognize the impact of repetitive micro-events, perhaps invisible to others, that play on the emotional vulnerability of individuals (such as contact avoidance or unsolicited intimacies in the case of women) (Essed 1990, 1991).

One related area where there is still much debate in both the research and policy worlds regards the means of defining and measuring discrimination (Simon 2007; 2008). The collection of data is a necessity that stems from the development of minority protection and antidiscrimination policies. To better protect people against discrimination, information is needed: Who are these people? What is the scale of the problem? Where are the places where the discriminatory practices take place? Measuring discrimination is therefore one of the priorities of the EU political agenda to accelerate the adoption of remedial measures adapted to the needs and specific situations, although the tension between minority protection and privacy rights slow down the process, which is politically controversial (Ringelheim, 2008). Data collection is expected to serve the purpose of affirmative action or at least the targeting of specific populations through public policies (compensation for disadvantage or underrepresentation). Finally, data collection could facilitate the burden of the victim in proving the discrimination he or she suspects he or she has been subjected to (Ringelheim & de Schutter, 2009).

As Justus Veenman's article here suggests, there needs to be at the very least a triangulation of methods to arrive at an accurate picture of the various aspects of discrimination. Each method captures one particular aspect of the issue. Testing can be used to identify cases of direct discrimination when, for instance, entering a nightclub or looking for an apartment or a job.¹⁷ Interviewing employers can help understand their own reasoning in their treatment of members of various groups (women, ethnic minorities, etc.). Surveying population samples about their experience of discrimination gives us an idea of the variety of situations in which minorities have felt mistreated. Social psychologists conduct tests instead that seek to reveal how certain groups in fact have internalized racial, ethnic, or gender discrimination by self-demeaning themselves or underperforming in tests when told. Finally, there are a number of studies that do not seek to understand discrimination as much as to measure (in)equalities in society and to identify the relevant variables that explain them, including belonging to

a particular minority group or having a migrant background. Two of the articles in this issue tackle this issue so as to measure "ethnic penalties" and assess the social cost of belonging to certain target groups:¹⁸ Karen Phalet's, which focuses on Turks in Belgium and regional disparities in their access to jobs; and Arnaud Lefranc's, which analyzes French survey data and compares the role that the parents' country of birth play in individuals' performance on the labor market. Lefranc's article raises several important points, and we only highlight a couple here. First, there is a real need to rethink what we mean by equality in a way that takes into account recent debates in philosophy and social theory. Otherwise, studies talk past each other with different expectations of what equality means. Moreover, conceptual debate is a precondition to research design and thus to proper measurement. Second, Arnaud Lefranc's article, based on data that include place of birth and nationality of parents, confirms that North African immigrants' children have a real problem of access to jobs *ceteris paribus* that other migrant groups' children do not share. This kind of study has clear policy implications, as it underlines that the key issue remains labor market access. Karen Phalet's article on the ways ethnic penalties vary across national territory has implications for politics rather than policy. In fact, the dominant antimigrant discourse in Flanders politics seems to be mirrored in the situation of the Turkish "second generation": certain migrant minorities fare less well than in other regions including Brussels and the less dynamic Wallonia. The role of the official *dona* that diffuses from elected and administrative elites down to the street-level bureaucrat or private actors must not be neglected. This is verified both quantitatively in Karen Phalet's study and qualitatively in the interviews conducted by Valérie Sala Pala in her chapter on discrimination in housing. To sum up, the articles provide us with empirical results but also show that there are a number of avenues for research focusing both on the characteristics of migrant minorities and on those of the local milieu. This suggests that monitoring should be targeted, as Veenman and Phalet illustrate in this issue.

All these contributions dealing with measurement of discrimination pay a reflexive attention to the practice of the researchers in order not to equate evidence of discrimination with cause of discrimination. Here the techniques of measurement and the invitation to strategic comparative agendas of research are central. Phalet suggests to systematically rely on cross-national comparisons of ethnic groups and comparative analysis of ethnic penalties to assess the impact of the local environment and the specificities of local labor markets regarding the institutional explanations of ethnic closure and differential effect discrimination. Lefranc also insists on the methodological and empirical precautions to take when working on ethnic-based discriminatory penalty: What is motivated by the ethnic background and what is not? To clarify the driving determinants of observed ethnic disadvantage and estimate the extent of discrimination in earnings differential, Lefranc isolates the various factors that interact with it, such as differences in education and social origin, individual human capital, parental background, and access to the job market. More largely, the contributions focusing on measurement in this issue invite scholars to further develop mixed-methods approaches in the study of inequality in differentiated societies.

With discrimination legally banned, can a shared understanding of equality emerge? Some discussions tend to say yes (when dealing with women); others do not (religious reference). "It is not then, a commitment to equality but an understanding of difference that poses the key challenge to implementing an equality framework at the national level" (Rudiger, 2007, p. 43). In that view, some differences remain much more visible than others. In the post 9/11 European Union, racial and religious differences encapsulate the very limits of the promises of a pluralistic equality. As cognitive social theory has shown, discrimination cannot simply be reduced to an intention that motivates a decision to treat someone differently (Hamilton Krieger, 2008). It is not merely a question of ignorant individuals who have conscious prejudices against groups of people; it is also the product of more implicit normative expectations stemming from imaginaries and representations based on stereotypes that are omnipresent in social life and heavily condition our relation to others. This individual and intentional dimension of racism has been balanced in the EU antidiscrimination legal settings by the addition of a reference to indirect discrimination.¹⁹ In that context, statistical evidence seems to be the only way to assess and eventually correct such discrimination, which cannot be said to be motivated or articulated. Monitoring and evaluation should therefore focus on the negative impact of discrimination on a specific group of persons.

Concluding Remarks

The persistence of racism indicates that Europe is not yet done with race in the generic sense, that is, encompassing all elements defining belongings and identities. One of the explanations for this parallel intensification of antidiscrimination policies in Europe and the growth and maintenance of racism is historical. As Lenin (2004) puts it, the dominant antiracism since the 1950s has neglected to "historicize the growth of racism as a political idea used by states, for example, under the conditions of colonialism, in the treatment of the working classes, the development of modern political anti-Semitism and the regulation of European-bound immigration" (p. 428). Goldberg (2002), dealing with racism rather than discrimination, convincingly argues that the persistence of racism in post-Holocaust Europe follows the logic of what he calls a racial historicism that has never been discussed. The ideal of a "color-blind" society that lies at the core of the EU antidiscrimination project ends up with the *de facto* persistence of discrimination. Linking antidiscrimination and equality policies with antiracism and multiculturalism as political projects, Hamilton Krieger (2008) complements Goldberg's perspective. She elaborates on what she called the cognitive bias that informs and distorts judgment, leading to survival of inequalities and discrimination even in the U.S. color-blind system. At the intersection of these two perspectives, antidiscrimination provisions, by working on the inclusion of differences, produces a kind of cultural cloning made possible through a legal standardization of whiteness as the norm, structuring in the process the entire color blindness project (Essed, 2005): What happens then to those who, in fact, cannot be Whitenized?

This trend of normalization of strong stereotypes and stigmatization of particular groups or individuals has been exaggerated following 9/11. A cultural racism is on the rise, with a new legitimacy binding danger and threat with cultural, ethnic, and religious markers. It would seem as though racism against and discrimination of certain groups (Roma, Muslim Africans, Muslim Arabs, Jews) has come to be perceived as not so problematic when motivated by culture as when explained by racial or ethnic belonging. The growing cultural racism that is observed throughout EU member states is, as in the case of discrimination, operating directly as well as indirectly. "Is there an egalitarian solution to combat racism?" seems to be the question underlying the generic investment in the legal and political implementation of the notion of discrimination as the cornerstone of equality policy in Europe. Antidiscrimination acts as a set of regulatory practices of private and public potentially racist attitudes.²⁰ This legal development fits in with the collective European political imagination that today is based upon an idea of itself as inherently nonracist. But racism, observes Lenin (2008), continues to define the sociality of Europe and deep-seated discriminatory structures survive that are not only historically grounded. "What the insistence on social cohesion and integration and the concomitant espousal of national values through the establishment of citizenship tests, for example, have done is to shift responsibility for societal success onto its outsiders" (p. 499).

The European Union is now at a crossroads, following a more global dynamic that is changing the landscape of European liberties and security. As pointed out in different NGO reports, the strengthening of the security frame has an impact on civil liberties, political rights, and social cohesion. This relates to the definition of danger, the representation of threat, and the rise of a logic of suspicion towards "potentially dangerous populations." Again, the specific case of Muslim populations is emblematic of this tension (if not contradiction) between, on one hand, an intensification of the suspicion towards Muslims as a consequence of anti-terrorism laws implemented after 9/11 and, on the other hand, the sophistication of the legal setting to promote equality and justice. Security has taken precedence over justice, and the antidiscrimination legal resources have not offered an equal protection to all vulnerable groups. Suspicion has emerged as a dominant paradigm and "has created a form of phobia about everything that may be considered as a national disloyalty" (Bigo Carrera, Guild, & Walker, 2007, p. 8). If equality of opportunity (a discourse on rights) and pluralism (a discourse on values) are to be promoted simultaneously, this entails achieving equal protection of individuals confronted with similar situations (i.e., a formal equality) and substantive equality to achieve the equal representation of different groups by assessing the structural causes for inequality. We end then with a question: Which political regime and policy mix best accommodates diversity?

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Bios

Valérie Amiroux is professor at the department of sociology of the University of Montreal and holds the Canada research chair for the study of religious pluralism and ethnicity (CEERTUM). She holds a PhD in political science from the Institut d'études politiques de Paris. She is the author of *Structures de l'islam entre Allemagne et Turquie. Parcours militants et expériences religieuses* (Paris: L'Harmattan, coll. Logiques politiques, 2001) and coeditor of *Politics of Visibility: Young Muslims in European Public Spaces* (Bielefeld, Transcript, 2006). Her current work deals with a comparison of forms of secularism in European countries in which she looks

at the controversies between public authorities and different religious minorities (Jehovah's Witnesses, Jews, Muslims, Sikhs).

Virginie Guiraudon is a permanent research fellow at the National Center for Scientific Research (CNRS) in Lille, France. In 2005-2006, she held a Marie Curie chair in social and political science at the European University institute in Florence. She holds a PhD in government from Harvard University and has been a visiting fellow at Princeton University and a recipient of the Descartes-Huygens prize, whose tenure she spent at the university of Nijmegen. She was also awarded the CNRS bronze medal for best young researcher and the European Union Studies Association best paper prize. She is the author of *Les politiques d'immigration en Europe* (Harmattan, 2000). Her current research analyzes the shifting of policy competence in the area of migration, asylum, and antidiscrimination to the EU level. Her articles on these themes have appeared in a number of volumes and journals including the *Journal of Common Market Studies*, *International Migration Review*, the *Journal of European Public Policy*, *West European Politics*, and *Comparative Political Studies*.

Article

From a "Common Principle of Equality" to "European Antidiscrimination Law"

Bruno de Witte¹

Abstract

The principle of equality is an important part of the contemporary constitutional law of all European countries. It is therefore a "common" principle, and was, as such, also integrated in the legal system of the European Communities. However, this common principle of equality was modernized and modified by a series of specific antidiscrimination laws adopted in the European Union, mainly during the past decade. This contribution explores the ways in which those recent antidiscrimination laws have modified the traditional understanding of equality law in Europe and are giving "teeth" to the abstract principle of equality.

Keywords

European Community law, principle of equality, suspect grounds, indirect discrimination, positive action, horizontal effect of rights

The Starting Point: A Common but Empty Principle

In the post-Second World War period, there emerged in Western Europe what may be called a common constitutional principle of equality. In all postwar constitutions, and later in the new democratic constitutions of Greece, Portugal, and Spain, this principle was recognized and given a prominent place.¹ After the fall of the Berlin Wall, the former communist states of Central and Eastern Europe followed suit.² In many of these constitutional equality clauses, the abstract principle is followed by an often

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¹European University Institute, Florence, Italy

Corresponding Author:

Bruno de Witte, Law department, European University Institute, Via dei Roccetini 9, 50014
San Domenico di Fiesole, Italy.
Email: Bruno.Dewitte@eu.it