



MULTIPLE DISCRIMINATION – European perspective

Doc. dr. Snjezana Vasiljevic, M.Phil (Cantab)

University of Zagreb, Faculty of Law

E-mail: svasilje@pravo.hr

University of Zagreb, Faculty of Law

+ The definition of multiple discrimination

- **should recognize**, as the current EU legal framework does not, that factors such as gender, age, disability, ethnicity, religion and sexual orientation can interact to create multiple or intersectional disadvantage.
- The fact that the current legislation does not expressly address multiple or intersectional discrimination leaves the most disadvantaged members of society, unable to challenge the discrimination they experience.



INTERSECTIONALITY

- <https://www.youtube.com/watch?v=beDfBYH2RxE>



INTERSECTIONALITY

The term was first used by Crenshaw (1989)

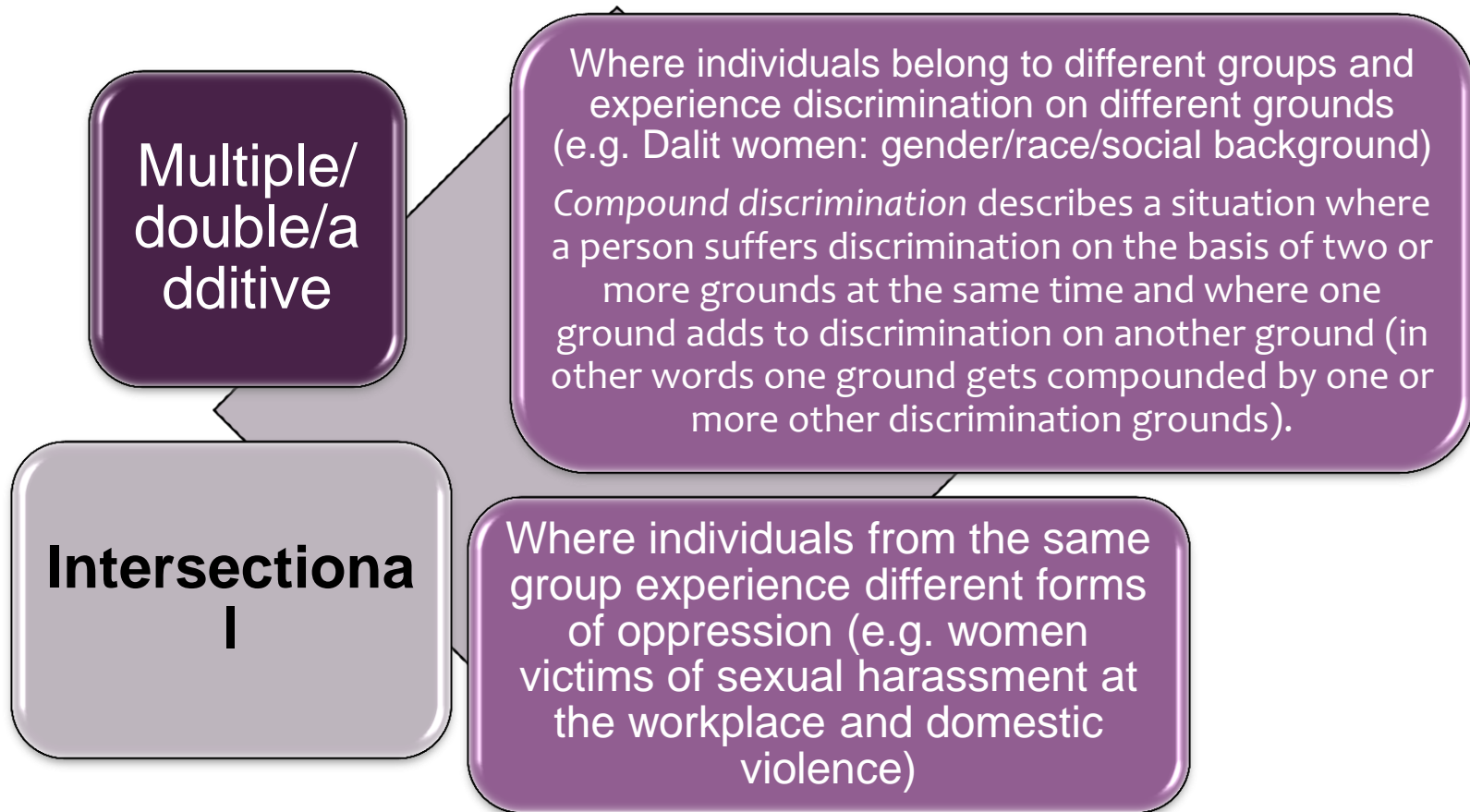
She used the picture of an intersection of streets

“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).”

+ CEDAW

- Story about MD starts from international law
- CEDAW is not really effective – BRINGS FORMAL, NOT SUBSTANTIVE EQUALITY
- E.g. gender equality concept is not uniformly implemented in all state parties
- Reasons? Historical, Cultural, Political

+ Examples



+ CEDAW Recommendation No. 25 on Art 4 (1) of the CEDAW Convention

- Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men.
- **States parties may need to take specific temporary special measures** to eliminate such **multiple forms of discrimination** against women and its compounded negative impact on them.

+ CEDAW Recommendation No. 25 on Art 4 (1) of the CEDAW Convention

- 28. States parties should explain the reasons for choosing one type of measure over another. The justification for applying such measures should include a description of the actual life situation of women, including the conditions and influences which shape their lives and opportunities — or that of a specific group of women, suffering from multiple forms of discrimination
- 38. Where necessary, such measures should be directed at women subjected to multiple discrimination, including rural women.

+ European Convention on Human Rights (1950)

- Article 14 (open-ended clause)
- **Prohibition of discrimination**
- The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. **NO DEFINITION OF MULTIPLE DISCRIMINATION**
- **ECtHR does not recognize multiple discrimination!**
- E.g. Leyla Sahin v Turkey (2004) /ECtHR upheld the ban of wearing Islamic headscarf



ISTANBUL CONVENTION (2014)

10

- Signed by 40, ratified by 18
- Entered into force 1 August 2014
- General obligation – eradicating prejudices , customs, traditions;
- Protection elimination
- Design comprehensive policies
- Scope – VAW- apply in times of armed conflicts

+ ISTANBUL CONVENTION (2014)

- Art 4 ensuring the practical realisation of the principle of equality between men and women
- Prohibition of discrimination
- Effective sanctions
- Abolishing laws and practices which discriminate against
- Open-ended equality clause (20 protected characteristics, including migrant or refugee & marital status)

+ ISTANBUL CONVENTION (2014)

- Comprehensive policies
- Research & data collection
- Art 13 – awareness raising – crucial for prevention
- Art 14 – EDUCATION
- Art 15 – Training of professionals

+ EU Charter of Fundamental Rights

- **Article 21. Non-discrimination** (exhaustive list of protected characteristics)
 - 1. Any discrimination based on any ground such as **sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation** shall be prohibited.
 - 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

+ LEGACY OF ETHNIC RAPE

- <https://www.youtube.com/watch?v=j6H4jSn5PLo>

+ THE CURRENT STATE OF MIND

- Expansion of the EU anti-discrimination law since the Art 13 EC (now Art 19 TFEU) & 26 TFEU
- Most people have multiple identities which can intersect (cumulative effect which is the most prominent)
- Result: discrimination on more grounds **IS INVISIBLE** opposite to the most dominant single axis approach
- **In diverse societies, multiple discrimination occurs on everyday basis**
- However, it is still not recognised as a “equal” ground of discrimination in the European legislation nor in the practice of the most distinguished European courts

+ INTERSECTIONALITY & ANTI-DISCRIMINATION LAW

■ SINGLE AXIS APPROACH

■ Courts recognize only on legitimate ground (e.g. either sex or race) or treat discrimination as additive, not intersectional

■ **COMPARATOR (either actual or hypothetical)** – unnecessary (perhaps that is the reason of reluctance of courts to multiple claims, how to decide if there is no “comparator tool”?)



DIFFERENT CLAIMS

- Multiple/additive claims

- Nwoke v Government Legal Service (1996)

- Intersectional claims:

- DeGraffenreid v General Motors

- Bahl v Law Society (2004) IRLR 799

- Leyla Sahin, ECtHR

+ HYPOTHESES

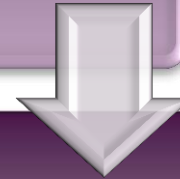
EU does
recognize
multiple
discrimination

Consistent
implementation
of anti-
discrimination
law in Member
States

Hierarchy of
equality

+ VARIABLES

Inconsistent equality mechanisms



No unique unified data collection
& anti-discrimination policy



No effective remedy



THEORETICAL FRAMEWORK

FEMINIST
THEORY

BLACK
FEMINIST
THEORY
(CRITICAL
DISCOURSE)

THEORY OF
DIFFERENCE



FEMINIST THEORIES

■ No unified theoretical model applicable

- Different forms of oppression lead to the different forms of discrimination & violence against marginalised groups (Young, 2005)
- Different stereotypes (racism, sexism, hetero/homosexism)

■ Universal forms, standards and politics – unacceptable (MacKinnon, Dworkin)

- Other theories (biological, cultural, evolutionist) – aggression/domination – social/genetic



BLACK FEMINIST THEORIES – CRITICAL DISCOURSE

- **White feminism ignored the experience of black women** (King, 1998)
- White feminism forgot the notion of adjective “white” (Robinson, 2000)
- **White feminism uses the view of white women** (Crenshaw, 1989)
- The story of intersectional discrimination started to be visible in 2008 during the US presidential elections (New York Times)

+ THEORY OF DIFFERENCE Judith Butler (1990)

more difference
we have in
society – more
possibility for
oppression..lead
to....

different
experiences
created by
individuals
(gendered
racism)...lead
to...

intersectional
experiences
(forced
sterilization,
ethnic rapes,
honour crimes)

+ THERE IS A NEED TO WORK ON COMPARATIVE ANALYSIS

- Document (policy) analysis
- Statistical data
- Interviews
- Court cases (ECJ, ECHR, national courts)
- Comparative legal analysis at different levels (international, EU, CoE, National – GB, Germany, Croatia)
- Literature review

+ PROBLEMS

- Many national institutional mechanisms & equality bodies do not collect data on:
- Race or ethnicity
- Data disaggregated by race & gender
- Data disaggregated by other grounds of discrimination

+ LIMITATIONS

LACK OF
CASE LAW

LACK OF
APPROPRIATE
LEGAL
FRAMEWORK

LACK OF
RESEARCH

LACK OF
RAISING
AWARENESS

+ THEORETICAL OBSTACLES

- Feminist legal theorists does not sufficiently identify the differences in race, class, and sexuality. The differences need to be interpreted.
- While it is necessary to determine similarities among women, it is important not to ignore differences, because each relationship that does not recognize differences and does not take them into consideration is not a comprehensive relationship.



THEORETICAL OBSTACLES

- A normative principle that respects only what we have in common does not respect women's individuality, ignores differences (experiences of women of African-American descent, migrant women, lesbians, women with disabilities, etc.), and sends out the message that the differences among women are not relevant.

+ What can we do? Enforcement of positive action measures?!?

- Raising awareness on racial/religious discrimination – rigorous sanctions for hate crimes
- Women & minority quota in politics/management boards of public/private companies? e.g. recommended female quota is 40% (zip model), how to set up the minority quota?
- Private sector initiatives/states award benefits for companies which promote diversity.
- Media present the most successful women belonging to different vulnerable groups (e.g. why women with disabilities or different ethnic background cannot be the directors of public companies)

+ Where it happens?

- The **labor market**, appears to be the sector where multiple discrimination occurs most often.
- Problem: In many MS, the scope of anti-discrimination legislation outside employment and occupation is limited to only gender and race/ethnic origin.
- New phenomenon – **mobbing, bullying at the workplace** (good example of multiple discrimination/intersection of sex, age, sexual orientation, disability, etc.)

+ *Is EU law capable of addressing multiple and intersectional discrimination yet?*

- Primary and secondary EU law (Article 13 of Amsterdam Treaty, Equal Treatment Directives)
- EU legal framework is lacking a clear definition of intersectional discrimination.
- However, it is possible to read the legal framework in a way that made it possible to offer adequate solutions to intersectional discrimination (teleological legal interpretation).



Is EU law capable of addressing multiple and intersectional discrimination yet?

Despite this EU directives do recognize that different grounds can intersect, in relation to gender the preamble to both the

■ Race and the Employment Equality Directives

..... stipulate that “in implementing the principle of equal treatment, the Community should, in accordance with Article 3 (2) of the Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”

■ Member States do not fully address Multiple Discrimination.



In the field of **nationality discrimination**, the ECJ has decided some cases concerning **migrant women**.

- The question would arise whether the intersections of gender and nationality discrimination were addressed. Cases such as *Allue* C-259/91, *Spotti* C-272/92,, *Schöning-Kougebetoulou* C-15/96 and *Scholz* C-419-92 while mainly decided under free movement of workers, also concerned women.
- The facts only partly allow the conclusion that these women had followed their husbands to their country of origin.
- The discrimination experienced by these women did not seem to have a gender dimension. Although their social situation is surely more typical for women than for men, these were not necessarily cases of intersectional discrimination.

+ Discrimination & free movement rights

- The gender dimension is more evident in cases where women engaged in **prostitution** have relied on **free movement rights**, as in *Adoui and Cornuaille* C-115/81 & 116/81 and *Jany et al.* C-268/99.
- In these cases the CJEU could, at least in theory, have considered whether restriction of free movement of a predominantly female group of workers would be in conflict with the principle of gender equality as a general principle of Community law (Burri & Schiek, 2009) .



Several cases have in the past concerned the **interaction of age and gender discrimination**

- Ms Defrenne C-149/77 and Ms Marshall C-152/84 were compulsorily retired at an earlier pension age than men would have been; Mrs Steinicke C-77/02 and Mrs Kutz-Bauer C-187/00 were denied a specific favourable form of part time work at an age at which men were still allowed access to this 'old age part time' (*Altersteilzeit*).
- These cases were decided when discrimination on grounds of age was not prohibited under Community law. Arguably the Court could not have been expected to consider both forms of discrimination (Burri & Schiek, 2009).

+ Age & sex discrimination?

- In the recent *Lindorfer* C-227/04 however, the CJEU did have the opportunity to consider both age and sex discrimination: the transfer of pension rights for Community employees distinguished on grounds of age and also on grounds of sex by reference to actuarial tables.
- The Court re-opened the proceedings in order to re-assess the question of age discrimination after its *Mangold* decision, but, guided by AG Sharpstone (2006) held that there was no age discrimination (Burri & Schiek, 2009).



PRELIMINARY REFERRALS BASED ON COLEMAN CASE C 303/06

■ I. DOES THE CASE FALL UNDER EU LAW? Yes

- 1. Are the parties involved covered? Yes: an employee and her employer
- 2. Is the protected ground covered or does the issue have relevance for a protected ground? Yes: disability; the question is whether or not harassment in association with disability is covered

■ II. IS THE FIELD COVERED? Yes: employment.



PRELIMINARY REFERRALS BASED ON COLEMAN CASE C 303/06

- **III. DOES EUROPEAN LAW APPLY TO THE WHOLE OR GREATER PART OF THE PERIOD IN WHICH THE DISCRIMINATION TOOK PLACE?**
- Yes, harassment occurred after the EED had been transposed into national law
- **IV. IS THERE A LEGAL ISSUE THAT NEEDS INTERPRETATION BY THE ECJ (is the key concept correctly transposed or not transposed at all)?**
- Yes: is the mother facing harassment on the basis of her association with disabled child? **(recognized as associated discrimination not intersectional!!!!)**
- The reference from the Employment Tribunal London South only considered discrimination on grounds of her son's disability. Arguably, gender role expectations were also a factor in the case, though it was not relied upon before the national court.



cases

- The largest number of cases is reported under the heading of **gender and racial or ethnic origin (e.g. Roma women)**.
- The next large number of cases are combinations **gender and family status/reconciliation of paid and family work (including part time work)**,
- **cases of gender and age.**

+ *EU member states addressing multidimensional problems of equality?*

- Not explicitly
- A limited amount of case law has emerged on the issue of EU.
- E.g. Croatian general Anti-discrimination Act prohibits multiple discrimination

+ The way forward.....

- Religion is expressly protected as separate ground under EED
- However, an alleged victim of religious discrimination may have an interest in associating religion with the ground of race because, as EU law currently stands, protection from race discrimination is broader in scope than protection from religious discrimination
- Need for comparable statistical data across the EU and CoE (importance of the FRA & European Monitoring Centre on Racism & Xenophobia)
- Enforcement of multiple & intersectional discrimination through hard & soft law, including gender mainstreaming concept in different European policies

+ Community-law definition of multiple discrimination necessary?

- Yes, a community-law definition of the term is necessary.
- EU anti-discrimination and equal treatment legislation does recognize that different protected grounds can intersect, but there is no explicit prohibition of multiple discrimination.
- New legislation should cover all grounds of discrimination and in all areas (not just within the employment and occupation fields) such as social protection, including social security and healthcare; social benefits; education; and access to and supply of goods and services which are available to the public, including housing.

+ *How legal norms on intersectional discrimination can be applied in Europe?*

- In some European states, specialized equality bodies constructed for that specific purpose have not been consistent and effective in implementing measures defined by existing legislation neither proven to be coherent with new standards introduced by European Community law.
- **Due to legal limitations (division of powers of different equality bodies) it is impossible to track multiple discrimination).**

+ *How legal norms on intersectional discrimination can be applied?*

- Some European countries fail in harmonizing domestic laws in the field of race and gender with each other.
- The lack of full understanding of the **basic concepts of equality** - equality legislation is full of gaps and definitions, often literally adopted from the EU legislation.
- No recognition of multiple discrimination in practice



EXAMPLE OF LEGAL FRAMEWORK – SINGLE AXIS APPROACH

- Anit-discrimination provisions scattered all over national legislation ...e.g.
- Gender Equality Act
- Domestic Violence Act
- Same-sex Unions Act
- General Anti-discrimination Act
- Other laws prohibiting discrimination: Labour law, Family law, Criminal law, Media law, Law on scientific work and high education



EXAMPLES of INSTITUTIONAL MECHANISMS - SINGLE AXIS APPROACH

- Governmental Office for Equal Opportunities
- Parliamentary Committee for Equal Opportunities
- Parliamentary Committee for Human Rights
- Ombudsperson for Human Rights
- Ombudsperson for Gender Equality
- Ombudsperson for people with disabilities
- Ombudsperson for children

+ SANCTIONS- legal dilemma

- Dissuasive effect may require the sanction to be greater than what it would have been if the discrimination had related to just one of the protected grounds
- For example, multiple discrimination must carry higher penalties than 'single' discrimination.
- It seems that in the natural laws of the MS the problem of multiple discrimination is rarely addressed in an explicit manner, and if so, then not necessarily in the context of sanctions understood as penalizing measures (e.g. where the law provides "for higher damages because of the aggravated conducted of the discriminator.")



RECOMMENDATIONS

- 1. Research
- 2. Legislation
- 3. Education and trainings
- 4. Awareness raising
- 5. Encourage reporting
- 6. Data collection
- 7. Promoting good practices