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# When Law Remembers

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## Introductory remarks

In order to address contemporary conflicts, law sometimes invokes, explicitly or implicitly, past principles, past ideas, concepts and narratives. Why? And what is going on when law feels the need for memory? These are the issues this paper wishes to address; its aim is to argue that when law remembers, changes are at stake. Remembering is not conservative, not necessarily at least: on the contrary, it is one of the expressions that movement takes on in law. 'Movement' is nothing but the search for 'justice' that animates law[1]. Often, the act of remembering – a movement towards the past – acknowledges that the conflicts of the present require new balances, new images, new principles. When law remembers, an opportunity is being opened to legal interpreters to renew their vocabulary and their established set of ideas, and to re-tune their connection with the times.

**<u>The context of this reflection: Antidiscrimination Law and the Markets in the European Process of Integration</u>**

The field to which I intend to apply this hypothesis is that of the relationship between law and the market, particularly between antidiscrimination law and the market, within the European Process of Integration.

In the context of the European Process of Integration, anti-discrimination law is seen as a market friendly-tool, aiming to enhance and support the market, and not to protect from it the goods or socially important ends that the market on its own would otherwise depreciate or harm.

It does not take much to understand why anti-discrimination law and the European Process of Integration go hand in hand: after all, the Union was born to give life to a fair competitive common market; fair competition requires parity; and anti-discrimination aims for parity of treatment. In Europe, we call this ‘the economic aim’ of anti-discrimination law; but we would be better off calling it the ‘utilitarian’ understanding of anti-discrimination law, which is not only accepted, but valued and promoted, precisely *because* it works beneficially for the markets.

No surprise then if in the EU’s conception there are never markets that discriminate, but there are laws, traditions, social habits and cultural convictions reflected in law that do so. Anti-discrimination law is entrusted with the mission of helping markets to shed all the discriminatory elements encapsulated within national legislation and social traditions.

Gender policies offer the best explanation of this approach’s multiple implications.

For decades, many national ‘protective’ legislations had accorded to women special

treatments in order to compensate (in terms for example of a better retirement scheme or more flexible treatment at work) their ‘double burden’ (the contribution that working women make to family life as well). Then the nation states suddenly learned from the EU that this kind of legislation is discriminatory, inasmuch as it repeats stereotypes that condemn women to the margins of the employment market. As the ECJ is fond of repeating, "as parents, men and women are equal" (*Commission vs France*, C-212/86) and "neither men nor women have a special relationship with family care or work" (*Griesmar*, Case C-366/99). Only pregnancy, the delivery of a baby, and breastfeeding can justify special treatment in favour of women (*Dekker*, Case C-177/88), passing the test of the new European notion of gender equality.

In other words, traditions, social attitudes and national legislation (if not national constitutional law itself) have played a regressive and negative role, while markets, supported by the anti-discrimination protection, have played the transforming and progressive role: that of the space where women find their emancipation from past gender roles that tied them to the family and housework[2].

Of course, along with the special treatment of working women, the idea itself that workers are entitled to social protection has been banned from today’s European political speech. Working women were the prototype of the protected worker; the latter was arguably the true target of anti-discrimination policies and case law. So at least many critics say. Cutting the anti-discrimination protection down to nothing but a chance to enter the marketplace came at the cost of losing a sound set of past social protective law, hindered the adoption of new ones, and ended up explicitly subordinating rights to the market. But what counts, for the purposes of this presentation at least, is the official ‘rhetoric’ justifying this. Forms and contents of working people's rights have to be tailored to the market's needs and priorities, the EU

stresses, because a well-functioning, fully competitive, and thereby non-discriminating market will do good for all of society. It will offer everyone freedom from past norms that limit their autonomy and their quest for self-development, granting not merely economic chances, but chances for self-fulfilment, self-empowerment, and social inclusion.

## **The Feryn case**

The EUCJ's established doctrine (the marketplace, naturally non-discriminating as it is, cures the ills of a discriminating society) seemed to be put at risk in 2008, when the *Feryn* case forced the Court to openly grapple with the discriminatory face of the market.

The facts of the case were startling enough. Feryn is a Belgian firm specialized in the sale and installation of up-and-over doors and sectional doors. Seeking to recruit fitters, the firm had placed a large vacancy sign on its premises. Only Moroccans responded. Interviewed by some Belgian newspapers and on Belgian national television, Mr. Pascal Feryn, one of the firm's directors, had declared:

" *Apart from these Moroccans, no one else had responded to our notice in two weeks…. But we aren't looking for Moroccans. Our customers don't want them. They have to install up-and-over doors in private homes, often villas, and those customers don't want them coming into their homes."*

*"We have many of our representatives visiting customers …. Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just*

*immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: "no immigrants"…. I must comply with my customers' requirements. If you say: "I want a particular product or I want it like this or like that" and I say: "I am not doing it, I'll send these people", then you say: "I don't need that door". Then I'm putting myself out of business. We must meet our customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!"*[3]

It was the Belgian body for the promotion of equal treatment that brought proceedings against Mr Feryn, and the case ended up before the Court. The Court ruled in the case by saying that the fact that an employer states publicly that he will not recruit employees of a certain ethnic or racial origin amounts to direct discrimination within the meaning of Council Directive 2000/43/EC, implementing the principle of equal treatment between individuals irrespectively of their racial or ethnic origins.
Central to the ruling are two points. Firstly, the moral it affirms, which is that the businessperson is not excused by the fact that his discriminatory hiring policy is driven not by a discriminatory intent, i.e. by his own discriminatory preferences or personal inclinations, but by social conventions, considered irrefutable; second is the line of reasoning followed by the Court in reaching its conclusions. Recognizing an act of direct discrimination in Mr. Pascal Feryn's speech implied going far beyond the letter of the Directive. There was no identifiable complainant who had become victim of Mr Feryn discriminatory speech: Directive 2000/43/EC states that direct discrimination occurs when "one person is treated less favourably than another". The

Court went far beyond the letter; and ruled that the lack of an identifiable complainant did not prevent concluding that there was direct discrimination, because: "*the aim of the Directive is to foster the conditions for a socially inclusive labour market*", and this aim would be hard to achieve if the scope of the Directive were limited to cases where "a victim" is identifiable. In other words, the Court stated that the aims of the Directive (developing a socially inclusive labour market) are put at risk by behaviours like that of Mr. Feryn. Reasoning in this manner, the Court achieved the goal of affirming anti-discrimination protection *against* the interests of a single businessman, but *in the name of the market's interests* (in the name of a socially inclusive labour market), not in the name of non-market values (such as rights, dignity, equality). Notwithstanding the Court's conclusion, the facts that gave origin to Feryn are certainly more consistent with the opinion of a number of scholars who share the view, opposed to the Court's traditional assumptions, that anti-discrimination law should be better understood, rather than as an instrument protecting the market's interests, as an instrument protecting goods (equality, dignity) that markets, in the name of their quest for profit, could and often do harm. A few years ago, Cass Sunstein noted that in a racist society, it is certainly more convenient for employers to discriminate than not to discriminate. Therefore, he maintains, "a legal system committed to an anti- discrimination principle might in some cases restructure market arrangements so as to put members of disadvantaged groups on a plane of equality"[4]. Many European scholars do share these views. They see in the 'economic aim' of EU anti-discrimination law (which was not born to protect rights against the market but to enhance markets) a sort of youthful error of the Process of European Integration. Now that the EU is no longer a common market only, but a political, monetary, and cultural union, mainstream scholarship maintains that it is time for the Court to adopt, in its

decisions, a strongly rights-oriented attitude capable of saying aloud that antidiscrimination protects rights, not the market's interests.

So much did *Feryn* appear inevitably to lead the Court to admit, for the first time in its history, that anti-discrimination law and market can be in conflict, that the General Advocate in his opinion on the Feryn Case, in response to a defence that had based its argument on: “it is not me that is racist, but society”, quoted Sunstein by saying: “all of this only tells us that markets don’t cure discrimination”. But the Court, as we have seen, did not pick up the Advocate General’s point and, facing the challenge of Feryn, rebuilt its stronghold that apparently been placed in crisis on the basis of the same case: anti-discrimination norms have market-based objectives.

The moral of the case is that anti-discrimination law can go against the interests of business and profit, but when it cooperates with the market’s ends, it does the market good. Now, in what sense is it plausible to confirm that anti-discrimination law is good for the market even when it goes against the interests of business and profit? What can be said about such an apparently paradoxical statement?

When we ask ourselves this, we discover the hidden role that memory plays in Feryn.

## The hidden work of Memory: looking for another model of relationship between law and the market

There is a simple, elementary, old, and often forgotten sense in which law has been considered good for the market: law is good for the market when it protects the market from profit that is illicitly earned. And the profit that is illicitly earned is that which evades pacts and agreements, whose respect and fulfilment enable the very existence of a civil society. Even if it goes against the market’s interests, law is good

for the market when it protects this latter from that profit which degenerates the quality of the exchanges – of economic and social exchanges at the same time, since they are bonded together. Profit diminishes the quality of community life when it is the fruit of fraudulent activities, illicit agreements, deceitful advertising or the manipulation of food products. Or, as in the case in point, when it is earned by giving in to the customers' deteriorated tastes, by businessmen who, calling themselves the victims of such clients, only corroborate and legitimize their attitudes in the name of profit. When abusive speech takes place, abusive exchanges abound.

In a word, law does good for the market when law reminds the market that it is part of society. Indeed, when we think of the market as a part of society, we immediately realize that the acts of a corrupt or dishonest businessperson at the same time harm commercial activities, and do wrong. And here memory is at work: the memory of conceptions about the relationship between law, economics and society, that existed in the past, and were then forgotten, but still make sense.

By reprising the affirmation by which anti-discrimination law is good for the market and for this reason the Directive should be interpreted extensively, the ECJ assumes a position that would sound familiar to ancient Roman jurists and to those of the Middle Ages, and certainly to Adam Smith: the market's activities are not exempt from the need for a moral position, and the amount of and the quality of ethics that the market exhibits, is taken from and then given back to society. That is: the market is a social being, it takes place in society and is part of it. It is for this reason that Feryn is unable to defend himself by saying that it is all society's fault. Because his business is also part of society. And no one understands this better that the European Court of Justice, whose anti-discrimination doctrine, by insisting on the inclusion, cohesion and well-being that market is able to provide, has always relied on the market's sociability.

That the market (and the businessman) should be prudent and honest was indeed a central idea in commercial law (*lex mercatoria*), the complex of prescriptions and statements, mostly originating from ancient Roman Law interpreted in view of the needs of newer economic exchanges, put together and continuously updated and evolved by the work of Medieval and modern jurisprudence; and spread throughout continental Europe by the cosmopolitan jurists of that age's teaching activities and professional councils.

*"In the Middle Ages the problem of the morality of markets was posed in relation to the emergence of a new kind of mercantile man who anticipates the idea of the entrepreneur in the modern sense. The first period of the Italian communal age (12$^{th}$ - 13$^{th}$ centuries) offers the pure model of a constitutional-economic order – based on free competition – without economic legislation. Control is delegated to codes of ethical conduct and to the jurisdictions of the professional orders, the corporations. Corporations' statutes constantly affirmed the duty to operate fairly (*bene et legaliter *were the Latin words, which meant: honestly and respectfully of the rule of law), without fraud or deception; corresponding to this principle was the general prohibition of unfair competition and monopoly"*[5].

In Feryn, apparently reminiscent of the Roman and Medieval warning of *honesta utilitas* ("to earn honestly"), the ECJ individuates, remembers and rediscovers the possibility of a close, undivided relationship between laws and economics, a relationship that harks back to ethical grounds common to the rationality of law and economics (the *honesta utilitas* does not mean *honeste vivere*, of "honestly living") that throughout history has cemented a bond between the two fields.

Having insisted for over two decades on painting the market as an important place for socialization, the Court of Justice recalls in Feryn the *obligations* that are connected to this position. Society is the environment in which human interactions take place; if the market is society, then the exchanges that take place in it, the quality of these exchanges, are the moments that constitute the social order: abuses that take place in the market therefore represent an attack upon the social order. The honesty and correctness demonstrated by the market generates virtue in society, and vice versa. The market is not separated from or without responsibility to the rest of the social order: they are reciprocally linked.

In this way, anti-discrimination law corresponds to market ends without automatically giving the market license to dynamism, development and progress. It is not an instrument for the market to pursue its own ends. Instead, it commits the market to abide by *probity* and *honestly,* which, as Adam Smith taught, are the sign of a "*civilized and commercial society*".

In the Feryn judgment, through the historical breadth of the adjective 'fair', economics' law and rationality rediscover themselves as connected with those social and legal rules that shape, elaborate and model the idea of 'honesty'. Somewhere, behind and beneath the hyper-technocratic construction of the Common Market, lies the remembrance of a humanistic understanding of economics. And the Court admits that, today, we are in need of it.

## **From Memory to Change**

When law remembers, changes are heralded, and the necessity of new understandings is acknowledged. Actually, we are in need of new scenarios in which to imagine the relationship between law, society and the market. *Feryn* says that both the alternatives we are accustomed to discuss (markets cure discrimination and discrimination law is an instrument that serves the market's ends; the market does not cure discrimination, and anti-discrimination law is the instrument for state authorities to protect against the immoral market's good and ends it would otherwise harm) have become useless in the face of the present state of things.

Those alternatives stem from the same origin and say the same thing: that markets are allowed to be detached from ethics. From mercantilism onwards, the rationalist utilitarian mentality that created the *homo oeconomicus* prevailed. Contrary to what had happened to the medieval merchant, the *homo oeconomicus* was given a rationality divorced from the ethics that for centuries had provided common ground for law and economics, anchoring both to society.

Once constructed on the artificial rationality of *homo oeconomicus*, economics was separated from law, and vice versa. Being rational to economic ends took the place of being prudent, honest, and fair. This separation historically manifested itself in two ways: in the idea that the law should protect society from the market, and in the idea that the law should be subordinated to the market. These two opposing ideas have a common premise: the economy follows its own rationality, a self-containing rationality based on profit and indifferent to, or autonomous from, the rationality which governs the remaining social exchanges and interactions. We recognize the operating of these ideas in the welfare state principles adopted by many European countries in the post-World War II era, to which those who say that antidiscrimination law is a matter of rights to be protected against the market still refer. Consciously or

not, those who reason in this way repeat paradigms that were established after the second Industrial Revolution, and that Karl Polanyi explained in his book 'The great Transformation' of 1944[6]: nation states allowed self-regulating capitalism to exist, allowed it to pursue its ends, but kept for themselves a precise role, that of protecting society against the potentially socially disruptive market's aptitudes. The adoption of social protection legislations said that societal concerns are for the state, for public authorities, for politics. And law was seen as a product of the state, the instrument it used to protect society against the market.

Now the time has come to reflect on how puzzling the results of this were: both markets and society have their own laws – economic laws for markets, legal laws for societies – but the two systems are not supposed to be joined by common values or interests; only, if the state is strong enough, able enough, it will hopefully force markets to 'restructure' their arrangements in the name of interests, goods and ends that the market neither recognizes nor cares for. But what happens when states and government are not strong enough to counter the market, or not willing enough, which is what is happening today? As lawyers, are we doomed to certify that rights are going to disappear, because the authority, the political power structured as governmental authority, that was supposed to protect them, has died?

Making use of memory, we could begin to abandon the intellectual construction according to which law and economics are separated, pertain to different spheres, follow different ends; and we could reactivate, as *Feryn* suggests to us, the idea of the market as an order, which is founded upon, and in need of, respect for some basic principles or values of coexistence, starting from the words that connect us. A functional market requires a well-ordered society, reflects it, is part of is constitution; a functional market is one that accepts the obligations that tie it to society. It is

because "*at the very end, the economic order is not isolated from public morality*" [7] that Mr Feryn will not make money from the racist inclination of Belgian society and his discriminatory speech will not be approved or considered inoffensive. Reminiscent of the pre-modern link between law, society and the market, *Feryn* provides for us – together with its critical potential – a mentality of "*the useful results in a close relationship with the fair*"[8]: a paradigm able to rediscover that law and markets are not detached, but connected, through the medium of ethics. Markets are reminded that of course the economy obeys its laws, but these have to be connected to, and responsive to, shared social values – that it to say to the living world of needs, interests, views and mentalities amid which markets exist.

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[1] For the metaphor of 'movement' in law, see A. Giuliani, "Droit, Mouvement, Réminescence", *Archives de Philosophie du Droit ,* 29 (1984): 103. On Giuliani's work, see in this section the contribution of JF.J. Mootz; the Italian reader can see also F. Cerrone and G. Repetto (eds.), *Alessandro Giuliani. L'esperienza giuridica tra logica ed etica* (Giuffrè, Milano, 2012)).

[2] S. Niccolai, "Changing Images of Normal and Worthy Life: the Constitutional Potential of Economic Sensitivity in EU Gender and Anti-discrimination law", in S. Niccolai and I. Ruggiu (eds), *Dignity in Change: Exploring the Constitutional Potential of EU Gender and Anti-Discrimination Law* (Epap, Fiesole, 2010), 41.s.

[3] European Court of Justice, Case C- 54/07 *Feryn*.

[4] C.S.Sunstein, "Why Markets Don't Stop Discrimination", *Social Philosophy and Policy,* (1991), 2:22.

[5] A. Giuliani, *Giustizia e ordine economico* (Giuffrè, Milano, 1997).

[6] K. Polanyi, *The Great Transformation* (Beacon Press, Boston, 1944).

[7] A. Giuliani, *Giustizia,* 228, with reference to Adam Smith.

[8] A. Giuliani, *Giustizia,* 157.