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## Multiple Discrimination and the European Union – what Lessons Can Be Learnt from Canada and the US?

Discrimination is a social phenomenon and as such has been evolving, with new forms emerging and gaining importance. An interesting example in this respect is multiple discrimination, based on more than one ground. This contribution presents the definition and types of multiple discrimination as well as the ways of dealing with it in practice. The author first presents those jurisdictions which try to apply an intersectional approach to this form of discrimination, that is Canadian and US cases. Then the regulations of the EU as well as the case law of the Court of Justice are described. The conclusion contains a comparison between the EU approach on the one hand and those two national jurisdictions on the other. The author also tries to formulate some suggestions as to what the EU could do in future in order to strengthen protection against multiple discrimination.\*

### 1. Introduction

Multiple discrimination was defined in American literature by Kimberlé Crenshaw at the end of the 1980s. She underlined that ‘in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks, in sex discrimination cases, the focus is on race- and class-privileged women. This focus on the most privileged group members marginalises those who are multiply burdened (...).’<sup>1</sup> The author concentrated on the situation of Black women but the same remarks can be referred to the combination of other grounds on which discrimination is based, eg sex and ethnic origin, sex and age, race and disability, etc. This is connected with the fact that people do not have just one feature, on the contrary, they fit into different categories. If a person suffers discrimination on the basis of more than one ground, such as gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, he or she is treated in a particularly disadvantageous way. The result of such a discriminatory practice is qualitatively different from the situation when discrimination is based only on one criterion.

\* K. Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ in D.K. Weisberg (ed), *Feminist Legal Theory: Foundations* (Temple University Press 1993) 383.

Therefore, multiple discrimination should be distinguished as a particular form of adverse treatment. Still, it is not an easy task because of its synergistic nature. As a result it is not only difficult to define this specific concept in simple terms, but also to apply and monitor it, eg by collecting data in the form of statistics. The experience of many states demonstrates that multiple discrimination creates problems for both law-makers and organs applying the law. It is, however, interesting to note that there are some jurisdictions where such multiple discrimination claims are dealt with in a special way. Instead of applying a traditional comparator approach they concentrate on the situation of the group to which the person with multiple identities belongs and take into account the whole social and political context as well as stereotypes which exist in the society. Such an approach is applied by some Canadian and US courts.

This is the main reason why, after presenting the definitions of multiple discrimination and its specific features, the third and fourth parts of the article concentrate on the legislation and the case law of Canadian and US courts. They try to develop the so-called intersectional approach to multiple discrimination, so it is interesting to present their judgments given in cases where discrimination is based on more than one ground. The question also arises how multiple discrimination can be addressed within the framework of EU anti-discrimination law. The European Union case is interesting for several reasons. First of all, in recent years the EU has been involved in combating discrimination on various grounds and in many areas, connected not only with employment. At the regional level the EU has been the most active in pursuing policy and law reform initiatives to recognise, define and respond to multiple discrimination.<sup>2</sup> Moreover, the EU can influence the regulations and judicial practice of its 28 Member States. Therefore, its legislation and the case law of the Court of Justice on multiple discrimination are presented in the fifth part of the article. The conclusion contains a comparison of approaches applied within the jurisdictions of Canada and the US with that of the EU. Such a comparison should show if and what further actions are required to tackle multiple discrimination at the EU level.

## 2. Definitions and types of multiple discrimination

The principle of equality precludes comparable situations from being treated differently and different situations from being treated in the same way, unless the treatment is objectively justified. This notion is based on the Aristotelian equality formula and has a formal character. In practice it requires comparisons between different or

<sup>2</sup> C. Sheppard, 'Multiple Discrimination in the World of Work' (2011) Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, Working Paper No. 66. Geneva, 16.

similar situations. Therefore, a formal equality approach appears to be insufficient in cases of multiple discrimination. In order to deal with claims of discrimination based on more than one ground the concept of substantive equality should be taken into account as it concentrates on ensuring equality in practice. Moreover, it does not concentrate on the situation of individuals but the whole group to which they belong and makes it possible to take into account certain stereotypes.<sup>3</sup>

Discrimination as a legal concept is difficult to define. Still, there is a consensus that this term is not equivalent to distinction as such, but occurs when the differential treatment is based on a criterion prohibited by law<sup>4</sup> and is not justified. Discrimination by definition has been understood to occur when one group is treated less well than another either directly or indirectly through the inequitable effects of laws and policies.<sup>5</sup> Consequently, anti-discrimination law has been based on comparison, eg the treatment of women has been compared to the position of men, the disabled to people without disabilities, etc.

However, this traditional approach does not seem appropriate in cases of multiple discrimination which refers to situations of differential treatment based on more than one ground, such as gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This is the basic description of the phenomenon though in literature it has been given several meanings as it can manifest itself in different ways. In order to ensure greater transparency the best approach is to treat multiple discrimination as an umbrella term for all situations where discrimination occurs on more than one ground and to distinguish its three different types.

The first one occurs when discrimination is based on several grounds but they apply in different circumstances. For instance, a young woman may experience discrimination on the basis of her gender in one situation and because of her age in another. As a result each of these unlawful acts could be dealt with separately in legal proceedings.<sup>6</sup> Thus, this kind of multiple discrimination does not seem to require special regulations or approaches although persons affected by it should merit attention, simply because of the frequency of discrimination they experience or are in danger of experiencing.<sup>7</sup>

The second one refers to the situation where a person suffers discrimination on the basis of two or more grounds at the same time. In this situation one ground

<sup>3</sup> T. Hervey and J. Shaw, 'Women, Work and Care in EC Law' (1998) 8 (1) *Journal of European Social Policy* 43, 49.

<sup>4</sup> M. Miné, 'Les concepts de discrimination directe et indirecte' (2003) 4 (3) *ERA-Forum* 30, 30.

<sup>5</sup> C. Sheppard (n 2) 26.

<sup>6</sup> P. Uccelari, 'Multiple Discrimination: How Law Can Reflect Reality' (2008) 1 *The Equal Rights Review* 24, 25.

<sup>7</sup> T. Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Institute for Human Rights, Abo Akademi University 2002) <<http://cilvektiesibas.org.lv/site/attachments/01/02/2012/timo.pdf>>.

adds to discrimination on another ground and creates an added burden. Therefore, it is called compound, cumulative or additive discrimination. Such a case arises, for instance, where several requirements based on different grounds are listed in a job description and the result is such that the person does not get the job not because he or she does not fulfil one condition but two or more. Compound discrimination deserves major attention, as its results are very intense in nature.<sup>8</sup> Consequently, it requires additional activities of authorities making and applying the law.

The third type of multiple discrimination (called intersectional discrimination) takes place where two or more grounds operate and interact with each other at the same time in such a way that they are inseparable. Such discrimination arises out of the combination of various oppressions which together produce something unique and distinct from any other form of discrimination standing alone.<sup>9</sup> The distinction between these types of multiple discrimination is clarified by Kimberlé Crenshaw<sup>10</sup> in the following way:

Black women can experience discrimination in ways that are both similar to and different from those experienced by white women or 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 discrimination – the combined effects of practices which discriminate on the basis of race and on the basis of sex. And sometimes, they experience discrimination as Black women – not the sum of race and sex discrimination, but as Black women.

In the third situation a victim will not be able to show that, but for her/his race or gender taken separately, she/he would have been treated differently. Therefore, in legal proceedings the grounds must be dealt with together. As a result this type of multiple discrimination causes the biggest practical problems and requires a special approach which takes into account not only the complexities of the combination of grounds, but also different historical, socioeconomic and political factors. Unfortunately, most anti-discrimination laws, including the EU law, have a single-identity focus and they list categories sequentially not addressing intersectional or multidimensional discrimination explicitly.<sup>11</sup>

<sup>8</sup> T. Makkonen (n 7) 13.

<sup>9</sup> S. Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 (1) *Oxford Journal of Legal Studies* 65, 68.

<sup>10</sup> K. Crenshaw (n 1) 385.

<sup>11</sup> S.B. Goldberg, 'Intersectionality in Theory and Practice' in E. Grabham, D. Cooper, J. Krishnadas and D. Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 132.

### 3. Canadian legislation and case law

For a long time multiple discrimination was not explicitly regulated in Canadian legislation. However, section 15 of the Canadian Charter of Rights and Freedoms of 1982, which is part of the Canadian Constitution, provides that ‘every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability’. The list of grounds mentioned in this equality clause is not exhaustive and thus allows the courts to take into account new grounds as well as their combination. The Canadian Human Rights Act of 1985<sup>12</sup> predicted a closed list of grounds (race, national or ethnic origin, colour, religion, age, sex, marital status, family status, sexual orientation, disability and conviction) but it was amended in 1998. As a result the additional clause 3(1) titled ‘multiple grounds of discrimination’ was added. It provides that ‘for greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds’. This clause is a good basis for the case law of the Supreme Court of Canada and other courts and tribunals which have already addressed the issue of multiple discrimination.

The first signs of an intersectional approach in the case law of the Supreme Court of Canada can be seen in Madam Justice L ‘Heureux–Dubé’s dissenting opinion expressed in the *Mossop* case.<sup>13</sup> She underlined:

It is increasingly recognised that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.

However, the majority decision given in this case was based on a single ground approach and the discrimination claim was dismissed. Another relevant decision was delivered in *Law v Canada*,<sup>14</sup> where the majority came to the conclusion that a party can claim discrimination based on more than one of the enumerated and analogous grounds. In such a situation,

<sup>12</sup> RSC 1985 c. H-6.

<sup>13</sup> 1 SCR 554 [1993].

<sup>14</sup> 1 SCR 497 [1999].

(...) this part of the discrimination inquiry must focus upon whether and why a ground or confluence of grounds is analogous to those listed in section 15(1). This determination is made on the basis of a complete analysis of the purpose of section 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under section 15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity.

The *Law* case acknowledges intersectionality and takes into account contextual factors, such as the nature and situation of the individual or group at issue on the one hand, and the social, political and legal history of Canadian society's treatment of the group on the other. According to this judgment human dignity becomes an important value – if it is harmed by the additional burden or denial of certain benefits then discrimination can be found even though it is based on grounds not predicted in section 15 of the Canadian Charter of Rights and Freedoms. In the literature it is suggested that a detailed intersectional analysis could include the following guidelines: a) do the facts in question indicate an overlap or intersection of more than one ground of discrimination? (b) what are the subjective contextual factors that impact the individual or group in question? (c) can objective contextual factors be identified that help us determine the impact of the discrimination?<sup>15</sup>

An example of such an analysis can be found in the *Sparks* case,<sup>16</sup> where the complainant – a public housing tenant – argued that she was treated differently than private sector tenants on the basis of race, sex and income (poverty). The Nova Scotia Court of Appeal agreed with these arguments and found discrimination based on the combination of these grounds. It underlined that 'the public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in section 15(1)'. Although the court did not refer to multiple discrimination, there is no doubt that it applied an intersectional approach. It considered not only the situation of the plaintiff but also the social position of the whole group she belonged to. Thus both subjective and objective contextual factors were taken into account.

A very similar approach was followed by the Ontario Court of Appeal in the *Falkiner* case,<sup>17</sup> where discrimination based on multiple grounds was recognised. The respondents claimed that they had been discriminated against on the basis of more

<sup>15</sup> K. Steinberg, 'The New Ontario Human Rights Code: Implications for an Intersectional Approach to Human Rights Claims' (Unpublished manuscript, University of Toronto 2009) 37.

<sup>16</sup> 119 NSR (2d) 91 [1993].

<sup>17</sup> 212 DLR (4th) 633 [2002].

than one personal characteristic (receipt of social assistance, sex and being single mothers). Therefore, they referred to three comparator groups: persons who are not on social assistance, male social assistance recipients and in relation to single mothers – other social assistance recipients. The Court agreed with such a general approach and stated that ‘multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged’. As a result it analysed all the alleged forms of discrimination and came to the conclusion that the appellants had received differential treatment on the basis of three prohibited grounds: sex, marital status and receipt of social assistance.

In the *Baylis-Flannery* case<sup>18</sup> the Human Rights Tribunal of Ontario not only found that the plaintiff was sexually and racially harassed (so it took into account the intersection between two grounds) but it also decided that she should be given restitution for all of the infringed grounds. The tribunal underlined that:

The danger in adopting a single ground approach to the analysis of this case is that it could be characterised as a sexual harassment matter that involved a Black complainant, thus negating the importance of the racial discrimination that she suffered as a Black woman. In terms of the impact on her psyche, the whole is more than the sum of the parts: the impact of these highly discriminatory acts on her personhood is serious.<sup>19</sup>

Consequently, she was awarded damages for both sex and race discrimination as well as extra damages for mental anguish and special damages for loss of income. This decision shows that serious forms of discrimination which are intersectional in nature should be punished more severely than differential treatment based on one ground. In other words an intersectional approach should be applied not only to the assessment of the facts but also with respect to liability and remedy.

On the whole it can be seen that Canadian courts try to apply a contextual analysis of cases, taking into account both subjective and objective factors which relate in particular to the position of the whole group the discriminated person belongs to. This requires the examination of historical disadvantages, social and political context as well as stereotypes which exist in the society. The above-described cases confirm that it is possible to take into account discrimination based on all the grounds invoked by the parties, not just those which are the least controversial. This appears to be the most important lesson for the Court of Justice of the European Union and for the courts of its Member States.

<sup>18</sup> HRTO 28 [2003].

<sup>19</sup> HRTO 28 [2003] para 145.

#### 4. Multiple discrimination in the US: the case law and activities of the United States Equal Employment Opportunity Commission

The most important provisions on discrimination in employment are included in Title VII of the Civil Rights Act of 1964. It prohibits discrimination on the basis of race, colour, religion, sex and national origin. This is an exhaustive list of grounds and at the same time quite narrow. Other criteria of discrimination such as age or disability are covered by separate acts, eg the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990 (amended in 2008). However, this legislation does not refer to the combination of two or more grounds.

This was underlined in the *DeGraffenreid* case,<sup>20</sup> where the US District Court for the Eastern District of Missouri dismissed a claim based on both race and sex discrimination. It held that:

The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.

Nevertheless, not all US courts decided to follow such an approach and in the *Jefferies* case<sup>21</sup> the Court of Appeal applied a 'sex plus' analysis to a claim of multiple discrimination brought by a black woman. It was said that Title VII of the Civil Rights Act of 1964 permitted employment discrimination claims based on any or all of the listed characteristics. According to the Court 'recognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females'.<sup>22</sup> Such an approach permitted claims involving multiple grounds.

Unfortunately, this decision was subsequently limited by the US District Court for the District of Columbia in the *Judge* case<sup>23</sup> as it stressed that the only possible combination of grounds is that of sex plus one other criterion of discrimination. Referring to the *Jefferies* case it noticed that:

<sup>20</sup> 413 F Supp 143 [1976].

<sup>21</sup> 615 F 2d 1025 [1980].

<sup>22</sup> See F.D. Weatherspoon, *African-American Males and the Law: Cases and Materials* (University Press of America 1998) 117.

<sup>23</sup> 649 F Supp 770,780 [1986].



(...) it turns employment discrimination into a many-headed Hydra, impossible to contain within Title VII's prohibition. Following the *Jeffries* rationale to its extreme, protected subgroups would exist for every possible combination of race, color, sex, national origin and religion.

The limitation created by the *Judge* decision reflects a desire by the courts to keep the complexity of discrimination law to a minimum but it appears to be arbitrary and it does not take into account the situation of other subgroups, eg black lesbians or all other persons whose social nature is not limited to two factors.<sup>24</sup>

Other judgments confirm that the analysis of multiple discrimination concentrates on the combination of two grounds. For instance, in the *Lam* case<sup>25</sup> the Court of Appeal underlined that 'like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women (...) when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors'. Intersectional claim was also taken into account in the *Jeffers* case<sup>26</sup> where the Court underlined that 'some characteristics, such as race, color, and national origin, often fuse inextricably. (...) Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination.' It also noticed that persons with multiple identities have often been subject to certain stereotypes. A similar approach is applied in cases concerning sexual harassment, eg in the *Anthony* case<sup>27</sup> it was found that the plaintiff was subject to certain incidents which were offensive on the ground of both race and sex and as such created a hostile environment.

Still, many courts have refused to abandon a single-factor analysis with respect to intersectional claims which has caused not only unnecessary losses for plaintiffs but also reluctance by many claimants to plead discrimination or harassment based on two or more grounds.<sup>28</sup> Thus, the current position of US courts is specific – it is based on a case-by-case approach and does not take into account all possible combinations of grounds. Therefore, it is suggested that the United States Equal Opportunity Commission (a federal agency created to enforce federal laws prohibiting discrimination in employment) should issue guidelines instructing judges how to deal with intersectional claims.<sup>29</sup>

<sup>24</sup> See E. Britton, 'Multiple Discrimination in the USA' (2008) <<http://suite101.com/article/multiple-discrimination-in-the-usa-a45059> (date of access: 20.01. 2015)>

<sup>25</sup> 40 F 3d 1551 [1994].

<sup>26</sup> 264 F Supp 2d 314 [2003].

<sup>27</sup> 898 F Supp 1435 [1995].

<sup>28</sup> B.A. Areheart, 'Intersectionality and Identity: Revisiting a Wrinkle in Title VII' (2006) 17 *George Mason University Civil Rights Journal* 199, 214 and 229.

<sup>29</sup> B.A. Areheart (n 28) 232.

The United States Equal Opportunity Commission (2006) has tried to take this problem into account, eg in the Compliance Manual on racial discrimination it refers to its intersectional form and underlines that:

Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. (...). The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEOC statute – e.g., race and disability, or race and age.

Thus, the EEOC suggests the possibility of embracing several grounds in one claim so it rejects the ‘sex plus’ rationale recognised by some courts. It appears that the work done by the EEOC may over time have an impact on case law within the field of employment legislation but this process is rather slow. The example of the US courts’ practice shows that it can be difficult to tackle multiple discrimination without any legal background.

## 5. Multiple discrimination in EU Law

### 5.1. Treaties and the Charter of Fundamental Rights

The European Union has developed many standards concerning equal treatment, which is connected with the fact that it has evolved from a purely economic community to a community based on common values. In Article 2 TEU equality is listed next to respect for human dignity, freedom, democracy, the rule of law and respect for human rights, which emphasises the role that it plays within these core values. Moreover, Article 10 TFEU added by the Treaty of Lisbon of 13 December 2007 provides the basis for the development of mainstreaming strategy in relation to all the grounds of discrimination prohibited under EU law. It states that ‘in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. However, it does not refer to discrimination based on two or more grounds. Similarly Article 19 of the Treaty on the Functioning of the European Union<sup>30</sup> which provides a basis for taking action ‘to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’,

<sup>30</sup> TFEU, OJ C 326, 26 October 2012, 47–199.

just lists these criteria without mentioning their combination. Other provisions of the founding Treaties, eg regulating equality of men and women, do not contain any references to multiple discrimination. This can be connected with the fact that EU anti-discrimination law is based on a single-ground approach. Moreover, it has been under constant evolution which can be observed in particular in relation to its scope and the list of grounds that has been gradually expanded.

This tendency can be observed in the provisions of the Charter of Fundamental Rights of the EU<sup>31</sup> which in Article 21 (1) provides for the general prohibition of 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’. Article 21 (2) predicts prohibition of discrimination based on nationality. Thus, the Charter favours a broad list of grounds which is simultaneously non-exhaustive.<sup>32</sup> The phrase ‘any ground such as’ provides for the possibility to take into account also a combination of grounds which is in contrast with Article 19 TFEU as it contains a closed list of grounds. However, Article 51 (2) of the Charter underlines that it ‘does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’ Therefore, it is noticed in literature that the Charter does not create any new rights for individuals or extend the protection provided by both the Treaties and Equality Directives.<sup>33</sup>

## 5.2. EU Legislation, Council and Commission documents

Since multiple discrimination is not regulated in the Treaties, the question arises if there are any EU provisions which recognise the existence of this phenomenon. First references to multiple discrimination can be found in acts concerning EU action programmes to combat discrimination. For instance, in recital 4 of Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination it is underlined that ‘women are often the victims of multiple discrimination.’<sup>34</sup> Moreover, in its Communication: ‘Non-discrimination and equal opportunities for all – A framework strategy’<sup>35</sup> the European Commission notices that ‘some people may experience multiple discrimination on several grounds’. It also comes to the conclusion that ‘mainstreaming and the development of an integrated

<sup>31</sup> OJ C 326, 26 October 2012, 391–407.

<sup>32</sup> M. Bell, ‘Equality and the European Union Constitution’ (2004) 33 (3) *Industrial Law Journal* 242, 248.

<sup>33</sup> E. Howard, ‘EU Equality Law: Three Recent Developments’ (2011) 17 (6) *European Law Journal* 785, 787.

<sup>34</sup> OJ L 303, 2 December 2000, 23–28.

<sup>35</sup> COM (2005) 224 final.

approach should help to focus on situations of multiple discrimination'. Furthermore, one of the tasks of the European Union Agency for Fundamental Rights provided for years 2007–2012 was to work on 'discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination)'.<sup>36</sup>

It is interesting to note, however, that the most important gender equality acts<sup>37</sup> do not even mention multiple discrimination. It can be treated as an important omission given the fact that women are particularly exposed to this form of discrimination which is underlined in the 2000 Equality Directives.<sup>38</sup> Recital 14 of the Preamble to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>39</sup> predicts that 'in implementing the principle of equal treatment irrespective of racial or ethnic origin, 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'. A similar provision is contained in recital 3 of the Preamble to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.<sup>40</sup>

It can be noticed that European Union regulations do not contain separate provisions on multiple discrimination, although they recognise the existence of this phenomenon. In particular, it is not prohibited as such although the European Commission is aware that it should be taken into account in a more detailed way. This is also connected with the fact that EU anti-discrimination law is based on a single-ground approach and various criteria for discrimination such as: gender, race or ethnic origin, religion or belief, disability, age and sexual orientation are regulated in separate acts with different fields of application. Discrimination based on race or ethnic origin is prohibited not only in employment, occupation and vocational training, but also in areas that are not related to them, such as social protection, including social security and healthcare, social benefits, education, access to and supply of goods and services which are available to the public, including housing (Article 3 (1) of Directive 2000/43/

<sup>36</sup> See Article 2 (b) of Council Decision 2008/203/EC of 28 February 2008 implementing Regulation (EC) no 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007–2012, OJ L63, 7 March 2008, 14–15.

<sup>37</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21 December 2004, 37–43 and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26 July 2006, 23–36.

<sup>38</sup> This term encompasses directives adopted in 2000 – Directive 2000/43/EC and 2000/78/EC as well as gender equality directives – Directive 2004/113/EC and Directive 2006/54.

<sup>39</sup> OJ L 180, 19 July 2000, 22–26.

<sup>40</sup> OJ L 303, 2 December 2000, 16–22.

EC). Directives concerning gender discrimination have a similar scope of application but they do not cover education, media and advertising. However, discrimination on grounds of religion and belief, age, disability and sexual orientation is prohibited only in employment, occupation, vocational training and in relation to membership and involvement in an organization of workers or employers (Article 3 (1) of Directive 2000/78/EC).

The lack of legislation against discrimination outside employment and occupation on these grounds can be a problem in situations where they are combined with gender and racial or ethnic origin. For example, if a person is subject to discrimination involving religion and ethnic origin in access to healthcare, it is possible to bring a case but only on the ground of the latter. Thus, this case of multiple discrimination could not be addressed properly. It should be noticed that in 2008 the European Commission prepared a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation<sup>41</sup> which covers such areas as: social protection, including social security and healthcare; social advantages; education and access to and supply of goods and other services which are available to the public, including housing. Unfortunately, this act has not been adopted yet since it has been difficult for the Member States to agree on its content. It does not mean that they are reluctant to address multiple discrimination although its definition has been included into the proposal of the European Commission by the European Parliament in its legislative resolution. Rather it has more to do with the fact that protection on the grounds covered by this proposal, eg disability, requires great expense and the current economic situation discourages the Member States from taking on additional financial obligations. There is a lack of political will on the part of some Member States and it is difficult for them to take further steps in the field of the protection of equality. It should also be noticed that the extension of the prohibition of discrimination based on certain grounds, eg sexual orientation, generates emotions as this problem is morally sensitive.

The different material scope of application of the Equality Directives is not the only problem in the context of multiple discrimination. Another is connected with possible exceptions to the general prohibition of discrimination. Its scope differs in relation to particular grounds. Thus, direct discrimination based on sex in areas of employment and occupation can be justified mainly by 'a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate'.<sup>42</sup> A similar exception to the non-discrimination principle is provided for in Article 4 of Directive 2000/43 and a broader list of exceptions is included in Directive 2000/78/EC concerning religion or belief, age, disability and

<sup>41</sup> COM (2008) 426 final.

<sup>42</sup> Article 14 (2) of Directive 2006/54/EC.

sexual orientation. In addition to a genuine and determining occupational requirement<sup>43</sup> discrimination can be justified by measures which ‘in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others’.<sup>44</sup> This exception is quite general and as such has been criticised in literature. In fact, one can speculate why it was at all necessary in a measure addressing discrimination on the grounds of religion or belief, disability, age and sexual discrimination, while a similar provision was not included in any of the other Equality Directives.<sup>45</sup>

Moreover, Directive 2000/78/EC provides for a special exception to the prohibition of discrimination on the grounds of religion or belief. As a result, organizations with a religious ethos will be able to refuse to employ individuals of a different religion or belief where the nature or context of the position in question justifies such a difference of treatment.<sup>46</sup> Article 3 (4) of the Directive relates to disability and age – it allows Member States to enact legislation whereby the prohibition of discrimination on the basis of these two criteria shall not apply to the armed forces. Finally, the Directive contains a detailed regulation concerning exceptions to the prohibition of discrimination based on age. Article 6 (1) of the Directive provides that Member States may justify different treatment on grounds of age ‘by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’. This provision differs from the others since it predicts an open-ended possibility for Member States to justify direct age discrimination. As a result of the hierarchy among particular grounds race discrimination seems to be at its peak and age discrimination at the bottom since it can be broadly justified.<sup>47</sup>

This question should also be taken into account while regulating multiple discrimination as during legal proceedings there is a tendency to select such a ‘strong criterion’ and base a claim on it. For instance, a victim of discrimination on grounds of both age and sex, refers only to the latter as it is easier to ‘win the case’, but if other criteria are not taken into consideration, then multiple discrimination cannot be addressed properly. The problem becomes even more complicated when it is not only the victim’s tactic but the result of the activities of courts. The examples of such situations can be found in the decisions of the Court of Justice of the EU.

<sup>43</sup> Article 4 (1) of Directive 2000/78/EC.

<sup>44</sup> Article 2 (5) of Directive 2000/78/EC.

<sup>45</sup> M. Bell and L. Waddington, ‘More Equal Than Others: Distinguishing European Union Equality Directives’ (2001) 38 *Common Market Law Review* 587, 598.

<sup>46</sup> M. Bell and L. Waddington (n 46) 600.

<sup>47</sup> M. Bell and L. Waddington (n 46) 599 and 610.

### 5.3. The case law of the Court of Justice of the EU

Although there have been several cases where the Court of Justice has had a chance to address the problem of multiple discrimination, it has not decided to refer to this concept, even after the adoption of the 2000 Equality Directives.

In *Lindorfer*,<sup>48</sup> which concerned the calculation of the length of pensionable service credited in the Community pension scheme to a Council official, the Court of Justice had an occasion to deal with sex and age discrimination as both grounds were invoked by the plaintiff.<sup>49</sup> Advocate General Jacobs in his opinion of 27 October 2005 considered her arguments concerning discrimination based on sex, age and nationality and came to the conclusion that only the first of them had been clearly demonstrated by Ms Lindorfer. Advocate General Sharpstone in the second opinion given in this case<sup>50</sup> took a similar approach. Following these remarks the Court of Justice stated that the Court of First Instance was wrong in holding that Ms Lindorfer had not suffered discrimination on account of her sex and set aside its judgment on this ground. But the question of age discrimination was not taken into account in detail. Therefore, in literature it is underlined that in this case the Court of Justice made only a cautious attempt to acknowledge instances of intersectional discrimination against women.<sup>51</sup> It was aware of the multiple dimension of the case, but did not decide to refer to this concept and elaborate on it.

The next case, *Christine Kleist*,<sup>52</sup> concerned the plaintiff's compulsory retirement at the age of 60 while the normal pensionable age for men was 65. Thus, the legal problem the Court of Justice had to deal with was whether an employer might retire a female employee for employment policy reasons as soon as she reached the statutory pensionable age which was different for men and women. Dr Kleist suggested that her case could be examined also in the light of the provisions of Directive 2000/78, as the national rules such as those at issue in the main proceedings resulted, in addition, in direct discrimination on the grounds of age. However, both Advocate General Kokott in her opinion of 16 September 2010 and the Court of Justice in its judgment did not decide to take this claim into account. Age discrimination was not considered for different reasons. Advocate General referred to the case law of the Court of Justice on compulsory retirement upon

<sup>48</sup> Case C-227/04 P [2007] ECR I-6767, ECLI:EU:C:2007:490.

<sup>49</sup> Opinion of 30 November 2006. It should be explained that the Court re-opened the proceedings in order to re-assess the question of age discrimination after its *Mangold* decision.

<sup>50</sup> S. Burri and D. Schiek, *Multiple Discrimination in EU Law. Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Commission 2009) <[http://ec.europa.eu/justice/gender-equality/files/multiplerediscriminationfinal7september2009\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/multiplerediscriminationfinal7september2009_en.pdf)>, 8.

<sup>51</sup> Case C-356/09 [2010] ECR I-11939, ECLI:EU:C:2010:703.

<sup>52</sup> Case C-415/10 ECLI:EU:C:2012:217.

reaching the statutory pensionable age according to which it may be justified on employment policy grounds. Therefore, she did not see the reason for taking this ground into account. The Court of Justice found another explanation as it referred to the position of the national court that had not asked for the interpretation of Directive 2000/78. It seems that it was only an excuse for not considering multiple discrimination based on both sex and age.

In the next case, *Meister*,<sup>53</sup> the plaintiff claimed that she had been the victim of discrimination based on sex, origin and age as she had applied for a job twice and her application had been rejected without providing her with information on the grounds for the decision. Therefore, the national court asked whether Directives 2000/43, 2000/78 and 2006/54 provided for a right to information enabling unsuccessful job applicants to force the employer to tell them who was engaged and for what reasons. Thus, it seems that the national court accepted the multiple dimension of the case, although it did consider if multiple discrimination had taken place as in its opinion the plaintiff had not produced sufficient evidence to support a presumption of discrimination. Advocate General Mengozzi in his opinion of 12 January 2012 underlined that the Equality Directives did not provide for a job applicant's right to force the employer to tell him/her whether and on the basis of what criteria that employer had engaged another applicant. The Court of Justice came to the same conclusion: it excluded a job applicant's right to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process but added that the refusal to grant such information 'may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.'<sup>54</sup> The Court of Justice left the national court with the task of determining whether that had been the case in the main proceedings. Thus, even though it was accepted that discrimination could have been based on several grounds such as sex, ethnic and age, no further directions were given on how to treat such cases with a multiple dimension.

On the whole it should be noticed that the case law of the Court of Justice has not acknowledged instances of multiple discrimination yet. It seems that the main reason for such a position is that the Court applies the EU anti-discrimination regulations which are based on a single-ground approach. Therefore, it can be difficult to elaborate on the concept of multiple discrimination. Moreover, in the presented cases this problem had not been addressed in a direct way by the parties or national courts. Thus, the Court of Justice has not been 'forced' to deal with multiple discrimination in a detailed way. However, it should refer to this concept and try to apply an intersectional approach. In this way national courts of the Member States would

<sup>53</sup> Case C-415/10, para 47.

<sup>54</sup> COM (2008) 426 final.



get some directions as to how to proceed in such cases and, consequently, uniform standards for the protection of victims of multiple discrimination in Europe could be developed.

The Court of Justice of the EU could take into account approaches applied by Canadian and American courts when they refer to discrimination based on the combination of two or more grounds. In such cases the social position of the whole group the victims of such discrimination belong to should be considered. This calls for an examination of historical disadvantages, social and political context as well as stereotypes which exist in the society. Furthermore, the Court of Justice should apply a special intersectional approach not only to the assessment of the facts but also with respect to liability and remedy. It is connected with the fact that multiple discrimination has more adverse effects than differential treatment based on one ground. Consequently, it should be punished more severely than other forms of discrimination.

## 6. Conclusion

The analysis of the legislation adopted in Canada, the US and the EU shows that only the first one addresses the question of multiple discrimination in a direct way. The Canadian Human Rights Act after the amendment in 1998 refers to ‘a discriminatory practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds’. There is no doubt that explicit reference to multiple discrimination has supported Canadian courts in developing an intersectional approach to cases where it has been invoked by the parties. It is interesting to note that Canadian courts do not try to find a group of people to whom a person affected by multiple discrimination could be compared. This means that a traditional approach to discrimination based on comparison has generally been rejected. Instead, courts take into account the position of the group to which such a person belongs. Such an analysis calls for an examination of historical disadvantages suffered by the group, social and political context of its situation and also different stereotypes which exist in the society. Thus, an intersectional approach is connected with a complex evaluation of different subjective and objective factors which, however, seems to serve the interests of the victims of multiple discrimination in the best way.

American courts cannot rely on legal provisions referring to multiple discrimination. Nevertheless, some of them have developed certain standards in relation to this form of discrimination, in particular to the combination of sex with another ground. Consequently, the analysis of multiple discrimination concentrates on the combination of two grounds. In such cases some American courts have noted the need for taking into account certain stereotypes which exist in the American society, eg in relation

to black or Asian women. However, the combination of other grounds has not been considered yet so the approach of American courts seems to be incomplete and as such needs to be further developed.

Both the law and practice of the EU show that tackling multiple discrimination is still a challenge for this organization. No binding law contains the prohibition of this form of discrimination or its definition. The Canadian case shows that the regulation of multiple discrimination can support organs applying the law and, consequently, also the victims of discrimination. The adoption of a general definition of multiple discrimination would help to create a common understanding of this phenomenon and the Member States would get directions on how to regulate it in their legal orders. As a result, the level of protection extended to the victims of multiple discrimination would be similar throughout the whole EU. In this regard it should be noticed that the European Parliament has formulated such a definition in its legislative resolution on the proposal of the Commission for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.<sup>55</sup> According to it multiple discrimination occurs when discrimination is based '(a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or (b) on any one or more of these grounds and also (i) on the ground of sex (...), (ii) racial or ethnic origin (...), or (iii) nationality (...)'. Thus, the definition proposed by the European Parliament refers not only to the grounds regulated in the proposal for the Directive but also to the other ones. It seems that it could be a good starting point for tackling multiple discrimination at the EU level but the future of the proposal is still uncertain since there has been a long discussion on this act in the Council. It should also be noticed that it is a fragmented approach as it applies to the sphere outside employment and occupation. As a result similar definitions or clauses should be included into other Equality Directives.

It is also important to consider the possibility of proving discrimination without indicating a comparator. For instance, definitions included in the Equality Directives could predict that 'direct discrimination occurs where one person is treated less favorably on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation for example if treated less favourably than another is, has been or would be treated in a comparable situation'. It seems that such a regulation could assist the development of an intersectional approach to discrimination in the case law of the Court of Justice of the EU. Even if these legislative changes are not adopted, the Court should refer to the question of multiple discrimination. Then national courts of the Member States of the EU would get some directions on how to proceed in such cases. The Court of Justice could take into account approaches applied by Canadian

<sup>55</sup> S. Burri and D. Schiek (n 51) 24.

and American courts and refer to discrimination based on the combination of two or more grounds. The US case shows that it is possible even if there is no particular legislation on multiple discrimination.

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