

ERA seminar: Current reflections on EU
Gender Equality Law

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**The challenge of multiple and
intersectional discrimination
in EU law**

Dr Diamond Ashiagbor,
Professor of Labour Law, SOAS
University of London

Overview

- Introduction
- What is multiple discrimination? How does it differ from intersectional discrimination?
- The policy context
- Intersectionality and anti-discrimination law
- The structure of anti-discrimination law: Coping with intersectionality
- Data across EU member states
- Ways forward?

Introduction

- Expansion of EU anti-discrimination law since Article 13 EC / Article 26 TFEU
- Most people have multiple identities: an age, a gender, a sexual orientation and an ethnicity. Many have or acquire a religion or a disability as well
- The result = discrimination may well occur on more than one ground and there is now the prospect of claims based simultaneously on several grounds
- Most prominent is the cumulative effect of gender discrimination when it intersects with other grounds: Fredman (2005) –
 - ‘Ethnic minority women, older women, black women and disabled women are among the most disadvantaged groups in many EU Member States. Similar multiple or intersectional discrimination is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people’.

What is multiple or intersectional discrimination?

- What is multiple discrimination? How does it differ from intersectional discrimination?
- Multiple / double / additive discrimination:
 - Where an individual belongs to two different groups, both of which are affected by discriminatory practices
- Intersectional discrimination:
 - Arising out of a combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone (M. Eaton, 1994, at 229)

What is multiple or intersectional discrimination?

- Intersectional discrimination:
 - “Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women’s experiences; sometimes they share very similar experiences with Black men. Yet often they experience double [or additive] discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience [intersectional] discrimination as Black women – not the sum of race and sex discrimination, but as Black women.” (Crenshaw, 1989, at 385)

The policy context

- *Fairness and Freedom: The Final Report of the Equalities Review, 2007* (UK Cabinet Office) Ch 3, 64:

The phrase ‘multiple disadvantage’ has drifted into popular use in recent years. It is taken to mean that having more than one characteristic typically associated with a disadvantage increases an individual’s likelihood of experiencing that disadvantage. The idea has even been lampooned with some media competing to find the most ‘oppressed’ person – the fabled Black disabled lesbian, for example. But research shows that the concept does have some validity when considering employment.

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The policy context: continued

Multiple markers of disadvantages can drastically reduce the probability of being employed. For instance, disabled people have very low rates of employment when their disability is accompanied by other factors, such as lone parenthood, belonging to an ethnic minority group or a lack of educational qualifications. Pakistani and Bangladeshi women are more likely to have three additional disadvantaging characteristics other than ethnicity: having young children, lower educational qualifications and living in an area with relatively high unemployment rates.

However, evidence suggests that this is not a simple phenomenon and is only true in a few special cases.

The policy context: continued

Within employment, third country nationals of both genders tend to be heavily concentrated in particular sectors of the labour market. But women with a migrant background are disproportionately found employed in low-skilled, low-paid jobs, in atypical or precarious employment in sectors such as personal and domestic services, cleaning, catering, health and care.

(Ashiagbor, 2009; European Monitoring Centre on Racism and Xenophobia, 2003 at 15)

Intersectionality and anti-discrimination law

- Intersectionality theory:
 - That the law disadvantages those who put forward claims premised on multiple rights or intersectional identities – e.g. claimants must plead either race or sex discrimination
 - Courts tend to minimise complexity: concentrate on one ground only; or treat discrimination as additive not intersectional
- Multiple / additive claims
 - *Nwoke v Government Legal Service* (1996) *Equal Opportunities Review*, 6
- Intersectional claims
 - *DeGraffenreid v General Motors*, 413 F. Supp 142 (ED Miss. 1976)
 - *Jeffries v Harris County Community Action Association*, 615 F. 2nd 1025 (5th Cir. 1980)
 - *Bahl v Law Society* [2004] IRLR 799

The structure of EU anti-discrimination law

- Framework Equality Directive 2000/78, recital 3:
- Race Directive 2000/43, recital 14:

In implementing the principle of equal treatment irrespective of racial or ethnic origin, 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.

The structure of EU anti-discrimination law

The structure of the directives creates several potential obstacles:

- segmentation into three different sets of directives: ‘atomised’ nature of the grounds in EU anti-discrimination law
- Directives have differing material scopes, with the Race Directive outlawing discrimination over a wider scope than the Framework Equality Directive
- definitions of direct and indirect discrimination

Coping with intersectionality

- multiple discrimination does not merely consist in the adding of two or more sources of discrimination; the result is qualitatively different or *synergistic* (Crenshaw)
- synergistic nature of such discrimination makes it harder to frame policy and law; makes discrimination more difficult to monitor
- many national statistics bodies within the EU do not collect data
 - on race or ethnicity,
 - or data disaggregated by race and gender,
 - or data disaggregated by other grounds of discrimination

Coping with intersectionality:

Differing national paradigms of race across the EU

- Alternative strategies of models of inclusion: assimilation, integration, multiculturalism. Some definitions of contested concepts:
 - **Assimilation:** process of absorption of minorities, or the uni-directional process by which minorities adopt a commitment to an orthodox, hegemonic majority group identity and culture
 - **Integration:** interchangeable with assimilation; or more commonly – a two-way process of social interaction involving change in values, norms and behaviour for both newcomers and members of the existing society
 - **Multiculturalism:** the political accommodation of minority ethnic and religious groups in the context of immigration to western European countries from outside the west

See: Hall, 2000; Modood, 2007; Vasta, 2007; Castles et al, 2003; Joppke, 2004

The way forward

- Comparability of statistical data across EU member states
 - European Monitoring Centre on Racism and Xenophobia ⇒ EU Fundamental Rights Agency
 - Secondary collection of data through national focal points: ‘the aim of this network is to provide the Agency with objective, reliable and comparable socio-legal data on fundamental rights issues to facilitate the FRA's comparative analyses at EU level’ [FRANET, launched in July 2011, replaces the former FRALEX and RAXEN networks]
- Enforcement of multiple and intersectional discrimination claims through hard and soft law
 - Treaties and Directives
 - ‘mainstreaming’ i.e. integrating concern for gender throughout all EU policies

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Contact details

Dr Diamond Ashiagbor

Professor of Labour Law

School of Law

SOAS, University of London

Thornhaugh Street

LONDON WC1H 0XG

T: +44 (0)20 7898 4246

F: +44 (0)20 7898 4619

E: da40@soas.ac.uk

W: <http://www.soas.ac.uk/staff/staff61170.php>