



Legal Seminar 25 November 2008 on the implementation of EU law on equal opportunities and anti-discrimination

DISCUSSION PAPER MULTIPLE DISCRIMINATION AND POTENTIAL CONFLICTS BETWEEN GROUNDS

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Diversity in racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation has led to various kinds of *singular* discrimination. A large number of actions have been introduced in the fight to combat inequalities stemming from singular discrimination. However, people's identities are usually complex and multi-layered and individuals are also treated differently due to several grounds; this is another major problem, the *multiple* discrimination. Multiple discrimination can be found in two types: *additive* or *intersectional*. Additive discrimination relates to a situation where an individual is discriminated against on more than one ground and these grounds are added to one another. In intersectional discrimination a person's multiple identities can be the cause of discrimination in such a way that the grounds of discrimination cannot be considered separately. Various groups such as senior citizens who happen to be homosexuals, women belonging to a particular religion or belief, aged black women, Roma being disabled, Muslims being homosexual, aged workers with impairments and functional limitations, are being discriminated against on dual or triple grounds and are denied proper access to, and use of, their rights. Sometimes, they are even excluded from their community and cut off from their values and socio-cultural context into which they have been living.

Groups facing multiple discrimination experience violations of their human rights, but they also become the recipients of humiliation and prejudice and can thus not fully participate in the normal life of society. This results, oftentimes, to intense social exclusion and to a defeat of the principle of equality in terms of full citizenship rights.

Multiple discrimination is widespread and has deep economic, cultural, political, historical and social causes which are intertwined and interrelated. While European societies have covered a lot of ground in their reception of 'Others,' understanding, accepting, and integrating 'Otherness,' still constitutes a major challenge; the perception of "Others", which any society acts upon, has instigated wars, hostility, and discrimination. In other cases, more constructive perceptions of "Others" have led to economic and political integration and growth as well as cultural coexistence if not gradual assimilation. This progress can be in part attributed to developments in the international and the European legal system as well as the Constitutions of each country.

However, multiple discrimination can not only be fought on legal terms, as criminalizing it does not necessarily mean eradicating it. Multiple, additive and intersectional discrimination, in the same fashion as singular discrimination, mainly stem from and reveal a certain self-, and group-, conscience of one's own identity. In other words, discrimination should be understood as a manifestation of identity. Identities are in flux.



They develop in the shadows of pre-existing linguistic structures and prevalent social stereotypes and values and are shaped by public education, media input and religion. Historical circumstances also play a definitive role in identity-formation. Identities are then recycled through various institutions such as the courts and the military, churches and schools and by individuals such as influential political leaders. Even among members of one vulnerable group, there are different rates in the discrimination they face.

Discrimination on the grounds of both disability and gender is clearly visible, as women with learning difficulties have even lower employment ratios than men and are therefore even more subject to discrimination in employment. Women in general are more prone to discrimination in employment than men, in relation to their age and motherhood, existing or potential. Women that belong in a particular religion or belief are discriminated more than women that belong in other religions, in relation to social protection and advantages, employment and occupation, access to goods and services. In many countries, discrimination on the grounds of both gender and sexual orientation is higher in women than in men, and in some cases sexual orientation and religion directly leads to discriminatory cases.

Unfortunately, there is still a significant gap between legislative reforms and the attitudes of closely involved actors and of the society in general, which, when focuses its attention on people that belong to these groups, it tends to be in stereotypical ways that express more about the fears and prejudices of the 'mainstream' public than it does about the individuals, their potential and their positive contributions to societies.

In order to determine whether a person has been the subject of differentiated treatment because s/he belongs to a protected group, a comparator is necessary, so as to make a comparison between the individual claiming discrimination and a person that belongs to an opposite group. In case no real person can be found for the comparison, the court may consider using a hypothetical comparator. However, taking into account that even when the courts adjudicate cases of single ground discrimination it is often difficult to find a suitable comparator, this problem is more obvious in discrimination claims based on multiple characteristics. In addition, some legal systems do not allow the use of a multiple ground comparator, and the complainant has therefore to select only one ground of discrimination, although this does not fully correspond to the discriminatory treatment s/he faced.

The two anti-discrimination Directives use an exhaustive list on the grounds of discrimination and do not expressly prohibit discrimination on several grounds. On the contrary, the European Convention on Human Rights and the European Charter of Fundamental Rights have an open list on the prohibited grounds, that could render possible to offer protection to multiple discrimination,¹ This is extremely important especially for the decisions of the European Court of Human Rights, that are legally binding for the Member States, unlike the European Charter of Fundamental Rights, that does not enjoy legal status yet.

¹ Article 14 of the ECHR, Art. 1 of Protocol No. 12 to the ECHR and Article 21 of the European Charter of Fundamental Rights.



Article 14 in the ECHR prohibits discrimination based on “*any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status..*”, while the European Charter of Fundamental Rights uses a similar wording in Article 21, stating that “*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*” As the Explanatory Report of the Protocol No. 12 to the ECHR provides for in par. 20, “The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today’s societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included.”

As O. De Schutter points out, “any criterion of differentiation may be potentially examined under Article 14 ECHR, whether or not it has traditionally been listed among the prohibited forms of discrimination in the international law of human rights.”² Although in Recital 14 of the Racial Equality Directive, the possibility of combined discrimination among women on the grounds of sex and racial/ethnic origin is acknowledged, there is no other specific provision in this Directive or the Employment Framework one addressing multiple discrimination, as both Directives have adopted a single ground model. However, the Directives do not prevent the Member States in addressing multiple discrimination through a more protective legislative framework, as both provide for Member States introducing or maintaining more favourable provisions than those laid down in the Directives.³ Although according to the principle of subsidiarity foreseen by the EU Treaty, decisions should be taken as closely as possible to the citizen in order to be more effective, multiple discrimination is so complicated that should be dealt with on an overall Community level, ensuring the same level of protection for all EU citizens, despite the Member State they are living in.

² O. De Schutter, *The Prohibition of Discrimination under European Human Rights law, Relevance for EU Racial and Employment Equality Directives*, HEC, MPG, European Commission, February 2005, P. 13.

³ Article 6 par. 1 of the Racial Equality Directive and Article 8 par. 1 of the Employment Framework Directive.



Questions:

- *Do you consider that the current legal framework is inadequate to remedy multiple and intersectional discrimination?*
- *What, in your opinion, is the role of the actual or hypothetical comparator in adjudicating cases of multiple discrimination?*
- *Would it be more effective for the victims to plead only one ground of discrimination, despite the real facts?*
- *How has it been dealt with in various countries' legislative systems?*
- *What role could play the evaluation of the discriminatory effect on the victim, rather than the comparator? How could the existing European and national legal provisions be better implemented in that view?*
- *What extra measures, and in what domains, should be taken and made into law in order to tackle multiple discrimination?*