

Multiple Discrimination and Equality Conflicts

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“Applying EU Antidiscrimination Law”

Seminar for Members of the Judiciary

ERA Conference Center, Trier, 18-19 March 2013

Slide 1 –

The title I was assigned to speak about was “multiple discrimination and equality conflicts” – which I have taken to be about the problems that can arise when faced with a claim of discrimination on multiple grounds. Among those problems are some conflicts between the understanding that multiple discrimination is something that our anti-discrimination laws should be able to address, and the recognition that it does not fit easily within the paradigm on which those laws are based.

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I will first talk about the different ways the term “multiple discrimination” can be understood; then I will explain how it conflicts with the concept of equality that forms the foundation of the dominant model of anti-discrimination law, present some examples of how national courts have dealt with the issue of multiple discrimination, and close with some suggestions on what conclusions we can draw from all of this.

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generally speaking, when people use the term “multiple discrimination” they’re talking about discrimination based on any combination of protected categories – how is this possible? Well you must remember that we all have at least 6 of the 7 characteristics that fall under one of these categories – we all have a sex, racial or ethnic origin, religion or belief, an age, a sexual orientation, and a nationality. The one thing we don’t all have is a disability – and we may not even agree on what a disability is. So – for the sake of an example, let’s imagine a case where some might be discriminated on the basis of all 7 grounds:

An elderly, blind, lesbian Palestinian Muslim woman, living in an EU country.

Why is it interesting and even important to consider all of these protected grounds in a single case?

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Public discussion of the concept of multiple discrimination started in the United States in the 1980s with the work of some American black female scholars, including Elizabeth Spelman and Kimberlé Crenshaw. Spelman criticized feminists’ tendency to talk about women as if they all have and share some essential woman-ness regardless of racial, class, religious, ethnic, and cultural differences. Spelman and others argued that it was important to accurately describe the differences among women’s experiences of oppression in order to lay the foundation for more effective strategies for combat the oppression of all – rather than just some – women.

Kimberlé Crenshaw has the distinction of having written one of the most cited articles in the literature on discrimination – Pick up any book or article on sex or race discrimination or multiple discrimination, and you'll find her article cited. She introduced the concept of intersectionality as a way of describing the experiences of women with different backgrounds and experiences. She argued that black women experience the combined effects of both racial and sex discrimination simultaneously.

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It wasn't long before the idea that women could experience discrimination on more than one ground simultaneously received international recognition – first in the Beijing Declaration from 1995 and then in recommendation no. 25 of the UN Committee on the Elimination of Racial Discrimination from 2000.

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At about the same time the EU also recognized the existence of the phenomenon of multiple discrimination, as seen in the preambles to the 2000 anti-discrimination directives, the council decision of 27 November 2000, the decision establishing the European Year of Equal Opportunities for all, and the 2008 Community action programme.

Nevertheless, there still isn't any binding legislation that defines what multiple discrimination is or how courts should deal with it.

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In 2009 The European Parliament proposed adding a provision to the commission's 2008 proposal for a new directive extending protection against, discrimination on grounds of religion, belief, disability, age or sexual orientation beyond employment and occupation, but the proposal has still not been adopted. It's been under consideration in the Council for more than 4 years.

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At the moment, without the benefit of any binding legislation to guide decision-making, there are three ways of understanding multiple discrimination that have appeared in scholarship on the subject.

Multiple discrimination is simply additive – you can analyze each ground separately.

An example of this is a decision by the Irish Equality Officer from 2001, the Glimmer Man pub case –

This case involved a visually impaired man who was a member of the Traveller Community. When he entered the pub with his wife (who is also visually impaired), his 13-year-old son and his guide dog, he was refused service, first because of the presence of the child (the bar had a no-children policy) and then, after he had sent his son home, because of the presence of the dog. He also felt that his membership of the Traveller Community might also have influenced the refusal to serve him.

He claimed discrimination on grounds of family status, disability, and membership of the Traveller Community.

The equality officer then examined for each of the three grounds, the concrete complaint of discrimination. And found that he was not discriminated against on the basis of disability or his membership of the Traveller Community on the same day. – this is clearly a different understanding from that of intersectionality, which is that different combinations produce different effects – that is, a particular combination will produce a different experience and effects from another combination, and you can't separate the effects from the combination. This understanding of multiple discrimination has been criticized for creating an infinite regress problem – as we recognize ever more complex identities, existing recognized identity groups tend to split into ever-smaller subgroups until there's no category left but the individual, which precludes the possibility of recognizing group-based oppression at all.

The additive understanding from the compound discrimination might seem similar, but they are distinguishable – let me give you an example. A disabled woman in her fifties may be discriminated against on the basis of her age in access to education or job training, while she was discriminated against on the basis of her sex with regards to promotions when she was younger, and on the basis of her disability in a situation in which a public office building is not accessible to persons with wheelchairs.

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Now I'll talk about conflicts with equality.

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The first and most obvious problem is that antidiscrimination law in the EU and most other jurisdictions is that it is based on the paradigm of equal treatment. The absence of discrimination is taken to be equality or equal treatment. It is in the nature of equality to call for a comparison – if something is equal, it is equal to something else. If it is unequal, then there is something to which it is unequal. You cannot have equality without a comparison. We know this from math – you don't use an equal sign in math by itself – you have to have something on both sides.

The problems begin when you try to find the right comparator for a complainant.

With whom do you compare an elderly, homosexual female of minority ethnic or racial origin?

A man?

A younger person?

A heterosexual person of either sex?

A member of the ethnic or racial majority?

All 4?

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There are at least 4 additional problems –

A special variation of the comparator problem is seen in trying to prove cases of indirect discrimination on multiple grounds. In an article in the Oxford Journal of Legal Studies, Sarah Hannett gives the following example: Suppose a job requirement does not disproportionately affect either Asian men or white women, but has a clearly adverse impact on Asian women. She points out that in a claim for indirect race discrimination, the comparison would be made between the proportion of Asians who can comply, compared with the proportion of non-Asians who can comply. Under this test, it may be arguable that as an Asian, the woman in question, has not been indirectly discriminated against as she has not suffered sufficient disproportionate effect. Asian men, and some Asian women, could comply with the condition. Likewise, in a claim for indirect sex discrimination, the comparison must be made between the proportion of women who can comply, compared with the proportion of men who can comply. Again, it is at least arguable that as a woman, she has not been indirectly discriminated against, as the majority of women could comply. But as an Asian woman, the requirement or condition disproportionately impacts upon her.

It may be clear that it is not sufficient to compare her to women or Asian persons alone, but to whom should she be compared instead? Can we do away with any requirement of comparison?

Well what do the Directives say?

They define direct discrimination as:

- Being taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; and
- indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.

As is well known, the use of the phrase “would be treated” in the definition of direct discrimination allows for hypothetical comparisons - so perhaps for purposes of direct discrimination finding a real comparison is not necessary. Perhaps it is enough simply to recognize that female members of minority groups are likely to experience a kind of discrimination that neither the men in their groups or non-minority women are likely to experience. Likewise, the definition of indirect discrimination might allow doing away with this single-dimension comparison as it only calls for showing “a particular disadvantage compared with other persons” – it will be interesting to see what the Court of Justice does with cases like this if and when they ever get any cases like this.

The second problem concerns the differences in personal and material scope of protection provided by EU law

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Currently, the EU directives do not provide the same personal and material scope of protection.

The racial and ethnic origin directive has the broadest protection, covering:

- Employment,

- social protection, including social security and healthcare;
- education;
- and access to and supply of goods and services.

The next broadest in terms of material scope is the sex equality directive, which covers employment, social security, and access to supply of goods and services (excludes education and social protection beyond the scope of social security and education)

Finally, the framework directive, prohibiting discrimination on the remaining grounds, only covers employment matters.

These differences mean that a case of multiple discrimination is only partly covered by the directives.

The third problem concerns enforcement mechanisms –

- All 3 of the discrimination directives covering, racial and ethnic origin, sex, and the other grounds, require the Member States to :
 - ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
 - ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

These provisions do not require the Member States to set up the same judicial and/or administrative procedures for all grounds of discrimination. Tendency to set up single equality bodies, with, at my last count, were located in 20 member States have single Equality Bodies competent to deal with all discrimination grounds (Sweden, Belgium, Bulgaria, Denmark, Germany, Greece, France, Ireland, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Romania, Slovenia, Slovakia and the United Kingdom). But only a handful of these reportedly prioritise working on multiple discrimination – and each follows its own approach. (the Equal Treatment Commission (the Netherlands), the Equality Authority (Ireland), the National Council for Combating Discrimination (Romania) and the Danish Institute for Human Rights prioritise multiple discrimination in their work).

Finally, the fourth problem concerns differences in exceptions and justifications for the different grounds of discrimination. For example, the framework directive has a more general exemption for age discrimination than the exemption for disability.

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Now let's take a look at two examples of practical solutions to some of these problems:

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In Germany, the General Non-discrimination Act of 2006 offers a solution to the problem of different exceptions – it stipulates that in cases of multiple discrimination the justification must meet the requirements of the strictest exception applicable to the case at hand. This solution does not necessarily require explicit legislation, so it is possible that the Court of Justice could simply adopt such an approach if it is presented with such a case.

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In the Rasmussen case, it seems like it would have been possible to say the difference in treatment was based on gender, but the Court refrained from doing so. Instead, it simply focused on the actual difference in treatment between the time limit applying to the husband and that applying to the wife. – this approach seems to solve the issue of multiple discrimination rather effectively, as a complainant could allege a case of discrimination based on any combination of characteristics – however, the ECtHR treats certain grounds of discrimination as suspect, which then require “very weighty reasons” as a justification for a difference in treatment. Thus, there is still a difference between the grounds. On the other hand, this may be more of a theoretical than a practical problem since most cases usually concern at least one suspect personal characteristic – or even more – for example in the case of racial or ethnic origin and gender discrimination. Open lists of grounds – like in the ECHR – combined with a comparable material scope and comparable exception clauses would appear to constitute an effective way of giving the courts leeway to find effective and appropriate remedies for victims of multiple discrimination.

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We've now reached the end of my lecture and I'd like to leave you with these concluding remarks –

Multiple discrimination represents a serious challenge to the way we normally think about discrimination and the way we have tried to address it through law. Some have argued that it threatens to render the concept of discrimination meaningless, and pester the lives of judges and lawyers, because it seems the possible combinations of discrimination grounds are endless and leaves us with the feeling that it all just comes down to unfair treatment.

On the contrary, I would like to suggest that sometimes challenges like this are an invitation to re-examine our assumptions and arrive at a deeper and perhaps more accurate understanding of the phenomenon we are trying to address through anti-discrimination law. Surely, if we forget for a moment the need to find a comparator, and the problems concerning differences in material scope and enforcement, we can recognize that the purpose of anti-discrimination law is to address cultural and social practices that tend to marginalize specific groups of people. While the remedies may be largely individual, the purpose of the law is to minimize – or even de-institutionalize – these kinds of practices. When we remember this, it does not seem so difficult to see, for example, that black women and Asian women in European countries can be disadvantaged in relation

to white men and women because they are both female and belong to racial or ethnic minorities. The problem then seems to be more about the paradigm we use to understand discrimination than it is about the concept of multiple discrimination. We can only hope that as legal scholars and practitioners continue to think deeply about the nature of discrimination and the challenges of addressing it, we will together develop a more exact understanding and more flexible paradigm.

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Thank you for your attention – and good luck in your future work with multiple discrimination!