“Multiple discrimination” - what are the challenges?

European Academy of Law – 22nd of November 2010
Multiple Discrimination - Overview

- Notions: multiple discrimination
- Problems with “intersectionality”
- Challenges addressing multiple discrimination legally
- Multiple discrimination and the EU
  - EU legislation
  - ECJ case law
- Practical approaches – national levels
- Ways forward for the EU?
Multiple Discrimination

• *Beijing declaration (UN 1995)*
• *(The governments affirm their determination) to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability or because they are indigenous people.*’ *(United Nations 1995)*
‘Discrimination, like traffic through an intersection, may flow into one direction and it may flow into another. If an accident happens at an intersection, it can be caused by cars travelling from any number of directions, and, sometimes, from all of them. Similarly, if a black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination’ (Crenshaw 1989, 145)
Critique of intersectionality

• Too complex to offer guidance in practical matters (Squires 2008)
• Answers to specific problems of common law concepts (Rey Martinez 2008)
• Danger of submerging demands of gender equality, in particular in EU discourse (Squires 2008, Verloo 2006, Holzleithner 2005)
• May also strengthen gender equality as most of those affected are women (Schiek 2005)
Intersectionality – challenges for law(yers)

Law(yers): reduce complexity

Many reasons for disadvantage

Intersections of dis/advantage in anyone

Adequate concept?

Add “grounds”?
Intersectionality and Law

- Legal discourse of minor relevance to social change (Conaghan 2009)
- Advocacy important to bring neglected issues to mind, including intersectionality (Goldberg 2009)
- Position of intersectional discrimination against women underdeveloped in EU law (Nielsen 2009)
Multiple discrimination and EU law

• EU legislation
• Practical application
  – ECJ case law
  – National developments
• EU level Policy development
EU legislation on non-discrimination

"Race “ Dir 2000/43: Employment, social security, social advantages, health, education, goods & services

"Umbrella Dir” 2000/78 Employment 4 grounds

Non-Discrimination Main-streaming -

Planned: Directive 4 grounds goods & services, social security, social advantages, health, education,

Gender Main-streaming

Equal Treatment Gender Goods & Services Dir 2004/113

Employment Gender Dir 2006/54

Equal Pay Gender Article 157 TFEU + Directives

Self employed Gender Dir 86/613

Social Security Gender Dir 79/7

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EU legislation

• Directives 2000/43 and 2000/78
  – “women are often the victims of multiple discrimination”
    • Recital 14 Dir 2000/43, Recital 8 Dir 2000/78/EC
  – Obligation to report on issues of multiple discrimination and gender mainstreaming
    • Article 17 and 19 respectively

• “gender” Directives:
  – No reference to multiple discrimination
Planned legislation

• COM 2008 (426)
  – No mention of multiple discrimination in text
  – Obligations to report

• EP proposal
  – Full definition (very specific)
Proposed definition

- Article 1 (…)
- 2. Multiple discrimination occurs when discrimination is based:
  - (a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or
  - (b) on any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of
    - (i) sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive),
    - (ii) racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or
    - iii) nationality (in so far as the matter complained of is within the scope of Article 12 of the EC Treaty).
ECJ case law – intersectionality “vanished”

- Nationality and gender
  - Adoui & Cournaille, Jany et al
- Gender and disability
  - Coleman
- Age and ethnicity
  - Kücükdeveci
- Age and gender
  - Lindorfer, Age Concern, Petersen, Bulicke
- Sexual orientation and gender
  - Maruko, Roemer
Practical approaches – national level

• Acknowledging multiple discrimination as a phenomenon
• Responding adequately
• Preventing multiple discrimination
Acknowledging multiple discrimination

- Recognising multiple/intersectional discrimination
  - Positive: Denmark “Føtex” (U 2005, 1265H)
  - Positive: Paris Court of Appeal (2001/32582)
  - Positive: Oslo Equality Tribunal (1/2008)

- Adequately dealing with justifications
  - Example: German legislation
Responding adequately

• Adequate damages
  – Positive example: Austrian Legislation
  – Practical examples? Not yet

• Other remedies
  – Negotiating agreements on future policy (derived from positive duties)

• Injunctions
Preventing multiple discrimination

• Positive duties
  – Also to be implemented in legislation
  – Positive examples: Spain and Bulgaria

• Developing policy concepts
  – Avoiding identity politics
  – Raising awareness of institutional actors
Examples

• Bulgaria ("PADA")
  – Article 11 … "(2) State authorities, public bodies and local
governments shall undertake priority measures (…) to
provide equal opportunities for individuals who are victims of
multiple discrimination."

• Spain (Law 3/2007)
  – Article 14.6 (criteria for action of public bodies include)
‘consideration of the particular difficulties in which women
included in groups of special vulnerability (at risk of social
exclusion) are, such as those belonging to a minority, migrant
women, girls, women with disabilities, elderly
women, widows and female victims of domestic violence, for
which public authorities could also adopt measures of
positive action’
What is at stake?

• Barriers to dealing adequately with multiple/intersectional discrimination
  – Lack of awareness?
  – Lack of a definition?
  – Comparator approach?
  – Compartmentalisation?
  – Lack of social actors?
Ways forward for the EU?

• No premature overregulation
  – Acknowledging the problem in legislation consistently, without delivering a “common law style” definition may prompt judicial creativity

• Positive policies (“OMC” like)
  – No compartmentalisation of intersectional experience into specific “groups”
  – Initiating wider discourse on central nodes for non-discrimination and their intersectionality
Non-Discrimination Law as movable system

Gender

‘Race’

Disability
Thank you for your attention!
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