

Hege Skjeie
Department of Political Science,
University of Oslo
Legal seminar on the implementation
of EU law on equal opportunities and
anti discrimination.
Brussel, October 6, 2009

Workshop: Gender and religion: A case of conflicting grounds?

- ▣ Two ways of approaching the workshop question:
- ▣ The “minorities within minorities” problematic, from the feminist critique of multiculturalism.
- ▣ The perspective of “multiple discrimination” and “intersectionality” in anti discrimination law/legal scholarship.
- ▣
- ▣ Minorities within minorities = gender and religion as a case of conflicting grounds
- ▣ Multiple discrimination = gender and religion as a case of intersecting grounds

The “minorities within minorities” problematic:

- ▣ Institutional autonomy for religious groups, vs. individual rights to equality/non discrimination
- ▣ Challenge: Rights must be properly balanced, or properly prioritized
- ▣ “Case” under consideration: Exemptions to anti discrimination laws (and Norwegian law)

Multiple discrimination

- ▣ The perspective of “multiple discrimination”:
- ▣ Poses the problem as one of misrecognition: discrimination grounds are not (only) separate, but intertwined
- ▣ Challenge: Rights must be recognized in their complexity
- ▣ “Case” under consideration: Hijab bans (and Norwegian judicial practice)

“Minorities within minorities”:

- ▣ A critique of multiculturalism’s advocacy of group based rights. Of equal relevance to religious groups, whether minority or majority based.
- ▣ min-min problematic: concerned with gender specific consequences of state policies which grant autonomy to groups;
- ▣ The problem: “external protections” which leads to “internal restrictions”

“The paradox of multicultural vulnerability”:

- ▣ Individuals inside the group can be injured by the very reforms that are designed to promote their status as group members in the accommodating state (cf Aylet Shachar 1999).
- ▣ When religious law defines civil, political and social rights and obligations in a manner that systematically promotes differential treatment of women and men, girls and boys.
- ▣ (And) When secular laws protect religious freedom such that internal gender discrimination becomes a religious group right.
- ▣ For instance:
- ▣ When religious groups are granted exemptions from general laws against gender discrimination.

- ❑ Two Examples of different “judicial approaches” to the problem of conflicting rights: Criteria for performing balancing acts
- ❑ Martha Nussbaum and Cass Sunstein on whether protection against gender discrimination should encompass religious communities
- ❑ From “Is multiculturalism bad to women” – the debate over Susan Okins essay (1999)

Martha Nussbaums “judicial approach”:

- ❑ The state cannot place a **substantial burden** on the exercise of religion unless it can at the same time claim a **compelling interest** in so doing.
- ❑ *Is protection against gender-based discrimination a compelling interest?*
- ❑ Nussbaums answer: Guarantees for equal freedom and equal opportunities in fundamental areas such as bodily integrity, health, political equality, freedom of speech and assembly, and the opportunity to seek employment outside the home. Also: the right to marital consent and to divorce.

- ❑ Internal religious dogma and practices associated with dress codes, rituals or the choice of clerical personnel can legitimately claim freedom from the application of secular law.
- ❑ Prerequisite: genuine “exit” possibilities.
- ❑ Children may need extra protective measures because they lack the same “exit” opportunities.

Cass Sunsteins "judicial approach":

- ❑ Critique of "The asymmetry thesis": How it is unproblematic to apply ordinary civil and criminal law to religious institutions, but problematic to apply the law forbidding gender discrimination to those institutions.
- ❑ Exemplified: It is uncontroversial to forbid clergymen to beat women as part of a religious ceremony, but unacceptable to prohibit gender segregation in religious educational institutions.
- ❑ *Why?*

- ❑ Habitual conceptions of "compelling interest":
- ❑ Gender segregation is understood as only "minorly important"; differential treatment is not a particularly harmful form of discrimination.
- ❑ The "substantial burden" criterium:
- ❑ Helps maintain the right to discriminate as a "holy right".
- ❑ It should be possible to introduce a ban on gender-based discrimination that also entails a break with established religious practices.

- ❑ The (only) difficult balancing act:
- ❑ Cases where a compelling interest is met with a plausible claim that the interference would seriously jeopardize the continuing function of the relevant religion.

Question: Approach similar to HRC General Comment no. 28, 2000?

- ❑ State Parties must ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law, and to the enjoyment of all Covenant rights. The protection of religious freedom may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion

case under consideration:

- ❑ General exemptions in Norwegian law:
- ❑ The Gender Equality Act (1978) applies to all areas of society, with an explicit general exemption for the internal affairs of communities of faith (§ 2). The law does not apply to these internal affairs; i.e. they are placed outside the scope of the law.
- ❑ In the Act relating to Worker Protection and Working Environment (2004), religious communities are exempted from the general ban on discrimination on the basis of sexual orientation through the stipulation that differential treatment on the ground of homosexual cohabitation in (specific) positions within religious communities, will not be in violation of the ban on discrimination (§13.3)

Formal revision proposals (2008/2009):

- ❑ Follows Nussbaum rather than Sunstein, and builds on ECrtHR reasoning on the collective dimension of religious freedom.
- ❑ Respects the right to autonomy in matters that are closely related to faith. In this respect, religion needs "special protection".
- ❑ Does not challenge "established religious practices".

- ▣ **But:** Protection of such is not to be regulated through general exemptions. The ordinary definitions of acceptable differential treatment apply.
- ▣ , i.e. “Necessary” and “Proportionate”.
- ▣ “Necessary” relates to considerations of “The religious core”.
- ▣ It could encompass:
 - ▣ Religious rituals; gender segregation
 - ▣ Religious preaching; male only
 - ▣ religious teaching; gender segregation, gender stereotypical roles
- ▣ (Some employment in religious funded schools, kindergartens)

Multiple discrimination / Intersectionality

- ▣ The new ‘buzzword’. Originates in legal scholarship addressing the gaps in single ground based discrimination law. (Crenshaw 1989)
- ▣ An ‘intersectional’ approach recognizes that identities as well as structural patterns of inclusion and exclusion are shaped by more than one factor (Kantola and Nousinainen 2009).
- ▣

Definitions

- ▣ ‘Multiple discrimination’ refers to a situation, or phenomenon, where a person is discriminated against on several different grounds at different times.
- ▣ ‘intersectional discrimination’ refers to a situation in which several grounds of discrimination interact concurrently (Makkonen 2002).

EU general framework:

- ❑ Six key equality strands: gender, racial and ethnic origin, disability, age, religion and sexual orientation.
- ❑ **"Tackling multiple discrimination. Practices, policies and law" (2007):** Combatting multiple discrimination is a stated policy aim. But how?
- ❑ Often, a strategic decision is made to 'choose the strongest ground', and to leave out grounds of discrimination that are difficult to prove, either vertically ground by ground, or in combination.
- ❑ In cases which clearly involve several grounds, the tendency is still to consider the grounds separately, and not as inextricably linked.

❑ A European "paradigm symbol" of intersectional discrimination

- ❑ Policies that aim to ban the Muslim headscarf (Loenen 2008; Schiek and Chege 2008; Bamforth, Malik and O'Cinneide 2008).

A case of intersecting grounds: Hijab in Norwegian judicial practice

- ❑ Anti-discrimination legislation is dramatically broadened, along the EU "strands".
- ❑ Joint equality and anti-discrimination enforcement agency since 2006.
- ❑ White paper on the joint enforcement institution: Stressed the advantages in dealing with cases of multiple discrimination.
- ❑ Example : a situation where employers prohibit Muslim women from wearing the hijab at work. Such cases are located 'in the borderland' between discrimination on the grounds of gender and religion .

Ombud decisions

- ❑ Gender neutral dress codes are producing gender-specific discriminatory effects. For women who wear headscarves on religious grounds, it is an element of their personal integrity. A prohibition would entail significant disadvantages for these women .
- ❑ Hijab bans in (private sector) work places are regularly found violate the prohibition against religious discrimination in the Discrimination Act and the prohibition against indirect discrimination in the Gender Equality Act.

The "Strasbourg view": A case of conflicting grounds

- ❑ A ban on the headscarf is mainly treated as an issue of religious discrimination.
- ❑ One reason for **allowing** bans could then be conflicting gender equality concerns,
- ❑ For example when hijab is construed as a symbol of women's submission in Islam.
- ❑ From "Sahin":
- ❑ "Wearing a headscarf appears 'to be imposed on women by a religious precept that is hard to reconcile with the principle of gender equality'
- ❑ We have – or rather – we construct - two conflicting rights, which must be prioritized. In this case, religion should cede to gender equality.

Attempt at conclusions

- ❑ Problems with "the judicial approach": Is it overly conflict-driven? The need to balance/prioritize...
- ❑ Makes "hard cases" harder than they need be ? (Anne Phillips 2005)
- ❑ When is intersectional analysis an alternative? Changes the perspective/ a way to eliminate fake conflicts (cf. Brems).

- ▣ The problem of religious group rights vs individual rights to non discrimination: The vulnerability dilemma.
- ▣ Important to remember Sunsteins warning: “substantial burden” arguments leave religious institutional autonomy unchallenged.
- ▣ Who is to decide what belongs to “the core”?
- ▣ The argument on democratic participation:
- ▣ Nussbaum: (equal) participation within
- ▣ Okin: equal participation in negotiations over group rights; apply gender balance politics
- ▣ Hijab and sivil society participation: Constructed the Norwegian case
