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Multiple discrimination in law

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Introduction

This paper provides an introduction to the issue of multiple discrimination and the problems it presents in law. It analyses how the law in many European countries deals with cases of multiple discrimination. It will discuss the GendeRace Project, a project which aimed to evaluate the effectiveness of racial discrimination laws in a gender perspective, and some of its findings.¹

This paper will also examine some alternative ways of addressing multiple discrimination in law and will give examples of good practice, some of which are based on the findings of the GendeRace project. The focus of the lessons that can be learned from these examples will be on the European Union level.

Before the above is discussed, the term ‘multiple discrimination’ will be defined.

Definitions of Multiple discrimination

In the last decade or so, the idea of discrimination taking place on more than one ground has come to the fore in the socio-legal literature where the term ‘intersectionality’ is commonly used.² The term ‘intersectionality’ was first used in this context by

¹ For the final Report of this project see: Carles, I. and Jubany-Baucells, O. (eds) (2010) *GendeRace - The Use of Racial Anti-Discrimination Laws: Gender and Citizenship in a Multicultural Context*. Final Report. The project was funded by: EU Seventh Framework Programme, Grant Agreement number SSH7-CT-2007-217237. This Report and more information on the project can be found on line at: <http://genderace.ulb.ac.be/rapports/GENDERACE%20FINAL%20REPORT%20sent.pdf> Author was part of the UK research team in this project.

² See, for example, Ashiagbor, D. (1999) ‘The Intersection between Gender and ‘Race’ in the Labour Market: Lessons for Anti-Discrimination Law’, in: Morris, A. and O’Donnell, T. (eds), *Feminist Perspectives in Employment Law* (London: Cavendish); Makkonen, T. (2002) *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*, available on line at: <http://www.abo.fi/instut/imr/norfa/timo.pdf>; Hannett, S. (2003) ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination’, 23, 1, *Oxford Journal of Legal Studies* 65-86; Verloo, M. (2006) ‘Multiple Inequalities, Intersectionality and the European Union’, 13, 3, *European Journal of Women’s Studies* 211-228; Yuval-Davis, N. (2006) ‘Intersectionality and Feminist Politics’, 13, 3, *European Journal of Women’s Studies* 193-209; Grabham, E., Cooper D., Krishnadas, J. and Herman, D. (eds) (2009) *Intersectionality and Beyond: Law, Power and the Politics of Location* (London/New York: Routledge/Cavendish); Schiek, D. and Chege, V. (eds) (2009) *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge

Kimberlee Crenshaw in an article in 1989³ to explain the specific discrimination experienced by black women.⁴ The term ‘multiple discrimination’ is another term used in this context, for example, within the EU,⁵ although intersectionality is used there as well, sometimes together with multiple discrimination.⁶ However, the terms are not always explained clearly and especially the term ‘multiple discrimination’ can refer to a number of different meanings. Generally, three types are identified in the literature.⁷

The first type of multiple discrimination takes place where a person suffers from discrimination on several grounds, but each incidence of discrimination takes place on one ground at a time. So, for example, a disabled woman is passed over for promotion at work because she is a woman and a man is promoted instead (sex discrimination). Then, at a different time, the same woman is refused access to a restaurant because she is in a wheelchair (disability discrimination). Thus, the discrimination takes place on the basis of several grounds operating separately and at different times. Sometimes the term multiple discrimination is used for this specific form of discrimination only.

The second type of multiple discrimination takes place where a person is discriminated against on more than one ground in the same instance and discrimination on the one ground adds to the discrimination on the other ground to create an added burden. So, one ground gets compounded by one or more other grounds. An example taken from the

Cavendish); and, Schiek, D. and Lawson A. (eds) (2011) *European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination* (Farnham UK/Burlington USA: Ashgate).

³ Crenshaw, K. (1989) *Demarginalising the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, University of Chicago Legal Forum.

⁴ On the development of the term ‘intersectionality’ see Schiek, D. and Lawson, A. (2011) ‘Introduction’ in: Schiek and Lawson, supra note 2, at 1-3. These authors also discuss the criticism raised against the term.

⁵ See, for example, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (2007) *Tackling Multiple Discrimination Practices, Policies and Laws* (Luxembourg: Office of Official Publications of the European Communities); European Network Against Racism (2011) Factsheet 44 *The Legal Implications of Multiple Discrimination*, available on line at: <http://cms.horus.be/files/99935/MediaArchive/publications/FS44%20The%20legal%20implications%20of%20multiple%20discrimination%20final%20EN.pdf> and, EU-MIDIS, European Union Minorities and Discrimination Survey, *Data in Focus Report – Multiple Discrimination* (EU Fundamental Rights Agency, 2010), available on line at: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub-multiple-discrimination_en.htm

⁶ As in the title of another EU Commission publication: Burri, S. and Schiek, D. (2009) *Multiple Discrimination in EU Law Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Network of Legal Experts in the Field of Gender Equality, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities).

⁷ Makkonen, supra note 2, at 9-11; see also: Fredman S. (2005) ‘Double Trouble: Multiple Discrimination and EU Law’ 2, *European Anti-Discrimination Law Review* 13-18; and, Moon, G. (2010) *Multiple Discrimination: Justice for the Whole Person*: <http://www.errc.org/cikk.php?page=1&cikk=3564> .

British case law is the case of *Perera v Civil Service Commission*.⁸ Here, Mr Perera applied for a job for which the employer had set out a number of requirements. Mr Perera was turned down because of a variety of factors, including his experience in the UK, his command of English, his nationality and his age. The lack of one factor did not prevent him from getting the job, although it made it less likely. The lack of two factors decreased his chances still further. Another example is where a police department has a minimum height requirement for job applicants which disproportionately affects women. It also requires applicants to do a written test which would disproportionately affect people from a different ethnic origin. A woman from a different ethnic origin would thus experience a double disadvantage and this would constitute indirect discrimination on both gender and race.⁹ This type of multiple discrimination is often referred to as compound, additive or cumulative discrimination.

The third type of multiple discrimination is referred to as intersectional discrimination and takes place where two or more grounds of discrimination interact and discrimination takes place because of this interaction. A good example is the following: a driving school does not want to employ older women as driving instructors. The school does employ younger women and younger and older men. An older woman who is turned down for a job as driving instructor complains about discrimination on the grounds of sex and age. The driving school can show that it employs women, so there is no sex discrimination; and that it employs older people, so there is no age discrimination. Only when both grounds are taken together, discrimination can be said to occur and the woman in this case would thus not succeed in bringing a case under either of the single grounds.¹⁰ The discrimination which takes place cannot be captured wholly by looking at discrimination on one ground only or each ground separately.

However, it is not always easy to distinguish between the different forms of multiple discrimination, especially between additive and intersectional discrimination. See, for example, the following case which was decided on by the Dutch Equal Treatment Commission.¹¹ A blind, ethnic minority woman applied for a job. As part of the application process, candidates had to take a written test. Because the woman was blind and thus could not do a written test, the company offered her an oral test instead. Based on the results of the test, the organisation did not offer her a job as receptionist or an

⁸ *Perera v Civil Service Commission* (no 2) [1983] ICR 428.

⁹ Gerards, J. (2007) 'Discrimination Grounds' in: Schiek, D, Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford and Portland, Oregon: Hart Publishing) 171.

¹⁰ The example was given by the British Government in: Government Equalities Office: *Equality Bill: Assessing the Impact of a Multiple Discrimination Provision*, April 2009, at 11, available on line at: <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-1229.pdf>

¹¹ Commissie Gelijke Behandeling (Equal Treatment Commission) Judgment 2006-256, available on line (in Dutch) at: www.cgb.nl See on this case also: Burri, S. (2011) 'Promises of an Intersectional Approach in Practice? The Dutch Equal Treatment Commission's Case Law' in: Schiek and Lawson (eds), supra note 2, 104-105.

administrative job, but offered her work in the production department instead. The woman argued that she should have been allowed to take a test in Braille. She was disadvantaged because, as a non-native speaker, it was more difficult to take an oral test than a written test. She argued that this amounted to discrimination on the ground of disability and/or ethnicity. The Commission found discrimination on the ground of disability because the organisation had not made reasonable accommodation – providing the test in Braille did not lead to undue hardship, as the organisation agreed – and discrimination on the ground of race or ethnicity. The heading to the full judgment mentions ‘intersection’, and the judgment itself refers to a running together or coincidence of grounds. But is this intersectional or additive discrimination? Does the discrimination take place because of the interaction of disability and ethnicity or is the adverse effect of being disabled compounded by the fact the woman was not a native Dutch speaker? It is suggested that both could be argued and we come back to this later, when we discuss the way courts and equality bodies deal with cases of multiple grounds.

The above shows that it is not always easy to distinguish between the different types of multiple discrimination. This is exacerbated by the fact that the term ‘multiple discrimination’ is often used for any of these types and it is not always made clear what exactly is meant when a person uses this term.

Before analysing the problems with claims of intersectional discrimination, the GendeRace project will be discussed as the findings of this research project can be used to illustrate some of the points in the analysis.

GendeRace Project

As mentioned in the introduction, Middlesex University was involved in the GendeRace project, an FP-7 EU funded project which was conducted between February 2008 and July 2010 and consisted of research in 6 countries: Bulgaria, France, Germany, Spain, Sweden and the UK.¹² The objectives of the project were, firstly, to broaden the understanding of the impact of gender on the experience of racial or ethnic discrimination; and, secondly, to improve the knowledge of the combined effects of racial or ethnic and gender discrimination in order to reveal the various forms of specific discrimination that women experience. The project also aimed to increase the understanding of the impact of gender on the treatment of complaints of racial or ethnic discrimination and the use of the law and the institutional framework in these cases. The analysis included the testing of key theories concerning the effects of a ground specific approach to anti-discrimination legislation on the treatment of multiple discrimination cases based on ethnicity and gender. Through all this, the project aimed to develop practical tools to assess the effectiveness of policies and practices in the field of anti-

¹² GendeRace Project, Final Report, *supra*, note 1.

discrimination in order to take the intersectional dimension of discrimination into account. The research was carried out through a study of case law and complaint files, and through around 120 semi-directive interviews with victims of discrimination and 60 interviews with stakeholders, lawyers dealing with discrimination complaints, women and minority NGOs, policymakers and social partners. A workshop with stakeholders and experts took place in each partner country to discuss the main findings of the investigation and to gather policy recommendations.

Some of the key findings of GendeRace project will be discussed here. One important finding was that there is a clear impact of gender on the experience of (race or ethnicity) discrimination. We found, for example, that men can more easily conceptualise their experience as discrimination, while women often feel themselves at fault. Men and women also appeared to experience different forms of discrimination, with women more often being the victims of harassment or intra-group discrimination – intra-group discrimination is discrimination against a person by another person of the same racial or ethnic group – and men more commonly facing discrimination in places of recreation and leisure.

The research also showed that there are differences between men and women in the way they deal with complaints of discrimination. Men tend to lodge complaints more frequently than women and they pursue cases further, including in courts and tribunals, while women more often settle a case at an earlier stage. The research suggested that this is linked to the many barriers in reporting experiences of discrimination, including the time which needs to be devoted to pursuing a claim and the emotional toll this extracts both from the person pursuing the complaint and their family. This emotional toll especially seems to weigh much more heavily on women. The research also found that people resorting to a legal remedy when exposed to discrimination primarily comprised of citizens of foreign origin with a higher education and in steady employment.

That cases of multiple and intersectional discrimination are not identified and treated as such was another key finding of the GendeRace research. First of all, despite a tendency in the six countries taking part in the project to go over to a single anti-discrimination law and a single equality body, both covering all the grounds on which discrimination is prohibited in national law, it became clear that the multiple ground approach was still rather overlooked by formal and informal bodies or organisations. Victims of multiple discrimination themselves also did not often identify their experience as such either. Often they would only recognise it when prompted by the interviewer. It was also found that there was a very distinct lack of data on multiple discrimination.

It must be pointed out that the advantage of a single anti-discrimination act is that such an act is more likely to provide the same protection against discrimination on all grounds, although this is not always the case, and this would make a multiple claim easier. If different grounds are covered by different acts and the areas covered by these

acts are different as well, a claim for multiple discrimination becomes much more complicated.

The GendeRace research findings led to a number of recommendations, including the harmonisation of the protection against discrimination provided by the EU Equality Directives, the incorporation of an explicit reference to multiple discrimination in those Directives with a clear operational definition of discrimination and the inclusion of a clause allowing complainants to lodge a complaint on several grounds within the framework of a single legal procedure. The project also recommended to involve legal experts in the development of case law based on multiple discrimination in order to influence the legal framework in this area. Awareness of multiple discrimination should be raised, not only amongst vulnerable groups, but also amongst advisory and support organisations, through the development of cooperation between organisations targeting particular groups and equality bodies and through the development of networks for multi-ground dialogue. A need to standardise the system for gathering data on (multiple) discrimination complaints in the Member States was also one of the recommendations.

After this introduction to the GendeRace project and its findings and recommendations, the next section will analyse some of the problems that legal systems appear to have with dealing with multiple discrimination claims. The GendeRace information will be used to illustrate these problems where applicable.

Problems with dealing with multiple discrimination in law

Above we have briefly mentioned that the advantage of a single anti-discrimination act is that such an act is more likely to provide the same protection against discrimination on all grounds, with the same definitions of the forms of discrimination applying. Such an act is also more likely to protect against all forms of discrimination in the same areas, although this is not always the case. Making claims of discrimination on multiple grounds would be easier under such an act. If different grounds are covered by different acts and the areas covered by these acts are different as well, a claim for multiple discrimination becomes much more complicated. The protection provided under EU anti-discrimination law can be used to illustrate this.

The EU Equality Directives¹³ have been said to create a hierarchy between discrimination grounds, with better protection provided against discrimination on the grounds of race and sex than on the grounds of religion or belief, disability, age and sexual orientation.¹⁴ The protection against racial and ethnic origin discrimination and sex discrimination is stronger because, firstly, Directive 2000/43/EC prohibits racial and ethnic origin discrimination in employment related areas; in social protection, including social security and healthcare; in social advantages; in education; and, in access to and supply of goods and services which are available to the public, including housing.¹⁵ Sex discrimination in the area of employment and occupation is prohibited by Directive 2006/54/EC,¹⁶ while Directive 2004/113/EC¹⁷ prohibits sex discrimination in the access to and the supply of goods and services. Discrimination on the grounds of religion or belief, disability, age and sexual orientation is, however, only prohibited in the area of employment and occupation.¹⁸

Another reason why the protection against racial and ethnic origin discrimination and against sex discrimination is stronger is that Directives 2000/43/EC, 2004/113/EC and 2006/54/EC impose a duty on the EU Member States to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin and sex respectively.¹⁹ These Directives leave it up to the Member States to decide whether they want to create or designate one single body or different bodies covering race and sex discrimination. Directive 2000/78/EC does not contain any such duty in relation to the grounds of discrimination mentioned in there.

¹³ This refers to the following EU Council Directives: Directive 2000/43/EC of 29 June 2000 *implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin*; Directive 2000/78/EC of 27 November 2000 *establishing a General Framework for Equal Treatment in Employment and Occupation*; Directive 2004/113/EC *implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services*; and, Directive 2006/54/EC *on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast)*.

¹⁴ For more information on this hierarchy see the following authors: Flynn, L. (1999) 'The Implications of Article 13 EC – After Amsterdam will some Forms of Discrimination be more Equal than Others?' 36 *Common Market Law Review* 1127-1152; Bell, M. and Waddington, L. (2001) 'More Equal than Others: Distinguishing European Union Equality Directives', 38, 3, *Common Market Law Review*, 587-611; Barry, E. (2003) 'Different Hierarchies – Enforcing Equality Law' in: Costello, C. And Barry, E. (eds) *Equality in Diversity The New Equality Directives*, (Dublin: Irish Centre for European Law/Irish Equality Authority/Ashfield Publishing) 409-434; and, Howard, E. (2007) 'The Case for a Considered Hierarchy of Discrimination Grounds in EU law', 13, 4, *Maastricht Journal of European and Comparative Law*, 445-470.

¹⁵ See Article 3(1) Directive 2000/43/EC.

¹⁶ Article 14 Directive 2006/54/EC.

¹⁷ Article 3 Directive 2004/113/EC.

¹⁸ Article 3(1) Directive 2000/78/EC.

¹⁹ Article 13 Directive 2000/43/EC, Article 12 Directive 2004/113/EC and Article 20 Directive 2006/54/EC.

These differences lead to two problems with multiple discrimination claims. First, a claim for discrimination on a combination of two grounds will not succeed if discrimination on one of the grounds claimed is prohibited under the law but the other is not. For example, under EU law, an ethnic minority disabled person who is denied access to a nightclub because they are both disabled and of an ethnic minority, can complain about discrimination on the grounds of racial or ethnic origin, but not on the grounds of disability as Directive 2000/78/EC does not cover this area. The second problem is that, if a specialised equality body does not cover both the grounds claimed, then a claim to the body or with the assistance of the body will usually only be possible on the one ground. For example, if a Member State has established a body for the promotion of equal treatment on the ground of racial or ethnic origin, then that body will, most likely, only deal with or assist in claims for racial and ethnic origin discrimination, whether there is another ground involved or not. And, if a Member State has established different equality bodies covering race and sex discrimination, then it could very well depend on which body the victim contacts, whether a case is fought on the ground of sex or of race discrimination, but neither body is likely to bring a case on both grounds. It must be noted, however, that the European Commission, in July 2008, has brought out a proposal to extend the material scope of Directive 2000/78/EC to bring this in line with the material scope of Directive 2000/43/EC.²⁰ The proposal also contains a duty on the Member States to designate bodies covering equal treatment on the grounds of religion or belief, disability, age and sexual orientation. It is left to the Member States to decide whether they designate one body or more bodies. However this proposal has not been adopted to date.

Therefore, different provisions for different grounds of discrimination could lead to problems in dealing with discrimination claims on more than one ground. However, although the EU Equality Directives do not impose an obligation on Member States that their national law should have any provisions against discrimination on more than one ground, they do not appear to prohibit them from providing for this either. But what are the problems for the law in dealing with multiple discrimination?

First of all, many national legal systems do not provide for claims of discrimination on more than one ground, or can only deal with such cases by looking at and deciding on each of the discrimination grounds separately. If a court or tribunal is looking at each ground separately, then each ground will have to be proven separately, which increases the burden of proof imposed on the complainant. This is called a single ground approach to multiple discrimination and this approach could lead to a finding that no discrimination has taken place in cases of intersectional discrimination. In the example of the older woman applying for a job of driving instructor given above, no discrimination on the ground of sex or on the ground of age could be proven or would

²⁰ COM (2008) 426, *Proposal for a Council Directive on implementing the Principle of Equal Treatment between Persons irrespective of Religion or Belief, Disability, Age or Sexual Orientation*.

be found, and thus a finding of discrimination could only be established if the court could take the combination of the two grounds into account. In that case, being able to claim on more than one ground would be the only chance of making a successful claim. And, in the above mentioned case of the Dutch Equal Treatment Commission regarding the blind, ethnic minority job applicant, the Commission looked at each ground, disability and race, separately, suggesting that it dealt with the case as a case of additive or compound discrimination rather than intersectional discrimination. In cases where the first or second type of multiple discrimination we distinguished above occurs, the grounds can be looked at separately, but in a case of intersectional discrimination this is often not possible as shown with the example of the driving instructor. The increase in the burden of proof represents a problem for multiple discrimination cases of all three types.

But why do most national anti-discrimination laws in the EU Member States deal with claims on multiple grounds in this way? It is suggested that part of the reason might be that the definitions of both direct and indirect discrimination, under the EU Equality Directives as well as in many national anti-discrimination laws, depend on a comparator: according to EU law, direct discrimination takes place where one person is treated less favourably than another is, has been or would be treated *in a comparable situation*. Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular characteristic at a particular disadvantage *compared to other persons* [my italics]. The comparison that must be made, even though the use of a hypothetical comparator is allowed, makes a claim on more than one ground more difficult, because the more grounds applicable, the more complicated it becomes to choose a comparator. For example, who should be the comparator for an ethnic minority, lesbian, disabled, Muslim, retired woman? Do you compare her with a white, heterosexual, able-bodied, non-Muslim, non-retired man?

There is also the problem that victims of (multiple) discrimination do not recognise what has happened to them as such. They might not even realise that they have been discriminated against, let alone that they have been discriminated against on more than one ground, as was found in the GendeRace research. If victims of discrimination recognise their treatment as such and decide to seek advice from an equality body or other advice organisation, sometimes it depends on the body or organisation which ground will be pursued, as was already mentioned above. If it is an organisation working for sex equality, for example, then the case is likely to be taken on the ground of sex discrimination, even if another ground is recognised. And, even if a victim seeks advice from a body dealing with all grounds of discrimination covered by the national legislation, the advisor, even if they recognise that different grounds are at play, will often make a strategic decision as to which ground to pursue: the ground they think is strongest and which can be proven most easily and which is thus most likely to lead to a finding of discrimination. Claiming more grounds means making matters more complicated and increases the burden of proof. Although, as seen above, in some cases

only claiming one ground would not lead to a finding of discrimination and, in those cases, the taking cases on more than one grounds increases the chances of success.

Problems with a single ground approach

The single ground approach in dealing with multiple discrimination based on a list of grounds of discrimination enumerated in the anti-discrimination legislation, thus appears to be the most common approach in all the countries involved in the GendeRace project and in many other European countries. But why is such a single ground approach seen as problematic? Is a finding of discrimination, even if it is only on a single ground, not enough? A number of points of criticism, all interlinked and overlapping, can be brought forward against this single ground approach to cases where multiple grounds are present.²¹

Firstly, listing the grounds of discrimination tends to emphasise differences between people and exacerbates the tendency to see others as different. For example, a Muslim person claims discrimination on the ground of religion because he is treated less favourably than a non-Muslim person. This emphasises the difference between these two people and sets the Muslim person apart from other persons. Related to this is the fact that this approach presumes that categories can be easily drawn, that there are clear distinctions between the categories protected by the law and that each ground can be looked at in isolation. In practice, the distinctions are not always clear and this is exacerbated by the fact that some categories are often socially constructed (like race). For example, the GendeRace research found that discrimination against women who wear the *hijab* or Islamic headscarf took place in several countries, while Muslim or Arabic or 'foreign-looking' men were often denied access to places like nightclubs. Is this because of religion, racial or ethnic origin or even nationality? And in both cases sex was an issue as well. The problem is exacerbated by the fact that perpetrators of discrimination often do not make distinctions either: they might discriminate because someone wears a turban, and thus is of foreign origin and probably a (Muslim) terrorist.

Secondly, one social characteristic becomes dominant and the others become invisible. The approach also tends to promote an essentialist understanding of identity and presumes that the 'self' has an essence which is rather unchangeable over time. In reality, for most people the traits that define them are multiple and they will emphasise different traits at different times. Moreover, the traits that define them can change over time. This is especially clear for traits like age, disability and religion.

²¹ See on this: Makkonen, supra note 2, 17-22; Hannett, supra note 2; Smith, O. (2005) 'Ireland's Multiple Ground Anti-Discrimination Framework – Extending the Limitations?' 8, *International Journal of Discrimination and the Law* 7-31; McColgan, A. (2007) 'Reconfiguring Discrimination Law' *Public Law* 74-94; and, Goldberg, S. (2011) 'Identity-based Discrimination and the Barriers to Complexity' in: Schiek and Lawson, supra note 2, 177-190.

A third point of criticism is that the approach can also lead to exclusionary tendencies: groups form around a single ground and are only interested in promoting provisions dealing with that ground. This tends to polarise groups, but it also assumes homogeneity within groups and does not give any attention to differences between individuals within the group. The GendeRace research found that intra-group discrimination takes place with a certain frequency as well. A single ground approach often also assumes that groups are mutually exclusive while, in reality, people can belong to a number of different groups at the same time.

Lastly, but most importantly, all these factors suggest that a single ground approach to dealing with multiple discrimination cases does not recognise the unique situation of the victim; it does not recognise his or her whole identity with all its different traits. It forces claimants to choose between the multiple elements that make up their identity. People who file discrimination complaints are not always looking for financial or other compensation. They often just want acknowledgement that they were indeed victims of discrimination. They want recognition of what they are and of the fact that they are discriminated against because of what they are. They might lose a case because there is no discrimination on either one of the single grounds complained about as in the above mentioned example of the older woman who applied for a job as a driving instructor. But, even if they win a case fought on a single ground, they might not feel satisfied because there will not be any real acknowledgement by the court or tribunal that what factually happened was discriminatory. They might feel that they have obtained an opinion on something that has not happened in the way it was described in the court at all.

A good example of the latter is the British case of Miriam O'Reilly who claimed sex and age discrimination against the BBC.²² In this case it seemed clear to many, not only in the academic world but also in the media, that discrimination had taken place on the combined grounds of sex and age. However, the Employment Tribunal only found age discrimination. Ms O'Reilly had been the presenter on the BBC programme 'Country file' for a number of years, but was then dropped when the programme moved to a different, more prime time, evening slot and she was replaced by a younger presenter.

The Employment Tribunal in this case found age discrimination as they thought she would have been considered for the presenter's job if she had been 10 to 15 years younger. However, they did not accept sex discrimination, as, in their view, an older man would have been treated in the same way. The Employment Tribunal stated that 'we do not doubt that older women have faced particular disadvantage within the broadcast media'.²³ They continued: 'while we conclude that age was a factor in the

²² *Miriam O'Reilly v British Broadcasting Corporation*, Case Number 2200423/2010, 11 January 2011, available on line at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/oreilly-bbc.pdf>

²³ *Ibid.*, at para. 292.

final choice of presenters, we do not accept that this particular decision involved combined age and sex discrimination or sex discrimination in addition to age discrimination'.²⁴ However, the latter appears to be doubtful, considering that John Craven, who is over 70 years old, is a regular presenter on the programme and considering the amount of older male presenters in all type of BBC and other broadcast companies' programmes. The Employment Tribunal accepted that 'older women have faced particular disadvantage within the broadcast media', but then concluded that an older man would have been treated in the same way, which seems contradictory. In the UK, there have also been other incidents concerning older female television presenters and news readers who lost their job, which have been widely discussed in the media and which raised the issue that there appears to be a culture within the BBC (and other British broadcasting companies) which treats older male and older female presenters differently.²⁵ None of these other cases were taken to tribunals.

Therefore, Ms O'Reilly won her case on the age discrimination ground but not on the combined grounds of age and sex. This might not have been very satisfactory for her, as she, and many others, appeared to see this clearly as a case based on the combination of the grounds of age and sex, and this was not recognised by the Employment Tribunal. The finding of age discrimination by the Tribunal does not seem to reflect what really took place in practice. In cases of discrimination on intersectional grounds, the discrimination experienced is different from that experienced on any individual ground and this is not recognised by the courts in a single ground approach to cases of multiple discrimination. However, from some of the interviews for the GendeRace project with legal experts and discrimination advisers, this appears not to be a problem in that many discrimination cases. According to these interviewees, often people do not seem to care too much about this recognition and they are more worried about practical things, like getting a good job reference which will help in finding another job.

So the single ground approach in dealing with multiple discrimination claims used in the GendeRace partner countries and most other European countries has been criticised for a number of reasons. But this raises the question whether there are any alternative ways to address intersectional discrimination? The next part will look at this.

Ways to address multiple discrimination/examples of good practice

The anti-discrimination legislation, both at national and at European level, could allow for a claim to be made on more than one ground of discrimination and allow for a comparison to be made taking into account more than one ground. It is suggested that the most effective way to achieve protection against multiple and intersectional

²⁴ Ibid. at para. 300.

²⁵ See on this: Plunkett, J. (2011), *Country file's Miriam O'Reilly wins BBC Ageism Claim*, available on line at: <http://www.guardian.co.uk/media/2011/jan/11/countryfile-miriam-oreilly-tribunal> and the links to other articles on this web page.

discrimination across the EU would be action in a EU directive along the lines of the recommendations of the GendeRace project - harmonisation of protection against discrimination against all grounds covered by EU anti-discrimination law, an explicit reference to multiple discrimination in the equality directives with a clear operational definition of discrimination, and the inclusion of a clause allowing a discrimination complaint to be made on several grounds at the same time. The adoption of the proposed new directive²⁶ would be a step in this direction as it levels up the protection against discrimination on the grounds of religion or belief, disability, age and sexual orientation to all the areas covered by Directive 2000/43/EC. If provisions against multiple discrimination were laid down in a EU Directive, all Member States would have to implement these.

Section 14 of the British Equality Act 2010 could function as an example of a multiple discrimination provision laid down in an anti-discrimination act and was given as an example of good practice by the GendeRace project. In Britain, a new Equality Act was adopted in 2010, and this act provided in a single act protection against discrimination on all the grounds previously covered by a number of different acts and regulations. When this Act, referred to as the Equality Act 2010, came out, a provision for 'combined discrimination: dual characteristics' was made in Section 14, which determined that a person (A) discriminates against another (B) if, because of a combination of two relevant, protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics. Therefore, a claim could be made for multiple or intersectional discrimination, for discrimination on a combination of grounds, but only claims of direct discrimination and only claims on a combination of two grounds were allowed. There was no possibility of making a claim on more than two grounds under this Section 14. The British Government gave two reasons for these limitations. The first reason was that the legislation would become too complicated if claims for discrimination on three or more grounds were to be allowed and that this would make it more difficult for businesses and employers to know how to avoid discrimination; the second reason for the limitation was that it had become clear, from the previous consultation, that providing for a combination of two grounds together would be enough in the vast majority of cases.²⁷

A claim for dual discrimination under Section 14 would only be possible if discrimination on both grounds is prohibited in the relevant area under the Act. No specific provisions in relation to the burden of proof or evidence in dual discrimination cases were made in the Act and, with regard to the comparator, the Government consultation document explained that courts and tribunals could continue to use either actual or hypothetical comparators when considering multiple discrimination claims.

²⁶ COM (2008) 426, supra note 20.

²⁷ Government Equalities Office, supra note 10, at 9, point 2.7; at 15, point 4.6 and at 16, 4.9 and 4.10. .

The comparator would be someone who does not have either of the protected characteristics.²⁸ The section would thus still require a comparison to be made, although, in line with EU law, a hypothetical comparator would be accepted.

If a court or tribunal should find in favour of the claimant in a multiple discrimination claim, compensation and damages would be calculated in the same manner as for single-strand claims of discrimination based on actual loss and injury to feeling. There was no provision for aggravated damages or increased compensation for multiple discrimination.²⁹ As the British equality body, the Equality and Human Rights Commission, covers all grounds of discrimination which fall under the Act, there would be no problem in them dealing with cases on a combination of two grounds.

Despite the limitation to direct discrimination and to claims on a combination of two grounds only, Section 14 of the Equality Act 2010 would thus provide a solution for cases where a combination of two grounds of discrimination is present but discrimination cannot be proven on either ground, and it would give the victim a remedy where he/she does not have one now. It would thus help victims like the older woman who wanted to be a driving instructor in the example mentioned above. However, this Section of the Equality Act 2010 did not come into force when most of the other parts of the Act came into force in October 2010 and it was said at that time that the coming into force of this section was still being discussed within the Government. In the April 2011 budget, the Government announced, in a very short paragraph, that this section will not be brought into force at all, as part of its actions to reduce regulations which have a disproportionate cost on business.³⁰ Therefore, the section will not become law. However, it can still be seen as an example of how law could deal with multiple discrimination.

Another way of providing for multiple discrimination in anti-discrimination legislation, which goes beyond the limited provisions in the British Equality Act 2010 described above, can be found in the amendments suggested by the European Parliament in relation to the proposal for the new directive³¹ which extends the protection against discrimination on the grounds of religion or belief, disability, age and sexual orientation outside the employment field to all areas covered by Directive 2000/43/EC.³² The Parliament has suggested to change Article 1 of the proposed Directive to read: ‘this

²⁸ Ibid. at 18, points 4.16 and 4.17.

²⁹ Ibid. at 21, point 5.8.

³⁰ See on this: HM Treasury, Budget 2011, pages 28-29, points 1.81, available on line at: http://cdn.hm-treasury.gov.uk/2011budget_complete.pdf

³¹ COM (2008) 426, supra note 20.

³² European Parliament P6_TA-PROV(2009)0211, *European Parliament Legislative Resolution of 2 April 2009 on the Proposal for a Council Directive implementing the Principle of Equal Treatment between Person irrespective of Religion or Belief, Disability, Age or Sexual Orientation* (COM (2008)0426 - C6-291/2008 - 2008/0140(CNS)).

Directive lays down a framework for combating discrimination, including multiple discrimination, on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation'. The suggested Amendment then describes that multiple discrimination occurs when discrimination is based on a combination of any of two or more of the grounds covered by Article 19 TFEU (sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation) and nationality.³³

The Parliament also proposes that the definition of direct discrimination should read: 'direct discrimination shall be taken to occur where one person, or persons who are or who are assumed to be associated with such a person, is treated less favourably than another is, has been or would be treated in a comparable situation, *on one or more of the grounds* [my emphasis] referred to in Article 1'.³⁴ Both these amendments could be transferred into the other EU Equality Directives (2000/43/EC; 2000/78/EC; 2004/133/EC and 2006/54/EC). The advantage of having an explicit provision at EU level has already been pointed out: all EU Member States would have to implement the Directive and thus provide for protection against multiple discrimination. However, even if the EU would not provide for this, the Member States could still use the Parliament's proposed amendments as an example for laying down protection against multiple discrimination in their national laws. However, the amendments suggested by the European Parliament would also, like Section 14 of the British Equality Act 2010, still leave the requirement for a (real or hypothetical) comparator in place.

Despite the interest shown within the EU institutions, the EU does not appear to be planning to provide for multiple discrimination. In the explanatory memorandum to COM (2008) 426, the Commission reports that, in its consultation, attention was drawn to the need to tackle multiple discrimination, for example by defining it as discrimination and by providing effective remedies. It then states: 'These issues go beyond the scope of this directive but nothing prevents Member States taking action in these areas'.³⁵ In other words, the EU will not provide for this and it is left to the Member States to do so. However, not many Member States have actually provided for the taking of cases on multiple grounds to date.

An example of a Member State's national law which does already provide for multiple discrimination can be found in Article 18(3) and (4) of the Labour Code of Poland.³⁶

³³ Ibid. Amendment 37.

³⁴ Ibid. Amendment 38.

³⁵ COM (2008) 426, supra note 20, at 4.

³⁶ For example, Article 18(4) of the Labour code defines 'indirect discrimination' as follows: '*Indirect discrimination occurs whenever an apparently neutral provision, criterion or practice results in differences in terms of employment to the detriment of all or a substantial number of employees belonging*

And, the Bulgarian Anti-discrimination Law defines multiple discrimination as ‘discrimination on the grounds of more than one of the characteristics under Article 4(1)’.³⁷

Evidence that discrimination occurred on more than one ground could also be seen as an aggravating circumstance or factor which can give rise to the award of a higher sum in compensation. Austria, Italy and Romania, for example, have provided for multiple discrimination to be taken into account when calculating compensation.³⁸

Another example the EU Member States could use is the Canadian Human Rights Act, which was amended in 1998 and now includes a section, Section 3(1) under the heading ‘multiple grounds of discrimination’, which states:

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.³⁹

This approach deals with some of the points of criticism made against the single ground approach. As Moon writes:

The great merit of this approach is that it has permitted the particular experience of the individual to be acknowledged and so remedied. The Ontario Human Rights Commission has noted that taking an intersectional approach leads to a greater focus on society’s response to the individual and a lesser focus on the category into which the person may fit. This enables a Court to make a more person-specific analysis of the effect of the treatment in question.⁴⁰

This would thus put more emphasis on the individual’s experience.

The approach of the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 might also be more suited than other equality regimes to tackle multiple discrimination. This Act determines that neither the State nor any person may unfairly discriminate against any person (Section 6). Discrimination is defined in Section 1(1)(viii) as meaning

to a group differentiated with regard to one or more reasons mentioned in § 1, and if they cannot be objectively justified by other reasons’.

³⁷ Final Report GendeRace Project, supra note 1, at 202.

³⁸ Burri and Schiek, supra note 6, at 17.

³⁹ See on this for example: Schiek, D. (2005) ‘Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law’ 12, 4 *Maastricht Journal of European and Comparative Law* 457-459; and, Moon, G. (2011) ‘Justice for the Whole Person: the UK’s Partial Success Story’ in: Schiek and Lawson, supra note 2, 162-163. See on the treatment of intersectional and multiple discrimination in Canada more generally: Grabham, E. (2002) ‘Law v Canada: New Directions under the Canadian Charter?’ 22, 4 *Oxford Journal of Legal Studies* 641-661; McColgan, supra note 21, at 87-90; and, the report by the European Commission mentioned supra note 5, at 25-26.

⁴⁰ Moon, supra note 39, at 163.

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

Section 1(1) (xxii) mentions, in paragraph (a) a number of prohibited grounds,⁴¹ and then adds:

or any other ground where discrimination based on that other ground

- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);

This South-African Act thus outlaws discrimination on a expansive list of grounds and also on any other ground where discrimination on that ground causes or perpetuates systemic disadvantage or undermines human dignity. The focus of the analysis therefore rests on the effect of the treatment on the individual. This is confirmed by Section 14 of the Act, which determines what needs to be taken into account to establish whether the discrimination was unfair or not and this includes whether the discrimination impairs or is likely to impair human dignity and the impact or likely impact of the discrimination on the complainant.⁴² The South African approach is thus able to address any ground or combination of grounds howsoever defined by the claimant, so long as it can be shown to constitute a marker of disadvantage or undermines human dignity and a person's sense of self.

Going back to what was said earlier about what victims want when they make a claim for discrimination: they want recognition of what they are, of their whole identity, with all the characteristics that make up what they are. They want recognition that what they have experienced is discrimination because of what they are. The Canadian and the South-African approaches appear to be better suited to give the victim this recognition. The South-African approach is especially well suited to deal with intersectional discrimination, because it looks at the effect of the treatment on the individual. The focus in the South-African Act on treatment which perpetuates systemic disadvantage and/or undermines human dignity whether this is based on one or more discrimination grounds makes this approach much more suitable to deal with claims which satisfy the victim as it acknowledges what factually happened and that the discrimination took place because of what they are with all their traits or characteristics.

⁴¹ Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁴² Section 14(3)(a) and (b) respectively.

National institutional provisions for dealing with discrimination could play a role in dealing with multiple discrimination claims as well. It was already noted that the existence of a single equality body which deals with all grounds of discrimination covered by the anti-discrimination law could make it easier for victims to find advice and assistance in multiple discrimination complaints. The existence of a number of different bodies covering different grounds could make it very difficult for a victim of multiple discrimination to find help in bringing a claim. There appears to be a tendency in quite a few of the EU Member States to establish or to change over to single bodies.⁴³ In the GendeRace partner countries, Bulgaria, France and Germany already had a single equality body and Sweden and the UK recently created one. Sweden had four different ombudsmen to monitor and combat discrimination on different grounds (ethnicity, disability, gender and sexual orientation) which merged in January 2009. The UK Equality and Human Rights Commission took over the tasks of three different commissions existing before then (for race, gender and disability). It started its work in October 2007 with a remit which was extended to include all the grounds on which discrimination is prohibited in British law as well as human rights. Both Sweden and the UK have also consolidated a number of different anti-discrimination laws into a single equality act.

Conclusion

This paper has pointed out that the term multiple discrimination is used for a number of different types of cases where more than one ground of discrimination is present, often without a clear indication of what is meant by the term. Three types were distinguished: intersectional discrimination, additive discrimination and multiple discrimination (used in a narrow sense).

After discussing the GendeRace project and some of its findings, the problems of dealing with multiple discrimination in law were discussed. Although EU anti-discrimination law does not impose an obligation on the Member States to provide for claims of discrimination on more than one ground, it does not appear to prohibit them from doing so either. However, the problem with EU law is that the protection provided against discrimination differs for the different grounds of discrimination. This makes it more difficult to claim on more than one ground under EU law.

One of the main difficulties in many of the EU Member States is also that the law does not provide for multiple ground claims and that the courts use a single ground approach, where each ground is looked at separately and each ground thus has to be proven

⁴³ Final Report GendeRace Project, *supra*. note 1, at 203. See also: Ammer, M., Crowley, N., Liegl, B., Holzleithner, E., Wladasch, K. and Yesilkagit, K. (2010) *Study on Equality Bodies set up Under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC* Synthesis Report (Human Rights Consultancy, Utrecht, the Netherlands and Ludwig Boltzmann Institute of Human Rights, Vienna, Austria), at 46, point 49, available on line at: www.ec.europa.eu/social/BlobServlet?docId=6454&langId=en

separately. This approach has been criticised for a number of reasons, the main one being that such an approach does not recognise the unique situation of the victim and their whole identity with all its different traits.

A number of ways to address multiple discrimination in law were suggested, including some examples of national law and the proposed amendments of the EU Parliament to the Proposal for a new EU Directive. Two examples of legislative provisions, in Canada and in South Africa, were given which would make claims for multiple discrimination easier because they focus particularly on the individual victim and the effect of the treatment on him or her.

The GendeRace research suggested that there are some signs of the development of awareness of multiple and intersectional discrimination at national level as well as at the EU level. The project and my own research activities during and since that project, suggest that the issue of multiple discrimination has come to the fore in countries where the anti-discrimination law has been in existence for a certain amount of time. In those countries, the law has settled and developed and issues of discrimination have become more generally known. The thinking in these countries about equality and non-discrimination has evolved towards considering equality objectives which go beyond mere equal treatment. In contrast, in countries where anti-discrimination laws are relatively new, the first priority appears to be to establish the law and deal with discrimination or unequal treatment as such, rather than looking beyond this and complicate things further by looking at discrimination on two or more grounds at the same time. With the many different stages of development of anti-discrimination law in the EU Member States, maybe it is too much to expect the EU to take the lead in providing for multiple discrimination. However, a provision by the EU would be the only way to ensure that multiple and intersectional discrimination would be provided for in the anti-discrimination legislation of all EU Member States.