BARBARA HAVELKOVÁ AND MATHIAS MÖSCHEL (EDS), *ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS* (OXFORD UNIVERSITY PRESS 2019)

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I. INTRODUCTION

In a context of mistrust towards theories of intersectionality and post-colonial studies perceived as emanations of "other" legal cultures, the publication of *Anti-Discrimination Law in Civil Law Jurisdictions* is particularly timely.[1] Indeed, suspicion towards "new theories" of equality often comes from the impression that, on the one hand, they are pure Anglo-Saxon legal productions and that, on the other, intersectionality and post-colonial studies cannot or should not be transferred into civil law systems.

Against this backdrop, its collection of essays unpacks and contextualizes the assumptions of otherness that can target antidiscrimination law. This one-of-a-kind volume explores how anti-discrimination laws 'fare and fit' in civil law contexts and factors influencing their (lack of) suitability. Starting from the premise that anti-discrimination law is indeed seen as a product of common law, this collection of essays 'aims to answer the question, analytically and critically, of whether and which specific issues arise when

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1 See, for instance, the French Senate's recent proposed amendment to the Research Programming Act of 2020, requiring that 'academic freedoms shall be exercised in accordance with the values of the Republic', referring to the alleged threat caused by post-colonial studies and intersectional approaches to equality law. See 'Recherche: un amendement du Sénat suscite la colère du monde universitaire' (Public Sénat, 30 October 2020) <https://www.publicsenat.fr/article/parlementaire/recherche-un-amendement-du-senat-suscite-la-colere-du-monde-universitaire> (my translation).

 doi:10.2924/EJLS.2022.018

anti-discrimination law meets the civil law jurisdictions of continental Europe'.[2]

Each chapter explores one or several legal regimes, identifying the key features of these that eventually strengthen or limit anti-discrimination law. These specificities can either be embedded in the structure of a national system or arise from its application. Following these two possibilities, the book is divided into two parts. Part I examines the structural aspects of specific domestic legal and extra-legal frameworks that limit or strengthen anti-discrimination law. Part II targets more concrete aspects of the enforcement and effectiveness of anti-discrimination laws. In both Parts, each chapter discusses either the barriers to the integration of anti-discrimination law into a given legal system, or that system's successes, understood in relation to a specific set of factors. These failures and successes are examined in the following section of this review. The final section then explores the depth of this intrinsically comparative volume, as well as the limitations that arise from its methodological variety.

II. Success and Failures in the Integration of Anti-Discrimination Law

Following the structure of the volume, this review starts with the theoretical limitations on the integration of anti-discrimination law in national legal systems, before turning to more practical ones.

1. Theoretical Limitations to the Incorporation of Anti-Discrimination in National Systems

In their introductory chapter, editors Barbara Havelková and Mathias Möschel classify the theoretical obstacles to the full reach of anti-

[2] Barbara Havelková and Mathias Möschel, 'Introduction: Anti-Discrimination Law's Fit into Civil Law Jurisdictions and the Factors Influencing It' in Barbara Havelková and Mathias Möschel (eds), *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press 2019) 3-4.

discrimination law, based on the findings of the following chapters, into four types: first, the presence of pre-existing laws and their interpretation; second, institutional choices and narratives; third, constitutional and legal foundations; and finally, the wider political and social context. By delving into the elements that limit or facilitate the development of anti-discrimination law, the first eight contributions illustrate national specificities, such as legal cultures and narratives.

First, Stephanie Hennette-Vauchez and Elsa Fondimare argue in Chapter 2 that national specificities have sometimes been used as shields to justify the poor implementation of anti-discrimination law, as it is the case for French "republicanism".[3] Their contribution deconstructs the alleged incompatibility between anti-discrimination law and the "French Republican model", which affirms the ideals of state neutrality and equality between all citizens. While anti-discrimination is based on the premise that individuals are divided by society into groups based on specific characteristics, the French Republican model necessarily requires the disregarding of differences between individuals. Accordingly, the French legal framework builds theoretically on the abstract conception of the legal subject and on the idea of the formal equality of all before the law. Against the political use of the Republican model, which opposes the dissemination of anti-discrimination law, the authors demonstrate the inconsistency that has characterized this "model" since its birth. They bring to the fore divisions amongst French citizens, and between nationals and foreigners, that are embedded in the legal system. They thus 'underline the politics of keeping the myth alive' and conclude that that the Republican model never existed in practice.[4]

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3 Stephanie Hennette-Vauchez and Elsa Fondimare, 'Incompatibility between the "French Republican Model" and Anti-discrimination Law: Deconstructing a Familiar Trope of Narratives of French Law', in Havelková and Möschel (eds) (n 2).

4 Ibid 57.

Barbara Havelková finds a comparable dichotomisation between equality and non-discrimination to be part of the Czech legal regime.[5] Accordingly, national specificities can be conveyed through the legal culture of a state, understood as a set of implicit norms based on principles that are historically and socially contingent. In the Czech Republic, this takes the form of 'generalizations and stereotypes which then feed into prejudice and bias'.[6] In addition, Havelková finds the general principle of equality to 'act as a false friend to ground-related anti-discrimination rights', eventually leading to a narrow interpretation and application of the anti-discrimination law provisions.[7] Accordingly, judges will look for motive and intent when facing ground-related discrimination claims because they only understand discrimination as 'a "few bad apples" problem'.[8]

Legal cultures can ultimately lead to the weak legal mobilisation of anti-discrimination law, as Michael Wrase and Laura Carlson demonstrate for Germany and Sweden, respectively.[9] In the Swedish case, procedural constraints and legal (pre)conceptions, as well as the specific role of social partners, limit the adoption of a sound anti-discrimination framework. Indeed, Swedish social partners have the right to 'determine the terms and conditions of the labour market' through self-regulation in the form of collective agreements.[10] Their specific positioning, almost comparable to that of legislators in certain aspects, also curbs interactions between

5 Barbara Havelková, 'The Pre-eminence of the General Principle of Equality over Specific Prohibition of Discrimination on Suspect Grounds in Czechia', in Havelková and Möschel (eds) (n 2).

6 Ibid 73.

7 Ibid 93.

8 Ibid 76.

9 Michael Wrase, 'Anti-Discrimination Law and Legal Culture in Germany' in Havelková and Möschel (eds) (n 2); Laura Carlson, 'Access to Justice in Sweden from a Comparative Perspective', in Havelková and Möschel (eds) (n 2).

10 Laura Carlson (n 9) 134.

lawmakers and trade unions, eventually preserving 'existing legal structures' rather than challenging them.[11]

The reception of anti-discrimination instruments can also diverge depending on the grounds of discrimination and whether or not these are the fruit of external obligations. Lisa Waddington's chapter regarding the history of disability quotas in Europe is fascinating in this respect.[12] Her contribution does not focus solely on one legal system but provides an overview of disability quotas in various European countries. It demonstrates that, since disability quotas are the result of national decisions aimed at re-integrating returning soldiers disabled by World War I into the labour market, their legitimacy is uncontested in many jurisdictions, even in those that consider race or gender quotas to be breaches of the principle of equal treatment. Disability quotas thus reflect 'a welfare (or charity) model of people with disabilities, rather than a civil rights model' as characterises race or gender quotas.[13] Accordingly, they are fully integrated into, and considered legitimate by, civil law systems, at least insofar as they are not the product of common law. Disability quotas are usually considered as *sui generis* legal instruments with civil law origins, and hence that meet 'tolerant attitudes' from national legal actors and 'infrequent legal challenges'.[14]

2. Practical Limitations to the Incorporation of Anti-Discrimination in National Systems

The second part of the book develops more practical aspects of the (lack of) integration of anti-discrimination law into national regimes, focusing mostly on implementation and enforcement, which can be limited by several actors. First, difficulties regarding the implementation of anti-discrimination

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11 Ibid 135.

12 Lisa Waddington, 'The Relationship between Disability Non-discrimination Law and Quota Schemes: a Comparison between Common Law and Civil Law Jurisdictions in Europe' in Havelková and Möschel (eds) (n 2).

13 Ibid 95.

14 Ibid 111.

law may emanate from judicial practices. Stamatina Yannakourou and Dimitris Goulas scrutinise the reasons behind Greek courts' 'limited role in the enforcement of anti-discrimination law in Greece', finding that lack of awareness regarding social inequalities, ideological constrains and unease with discrimination-related legal concepts limit the potential for social transformations through anti-discrimination law.[15] More concretely, Greek courts have demonstrated their lack of familiarity with anti-discrimination-related concepts, such as indirect discrimination, or in assigning the burden of proof. When using these concepts, Greek judges have been prone to 'errors and misconceptions'.[16] Against this backdrop, they have often preferred to resort to 'well-known and established legal concepts and techniques' in the face of overt discriminatory practices.[17] This choice indeed represents the easy option. However, Yannakourou and Goulas argue that it is also the fruit of judges' own 'ideological or ethical values' regarding the importance one should give to anti-discrimination law.[18] In the same vein, Elena Brodeală provides an overview of Romania's enforcement of anti-discrimination law through the lens of the jurisprudence of the European Court of Human Rights.[19] Brodeală demonstrates that elements of Romania's jurisprudential culture, such as the absence of a contextual interpretation of legislation and the paternalistic vision of women as in need of protection, jeopardise the effectiveness of anti-discrimination law.

Other contributors examine the role played by equality bodies in the enforcement of anti-discrimination provisions. Martin Risak, Christian Berger and Miriam Rehm investigate the influence of socio-economic

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15 Stamatina Yannakourou and Dimitris Goulas, 'Enforcing Anti-Discrimination Law in Greece: Courts' Resistance and Deficiencies of Civil Litigation against Employment Discrimination' in Havelková and Möschel (eds) (n 2) 195.

16 Ibid 198.

17 Ibid 199.

18 Ibid 201.

19 Elena Brodeală, Gender Discrimination in Romania through the Case Law of the ECtHR: Searching for the Roots of the Systemic Failure to Protect Women's Rights in Romania' in Havelková and Möschel (eds) (n 2).

factors on the decision-making process of the Austrian Equal Treatment Commission (ETC).[20] Building on the quantitative examination of cases involving discrimination on the basis of age, race, religion, and sexual orientation, their contribution identifies several often counter-intuitive findings. For instance, they found that the majority of applicants are educated unemployed men, who claim mainly race- or sex-based discrimination. Only in 39% of cases did the ETC rule in favour of the applicants.

Nevertheless, the picture is not completely bleak, as revealed by certain 'success stories', to use the editors' words.[21] For instance, Susanne Burri demonstrates the clear influence of the Dutch Institute for Human Rights (IHR) on the tackling of pregnancy and maternity discrimination.[22] More specifically, the IHR helped further the implementation of CJEU jurisprudence by issuing non-binding opinions following individual complaints. These opinions are presented in court proceedings and often explicitly mention the European case-law. Accompanied by research reports and public information, these opinions participate in raising awareness regarding the impact of anti-discrimination law policies. The IHR's positive impact in the Netherlands is not limited to the pregnancy and maternity context but can also be seen in the area of religious discrimination, as Titia Loenen explores.[23] Backed by a sound religious anti-discrimination law framework, the IHR's opinions have, to a large extent, been followed by

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20 Martin Risak, Christian Berger and Miriam Rehm, 'Pares Inter Inequales? A First Glimpse of the Cases before Senate II of the Austrian Equal Treatment Commission' in Havelková and Möschel (eds) (n 2).

21 Havelková and Möschel (n 2) 5.

22 Susanne Burri, 'Combating Pregnancy Discrimination in the Netherlands: The Role of the Equality Body' in Havelková and Möschel (eds) (n 2).

23 Titia Loenen, 'The Impact of Anti-Discrimination Law in the Netherlands: A Case Study of Discrimination on Grounds of Religion in Employment' in Havelková and Möschel (eds) (n 2).

judges, governmental authorities, employers, and employees' organizations, influencing how expressions of religion on the workplace are dealt with.

Two other success stories are portrayed in the contributions of Möschel, regarding the influence of the prohibition of racial harassment in Italy, and Marie Mercat-Bruns, regarding indirect discrimination provisions in French employment law.[24] Möschel argues that, despite a weak anti-discrimination legal culture and race equality body in Italy, non-discrimination provisions still had a clear impact, thanks to the creative legal mobilisation of NGOs and individuals. Indeed, NGOs and civil society have fought against racial discrimination through litigation, relying on racial harassment provisions rather than following the traditional criminal law path or the indirect/direct discrimination dichotomy, which is shown to be more complicated for judges to understand. While the Italian example illustrates how certain legal actors had to bypass the lack of understanding of courts regarding the concept of indirect discrimination, French judges appear to have a better grasp over this notion. Mercat-Bruns' contribution explores French case-law on employment issues, evaluating the extent to which it incorporates the concept of indirect discrimination. This concept, she observes, was quickly embraced by labour courts, in contrast to the slower path of employment law caused by the strong resistance of political actors relying on the Republican model, as analysed by Hennette-Vauchez and Fondimare. In practice, the concept of indirect discrimination allowed courts to ensure the employers' accountability, in spite of the shortcomings of the employment law framework.

[24] Mathias Möschel, 'Italy's (Surprising) Use of Racial Harassment Provisions as a Means of Fighting Discrimination' in Havelková and Möschel (eds) (n 2); Marie Mercat-Bruns, 'Tackling Indirect Discrimination in Employment in France: A Relative Success?' in Havelková and Möschel (eds) (n 2).

III. Comparing National Anti-Discrimination Law Systems: Methodological Issues and Resulting Limitations

These contributions reflect the blurred line between theoretical and practical limitations to anti-discrimination. Theoretical and practical limitations to a strong antidiscrimination regime are often rooted in national legal systems, as exemplified by the Spanish case for instance. María Amparo Ballester Pastor attributes the 'failure' of the concept of indirect discrimination in Spain not only to legislative and jurisprudential difficulties, but also to the Spanish legal culture and the legal procedures involved in acknowledging and enforcing this principle.[25] In addition, these case studies reveal both the variety and specific nature of the factors impeding the incorporation and implementation of anti-discrimination law in national systems.

Nonetheless, it is possible to identify a series of commonalities amongst the legal and extra-legal factors that are at play in different countries, such as the nature of the legal regimes applicable to equality and anti-discrimination law, the role of legal culture, and the influence of equalities bodies, which can either limit or further the effectiveness of anti-discrimination law. Building on these findings, Havelková and Möschel's illuminating summary undertakes a thorough comparison of the diverse legal systems analysed.[26] The two editors identify two groups of states that share similar approaches towards anti-discrimination law. First, post-socialist countries often fail to implement anti-discrimination law due to a series of legal and extra-legal factors, classified by the editors in a further four categories: 'pre-existing law and its interpretation; institutional choices and mobilization; constitutional and legal foundations and narratives; and the wider political and social context'.[27] Second, Mediterranean countries are not particularly effective in

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25 María Amparo Ballester Pastor, 'Challenges to the Effectiveness of the Protection against Indirect Discrimination on the Ground of Sex in Spain' in Havelková and Möschel (eds) (n 2) 277.

26 Barbara Havelková and Mathias Möschel (n 2).

27 Ibid 10.

enforcing anti-discrimination law, though there are certain "success stories" which stand out. The editors also make two additional observations. On the one hand, Sweden is, against all assumptions when it comes to Nordic countries and equality, quite defective, mainly because of extra-legal factors (amongst others, the scepticism towards 'individualized solutions').[28] On the other, the Netherlands is the clear winner in the race for the most favourable anti-discrimination law, to borrow the editors' metaphor. Havelková and Möschel also suggest a series of factors that influence the integration of EU anti-discrimination law, which they picture as a 'legal irritant'.[29] These factors are, amongst others: time; the area of law involved and, even more so, the ground of discrimination; and specific concepts, some of which are less handy to deal with for national jurisdictions.

Ultimately, the volume offers a glimpse into the various struggles shared by, or specific to, European states in their integration of anti-discrimination law. It also pinpoints the limitations on the use of anti-discrimination law for the individuals. Thanks to its inherently comparative perspective, this series of essays is particularly helpful in separating the common aspects shared by more than one Member State from more country-specific features. The beautiful result is a compelling overview of the reality of anti-discrimination law in several legal regimes.

This is not to say, however, that each chapter examines analogous elements. The contributions neither share similar structures nor analyse each regime from similar perspectives. Indeed, the volume does not aim at offering a comprehensive overview of anti-discrimination legal frameworks. The analysis of each national regime and its practices cannot, and should not, be generalised to all civil law jurisdictions, as the contributors did not assess the national regimes based on similar criteria or methodologies. Some chapters draw on very detailed accounts of the legislative histories of the countries under scrutiny. Others offer more general criticism or adopt a comparative

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28 Ibid 5.

29 Ibid 3.

approach. Likewise, certain authors adopt qualitative methods, while others offer quantitative analyses.

Ultimately, the volume is a mosaic that offers diverse and colourful pictures. It opens one's eyes to the realities of anti-discrimination law in neighbouring legal regimes and helps us draw connections between elements that could otherwise have been thought of as peculiar national specificities. While I knew that France recently deleted the concept of race from its Constitution, I was unaware Sweden had removed this same word from its most recent Discrimination Act.[30] The volume also sheds light on specific limitations embedded in national legal or extra-legal systems that would have otherwise been ignored. This is clear in the Swedish case, where trade unions' interests are in line with those of the legislators (a position quite uncommon amongst European states) and tend towards the protection of the status quo. As a result, although each contribution discusses the specificity of one legal regime or approach, the assemblage of essays implicitly reveals the continuities and the discontinuities between certain groups of states.

However, although many contributions tackle, either indirectly or more explicitly, the impact of EU law on the construction of the domestic anti-discrimination law systems, EU law remains the elephant in the room. Questions necessarily arise regarding the participation of European states' representatives and EU civil servants – (mainly) natives of civil law states – in the construction of EU anti-discrimination law. One can only hypothesise how decisive the role (and geopolitical power) of civil law representatives might have been in this law's creation. Actually, a closer look at the CJEU's case-law reveals similar pitfalls to those noticed by Fondimare and Hennette-Vauchez in the case of France.

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30 Carlson (n 9) 128.

IV. Conclusion

Overall, the volume, gathering prominent scholars as much as emerging researchers, offers glimpses into legal conundrums, successes, and failures in many European legal regimes. It piques readers' curiosity about an often ignored, if not forgotten, aspect of anti-discrimination law, namely its common-law origins and its lack of "transposability" into civil law regimes. Certain chapters showed that this supposed origin can be a misconception, for instance in the case of disability quotas, which were developed quite early on by civil law systems themselves. Others demonstrated that it is not only the formal structure of common law systems that render the integration of anti-discrimination law into civil law systems difficult, but also other – more political – external factors.

As such, this collection of essays nicely complements the broad existing literature on anti-discrimination law, which focuses either on specific grounds of discrimination or specific geographic areas. More precisely, the bulk of the scholarship concentrates on EU anti-discrimination law and/or on the impact of EU anti-discrimination law on national regimes.[31] Additional contributions examine in detail the situation with regard to one ground of discrimination in a specific national legal system, but offer little in the way of broader context or comparison (and often are not written in

[31] See, amongst *many* others, Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002); Evelyn Ellis and Philippa Watson (eds), *EU Anti-Discrimination Law* (Oxford University Press 2012); Anna Lawson and Dagmar Schiek (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Routledge 2016); Uladzìslaŭ Belavusaŭ and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Bloomsbury 2019). On the German, Dutch, and English legal systems, see Jule Mulder, *EU Non-Discrimination Law in the Courts: Approaches to Sex and Sexualities Discrimination in EU Law* (Hart 2017).

English).[32] Finally, legal scholars in civil law countries often do not use the anti-discrimination law lens, which presumes the existence of inequalities between social groups, despite its usefulness in exposing the realities that lurk behind the limits of the legal language. Ultimately, the contributions prompt the reader to go beyond the boundaries of their own research framework and build bridges between legal regimes. As a constellation of studies enriched by their combination, this volume meets expectations and paves the way for future comparative and socio-legal research.

[32] See, in the context of France, Jimmy Charruau, 'La notion de non-discrimination en droit public français' (PhD thesis, Université d'Angers 2017). See also, regarding the Italian regime, Elena Consiglio, *La discriminazione tra eguaglianza e libertà* (Aracne editrice 2019).