Globalization and Legal Transplant: Lessons from Implementing the EU Race Directive

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One remarkable consequence of globalization is the spread of human rights norms across legal cultures, such as the norm against discrimination in employment. The recent adoption of new antidiscrimination laws in France (2001 and 2004) and Germany (2006), as required by the EU’s Race Directive of 2000, is an attempt to spread a particular kind of transnational culture – a culture of respect of ethnic diversity. As an early position paper on the directive put it, the goal was “to promote a diversified, multicultural Europe which espouses equal opportunities for all citizens irrespective of gender, origin, race, religion, opinions, age, or disability.”

At the same time, the Race Directive was largely based on British antidiscrimination law, which itself borrowed in the 1970s from the U.S. model. The process of transplanting antidiscrimination law on the Continent highlights the dynamics between political culture and legal culture. To what extent does the transformation of political culture (e.g., eradicating discrimination) require broader shifts in legal culture? Are the changes to legal culture desirable?

It is often the goal of antidiscrimination law to transform social and political cultures in which minorities and outsiders are stereotyped and adversely treated. And, arguably, this transformation is badly needed in France and Germany, as well as in many other European countries. Riots in France in 2005 indicated that black and North African minorities experience severe discrimination in French society. In Germany, immigrants without German blood have always been regarded as outsiders, and until 2000, were rarely eligible for German citizenship. Operating under these social norms, German opponents of antidiscrimination law viewed discrimination against black and Turkish minorities as a legitimate exercise of their freedom of contract.

When antidiscrimination law is introduced, the aspiration is that providing legal remedies for discriminatory behavior can reform a culture of racism and stereotyping. A change in political culture is expected and intended. But the approach taken by the EU’s race directive puts pressure to change the legal culture as well, particularly the legal culture of civil litigation in continental Europe. By “legal culture” I am referring to an entire set of institutions and practices in a legal system, which functions beyond the particular policy area to which any particular legal reform might be directed. To the extent that the political transformations demanded by the EU Race Directive prescribe are undertaken through legal changes in civil litigation, there may be reverberations in areas of law beyond racial equality. Comparative lawyers need to confront and evaluate this dynamic.
To achieve its objectives, the EU Race Directive directed all the member states to adopt legal strategies used in U.S. and British antidiscrimination law. Specifically, it required reforms to facilitate the civil litigation of individual complaints. One provision that required new legislation in most member states was a requirement of burden-shifting in civil cases challenging discrimination. Article 8 of the directive provides:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

The implementation of burden-shifting in France highlights the barriers that the French legal culture of civil litigation, independent of its political culture of racism, may pose to the use of legal transplant to transform the political culture of discrimination.

France passed a law implementing this burden-shifting requirement in 2001. But it has not made civil litigation of employment discrimination cases much easier for French plaintiffs, in light of the absence of Anglo-American-style discovery in the French civil litigation system. In order for a plaintiff claiming discrimination in employment to establish “facts” from which discrimination can be presumed, the plaintiff must, at the very least, show that there was some disparity of treatment between himself and, say, another employee. The institutional framework of French civil litigation makes this extremely difficult. Several rules in the French Code of Civil Procedure, understood through the principles that underlie these rules, make it highly unusual for one party to obtain evidence from the adversary that will help establish its own case. Article 2 provides that “The parties conduct the suit under the burdens they carry. It is up to them to accomplish the procedural acts in the forms and time frames required.” This article is understood to establish the party-driven nature of the proceedings, which is elaborated by Article 9, providing “The burden is on each party to prove, consistent with the law, the facts necessary to the success of its claim.” This provision has been interpreted to mean that an equitable proceeding requires each party to prove, without the aid of the court or of the other party, the facts upon which the claim depends. Civil procedure rules do authorize the judge to investigate facts, but a strong norm of judicial neutrality limits the investigations. Only in exceptional circumstances do judges require the defendant to produce evidence crucial to the proving plaintiff’s allegations. Judges tend to see such orders as contrary to Article 146, which provides, “In no case can an investigatory order be issued for the purpose of supplying the deficiency of a party in administering proof.” Finally, parties cannot be witnesses in their own cases. The nature of discrimination – which often depends on evidence that is in the hands of employers, as well as testimony by parties – makes it extremely difficult to establish even the basic facts that would shift the burden.
Other features of French legal culture make it extremely difficult for civil litigation to be used as a tool of social transformation, as it is in the United States. There is no class-action litigation in France, nor are there punitive damages, both features that enable the entrepreneurial leadership of lawyers in litigating employment discrimination cases in the United States. Furthermore, French bar associations’ ethics rules prohibit lawyers from soliciting business from potential clients. As a result, despite the availability of civil remedies for employment discrimination in French law, which largely developed from the 1980s to the present as a result of implementing EU law, most victims of employment discrimination seek recourse in criminal proceedings. Rules of criminal procedure make it far easier for a victim, aided by a prosecutor, to obtain evidence that is in the hands of employers and other alleged discriminators, which might support an inference of disparity of treatment. But many complain that criminal proceedings are also ineffective in transforming the political culture of discrimination in France, because the presumption of innocence in criminal law makes it very difficult, in the absence of clear intent to discriminate, to convict an alleged discriminator. As a result, antidiscrimination law seems to have only a marginal impact on the political culture of discrimination against racial minorities in France.

This has led many lawyers in France to propose more legal transplant. Lawyers litigating employment discrimination cases are calling for judges to depart from established norms and to issue investigatory orders as a matter of course in these cases, with little thought to how this might affect the employers’ adversarial behavior in litigation and the overall costs of these cases. There are also proposals to introduce class action litigation in France, part of a larger trend in Europe of spreading American-style adversarial legalism in various areas of public governance.

It is too early to tell whether and how the new antidiscrimination law in Germany (in effect since August 1, 2006) will put pressure on its rules, institutions, and culture of civil litigation. But other developments in Germany might suggest a similar move towards a more American adversarial legal style in civil litigation, one which might facilitate the use of civil litigation by entrepreneurial lawyers to transform social norms and the political culture. For instance, in March 2007, the German Constitutional Court struck down a law banning contingency fees, in a case not unrelated to issues of racism. The underlying litigation had been undertaken by a German Jewish plaintiff seeking compensation for the expropriation of her estate near Dresden. In any case, without a legal ban on contingency fees in Germany, there are greater incentives for lawyers to bring antidiscrimination cases under the new antidiscrimination statute.

The recent developments in the implementation of the Race Directive highlight the stakes of using law to transform existing political cultures to achieve globally shared human rights aspirations. Even when the aspiration towards a social or political norm like non-discrimination is shared transnationally (and indeed, this, too, remains a contested proposition), agents of legal transplant should consider and evaluate the effects of transplant on the broader legal culture in which a given norm operates.