

ПОВЕЌЕКРАТНА ДИСКРИМИНАЦИЈА

Апстракт: Во современото општество во кое сите права и слободи во голема мера се загарантирани и регулирани со закон постојат активности каде што истите тие права се повредени или се врши одредена дискриминација. Дискриминација се јавува како резултат на нееднаков третман на лицата во основните разлики. За да се спречи оваа појава, потребно е правата да се добро познати и достапни на соодветно ниво за да може дискриминацијата да се намали. За таа цел во ова истражување ќе бидат истражени концепти и дефиниции за дискриминација, видови на дискриминација и нејиното препознавање во пракса. Исто така, ќе се направи преглед на законодавството за да се види кои чекори се превземаат во поглед на регулацијата, со цел да се спречи дискриминацијата. Ова истражување е, пред сè, да се утврди фактичката состојба за регулирање на ова прашање, жалби до центрите за социјална работа и социјалните работници, како и претставки до Комисијата за заштита од дискриминација.

Постојат различни дефиниции на „основа за дискриминација“. Една од најчесто спомнуваните дефиниции според Европскиот суд за човекови права е „лични карактеристики со кои лица или групи на лица се разликуваат едни од други“. Според друга дефиниција, основа за дискриминација е карактеристика на еден поединец која не треба да се смета за релевантна во однос на различниот третман или уживање на одредени придобивки.

Правната дефиниција на поимот дискриминација значи нееднаков третман врз основа на одредени лични особини и карактеристики, или дискриминаторски основи, вклучувајќи неосновани класификации и диференцијации во правен контекст. Во областа на човековите права, поимот дискриминација е разликата во однос на уживањето на правата врз основа на различни законски основи или неформално вградени принципи.

Основа за дискриминација е заштитна карактеристика на која треба да се базираат недозволените различни третмани и која може да биде лична карактеристика или статус, или претпоставена лична карактеристика или статус, со која личност или група на лица се идентификуваат како

одредена раса, боја, етничка припадност, јазик, националност, пол, сексуална ориентација, религија, уверување, образование, инвалидитет, возраст, семеен или брачен статус, здравствен статус итн.

Кумулативна (заедничка) дефиниција за повеќекратната дискриминација: ако некој трпи нееднаков третман по повеќе основи на дискриминација, каде дискриминацијата се случува во различни интервали за секоја основа на дискриминација, станува збор за повеќекратна дискриминација. Доколку дискриминацијата се случила по повеќе основи, во исто време, тогаш тоа е кумулативна дискриминација. Како и да е дискриминација која се случува по неколку основи, во исто време, каде што имаме меѓусебна поврзаност и неразделност на основите, станува збор за дискриминација на исклучување поврзано со национално и етничко потекло, раса, вера и пол.

Клучни зборови: *повеќекратна дискриминација, правна еднаквост, религија, раса, етничка припадност, сексуална ориентација*

PETROVA Tanja

MULTIPLE DISCRIMINATION

Abstract: In modern society in which all rights and freedoms is largely guaranteed and regulated by legislation, but constant activity in a way that those same rights are violated or performed a certain discrimination. Discrimination occurs as a result of not equal treatment of persons in the basis differs. To prevent this phenomenon, it is necessary to be well known and available to the appropriate level of discrimination can be reduced. For this purpose in this research will be explored concepts and the definition of discrimination, types of discrimination and practicing it. It will also take stock of legislation to see that regulations are undertaken in order to prevent discrimination. The paper also do that and empirical research to determine the actual situation and the regulation of this issue, appeals for national law, social centers and social workers as well as complaints with the Commission for protection against Discrimination.

There are different definitions of “a basis for discrimination.” One of the most commonly cited definition is that of the European Court of Human Rights, according to which it is a “personal characteristic by which persons or groups of persons differ from each other.” According to another definition, the basis for discrimination is characteristic of an individual that should not be

considered relevant in terms of differential treatment or enjoyment of certain benefits.

The legal definition of the term discrimination means unequal treatment based on certain personal attributes or characteristics, or discriminatory grounds, including unfounded classifications and differentiations in a legal context. In the area of human rights, the term discrimination is a difference in terms of the enjoyment of rights based on different legal grounds or informally embedded and principles.

The basis for discrimination is a protective feature on which should be based impermissible different treatment, and which may be a personal characteristic or status, or assumed or related personal characteristic or status by which a person or group of persons identified a particular race, color, ethnicity, language, nationality, sex, gender, sexual orientation, religion, belief, education, disability, age, family or marital status, health status etc.

Multiple discrimination summary (cumulative) discrimination: If a person suffers unequal treatment of multiple grounds of discrimination, where discrimination is happening at different intervals for each ground of discrimination it comes to multiple discrimination. If discrimination has occurred on several grounds at the same time then it is a summary (cumulative) discrimination. However the discrimination has occurred on several grounds at the same time, where there was a mutual relationship and inseparability between basics, then it comes to discrimination of exclusion linked to national and ethnic origin, race, religion, and gender.

Keywords: *Multiple Discrimination, Legal, Equality, Religion, Race, Ethnic origin, Sexual orientation*

An Expansive Definition of Multiple Discrimination

Equality is a fundamental right which protected by EU law. The principle of equality implies that discrimination is prohibited on the grounds of sex, racial or ethnic origin, disability, age, sexual orientation, religion or belief (Protected grounds).

Discrimination on grounds of nationality (between nationalities Member states of the EU) is protected by Article 12 of the Treaty establishing the European Community. Member states have to apply this principle in their domestic legislation. National courts when faced with domestic legislation, which is contrary to this principle, need not apply but must guarantee the general principle of equality and ensure that is effective. The principle of equal pay for men and women, equal work or work of equal value was introduced by Article 141 of the Treaty establishing the European Community.

It was followed by the Directive on equal pay and equal treatment Directive and other EU directives aimed at protecting the fundamental principle of non-discrimination based on sex in the workplace. Article 13 of the Treaty establishing the European Community empowers the EU to take measures against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual determination. It must be noted that EU law does not provide protection Discrimination on the basis of political affiliation or political opinion.

Recommendations:

That the terminology chosen to address multiple discrimination be explained and defined clearly by international organizations, governments, trade unions and civil society organizations.

That a broad definition of multiple discrimination, inclusive of additive, compound and intersectional discrimination be adopted.

Difficulties in Measuring Multiple Discrimination

One of the most significant challenges regarding multiple discrimination is the difficulty in measuring its occurrence. The principle of equality is the basic principle of human rights, based on the equal value and dignity of all human beings. This principle is articulated in all international and regional instruments on human rights. When we talk about equality we need to distinguish between formal equality and material equality. Namely, the formal equality or, as it is also called, provided legal equality implies formal recognition that all people have equal rights and freedoms guaranteed by the law and equal application of the law by state authorities. This kind of equality presumed if there is a legal framework within which all men are equal in terms of enjoyment of rights and freedoms, while not paying attention to the outcome of the same, that this kind of equality excludes from its conception indirect discrimination.¹

On the other hand, the material equality which assumes wider interpretation of the notion of equality implies the implementation of legal Equality in everyday life, and the results and effects following the implementation of laws, policies and practices should be discriminatory. Especially taking into account the diversity of designated protected groups, for example in cases of pregnancy (after terms of sex), or the appropriate adjustment for the disabled (in terms

¹⁾ European Commission. 2007. Tackling multiple discrimination: Practices, policies and laws, (Italy, Directorate-General for Employment, Social Affairs and Equal Opportunities).

of handicap). Therefore, material equality is an indicator indicating possible inconsistencies regarding the application of formal or legal equality. The goal of a democratic society is to achieve above all material equality.²

Recommendations:

That international organizations, governments, employers and trade unions promote research to secure: (i) quantitative data that is disaggregated to track problems of multiple discrimination and; (ii) qualitative data that is attentive to multiple and complex experiential realities of inequality.

That research and data collection be inclusive of the most vulnerable individuals within socially disadvantaged groups.

Legal and Policy developments

Law on Prevention and Protection against Discrimination is expected to complement the legal gaps that exist in our legal system in the field of non-discrimination and to allow easier legal protection of all persons who would appear as alleged victims of discrimination. The law in its article 3 in addition to the discriminatory grounds such as sex, race, color, gender, belonging to a marginalized group, ethnicity, language, nationality, social background, religion or belief, other beliefs, education, political affiliation personal or social status, mental or physical disability, age, family or marital status, property status and health, and provides an open list of grounds saying the phrase or any other such basis.³

Direct discrimination on discriminatory grounds is prohibited under Article 6 § 1 of the Law, and occurs when a person has acted in a less favorable form of distinction, exclusion or restriction which has caused or could have a seizure, disruption or restriction of human face opposed to the other person in a comparable situation, on the basis of the protection characteristic of the person. The definition is not entirely in accordance with Directive 2000/78 / EC, because it is envisaged that the unfavorable treatment only has or could have, not that there was. Also, the definition of types of less favorable treatment, while adding the risk of exclusion of some kind of treatment which

²) Kotkin, M. J. 2009. "Diversity and discrimination: A look at complex bias", in William and Mary Law Review, Vol. 50, No. 5

³) Moon, G. 2009. "Multiple discrimination: Justice for the whole person," in Roma Rights (2009), Vol. 2, Multiple Discrimination, European Roma Rights Centre, http://www.errc.org/en-research-and-advocacy-roma-details.php?article_id=3564 [27 August 2010].

is not specified if approaches to the application of a restrictive interpretation by the courts. It would have to be worked out in order to clearly reflect the three elements of direct discrimination.⁴

Indirect discrimination on discriminatory grounds is prohibited in accordance with Article 6 paragraph 2 of the Law, and occurs when an apparently neutral provision, criterion or practice puts a person in a protective feature or wider group of such persons, in particular disadvantage compared with other persons, unless such provision, criterion or practice arising from justifiable purpose and the means of achieving that aim are appropriate and necessary. The definition does not fully comply with Directive 2000/78 / EC, because it is envisaged that only puts individuals at a special disadvantage, rather than puts or could put in a special disadvantage.⁵

The Law is no possibility of a general justification for indirect discrimination in accordance with the existence of legitimate and the test of proportionality. It is interesting to note that the courts should play a key role in solving the dilemma of percentage of the group members in cases of indirect discrimination. Moreover, it is expressly forbidden statistical data to be used in proving these cases, the authors consider that they would be acceptable as evidence in judicial proceedings, of course, according to the free assessment of the court if he bowed faith.

Approaches in determining the grounds for discrimination

Courts and bodies working on prevention of discrimination may have different approaches in determining the grounds for discrimination. Their approach will largely depend on the legal framework under which they operate, which determines their freedom of interpretation that may have when considering cases of potential discrimination, and in determining the grounds for discrimination. Development of the legal protection of equality and protection from discrimination on home level is a newborn, and freedom of interpretation appears to be a particularly valuable assistance to applicants and their representatives.⁶

⁴ Muigai, G. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. 2010. *Data Collection and the Use of indicators to promote and monitor racial equality and non-discrimination*, Office of the High Commissioner for Human Rights Regional Seminar for the Americas, Rio de Janeiro, 3-5 May 2010.

⁵ European Commission. 2007. *Tackling multiple discrimination: Practices, policies and laws*, (Italy, Directorate-General for Employment, Social Affairs and Equal Opportunities).

⁶ Burri; D. Schiek (2009.): *Multiple discrimination in EU law: Opportunities for legal responses to intersectional gender discrimination?* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities), pp.43-45.

Equality bodies should assist applicants as they can better formulate their claims, while certainly considering them fully their originally filed claims. For example, applicants have requested the establishment of discrimination grounds ethnicity, gender and marginalized group. Equality body may deem relevant basis in this particular case, despite ethnic and marginalized group is age, but not sex. In that case, the body will have to consider all four grounds in order to simultaneously answer the claim of applicants, but also to identify and act on other grounds it considers is potentially damaged by the will fulfill the ultimate goal of existence – promoting the principle of equality and protection from discrimination. Determining grounds of discrimination in countries with an open model or model a general ban requires openness of courts and bodies which act on these provisions. In determining the basics in these systems, it is the competent institutions to take into account the social, political, economic and cultural development of society. Open model and model with a general prohibition gives space to these institutions for evolutionary interpretation of the basics.⁷

The competent institutions are facing various challenges regarding the determination of the basis for discrimination and treating them. Some of them include the determination of belonging to a particular group, multiple discrimination, discrimination aggregate (cumulative) discrimination, discrimination by association, the supposed feature, comparator and the importance of the comparator, degree / gradation of protection on the basis of discrimination, affirmative action and positive action measures, reasonable adjustment, etc.

All these institutes are important for the understanding, interpretation and application of the grounds of discrimination, and therefore there will be briefly clarified. Belonging to a certain group: If there is no justification for a different approach, the principle of self-identification of the person with a particular group should be taken as determining for determining affiliation to a particular group.⁸

Affiliation also can determine through possession of personal characteristic or status which binds to a specific group. Often important in cases of unequal treatment has the potential discriminator perception of belonging to a particular group of person (see “assumed characteristic” below). Multiple discrimination,

⁷) European Commission. 2007. *Tackling multiple discrimination: Practices, policies and laws*, (Italy, Directorate-General for Employment, Social Affairs and Equal Opportunities). European Union Agency.

⁸) Zappone, K.E. (ed.) 2003. *Rethinking identity: The challenge of diversity*. (Ireland, Joint Equality and Human Rights Forum).

discrimination, summary (cumulative) discrimination: If a person suffers unequal treatment of multiple grounds for discrimination, where discrimination is happening at different intervals for each ground of discrimination it comes to multiple discrimination. If discrimination has occurred on several grounds at the same time then it is a summary (cumulative) discrimination. If, however, the discrimination has occurred on several grounds at the same time, where there was a mutual relationship and inseparability between basics, then it comes to discrimination. Discrimination by association: If unequal treatment is the one person due to his association with another person who holds a protected personal characteristic or status, then discrimination against a person is considered discrimination association. Assumed feature: The person does not really have a definite feature or status to be discriminated on the basis of it. There will be a decisive perception of potential discriminator, which presupposes that the person belongs to a particular group such characteristic or status, whether it really is.⁹

Degree / gradation of protection: As will be repeatedly emphasized in the cases discussed in this guide, the courts and the bodies deciding on discrimination cases often make gradation protection grounds for discrimination.

Gradation is done so that, after verifying that there is a different treatment for some of the basics, courts and bodies will require “very weighty reasons” or more stringent in seeking reasonable justification for such different treatment. While other items courts and bodies will exercise greater margin of permissibility (as does, for example, ECHR) and thus leave more space, or other potential discriminator to prove that different treatment is justified, proportionate, and that serve a legitimate purpose.¹⁰

Affirmative measures and positive action measures: These measures are defined in relation to certain grounds for discrimination, and with the specific goal to promote material equality, including through quotas or other rules for representation of marginalized or excluded groups, which are time-limited in nature and aim to correct historical injustice made against a particular group. Such measures may be: in fact neutral, but goal-inclusive policies; programs through which you can get / reach disadvantaged groups; preferences in employment and redefine required qualifications, other concrete

⁹⁾ Sweden. 2009. *New anti-discrimination legislation and a new agency, the Equality Ombudsman*, (Ministry of Integration and Gender Equality). Available at: <http://www.sweden.gov.se/content/1/c6/11/80/10/4bb17aff.pdf> [21 July 2010].

¹⁰⁾ Lombardo, E.; Verloo, M. 2009. “*Institutionalizing intersectionality in the European Union? – Policy developments and contestations*” in *International Feminist Journal of Politics*, Vol. 11, No. 4, pp. 478 – 495.

actions to eradicate discrimination. Not only is there no space to claim unequal treatment in cases of consistent application of these measures, but the absence of the introduction and application of such measures should be considered discrimination.¹¹

Reasonable adjustment, necessary and appropriate adjustment, which will cause a disproportionate load in cases where it is necessary to ensure that the person will be on equal footing with the other to enjoy fundamental rights and measures taken reasonable adjustment cannot be regarded as unjustified, unfair treatment. On the contrary, the absence of such measures could be considered discrimination.

Conclusion

There are different definitions of “a basis for discrimination.” One of the most commonly cited definition is that of the European Court of Human Rights, according to which it is a “personal characteristic by which persons or groups of persons differ from each other.” According to another definition, the basis for discrimination is characteristic of an individual that should not be considered relevant in terms of differential treatment or enjoyment of certain benefits. Multiple discrimination summary (cumulative) discrimination: If a person suffers unequal treatment of multiple grounds of discrimination, where discrimination is happening at different intervals for each ground of discrimination it comes to multiple discrimination. If discrimination has occurred on several grounds at the same time then it is a summary (cumulative) discrimination. However the discrimination has occurred on several grounds at the same time, where there was a mutual relationship and inseparability between basics, then it comes to discrimination of exclusion linked to national and ethnic origin, race, religion, and gender. Discrimination on grounds of nationality (between nationalities Member states of the EU) is protected by Article 12 of the Treaty establishing the European Community. Member states have to apply this principle in their domestic legislation. National courts when faced with domestic legislation, which is contrary to this principle, need not apply but must guarantee the general principle of equality and ensure that is effective. The principle of equal pay for men and women, equal work or work of equal value was introduced by Article 141 of the Treaty establishing the European Community. It was followed by the Directive on equal pay and equal treatment Directive and other EU directives aimed at protecting the

¹¹⁾ Fredman, S. 2009. “Positive rights and duties: Addressing intersectionality”, in D. Schiek and V. Chege (eds.): European Union non-discrimination law: Comparative perspectives on multidimensional equality law (London, Routledge-Cavendish), pp. 73-89.

fundamental principle of non-discrimination based on sex in the workplace. The principle of equality is the basic principle of human rights, based on the equal value and dignity of all human beings. This principle is articulated in all international and regional instruments on human rights. When we talk about equality we need to distinguish between formal equality and material equality. Namely, the formal equality or, as it is also called, provided legal equality implies formal recognition that all people have equal rights and freedoms guaranteed by the law and equal application of the law by state authorities. This kind of equality presumed if there is a legal framework within which all men are equal in terms of enjoyment of rights and freedoms, while not paying attention to the outcome of the same that this kind of equality excludes from its conception indirect discrimination.

Bibliography

- Abrams, K. 2014. "Title VII and the complex female subject", in *Michigan Law Review*, Vol. 92, No. 8, pp.2479-2540.
- Arnardottir, O. M. 2009. "Multidimensional equality from within: themes from the European Convention on Human Rights", in D. Schiek; V.Chege (eds.): *European Union non - discrimination law: comparative perspectives on multidimensional equality law* (New York, Routledge-Cavendish), pp. 53-72.
- Burri; D. Schiek (2009.): *Multiple discrimination in EU law: Opportunities for legal responses to intersectional gender discrimination?* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities), pp.43-45.
- European Commission. 2007. *Tackling multiple discrimination: Practices, policies and laws*, (Italy, Directorate-General for Employment, Social Affairs and Equal Opportunities).
- European Union Agency for Fundamental Rights. 2010. *The impact of the Racial Equality Directive - Views of trade unions and employers in the European Union: Strengthening the fundamental rights architecture in the EU IV* (Luxembourg).
- Fredman, S. 2009. "Positive rights and duties: Addressing intersectionality", in D. Schiek and V. Chege (eds.): *European Union non-discrimination law: Comparative perspectives on multidimensional equality law* (London, Routledge-Cavendish), pp. 73-89.
- General Recommendation No. 26 on women migrant workers*, CEDAW/C/2009/WP.1/R. Available at: http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf [31 August 2010].

- Kotkin, M. J. 2009. "Diversity and discrimination: A look at complex bias", in *William and Mary Law Review*, Vol. 50, No. 5, pp.1439-1500.
- Lombardo, E.; Verloo, M. 2009. "Institutionalizing intersectionality in the European Union? – Policy developments and contestations" in *International Feminist Journal of Politics*, Vol. 11, No. 4, pp. 478 – 495.
- Moon, G. 2009. "Multiple discrimination: Justice for the whole person," in *Roma Rights* (2009), Vol. 2, Multiple Discrimination, European Roma Rights Centre, http://www.errc.org/en-research-and-advocacy-roma-details.php?article_id=3564 [27 August 2010].
- Muigai, G. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. 2010. *Data Collection and the Use of indicators to promote and monitor racial equality and non-discrimination*, Office of the High Commissioner for Human Rights Regional Seminar for the Americas, Rio de Janeiro, 3-5 May 2010.
- Sweden. 2009. *New anti-discrimination legislation and a new agency, the Equality Ombudsman*, (Ministry of Integration and Gender Equality). Available at: <http://www.sweden.gov.se/content/1/c6/11/80/10/4bb17aff.pdf> [21 July 2010].
- United Nations Committee on the Elimination of Discrimination against Women. 2009.
- Zappone, K.E. (ed.) 2003. *Rethinking identity: The challenge of diversity*. (Ireland, Joint Equality and Human Rights Forum).