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The Enforcement and Effectiveness of Anti-Discrimination Law
M. Mercat-Bruns & D. Oppenheimer (eds) (to be submitted to Springer publisher)

Academy of Comparative Law
Montevido Congress, 16-18 November 2016

National Report: Belgium[1]

Emmanuelle Bribosia[2] and Isabelle Rorive[3]

Working Paper no. 2016/5

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Introduction

Belgium has been a part of the EU from the very beginning of the European Communities. From the outset, anti-discrimination has been a key element of a European integration relying on free movement and eager to avoid distortions of competition between Member States. At the end of the 90s, the emerging concept of EU citizenship and the EU's need for more popular legitimacy fostered broader equal opportunities policies and new legislative powers "to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[4] This, in turn, had a profound impact on Belgian anti-discrimination law.

The country's government type is that of a representative democracy. The official head of the State is the King who has mainly formal functions. The Prime Minister is the head of the federal government, which always consists of a coalition of different political parties since usually several parties get elected into parliament. Belgium is a federal State with three Communities[5] and three Regions[6] which have exclusive fields of competence and are not subordinate to the federal State. In the Belgian federal system, the competence to legislate on discrimination in the areas covered by the EU Directives (the Racial Equality Directive,[7] the Employment Equality Directive[8] and the Gender Equality Directives[9]) is divided between the federal State, the Communities and the Regions.

[1] This research has been funded by the Interuniversity Attraction Poles Programme (IUAP), initiated by the Belgian Science Policy Office (BELSPO). More particularly, this paper has been written in the framework of the IUAP project *The Global Challenge of Human Rights Integration: Towards a Users' Perspective* (2012-2017): www.hrintegration.be/.

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[4] Art. 13 inserted in the EC treaty in 1997 (in force, 1999) and now enshrined in Art. 19 TFEU.

[5] The French-speaking Community (*Communauté française*) which is referred to as the Federation Wallonia-Brussels (Fédération Wallonie-Bruxelles) in the political and media discourse, the Flemish Community (*Vlaamse Gemeenschap*), the German-speaking Community (*deutschsprachigen Gemeinschaft*).

[6] The Walloon Region (*Région wallonne*), the Flanders (*Vlaams Gewest*) and the Brussels-Capital Region (*Région de Bruxelles-capitale*). In contrast to the French-speaking part of Belgium, the Region and the Community are merged in the Flemish part.

[7] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 p. 22-26.

[8] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 p. 16-22.

[9] Primarily, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204, 26.7.2006, p. 23-36 and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in

The federal structure of the country has been, and still is, a complicating factor in the implementation of anti-discrimination law, not only because of the uncertainties concerning the division of competences between the federal State, the Regions and the Communities, but also because the sociological and political context is different in each part of the country. While the French-speaking part (the French Community, the Walloon Region and, to a large extent, the Brussels-Capital Region) has traditionally chosen a more formal and individual model of combating discrimination which is closer to the French model, the Dutch-speaking part (the Flemish Region and Community) has been more willing to seek inspiration from the United Kingdom or the Netherlands. These countries use to have a more multiculturalist approach implying, for instance, a greater willingness to promote equal treatment through statistical monitoring and allowing for affirmative action schemes. The stakes are also higher in the Flemish Region/Community, because of the significance in that part of the country of the *Vlaams Belang*, an extreme-right, nationalistic political party. Its representation in parliament allows this extremist and xenophobic party to influence the debates on issues such as the integration of migrants or the wearing of headscarves by Muslim women in schools or in employment.

1. Is anti-discrimination law being enforced?

Belgium is party to most of the important international agreements relevant for counteracting discrimination. However, it has not yet ratified Protocol no. 12 to the European Convention on Human Rights and the Council of Europe Framework Convention for the Protection of National Minorities. After ratification, these international instruments are part of the domestic legal order and can be applied directly by domestic courts if the provision at stake is sufficiently clear and precise for direct application.

Articles 10 and 11 of the Constitution which prohibit discrimination are applicable generally, without any restriction either as to the grounds on which the discrimination is based (they require that the principle of equality be respected in relation to all grounds) or as to situations concerned (they apply to all contexts and not only employment and occupation, but also to the scope of the Racial Equality Directive). However, they are rarely invoked in private relationships because of their very general formulation and the delicate issues which would be entailed by their application in this context, for instance to protect an individual from private acts of discrimination by an employer. These constitutional provisions have been most effective when invoked against either legislative norms or administrative acts. In this respect, the Constitutional Court and the Council of State, the highest administrative court, have developed a very extensive jurisprudence.

Today, the major anti-discrimination legislation at federal level is embodied in three Acts adopted on 10 May 2007. First, there is the federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (hereafter the Racial Equality Federal Act).[10] This Act aims at implementing both the Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination in one single legislation prohibiting discrimination on grounds of alleged race, colour, descent, national or ethnic origin, and nationality. It marks a turning point as the federal Act of 30 July 1981 originally formed part of criminal legislation. The evidentiary burdens facing the

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the access to and supply of goods and services, Official Journal L 373, 21.12.2004, p. 37-43.

[10] OJ (*Moniteur belge*), 30 May 2007, modified subsequently.

prosecution in that context – or, indeed, an alleged victim of discrimination – have most of the time appeared insuperable because the perpetrator's intent had to be established. Secondly, there is the Federal Act pertaining to the fight against certain forms of discrimination (hereafter the General Anti-discrimination Federal Act) [11], which covers age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion, language, genetic characteristic and social origin. The third Federal Act concerns the fight against discrimination between women and men (hereafter the Gender Equality Federal Act),[12] which relates to gender and related grounds including pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression.

Apart from the federal legislator, the Regions and Communities have also taken action in their respective and vast fields of competence (such as education, housing, healthcare, vocational training, placement of workers, policies for the professional integration of the unemployed, social aid, public transports apart from the national airport and public railway).[13] These attempted to harmonize the content of their statutory law to the Federal Anti-discrimination Acts.

This large body of international, European and domestic law is not only a law on paper. Anti-discrimination law is, to a certain extent, applied and enforced in practice. However, judicial precedents show a mixed picture.[14] With regard to the enforcement of new legal concepts for instance, one might point to very promising precedents in disability cases although reasonable accommodation was unknown in Belgian law before the Employment Equality Directive. Conversely, a fair amount of cases decided in court show that there is still a noticeable lack of knowledge of anti-discrimination law by the professionals in charge of its implementation, especially with a view to the notion of indirect discrimination.

Barometers supported by the Inter-federal Centre for Equal Opportunities (ICEO) provide data and statistics which are crucial to address discrimination issues (these include the Socio-economic Monitoring, the Diversity Barometer in Employment and the Diversity Barometer in Housing). These barometers show that there are still many discriminatory practices in employment and housing. A Diversity Barometer in Education is expected in 2016. It is well-documented that structural instances of discrimination remain unsolved. For instance, the European Committee of Social Rights (ECSR) condemned Belgium twice in recent years in major cases. One case related to the lack of social services available to highly dependent

[11] OJ (*Moniteur belge*), 30 May 2007, modified subsequently.
[12] OJ (*Moniteur belge*), 30 May 2007, modified subsequently.
[13] Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008 (OJ (*Moniteur belge*), 23 September 2008, modified subsequently; Decree of the French Community of 12 December 2008 on the fight against certain forms of discrimination (OJ (*Moniteur belge*), 13 January 2009; modified subsequently; Decree of the Walloon Region of 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men in the fields of economy, employment and vocational training (OJ (*Moniteur belge*), 19 December 2008, modified subsequently; Decree of the German-speaking Community of 19 March 2012 aiming at fighting certain forms of discrimination, OJ (*Moniteur belge*), 5 June 2012 ; Ordinance of the Region of Brussels-Capital of 4 September 2008 relating to the fight against discrimination and equal treatment in the employment field, OJ (*Moniteur belge*), 16 September 2008, modified subsequently; Decree of the *Commission communautaire française* of 9 July 2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment, OJ (*Moniteur belge*), 3 September 2010; modified subsequently.
[14] P. Charlier and J. Ringelheim, "Les lois belges de 2007 et la lutte contre la discrimination: l'épreuve de la pratique", in *Politiques antidiscriminatoires*, J. Ringelheim, G. Herman & A. Rea (dir.), Louvain-la-Neuve, de Boeck, 2015, p. 121.

persons with disabilities[15] and the other to the breach of the right of housing in the context of unfair treatment of Travellers and Roma.[16] Moreover, in 2014, the UN Committee for the Protection of Persons with Disabilities expressed its concern about the "poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority".[17] The Committee also noted "the low number of persons with disabilities in regular employment" and "the Government's failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector".[18] Regarding Travellers, in 2014 concerns were also raised by the European Commission against Racism and Intolerance (ECRI)[19] and by the Committee on the Elimination of Racial Discrimination.[20] There is still a shortage of properly equipped transit sites for Travellers, in particular in the Walloon Region and in the Brussels-Capital Region. Furthermore, the numerous judicial rulings involving the highest courts in Belgium (such as the Constitutional Court or the Council of State) show that the issue of religious symbols (and actually, the wearing of the Islamic veil known as the *hidjab*) remains a very controversial one in Belgium. There is, for instance, much confusion in the case law about profit companies which invoke the respect of neutrality in their brand so as to justify the dismissal of female workers wearing the *hijab*. The anti-terrorist climate at the end of 2015 has already led to numerous police abuses against Muslim persons (or those perceived as such).[21]

2. How is anti-discrimination law enforced?

The statutory reform of 2007 aimed not only at implementing EU law but also at addressing the deficiencies of Belgian antiracism law. The 1981 Moureaux Act was the first piece of legislation to address ethnic discrimination[22]. A legal provision criminalising discrimination in the labour market was adopted in 1994.[23] However, no case was successful in court despite several scientific studies showing a high level of ethnic discrimination in employment.[24] According to the Belgian equality body, then the Centre for Equal Opportunities and Opposition to Racism (CECLR), this was to a large extent due to the weight of the burden of proof. It is highly difficult to prove that an employer's decision to not hire or to dismiss a person is based on considerations of race or ethnic origin. Employers do not have to give reasons for their actions and other workers are rarely ready to testify against their employer. In addition, many barriers contributed to the inefficiency of the Moureaux Act such as the

[15] ECSR, *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 75/2011, decision adopted on 18 March 2013 (published on 29 July 2013).
[16] ECSR, *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 62/2010, decision adopted on 21 March 2012 (published on 31 July 2012).
[17] Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014), para. 22 – 23.
[18] Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014), para. 38 – 39.
[19] 2014 ECRI report on Belgium.
[20] CERD/C/BEL/CO/16-19, 14 March 2014, paras. 18–19.
[21] P. Charlier, co-director of the Inter-federal Centre for Equal Opportunities, "Protéger nos libertés et garantir notre sécurité", carte blanche in the *Libre de Belgique*, 7 December 2015.
[22] Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, OJ (*Moniteur belge*), 8 August 1981.
[23] Art. 2*bis* of the Moureaux Act inserted by an Act of 12 April 1994, OJ (*Moniteur belge*), 14 May 1994.
[24] See, among others, P. Arrijn, S. Feld & A. Nayer, *La discrimination à l'accès à l'emploi en Belgique en raison de l'origine étrangère*, International Labour Office, 1998; A. Martens, N. Ouali & al., *Discriminations des étrangers et des personnes d'origine étrangère sur le marché du travail de la Région de Bruxelles-Capitale*, Université Libre de Bruxelles and Katholieke Universiteit Leuven, ORBEM, January 2005.

failure of the police to register discrimination complaints or to draw up official reports and the prosecutor's reluctance to take legal action.

Thus, one of the major changes of Belgian law at the beginning of the 21st century was to develop a civil protection device applicable beyond racial or ethnic grounds. In turn, this has allowed the equality bodies – which do not have the status of quasi-judicial bodies - to develop non-binding procedures in their assistance to victims to reach an amicable settlement. In this line, the Inter-federal Centre for Equal Opportunities (ICEO) has built up a system of informal conciliation and mediation, which is one of the usual paths through which anti-discrimination law is enforced at the individual level. The "amicable settlements" (*solutions négociées*) are published on its website in a way that ensures the anonymity of the parties.

3. Who enforces anti-discrimination law?

In Belgium, there are two bodies for the promotion of equal treatment: the Inter-federal Centre for Equal Opportunities (ICEO) and the Institute for Equality between Women and Men.

The formerly was created in 1993, initially called Centre for Equal Opportunities and Opposition to Racism.[25] Until 2014, it was a federal Centre, only competent regarding the implementation of the Racial Equality Federal Act and the General Anti-discrimination Federal Act. By now it has become an inter-federal Centre, with a main office in Brussels and decentralized contact points in Flanders and in Wallonia competent to promote equal opportunities and fight any kind of distinction, exclusion or restriction based on the prohibited grounds contained in various anti-discrimination instruments adopted at both regional and federal levels.[26] For political and policy reasons, the (still federal) Institute for Equality between Women and Men (created in 2002)[27] is competent to tackle discriminations based on gender and related grounds (pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression). However, such an institutional setup does not facilitate the development of policies against multiple or intersectional discriminations when gender is at stake.

Both equality bodies are autonomous public services. Their independence is guaranteed by legislation and, in practice, they fulfil their mandate in an independent fashion with an annual budget which has not been cut following the financial crisis of 2008. The ICEO and the Institute issue reports and recommendations within their mandate. They also assist victims of discrimination and they may file judicial actions. In 2014, the Centre received 4,627 complaints; it opened a file in 1,670 cases and it launched a lawsuit in 14 cases. The relatively low amount of cases related to the opened files is partly due to the capacity of the Centre to reach amicable settlement through mediation. Of course, victims can file a complaint on their own before civil courts or where an employment relationship is concerned before employment tribunals (*tribunaux du travail)*. They might need to instruct a lawyer and even if the Judicial

[25] The Centre for Equal Opportunities and Opposition to Racism was created by a Federal Act of 15 February 1993 (OJ (*Moniteur belge*), 19 February 1993).
[26] Apart from language to avoid to trap the ICEO in linguistic disputes which are at the forefront of many political debates in Belgium.
[27] The Institute for Equality between Women and Men was created by a Federal Act of 16 December 2002 (OJ (*Moniteur belge*), 31 December 2002).

Code provides for legal aid in favour of claimants with low incomes, there are increasingly restrictive conditions attached.

Seeing the limited scope of this paper and the fact that the action of the Institute for Equality between Women and Men is more confidential, we focus here on the action of the ICEO. It receives discrimination reports on a daily basis either directly or through local contact points. A large number of requests for intervention can be dealt with quickly by providing information or by making a referral to other authorities or organisations. Other issues require more investigation: racist or homophobic attacks, conflicts between employer and employee, discrimination in domestic leases, racist remarks and incitement to hatred on the Internet, etc. In the new inter-federal structure, there are 25 persons working in the department in charge of processing individual reports. Moreover, the Centre collaborates on a regular basis with NGOs as well as Belgian or European universities and institutions such as the King Baudouin Foundation. It is an early member of the European Network of Equality Bodies (Equinet). In the framework of this cooperation, it organises trainings, seminars and programs for the exchange of information and practical experience. The Centre publishes recommendations and provides expertise to all levels of government on the ways of how to improve legislation and to develop action plans or new policies.

Social partners have also been actively involved in dissemination activities. The ICEO regularly organized training sessions in cooperation with employers' and workers' organizations. Some major Collective Agreements (as made compulsory through regulation) foster antidiscrimination policies. Moreover, social partners are involved in specific taskforce promoting equality which are directly linked to Federal Public Services (Ministries).[28] At the regional level for instance, the Flemish Government concluded a number of agreements with businesses at the sectorial level, which encourage diversity, promote specific measures for the integration of migrant workers, and provide for codes of conduct in favour of diversity and against discrimination at the level of companies. In addition, a range of initiatives has been taken in order to actively promote the employment of members of (traditionally underrepresented) 'target groups', in particular persons of foreign origin (*allochtones*) and persons with disabilities. The, 'Jobkanaal' project for instance, launched within the Flemish network of undertakings VOKA, or the 'diversity' focal point of the UNIZO (association of small and middle-size enterprises) contribute to promoting diversity in employment.

4. Who benefits from the enforcement of anti-discrimination law?

It is difficult to define who specifically benefits from the enforcement of anti-discrimination law. Federal anti-discrimination legislation of 2007 should have been assessed after five years but the process has not yet been completed. The annual report of the ICEO provides some figures which are not more that the tip of the iceberg and which do not take into account gender discriminations. In 2014, on almost all discrimination grounds, the number of cases dealt with by the ICEO increased. The three main grounds were (as of 2013) race and ethnicity (41% of all cases), disability (20%) and religious and philosophical belief (16%) followed by age (5%), sexual orientation (4%), property (4%) and health status (3%). The three main social areas concerned were (again as of 2013) goods and services (25% of all files, among which many relate to housing), employment and the labour market (23%), and

[28] See for instance, the "Multicultural Business Unit" (*Cellule Entreprise Multiculturelle*), set up within the Federal Public Service (Ministry) of Employment.

media (20%) followed by education (10%), life in society (9%) and the sector 'Police and Justice' (5%).[29]

5. Who is harmed by the enforcement of anti-discrimination law?

We are not aware of any detailed studies which discuss who has been "harmed" by the enforcement of anti-discrimination law in Belgium. Recent interdisciplinary analysis which rely on Belgian law and the social sciences are too general to provide circumscribed answers. Among the unintended effects of anti-discrimination law, they point to the displacement of discrimination and the concealment of discrimination. Institutions and organizations put in place internal legal structures designed to symbolize the respect for the law. The protection framework becomes managerial. The violation of a right is framed as a misunderstanding that should be sorted out within the organization.[30]

What is sure is that, while Belgium has a fairly good anti-discrimination law on paper, discrimination in major fields such as employment, housing or education remains pervasive.

6. What remedies are provided by the enforcement of anti-discrimination law?

Under the anti-discrimination law adopted at the federal level and by the Regions and the Communities, the victim of discrimination may either seek damages according to the usual principles of civil liability or may opt for a payment of lump sums defined in the law. Damages are payable each time a discriminatory practice is proven to have occurred (in line with the general rule in non-contractual civil liability enshrined in Article 1382 of the Civil Code which provides for compensatory damages). The shift of the burden of proof is provided in all jurisdictional procedures except criminal ones. However, some judicial precedents show that courts are still struggling with this device. Providing for the choice of the victim to seek the payment of damages on the basis of the 'effective' damage or on the basis of the lump sums defined in the law aims to ensure the effectiveness of the sanctions provided for instances of discrimination.

The victim can also request that (1) the court rules that the discriminatory provisions enshrined in a contract are null and void; (2) the court delivers an injunction ordering the immediate cessation of the discriminatory practice under the threat of financial penalties (*astreintes*); (3) the court imposes the publicity of the judgment finding a discrimination, by the posting of the judicial decision on the premises where discrimination occurred or by the publication of the judicial decision in newspapers.

The decisions handed down by the Commercial Court and the Court of Appeal of Ghent in the case *Centre for Equal Opportunities and Opposition to Racism v. B.V.B.A. Kuoni Travel Belgium*[31] provide a good example of the sanctions applicable in Belgian Law. The case

[29] ICEO, *Le travail du Centre exprimé en chiffres pour l'année 2014*, report issued in October 2015, available on its website (www.diversite.be).

[30] See, for instance, J. Vrielink, "Le droit de l'égalité fait-il la différence? Les effets du droit antidiscriminatoire à la lumière des recherches en sciences sociales", in *Politiques antidiscriminatoires*, J. Ringelheim, G. Herman & A. Rea (dir.), Louvain-la-Neuve, de Boeck, 2015, p. 51-66.

[31] Judgment no. 7302 of 29 September 2010 of the Commercial Court of Ghent and Decision of 20 January 2011 of the Court of Appeal of Ghent.

concerns a deaf man used to self-sufficient travelling who called upon the services of a travel agency to book a package tour in Jordan. Believing that his security would not be correctly insured because of his difficulties to communicate with the local population, the travel agency refused to offer its services unless an independent guide accompanied the deaf man at his own expense. After several mediation attempts, the ICEO brought an action before the Commercial Tribunal of Ghent, alleging that simple adjustments should have been admitted by the travel agency. The Commercial Court of Ghent ruled in favour of the ICEO and sentenced the travel agency for its failure to provide reasonable accommodation to the victim and to have refused him to participate in the package tour in Jordan. The travel agency was condemned to pay a lump sum of EUR 650 and a civil fine (*astreinte*) of EUR 1,000 for every possible new offence noticed and per diem if the offence continues. Furthermore the travel agency had to advertise the judgment in its Ghent's branch and on its website, and to publish it at its own expenses in the media. In a decision of 20 January 2011, the Court of Appeal of Ghent confirmed the judgment of the Commercial Court of Ghent, but decided to condemn the travel agency to pay a lump sum of EUR 1300 (and not only EUR 650 as it was decided in first instance).

The famous *Feryn* case is another good example. After the decision of the Court of Justice of the European Union (ECJ), the Labour Appeal Court ruled that Mr. Feryn, by publicly declaring that his firm was not recruiting any employees of Moroccan origin, was engaging in direct discrimination. It ordered the cessation of the discriminatory practice and the publication of this judicial injunction in several newspapers. [32]

In addition, due to the insistence of certain non-governmental organizations, a limited range of discriminatory acts (such as racial discrimination in the provision of goods or services and in employment) is also criminally punishable. These offences may lead to imprisonment (one month to a year), fines (EUR 250 to 5,000), a combination of the two, or even the loss of civil and political rights for a certain time (meaning that during this time the offender cannot be a civil servant, nor be elected, nor sit in representative bodies). Moreover, the victim has the option of claiming compensation for the damage caused by the offence. Actually, these criminal offences have been very rarely prosecuted and have led to very few convictions because of the difficulties in finding a person criminally liable (see burden of proof issue).

Still, on the terrain of criminal law, the incitement to commit discrimination or the incitement to hatred or violence against a group defined by certain characteristics is a criminal offence, if it is done under the conditions of publicity defined by Article 444 of the Penal Code. Civil servants who, in the exercise of their functions, commit discrimination may be criminally charged. And, when certain offences defined in the Penal Code are committed with an 'abject motive', i.e. with discriminatory intent (hate crimes), this might be held as an aggravating circumstance.[33] In this respect, the murder of a young homosexual man in May 2012 was the first murder to be treated as a homophobic hate crime by the Belgian judicial authorities under

[32] Judgment of 28 August 2009 of the Labour Appeal Court of Brussels after the preliminary ruling of the Court of Justice of the European Union of 10 July 2008 (Case C-54/07).

[33] These offences which may thus lead to stronger convictions if driven by such an 'abject motive' are: rape and sexual assault (Articles 372 to 375 of the Penal Code); homicide (Articles 393 to 405*bis* of the Penal Code); refusal to assist a person in danger (Articles 422*bis* and 422*ter* of the Penal Code); deprivation of liberty (Articles 434 to 438 of the Penal Code); harassment (Article 442*bis* of the Penal Code); attacks against the honour or the reputation of an individual (Articles 443-453 of the Penal Code); putting a property on fire (Articles 510-514 of the Penal Code); destruction or deterioration of goods or property (Articles 528-532 of the Penal Code). Except for the offence of harassment, these situations are not normally met in the field of employment and occupation.

new anti-discrimination law.[34] In a recent case where about fifteen people – mainly undocumented migrants and homeless people – were victim of violent and degrading treatment by railway police officers, the perpetrators were brought before the Court of First Instance of Brussels (Criminal section) by the public prosecutor. They were notably charged with the use of illegitimate violence committed with a discriminatory intent (hate crimes). On 26 February 2014, the Court of First Instance of Brussels (Criminal section) convicted eleven out of fourteen defendants. The nature and the degree of the sentences varied depending on the role of the perpetrators in the violent acts at stake and some of their former criminal convictions but included community service of 60 hours, prison sentence of 1 year to 40 months with probation that was combined, in some cases, with a fine between 500 and 600 euros. It is worth noting that the abject motive (discriminatory intent) was retained against the four police officers in the cases in which the ICEO intervened.[35]

The 2007 Federal Anti-discrimination Acts significantly improve the system of sanctions available to victims of discrimination, bringing Belgium closer to a situation where discrimination leads to 'effective, proportionate and dissuasive' sanctions as required by EU law.

7. Who supports the enforcement of anti-discrimination law?

Antidiscrimination law provides for the legal standing of the ICEO, the Institute for Equality between Women and Men, and organizations with a legal interest in the protection of human rights or in combating discrimination (at least three years after their creation) and trade unions. They may file a suit (civil or criminal) on the basis of the anti-discrimination legislation. However, where the victim of the alleged discrimination is an identifiable (natural or legal) person, her consent determines the admissibility of the claim. Class action is not allowed and instances of strategic litigation are not frequent but often successful.

To give a few examples, with the *Feryn* case, the ICEO initiated the first case of ethnic discrimination before the ECJ.[36] It is a topical instance where the ICEO acted on its own behalf to denounce a breach of the antidiscrimination legislation as there was no identified victim. The ICEO pressed for a referral to the ECJ to decide that, in case an employer declares publicly that he will not recruit employees of a certain ethnic or racial origin, it is likely to deter applicants from this ethnic minority. This practice hinders their access to the labour market and constitutes a direct discrimination in respect of recruitment within the meaning of the Racial Equality Directive. The issue of the shift of the burden of proof was also at the core of the *Feryn* case. Similarly, the ICEO has been working for many years to address the policy of profit companies that include the respect of neutrality in their brand so as to justify the dismissal of female workers wearing the *hijab* and bypass antidiscrimination law. After initially unsuccessful attempts,[37] the ICEO recently managed to convince the Court of Cassation, the highest court in the judiciary, to make a reference for a preliminary ruling in

[34] Courts of Azzize of Liège, 22 December 2014, *Ihsane Jarfi* case.
[35] Judgment of the Court of First Instance of Brussels (Criminal section) of 26 February 2014, available on the website of the ICEO (www.diversite.be).
[36] CJEU, *Feryn*, 10 July 2008, Case C-54/07.
[37] See, for instance, Labour Court (*Arbeidsrechtbank*) of Tongres (Flanders), 2 January 2013, *Joyce V. O. D. B. v. R. B. NV and H. B. BVBA*, judgment no. A.R. 11/2142/A, available on the website of the ICEO (www.diversite.be).

the *Achbita* case.[38] Again, this would be one of the first ECJ rulings related to the ground of religion.[39]

The *Adecco* case is a good example of (transnational) strategic litigation pursued by a trade union. The multinational temp agency 'Adecco' was listing job seekers depending on their race and ethnic origin. Native Belgian people without foreign roots were registered in the computer system under the code BBB, by reference to the Belgian breed of Cattle *Blanc Bleu Belge* ('White Blue Belgian'). The system was put in place to please certain clients. In 2009, the French NGO 'SOS Racisme', which was involved in another procedure in France against Adecco for similar facts and a Belgian leftist trade union organisation (the FGTB) launched a procedure before the Court of First instance of Brussels. They claimed that thousands of job seekers had been discriminated against on the grounds of their race and ethnic origin. The Tribunal acknowledged the discrimination and sentenced Adecco to pay EUR 25,000 damages to the first applicant and a symbolic EUR 1 to the second applicant. On 10 February 2015, the Appeal Court of Brussels rejected the argument brought forward by Adecco according to which there would be a lack of interest of the French NGO 'SOS Racism' because its interest would be restricted to discrimination occurring in France. Interpreting Article 32, 1° of the Racial Equality Federal Act (associations willing to claim damages on behalf or in support of complainants, in case of violation of the antidiscrimination legislations, must have a legal personality for at least three years and a legal interest in the protection of human rights or in combating discrimination) in the light of European law, the Court held that there was no territorial requirement and that an association could bring a non-discrimination claim irrespective of the location of its head office in the European Union. As to the merits of the case, the Court upheld the decision of the Tribunal of first instance in holding Adecco liable of discrimination. The liability was assessed under a Provision of the Civil Code (Art. 1384, al. 3) according to which an employer is liable for his/her employee's civil wrongs committed during the employment relationship (irrebuttable presumption of liability). The Appeal Court of Brussels condemned Adecco to a much heavier compensation (EUR 25.000 to both applicants), stressing that a mere symbolic sentence does not meet the requirement of effective and deterrent sanction as imposed by European Law. Although it was the first time that a multinational in Belgium was convicted for racial discrimination on a wide scale, one should not forget that direct responsibility of the company was not established but only the responsibility for the discriminatory acts of its employees. Beyond this specific case, it is striking that there is still a lot of racism in the field of temporary employment in Belgium. On 23 February 2015, ICEO published an article where it called on Belgian governments to take measures to cease the illegal practices of discrimination in the sector of 'service vouchers' (*titres services*). [40] Indeed, according to a study of the NGO *Minderhedenforum*, two out of three service vouchers companies in the Flemish part of Belgium still accommodate the wish of their clients when they ask for workers with no foreign roots.

Finally, the French-speaking Human Rights League (LDH) entirely run two successful anti-discrimination cases before the ECSR concerning, in the first case, the breach of the right of

[38] Samira Achbita, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, Case C-157/15, request for a preliminary ruling lodged by the Belgian Court of Cassation on 3 April 2015.
[39] See also, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Microploe Univers SA*, Case C-188/15, request for a preliminary ruling lodged by the French Court of Cassation on 24 April 2015.
[40] The 'service vouchers sector' is a system of temporary employment in the field of domestic work.

housing in the context of unfair treatment of Travellers and Roma,[41] and, in the second one, the lack of social services available to highly dependent persons with disabilities.[42]

8. Who opposes the enforcement of anti-discrimination law?

The political context in Belgium is highly volatile due to fierce linguistic disputes rooted in historical and economic differences. This does not favour antidiscrimination policies as the ECRI pointed out in 2014:

> 'since its fourth report on Belgium a number of leaders of and militants from extremist parties have continued making statements in public against the other linguistic Community in the name of extreme nationalism combined with intolerant and xenophobic arguments against foreigners and minority groups. ECRI considers that this exploitation of the climate of political tension that exists between the linguistic Communities is particularly deplorable as it not only encourages inter-Community prejudice and stereotyping but can fuel hatred also against ethnic minorities and migrants'.[43]

This statement is mirrored in recent developments. Over the last years, politicians of the Dutch-Speaking Nationalist Flemish Party (NVA) repeatedly issued statements with racist connotations. There is much political concern about this issue as this is the most influential party in the Flemish part of Belgium. After the elections of May 2014, it has been, for the first time, become part of the Federal Government. In this line, it became public that the current Secretary of State for Asylum, Migration and Administrative Simplification, Theo Francken, wrote on Facebook: "I acknowledge the added value of the Jewish, Chinese and Indian Diasporas but I don't recognize the added value of the Moroccan, Congolese and Algerian Diasporas". In March 2015, Bart de Wever, the President of the NVA and Mayor of the major Flemish city (Antwerp) stated that "racism is a relative concept and is used too frequently as an excuse of personal failure by some communities such as Moroccans, especially Berbers".[44] Such controversial statements initiated an awkward debate as to whether this is racism or not according to the Racial Equality Federal Act. Some organizations and citizens lodged a complaint for racism against Bart De Wever. Even if the applicability of the Racial Equality Federal Act is questionable, it is highly problematic that politicians of high profile stigmatize ethnic minorities whose members have been facing discrimination in Belgium for many years. In addition, despite the repeated calls of the ICEO for an Inter-federal Action Plan against Racism, the 2014 federal Governmental Agreement enshrines no commitment in this respect. Belgium is still failing to keep a promise made during the World Conference against Racism held in Durban in 2001.

The appointment of Prof. Matthias Storme at the Board of Directors of the new Inter-federal Centre for Equal Opportunities is also controversial. This lawyer and law professor is well known as a fierce opponent of the equal treatment legislations and the equality body in charge of their implementation. He was the one who launched the actions in annulment against

[41] ECSR, *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 62/2010, decision adopted on 21 March 2012 (published on 31 July 2012), see above in point 1.
[42] ECSR, *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 75/2011, decision adopted on 18 March 2013 (published on 29 July 2013), see above in point 1.
[43] Para. 51 of the 2014 ECRI report on Belgium.
[44] See the press article available on the website of the newspaper *Le Soir* (www.lesoir.be).

almost all the provisions of the Federal Anti-discrimination Acts of 10 May 2007 (the Racial Equality Federal Act, the General Anti-discrimination Federal Act and the Gender Equality Federal Act), which were rejected by the Constitutional Court on 12 February 2009.[45] In addition, in 2004, he publicly stated that the conviction for racism of the *Vlaams Blok*, an extreme-right party now renamed *Vlaams Belang*, almost morally obliged him to vote for the extreme-right and that anti-discrimination law was a "blunder and an attack against democracy".[46] Still on a libertarian tone, he also stated that "discriminating is a fundamental freedom".[47]

Beside the political context, opposition against anti-discrimination law comes at times from employers, landlords or insurance companies. For instance, when conditions of admissibility of situation testing in court were discussed at the federal level in 2005, the VLD (a Flemish right-wing party which was part of the coalition government) relayed criticism by employers' organizations and the National Office for Landlords (*Office national des propriétaires*). In a major daily newspaper, the party refused "to set up a team of spies, send moles to infiltrate companies, open informer hotlines and sanction Big Brother".[48] The Prime Minister himself did not shy away from calling the testers "infiltrators" and "informers", adding: "you do not send a naked woman to a man to see if he is adulterous".[49] And, after the ECJ ruling in the *Test-achats* case[50] (which originated from Belgium), the insurance companies were very clear that they will rely on other grounds than gender (such as the state of health) to assess risk and define premium for life insurances.

9. How broad is the coverage of anti-discrimination law?

The coverage of anti-discrimination law is very broad in Belgium. On the one hand, it concerns 19 explicit grounds: alleged race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin, trade union opinion, gender and related grounds (pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression). On the other hand, it provides for protection in large areas of public life: the provision of goods or services when these are offered to the public; access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in the public sector; the nomination of a public servant or his/her assignment to a service; the mention in an official document of any discriminatory provision; and access to and participation in, as well as exercise of an economic, social, cultural or political activity normally accessible to the public.

Some uncertainties remain regrettably, with a view to the precise delimitation of the powers held respectively by the Federal State and the Regions and Communities in this field, which has constituted an obstacle in the process of implementation and is still tricky with respect to enforcement.

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[45] Ruling no. 17/2009.
[46] "Le N-VA Matthias Storme nommé administrateur du Centre interfédéral pour l'Egalité des Chances", *Le Soir*, 25 October 2014, available on the website of thenewspaper *Le Soir* (www.lesoir.be).
[47] "La N-VA a nommé Matthias Storme au poste d'administrateur de l'institution. Ses partenaires n'y voient rien à redire", *Le Soir*, 27 October 2014, available on the website of this newspaper (www.lesoir.be).
[48] *Le Soir*, 26, 27 and 28 March 2005.
[49] *De Standaard*, 25 March 2005.
[50] CJEU (Grand Chamber), 1st March 2011. *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, Case C-236/09.

10. Does the enforcement of anti-discrimination law vary according to the ground of discrimination?

Contrary to EU law, the material scope of protection is the same with respect to the 19 protected grounds. The legal coverage is, however, not entirely the same. First, there is an open system of justification when differential treatment is based on a ground not covered by EU law (such as civil status, birth, property, actual or future state of health, physical characteristic, political opinion, trade union opinion, language, genetic characteristic, social origin and nationality). In addition, specific tools apply only to some grounds protected in EU law (i.e. reasonable accommodation duty limited to disability, ethos-based organization exception related to direct discrimination based on religion or belief, genuine and determining professional requirement, etc.). Second, although it is one of the guiding principles of the 2007 federal reform that there should be no hierarchy between grounds, criminal offences were chiefly upheld in the Racial Equality Federal Act (discrimination in the provision of goods or services, in access to employment, vocational training or in dismissal procedure).

In practice, the files opened by the ICEO show important disparities between grounds. For instance, in 2014, out of 1,845 files, 764 (41 %) were related to race and ethnic origin, 372 (20 %) to disability, 297 (16 %) to philosophical or religious belief, 100 (5 %) to age, 80 (4 %) to fortune, another 80 (4 %) to sexual orientation, 63 (3 %) to state of health, 23 (1 %) to political belief, another 23 to physical appearance or characteristic, 19 (1 %) to civil status and 22 (1 %) to others grounds.

In addition, some discrimination grounds might get a higher priority based on the political agenda. For instance, due to European pressure, a Task Force on Roma was set up and led to the adoption of a 'National Strategy for Roma Integration' in March 2012. Significant acts of violence against LGBT people led to the drafting of an Inter-federal Action Plan preventing and fighting homophobic and transphobic violence in 2013. One year later, the UN Committee for the Protection of Persons with Disabilities expresses its concern about the "poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority".[51] The ICEO is clearly pushing the political agenda in this sense.

Finally, judicial rulings also show some disparities. For instance, decisions from the highest courts in Belgium (such as the Constitutional Court or the Council of State) show that the issue of religious symbols (and actually, the wearing of the *hidjab*) is still a very controversial one in Belgium.

11. What is the relationship between the enforcement of anti-discrimination law and the quest for equality on both an individual and systemic level?

The path chosen by the ICEO illustrate a will to tackle structural discrimination. In its last report, it stressed that more and more people are facing exclusion and that discrimination is

[51] Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its 12th session (15 September-3 October 2014), para. 22 -23.

most often taking a "structural form".[52] It insists on the need of carrying on to develop socio-economic devices such as the diversity Barometers. In the opinion of the ICEO, promoting equal opportunities is based on at least three pillars: employment, education and housing, to which one should add access to culture and access to health care. Cross policies between the too numerous and scattered competent public authorities is one of the main challenges for the future.[53]

However, one should keep in mind that there are no specific sanctions (such as desegregation plans) to tackle the issue of structural discrimination. In addition, the Federal State, the Regions and the Communities are very reluctant to foster measures of positive action, which, at this stage, are still very limited on the ground.[54]

12. Is the enforcement of anti-discrimination law regarded as different from the enforcement of other laws?

As the issue of effectiveness has been troublesome with respect to anti-discrimination law, some legal tools derogatory to civil procedure and the law of evidences were implemented. In line with EU law, the shifting of the burden of proof where a *prima facie* case is made out is provided for. In addition, the claimant in a discrimination claim might ask the court to deliver an injunction ordering the immediate cessation of the discriminatory practice under the threat of financial penalties (*astreintes*). This injunction is made as if there were emergency proceedings but the court ruling is definitive (and not an interim decision). Such a specific procedure (*comme en référé*) only applies in particular fields as, for instance, environmental law, intellectual property rights or family law issues.

The actors in charge of the enforcement of anti-discrimination law are also playing a major role. With their broad mandate,[55] the two equality bodies are the key players in this field. But they are not the only ones to have receive legal standing as organizations with a legal interest in the protection of human rights or in combating discrimination, established for at least three years, and trade unions, are also entitled to file a suit (civil or criminal) in anti-discrimination cases.

Finally, the Ministerial Circular (*circulaire commune*) for an efficient policy of monitoring and prosecution of any type of discrimination, adopted on 16 December 2013, is another particular legal tool. The Circular aims at strengthening the cooperation between the Justice departments and the Police departments to ensure a better registration and prosecution of all forms of discrimination and hate crimes, including homophobic discrimination and cyberhate. In criminal matters, this Circular compels the prosecution departments and the police services to register all criminal cases implying a discriminatory intent. Moreover, this Circular provides for the appointment of a 'coordinator prosecutor' (*magistrat coordinateur*) who is in charge of its implementation. This prosecutor is the contact person for the ICEO. Other prosecutors and labour auditors are in charge of discrimination issues in their respective departments (prosecution department and labour department) as well as public servants in police services.

[52] ICEO, *Rapport annuel 2014. Une année charnière qui ouvre des portes*, issued on , p. 68.
[53] *Ibidem*, p. 69.
[54] *Ibidem*, p. 69.
[55] See above, point 3.

13. What does the enforcement of anti-discrimination law reveal about the nature of your legal system or about the enforcement of laws in your legal system

The enforcement of anti-discrimination law in Belgium illustrates one of the pitfalls of the complex federal structure. The Council of State has failed to provide clear guidelines concerning the division of tasks between the federal level, the Regions and the Communities in the implementation of the European directives.[56] In some respect it could lead to situations in which competence disputes supersede the objective of respecting and promoting equality and non-discrimination. This is also the case for other fundamental rights, which have to be enforced by public authorities at different levels (federal, Regions and Communities) and is more broadly the current situation in the institutional framework of Belgium.

For almost ten years, the lack of a strong coordination between the different levels of the state was certainly the most serious obstacle to achieving full compliance with EU law. There have been significant improvements in this respect as the Regions and Communities managed to harmonise their statutory law with federal legislation. Moreover, the Federal State, the Regions and the Communities approved a Cooperation Agreement on 12 June 2013 to turn the Centre for Equal Opportunities and Opposition to Racism into an Inter-federal Centre, which has been operational since March 2014. The Institute for Equality between Women and Men is still a federal organization.

Conclusion

Belgium is at a crossroads. The legal reforms instilled by the EU are mostly implemented on paper. On the ground, the scale of discriminatory practices in employment, housing, education is large and major structural instances of discrimination remain unsolved.

A fair amount of cases decided in court show that there is still a noticeable lack of knowledge of the anti-discrimination law by the professionals in charge of its implementation. Indeed, anti-discrimination law is tough to master. It is highly technical with some legal devices originating from common law legal systems. It crosses the classical branches of the law (such as civil law, labour law, social security, constitutional law, human rights law, criminal law) on which the field of competences of lawyers are built. It is also scattered between different institutions, public authorities and legal texts. More resources should be allocated to properly train judges and lawyers. Strategic litigation is often well thought of by the ICEO or NGOs such as the LDH which have used the European Courts and bodies (ECSR) to develop judicial precedents. But litigation is not enough. The follow up of judicial achievements should be closely designed. And while the ICEO and the Institute for Equality between Women and Men are carrying on anti-discrimination campaigns, it seems that there is never going to be enough information and education to deconstruct stereotypes, reduce personal prejudices and bridge the distances between ‘Us’ and ‘Them’.

Brussels, 12 January 2016

[56] Council of State, opinions no. 40.689/AG, 40.690/AG, and 40/691/AG, of 11 July 2006. These opinions were appended to the governmental bill presented to the House of Representatives on 26 October 2006 (doc. No. 51 2720/001). Following a number of changes to the original bill, a second text was presented to the Council of State, on 2 October 2006. However, the second opinion of the Council of State did not re-examine the question of the division of competences.