Marie Mercat-Bruns

Systemic discrimination at work in France and the EU: can antidiscrimination law be transformative?

Sommario: **1.** The concept of systemic employment discrimination: its formal construction abroad and emergence in Europe. **2.** Examples of systemic discrimination in EU and French employment law. **3.** Systemic solutions in cases of structural inequality at work: an opportunity to consider discrimination law as transformative? **4.** Conclusion.

1. *The concept of systemic employment discrimination: its formal construction abroad and emergence in Europe*

"Systemic discrimination" as a concept cannot be found in the letter of the law in Europe. So our first goal is to show how and why this notion, defined later, has emerged informally in France in a particular legal context drawing from a comparative analysis with countries engaged in a similar process. This analysis of the development of employment discrimination law plays an important role at a time when labor and employment law in EU member states are facing a variety of changes under the impetus of EU flexicurity policy[1]. Reflecting on systemic discrimination begs the larger question of whether antidiscrimination law can be seen as an autonomous legal discipline of Law with certain concepts (direct, indirect, multiple and systemic discrimination) based on international and national norms of different value and principles (equality and liberty), specific rules of evidence (shift of burden of proof) and goals (diversity, religious neutrality)[2]. Considering systemic dis-

[1] Bekker, *Flexicurity in the European Semester: still a relevant policy concept?*, in *JEPP*, 2017, II, p. 175.

[2] Mercat-Bruns, *Le droit de la non-discrimination : une nouvelle discipline en droit privé ?*, in *RD,* 2017, p. 224.

crimination might help to provide meaning, coherence, logic and order to antidiscrimination policies, legislation and case law by measuring to what extent it can be truly transformative in employment. Our goal is to show that systemic discrimination focuses both on a new way to uncover and analyze forms of employment discrimination in practice and, eventually, to offer systemic solutions to more structural manifestations of discrimination[3].

Before dealing with the above mentioned topics, a basic definition of systemic discrimination must be adopted in the context of employment which will be later fleshed out. Systemic discrimination at work can be described as patterns of behavior, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for persons in the workplace. For example, the glass ceiling phenomenon, where women do not experience the same career path and overtime pay than men can reflect systemic discrimination. The glass ceiling cannot be seen only as an illustration of a collective form of sex discrimination but constitutes a structural barrier to equal opportunity in employment resulting from voluntary and involuntary practices. In this perspective, direct and indirect sex discrimination can coexist to produce systemic discrimination.

In this perspective, the first step is to understand how the concept of systemic discrimination emerged in France and abroad in employment. The second stage of the analysis is to show how this research grid can offer a new way to "revisit" French and European case law in employment. Thirdly, it can be useful to consider a new approach to adopting systemic discrimination as a vector to test new tools for equal opportunity in employment.

When discrimination affects a certain number of workers, the reaction to consider should be the sum of a certain number of individual claims. But what if this collective dimension of discrimination reflected a change in the nature of discrimination itself? This question arises from an analysis of the law of countries who have adopted the concept of systemic discrimination itself like the United States and Canada and the law of some European countries which have recently adopted a form of class action to fight collective discrimination such as France.

[3] Mercat-Bruns, *Discrimination at work: Comparing European, French, and American Law*, University of California Press, 2016, p. 108; also accessible *E-Book, https://www.luminosoa.org/site/books/10.1525/luminos.11/*, and Mercat-Bruns, *Discrimination au travail: dialogue avec la doctrine américaine*, Dalloz, 2013, p. 269. Mercat-Bruns, *Oppenheimer, sartorius, comparative perspective on enforcement and effectiveness of antidiscrimination law*, Springer, 2018.

In the United States systemic discrimination has been determined by using a more quantitative criterion: as described by the Equal Employment Opportunity Commission, "systemic discrimination in employment involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area. Examples of systemic practices include: discriminatory barriers in recruitment and hiring; discriminatorily restricted access to management trainee programs and to high level jobs; exclusion of qualified women from traditionally male dominated fields of work; disability discrimination such as unlawful pre-employment inquiries; age discrimination in reductions in force and retirement benefits; and compliance with customer preferences that result in discriminatory placement or assignments"[4].

Canada has opted for qualitative criteria to define systemic discrimination uncovered through litigation: as the Ontario Human Rights Commission has explained, "discrimination can result from individual behavior as well as the unintended and often unconscious consequences of a discriminatory system"[5]. As the Supreme Court of Canada has described, "in terms of grounds, it can be described as patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage in the workplace for persons based on their race" for example[6]. In France, an attempt to define systemic discrimination in employment was made in the national report of the Ministry of Justice prior to the passage of the law of 2016 on class action discrimination suits[7]. The study tried to grasp systemic discrimination in employment as the cause and justification for the class action bill: "systemic discrimination is a discrimination that derives from a system, in other words an established order resulting from

[4] *Www.eeoc.gov/eeoc/systemic/*.

[5] *Www.ohrc.on.ca/en/racism-and-racial-discrimination-systemic/*.

[6] Supreme Court of Canada, CN v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114: Action Travail des Femmes alleged that CN was guilty of discriminatory hiring and promotion practices contrary to the Canadian Human Rights Act by denying employment opportunities to women in certain unskilled blue-collar positions. A Human Rights Tribunal studied the complaint, found that the evidence indicated clearly that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs, and concluded that it was essential to impose upon CN a special employment program.

[7] Law n° 2016-1547, Nov. 18 2016 on the modernization of Justice XXI Century, JORF n° 0269 Nov. 19/2016.

practices, voluntary or involuntary, apparently neutral but which produces wage gaps or disparities in career promotions between groups in employment. This systemic discrimination combines four factors: stereotypes linked to certain groups, job segregation in the representation of different groups in employment, an undervaluation of certain jobs and a preference for short term economic goals. Systemic discrimination is not easily detected without an in-depth investigation of situations by categories of employment"[8].

However, despite this rather elaborate French analysis of systemic discrimination provided before the legislative reform, the new French law on class actions to combat discrimination falls short from adopting a new concept of systemic discrimination and focuses on a much narrower, somewhat uniform, description of the collective discrimination targeted by the new procedural measure, ignoring its complex nature. The new French law covers a rather narrow discriminatory violation perpetrated by the same person, affecting a group in a similar way: under article 62, "The new law seeks to intervene when several persons placed in a *similar* situation who have suffered from a harm committed by the *same* person, caused by a contractual or legal violation of the *same* nature…"[9].

In this context, it is uncertain whether or not the new French class action suit will help to prevent and combat systemic discrimination often linked to a variety of acts and a variety of authors at different times of a career for example, producing a glass ceiling effect at the end of a professional life. Systemic discrimination can stem from both formal and informal policies, practices and decision-making processes and can result in barriers for and exclusion of persons protected by antidiscrimination employment law. For example, the use of informal or highly discretionary approaches are particularly problematic as there is more room for subjective considerations, differing standards and biases to come into play. Moreover, systemic discrimination in employment can result, for instance, from the design of policies, practices and decision-making processes in a way that uses the dominant culture of the company as the norm (for instance, systematic promotion of a youth culture in a sector to please customers or a clearly gendered workplace through specific dress codes in a company...).

[8] See Pecaut-Rivolier, *Lutter contre les discriminations au travail: un défi collectif*, Rapport au Ministère de la Justice, 2013, p. 27.

[9] Law n. 2016-1547, Nov. 18 2016 on the modernization of Justice XXI Century, JORF n. 0269 Nov. 19/2016.

Since individual EU Member states might interpret the concept of systemic discrimination differently according to their legal tradition and their implementation of EU equality law in employment, the notion of systemic discrimination can be used first as a useful instrument to "revisit" how the existing antidiscrimination legal frameworks in European and national legal frameworks have already adopted a systemic lens, notwithstanding the eventual adoption of systemic discrimination in the future as a formal concept in national and EU norms themselves.

2. *Examples of systemic discrimination in EU and French employment law*

It is possible to show that, in view of the extensive body of laws and judicial interpretation of notions of direct and indirect discrimination and of grounds of discrimination, litigation and legislative developments have previously dealt implicitly with systemic discrimination in employment. This analysis actually follows a more general trend in antidiscrimination law that can be perceived as transformative to the extent that the causes of discrimination seem more structural in nature.

First the expansion of antidiscrimination law from intentional direct discrimination to indirect discrimination lays the first foundations of this more subtle systemic framework because it shifts the focus on apparently neutral rules having disadvantageous effects on people with a protected characteristic. The idea of subjecting to scrutiny as indirect discrimination an innocuous difference in pay between full-time workers and part-time workers regardless of the quality and the nature of the job to fight abstenteism, encourage productivity and promote full use of machinery, proceeds from the same systemic logic to confront the causes of the persistent gender wage gap[10].

Similarly, the construction of the standard of equal pay for work of equal value draws from the purpose to combat the often involuntary segregation of jobs according to sex and to allow comparability between, first, identical jobs occupied by men and women than comparable jobs[11]. In particular, when a job classification system from the outset is used to determine pay,

[10] ECJ March 31 1981 *Paula Jenkins* Case C-96/80, ECLI:EU:C:1981:80.
[11] EUCJ April 8 1976 *Defrenne* Case C-43/75, ECLI:EU:C:1976:56.

such a system must be based on the same criteria for both men and women, for example, stewards and airline stewardesses/hostesses; otherwise, women may suffer from loss in pay and pension even though the men and women of the same air crew perform identical duties. In both cases, in a company, more generally, wage disparities can be perpetuated over time because of past direct discrimination in pay detrimental to women that have been consolidated in the distribution of jobs increasing the risk of indirect sex discrimination. It is more generally the combination of direct and indirect sex discrimination that produces systemic wage discrimination in a particular sector of activity as the ECJ Court recognized early on: "it is impossible not to recognize that the complete implementation of the aim pursued by article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at community and national level"[12].

This prior judicial recognition of systemic discrimination in promotions has also become over the years an essential requirement to implement equal employment opportunity. In the *Napoli* case, the ECJ promotes institutional systemic change to the extent that it considers the structural effects of maternity leaves on careers of women over time. In that case, national Italian legislation permitted exclusion of Ms Napoli from a training course to become a deputy commissioner in the prison service as a result of her absence from that course for a period of more than 30 days, even though the reason for that absence was compulsory maternity leave. The Court starts with a systemic analysis of the barriers for opportunity to develop career paths and takes into account that this time frame of the training is essential for advancement in this type of work of a civil servant of the penitentiary system: "the vocational training course which forms an *integral* part of [this] employment and which is *compulsory* in order to be able to be appointed *definitively* to a post as a civil servant and *in order to benefit from an improvement in [Napoli's] employment conditions,* while guaranteeing her the right to participate in the next training course organised, the date of which is nevertheless uncertain". In other words, Napoli is not refused the training because of her

[12] ECJ *Defrennes* C-43/75, cit., § 19.

absence linked to maternity but she is postponed to a later, uncertain date which will delay her advancement and contaminate indefinitely the progression of her career. Other workers who did not bare children benefited from the training right away and were promoted earlier with a direct positive effect on their wages.

This same structural analysis can be found in examples of laws on the discriminatory nature of pay scales for apprenticeships[13] or on retirement pensions which also perpetuate systemic discrimination. Yet judicial scrutiny seems less stringent for collective bargaining agreement[14] because of the deference generally reserved to collective contracts made by the social partners in Europe[15]. In the *Brachner* case, the question was whether a pension reform, which increased first all pensions except the lowest ones, disproportionately affected women who benefit from these lower retirement benefits: "article 4(1) of Directive 79/7 must be interpreted as meaning that, taking into account the statistical data produced before the referring court and in the absence of evidence to the contrary, that court would be justified in taking the

[13] EUCJ June 18 2009 *Hütter* Case C-88/08, ECLI:EU:C:2009:381: "Articles 1, 2 and 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded".

[14] With regard to age, a collective bargaining agreement based on a national scheme for example can give way to a more lenient argument while applying the proportionality test in application of article 6 Directive 200/78 exception which excludes the presence of age discrimination, ECJ July 5 2012 *Hörnfeldt* Case C-141/11, ECLI:EU:C:2012:421 § 39: "in that regard, it must be pointed out, firstly, that the 67-year rule [of mandatory automatic retirement] makes it possible for the social partners to make use, by means of individual contracts or collective agreements, of the mechanism of automatic termination of employment contracts only from the age of 67, since Paragraph 32a of the LAS prohibits the imposition of a compulsory retirement age lower than 67. That paragraph thus confers on the employee an unconditional right to continue his professional activity until his 67th birthday, in particular in order to augment the income on the basis of which his retirement pension will be calculated and thus to increase the amount of that pension".

[15] See ECJ Oct. 16 2007 *Palacio* Case C-411/05, ECLI:EU:C:2007:604, § 68: "It should be recalled in this context that, as Community law stands at present, the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see, to that effect, ECJ Nov. 2005 *Mangold* Case C-144/04, ECLI:EU:C:2005:709, § 63).

view that that provision precludes a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners"[16]. Here the collective policy impacts the welfare states since this discrimination affects disproportionately pensions and not employment. So systemic discrimination can have a wider scope than just conditions of employment.

Lastly, systemic direct discrimination has been smoked out by the Court in instances where the cause of discrimination even affects a worker's personal relationships outside the workplace because of the care given to a child. In *Coleman* case, a mother taking care of her child with a disability did not obtain the same worktime adjustments than workers who were parents of children without disabilities[17]. The Court creates a concept of discrimination by association and so *structurally* the discrimination ban extends the disability ground to the systems of primary "care" providers and unavoidable barriers to employment: "where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee"[18]. The plaintiff Coleman had also been subject to harassment, insults and humiliation, which is also a sign of a hostile environment, symptomatic of systemic discrimination.

On a national level, France also offers examples of cases where the judges implicitly seem to take a systemic approach to discrimination issues, outside of the observation in previous studies of systemic discrimination through the glass ceiling effect of age, union and sex discrimination in employment[19]. Four cases offer illustrations of how the French Supreme Court seems to grasp the voluntary and involuntary effects of employment practices or of work organization as well as apparently neutral legislation that perpetuate the disadvantage of certain groups at work.

A first case concerns an example of sex segregation of jobs uncovered by the high court[20]. Indirect sex discrimination was used to contest the refusal

[16] ECJ October 20 2011 *Brachner* Case C-123/10, ECLI:EU:C:2011:675.
[17] EUCJ July 17 2008 *Coleman* Case C-303/06, ECLI:EU:C:2008:415.
[18] EUCJ July 17 2008 *Coleman* Case C-303/06, cit. § 51.
[19] Mercat-Bruns, *Identification de la discrimination systémique*, in *RDT*, 2015, p. 672.
[20] Cour de Cassation Soc. June 6 2012 N° 10-21489.

to affiliate social workers to the pension fund for managers and to affiliate technicians with the same level of qualification to the manager's fund. Social workers were mostly women and technicians mostly men. The Court used a systemic analysis because it showed both that there was a direct effect of this difference of affiliation in the way it devalued the profession of social worker and that the defendant did not give a proportionate justification for this difference of treatment. The objective of this difference could be the coherence of the allocation of benefits according to different professions to ensure the survival of the pension system. But the Court then proceeded to question whether the means to achieve that aim were coherent, namely means that were necessary and appropriate. In other words, the Court exposed the structural incoherency of the evaluation of managerial professions.

First the Court rejected the argument that social workers were not considered managers in other collective bargaining agreements: a circular reasoning which reflects historical systemic discrimination. Second the Court concretely compared the skills and tasks of technicians and social workers and realized that social workers demonstrated more managerial skills, leadership working on guardianship investigations and domestic violence compared to technicians. This case proves that collective bargaining agreements to manage benefits linked to the welfare state, decisions of employers or public authorities can perpetuate past systemic discrimination regarding certain positions devalued and dominated by women.

The second French case concerns systemic discrimination and the ground of race. In this litigation, it was a Court of Appeals and not the Cour de Cassation which revealed how racial harassment can be a source of systemic discrimination at work[21]. In this instance, a cook of maghrebin origin quits his job without giving notice after repeated comments from his supervisor in the kitchen on how work of bad quality was "arab work". The Court of Appeals of Lyon[22] recognizes this as racial discrimination and considers that the employee resignation is constructive discharge and is not justified for just cause. The Court of Appeals implies that this has created a systemic hostile environment discouraging the worker distraught who decides to resign. The Court of Cassation on appeal reverses the judgment of the Court of Appeal, considering that the link between the discrimination and the un-

[21] See Cour de cassation Soc. Sept. 22 2015 N° 14-11563.

[22] Cour d'appel de Lyon Dec. 5 2013.

explained departure of the worker is not explained by the Court of appeals. Outside of the unfortunate outcome, the Court of Appeals probably was not followed because the direct effect of the discrimination on the plaintiff's ulterior conduct was not established. The plaintiff should have alleged systemic racial harassment which is typical in certain professions like sexual harassment and would have proven the causal link between discrimination as harassment and the worker's will to resign without notice[23].

The third case which reflects a trend towards a systemic approach to discrimination at work concerns a case of multiple discrimination based on the combined effect of origin and sex. Again indirect discrimination serves to combat the recurring exploitation of very vulnerable groups, namely undocumented domestic female workers, subject to systemic discrimination due to the invisibility of their precarious status. This remarkable case of an undocumented worker from Cape Verde went practically unnoticed[24]. The plaintiff had worked nine years as a nanny at a home where she received room and board. She was subsequently dismissed with no severance pay, no housing perspective and no possibility to contest the just cause of the dismissal in front of the labor court in view of her illegal status. The French Supreme Court was determined to condemn this abuse of power, declaring that the existence of discrimination does not always require a comparison with other workers. In other words, as the Court explicitly states: the worker had been the subject of "exploitation" because her employer let her off without remedy, conscious of her illegal status. Her employer knowingly took advantage of her "apparently neutral" status of undocumented worker to dismiss her without any redundancy or justification. The Court relies on a systemic approach to indirect discrimination by concluding that this "exploitation" of her supposedly neutral status created a disadvantage affecting only people of certain nationalities. The Court alludes to the fact that often these foreign women work as illegal domestic workers. The use of indirect discrimination based on a single ground allows the Court to explain that "the worker cannot be compared to other domestic workers who are documented and can contest their unjust dismissal and vindicate their rights".

The key to the judge's reasoning is to show how indirect discrimination

[23] Mercat-Bruns, *Racisme au travail: les nouveaux modes de détection et les outils de prévention*, in *DS*, 2017, p. 361.

[24] Cour de Cassation, Soc. Nov. 3 2011, no. 10-20765.

can operate efficiently to expose laws and not just employers' practices which are apparently neutral in principle but arbitrary in application: multiple discrimination can produce a negative impact which is not always apparent. This implicitly shows how direct discrimination is also limited in confronting certain forms of multiple discrimination because of the need for a comparator at the initial stage of proof of discrimination (in this case, no comparability possible with domestic workers who can seek redress in court) whereas indirect discrimination is invoked here in the absence of a comparator to prove direct discrimination. These undocumented workers are both exposed to intersectional bias since they are seen as exploited and vulnerable and they suffer from compounded discrimination because as women in these domestic jobs they can be subject to sexism and racism at the same time or sequentially. Workers subject to multiple discrimination are more often exposed to systemic discrimination because of their more limited opportunities to detect and contest systematic discrimination in court due to their situation of aggravated subordination[25].

Lastly, the *Bougnaoui* case of the dismissal of a veiled female engineer[26], which was handed down after a preliminary ruling of the EUCJ[27] shows the emergence of ways religious discrimination in the workplace can give rise to systemic discrimination. In this instance, Bougnaoui was wearing her veil inside the company but as a consultant, customers rejected the idea that she could come and work with them with her veil. She contested her dismissal based on her refusal to take off her veil. The EUCJ rejected the idea customer injunctions could justify an essential and determinate requirement for her job and therefore it would be direct discrimination if this justified the dismissal. However, the EUCJ Court considered the company could put into place a neutrality rule for workers in contact with customers and it would not be indirect discrimination if the employer had provided reasonable accommodation and attempted to transfer the employee to another job with no customer interaction before firing her. In light of the EUCJ decision, the Cour de Cassation followed this two step standard and globally embraced a systemic approach to the issue by deciding there was direct discrimination

[25] Mercat-Bruns, *Discriminations multiples et identité au travail au croisement des questions d'égalité et liberté,* in *RDT*, 2015, p. 28.

[26] Cour de Cassation Nov. 22 2017 n°13-19855.

[27] EUCJ March 14 2017 *Bougnaoui* Case C-188/15, ECLI:EU:C:2017:204.

in the absence of a neutral dress code in the company. Even though the more global issue of the impact of these neutrality rules over time on highly qualified veiled female workers was not discussed, the Cour of Cassation did consider that, in the future, in the presence of a neutrality rule in other cases, its discriminatory impact could only be discarded if there is an attempt to reasonably accommodate the worker. The judicial introduction in France of a possibility of religious reasonable accommodation, a positive obligation to try to reinstate the worker in another employment, seems to favor a systemic approach to the question of religious discrimination in the event of a neutrality company code, under the impetus of the EUCJ.

3. *Systemic solutions in cases of structural inequality at work: an opportunity to consider discrimination law as transformative?*

This finding of a systemic analysis of discrimination in Europe requires a last phase of reflection intrinsically linked to this structural view of discrimination. One of the main redeeming features of a systemic discrimination approach is that it requires systemic solutions once it is discovered to compensate the structural inequalities exposed[28]. Conversely, the main challenge, generally, with regard to discrimination law, is its variable scope and effect to combat discrimination mostly through litigation, even in civil jurisdictions: the difficulty is to repeatedly have to prove discrimination despite the shift in the burden of proof[29] and rely on the difficult enforcement in countries when the financial remedies awarded for the violation are often rare or limited[30].

The collective nature of systemic discrimination requires collective and global solutions that can be varied and constitute measures for substantive equality. European law authorizes positive action in the form of flexible quotas[31] and there have been previous European Union attempts to encourage

[28] See Chicha-Pontbriand, *Discrimination systémique: fondement et méthodologie*, Commission des droits de la personne du Québec, éd. Yvon Blais, 1989, p. 85.

[29] Directives 2000/78, Art. 10; 2000/43, Art. 10 and see EUCJ April 19 2012 *Meister* Case C-415/10, ECLI:EU:C:2012:217.

[30] Mercat-Bruns, Oppenheimer et al. (eds.), *Enforcement and Effectiveness of Discrimination Law in a Global World,* Springer, 2018.

[31] See for example, ECJ Oct 17 1995 *Kalanke* Case C-450/93, ECLI:EU:C:1995:322; ECJ March 28 2000 *Badeck* Case C-158/97, ECLI:EU:C:2000:163.

parity rules in executive boards[32]. The occurrence of harassment as a form of discrimination can also be anticipated through training on identifying stereotypes fostered by the company's culture and rules to prevent the risk of a glass ceiling in high level management positions[33].

In France, the most innovative systemic tool comes out of the act on class action suits to prosecute discrimination claims that has been adopted in 2016[34]. This new act on class action in France provides for compensation for emotional distress and material compensation but also considers the possibility to avoid litigation through a pre-litigation transaction if the employer commits to stop the collective discrimination for the future: a more structural alternative that goes beyond compensation of individual harm[35]. Moreover, if the litigation is pursued, the judge can also order an injunction to stop the discrimination in the future instead of only requiring a financial remedy[36]. This option could allow the implementation in companies of "equity programs, strategies for both promoting equality and preventing discrimination"[37].

The goal of these systemic solutions is to develop accountability and transparency of companies to promote and recruit more workers from disadvantaged groups in certain sectors at all levels including management positions. Another option is to encourage companies to adopt mechanisms to

[32] File:///C:/Users/MarieMERCAT/Downloads/WomenonBoards.pdf.

[33] Bell, Mc Laughlin, Sequeira, *Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents*, in *JBE*, ournal *of Business Ethics*, 2002, pp. 65-76.

[34] See *op. cit.*, note 5.

[35] Art. 64, Law of the modernization of Justice, cit., note 5.

[36] Art. 65, Law of the modernization of Justice, cit., note 5.

[37] Equity programs is a term used in Canada to describe "a broad, proactive strategy for promoting equality and preventing discrimination. It is based on principles of flexibility, accessibility, expansion, innovation and accountability". See in the Saskatchewan Province, equity programs in education and employment: "employment equity plans help Saskatchewan employers and employees experience the benefits of fair, full employment and a diverse workforce…. Equity in employment means: a representative workforce that mirrors the make-up of Saskatchewan's working age population at all levels and in all occupations; and supportive, welcoming work environments that promote the full participation of all groups". The Saskatchewan Human Rights Commission uses Statistics Canada data on the make-up of Saskatchewan's working age population to get a picture of what a representative workforce would look like. Qualitative indicators of success include subjective factors such as job satisfaction and positive working relationships : http://saskatchewanhumanrights.ca/equity-site/what-is-the-equity-program.

monitor the concrete measures for inclusive equality[38] and avoid repeated or future liability of undertakings. This could take multiple forms: training on implicit bias awareness for managers, virtual platforms to inform all workers of promotion opportunities, empowering them to apply, implementation of policies to compensate or signal the gender gap, and mentoring proposals between senior managers and lower level workers to avoid the risk of a progressive underepresentation in managerial positions of certain groups of workers because of their age, origin or sex for example. In sum, the existence of a class action suit can create more impetus for meaningful positive action to prevent or avoid systemic discrimination in the future.

4. *Conclusion*

Revisiting antidiscrimination law at work through the lens of systemic discrimination informs different dimensions of the principle of equality. First, from a pragmatic point of view of the strategic labor law litigator or the human resource manager, the recognition of systemic discrimination helps to understand the articulation between direct and indirect discrimination. Secondly, the existence of systemic discrimination requires enforcement which is a balance between detecting discrimination in employment and implementing compliance mechanisms to cease the structural discrimination in the future. Thirdly, combating systemic discrimination contributes to a more proactive view of social cohesion in Europe where historically legitimate differential treatment to confer social rights through legal categories exist in the welfare systems (maternity, pension, disability..). Understanding the causes and consequences of systemic discrimination can help to organize workers' social rights in a way to avoid structural inequalities taking into account more globally parental rights, intergenerational conflict and access to justice for the most disadvantaged groups in employment such as those subject to multiple discrimination.

[38] See generally SHEPPARD, *Inclusive Equality: the relational dimensions of systemic discrimination in Canada*, McGill Queens University Press, 2010.