At the margins of equality law: The emergence of new antidiscrimination frameworks in courts to ensure transformative equality

Antidiscrimination law is structured around protected identity categories, such as race, gender or religion, in order to ensure equality. However, these categories are problematic because many marginalized individuals or groups do not fit in. Antidiscrimination law is confronted with the double issue of the inadequacy of its ground-based approach and the multiplication of protected grounds. On the one hand, these protected grounds need to adapt to societal changes rapidly enough, but on the other hand, their constant multiplication is problematic. Some antidiscrimination provisions, like the section 15 of the Canadian Charter of Rights and Freedoms and the article 14 of the European Charter of Human Rights specifically foresee these adaptations by providing an open-ended list of protected grounds and allowing for the recognition by judges of new or analogous grounds. For instance, the Canadian Supreme Court has recognized that it is prohibited to discriminate on the ground of sexual orientation in *Egan v. Canada* [1995] 2 S.C.R. 513. More recently, the debate has shifted to numerous other unprotected identity traits, revealing a hiatus between law and reality. For example, on what ground could a person discriminated against because of her obesity base her claim? More and more new grounds and subcategories of identity have appeared on the antidiscrimination agenda, posing an issue of legal adaptation.

To remedy these flaws, new antidiscrimination tools have emerged in courts, notably under the influence of US critical theory and of Kimberlé Crenshaw's intersectionality theory. These new judicial antidiscrimination approaches aim at better accommodating the claims of marginalized and so-called 'particularly vulnerable' social groups. These tools attempt to grasp the complexity of discrimination and to place it back in its wider social context. They perform a crucial contextualization work through, for example, the inclusion of statistics and social science expertise in legal reasoning, approaches in terms of stigma and prejudice, reasoning focusing on vulnerability and anti-stereotyping, as well as analyses in terms of historical, material and symbolical disadvantage. Hence, these tools allow judges to acknowledge the inequality structures and social hierarchies which underlie discriminatory acts, and to articulate individual experiences (single mistreatments) and the collective social context (structural inequality), and thus to deliver a sounder analysis.

The ultimate goal of these new contextualization approaches is to ensure transformative equality by addressing the root causes of discrimination and by overcoming the formal equality model proposed by antidiscrimination legislation. However, despite the rich theoretical critique towards the ground-based approach, in practice these antidiscrimination techniques form a loose and disparate toolkit, and have not yet been consolidated within a coherent framework. Moreover, the implementation of these new tools poses challenges, notably in terms of robustness and systematization. This piece, comparing judicial practice, will scrutinize relevant US and Canadian courts, where the intersectional theory has first influenced judges, and the European Court of Human Rights (ECtHR) and Court of Justice (ECJ), where alternative antidiscrimination tools have subsequently traveled. This paper aims at understanding whether and how the development of alternative antidiscrimination tools within courts represent a paradigm shift, and thus an efficient and normatively desirable framework capable of leading to transformative equality?