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"THE PHENOMENON OF MULTIPLE DISCRIMINATION AND ITS PROTECTION UNDER THE ANTI-DISCRIMINATION LEGISLATION"

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Abstract

The phenomenon of multiple discrimination has been recognized in international law and the law of the European Union, subsequently the gender and anti-discrimination Directives, but it was not clearly defined. Thus effective protection and mechanisms for countering discrimination on multiple grounds such as racial or ethnic origin, gender, religion or belief, disability, age or sexual orientation are lacking across the board. European experiences show that there is the risk of not efficiently covering this type of discrimination with the structure of the existing anti-discrimination legislation.This paper elaborates the position of multiple discrimination in the existing anti-discrimination legislation, specifically the European Union law. The paper analyses the types of multiple discrimination, such as cumulative or additional discrimination and intersectional discrimination. Furthermore, the paper identifies the key challenges linked with protection of multiple discrimination cases, such as differences in the substantive and in the personal coverage of the anti-discrimination legislation, differences in the exceptions of specific discriminatory grounds, and difficulties in finding a comparator in cases of indirect multiple discrimination. Finally, the paper presents ways forward in countering multiple discrimination, especially the use of Article 14 from the European Convention on Human Rights, which contains an open list of grounds and a general justification, as well as some progressive national legislations such as the Irish Equal Status Act or the German General Act on Equal Treatment. The text uses results from research and surveys that have been conducted in the European Union and draws conclusions from the international and national case law.

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Keywords: *multiple discrimination, inter-sectional discrimination, anti-discrimination legislation*

INTRODUCTION

The principle of equality is a fundamental principle of human rights, which is based on the equal worth and dignity of all human beings. This principle is articulated in all international and regional human rights instruments (Poposka, 2013, pp.1-2). Equality is an evolving concept and distinction should be made between formal, *de jure* equality and substantive, *de facto* equality. Namely, the formal equality that draws from the Aristotelian teaching (*Ethica Nicomachea*, V.3), or as legally provided equality, is established when a legal framework exist that treats all persons equally in relation to their enjoyment of rights and freedoms disregarding the effect of that treatment. From another side, substantive equality assures equal opportunities for all and objective equality in the result, not only in the treatment. Differences between groups are taken into consideration. The aim of a democratic society is to accomplish substantive equality (Poposka, 2012, pp.29-30). This type of equality is stipulated in a clear manner in the contemporary theory of *multidimensional inequality*, especially when it tackles multiple discrimination. The theory emphasizes the existence of multi-disciplinary individual and group identities that result in the increased vulnerability of the protected individual and/or group that is presented in interlink with complex structural social factors (Arnardóttir, 2009).

The legal definition of the term discrimination (lat. *discriminare*, *discriminatio*) encompasses unequal, less favourable treatment on the grounds of a personal protected characteristic, the discriminatory ground that includes qualifications and differentiations in a specific legal context. Discrimination can be observed in different forms such as direct and indirect discrimination, harassment and instruction to discriminate, and in some countries in the *sui generis* form of reasonable accommodation. Multiple discrimination is a specific form of discrimination, occurring when an individual or group experiences discrimination on two or more discriminatory grounds resulting in multiple disadvantages Combating discrimination is part of the social objectives of the European Union (*Defrenne II case*) and in the words of the Court of Justice of the EU in the *Schröder case* "[t]he social dimension is equally if not more important than the economic dimension (paragraph 56)" (Poposka, 2013, pp.2).

In society often one person encompasses several protected characteristics, and thus unequal treatment may occur simultaneously on several grounds. For example, an older worker with back pain could hardly find a permanent job considering the combination of age and health status, or the linguistic and cultural needs of a disabled person belonging to an ethnic community could be neglected when disability related services are provided. Furthermore, women belonging to ethnic groups make up one of the most vulnerable groups in many EU Member-States and wider (Fredman, 2005, pp.13-19). In such cases, multiple discrimination occurs, i.e. discrimination on more than one ground, which does not consist only of the sum of the two discriminatory grounds, but of the discriminatory effect which is quantitatively different, i.e. synergistic. Owing exactly to the synergistic nature of multiple discrimination, it is very difficult to clearly define specific policies and legislative solutions for this phenomenon.

1. MULTIPLE DISCRIMINATION IN ANTI-DISCRIMINATION LEGISLATION

1.1. Types of multiple discrimination

There are two separate types of multiple discrimination. The first type is called *cumulative* or *additional discrimination*, and it occurs when discriminatory grounds overlap (Hannett, 2003). For example, a person is denied entry to a restaurant, because he is Roma in a wheelchair – in this case, the discriminatory grounds are ethnic origin and disability. He can be denied entry due to one of the characteristics, being Roma or being a person with a disability, and in this case it will be single-ground discrimination. But in the same case the person can be denied entry because of both characteristics simultaneously, and in this case this will be cumulative discrimination. In the *Meister* case the applicant claimed that she had been discriminated against on the grounds of her age, sex and origin in the recruitment process where a private company made two successive, identical job advertisements for which Ms.Meister applied, unsuccessfully, without being called for an interview.

The second type is called *intersectional discrimination* and it occurs when there is a unique combination of discriminatory grounds, and the discrimination is at the crossroad between individual grounds protected under anti-discrimination legislation (Fredman, 2005, pp.13-19). For example,

women with African descent, who might not be discriminated against because they are women or because they are of African descent, but because they are women of that particular descent, due to prejudices that affect them. In this case, there is no discrimination either on the ground of gender, nor ethnicity as a single-ground of discrimination, but on both grounds in synergy, ethnic female. It is evident that both characteristics are completely inseparable and the discrimination occurs as a result of stereotyped attitudes or prejudice relating to both of them. As *Crenshaw* argues, multiple discrimination does not simply consist of the addition of two sources of discrimination, the result is qualitatively different, or synergetic (Crenshaw, 1989).

The European Commission study Tackling Multiple Discrimination: Practices, Policies and Laws from 2007 states that, sometimes the term multiple discrimination refers to additive or accumulative discrimination on one hand, or as a general term for both additive and intersectional discrimination on the other (European Commission, 2007). However, despite the fact that examples of multiple discrimination are well known in everyday life, as shown by public opinion polls, the existing anti-discrimination legislation is not able to resolve this problem yet. The answer lies in the fact that the anti-discrimination legislation is designed in such a way that it considers discrimination as a single-dimension fiction and gives an answer to that exact challenge. This is exactly where the paradox lies - the more persons deviate from the 'normal image', the more they are likely to be victims of multiple discrimination, and at the same time, they are less likely to receive appropriate protection against such discrimination.

1.2. Current state of affairs

Multiple discrimination as a phenomenon has been recognized in international and regional, i.e. European, legal documents dealing with human rights and protection against discrimination. It is clearly mentioned but not defined in the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, stating that "[i]n implementing the principle of equal treatment, the Community should, ... aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination." (preamble, paragraph 3). The same rhetoric can be observed in paragraph 14 of the preamble of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, as well as in paragraph 13 of the preamble of the Proposal for a Council Directive on

implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

Furthermore, the European Parliament goes further issuing Resolutions supporting the process of reviewing the implementation of all policies related to the phenomenon of multiple discrimination explicitly mentioning women from minority backgrounds, especially Roma women (paragraph 31 from the European Parliament Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme), and older women and older people from ethnic minorities (paragraph 44 from the European Parliament Resolution of 21 February 2008 on the demographic future of Europe) as possible subjects of multiple discrimination.

On the same note, the Beijing Declaration and Platform for Action emphasises the fact that indigenous women often face barriers both as women and as members of indigenous communities (paragraph 32). The Committee for the Elimination of Racial Discrimination (CERD) in its General Recommendation No. 25: Gender related dimensions of racial discrimination, goes further recognizing that some forms of racial discrimination have a unique and specific impact on women. The Committee states that "[c]ertain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers. Racial discrimination may have consequences that affect primarily or only women, such as pregnancy resulting from racial bias-motivated rape; in some societies women victims of such rape may also be ostracized. Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life." (paragraph 2).

The Committee on the Elimination of Discrimination against Women in its General Recommendation No. 28 stresses the same point as CERD, i.e. that intersectionality is a basic concept for understanding the scope of the general anti-discrimination obligations of States. Namely, the Committee recognised that the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Thus, "[s]tates parties must legally recognize

such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with the Convention" (paragraph 18).

As we can see, the international standards recognise the phenomenon of multiple discrimination, especially of women in relation to another protected characteristic, as a form of discrimination that should be tackled. From another side, a public opinion poll in the EU Member States clearly shows the same, i.e. that citizens of the Union consider that multiple discrimination in a variety of areas of social life is widespread. In the area of housing this percentage is highest and is 37%. Member States where citizens consider discrimination in this area is very or fairly widespread are Greece (52%) and France (58%), while the least proportion of citizens consider discrimination in this area as widely spread in Lithuania (13%) and Bulgaria (10%). In the area of health care the average is 15%. Countries in which this type of discrimination is considered to be widely spread are Greece (27%) and Cyprus (23%), while the least number of citizens who think that this discrimination is widely spread are in Bulgaria (8%) and Finland (9%). Furthermore, the average in the area of education is 24%. Countries in which citizens perceive this type of discrimination as widely spread are Greece (42%) and Cyprus (33%), while the least number of citizens think that this type of discrimination is wieldy spread in Bulgaria (7%) and Slovakia (10%). The average in the area of access to goods and services is 22%, and countries where citizens consider this type of discrimination is widely spread are France (36%) and Sweden (35%), while the least number of citizens think that this type of discrimination is wieldy spread in Bulgaria (7%) and Estonia (8%). Finally, 23% agree that there is very or fairly widespread discrimination based on a combination of factors in the context of buying insurance policies. Countries in which citizens perceive this type of discrimination as widely spread are France (41%) and Belgium (31%), while the least number of citizens consider this type of discrimination to be widely spread in Bulgaria (5%) and Romania (6%) (Flash Eurobarometar 232, 2008, p.7).

In the Republic of Macedonia the situation is the same. Namely, the recent public survey shows that 10,2% of the alleged discrimination falls under multiple discrimination with the following breakdown: 5,6% on two grounds, 2,5 on three grounds, 1% on four grounds, 0,7% on five grounds, 0,3% on six grounds and 0,2 on seven grounds (Mihailovska, Popvik, 2013, p.24). Furthermore, the national Anti-discrimination Law from 2010 in its Article 12 lists multiple discrimination as one of the more severe forms of

discrimination defining it as "discrimination towards certain person on several discriminatory grounds". Austria, Germany, Romania and United Kingdom also address multiple discrimination in their legislation.

2. CHALLENGES IN PROTECTION AGAINST MULTIPLE DISCRIMINATION

There are several challenges linked with the phenomenon of multiple discrimination in the legislation, such as the following: (i) differences in the substantive and in the personal coverage of the anti-discrimination legislation; (ii) differences in the exceptions from discrimination; and (iii) difficulties in finding a comparator in cases of multiple discrimination, especially in the cases of indirect multiple discrimination. All three will be assessed separately.

Firstly, the differences in the personal and material scope of the anti-discrimination legislations is the key problem, because different international human rights treaties and pieces of national legislation protect against different discriminatory grounds, most often defined in exhaustive lists, while such protection is offered only in some of the areas (for example in the area of employment and labour relations, but not in access to goods and services or education). Namely, there is a subtle hierarchy of discriminatory grounds especially in the anti-discrimination legislation of the European Union, i.e. the ground of race and ethnicity has very wide material coverage encompassing employment, education, access to goods and services and social protection. Followed by gender, that encompasses protection in the area of employment and access to goods and services, and on the end protection against discrimination on grounds such as religion and belief, disability, age and sexual orientation covered only in the area of employment and occupation. At the universal level, there are specific human rights treaties prohibiting discrimination against race and ethnicity, disability, and protecting women and children, but at the same time lacking on grounds such as age (elderly), sexual orientation, and broadly understood belief. Therefore, often in cases of multiple discrimination only part of the case is covered by the anti-discrimination legislation, regardless of whether it is a matter of one of the grounds or areas of protection, or both.

This is further complicated owing to the fact that in different countries there are different protective mechanisms, equality bodies or National Human Rights Institutions, mandated with protection against

discrimination for each of the grounds, and there is not a single body, which seriously undermines the competence of such mechanisms, to consider cases of multiple discrimination, especially when one of the grounds is not covered by the envisaged protection. Therefore, in many countries there is the tendency of merging existing bodies, i.e. of grouping them in one body with a wide mandate for protection against discrimination on all grounds listed in the legislation, and having a wide scope of competences. Examples such as France, the United Kingdom and Ireland are some of the many. According to *Solanke*, the consequence of the single dimension logic can be seen in British anti-discrimination law: prior to the Equality Act 2010, there were numerous separate statues covering, for example, race, gender, disability, religion and belief, age and sexual orientation. In order to be successful, a claim had to be brought clearly within the scope of one statute or the other: the Sex Discrimination Act 1975 created the fiction of a women or man with no other identity and the Race Relation Act created the fiction of a person with just a racial identity (Solanke, 2014, p.2).

Secondly, a serious challenge is the differences in the exceptions from discrimination envisaged for various grounds. For example, when considering the case of an older worker with back pain problems (as in the above example), who complains of multiple discrimination, the question arises whether the case will be covered by the general exception envisaged for the ground of age or by the more narrowly defined exception on the ground of health status or disability? In cases of multiple cumulative discrimination, this can be resolved by considering the two grounds separately, disability discrimination, and age discrimination. However, this will be very difficult to do in cases of multiple intersectional discrimination, i.e. when the discrimination is based on a combination of several different grounds that created a synergetic sum. This can be impossible.

Thirdly, a challenge that occurs in practice is the difficulty of finding a comparator in cases of multiple discrimination, especially the cases of indirect multiple discrimination, as well as in presenting a *prima facie* case of discrimination in court procedure. This challenge is significant because available national statistics on complex and specific groups of comparators are lacking. In line with the above stated, an Irish research has shown that there is no information about disabled persons belonging to ethnic communities at the national level, despite the fact that it is more than evident that this group suffers a complex form of discrimination – multiple discrimination perpetrated in a rather subtle manner, as different from the discrimination these persons face because of their disability or their ethnic affiliation. This sub-group often does not have appropriate access to

information about health care or social protection services. Thus, the research has shown that health care service providers most often ignore their ethnic affiliation when designing services for the disabled. At the same time, they are faced with discrimination by their own ethnic community because of their disability (Pierce, 2003).

3. WAYS FORWARD IN COUNTERING MULTIPLE DISCRIMINATION

As stated above, multiple discrimination as a phenomenon has been recognized in international human rights standards. However, a mechanism to counter multiple discrimination has still not been found. Experiences of other countries, especially of the USA, show that there is the risk of not efficiently covering this type of discrimination with the structure of the existing anti-discrimination legislation. Legal theoreticians consider that multiple discrimination can be countered only through the development of a harmonized model of anti-discrimination legislation that will have the same material scope of coverage and similar exceptions for all grounds equally, and which will envisage flexibility in the choice of a comparator (Fredman, 2002, pp.74-75).

Today, this approach can be seen in the widely defined provisions on protection against discrimination under the European Convention of Human Rights, i.e. the provisions of its Article 14, which contains an open list of grounds and a general exception. Therefore, under Article 14, it is not necessary to prove that differences in the treatment are based on one of the envisaged grounds, in light of the fact that the European Court of Human Rights considers the case not tying itself to the limitations set forth under that exception. The case law of the European Court of Human Rights, especially *Thlimmenos v. Greece case*, clearly shows that it is not necessary to reduce the complexity of cases by linking them to only one of the grounds explicitly referred to in the European Convention of Human Rights. This guideline, according to which it is up to the national courts to recognize and accept other discriminatory grounds under the open list of discriminatory grounds, is embodied in the legislations of Finland, Hungary, Latvia, Poland, Slovenia and of the Republic of Macedonia. In Belgium, the Court of Arbitration goes as far as considering the closed list of discriminatory grounds set forth under the legislation as unlawful (Court of Arbitration, Judgment no. 157/2004).

However, according to the opinion of the author, this proposal is not compatible with the existing anti-discrimination legislation of the European Union and if this proposal will apply it will blur the clarity and specific quality that the system guarantees currently. Therefore, an appropriate answer to the question of multiple discrimination should be searched for within the existing system. Two successful examples will be presented below. For a good practice in cases of multiple cumulative discrimination we can analyse the *Maughan v. The Glimmer Man*. In the specific case, the Irish Equality Tribunal considered all grounds (disability, belonging to a traveller community and family status) individually, taking into consideration various exceptions for each of the grounds set forth under the national legislation, the Irish Equal Status Act 2000-2004. In addition, the German General Act on Equal Treatment sets a good example of how to treat cases of multiple discrimination. The Act envisages that in these kind of cases, the justification must pass the test of the stricter exception applicable in the specific case, while ensuring the highest degree of available protection. This method can be applied even without explicit legal grounds and therefore the author considers that the Court of Justice of the European Union could apply this method in the future (Poposka, 2012, pp.115-116).

CONCLUSIONS

The single-dimension fiction of the potential victim of discrimination, rooted in the approach to protection from discrimination, unable the development of policy and legislation to effectively deal with the multiple discrimination phenomenon. Countries such as Austria, Germany, Romania, and United Kingdom address the phenomenon of multiple discrimination in their legislation. In the Republic of Macedonia, multiple discrimination is provided for as a more severe form of discrimination, according to the Anti-discrimination Law.

Challenges remain in dealing with the phenomenon of multiple discrimination in the legislation, such as: differences in the substantive and in the personal coverage of the anti-discrimination legislation; differences in the exceptions from discrimination; and difficulties in finding a comparator in cases of multiple discrimination, especially in the cases of indirect multiple

discrimination. Strategies for tackling this phenomenon vary, from the development of a harmonized model of anti-discrimination legislation that will have the same material and personal scope of protection and similar exceptions for all grounds equally, to a more flexible approach in creating frames for this phenomenon by developing case-law ensuring the highest degree of available protection for the particular group or sub-group in question.

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