



**Legal Seminar 6 October 2009
on the implementation of EU law on equal opportunities and anti-discrimination**

**DISCUSSION PAPER
DISCRIMINATION ON GROUNDS OF GENDER AND RELIGION:
A CASE OF CONFLICT BETWEEN GROUNDS?**

The first part of this discussion paper was drafted by Dr Susanne Burri, co-ordinator of the European Network of Legal Experts in the field of Gender Equality, Senior Lecturer, Utrecht Law School, and does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities.

Introduction

Examples of issues in which religious principles and expressions might eventually clash with the prohibition of discrimination on the ground of gender are numerous and often give rise to many controversies. Some Member States have for example adopted a ban on headscarves in schools (e.g. France, Belgium); in the Netherlands a confessional political party (the *SGP -Staatkundig Gereformeerde Partij*) excludes women from some specific (representative) functions within the party on the ground of their interpretation of the Bible. Dress codes applied in some workplaces or in certain sectors (e.g. the police) often prohibit some forms of religious expression, such as headscarves. Some catering establishments refuse admittance to people with headwear and this includes people (mostly women) wearing a headscarf for religious reasons. In the Netherlands, the government is discussing a prohibition on wearing a burqa in schools, for civil servants and eventually on public transport. Similar issues are raised in the case of separate facilities for men and women (see also the discussion around "sex-segregated" services in the context of access to goods and services) which are sometime justified by religious reasons. Another case in point is the annulment of a marriage in France, where religious considerations had a gender dimension (in this case virginity of the wife). In all these cases, a dilemma arises whereby the choice is between either a situation leading to discrimination based on gender or to discrimination based on religion.

It is proposed that the workshop addresses a number of questions which arise from such situations. How problematic is the exclusion of (mainly) women which is the consequence of such policies? How do they relate to fundamental rights such as the right to freedom of religion, the right to education, the right to employment, the right of freedom of movement etc.? And how do Equality Bodies and national courts address these issues when confronted with cases in which both discrimination on grounds of gender and religion are at stake? The aim of this workshop is to discuss different approaches to these issues and to consider, in one of the two presentations, a model developed by Professor Eva Brems on how to address such conflicting rights issues.

Diverging approaches

These dilemmas have shown the need to ensure a "balancing" of rights, which remain from recent experience uncertain and controversial. This is in particular illustrated in the numerous "headscarf" cases. How should a ban on headscarves be seen, as a form of indirect sex discrimination or a form of indirect discrimination on the ground of religion, or both? Norway offers an interesting approach in this respect.

The Equality and Anti-Discrimination Ombud considered a case in which a woman had been dismissed from work as a shop assistant because she refused to remove her headscarf at work. The Ombud split the case into an assessment of indirect gender discrimination, on the one hand, and direct discrimination on the ground of religion, on the other. The Ombud found that the employer had violated both prohibitions.¹ According to the Dutch Equal Treatment Commission dress requirements which *also* prohibit headscarves might amount to indirect discrimination on the ground of religion.² These approaches certainly differ from the one taken by the European Court of Human Rights in 2005 in the case of Leyla Sahin.³ Sahin, a young Turkish student, asked the European Court of Human Rights whether a university ban on religious symbols, including headscarves, was in violation of the European Convention on Human Rights. According to the Court this was not the case. Among other things, it considered that headscarves are difficult to reconcile with ideas of tolerance and sex equality. Moreover, it was, according to the Court, a powerful symbol that might (negatively) influence the position of women who do not wish to wear the veil.

Another case gave rise to many controversies in the Netherlands. A female teacher at a secondary school informed her colleagues by e-mail at the beginning of the school year that from then onwards she would no longer shake hands with men, due to her (Muslim) religion. She was offered another job, which she refused and was then dismissed. The Dutch Equal Treatment Commission considered that the requirement to shake hands with people regardless of their sex amounted to unjustified indirect discrimination on the ground of religion, because the requirement was not necessary: there exists an alternative in the form of a friendly sex-neutral nod.⁴ According to the District Court the dismissal was in this case not unjustified and no freedom of religion or any other principle of law was at stake; the issue of indirect discrimination was therefore not considered by the Court.⁵

Religious freedom vs. gender equality?

In most of the cases, we are faced with situations of indirect discrimination, where a particular religion or gender is affected disproportionately by a facially neutral provision. What is required in cases of indirect discrimination under EC law is that an appropriate justification is found for the measure or practice concerned (legitimate aim and proportional means to attain this aim). This means for example assessing whether a limitation on the expression of religious belief is appropriate and proportional, as for instance allowed under the European Convention on Human Rights (see Sahin case above).

On the other hand, exceptions to the principle of non-discrimination may be justified to allow particular treatment based on gender: EC Directives allow the use of "genuine occupational requirement" as an exception to the principle of equal treatment based on sex and can thus be relied upon by ethos based organisation for recruitment in certain jobs (eg. priests).

¹ See H. Skjeie, 'Multiple equality claims in the practice of the Norwegian anti-discrimination agencies' in: D. Schiek & V. Chege, *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law*, London and New York: Routledge.Cavendish, 2009, p. 295-309, at 304.

² See for example opinion 2008-123, available at: www.cgb.nl, accessed on 24 September 2009.

³ ECtHR, 10 November 2005, 44774/98.

⁴ ETC opinions 2006-220 and 221, available at: www.cgb.nl, accessed on 24 September 2009.

⁵ District Court of Utrecht, 30 August 2007, AB 2007, 307, with annotation by Groen and Vermeulen.

As mentioned above, separate facilities for men and women can be justified in the context of access to goods and services, for example for reasons of "decency". This issue here being whether "religious" reasons can be accepted or whether "decency" should be defined in "secular", non-religious terms.

Social Discrimination vs. Legal Discrimination

While addressing the issue of the status of women within the religious groups, it is important to distinguish between discrimination which may arise from a policy decision (like the headscarf ban), and discrimination that finds its origin in the social or family context (like access to health or polygamous unions). It can prove difficult, from a strict legal point of view, to fight discrimination originating from the social environment. EC Directives could allow however specific measures in the form of positive action. Therefore, the issue is how can gender discriminations originating from the religious context - eg. access to health, fight against excision, forced marriage, rights for second, third, etc. spouses of previous weddings, etc. - be included in policies in favour of gender and religious equality? What can positive action propose in that sense?⁶

Exceptions based on the ethos of an organisation

The European Court of Justice (ECJ) has not yet interpreted EC provisions which might be relevant to some cases involving, for example, dress requirements at the workplace. In particular, the question arises how the exemption in the Framework Directive (2000/78/EC) applying to religious institutions in Article 4 should be interpreted in relation to the prohibition of direct and indirect gender discrimination. Can a school based on the Christian religious ethos require that teachers do not wear a headscarf? Would that eventually be allowed for all teachers, or only teachers specifically teaching religious issues? Would such a requirement also fall within the ambit of the exception if the post is of a secretarial nature? Or a cleaning job?

Presentations

Professor Hege Skjeie will address mainly two issues. In the first place the position of minorities within minorities and gender and religion as a case of conflicting grounds. Secondly, the issue of multiple discrimination and gender and religion as a case of intersecting grounds.⁷

Professor Eva Brems will present a model to address conflicting rights issues (see the outline of her presentation in annex)

⁶ See further for example: Susan Moller Okin "Is multiculturalism bad for women?", <http://www.bostonreview.net/BR22.5/okin.html>.

⁷ The European Network of Legal Experts in the field of Gender Equality has published a report on multiple discrimination: S. Burri & D. Schiek, *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?*, July 2009 available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed on 24 September 2009.

ANNEX

Discrimination on grounds of gender and religion: a case of conflict between grounds?

Eva Brems

Situations of conflicting/competing human rights abound. As such cases are often hotly contested and in the forefront of public attention, the lack of a systematic approach to such situations is highly unsatisfactory.

In my work on conflicting human rights⁸ (which is to be considered as work in progress), I have proposed a 3-step model to address conflicting rights issues.

Step 1: Eliminate fake conflicts

In some cases, the conflict between fundamental rights is not a necessary feature of the issue concerned, but rather results from a particular approach to that issue. When a claim is made for the restriction of one human right in the name of the protection of another human right, it has to be examined whether it is possible to *avoid* the conflict between those two rights. Can a solution be found that leaves both rights intact? If this is the case, that solution will have to be preferred in most cases. An example in the context of criminal procedure is a legal provision attempting to realise the right to a trial within a reasonable time by imposing strict procedural time limits only on the accused, and not on the prosecutor. This is a restriction of the accused person's right of equality of arms. Both the reasonable time requirement and the requirement of equality of arms are sub-rights of the right to a fair trial. The European Court of Human Rights has held that the reasonable time objective can – and therefore should – be realised without impinging upon the equality of arms.⁹

Step 2: Preference for compromise

Most of the time, however, it will not be possible to fully protect both rights, which means that there is a 'real' conflict between human rights. In those cases, it is important to attempt to avoid having to sacrifice one right for the sake of the other. By definition, each of the interests involved is considered particularly important, so that under normal circumstances it is given priority over other claims. Hence a solution that completely forsakes the protection of one of those rights is undesirable. When both rights are put in the balance, the challenge is to find equilibrium, rather than making the balance tilt to one side or the other. Preference has to be given to a solution that does not subordinate one right to the other, but rather finds a compromise with concessions from both sides for the purpose of guaranteeing the maximum protection of both rights.

Step 3: Criteria for prioritization

It seems inevitable that a substantial number of conflicts will not be susceptible to either elimination or compromise, and may only be solved by according priority to one right over the other.

⁸ Eva Brems, "Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms", *Human Rights Quarterly*, 2005, 294-326; Eva Brems, "Introduction", in Eva Brems (ed.), *Conflicts Between Fundamental Rights*, Intersentia, 2008, 1-16.

⁹ ECtHR, *Wynen v. Belgium*, 5 November 2002, *Reports of Judgments and Decisions*, 2002-VIII.

In rare cases, international law provides the order of priority. E.g. in the conflict between freedom of expression and the prohibition of racial discrimination in the context of racist hate speech, article 4 CERD gives priority to the latter. Yet in most cases, no such ranking by the treaty maker is available, and the principle of indivisibility applies. Yet in order to solve the issue, rights have to be ranked in the concrete case.

In this respect it is useful to inventorize all relevant criteria that may guide this exercise. Some examples:

- a distinction between the core and the periphery within each right. In a conflict between rights A and B, it is possible that realising A infringes upon the core of B, whereas realising B would only infringe upon a peripheral zone of A, which would argue in favour of that solution.
- A related criterion is the severity of the interference caused by the exercise of one right in the exercise of the other and vice versa. If the exercise of the right is rendered utterly impossible, this will carry more weight than if it is 'only' made more difficult
- the indirect involvement of other rights, due to the involvement of third parties or to the 'leverage' effect of a particular right (e.g. the right to a fair trial acts as a lever for the enforcement of all other rights); if an infringement of right A indirectly results in infringements of rights C and D, there is increased reason to avoid this infringement.
- similarly, the involvement of other weighty general interests in addition to individual rights may play a role: we have fundamental individual rights in both scales of the balance; if this is joined in one scale but not the other by an important general interest, that may tilt the balance.
- the distinction between positive and negative obligations. Can it be argued that direct interferences by state authorities are more serious than shortcomings of the authorities in their obligation to fulfil rights?
- Similarly, a distinction may be made between direct and indirect discrimination: van den Brink¹⁰ has argued that in a conflict between a prohibition of direct discrimination and a prohibition of indirect discrimination, the prohibition of direct discrimination should carry more weight.

When dealing with women's rights, moreover, the results have to be tested against a few central guidelines of a feminist approach:

- in order to avoid essentialism, the viewpoint of the insiders has to be given full weight
- emancipation is a free choice

¹⁰ Marjolein van den Brink, "If there is anyone, who has an objection to this marriage..." Religious objections to conducting marriages of same-sex couples in the Netherlands, paper presented at the Seminar *Religion in the public sphere*, Utrecht University, 8 May 2008.

During the workshop, I intend to apply the model to a number of real cases. If time allows, I shall discuss the following:

- the SGP case (the Dutch case concerning measures against a protestant political party that refuses to consider women for elected positions)
- the prohibition of Muslim headscarves in Belgian schools
- the refusal to appoint men/women who on account of their Islamic belief refuse to shake hands with persons of the opposite sex (Dutch cases).