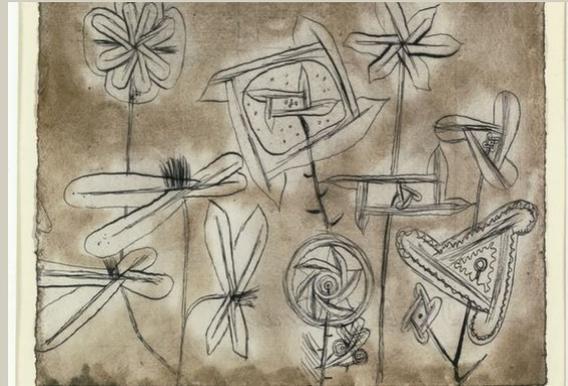


# Instability of antidiscrimination law

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**CURRENT REFLECTIONS ON EU ANTI-DISCRIMINATION LAW**

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## *Instability of antidiscrimination law*

- What do I mean by instability?
  - Feminist critique of antidiscrimination law
  - Mainstream concern with antidiscrimination law
  - Instability (“bursting by the seams”)
- Different dimensions of instability
  - Technical instability
  - Political instability
  - Conceptual instability
- Tentative conclusions: transformative equality & antidiscrimination law

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*Instability of antidiscrimination law***What do I mean by instability?**

- Originally not a very promising area of law
- Rapid development into an expanding legal and jurisprudential factor
  - CJEU & EC from the 70's
  - ECtHR from the 90's
- It has become a complex area of law (institutionally and procedurally)
  - Increased by introduction of multiple discrimination grounds in 2000 (patchwork of protection)
  - Equality law vs Antidiscrimination law

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*Instability of antidiscrimination law***What do I mean by instability?**

- Feminist critique of antidiscrimination law
  - The problem of power (its absence): Vogel-Polski; Lacey, Gianformaggio, Hiltmaat, Barrère
  - Limitations of (liberal) antidiscrimination law. collective and structural dimensions
- Mainstream concern with antidiscrimination law
  - Introduction of 2000 Directives
  - McCrudden, Tobler, Bell

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*Instability of antidiscrimination law*

**What do I mean by instability?**

**Instability (“bursting by the seams”)**

- Signs of fatigue
- Emergence of signs of change in antidiscrimination law, its dynamics, its relations to other bodies of norms

**Difficulty to predict scope and meaning & inadequacy to deliver responses to challenges**

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**Instability of antidiscrimination law**

**Different dimensions of instability (I)**

**Technical instability**

- Technically instable already before 2000: Complexity of the corpus
- Introduction of 2000 Directives: patchwork effect
  - Different scope of protection
  - Different standards: legal standing; evidence; level of scrutiny; comparison
  - Differing antidiscrimination doctrine in CJEU and ECtHR (even Social Charter)
  - Differing national legislation (due to use of Directives)
- Legal awareness, rights knowledge and effectiveness of protection

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*Instability of antidiscrimination law***Different dimensions of instability (II)****Political instability**

- Not new: equality is a contested idea
- Antidiscrimination laws struggled becoming

indirect discrimination, affirmative action (vs. positive discrimination), quota struggle, substantive equality, scope of equal opportunities

- New slogans

*Equality is not enough; discriminate to fight discrimination; unequal equality*

- Divergence between antidiscrimination law and equality policies  
Formal vs substantive equality and looming problem of structural inequality

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*Instability of antidiscrimination law***Different dimensions of instability (III)****Conceptual instability**

- Contested concept of equality: different aims and functions
- Protected good / targeted harm in discrimination: intentionality
- Relevant comparator & disadvantage
- Formal vs substantive equality

Remedies against conceptual instability

- New categories (further instability)
- Use of proxies
- Abandonment of comparisons

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*Instability of antidiscrimination law***Tentative Conclusions**

- Antidiscrimination law and Structural Inequality/Discrimination
  - Structural and systemic discrimination: need for further clarification
  - Convergence of antidiscrimination law with equality policy (and other policies mainstreaming)
  
- Antidiscrimination law & Transformative equality

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