

The Challenge of Multiple Discrimination

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The challenge of multiple discrimination

- I- Introduction
- II- Origins of the concept of multiple discrimination
- III- The challenges of combatting multiple discrimination in Europe
- IV- Challenge: the burden of proof in multiple discrimination cases
- V- Challenge: access to justice for victims
- VI- Challenge: institutional treatment of complaints (lawyers, judges)
- VII- Some ways to confront multiple discrimination in litigation

I-Introduction

- Why does it matter?
- Why the need to consider multiple discrimination? Doesn't this just extend the existing proliferation of grounds or make the difficult task of combating discrimination even more complex?
- The very logic of anti-discrimination law is founded on specific grounds.
- *The desire to take account of multiple discrimination is prompted by the observation that civil discrimination proceedings brought by people who suffer discrimination on several counts are less likely to succeed than when the case is founded on one of the prohibited grounds.*
- Outline:
- To understand multiple discrimination, we should step back in time a little to the United States, where the issue was first identified by a legal scholar.

II- Origins of the concept of multiple discrimination

- History of the fight for women's rights:
- 3 stages in the United States leading to intersectionality:
- 1- **Formal** equality between men and women and recognition of the principle of non-discrimination
- 2- **Substantive** equality, variable consideration of the different situations in which men and women find themselves (motherhood)
- 3- Does non-discrimination include black women? Do they face a specific form of discrimination? Multiple discrimination?
- Emergence of the idea of "intersectionality"

III - The challenges of combating multiple discrimination in Europe

Directive 2000/43/EC (recital 14) and Directive 2000/78/EC (recital 3) :

- “In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”
- *Dec. of Parliament and Council of 17 May 2006* (pt. 10): “It is essential that actions in relation to racial or ethnic origin, religion or belief, disability, age or sexual orientation take full account of gender differences.”
- *Action by the Commission: Strategy for equality between men and women (2010-2020):*
- “The aggravated consequences of **discrimination on two or more grounds**, for example age and sex in the case of older women seeking access to employment, need to be addressed in the implementation of relevant legislation as well as of the legal acts providing protection from discrimination on the other grounds referred to in Article 19 TFEU. The Commission is also studying the specific issues pertaining to sex discrimination in relation to gender identity.”
- Resolution 1887 (2012) of Council of Europe Assembly: “**Multiple discrimination against Muslim women in Europe: for equal opportunities**”

III - The challenges of combating multiple discrimination in Europe

- The different meanings of multiple discrimination in Europe (Lanquetin):
- - *Sequential discrimination* (e.g. woman with disability) influencing a series of decisions spread over time (recruitment, then access to promotion).
- - *Combined discrimination*, influencing subordination at several levels, meshing of different grounds (e.g. immigrant woman): only access to less qualified employment compared with non-immigrant women and is paid less than immigrant men
- - “*Intersectional*” *discrimination*: drawing on American doctrine with regard to new stereotypes that entail more than simply additive forms of discrimination, assumptions (woman of certain origin automatically associated with certain behaviour (linked to a religion) and social situation – interaction with prejudices)

III - The challenges of combating multiple discrimination in Europe

- This multiple discrimination affects every aspect of discrimination cases:
- Access to legal proceedings
- Challenge: the burden of proof in multiple discrimination cases
- Challenge: institutional treatment of these complaints (lawyers, judges)
- Monitoring and preventing multiple discrimination

IV - Challenge: the burden of proof in multiple discrimination cases

- Identifying cases which illustrate this multiple discrimination
- More complex discrimination but less visible in the case-law....
- The challenge of finding comparisons
- Courts can address discrimination in different ways: different expressions of direct discrimination, indirect discrimination
- Examples from the EUCJ
- Examples from the Cour de cassation (France)

IV- Challenge: the burden of proof in multiple discrimination cases

- EUCJ examples: multiple discrimination concealed behind direct discrimination and discrimination by association:
 - EUCJ C-555/07 Küçükdeveci, January 19 2010
 - EUCJ C-303/06 Coleman July 17 2008
 - EUCJ C-415/10 Meister April 19 2012
- Indirect discrimination serving multiple discrimination :
EUCJ 20 Oct. 2011, Brachner Case C-123/10; Dec. 6 2012, Odar Case C-152/11; July 17 2014 Case C-173/13
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IV- Challenge: the burden of proof in multiple discrimination cases

- Example from the Cour de cassation (France):
 - Some **direct** discrimination cases refer to new forms of (gender) discrimination based on cumulated criteria (physical appearance, sex) or evidence of a smoking gun
 - French Supreme court, 11 January. 2012, no. 10-28213
 - French Supreme Court 18 janvier 2012 No 10-16926
 - Some proceedings concern direct discrimination experienced by women engaged in trade union activities; a fact of discrimination does not necessarily require comparison with the situation of other employees.
French Supreme Court: April 10 2013 n° 11-26986

IV- Challenge: the burden of proof in multiple discrimination cases

- Example from the Cour de cassation (France):
- Indirect discrimination may expose multiple discrimination
- “Discrimination does not necessarily require a comparison with the situation of other employees.”
- French Supreme Court, 3 November 2011, no. 10-20765

V- Challenge: access to justice for victims of multiple discrimination

- Difficult for the victims themselves to be aware of a specific prejudice associated with this type of discrimination and to initiate more sophisticated legal proceedings without outside help and people are cautious about resorting to the judicial system given a general lack of trust in public agencies (powers to initiate proceedings held by the anti-discrimination body; trade unions and civil society organisations)
- Pre-litigation profiling to identify problems at the intersection of specific groups.
- What role might be played by diversity collective bargaining agreements to prevention multiple discrimination?

VI- Challenge: institutional treatment of complaints (lawyers, judges)

- Lawyers, trade unions, NGOs, anti-discrimination agencies do not always devote sufficient resources to the issue of fighting multiple discrimination.
- Courts are sceptical about the need for multiple discrimination as a category when a single ground is enough to prove discrimination.
- However are these problems with multiple discrimination confined to the justice system? Does anti-discrimination law perpetuate multiple discrimination by refusing to grasp it?

VII- Some ways to confront multiple discrimination in adversarial proceedings

- 1- Relevance of gender in complaints of racial discrimination; tackle inadequate and inconsistent data collection about the sex of victims of racial discrimination. Need for more efficient institutional monitoring of specific scenarios of multiple discrimination. Guidelines and gender mainstreaming I. Carles, O. Baucells, *Gender/ race: the use of racial antidiscrimination laws: gender and citizenship in a multicultural context*, Report for EU Commission (June 2010 (Ontario Human Rights Commission report (2001)
- 2- Need to limit claims to essential grounds of discrimination as the principal core of discrimination? (Study by D. Schiek)
- 3- Research on intersectionality and identity performance show that the respect of **equal liberty** to act in the workplace could draw from the intersectionality theory: antidiscrimination could transform social practices in the workplace. "It is possible to make the point that intra-group distinctions matter based on identity/personal liberty to avoid triggering workplace discrimination. Revealing multiple discrimination is crucial in a era where the worker seeks equal opportunity as well as some personal autonomy in the workplace (age/sexual orientation; religion/sex; physical appearance/gender).