

Multiple Discrimination in EU Law Towards Redressing Complex Inequality?

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Introduction

The Problem: Complex Reality vs. Single Categories of Protection

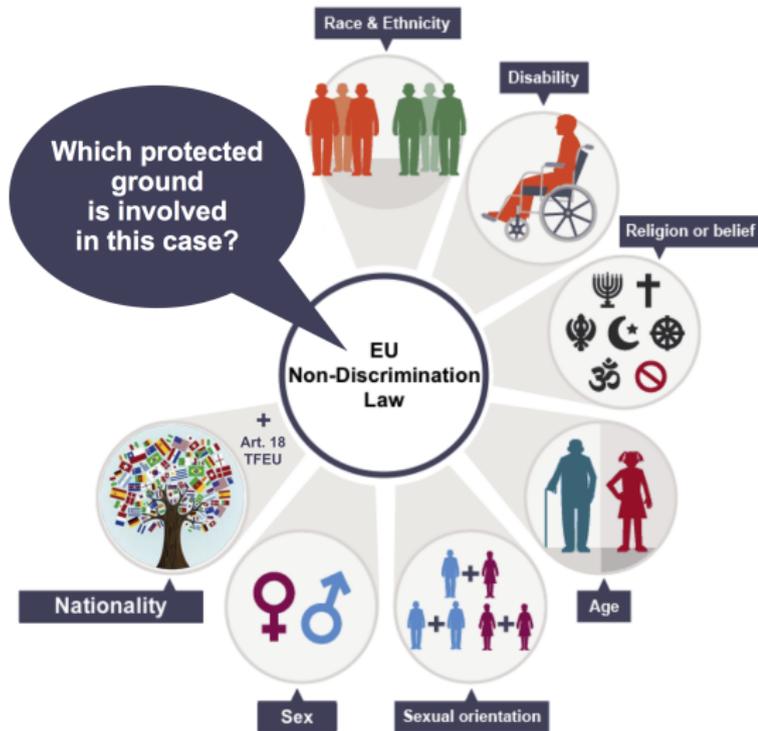
Introduction

1. The emergence of the problem of multiple discrimination

2. The EU legal framework

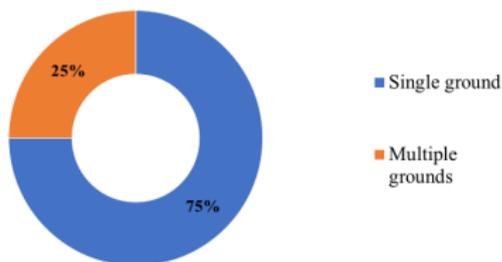
3. Redressing multiple discrimination

Current issues and conclusions



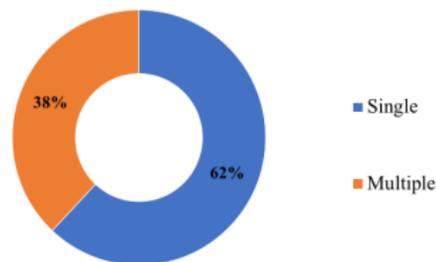
Some figures

Types of discriminations experienced in the general population (2015)



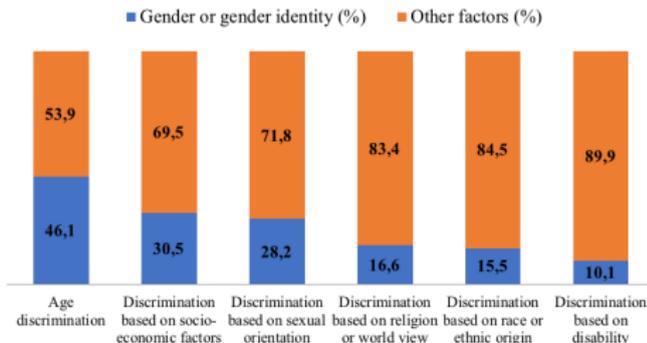
Source: Special Eurobarometer 437: Discrimination in the EU in 2015

Types of discrimination experienced among ethnic minority and immigrant populations (2010)



Source: Fundamental Rights Agency, Second European Union Minorities and Discrimination Survey (2010)

The role of gender and gender identity in other types of discrimination (2015)



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Structure of the Presentation

- ① **The emergence of the problem of multiple discrimination in EU law**
 - (a) Origins
 - (b) Definitions
 - (c) Introduction in EU law
- ② **The EU legal framework and the question of reform**
 - (a) Legislative setting
 - (b) Latest developments: towards reform?
 - (c) Policy framework
- ③ **Redressing multiple discrimination: obstacles and legal treatment at the CJEU**
 - (a) Obstacles and gaps
 - (b) CJEU: an overview
 - (c) C-443/15 Parris (2016): a missed opportunity
- ④ **Current issues and conclusions**

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1. The emergence of the problem of multiple discrimination

(a) Origins

- US Black feminism
- 1989: Crenshaw and the **intersection metaphor**
- Large spectrum of scholarship on **'intersectionality'**
- International human rights agenda:



→ Fourth World Conference on Women, Beijing, 1995: **'multiple discrimination'** → CEDAW

→ UN World Conference on Racism and NGO Forum, Durban, 2001: **'intersectionality'** → CERD

- 1990s: on the **EU agenda** during preparation phase of the 2000 directives

(b) Definitions

What is the conceptual relationship between multiple discrimination and intersectionality?

Multiple discrimination

- additive
- sequential
- intersectional

NB: no consensual terminology!



(b) Definitions

Intersectionality theory and intersectional discrimination

Intersectionality theory

Certain instances of discrimination are produced by the *synergies* of *co-constitutive* status-based systems of disadvantage.



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(c) Introduction in EU law

- 1995: European Forum of Socialist-Feminists and European Women's Lobby: report published by the European Parliament mentioned

'the multiple ways in which black and migrant women are discriminated against in the labour market, in immigration processes and as a result of racism'

£

'[the need] to tackle the issue of double/multiple discrimination that many women face'

- feminist framing: a women's rights issue
- linked with gender mainstreaming

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(c) Introduction in EU law

- Legislative lobbying: preparation of the 2000 directives
'In implementing the directive, Member States will ensure the integration of a gender perspective in order to prevent and eradicate double or multiple discriminations that many women face' - EWL (Position Paper 2000)
- Explanatory memorandum (Framework Equality Directive):
'discrimination on the grounds of either race/ethnic origin, disability, age, religion/belief or sexual orientation may affect women and men differently. The structural inequalities linked to sex and gender roles of women and men are frequently even more important in the context of dual, triple or multiple discrimination'
- Explanatory memorandum (Race Equality Directive):
'double discrimination'

2. The EU legal framework

(a) The legislative setting

- EP proposed to include definition and explicit ban:

*‘1. This Directive lays down a framework for combating discrimination, **including multiple discrimination** [...].*

2. 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 the grounds set out in paragraph 1, and also on the ground of any one or more of

i. sex [...],

ii. racial or ethnic origin [...], or

iii. nationality[...].

*And in recital (13): **Effective legal procedures should be available to deal with situations of multiple discrimination** [...in particular...] ensur[ing] that a complainant can raise all aspects of a multiple-discrimination claim in a single procedure.’*

(a) The legislative setting

- EP amendments not retained, ultimately only **non-binding** provisions adopted:
 - ▶ Recital (14) of Race Equality Directive
 - ▶ Recital (3) of Framework Equality Directive

'especially since women are often the victims of multiple discrimination'

- No transversal framework: **women's rights based understanding**
- Absent from the Gender Equality Directives
- European Commission willing to include the “need to tackle”, “defin[e]” and “provide effective remedies” for multiple discrimination in the Horizontal Directive it proposed in 2008

(b) The latest developments

June 17: Malta to 'clarify the issue of multiple discrimination'

- Transversal approach
- Recital 12: '[d]iscrimination on the basis of religion or belief, disability, age or sexual orientation **may be compounded by or intersect** with discrimination on grounds of sex or gender identity, racial or ethnic origin, and nationality'
- Recital 21: MS can take **positive action** measures to support 'group[s] of persons [...] **having a combination of characteristics**'
- Art. 2(2)(a)(b) direct and indirect discrimination '**on one or more [...] grounds**' are banned explicitly
- Commission supports but some member states oppose



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(c) The Policy Framework

- **Numerous references in policy**
 - ▶ ‘Community action programme to combat discrimination’ 2001-2006
 - ▶ Green Paper on Equality and Non-Discrimination in an Enlarged European Union 2004
 - ▶ European Year for Equal Opportunities 2007
 - ▶ Major research reports: 2007 (Danish Institute for Human Rights), 2009 (Burri and Schiek), 2016 (Fredman)
- **Progressive change of linguistic paradigm:**
 - ▶ From debates on a multi-ground equality framework...
 - ▶ ...to discussions on multiple discrimination...
 - ▶ ...and intersectionality
- **Discrepancy between political ambitions and legal solutions**

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3. Redressing multiple discrimination

(a) Obstacles

- **Grey zone:** no definition, no binding legal provision
- **Fragmented** anti-discrimination apparatus:
 - ▶ different directives for different grounds
 - ▶ different material scopes
 - ▶ different regimes of exceptions
 - ▶ hierarchies of protection
- **Complexity as a deterrent** for litigators
- Single-ground approach: **heightens evidentiary threshold**
- Choice of **comparator**?

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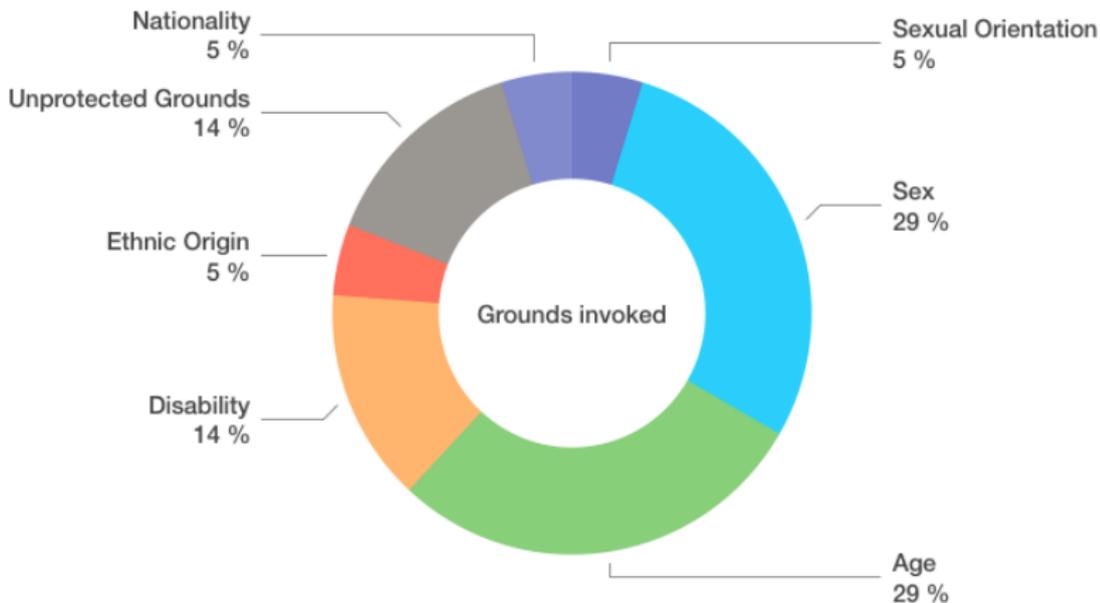
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(b) Overview

10 cases brought on multiple grounds at the CJEU so far:

- 2 grounds (8 cases) and 3 grounds (2 cases)
- Sex+ and Age+ claims, followed by Disability+ claims
- Most frequent combination: sex + age



(b) Overview

- **Contextual assessment**

- ▶ sex + ethnic origin + age in *Meister* (2012)
- ▶ “Taking into account the wider factual context” when establishing a comparator is impossible

- **Intra-categorical assessment**

- ▶ age + disability in *Odar* (2012)
- ▶ Looking for modifying factors of disadvantage

- **Inter-categorical assessment**

- ▶ sex + disability in *Z.* (2014)
- ▶ age + sexual orientation in *Parris* (2016)
- ▶ Focusing on the intersection of categories of disadvantage

(c) Detailed analysis

Focus on the decision in *Parris* (2016)



Question

*Does the rule at stake create discrimination arising from the **combined effect** of the age and sexual orientation of a member of the scheme?'*



AG Kokott

*'the combination of two or more different grounds...is a feature which lends a **new dimension** to a case...and **must be taken duly into account** in its assessment under EU law'*



CJEU

*'discrimination may indeed be based on several...grounds yet there is...**no new category of discrimination** resulting from the combination of more than one of those grounds'*

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Current issues

- C-157/15 *Achbita* (2017)
- C-188/15 *Bougnaoui* (2017)
 - ▶ First cases on religious discrimination
 - ▶ Questions regarding the wearing of an Islamic veil in the workplace



- Intersectional discrimination based on gender and religion (+ race)?
- Obstacles: intersectional argument too complex and too difficult to prove → deterrence effect

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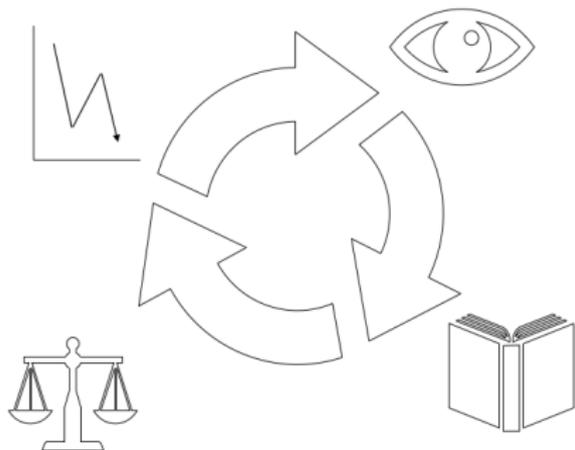
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Conclusions

- Lack of awareness and consistent definition
- Patchy legal and policy framework
- Missing adequate judicial response
- Deterrence: minimization of the problem

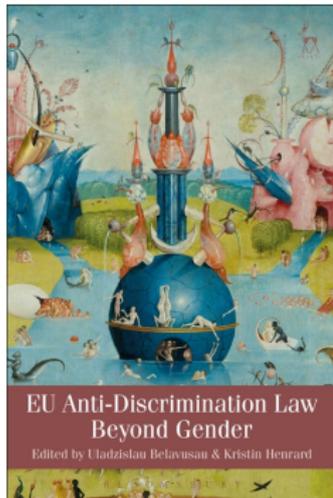


But...

- Renewed attention and discussions
- Close attention to case law reveals sensitivity
- Legislative reform?



Thank you for your attention!



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Reference:

Raphaële Xenidis, 'Multiple Discrimination in EU Law: Towards Redressing Complex Inequality?' in U Belavusau and K Henrard, *EU Anti-Discrimination Law beyond Gender* (Hart 2018, forthcoming)