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Enforcing (EU) Non-discrimination Law: Mutual Learning between British and Italian Labour Law?

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While substantive EU non-discrimination law has been harmonized in great detail, the enforcement regime for EU non-discrimination law consists merely of a few isolated elements. Thus, the pursuit of unity through harmonization in substantive EU law is accompanied by considerable regulatory autonomy for Member States in securing the efficiency of those laws, reflecting the diversity of national enforcement regimes, and resulting in twenty-seven different national models for enforcing discrimination law in labour markets. This article pursues two connected arguments through a comparison of rules for enforcing non-discrimination law in labour markets in Britain and Italy. First, it argues that enforcing non-discrimination law in labour markets is best achieved when responsive governance, repressive regulation and mainstreaming equality law are combined. Second, the article submits that diversity of national legal orders within the EU is not necessarily detrimental, as it offers opportunities for mutual learning across legal systems. The notion of mutual learning across systems is proposed in order to analyse the transnational migration of legal ideas within the EU. Such migration has been criticized in debates about the 'transplantation' of legal concepts or legal irritation through foreign legal ideas, in particular by comparative labour lawyers. However, EU harmonization policies in the field of non-discrimination law aim to impact on national labour laws. The article develops the notion of mutual learning across legal systems in order to establish conditions for transnational migration of legal ideas, and demonstrates the viability of these concepts by applying them to the field of non-discrimination law.

Keywords: Enforcing Discrimination Law, Mutual learning between legal orders, Comparative Law, Labour Law, Mainstreaming, Italy and Britain

1 INTRODUCTION

EU non-discrimination law, initially consisting of gender equality law and more recently extending to combat racial and other discrimination,¹ is generally seen

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¹ Mainly Directive 2006/54/EC of the European Parliament and the Council implementing equal opportunities and equal treatment of men and women in matters of employment and occupation (of July 5, 2006 OJ L 204/23) and Council Directives 2000/43/EC implementing the principle of

as a success story of European integration.² In spite of this normative success of non-discrimination law, inequalities based on race, sex and disability³ persist, especially in labour markets.⁴ This may suggest a lack of adequate enforcement of substantive norms in the world of work.⁵ Labour law enforcement regimes varied considerably in the twenty-seven EU Member States before the EU non-discrimination directives were implemented.⁶ As these directives do not provide a complete enforcement regime, diversity of national enforcement regimes persists. Does such diversity threaten the success of EU non-discrimination law in labour markets, or does it offer opportunities for mutual learning across national legal systems?

Addressing this question through a comparison of British and Italian law, this article argues that there are opportunities for mutual learning between non-discrimination and labour law systems as different as the Italian and British one. This argument is pursued through two interrelated hypotheses: first, that mutual learning between legal orders is possible under favourable conditions, which include the existence of actors able and willing to support reception of elements of foreign law, and the relative openness of the national legal system towards the general mission of the field of law in question, and second that a combination of determined reactive measures with innovative proactive ones is decisive for successful enforcement, and that following the principle of mainstreaming, non-discrimination law enforcement needs to be aligned with existing mechanisms to enforce labour law, if non-discrimination is to prevail in the world of work.

equal treatment irrespective of racial or ethnic origin (of June 29, 2000, OJ L 188/22) and 2000/78/EC establishing a general framework for equal treatment in employment and occupation (of Nov. 27, 2000, OJ L 303/16, covering discrimination on grounds of disability, religion and belief, sexual orientation and age). On the development of the socio-legal field see D. Schiek, *EU Non-discrimination Law & Policy*, in *Geschlechtergerechtigkeit*, 472–88 (Ch. Hohmann-Dennhardt, M. Körner & R. Zimmer ed., Nomos 2010).

² G. de Búrca, *The Trajectories of European and American Antidiscrimination Law*, 60 *Am. J. Comp. L.* 1–22 (2012); M. Bell, *The Principle of Equal Treatment: Widening and Deepening*, in *The Evolution of EU Law* 611–641 (Gráinne de Búrca & Paul Craig eds., Oxford U. Press 2011).

³ For a theoretical approach to using these ascribed characteristics as the focus of non-discrimination law see D. Schiek, 'Organising EU Equality Law Around the Nodes of "Race", Gender and Disability,' in *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* 11–27 (D. Schiek & A. Lawson eds., Ashgate 2011).

⁴ On gender equality in Europe: European Commission, *Progress on equality between women and men in 2011* (European Commn. 2012); on the global situation concerning gender, racial discrimination, migrant workers, disability and age: Director General, *Equality at Work. The Continuing Challenge* (Intl. Labour Conference 100th session 2011, 2011).

⁵ B. Hepple, *Equality at Work*, in *The Transformation of Labour Law in Europe. A Comparative study of 15 Countries 1945-2004* at 161 (B. Hepple & B. Veneziani eds., Hart 2009).

⁶ J. Malmberg, *Enforcement of Labour Law*, in *The Transformation of Labour Law in Europe* 263–287 (J. Malmberg et al. eds., Hart 2009).

Accordingly, the focus will be on enforcing non-discrimination law in the world of work through judicial enforcement and industrial relations and their interaction with each other. While the substance of non-discrimination law⁷ and its enforcement through equality bodies⁸ and public procurement⁹ have been widely discussed, other aspects of enforcement have only been discussed at national level¹⁰ or in reports to the European Commission.¹¹ Enforcing non-discrimination law has at times been theorized¹² with reference to responsive governance,¹³ but never relating to the transnational migration of legal ideas. This article combines theories of mutual learning and migration of legal ideas towards a new model of enforcing non-discrimination law in the world of work. The new approach proposes mainstreaming non-discrimination with responsive enforcement of labour law. The article demonstrates its value against the background of a comparison of British and Italian non-discrimination law enforcement in the world of work.

The argument will be developed as follows: the second section outlines concepts of enforcing non-discrimination law and labour law as aspirational regulatory fields. The third section compares enforcement regimes for non-discrimination law in Britain¹⁴ and Italy against the background of the national regulatory styles of labour law enforcement, and identifies differences between the respective national systems. The fourth section outlines the theoretical background for mutual learning across different national legal systems in the EU, drawing on debates about transplants and transposition in comparative law. The fifth section concludes by summarizing the potential for mutual learning about enforcing non-discrimination law in the world of labour between Britain and Italy and implicitly all EU Member States.

⁷ See the references in the articles cited in n. 2.

⁸ See M. MacEwen ed., *Anti-Discrimination Law Enforcement: A Comparative Perspective* (Ashgate 1997), G. Moon, *Enforcement Bodies*, in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* 871-953 (D. Schiek, L. Waddington & M. Bell eds., Hart 2007), B. de Witte, *New Institutions for Promoting Equality*, 60 *Am. J. Comp. L.* 49-60 (2012), C. Gooding, A. Lawson & B. Niven, *Equality Bodies in Europe: Impact and Effectiveness* (Hart 2013).

⁹ C. McCrudden, *Buying Social Justice* (Oxford U. Press 2007).

¹⁰ B. Hepple, M. Coussey & T. Choudhury, *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart 2000).

¹¹ For example Ch. Tobler, *Remedies and Sanctions in EC Non-Discrimination Law* (European Commn. 2005), *Discrimination in Working Life: Remedies and Enforcement* (J. McCormack ed., European Commn. 2004).

¹² Ch. McCrudden, 'National Legal Remedies for Racial Inequality', in *Discrimination and Human Rights: The Case of Racism* 251-307 (Sandra Fredman & Philippe Alston eds., Oxford U. Press 2001).

¹³ B. Hepple, *Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation*, 40 *Indus. L.J.* 315-35 (2011).

¹⁴ The comparison refers to Great Britain, i.e. England, Wales and Scotland, as non-discrimination legislation applies in these jurisdictions, but not in Northern Ireland. Scottish specificities of labour law enforcement will be disregarded.

2 ENFORCING ASPIRATIONAL LAW: NON-DISCRIMINATION AND LABOUR LAW

Both non-discrimination law and labour law aspire to shape social reality and not simply to reflect values that are well-established in socio-economic practice. Both bodies of law tend to challenge traditional methods of generating profits. The resulting enforcement problems are shared with other so-called 'social regulation'¹⁵ and socio-legal fields where regulatory ambitions abound, such as competition law, environmental law, and laws protecting intellectual property in the cyber-age.¹⁶ In any of these fields, enforcement of the law must be conceptualized as carefully as substantive rules if the aspirations of the field are to be achieved.

Traditionally, comparative analyses of law enforcement strategies start from the actors driving enforcement, distinguishing administrative, judicial and private enforcement in principle, while not neglecting mixed strategies.¹⁷ Such comparison suggests that enforcement relies on command and control: administrators are perceived as commanding specific actions for addressees to comply with, and individual parties aggrieved by non-compliance are expected to litigate. The resulting enforcement regimes are seen as inefficient, because they work retrospectively and are based on individual cases.¹⁸

The paradigm of responsive regulation¹⁹ promises more success in achieving socio-economic change. The enforcement pyramid is a popular image for illustrating its principles:²⁰ regulation should initially provide mechanisms to persuade socio-economic actors to comply, and provide tools for dialogue and agreements tailored to the structures and practices of specific actors. This technique ensures that all actors concerned can participate. If persuasion fails, more deterrent sanctions should be put in place, ideally progressively escalating, driven by a reflexive regulator, or a 'benign big gun'.²¹ Such strategies may

¹⁵ See B. Hepple, 40 *Indus. L.J.* 320 (2011).

¹⁶ See generally J. Braithwaite, *Regulatory Capitalism. How it Works, Ideas for Making it Better* (Edward Elgar 2008).

¹⁷ In general, see F. Cafaggi ed., *Enforcement of Transnational Regulation*, 3–4 (Edward Elgar 2012). For labour law enforcement see J. Malmberg, *The Transformation of Labour Law in Europe*, 263–87 (B. Hepple & B. Veneziani eds., Hart 2009).

¹⁸ See with particular emphasis on non-discrimination law Ch. McCrudden, *National Legal Remedies* 253–9 (2001), B. Hepple, 40 *Indus. L.J.* 315–335 (2011).

¹⁹ J. Braithwaite, I. Ayres & J. Braithwaite, *Responsive Regulation. Transcending the Deregulation Debate* (Oxford U. Press 2002).

²⁰ B. Hepple, 40 *Indus. L.J.* 321 (2011).

²¹ I. Ayres & J. Braithwaite, 19–53.

culminate in regulatory experimentalism, where mutual learning replaces any perception of conflicting interests of socio-economic actors.²²

In the field of non-discrimination law, states have had recourse to enforcement agencies since the 1970s²³ to complement individual claims before civil courts, which are still the focus of EU legislation.²⁴ Litigation on a group or public-interest basis has been debated,²⁵ as well as the creation of specialist adjudicative mechanisms and the use of mediation. Proactive²⁶ planning to reduce entrenched inequalities within organizations and awareness raising through civil society organizations have complemented the mechanisms for making equality reality, along with positive action measures, which may include 'reverse discrimination'.²⁷

Mainstreaming has been developed as a specific strategy for non-discrimination law. In short, mainstreaming aims at ensuring that the values underlying non-discrimination law are embraced proactively, rather than only complied with reactively.²⁸ In enforcing non-discrimination law, mainstreaming is relevant in two different ways. On the one hand, mainstreaming can be seen as a responsive enforcement strategy in its own right: it requires regulators to anticipate problems and proactively integrate the values of non-discrimination

²² Ch. F. Sabel & J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford U. Press 2010).

²³ See references in n. 8.

²⁴ Member States must make available judicial redress to individuals aggrieved by discrimination (Arts 7(1) Directive 2000/43, 9(1) Directive 2000/78, 17(1) Directive 2006/54), provide for effective, proportionate and dissuasive sanctions (Arts 15 Directive 2000/43, 14 Directive 2000/78 and 25 Directive 2006/54) and for sharing the burden of proof between perpetrator and victim (Arts 8 Directive 2000/43, 10 2000/78 and 19 2006/54). For sex discrimination, sanctions must include damages that cover at least the actual loss caused by discrimination (Art. 18 Directive 2006/54).

²⁵ E.g. by S. Fredman, *Making Equality Effective: Proactive Measures and Substantive Equality for Women and Men in the EU*, European Anti-Discrimination L. Rev. 7–17 (2010). The EU Directives only require that civil society organizations may engage in judicial procedures on behalf or in support of victims (Arts 7(2) Directive 2000/43, 9(2) Directive 2000/78 and 17(2) Directive 2006/54).

²⁶ Positive duties became the British programmatic vision for enforcing equality law with the 'Cambridge Report' (B. Hepple, M. Coussey & T. Choudhury); for an EU overview see S. Fredman, *Making Equality Effective: The Role of Proactive Measures* (European Commn. 2009).

²⁷ O. de Schutter, *Positive Action*, in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, 757–870 (D. Schiek, L. Waddington & M. Bell eds., Hart 2007). The EU Directives encourage proactive approaches in that Member States shall promote social dialogue and dialogue with civil society organizations with a view to promoting the Directives' principles (Arts 11, 12 Directive 2000/43, 13, 14 Directive 2000/78 and 21 (1,2), 22 Directive 2006/54), and allow positive action, without requiring Member States to engage in it (Arts 5 Directive 2000/43, 7 Directive 2000/78, 3 Directive 2006/54). For avoiding sex discrimination, Member States shall also encourage elements of equality plans (Art. 21 (3,4) Directive 2006/54). EU non-discrimination legislation is criticized as not sufficiently receptive to these elements of responsive regulation (B. Hepple, *Race and Law in Fortress Europe*, 67 *Modern L. Rev.*, 1–15 (2004)).

²⁸ J. Shaw, *Mainstreaming Equality and Diversity in the European Union*, 58 *Current Leg. Problems* 255–312 (2005), *Gender and the Open Method of Coordination* (F. Beveridge & S. Velluti eds., Ashgate 2005).

law in their sphere of responsibility.²⁹ On the other hand, enforcing non-discrimination law should resonate with enforcement mechanisms for the specific field. In this perspective, mainstreaming contributes to enforcement: it should ensure that non-discrimination law enforcement is not sidelined and rendered inefficient.

Enforcement of labour law in Europe has developed specific strategies, mainly spurred by the divergent interests of employers and employees and a tendency of employers' dominance. The main answer to this has been the industrial relations process: collective bargaining, underpinned by industrial action, constitutes negotiated regulation offsetting an imbalance of market powers between the two sides of industry. Viewed as one of the 'most innovative methods of regulation',³⁰ it also allows the tailoring of enforcement mechanisms to the needs of specific sectors.³¹ Elements of negotiated enforcement can also be found in agreements concluded as a result of concentration between management and labour and state bodies. Judicial enforcement was not always central to enforcing labour law, particularly as courts frequently criminalized the industrial relations process. Today, labour rights are routinely enforced judicially, but this is most successful if the industrial relations process and the judicial process interact, or if elements of negotiation through arbitration and conciliation are used.

Mainstreaming enforcement of non-discrimination law into the enforcement of labour law thus also introduces non-discrimination aims into negotiations between the two sides of industry. This is no easy task, as the industrial relation process has traditionally emphasized the contrast between management and labour, at the expense of acknowledging diversity within labour.³² The task is not impossible, however, as overcoming the division of labour along imagined differences such as sex, abilities and race can be seen as a precondition for protecting the interests of employees collectively.

3 COMPARING BRITAIN AND ITALY

Identifying the scope for mutual learning between British and Italian enforcement of non-discrimination law in the world of work thus requires consideration of the respective regulatory styles in enforcing labour law in

²⁹ Ch. McCrudden, *Mainstreaming Equality in the Government of Northern Ireland*, 22 *Fordham Intl. L.J.* 1768-1769 (1999).

³⁰ H. Collins, K. Ewing & A. McColgan, *Labour Law* 10 (2d ed. Hart 2005).

³¹ J. Malmberg et al., *Effective Enforcement of EC Labour Law* 77, 82, 101-102 (Kluwer Law International 2003).

³² B. Hepple, *Equality* 104-105 (2011); B. Bercusson, *European Labour Law* 344-345 (2d ed., Cambridge U. Press 2009).

general, and the subsequent identification of differences in enforcement mechanisms of non-discrimination law in each country.

3.1 ENFORCING LABOUR LAW

3.1[a] *Britain*

Judicial enforcement of labour law in Britain has moved from voluntarism to a rights-based system,³³ enhanced by an individualistic approach.³⁴ Employment tribunals rather than full courts are responsible for labour rights enforcement in the first instance. Consisting of a professional lawyer and lay members representing the two sides of industry, these tribunals offer a less adversarial and more specialist forum than traditional courts. Appeals to the Employment Appeal Tribunal can be followed by recourse to the ordinary courts. Accordingly, employment (appeal) tribunals, which are able to develop expertise and routine in labour law, can be overruled by ordinary courts, which have limited opportunity to develop such expertise.

The industrial relations process, originally the main regulatory force in British labour law, has been changed fundamentally and diminished in relevance.³⁵ The voluntary tradition of British industrial relations persists insofar as collective agreements are not legally binding per se, but only as implied (or expressly included) terms of a contract. Accordingly, enforcement of collective agreements could not be obtained in courts, but was (and is) dependent on the industrial relations process. Without a credible threat of collective action, a party would have difficulty enforcing the terms of a collective agreement. Since the beginning of the 1980s, industrial action has been regulated to such a degree that some authors are surprised that industrial action still occurs in Britain.³⁶ Trade unions have to comply with excessive requirements for ballots before calling any industrial action.³⁷ Moreover, substantive limits on collective industrial action correspond to limits on enforcing workers' rights through the industrial relations process. Such limits derive from the notion of the trade dispute, which defines

³³ See L. Dickens, *Delivering fairer workplaces through statutory rights? Enforcing employment rights in Britain* (Paper for International Industrial Relations Association, Sydney, August 2009).

³⁴ A.C.L. Davies, *Approaches to Labour Law* 10–11 (2d ed., Oxford U. Press, 2009). P. Davies & M. Fredland, *Towards a More Flexible Labour Market* (Oxford U. Press 2007).

³⁵ For national data see B. Kersley et al., *Inside the Workplace. First Findings of the 2004 Workplace Employment Relationship Survey* (Routledge 2006) (Results of the next WERS are expected by the end of 2012), for a comparative overview of the relevance of industrial relations in European countries see A. Jacobs, *The Transformation of Labour Law in Europe*, 201–232 (B. Hepple & B. Veneziani eds., Hart 2009).

³⁶ S. Deakin & G. S. Morris, *Labour Law*, 899 (2d ed., Hart 2009).

³⁷ For details see G. Pitt, *Employment Law*, 420–428 (8th ed., Sweet & Maxwell 2011).

statutory immunity for collective industrial action from common law damages.³⁸ Trade disputes under the statutory definition comprise disputes about interests as well as disputes about rights, which are not the privilege of the courts.³⁹ For example, disputes about conditions of employment as well as the individual or collective termination or the commencement of any employment relationship – issues of relevance for non-discrimination – can be a legitimate issue for a trade dispute.⁴⁰ Arbitration and conciliation are institutionally encouraged by the Arbitration and Conciliation Service (ACAS), to which any conflict before employment tribunals can be referred.⁴¹ Since national and sector-wide collective bargaining has ceded to single employer bargaining, there is limited scope for industry-wide or even national regulation in overarching matters such as non-discrimination.

3.2[b] *Italy*⁴²

Italian labour law as a rights-based system is also founded on the protection of workers' collective interests through trade unions. The constitution explicitly protects intermediary powers such as trade unions, and also safeguards the right to strike of both trade unions and individual employees.⁴³ Although weakened in practice by a decline in employers' engagement in national collective bargaining⁴⁴ and by the EU's and IMF's increasing pressure to curb wages under austerity programmes, trade unions have recently organized an impressive resistance by means of general strikes against these same political ideas.⁴⁵

³⁸ Part V TULR(C)A [Trade Union and Labour Relations (Consolidation) Act]. Due to specific historical developments and the reluctance of common law family legal systems to grant individual rights, British law does not acknowledge an individual right to industrial action, but rather grants freedom from prosecution and immunities (for more details see S. Deakin & G. S. Morris, 8–9.)

³⁹ See on the distinction in other jurisdictions A. Gladstone, *Settlement of Disputes over Rights*, in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, 721–749 (R. Blainpain ed., 10th ed., Kluwer 2010); A. Goldmann, *Settlement of Disputes over Interests*, *ibid.*, 751–783.

⁴⁰ Section 244 TULR(C)A contains the list of suitable subjects 244 TULR(C)A, for more details on its development and application see G. Pitt, 415–17, S. Deakin & G. Morris, 921–924.

⁴¹ For more details see S. Deakin & G. S. Morris, 81–87; G. Pitt, 5–10.

⁴² I am grateful to A. Lepore for drawing my attention to some of the contemporary Italian debates and materials during the course of his research period spent with me as a Marie Curie fellow.

⁴³ Italian Constitution, Arts 2, 39 and 40.

⁴⁴ Recently illustrated by the withdrawal of FIAT from the relevant employers' association, I. Senatori & O. Rymkevich, *Industrial Relations and Transnational Entrepreneurial Strategies: The Case of Fiat Chrysler* (International Labour and Employment Relations Association 2012).

⁴⁵ See for example the news clips on threats of industrial action in protest against austerity measures proposed by the interim government headed by Mario Monti, <http://prod-euronews.euronews.net/2012/03/21/italian-labour-reforms-spark-strike-call> (accessed July 6, 2012).

Furthermore, the three major Italian trade unions⁴⁶ have recently concluded a new general agreement with the employers' associations that promotes collective bargaining with all three trade union associations in an autonomously regulated manner.⁴⁷ Accordingly, industrial relations retain their relevance in Italy. National collective agreements, the CCNL, consist of different chapters. The first chapter resembles an employment code for the sector, and usually encompasses specific enforcement provisions, as well as the creation of supervisory or programmatic commissions for specific problems, which may be complemented by action committees at company level. Due to the strong constitutional protection of the right to strike, industrial action can be employed to support negotiations on the interpretation and enforcement of employees' rights. There is no substantive restriction on using industrial action for enforcing individual rights.

Judicial enforcement of labour rights in Italy is the task of the civil courts, as the constitutional prohibition of special courts also excludes labour courts.⁴⁸ The 1973 reform of the Code of Civil Procedure introduced an expedited⁴⁹ procedure through an individual judge,⁵⁰ for labour cases *inter alia*. In practice, labour cases are now allocated to the *giudice unico di primo grado* at each court, who is able to develop some expertise. Taken together with the creation of a specific section for labour disputes at the Supreme Court (*Corte di Cassazione*), this constitutes an equivalent to a labour law branch in the Italian court system, albeit without lay judges representing management and labour.⁵¹ Enforcing labour rights through the civil court procedure also means that only individual claims are allowed. Trade unions have no right to initiate a procedure for obtaining an interpretation of a collective agreement.⁵² They can support mass litigation, and underpin it with industrial action instead.⁵³

⁴⁶ After a period of unity shortly after WWII, Italian trade unions split into the CGIL (*Confederazione Generale Italiana de Lavoro*, i.e., Italian General Confederation of Labour, originally the only trade union confederation), CISL (*Confederazione Italiana Sindacati dei Lavoratori*, i.e., Italian Confederation of Workers' Trade Unions, assembling Christian trade unions) and UIL (*Unione Italiana del Lavoro*, i.e., Italian Labour Union, a social democratic branch). These trade union umbrella organizations used to co-operate in concertation with the state and in the conclusion of intersectoral agreements with the employers' associations governing industrial relations. The CGIL abstained from co-operation under the Berlusconi government and was not party to the 2009 intersectoral agreement.

⁴⁷ <http://www.eurofound.europa.eu/eiro/2011/08/articles/it1108029i.htm> (accessed July 6, 2012).

⁴⁸ Article 102 Constitution, motivated by the abuse of ad-hoc tribunals in the fascist period.

⁴⁹ The statutory limit of seventy days for completion of the procedure is not always complied with due to insufficient staffing of courts (T. Treu, *Labour Law in Italy* 135 (3d ed., Kluwer 2011)).

⁵⁰ The *pretore*, established in 1973, was replaced by the *giudice unico di primo grado* in 1998, (Legislative Decree 51/1998 [19 February]).

⁵¹ A. Gladstone, 727–8., T. Treu, 135.

⁵² T. Treu, 134.

⁵³ T. van Peijpe, *Effective Enforcement of EC Labour Law*, 154 (J. Malmberg et al. eds., Kluwer 2003).

Individual judicial enforcement of labour rights has been complemented by Article 28 of the Workers' Statute⁵⁴ in 1970. This provision gives trade unions standing before the courts for defending their collective interest in cases where the employer engages in anti-trade union behaviour.⁵⁵ While some authors find that Italy lacks a strong litigation culture,⁵⁶ Article 28 has been widely used,⁵⁷ alongside industrial action and collective bargaining.⁵⁸ The courts have interpreted it generously in favour of the trade unions.⁵⁹ Its efficiency is enhanced by means of innovative remedies in a special interim procedure. While ordinary interim procedures in civil jurisdictions are secondary to the main proceedings and only secure a right, Article 28 authorizes the judge to order the employer not only to discontinue the incriminated conduct, but also to remove the effects the conduct has had thus far. These orders can be issued in an interim procedure, have immediate effect and become permanent if not challenged within fifteen days.⁶⁰

Interaction between the judicial and industrial relation process is mainly secured by the absence of limits on industrial action. Accordingly, disputes are frequently pursued before the courts and in the industrial arena simultaneously. Conciliation and arbitration, by contrast, have always been viewed with suspicion: any compromise that resolves a judicial dispute between the worker and the employer may be biased in favour of the latter.⁶¹ Although the legitimacy of conciliation in labour disputes is explicitly acknowledged by statute,⁶² it is rarely used. Another hybridity between state regulation and collective bargaining persists in the tradition of tripartite agreements, which has engendered a series of neo-corporatist social pacts in Italy.⁶³

⁵⁴ *Statuto dei Lavoratori*, Act 300/1970.

⁵⁵ Paragraph 1 of the provision translates as 'whenever the employer indulges in behaviour designed to deny or to limit the exercise of trade union freedom and union activity, as well as the right to strike, the local organs of the national trade unions interested can demand that the *pretore* (...) issue an order to cease from the behaviour and to cancel its effect.' T. Treu, 179.

⁵⁶ D. Nelken, *Using Legal Culture*, V J. Comp. L. 25 (2010).

⁵⁷ T. Treu, 179.

⁵⁸ *Ibid.* 409.

⁵⁹ It can be used to support a single member (G. Giugni, *Diritto Sindicale*, 119–22 (Cacucci, 2011)) and to enforce any right granted by collective agreement (T. Treu, 411).

⁶⁰ More detail in G. Giugni, 119, T. van Peijpe, 182.

⁶¹ T. Treu, 138.

⁶² Act 533/1973.

⁶³ S. Negrelli & V. Pulignano, *The Evolution of Social Pacts in Italy: Crisis or Metamorphosis?* in *After the Euro and Enlargement: Social Pacts in the EU* 137–160 (Ph. Pochet, M. Keune & D. Natali eds., ETUI 2010).

3.2 ENFORCING NON-DISCRIMINATION LAW

Against this background, this section addresses two related questions: how do the enforcement regimes for non-discrimination law in Britain and Italy respectively correspond to these national traditions, and which specific enforcement institutions have been devised there?

3.2[a] *Britain*

British non-discrimination law, in its initial phases, relied on collective bargaining processes: equal pay for women and men was the subject of industrial action campaigns before the legislator tackled the issue.⁶⁴ More recently, individual judicial claims have tended to be seen as the main route to enforcing non-discrimination law.⁶⁵ These claims are heard by employment (appeal) tribunals in the first and second instance, before going to the Court of Appeal or even the Supreme Court. Only individual claims can be brought formally, though public-sector unions have staged impressive mass claims for equal pay, which effectively demonstrated the collective nature of the problem.⁶⁶ The disadvantages of entrusting a structural problem to an individual adversarial process have been stressed so often that a short summary will suffice here: the adversarial process motivates employers to avoid individual litigation rather than to undertake structural changes,⁶⁷ the vast majority of claims do not succeed,⁶⁸ and the effects on the claimants' individual careers still await empirical investigation. However, there are a number of sophisticated procedural provisions that could serve as a model for other jurisdictions. The Equality Act 2010 has provided a statutory base for the practice of engaging a panel of independent experts for equal pay cases.⁶⁹ The burden of proof rules are formulated much more clearly than in the EU Directives: tribunals must assume discrimination if they have facts before them from which they could infer discrimination,⁷⁰ and

⁶⁴ The 1968 equal pay strike of women sewing machinists at a Ford factory in Dagenham (Essex) is credited with bringing the first equal pay act into existence, K. Gilbert, *Promises and Practices: Job Evaluation and Equal Pay Forty Years on!* at 43 *Indus. Rel. J.* 137–51 (2012).

⁶⁵ S. Fredman, *Discrimination Law*, 279.

⁶⁶ For example, trade unions tried to uncover negative gender effects of introducing uniform pay systems for parts of the public sector from 1997 by supporting a large number of individual equal pay claims. Their number rose to 63000 in 2007/08 (G. Pitt, 226–27).

⁶⁷ B. Hepple, 40 *Indus. L.J.* 316 (2011).

⁶⁸ S. Fredman, *Discrimination Law*, 281–282, reports rates of success of 1%–2%, or about 29% if only counting the cases that were actually heard rather than withdrawn or settled.

⁶⁹ Now sec. 131 Equality Act 2010.

⁷⁰ Section 136.

the operation of this is facilitated by providing a questionnaire and, more importantly, by allowing explicit party statements as evidence.⁷¹

The vast amount of discrimination claims⁷² generates considerable expertise in the tribunals and the Advisory, Conciliation and Arbitration Service (ACAS). While proposals to introduce representative actions⁷³ have not been taken up in recent legislation,⁷⁴ the Equality Act 2010 takes a small step towards reflecting the collective character of labour discrimination in tribunal procedures. Tribunals can now make a (binding) recommendation to the employer to take 'steps obviating or reducing the adverse effect of any matter' not only on the claimant, but also 'any other person'.⁷⁵ Such recommendation could be classified as a proactive measure to solve for the future a structural problem that has been the basis of an individual claim. In giving these measures priority over payment of damages, the Act seems to promote proactive over reactive measures. However, these rules have already been selected for repeal.⁷⁶ Furthermore, the Equality and Human Rights Commission has powers not only to provide assistance to support individual claims, but also to apply for an injunction restraining a person from committing an act violating the non-discrimination legislation.⁷⁷ In addition, the procedure remains individualistic. Even a ruling that a term of a collective agreement is void can only result from an individual claim by a person who will be affected by the collective agreement.⁷⁸

Proactive elements of enforcement consist of positive duties for public-sector employers. However, British legislation has traditionally been restrictive of positive action.⁷⁹ The Equality Act 2010 only allows 'proportionate' positive action, i.e. measures encouraging persons sharing a characteristic such as sex or race to overcome disadvantage.⁸⁰ For recruitment, however, preferential rules are now explicitly allowed.⁸¹ Positive action and positive duties are not connected in the legislation, nor are positive duties linked in any way to the industrial relations process. There is no obligation to consult with trade unions, for example, or any

⁷¹ Section 138. The specific schedule for questionnaires has been selected for repeal, see below, n. 74.

⁷² Between Apr. 1, 2010 and Mar. 31, 2011, 38,820 cases on discrimination were brought before employment tribunals (The Employment Tribunals and EAT Statistics 2010/11, published Sept. 1, 2011).

⁷³ S. Fredman, *Discrimination Law*, 284–285, B. Hepple, M. Coussey & T. Choudhury, 95–96.

⁷⁴ B. Hepple, 40 *Indus. L.J.* 161 (2011).

⁷⁵ Section 124.

⁷⁶ This is under public consultation at the time of writing <http://www.homeoffice.gov.uk/publications/about-us/consultations/equality-act-wider-enforcement/>.

⁷⁷ Sections 28, 24 Equality Act 2006.

⁷⁸ Section 146 Equality Act 2010 allows for a 'qualifying person' to bring this claim, and defines this term accordingly.

⁷⁹ S. Fredman, *Discrimination Law*, 237–240.

⁸⁰ Section 158.

⁸¹ Section 159, which still awaits practical application. An optimistic assessment is made by B. Hepple, *Equality*, 130.

other measure to provide an incentive for employers to genuinely engage.⁸² In spite of this, collective bargaining around equality issues is not uncommon: the 2004 Work Employment Relations Survey⁸³ found that in about 20 % of existing collective agreements, some aspect of equal treatment was addressed. Moreover, trade unions support the establishment of special representatives for equality and non-discrimination at the level of individual employers, because they have come to consider adequate responses to workforce diversity as important for their mandate.⁸⁴ However, the practical effects of these positive developments are mitigated by the declining relevance of collective bargaining outside the public sector.

The provisions for enforcing non-discrimination law in labour markets in Britain reflect the recent individualization of enforcing labour law in this country in that judicial enforcement by individual claimants is given priority. In this field, a number of good practices can be identified, such as special procedures to prove discrimination. Moreover, the wide use of the procedures engenders expertise in the field, at least in the employment tribunal system and in the ACAS institution. The reluctance to mainstream equality issues into the industrial relations process corresponds to the weak protection offered to its participants in British labour law generally, while the timid approach to positive action and proactive measures corresponds to the individualization.

3.2[b] *Italy*

Implementation of EU non-discrimination law in Italy is more disparate than in Britain, since there is no single Equality Act. Directive 76/207/EEC on gender discrimination (superseded by Directive 2006/54/EC) was first implemented by Act 903/1977, consolidated by Legislative Decree 198/2006 (Act on Equal Opportunities for Women and Men).⁸⁵ Directives 2000/43 and 2000/78 have been implemented by legislative decrees, which needed several amendments.⁸⁶ In

⁸² B. Hepple, 40 *Indus. L.J.* 332 (2011).

⁸³ B. Kersley et al., 52–56.

⁸⁴ Trade Union Congress (UK), *Equality Reps Project Report* (Trade Union Congress 2009). An EU-wide study found a strong non-discrimination commitment among UK trade unions (S. McKay, *Does one size fit all? Trade Unions, Discrimination and Legal Regulation in the European Union*, 27 *Intl. J. Comp. Labour L. & Indus. Rel.* 165–87 (2011)).

⁸⁵ The legislative decree aimed at implementing Directive 2006/54, but required two amendments (Legislative Decree 5/2010, Jan. 25, 2010 *Gazzetta Ufficiale* 29/2010).

⁸⁶ Legislative Decree 215/2003 (July 9, 2003) *Gazzetta Ufficiale* 186 of Aug. 12, 2003, on racist discrimination, and Legislative Decree 216/2003 (9 July), *Gazzetta Ufficiale* 187 of Aug. 13, 2003, both amended by Legislative Decree 256/2004 (2 August), *Gazzetta Ufficiale* 244, Oct. 16, 2004, and Legislative Decree 59/2008 (8 April), converted into an ordinary act (101/2008 of June 6, 2008, *Gazzetta Ufficiale* 132 of June 7, 2008); insertion of para. 2 into Art. 15 of the *Statuto dei Lavoratori* (Act 300/1970).

addition, specific provisions were mainstreamed into existing labour legislation, and new regulations for more specific purposes such as encouraging positive action were created, partly going beyond EU obligations.⁸⁷

As regards the judicial enforcement of EU discrimination law, Italian legislation has only recently properly implemented the provisions of the directives relating to individual enforcement, but has not introduced specific measures or codes to make it easier for the courts to apply the new rules on burden of proof.⁸⁸ Even in the field of sex discrimination, remedies were initially limited: the 1977 Act (as amended) provides for fines of up to EUR 516, which was complemented by the victim's claim for non-pecuniary loss by Act 145/2005. Today, however, there are no specified limits for damages in discrimination cases. The effectiveness of judicial enforcement is also enhanced by specific procedural rules providing standing for trade unions, equality bodies and civil society organizations engaged in non-discrimination law.

The first of these provisions, Article 15, Act 903/1977 on gender discrimination (now Article 18 Code of Equal Opportunity 2006), is partly modelled on Article 28, Workers' Statute in that it gives standing before the court to a victim of sex discrimination or her trade union on her behalf, and provides for the same form of effective interim relief: the court can grant an injunction requiring the termination of the discriminatory conduct along with the elimination of any effects. The employer can apply within fifteen days to have the order quashed. The elimination of discriminatory effects can take the form of a judicially imposed positive action plan.⁸⁹ In cases of racial discrimination and other discrimination in labour markets, organizations dedicated to combating discrimination have standing for initiating proceedings on behalf of employees, but not in their own right. The organization has to be included in a list approved by a joint decree of the Ministries of Labour/Welfare and Equal Opportunities (Act 215/2003, Article 5). The equivalent provision for discrimination on grounds of age, sexual orientation, religion and belief and disability (Article 5, Act 214/2003) originally gave standing only to nationally representative trade unions for proceedings on behalf of employees. By virtue of a 2006 amendment, civil society organizations engaged in non-discrimination law have been granted the same standing. While these provisions seem impressive, they have not been used frequently, not even in the field of sex discrimination.⁹⁰

⁸⁷ Act 125/1991 (Apr. 10, 1991), Legislative Decree 198/2006 (11 April).

⁸⁸ A. Simoni, *Report on Measures to Combat Discrimination (Directives 2000/43/EC and 2000/789/EC) Country Report Italy, State of Affairs up to 1 January 2011*, 67 (Human Consultancy 2011).

⁸⁹ Article 36 seq. Act 15/903 (now: Art. 36 seq Equal Opportunities Act).

⁹⁰ T. van Peijpe, 145. In Italy, the frequency of litigation on specific subjects, such as non-discrimination, is not systematically documented. However, an analysis of recent case reports in the framework of the PIEDIUEL project (A. Lepore, as in the starred footnote above) demonstrated

Given the frequent recourse to Article 28 of the Workers' Statute,⁹¹ this may seem surprising. However, there is a difference between these provisions, as trade unions defend their own rights under Article 28, while equality rights are conceptualized as individual rights. Again, in the field of sex equality, the equality advisors appointed by the Commission of Equal Opportunities can raise a claim in their own right, in order to achieve a decision with immediate effect in favour of all employees experiencing discrimination as a result of a particular practice.⁹² There is no equivalent provision for the National Office against Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali - UNAR*).⁹³ Its mandate is merely advisory, and the Commission sees its main purpose as reconciling conflicts around discrimination. In addition to delivering annual reports its main task is giving advice and offering consultation, largely via helplines and the internet. Currently, the UNAR prioritizes informal dispute settlement over raising claims.⁹⁴

In line with a national tradition favourable to collective interest representation, Italian legislation, and recent tripartite agreements, established proactive measures and positive action. In addition, a considerable number of collective agreements contain positive action measures. In the field of gender equality, positive action was a matter dealt with by legislation in 1991.⁹⁵ The legislation defines positive action as any measure aiming at equality of women and men, and provides examples ranging from overcoming detriments in qualifications, improving women's working conditions, and facilitating women's access to occupations where they are underrepresented.⁹⁶ It entrusts the national committee for equality, the equality advisors and social partners at all levels with the promotion of positive action.⁹⁷ It also states that there should be financial

that litigation in this field is not overwhelmingly frequent. (e.g., Tribunale Milano July 19, 2011 and Cass. 6 October n. 21541, Mass. Giur. It., 2006 on the criteria to make employees redundant that have to include non-discrimination; Trib. Trento June 16, 2011, Lav. Giur. [2011] 1063; Cass. Mar. 28, 2011 n. 7086, Lav. Giur. [2011] 6, 627 on race discrimination; Cass. Mar. 3, 2009, n. 5089 Mass. Giur. It. [2009] on the criteria to choose employees to make redundant; Cass. Apr. 14, 2008 n. 9813 on discrimination for trade union membership; Consiglio di Stato Oct. 3, 2007 n. 5096, Massima redazionale [2007] on the principle of equal pay; Cass. 18 May 2006 n. 11661, Foro it. [2006] 10, 1, c. 2751 on discrimination for gender in the promotion and application of Art. 15 of Act 903/1977).

⁹¹ See above text accompanying n. 57.

⁹² Articles 37 and 38 Legislative Decree 198/2006 [Code of Equal Opportunities].

⁹³ The UNAR is part of the Italian Department for Equal Opportunities of the Presidency of the Council of Ministers, which has given rise to concerns for its independence (European Commission against Racism and Intolerance, Third report on Italy, 2006, see G. Moon, *Enforcement Bodies* (as in n. 8), 940).

⁹⁴ UNAR, *Relazione al Presidente del Consiglio sull'attiva svolta nel 2010* (annual report, 2011).

⁹⁵ Act 125/1991, now Legislative Decree 198/2006; *Gazzetta Ufficiale* n. 125 del 31 May 2006 - Supplemento Ordinario n. 133.

⁹⁶ Article 42, Legislative Decree 198/2006.

⁹⁷ Article 43, Legislative Decree 198/2006.

support for collectively agreed positive action, without specifying the amounts to be allocated.⁹⁸ Further, it obliges employers with more than 100 employees to produce an annual human resources report focused on equality of women and men.⁹⁹

In the field of racial discrimination, there is no such legislation. However, a tripartite agreement between UNAR, the main national trade unions, and all relevant employers' associations provides for proactive measures in the field.¹⁰⁰ UNAR undertakes to establish regional committees for consultation with the social partners on racial discrimination in employment, to promote training in racial antidiscrimination practice, to encourage an ethos of intercultural tolerance and equal opportunities, to raise awareness of discrimination and to support positive action. The social partners undertake to co-operate in all these fields with each other and with UNAR.

Building on this combination of legislation and collective bargaining, there has been a steady increase in clauses on gender equality and positive action in national collective agreements,¹⁰¹ complemented by company-level agreements utilizing public funding. Many national collective agreements now dedicate some of their introductory provisions to this cause. Frequently, the relevant provision stresses the partners' commitment to promoting equal opportunities between women and men in application of national and EU legislation, and at least to establishing a national bipartite commission on this issue. Typically these commissions are tasked with ensuring that the relevant legislation is applied in practice, that research into the employment situation of women is conducted, that awareness of continuing discrimination is raised and that positive action measures are developed where necessary. In many cases, regional committees for equal opportunity are also established, and even more frequently committees for equal opportunities at the level of individual employers are established and specifically charged with developing positive action measures. These measures are often related to moving away from the traditional role of women in the family, for example if employees of either sex are given the right to apply for flexible or part-time hours in order to combine parental duties and employment.¹⁰²

⁹⁸ Articles 44 and 45, Legislative Decree 198/2006.

⁹⁹ Article 46, Legislative Decree 198/2006.

¹⁰⁰ Approved on 13 May 2010.

¹⁰¹ Italian collective agreements are accessible on the webpage of the national council for the economy and labour. http://www.cnel.it/347?contrattazione_testo=37. Unless stated otherwise, the information reported in the subsequent paragraphs can be accessed there.

¹⁰² For example, the national collective agreement (CCNL) for the tourist industry of July 2010.

However, there are also specific clauses on positive action, preferential employment or promotion of women or against sexual harassment.¹⁰³

Again, there is less movement in the field of racial discrimination. However, national collective agreements from about 2010 regularly contain clauses on the integration of foreign labour. These typically also establish a bipartite commission, and mention specific training in Italian, provision of information in the native languages of foreign employees, support in obtaining leave to take up employment, and efforts to enhance the qualifications of foreign workers.¹⁰⁴

Enforcing non-discrimination law in labour markets in Italy is, unsurprisingly, related more to the industrial relations process, and thus also to collective structures, than its British equivalent. Despite Italy's initial reluctance to implement the non-discrimination directives,¹⁰⁵ its law goes far beyond the requirements of the directives in relation to positive action and collective structures. There is a marked difference between enforcing sex equality law, including the development of innovative instruments combining legislation, budgetary incentives and collective agreements, and the very reluctant enforcement of non-discrimination law related to other ascriptions, such as ethnic or national origin.

3.3 COMPARISON

Each national system has developed specific institutions for enforcing non-discrimination law in labour markets. The British rules on procedural safeguards of sharing the burden of proof, and on facilitating proof of discrimination with the help of statistics and the support of equal pay claims by independent assessment, find no parallel in Italy.

Conversely, Italian rules on positive action in gender equality go far beyond the British public-sector equality duties in that they also cover the private sector, and have served as a trigger for collective agreements in the field. As regards judicial enforcement, the standing of trade unions to enforce gender equality rights of their members' names is unique to Italy. In the field of racial discrimination as well as equal treatment irrespective of religion and belief, sexual orientation, disability and age, civil society organizations also have standing to

¹⁰³ See for an overview of such clauses at different levels M. Bergamaschi, *Equal Opportunities and Collective Bargaining in the European Union - Selected Agreements from Italy*. (Working Paper 97/19/EN, European Found. for the Improvement of Living & Working Conditions 1997).

¹⁰⁴ See, for example, the CCNL for the metalworking sector of June 2008, which establishes a national bipartite commission for integration of foreign workers in Art. 6, again with a mandate for research and exchange of best practice. However, in contrast to gender equality, no regional and enterprise level commissions are provided for.

¹⁰⁵ A. Simoni (as n. 88), 7–8.

enforce labour equality rights in the name of the victim, while in the UK such organizations only have standing to challenge administrative orders and legislative instruments before administrative courts.

All in all, certain elements of good practice in legislation and collective bargaining could be copied from Italy to Britain and vice versa. The question is whether such transposition would potentially be successful.

4 MUTUAL LEARNING BETWEEN LEGAL ORDERS?

4.1 THEORETICAL FRAMEWORK

The transposition of legal concepts from one country to another is widely debated by comparative lawyers,¹⁰⁶ frequently with some scepticism. In comparative labour law, this tone has been particularly marked.¹⁰⁷ Around the same time as Watson proposed the notion of transplants as a new approach to comparative law,¹⁰⁸ Kahn-Freund famously warned about the limits of such transplants in the field of labour law.¹⁰⁹ When European comparative lawyers challenged Watson with the hypothesis that legal transplants were impossible¹¹⁰ or would at least irritate the receiving legal system,¹¹¹ the debate in labour law had already moved on. Kahn-Freund had conceded that transfers may succeed depending on geographical, economic, social and political factors.¹¹² Two years after Legrand's article Hepple suggested that successful transfers were possible also in the field of collective labour law.¹¹³

The debate on 'legal transplants' has progressed from an academic critique of comparative law¹¹⁴ to a field of research developing tools for supporting law reform through legal borrowing.¹¹⁵ This progress was pioneered by comparative

¹⁰⁶ See lately the contributions in J. Sánchez Cordero ed., *Legal Cultures and Legal Transplants, Reports to the XVIIIth International Congress of Comparative Law* (Intl. Acad. of Comp. L. 2010).

¹⁰⁷ For more details, see A. Forsyth, *The 'Transplantability' Debate Revisited: Can European Social Partnership be Exported to Australia?* 27 *Comp. Labor L. & Pol. J.* 305–356 (2005–2006).

¹⁰⁸ A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974).

¹⁰⁹ O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Modern L. Rev.* 1–27 (1974).

¹¹⁰ P. Legrand, *The Impossibility of Legal Transplants*, 4 *Maastricht J. Comp. & European L.*, 111–124 (1998).

¹¹¹ G. Teubner, *Legal Irritants. Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *Modern Law Review*, 11–32 (1998).

¹¹² O. Kahn-Freund, 6, 8, 27. Watson also conceded that legal transplants might not succeed, *Comparative Law and Legal Change*, 37 *Cambridge L. J.* 321–322 (1978).

¹¹³ B. Hepple, *Can Collective Labour Law Transplants work?* 20 *Indus. L.J.* 1–22 (1999).

¹¹⁴ M. Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 *Theoretical Inquiries L.* 726–727 (2009).

¹¹⁵ M. Graziadei, 10 *Theoretical Inquiries L.* 728 (2009). This approach resonates with comparative labour law research (*supra* nn. 106, 108, 112).

labour law. This more constructive perspective is particularly well suited for analysing EU legal integration, which is usually inspired by one or several legal orders of the Member States. Accordingly, EU legislation and case law tends to require Member States to adapt their national law to imported legal ideas. This promotes the migration of legal ideas. EU non-discrimination law is a good example of such a dynamic. Following case law modelled on US and British experiences, EU non-discrimination legislation has been based on British and Netherlands concepts of multiculturalism and non-discrimination.¹¹⁶ As British anti-discrimination law was inspired by US experience, this amounts, at least in part, to an indirect transposition of US concepts to the European continent.¹¹⁷ Thus, EU non-discrimination law embraces the idea of the successful migration of legal ideas.

In order to analyse the migration of legal ideas within the EU in greater detail, it is useful to move beyond images evoking the impossibility of migrating ideas, such as 'transplant'¹¹⁸ or 'irritant'.¹¹⁹ Even the notion of adapting legal cultures may have negative connotations:¹²⁰ adaptation can be seen as a one-sided endeavour, typical, for example, for the situation of states applying for accession to the European Union or to benefit from association agreements.

The metaphor of mutual learning between legal orders is proposed as a concept that conveys a positive vision of migrating ideas. Mutual learning has been used as an actor-centred approach to new governance. Going beyond theories of experimental governance,¹²¹ this approach takes into account power imbalances between actors.¹²² Understanding EU legal integration between Member States as a process of mutual learning suggests that the reception and genetic integration of new ideas, even if they are imported, can be a positive development and a success. Mutual learning also implies a process of communication, in which those receiving new legal ideas maintain a level of control. Such voluntary migration of legal ideas is best achieved if the EU does not harmonize or unify but rather co-ordinates policy development, as through

¹¹⁶ D. Schiek, *Implementing Non-Discrimination Directives - Typologies for Legal Transplanting*, 7 Internationaal Colloquium Europees Verzekeringsrecht - Colloques Internationaux de droit européen de assurance (2007), 50-65. V. Guiraudon, *Equality in the Making: implementing European Non-Discrimination Law*, 13 Citizenship Stud. 527-549 (2009).

¹¹⁷ G. de Burca, 60 Am. J. Comp. L. 4-5 (2012); B. Hepple, *Equality at Work* 161 (2009).

¹¹⁸ This notion is also used by authors who appreciated the potential of migrating legal ideas, e.g., M. Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in *The Oxford Handbook of Comparative Law* 441-475 (M. Reimann & R. Zimmermann eds., 2d ed., Oxford U. Press 2006).

¹¹⁹ E. Öricü, *Law as Transposition*, 51 Intl. & Comp. L.Q., 207-211 (2002).

¹²⁰ *Adapting Legal Cultures* (D. Nelken & J. Feest eds., Hart 2001).

¹²¹ See *supra* text accompanying footnotes n. 19-22.

¹²² J. Lenoble & M. Maesschalck, *Reflexive Governance : Redefining the Public Interest in a Pluralistic World* 1-21 (O. de Schutter & J. Lenoble eds., Hart 2010).

the OMC (Open Method of Coordination) in employment policies.¹²³ In this regard, enforcement is a promising choice of topic, as this aspect of EU discrimination law is harmonized only to a very limited extent.

Critical perspectives on comparative law can contribute to identifying conditions favourable to mutual learning between legal orders.¹²⁴ From structural perspectives, differences in the 'formants' of legal systems¹²⁵ as well as the more hidden ideational elements behind them,¹²⁶ may complicate the migration of legal ideas, and thus require more elaborate learning. Accordingly, comparing systems that are different is more promising than comparing systems that are similar, because studies of differences inspire the detection of the unexpected.¹²⁷ Thus, a comparison between Italy and Britain appears worthwhile: these systems are traditionally classified as belonging to different 'families' of law,¹²⁸ and also perceived as having progressed to different degrees in embracing the agenda of EU non-discrimination law.¹²⁹

Thus, the migration of legal ideas may be possible but is certainly not unconditional. A legal idea will not thrive in a new environment if its substantive aspirations are too alien to this new environment to be accommodated. For migrant legal ideas to find a true new home, it is crucial to have agents able and willing to implement and, if necessary, enforce norms and translate them into socio-economic reality.¹³⁰ The question is whether new legislation speaks to existing social institutions, or if it inspires socio-legal entrepreneurs to support the integration of new ideas into particular existing legal systems. Conditions of learning between legal systems relate to actors and what is sometimes still called legal culture¹³¹ – i.e. the formants and the crypto types of the law in their social

¹²³ It is impossible to reference the wealth of literature on this concept. See for example K. Armstrong, *Governing Social Inclusion* (Oxford U. Press 2010), M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge U. Press 2011).

¹²⁴ D. Schiek, *Comparative Law and European Harmonisation*, 21 *European Bus. L. Rev.* 203–255 (2010).

¹²⁵ I.e., the relative position of the judicial process, the legislative process, the legal profession and academic processes in shaping the law.

¹²⁶ Sacco, who also invented the notion of formants, used the rather cryptic notion of 'cryptotypes' for these, see R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, 39 *Am. J. Comp. L.* 1–34 at 343–401 (1991).

¹²⁷ M. Graziadei, 10 *Theoretical Inquiries L.* 723–743 (2009); G. Dannemann, *The Oxford Handbook of Comparative Law*, 417 (M. Reimann & R. Zimmermann eds., Oxford U. Press 2006).

¹²⁸ Common law and Roman law respectively (see for the classical division in legal families by Rene David & John Brierley, *Major Legal Systems of the World Today* (3d ed., Stevens & Sons 1985), while Italy mixes different continental systems (M. Graziadei, in *The Oxford Handbook of Comparative Law* 453 (2006).)

¹²⁹ For example, the Migrant Integration Policy Index (MIPEX) classification of antidiscrimination laws in a number of countries classifies both Italy and Britain as favourable, although Italy scores slightly lower (67) than Britain (86). <http://www.mipex.eu/anti-discrimination> (accessed July 6, 2012).

¹³⁰ R. Cotterrell, 'Is There a Logic of Transplants?', in *Adapting Legal Cultures* 81–84 (D. Nelken & J. Feest eds., Hart 2001).

¹³¹ See the contributions in D. Nelken ed., *Using Legal Culture*, V *J. Comp. L.* 1–347 (2010).

embeddedness. All these elements contribute to differences between Member States and their readiness to perceive and respond to specific diversities based on ascribed characteristics, identity discrimination and other distinctions.

4.2 POTENTIAL FOR MUTUAL LEARNING BETWEEN BRITISH AND ITALIAN ENFORCEMENT REGIMES

What does all of this mean for the potential of mutual learning from mechanisms for enforcing non-discrimination law in the world of work? As stated above, this will depend on the availability of agents for change in each of the systems that could consider learning from the other, as well as on the openness of the legal system towards the general mission of non-discrimination law.

With regard to the latter point, it has been argued elsewhere that the readiness of the British and Netherlands legal systems to embrace this field of law is closely related to the tradition of multiculturalism and internal legal pluralism, as well as to certain configurations of the welfare state.¹³² In these European states, the influx of migrants has led to a concept of internal cultural diversity, which makes differences along certain ascribed characteristics easily recognizable and negotiable in different social realms. In other European states, welfarist traditions developed more along the dividing lines of class, and the relevant policies strove to reduce inequalities and to create an egalitarian society. This again may lead to a limited perception of specific diversities based on ascribed characteristics, identity discrimination and other distinctions. Considering the deliberations on enforcing labour law in section III, the suitability of a particular enforcement mechanism in the specific industrial relation environment would also be an important factor.

Thus, generally we can expect non-discrimination principles to take root more easily in Britain than in Italy due to the more widespread culture of individualism and multiculturalism in comparison with Italy. On the other hand, given the stronger collective tradition of Italian labour law, we can expect that elements of enforcement policies that speak to the collective dimensions of non-discrimination law will more easily take root in these countries. A few specific examples should be sufficient to illustrate these points.

There are a number of British procedural provisions facilitating the individual judicial enforcement of non-discrimination in labour markets from which the Italian system could learn. However, given the reluctance to use the procedural provisions already available in Italy, there is a limited expectation that those rules would take root. Any success would require that agents for change

¹³² D. Schiek, *Implementing Non-Discrimination Directives* 53–65 (2003).

emerge who push for the use of judicial enforcement. The EU-funded networks of national experts on different inequalities could be viewed as aiming to create such agents. There is also increasing interest in Italian academia in the field of equality law. However, for enforcing non-discrimination in the world of work, success might most easily be achieved from the increasingly positive stance of trade unions towards equality law. As demonstrated by the success of Article 28 Workers' Statute, opportunities for trade unions to enforce workers' rights in their own name may have the effect of engendering agency and ownership of these processes. Accordingly, the British models for judicial enforcement of non-discrimination in the world of work would need some adaptation to take root in Italy. For example, a claim for invalidity of discriminating clauses in collective agreements under section 146 Equality Act 2010 might resonate with the Italian labour lawyers' critique of the lack of collective enforcement in the Italian judicial system. In order to be well received, however, it should be phrased as a right for trade unions, and not merely for individual members.

The standing of trade unions and the equality advisor in Italian courts for challenging labour market discrimination in their own name constitutes another example. The limited practical application of this rule in its home country may well be connected to the distance of the Italian labour relations actors from non-discrimination law in general. However, this legal idea might travel well to Britain. There has been ample argument in favour of class action or representative action to enforce non-discrimination law. Thus, those who have argued in favour of this would probably serve as agents for change. The provision would possibly be more successful in a legal system where injustices in labour markets are readily translated to discrimination, and where litigation is generally viewed more favourably. Supporting demands for class or representative action by comparative law considerations may thus be successful in granting them more leverage.

Proactive measures and positive action can be quoted as examples of legal ideas that do not travel well. The British positive duty for public-sector employers does not presuppose positive action in the sense of 'reverse discrimination'. It only obliges employers to devise policies suitable for delivering the required results. The Italian positive action idea encourages special rights, and also allows individual actors in the industrial bargaining process to maintain conservative visions of separate but equal realms, for example for women and men. These different strategies for enforcing proactively the ideals behind non-discrimination law appear appropriate for the respective legal cultures: the British rule emphasizes individual rights and responsibility for avoiding discrimination, whereas the Italian rules promote equality with group-oriented measures.

5 CONCLUSION

This article has argued that there is potential for mutual learning for enforcing non-discrimination law in labour markets even between legal orders as different as the two discussed here. As the British legal culture, characterized by multiculturalism and individualism, favours the establishment of a non-discrimination culture in employment, procedural provisions that are not used in practice in Italy might flourish in Britain. As the Italian legal culture relies on collective structures in labour markets, with strong convictions of a collective dimension even of issues such as non-discrimination, an opportunity to enforce discrimination law against some collective agreement clauses might take hold better than in Britain.

These deliberations are of relevance beyond Italy and Britain. They show that maintaining the diversity of enforcement regimes in non-discrimination law is not necessarily as detrimental as it may seem.¹³³ Diversity not only offers opportunities for mutual learning, but is also a requirement for such mutual learning to take place. These processes may well be lost by the overzealous harmonization of enforcement regimes.

¹³³ In a recent report, de Hart & Ashiagbor argued in favour of more harmonization of national enforcement regimes: P. de Hart & D. Ashiagbor, *Comparative Study on Access to Justice in Gender Equality and Anti-discrimination Law* 65 (Milieu 2011).