



Comparative analysis in Romania, Finland and Italy of discrimination legislation, policies and legal decisions on multiple discrimination



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Introduction

International, European and national anti-discrimination legislation has generally approached the topic of equality from a unidimensional and sectorial perspective, starting from the premise that a person can be discriminated against on the basis on one ground at a time. This leads to the idea that such grounds can be effectively addressed separately, often by distinct legislation, policies, and strategies or by court decisions.

However, scholars and activists have increasingly shown that people oftentimes belong to more than one disadvantaged group and thus face complex and potentially unique forms of discrimination, which cannot be explained through the lens of a single ground of discrimination. Such is the case, for example, when it comes to the experience of Roma women, Black women, migrant women, disabled women, lesbian/bisexual women or a combination of such backgrounds. This is even more relevant, as “disadvantages, in general, tend to reinforce each other and accumulate”¹, which is especially evident in for ethnic and/ or migrant groups with a lower socio-economic background.

Therefore, starting with the late 1980’s, it has been explicitly pointed out that such a unidimensional perspective is often inadequate or at least insufficient in addressing all potential experiences of discrimination. Instead, terms such as “multiple”, “compound” and “intersectional” discrimination have been proposed in order to adequately understand the unique experiences of discrimination faced by each person and effectively tackle them. This would also help improve the principle of substantive equality, as stressed by Fredman².

Across Europe, Roma women are among those ones facing multiple, compound and intersectional discrimination. Therefore, in the following, the present research will analyze the way and the extent to which the legislation addresses these forms of discrimination in general. We aim to identify existing legal provisions and gaps in law and policy, which tackle intersectional discrimination against Roma women. In doing so, we will start by reviewing the theoretical framework. Then, we will look into the legislation, policy and case law on discrimination, at the EU and national level of Romania, Finland and Italy. For the sake of thoroughness, we will also provide a short overview on the legislation of other European countries.

Next, the research aims to identify how anti-discrimination legislation is applied by the courts and the national anti-discrimination authorities which have a quasi-judicial function, such as the National Council for Combating Discrimination in Romania, the Consigliera di Parità in Italy and the Non-Discrimination and Equality Tribunal in Finland³. The legislation and case-law will be examined in regard to their explicit or implicit approach to unidimensional and multidimensional discrimination, be it multi-discrimination, compound or intersectional discrimination.

Literature review: the concept of intersectionality and its origins

¹ Timo Makkonen 2002. *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*. Turku, Finland: Abo Akademi University.p. 8.

² Sandra Fredman. 2016. *Intersectional discrimination in EU gender equality and non-discrimination law*, Report for the European Commission, pp. 80–85

³ In Finnish language: Yhdenvertaisuus- ja tasa-arvolautakunta.

For a long time, instances of discrimination were treated in relation to a single ground, which still is the practice in many countries. Scholars call it the „single-axis approach“⁴, which „generally position racism and sexism as parallel or analogous, as opposed to intersecting or co-constitutive phenomena“⁵. “Single-axis” is the term used to denote those perspectives and methods of analysis that privilege one dimension of inequality (e.g., gender, race or class), such that all members of a certain gender, racial or class group are thought to have essentially the same experiences of gender, race or class⁶. This approach fails to grasp the specific kind of discrimination occurring to subjects located at the intersection of different discriminations. In the case of Roma women, incidents of forced sterilizations represent a kind of discrimination that neither Roma men nor women from the majority ethnic group experience.

In recent years, the notion of multiple discrimination has been recognized by the law and sanctioned by the courts.

In order to fully understand how discrimination can occur on more than one ground, we can follow various theoretical models: scholars like Makkonen⁷ and Fredman⁸, for instance, usually distinguish among three kinds of discrimination:

1. „multiple discrimination“, understood as “the phenomenon in which one person is discriminated against on several different grounds at different times.”⁹ For example, a Roma woman could be discriminated against on the basis of her ethnicity when trying to access a public space or service and on the basis of her gender when applying for a job.
2. another term proposed by authors for addressing a more complex form of discrimination is that of “compound discrimination”. This notion describes “a situation in which several grounds of discrimination add to each other *at one particular instance*: discrimination on the basis of one ground adds to discrimination based on another ground to create an *added burden*.”¹⁰ For example, a Roma woman might be restricted from accessing certain jobs, because of her gender and from others because of her ethnic background, thus leaving her with few options to support herself and her family.

While these two concepts have the advantage of considering several types of discrimination at once, the grounds can still be identified separately and without influencing each other, in the case of multiple discrimination; or just adding to each other on a permanent basis and creating specific and unique forms of discrimination, in the case of compound discrimination.

3. As opposite to “multiple discrimination” and “compound discrimination”, “intersectional discrimination” is considered by most scholars to be the best approach when trying to provide remedy to „minorities within minorities“. Intersectional discrimination describes a situation in which “all grounds of discrimination may interact with each other and produce specific experiences of discrimination”¹¹. The characteristic of this kind of discrimination is that it is “qualitatively different” from the ones occurring on

⁴ Vivian M. May, *Pursuing intersectionality, Unsettling Dominant Imaginaries*. Routledge, 2015, p. 82.

⁵ Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor*. Cambridge: Harvard University Press, 1992.

⁶ Idem.

⁷ Makkonen, *Multiple, Compound and Intersectional Discrimination*

⁸ Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law*

⁹ Makkonen, *Multiple, Compound and Intersectional Discrimination*, p. 10.

¹⁰ Idem, p. 11.

¹¹ Idem, p. 9.

one ground only¹²: e.g., in cases of Roma women's sterilization without their consent, neither Roma men nor non-Roma women would undergo this practice. Without considering the interaction between ethnic origin and gender, such cases concerning Roma women cannot be adequately sanctioned.

The concept of intersectionality stems from the broader critical legal studies, a school of legal and critical thought, which had emerged in the US, in the 1970s. Its main claim is that legislation maintains the status quo of the structures of power existing in a certain society¹³. More precisely, intersectionality is linked with Critical Race Theory and Black Feminism. Although the concept of intersectionality had floated around (especially thanks to the work of the Combahee River Collective¹⁴ and other Women of Color¹⁵), it is agreed by scholars that the term was first coined by Kimberle Crenshaw in her seminal work from 1989 *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*¹⁶. Indeed, the origin of „intersectionality” is closely linked to Black feminism, with the second wave of US feminism. More specifically it originated from its critique, as formulated by authors such as Angela Davis¹⁷, who highlighted that feminism had, unfortunately, been understood as homogeneous and white-essentialist, thus ignoring the experiences and voices of women of color and of other minority women.

To sum up, the concept has three major roots: critical legal studies, critical race theory and Black feminism. Although over the years, the term has evolved towards various other areas¹⁸, for this report we will focus on the concept of intersectionality in the area of non-discrimination, i.e. one of the two main fields in which it was first used¹⁹ together with violence against Black women²⁰.

In fact, intersectional theories rely on „a matrix framework that recognizes the intricately entwined functions of both identities and power”²¹. The law is a contested field in which multiple social groups and actors seek power, control, restitution and social transformation”, from the perspective of critical legal studies²². In this context, intersectionality is a necessary tool for adequately depicting structures of inequality and enabling legislators, policy-makers and judges to dismantle them and to find remedies to unique cases of discrimination.

¹² K. W. Crenshaw, 1991. "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color." *Stanford Law Review* 46: 1241–1299

¹³ Duncan Kennedy and Roberto Unger are two of the key figures of the movement. See in particular Roberto Mangabeira Unger, *The critical legal studies movement*, Verso Books, 2015.

¹⁴ Combahee River Collective is a Black lesbian feminist organization which issued the Combahee River Collective Statement, a key document for the development of Black feminism.

¹⁵ Patricia H. Collins, "Piecing Together a Genealogical Puzzle: Intersectionality and American Pragmatism". *European Journal of Pragmatism and American Philosophy*, 3, 2: 88-122.

¹⁶ University of Chicago Legal Forum 140: 139–167. Later followed by Crenshaw, K. W. 1991. "Mapping the Margins" See also K. W. Crenshaw, 2000. *Background Paper for the Expert Meeting on the Gender-Related Aspects of Race Discrimination*. United Nations.

¹⁷ Angela Davis, *Women, Race and Class*, Random House, 1981.

¹⁸ For more see Patrick R. Grzanka, *Intersectionality. A Foundations and Frontiers Reader*. Routledge. 2018.

¹⁹ Kimberlé W. Crenshaw 1989 "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" *University of Chicago Legal Forum*: 140 (1) Article 8.

²⁰ Kimberlé W. Crenshaw, 1991. "Mapping the Margins, 1244

²¹ Patricia Hill Collins., "Learning From the Outsider Within: The Sociological Significance of Black Feminist Thought", *Social Problems*, Vol. 33, 1986.

²² Patrick R. Grzanka (ed), *Intersectionality: Foundations and Frontiers*, Routledge, 2018. p. 2

For a long time, Black and other minority women were considered „impossible subjects”²³. That is, some experiences, or rather a vortex of their experiences, were not visible either for the law and courts, nor for policymakers.

As Crenshaw put it, using her famous intersection metaphor, which led to the creation of the term:

„Consider an analogy to traffic in an intersection, coming and going in all four directions. (...) If an accident happens in an intersection, it can be caused by cars traveling from any number of directions, and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination”²⁴.

Or, as explained by sociologist Roderick Ferguson, intersectionality is „a way to address the simultaneity of modes of difference”²⁵, it is an overlapping of several injustices.

Kimberlé Crenshaw herself later developed and refined her earlier statement:

„My objective (...) was to illustrate that many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women’s lives in ways that cannot be fully captured wholly by looking at the race or gender dimensions of those experiences separately”²⁶.

Shreya Atrey, builds on Crenshaw’s work, by applying intersectionality to discrimination law. She conceptualizes intersectionality further as it follows:

“intersectionality rejects the understanding of discrimination as a function of a single categorical axis and emphasizes the need to recognize discrimination resulting from the intersections of multiple axes of race, caste, religion, sex, gender, disability, age, sexual orientation etc. It seeks to reconceptualize the way we understand such intersectional discrimination, in order to present a more accurate vision of the prevailing social inequalities that correspond with people’s lived realities. (...) intersectionality illuminates the dynamic of the sameness and difference in patterns of group disadvantage based on multiple identities understood as a whole, and in their full and relevant context, with the purpose of redressing and transforming them.”²⁷

If we consider, for instance, the practice of international Human Rights Mechanisms, and in particular that of CEDAW (the Committee on the Elimination of Discrimination against Women) we notice that for a long time and up to recently, the Committee took notice and sanctioned discrimination against women only as single-faceted. In fact, „[t]he groups “women” was viewed by the Committee as being an essentially unitary category with comparisons being

²³ Ngai, M. M. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton, NJ: Princeton University Press. 2004

²⁴ Crenshaw, note 14, p. 149.

²⁵ R.A. Ferguson, *Reading Intersectionality*, *Trans-Scripts* 2. 2012.

http://sites.uci.edu/transscripts/files/2014/10/2012_02_08.pdf, Accessed 2.12.2020

²⁶ Crenshaw, K. W. 1991. “Mapping the Margins”, p. 1244

²⁷ Shreya Atrey, “Intersectional Discrimination”, OUP: Oxford (2019), p.77

made against a male comparator (presumably also devoid of any identifying features other than biological sex)²⁸.

For example, in *A.S. v. Hungary*²⁹ adjudicated by this Committee in 2006, where a Roma woman lodged complaint against Hungary because of forced sterilization, the Committee neither took into consideration the fact that the respective woman belonged to the Roma minority, nor made any reference to her status as a mother and as Roma, despite the fact that the claimant underlined that: “having children is said to be a central element of the value system of Roma families”.³⁰

This view has changed over the years since 2004 the CEDAW has explicitly addressed intersectional discrimination in some Recommendations³¹ and in its Communication on the cases, as proved by the ruling of *Alyne da Silva Pimentel Teixeira v. Brazil* (2008)³². In this case, a 28-year-old poor, pregnant woman of Afro-Brazilian descent from Rio de Janeiro was denied adequate health care by a private health clinic, despite evident problems caused by a high-risk pregnancy. As a result, she died soon afterwards, leaving behind her five-year-old daughter. Alyne’s family filed a lawsuit before the Rio de Janeiro Trial Court, demanding material and moral damages for her husband and daughter. After a delay of ten years, the court awarded moral damages and a pension for Alyne’s daughter, but it ruled that the state was not directly responsible for the inadequate health services provided at the private health center. In this case, the Committee found that the state failed to protect Alyne’s health, ensure her access to justice and to fulfil its duty of regulating the activities of private health providers. The committee stated that Alyne “suffered from multiple discrimination, being a woman of African descent and on the basis of her socio-economic background.” Therefore, the Committee recalled its previous observations on Brazil, noting “the existence of de facto discrimination against women, especially women from the most vulnerable sectors of society such as women of African descent [...]” as well as its general recommendation No. 28 (2010), “recognizing that discrimination against women based on sex and gender is inextricably linked to other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, cast, and sexual orientation and gender identity.”

In order to understand the importance of using an intersectional approach, let us consider, for instance, the prosecution of a raped poor Black woman. If the judge does not take into consideration the stereotypes against poor and minority women, that is the intersection in this case between poverty, Blackness and womanhood, he/she might doubt the truthfulness of the victim’s testimony and either acquit or show leniency towards her rapist. This is more likely to happen especially in front of jurors³³ who are, at times, led by prejudices and stereotypes to believe that women of color are more likely to consent to sex. So, of the judges or jurors ignore

²⁸ Ivona Truscan, Joanna Bourke- Martignoni, “International Human Rights Law and Intersectional Discrimination”, *The Equal Rights Review*, Vol. Sixteen (2016), p. 110.

²⁹ *A.S. v Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2004. 49 *Cecilia Kell v Canada*, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008, 26 April 2

³⁰ Paragraph 2.4

³¹ CEDAW, 2004. General Recommendation No. 25: Article 4, paragraph 1, of the Convention (Temporary Special Measures), 30th Session; CEDAW, 2010. General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW/C/GC/28), 16 December 2010

³² *Alyne da Silva Pimentel Teixeira v. Brazil*, Communication No. 17/2008, <https://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf>

³³ The term jurors refers to members of a jury, which is a sworn body convened by a court of law, to render an impartial verdict, or judgment or to set a penalty. Juries are commonly used in Great Britain, the United States, Canada, Australia and other countries.

the intersection of the victims of multiple identities, as a poor, Black woman and only consider her gender, it might be that they are not aware of certain prejudices they might have succumbed to.

The notion of intersectional discrimination is further developed by Kimberle Crenshaw, who theorized the notions of structural, political or representational intersectionality.³⁴ Structural intersectionality denotes “a full range of circumstances in which policies intersect with background structures of inequality to create a compounded burden for particularly vulnerable victims”³⁵, such as gendered discrimination towards women already marginalized due to their race and/ or class. Meanwhile, political intersectionality refers to how “women who are members of communities that are racially, culturally, or economically marginalized have actively organized in large and small ways to challenge the conditions of their lives”. More precisely, structural intersectionality maps the material consequences of intersectional oppression, whereas political intersectionality describes the strategies of resistance employed by individuals, social groups and organizations when faced with intersectional oppression. Lastly, representational intersectionality deals with the social construction of stereotypes and prejudices concerning specific groups of women. For example, Black women have been depicted as “angry women”³⁶ and Roma women as “non-Roma children kidnappers”³⁷

Meanwhile, critics of the concept of intersectionality argue that the intersectional approach is not a universal, absolute panacea to all discriminatory wrongdoings, and it should be taken with a grain of salt or at least in a critical manner. The most prominent critiques are based on the „fragmentation problem”, the „infinite regress problem” and the „relativism problem”³⁸. The „fragmentation problem” warns of an infinite creation of inequality subgroups, which would lead not only to conceptual fragmentation, but even to dissolution. As for the „infinite regress problem” the main criticism, as forwarded by Ehrenreich³⁹, is that by applying this concept, the focus will be on the individuals, thus making the group as a whole, with its own unique challenges, to disappear. The „relativism problem” describes each individual as a possible oppressor, rendering thus the entire anti-discrimination and equality apparatus meaningless.

However, despite the criticism, the intersectional approach offers a possible remedy to persons facing injustice on more than one ground, who otherwise would stand no chance. It represents a tool with unique capacities of allowing policymakers, legislators and judges to truly comprehend ambiguous and intricate experiences.

[General overview: intersectionality in European anti-discrimination legislation and case law](#)

Intersectionality in EU legislation and case law

This is the general picture of the origin and main theories on intersectionality, which, we highlight once again, are particularly linked to the American experiences. But what about the

³⁴ K. W. Crenshaw, *Background Paper for the Expert Meeting on the Gender-Related Aspects of Race Discrimination*

³⁵ Idem

³⁶ Idem.

³⁷ Sabrina Tosi Cambini, 2008. *La zingara rapitrice. Racconti, denunce, sentenze* (1986-2007). Roma: **CISU**.

³⁸ Truscan, Bourke- Martignoni, “International Human Rights Law and Intersectional Discrimination”,

³⁹ Nancy Ehrenreich, “Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems”, *University of Missouri – Kansas City Law Review*, Vol. 71, 2002, p. 267.

European Union? We already know that when it comes to imported legal concepts, in general, and the race discrimination, in particular, the transplanted concepts into European framework can be challenging⁴⁰. And, intersectionality stems, as we saw, from the intertwining of race and gender. However, as we will present in this section, in the EU space, intersectionality not only is more complex, encompassing several grounds- such as disability or age, but it is also not applied exclusively as a tool for women empowerment, given that some of the most interesting developments come from cases related to men experiences, in particular LGBTQ+.

Firstly, a quick theoretical note. The main debates on intersectionality in the EU are related to whether intersectional discrimination could and should be recognized as a different form of discrimination within the already existing anti-discrimination law, which covers direct discrimination, indirect discrimination, instruction to discriminate and, based on the Court of Justice's case-law, discrimination by association. Because of its complexity, the intersectionality conceptual apparatus has been criticized in the European space for either being too difficult to implement, especially in litigation⁴¹ as well as for being too challenging⁴². The problems already mentioned above, the „fragmentation problem”, the „infinite regress problem” and the „relativism problem”, also feed the theoretical debates in Europe, plus, they are complicated by the challenges posed of an intricate complex institutional and judicial framework, given the existence and dialogue between national states and EU level. In this context, and to sum up, currently there are three theoretical standpoints regarding the intersectionality in the EU context: scholars doubting that intersectionality might have any value as a practically relevant concept; reorganizing the anti-discrimination framework around different concepts; or interpreting the available policy and legislation as encompassing the concept of intersectionality, by using a purposive interpretation⁴³.

As for the conceptual reorganization, it has been suggested either to reorganize the discrimination grounds around three nodes⁴⁴, avowing, thus, fragmentation, and dilution: race, gender and disability⁴⁵; or utilizing the notion of “capacious grounds”⁴⁶, as well as the notion of “horizontal inequalities”⁴⁷.

First bans on discrimination, within the EU legal order, were conceived for a smooth functioning of the Common Market, as equal treatment on grounds of nationality was an essential condition for the free circulation of services, goods and persons. Since then, the EU anti-discrimination moved more and more away from economic freedom and towards the protection of its citizens. Article 141 TEC, ensuring the principle of equal remuneration between men and women, and ECJ decisions on the matter⁴⁸, subsequently strengthened EU sex equality legislation. The lobby of the Starting Line group in the Nineties and the Amsterdam Treaty in 1997 paved the way to extend antidiscrimination legal protection to all grounds covered in art. 13 TEC (now

⁴⁰ See in particular Mathias Möschel, *Law, Lawyers and Race, Critical Race Theory from the United States to Europe*, Routledge, 2014.

⁴¹ Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law*

⁴² Pok Yin S. Chow, “Has intersectionality reached its limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of ambivalence” *Human Rights Law Review*, 16 (3), September 2016, pp. 453-481.

⁴³ Dagmar Schiek, “On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)”, *International Journal of Discrimination and the Law* (2018), 18 (2-3), : 82-103.

⁴⁴ Schiek, “On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)”,

⁴⁵ McColgan, A (2014) *Discrimination, Equality and the Law*. Oxford: Hart.

⁴⁶ Sandra Fredman “Substantive equality revisited” *International Journal of Constitutional Law* 14(3): 69–79, 2016.

⁴⁷ Frances Stewart, *Horizontal Inequalities and Conflict. A Review of CRISES Findings. Background Paper for the World Development Report*. Washington: World Bank, 2011.

⁴⁸ See in particular *Defrenne vs. Sabena*, 43/75.

art. 19 TFEU): sex, racial and ethnic origin, religion and belief, disability, sexual orientation and age.

More precisely, in 2000 the first two EU antidiscrimination beyond sex were issued:

- Directive 2000/43 / EC for the equal treatment of people regardless race and ethnic origin in wide range of sectors beyond employment, such as access to goods and services and access to housing.
- Directive 2000/78/ EC for equal treatment in the field of employment and working conditions, regardless of disability, religion, personal beliefs, from age or sexual orientation.

In the following years, the existing EU Directives on sex have been harmonized to the standards set in the aforesaid antidiscrimination Directives, although some differences exist in their objective scope:

- Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- Directive 2006/54/EC on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

The Racial Equality Directive (2000/43/EC) is a critical piece of legislation highlighting the relevance of race as a ground of discrimination. It expanded significantly the scope of non-discrimination law at the EU level, by explicitly prohibiting discrimination on the grounds of race and ethnic origin in the context of employment, as well as in accessing the welfare system and social security, in accessing public goods and services. The Employment Equality Directive, also adopted in 2000, prohibits discrimination on the basis of sexual orientation, religion/ belief, age and disability in the area of employment. This directive was an important step in acknowledging categories beyond race and ethnicity as valid grounds for discrimination, and proposals to extend protections to areas beyond employment. This body of legislation was, then, confirmed by Articles 21–25 of the Charter of Fundamental Rights of the European Union. Article 21 in particular states that: “discrimination based on “sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

In spite of these advances in the area of anti-discrimination, it is important to underline that the EU legal framework still relies on addressing discrimination through a single-axis angle.

Currently, EU anti-discrimination law does not define intersectional discrimination, although, in the recent years, there has been an increasing appeal to include it. In a 2018 brief⁴⁹, the European Network against Racism, urged policy makers to adopt an intersectional approach for at least five reasons: To better understand the reality of discrimination; To acknowledge the severity of multiple marginalization; To design better equality policies. Tackling and framing issues from an intersectional approach will lead to more targeted and efficient policy measures and thus meaningfully improve the situation of discriminated people as a whole; To build a strong basis for solidarity; To achieve full equality. The same with the Center for Intersectional Justice, which in its 2019 Report⁵⁰, mentioned among its advocacy goals and policy

⁴⁹ <https://www.enar-eu.org/>, Accessed 2.12.2020

⁵⁰ Wadzanai Motsi-Khatai, *Intersectional Discrimination in Europe: relevance, challenges and ways forward*, Center for Intersectional Justice, 2020.

recommendations that: “Intersectional discrimination should be enshrined in the EU legislative framework for anti-discrimination and for gender equality. Policy measures in these fields should include targeted measures and provisions on intersectional discrimination, acknowledging the combined effects of discrimination on combined and multiple grounds (e.g. gender equality policies and national action plans against racism).”⁵¹

Although intersectionality per se is not explicitly part of the EU legislation, there are mentions, which could indicate a possible interpretation in this regard, especially in relation to “multiple discrimination”: Recital 14 of Directive 2000/43 and recital 3 of Directive 2000/78 talk of the fact that “women frequently suffer from multiple discrimination”. Moreover, the latest version of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation of 2019⁵², mention at recital 12 that “discrimination is also understood to occur based on multiple grounds”. At Recital 12ab, discrimination on multiple grounds is defined as “discrimination, in any of its forms, occurring on the basis of any combination of two or more of the following grounds, including where taken separately the situation would not give rise to discrimination against the person concerned: religion or belief, disability, age or sexual orientation. Discrimination on multiple grounds should be recognized in order to reflect the complex reality of discrimination cases, as well as to increase the protection of the victims thereof”.

As far as policies and soft-law measures are concerned, intersectionality has started to be integrated in some documents. For instance, while in the past EP resolutions on women with disabilities and violence against women, as well as the resolutions on Roma women, mentioned “multiple discrimination” as an aggravating factor⁵³, more recently they explicitly refer to intersectionality too⁵⁴. Moreover, the new Gender Equality Strategy 2020-2025⁵⁵ integrates an intersectional perspective as one of the main innovations in this area.

In fact, several scholars consider the use of the term ‘multiple discrimination’ as an overarching notion to encompass discrimination on more than one ground⁵⁶, or even as “compound” or “combined” discrimination, as Advocate General Kokott put it in the Parris case. In fact, over the last years, three cases in particular, which reached the ECJ, *Parris*, *Achbita and Bougnaoui*⁵⁷, had the potential of addressing intersectional discrimination, but failed. In

⁵¹ *Idem*, p. 33

⁵² Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels. Interinstitutional File 2008/0140 (COD) 26 June 2019.

⁵³ For instance, the 2005 *European Parliament resolution on the situation of Roma women in the European Union (2005/2164(INI))* “whereas Romani women face extreme levels of discrimination, including multiple or compound discrimination, which is fuelled by very widespread stereotypes known as anti-gypsism”,

⁵⁴ *European Parliament Resolution on the Situation of Women with Disabilities*, (2018/2685(RSP)), 29 November 2018; *European Parliament Resolution on the Situation of Fundamental Rights in the Euro-pean Union in 2017*, (2018/2103(INI)), 16 January 2019; *European Parliament Resolution on the Fundamental Rights of People of African Descent in Europe*, (P8_TA(2019)0239), 26 March 2019.

⁵⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, COM/2020/152 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>

⁵⁶ Fredman, “Substantive equality revisited”, note 36, Schiek, “On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)”, note 38, pp. 3–4.

⁵⁷ C-443/15 Parris. C-157/15 Achbita, C-188/15- Bougnaoui

the *Parris* case⁵⁸, the Court disregarded the AG Kokott proposition of ‘combined discrimination’ (indirect discrimination on grounds of sexual orientation and direct discrimination on grounds of age). The other two cases, *Achbita*⁵⁹ and *Bougnaoui*⁶⁰, were even more viable for at least a discussion on intersectionality, if not a recognition and sanction of it, given that in both cases it involved Muslim women suffering of discrimination in the workplace for wearing headscarves, despite the fact that the ‘Islamic headscarf’ remains a prominent emanation of intersectional discrimination on grounds of religion, gender and racial and ethnic origin⁶¹. Sadly, this context has been wholly ignored in the cases before the ECJ⁶². The European Court of Justice failed again to capture the intersectionality in the discrimination of Muslim women, illustrating of its reluctance to acknowledge it, not as a way to ignore certain experiences, but more as a refusal to “overcomplicate EU anti-discrimination jurisprudence to a degree that would dilute the effectiveness of its prohibitions”⁶³. Also, “the extent of intersectional disadvantage in the EU is difficult to gauge because of the lack of comprehensive data reflecting intersectional experiences”⁶⁴.

However, a number of cases concern discrimination on multiple factors, even though they do not use either the term “multiple discrimination” or “intersectional discrimination”⁶⁵.

Intersectionality in the Council of Europe

The Council of Europe (CoE) has had a key role in raising awareness with regard to multiple discrimination and intersectionality.

In this context, it is worth mentioning the Recommendation on sexual orientation or gender identity, adopted by the the Committee of Ministers on 31 March 2010. This is the first piece of law (although non-binding) at the CoE level, which deals with multiple discrimination (concerning LGBT people). The Appendix of the Recommendation, section XII, titled “Discrimination on multiple grounds”, contains a provision “encouraging [Member States] to

⁵⁸ In fact, Dr David L. Parris, a retired academic, brought proceedings against Trinity College Dublin, the Higher Education Authority, the Department of Public Expenditure and Reform and the Department of Education and Skills (Ireland), arguing that he had been discriminated against by reason of his age and sexual orientation. The proceedings concerned the refusal by Trinity College Dublin to accept his request that upon his death, the survivor’s pension be granted to his civil partner. The refusal was based on the fact that Dr Parris had entered into a civil partnership with his male partner after he had turned 60 and the occupational scheme provided that survivor’s pension is payable only if the claiming member married or entered into a civil partnership before reaching the age of 60.

⁵⁹ C-157/15, *Samira Achbita v. G4S Secure Solutions NV*, In the case, *Samira Achbita*, a Muslim woman, who had worked as a receptionist, was dismissed due to her refusal to stop wearing the Islamic headscarf.

⁶⁰ *Bougnaoui against Micropole Univers*, Asma Bougnaoui, a Muslim woman, was working with Micropole SA, a computer consulting firm, as a design engineer. During one business travel, one of the company’s clients felt “embarrassed” by the use of the veil by the engineer, and requested Micropole SA that, in the future, the situation did not recur. When asked to refrain from wearing veil, in name of necessary neutrality, Asma Bougnaoui refused and was dismissed.

⁶¹ Schiek, “On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)”, note 38 .

⁶² Idem

⁶³ Idem .

⁶⁴ Fredman, “Substantive equality revisited”, note 36 p. 9

⁶⁵ CJUE, *Galina Meister v. Speech Design Carrier Systems GmbH*, 19 April 2012, C-415/10 (EU:C: 2012:217): unequal treatment based on gender, age and ethnic/national origin) although the Court dismissed this case; CJUE, *Pensionsversicherungsanstalt v. Christine Kleist*, 18 November 2010, C 356/09 (EU:C:2010:703): discrimination based on age and gender; CJUE, *Johann Odar v. Baxter Deutschland GmbH*, 6 December 2012, C 152/11 (EU:C:2012:772): discrimination grounded on age and disability; CJUE, *Z. v. A Government Department and the Board of Management of a Community School*, 18 March 2014, C 363/12 (EU:C:2014:159): discrimination based on gender and assumed disability; CJUE, *Petya Milkova v. Izpalnitelen direktor na Agentiata za privatizatsia i sledprivatizatsio-nen kontrol*, 9 March 2017, C 406/15 (EU:C:2017:198): discrimination based on disability and status of civil servant.

take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including on grounds of sexual orientation or gender identity; national human rights structures should have a broad mandate to enable them to tackle such issues” (par. 46).

The Explanatory Memorandum (par. 46) mentions explicitly intersectional discrimination. It states:

“Human beings are not defined by one single criterion such as their gender, skin colour, language, national, ethnic or social origin, religion, age or sexual orientation, but are beings with diverse identities where a range of criteria interact with each other. Multiple discrimination can be said to occur when a person suffers discrimination based on his or her connection to at least two different protected discrimination grounds, or because of the specific combination of at least two such grounds. The latter situation is often also referred to as intersectional discrimination. An example of that is when a lesbian woman is treated less favorably than a heterosexual woman would be but also less favorably than a gay man. Sexual orientation and gender identity are factors which, in combination with one or more others such as race or sex, will increase the vulnerability of the persons concerned. States should therefore be aware of the reality of the phenomena of multiple or intersectional discrimination and be encouraged to take appropriate measures to provide effective protection against it. They could, for example, seek to develop statistical tools that take account of experiences of multiple or intersectional discrimination, while respecting fundamental principles regarding the right to privacy. Furthermore, legal provisions prohibiting discrimination should be considered in cases of multiple or intersectional discrimination and national human rights structures, including equality bodies and ombudspersons, should be given the broadest possible mandate so that they can tackle problems of discrimination based on a range of grounds, including notably sexual orientation and gender identity.

As far as hard law is concerned, the Convention on Preventing and Combating Violence against Women and Domestic Violence of 2011 (or Istanbul Convention,), entered into force on 1st August 2014, is the most comprehensive and legally binding response to violence against women and gender-based violence. Its Explanatory Memorandum mentions multiple discrimination in par. 53:

“In light of this case law, the drafters wished to add the following non-discrimination grounds which are of great relevance to the subject-matter of the Convention: gender, sexual orientation, gender identity, age, state of health, disability, marital status, and migrant or refugee status or other status, meaning that this is an open-ended list. Research into help-seeking behavior of victims of violence against women and domestic violence, but also into the provision of services in Europe shows that discrimination against certain groups of victims is still wide-spread. Women may still experience discrimination at the hands of law enforcement agencies or the judiciary when reporting an act of gender-based violence. Similarly, gay, lesbian and bisexual victims of domestic violence are often excluded from support services because of their sexual orientation. Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, crossdressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to “male” or “female” categories. Furthermore, migrant and refugee women may also be excluded from support services because of their residence status. It is

important to point out that women tend to experience multiple forms of discrimination as may be the case of women with disabilities or/and women of ethnic minorities, Roma, or women with HIV/AIDS infection, to name a few. This is no different when they become victims of gender-based violence”.

To be mentioned are also practices sensitizing on multiple discrimination and intersectionality in activities implemented by the cross-sectoral cooperation between the Youth Department and the SOGI Unit, such as the Conference on the specific situation of Roma young people affected by multiple discrimination concerning Roma youth “United in Dignity”⁶⁶ that took place on 24-26 June 2014 at the Coe Youth Centre in Strasbourg. The conference, which was part of the Roma Youth Action Plan, gathered more than 60 activists to raise awareness of and delve into multiple discrimination affecting young Roma migrants, Roma girls and Roma LGBTIQ+.

More importantly, for the understanding of intersectionality, is the ruling of the European Court of Human Rights in the *Garib* case⁶⁷, and in particular the dissenting opinion of judge Pinto De Albuquerque joined by judge Vehabović. The Grand Chamber did not find any violation on behalf of the authorities, even if the applicant was refused a housing permit on account of legislation imposing minimum income requirements to reside in a number of hotspot areas of Rotterdam, despite the fact that she was a single mother living on social welfare. The ruling was highly criticized and led to some heavily criticism – the ones expressed by judges Pinto De Albuquerque and judge Vehabović is particularly interesting for its discussion on intersectionality. In their dissenting opinion, the judges considered that the Court should have taken note of “the multiplicity of the possible forms of discrimination (which are) more insidious forms of discrimination, (...), not so easy to pinpoint, while being particularly harmful for those affected”. The judges then quote studies showing that “women - and especially single mothers - are more exposed to the risk of poverty than men”. They continue as to say that “it is now indispensable to take (intersectional discrimination) into consideration in order to reach a global and comprehensive understanding of the various discrimination situations (...)”. “The concept of intersectionality (...) helps us to perceive the relevant situations as a whole, rather than, as before, from a purely one-dimensional perspective (for this method) allows us to consider the effects of the intersection of the relevant forms of discrimination. To sum up, it is a question of acknowledging the composite nature of the sources of discrimination and the synergy of their effects. (...) it is precisely this consideration of the additional harmful effects produced by the combination of factors of discrimination, which has proved indispensable in addressing complex situations of discrimination. It is therefore not always sufficient to add together the multiple factors of discrimination, especially where the intersection between them exacerbates their consequences. ” There is therefore no doubt, concludes the judge “that the applicant’s intersectional situation, being both a woman and impoverished, considerably exacerbated her vulnerability vis-à-vis the Dutch housing policy in question”.

Intersectionality in selected EU member states

Given the specific interplay in legislation and policy occurring at the EU and at the Member States level, it is important to look as well at the way different MS deal, if any, with

⁶⁶ See at: <https://rm.coe.int/168046d02d> (29/11/2020). See also: *Fremlova & Georgescu*, 2014.

⁶⁷ *Garib v. The Netherlands*, Application no. 43494/09, 6 November 2017.

intersectionality. According to Fredman's study of 2016⁶⁸, intersectional discrimination is neither addressed, nor sanctioned and even "multiple discrimination remains marginal in the legislation and case law of the vast majority of the European states"⁶⁹. 'Intersectional discrimination' is rarely regulated across EU Member States: the terms usually adopted are 'multiple discrimination' or 'discrimination based on multiple grounds'. However, preliminary works are ongoing in Malta, where a draft bill includes explicitly the term "intersectional discrimination"⁷⁰. In the lack of definitions within national legislations, it is up to the courts to interpret the legal texts. It shall also be noted that case law concerning multiple/intersectional discrimination can be found in states without a legislation sanctioning it (as in France and Sweden⁷¹), while in other countries having such a law courts can be resistant to apply it. Moreover, case law can be found that concerns "intersectional cases" without using the term 'intersectional discrimination'.

At the moment, the following EU member states explicitly cover at least some aspects of multiple discrimination: Austria, Bulgaria, Croatia, Germany, Greece, Italy, Malta, Poland, Portugal, Romania, Slovenia, and Spain. In the following countries, there is no explicit mention of multiple discrimination: Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Slovenia. In countries such as France, the Netherlands, Poland, Portugal, Slovakia, recognition of multiple discrimination is possible through judicial interpretation, despite the fact that there is no explicit mention of it in legislation.

As for the members states listed above, which explicitly mention multiple discrimination, its implementation differs from state to state: In Austria, the consolidated version of the anti-discrimination law for the private sector only regulates the question of calculating the amount of damage. Articles 12 (13), 26 (13) and 51 (10) state that "[i]n cases of multiple discrimination, it is necessary to take this situation into consideration to calculate the amount of compensation". A similar rule is contained in the consolidated version of the anti-discrimination rule for civil servants (art.19a). In this regard, the Austrian law on disability (art. 7j) provides, that, among the various elements to be taken into account in establishing the amount of compensation (for example, the duration of the discrimination and the significance of the effects), multiple discrimination must also be considered.

Bulgarian legislation places a statutory duty on public authorities to give priority to positive measures benefiting multiple discrimination cases. Moreover, in the multiple discrimination cases, there is a special procedure requiring the relevant body to sit as an extended panel of five members (rather than three).

In Croatia, the anti-discrimination act considers multiple discrimination as a severe form of discrimination and requires the court to take it into consideration when determining the sanction or the amount of compensation. In Germany, the Allgemeines Gleichbehandlungsgesetz (AGG) of 14.08.2006 contains two rules on multiple discrimination, defined as "discrimination on multiple factors". Art. 4 concerns a rather controversial point: the justification in these complex cases. It provides that a differential treatment on the basis of several factors, contained in the anti-discrimination law, can be justified only if the justification extends to all the factors on which the discrimination is based. This means that justification must be

⁶⁸ Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law*, p 54

⁶⁹ *Idem*, p. 51

⁷⁰ Romina Bartolo. 2019. *Country Report. Gender Equality*. Luxembourg: Publications Office of the European Union.

⁷¹ *Idem*, 54-55

established at the highest possible level in the specific case (and not only on the basis of a single characteristic or some of them). Furthermore, art. 27(5) AGG establishes that, in case of multiple discrimination, the Antidiskriminierungsstelle des Bundes (the German Equality Body) and the competent representatives of the Federal Government and Parliament must cooperate.

As for the country lacking explicit mention, but allowing judicial interpretation: in France, for instance, courts have allowed multiple discrimination claims in relation to health, disability and trade union membership⁷². In Poland, courts rule in multiple discrimination cases, but the tendency was to focus on a single ground, and to not pursue the other ones⁷³.

In Spain, the Ley Orgánica n. 3/2007 on equality between men and women only provides a provision on multiple discrimination in art. 20 (c), which states that public authorities, in the elaboration of studies and statistics, must “design and introduce the necessary indicators and mechanisms that allow knowledge of the impact of other variables, the combination of which translates into in situations of multiple discrimination in the different areas of intervention”⁷⁴.

The draft bill “Proposición de Ley integral para la igualdad de trato y la no discriminación” (Núm. 67-1) of 30 July 2019, lodged at Parliament by the Socialist Parliamentary Group and lapsed in October 2019, deserves to be analyzed. In fact, had it been approved, this law would have contained the most advanced notion of intersectional discrimination among those currently present at the national level⁷⁵.

Art. 7, entitled “Discriminación múltiple e interseccional”, provided that:

[I] Multiple discrimination occurs when a person is discriminated against, simultaneously or consecutively, for two or more factors provided for in this law. Intersectional discrimination occurs when various factors among those provided for by this law concur or interact [concurrer o interactúan], generating a specific form of discrimination. In the case of multiple discrimination, the justification for the unequal treatment [...] must be provided in relation to each of the grounds for discrimination. Likewise, in the case of multiple or intersectional discrimination, the measures of positive action [...] must take into account the concurrence of the various causes of discrimination (Article 7).

Art. 32 of the same draft bill, concerning the Estrategia Estatal para la Igualdad de Trato y la No Discriminación, sanctioned (in point 4, letter c) that this strategy should pay “particular attention to multiple discrimination which, nature, imply a more serious attack on the right to equal treatment and non-discrimination”.

Lastly, art. 43 specified that multiple discriminations are to be considered among “very serious” forms of discrimination compared to others that are judged to be “mild” or “serious”.

In Sweden, there was, for instance, a 2010 claim, on the grounds of age and gender. The labor court stated that although there was gender discrimination and age discrimination they both

⁷² The Court of Appeal of Paris (19 March 2015, No 12/10164, 12/10370). Cour de Cassation no. 10 -20765.

⁷³ The forced retirement cases. Please see Łukasz Bojarski. 2018. *Country Report. Non-Discrimination*. Luxembourg: Publications Office of the European Union.

⁷⁴ Lorenzo Cachón. 2019. *Country Report. Non-discrimination*. Luxembourg: Publications Office of the European Union, p 18

⁷⁵ Bello, Barbara G., 2020. *Intersezionalità. Teorie e pratiche tra diritto e società*. Milano: Franco Angeli.

arise from the same act or omission and, therefore, this was **not** a reason to raise the level of the discrimination award

As a preliminary conclusion, intersectionality is not recognized per se, and even the less efficient concept of “multiple discrimination” was very little adjudicated despite the explicit provisions or the allowing of judicial interpretation.

Intersectionality in law and policy in three EU member states

1. Italy

General overview of the legislation

In Italy, intersectional discrimination is not explicitly mentioned in any binding law so far, but multiple discrimination is addressed in some legal acts. In the lack of a legal definition, it is far from clear whether the expression used by the Italian law-maker can be understood as “a sum” of the protected grounds or as ‘intersectional discrimination’. The Legislative Decrees of 2003, which directly implement the EU Antidiscrimination Directives, were the first pieces of law in Italy to take into account discrimination on more grounds:

1) The Legislative Decree n. 215 of July 9, 2003⁷⁶ implements the Directive 2000/43 / EC for the equal treatment of people regardless race and ethnic origin.

2) The Legislative Decree n. 216 of July 9, 2003⁷⁷ implements the Directive 2000/78/ EC for equal treatment in the field of employment and working conditions, regardless of disability, religion, personal beliefs, from age or sexual orientation.

Art. 1 of the former Legislative decree provides equal treatment between persons “irrespective of race and ethnic origin, providing the necessary measures to ensure that differences in racial or ethnic origin are not a cause of discrimination, also from the perspective that take into account the different impact that the same forms of discrimination may have on women and men, as well as the existence of forms of racism of a cultural and religious nature”. On a similar note, art. 1 of the latter Legislative Decree provides equal treatment between persons “regardless of religion, personal beliefs, disability, age and sexual orientation, with regard to employment and working conditions, taking the necessary measures so that these factors do not cause discrimination, in a perspective that also takes into account the different impact that the same forms of discrimination can have on women and men”.

No such article is integrated in the Legislative Decree n. 5 of 25 January, 2010⁷⁸ implementing the Directive 2006/54/EC on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

⁷⁶ Decreto Legislativo 9 luglio, 2003 n. 215. Attuazione della direttiva 2000/43/CE n.215 per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica. (Gazzetta Ufficiale n. 186 12 agosto 2003), 9 luglio 2003.

⁷⁷ Decreto Legislativo 9 luglio 2003, n. 216. Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro. (Gazzetta Ufficiale n. 187, del 13 agosto 2003), 9 luglio 2003.

⁷⁸ Decreto Legislativo 25 gennaio 2010, n. 5. Attuazione della direttiva 2006/54/CE relativa al principio delle pari opportunità e della parità di trattamento fra uomini e donne in materia di occupazione e impiego (rifusione). (10G0018). (Gazzetta Ufficiale del 5 febbraio 2010, n. 29)

However, one obstacle to tackling cases of multiple/intersectional discrimination in practice is the different objective scope of each Legislative Decree, that mirrors the hierarchy in the legal protection existing at the EU level, with racial and ethnic origin on the top (protection beyond employment and occupation) and discrimination on other grounds confined to the field of employment and occupation. The lack of provisions concerning multiple discrimination in Legislative Decree n. 5/2010 might also limit the possibility to tackle cases of intersectional discrimination in practice.

At moment of delivery of the present report, there are no pending legislative proposals on multiple/intersectional discrimination, even though the intersectional perspective is supported by part of the civil society in the ongoing Parliament works on the draft Bill on hate speech against LGBTQI+ people and misogyny.

It is important to clarify that art. 3 of the Italian Constitution, enshrining both formal and substantive equality, does not prevent from handling cases of multiple or intersectional discrimination. The ground “personal and social conditions” opens up possibility that discrimination is established for “other reasons related to the person”, and consequently (though implicitly) it allows protection from discrimination based on the intersection between grounds.

However, more grounds of discrimination can be simultaneously mentioned in the same claim. In fact, the previously existing differences in procedure law have been overcome by art. 28 of Legislative Decree 150/2011⁷⁹, that harmonizes the anti-discrimination procedure, providing for the summary procedure for all cases relating to discrimination, but discrimination action based on gender in the workplace (Article 38 of the Equal Opportunities Code - EOC⁸⁰). This harmonization allows the possibility of claiming discrimination on more than one ground in the same introductory act of the process (with the exception of art. 38 EOC).

A reference to multiple discrimination is also covered by the Motion no. 1/00243, unanimously adopted by the Parliament on October 15, 2019, which deals with multiple discrimination against women with disabilities in Italy with regard to the implementation of the United Nations Convention on the Rights of Persons with Disabilities⁸¹. Art. 6 “Women with disabilities” of this Convention is part of the Italian legal system due to the ratification Law no. 18/2009 and states that “States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms” (art. 6, paragraph 1).

Motion no. 1/00243 notes that the Italian Government should, inter alia, “always take into account multiple discrimination affecting minors and women with disabilities and the seriousness of the consequences it entails for their lives and, consequently, to ensure that they are always integrated in the implementation of public policies, actions and measures on the

⁷⁹ Decreto Legislativo 1 settembre 2011, n. 150. Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell’articolo 54 della legge 18 giugno 2009, n. 69. (11G0192) (Gazzetta Ufficiale – Serie Generale n. 220 del 21-09-2011), see Bello, Barbara G., 2020.

⁸⁰ Decreto Legislativo 11 aprile 2006, n. 198. Codice delle pari opportunità tra uomo e donna, a norma dell’articolo 6 della legge 28 novembre 2005, n. 246 (Gazzetta Ufficiale n. 125 del 31 maggio 2006 – Supplemento Ordinario n. 133).

⁸¹ Bello, Barbara G. *Intersezionalità. Teorie e pratiche tra diritto e società* 2020.

subject of gender equality as well as those relating to disability (Motion n. 1/00243 of 2019: par. 1).

It also requests the Italian Government “to include specific references to multiple discrimination against girls and women with disabilities in all awareness campaigns relating to the issue of gender equality and the fight against discrimination, disseminated in the media and various media, as well as [...] in initiatives aimed at schools on these issues” (Motion n. 1/00243 of 2019: par. 2 (h)).

Although a motion is a soft law act, the unanimous approval of this document is very important to sensitize lawmakers and practitioners on multiple/intersectional discrimination in Italy.

National anti-discrimination authorities

In Italy there two Equality bodies dealing with discrimination: UNAR and the National Equality Councilor. As it will be explained more in details below, they cover different grounds, and their cooperation shall be strengthened in order to tackle cases of multiple/intersectional discrimination in practice. The former one is promotion type authority and the second one a quasi-judicial one.

UNAR⁸² is the Italian Office against Racial Discrimination and is based at the Prime Minister’s office (Department of Equal Opportunities). It mainly is a promotion-type and legal support body⁸³. Since its inception in November 2004 it aims at promoting equal treatment and tackling racial and ethnic discrimination⁸⁴. This Equality Body also seeks to monitor the impact of discrimination on men and women⁸⁵. Its mandate also covers the relationship between race/ethnic origin and other forms of discrimination, such as those based on culture or religion. Its area of competences covers all those mentioned in Legislative Decree 215/2003 (following the Directive 2000/43): employment and occupation, social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing.

Since 2011 UNAR is the National Contact Point for social inclusion of Roma people⁸⁶ and since 2012 its competences have been widened to encompass LGBT-related discrimination⁸⁷. This

⁸² See at: <http://www.unar.it/>. UNAR was created by a Legislative Decree, number 225 on 9 July 2003, as part of the European Directive 2000/43/CE, to promote the principle of equal treatment of individuals, independently of their race or ethnic origin

⁸³ See at: https://equineteurope.org/author/italy_unar/

⁸⁴ In order to tackle discrimination in a capillary way, since 2007, UNAR has been promoting the establishment of Regional Anti-Discrimination Centres (see paragraph 12 of article 44 of the Consolidated Law on Immigration and Legislative Decree 215/2003) , in order to intensify anti-discrimination legal protection as well as inform the local community about its provisions. The Network is organized on a regional basis – through Regional Anti-Discrimination Centres, organizations established and managed by the Regions, with a role of coordinating provincials and local issues that may be present.

⁸⁵ It is worth mentioning the publication “Donne Rom, condizione femminile, diritti umani e non discriminazione” of 2013, which also includes an intersectional perspective in some chapters: http://www.istisss.it/wp-content/uploads/Donne-Rom-AAVV_IMPAGINATO.pdf. In particular, see: Corradi, Maria Laura, 2013. *Femminismo, post-colonialità e metodo intersezionale nelle narrazioni rom e nella prevenzione della violenza di genere*. In Aa.Vv., *Donne rom, condizione femminile, diritti umani e non discriminazione*. Roma: ISTISSS. Of the same author, see also Corradi, Maria Laura, 2018. *Il femminismo delle zingare. Intersezionalità, alleanze, attivismo di genere e queer*. Milano-Udine: Mimesis.

⁸⁶ See at: <http://www.unar.it/cosa-facciamo/strategie-nazionali/strategia-rsc/>

⁸⁷ Even though this entitlement is not provided by ordinary law, it might help to tackle intersectional discrimination in the grounds covered by UNAR.

Body coordinates the LGBT Strategy⁸⁸ ever since. It predominantly promotes anti-discrimination awareness-raising and provides a hotline to denounce discrimination cases⁸⁹.

The National Equality Councilor⁹⁰ was introduced by the Legislative Decree n. 198/2006⁹¹ and it is based at the Ministry for Labour and Social Affairs. It works with all the public authorities in the area of women's employment, work-life balance, social security and social welfare, fighting gender discrimination in the job places: its objective scope is narrower than UNAR's one (which covers area beyond employment and occupation). The Councilor develops actions and projects together with labour inspectors, job consultants and other institutional partners. Its competences are stronger than Unar, since it is a quasi-judicial body. While the National Equality Councilor deals with cases of national relevance, Regional and city Councilors handle cases occurring in the geographical area under their competence.

At the moment, the cases handled by Equality Councilors only implicitly tackle intersectional discrimination based on, e.g., gender and maternity or work-life reconciliation, gender and age. They do not cover the intersection with racial or ethnic origin, religion. The intersection considered in the Equality Councilors' practice mainly deals with the condition of being 'woman', 'worker/employee' and mother.

Even though these bodies have different powers and competences, tackling intersectional discrimination in both UNAR's policies or legal support and in the National Equality Councilor's awareness-raising and quasi-judicial decisions would be effectively reached by the cooperation among these Equality Bodies, which needs to be enhanced in the future. In the same vein, the cooperation between the Regional and City Equality Councilors and the Centri Regionali Antidiscriminazioni would help identifying, preventing and tackling cases of intersectional discrimination

Strategies and policies

As far as national policies are concerned, UNAR coordinates three National Strategies. In some of them "double discrimination" and "multiple discrimination" are mentioned, while it is not clear whether an intersectional perspective is integrated, especially in implementing these policies:

1) The National Strategy for the Inclusion of Roma, Sinti and Caminanti (RSC)

The National Strategy for the Inclusion of Roma, Sinti and Caminanti (RSC)⁹², adopted on February 24, 2012, aims to implement concrete initiatives of Roma, Sinti and Caminanti's

⁸⁸ See at: <http://www.unar.it/cosa-facciamo/strategie-nazionali/strategia-nazionale-lgbt/>

⁸⁹ See at: https://equineteurope.org/author/italy_unar/. [NGOs that want to cooperate with UNAR can enroll in the Register of associations and institutions that carry out activities in the field of the fight against discrimination \(art. 6 Legislative Decree 215/2003\)](https://equineteurope.org/author/italy_unar/), <http://www.unar.it/la-nostra-rete/associazioni/registro-associazioni-on-line/>

⁹⁰ See at: <https://www.lavoro.gov.it/temi-e-priorita/parita-e-pari-opportunita/focus-on/Consigliera-Nazionale-Parita/Pagine/default.aspx>

⁹¹ Decreto Legislativo n. 198. Codice delle pari opportunità tra uomo e donna, a norma dell'articolo 6 della legge 28 novembre 2005, n. 246. (*Gazzetta Ufficiale* n. 125 del 31 maggio 2006 - Supplemento Ordinario n. 133), 11. 4. 2006.

⁹² See: <http://www.unar.it/cosa-facciamo/national-strategies/?lang=en> (accessed on 6 November 2020). This Strategy implements the Communication of the European Union Commission No. 173 of April 4, 2011, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444909812175&uri=CELEX:52010DC0133> (accessed on 6 November 2020).

social inclusion and integration in the course of almost a decade (2012-2020). UNAR acts as Focal Point for this Strategy, which is articulated around four axes of intervention were identified that gave rise to as many tables and work groups: home, health, education and work⁹³.

This Strategy does not entail an explicit intersectional approach but it does adopt a gender approach that takes into consideration “double discrimination” faced by Roma women. In fact, par. 2.1.2 (“Gender approach: the sensitive approach to gender specificities”) states:

“[o]n the occasion of the Fourth World Conference on Women (Beijing, 1995), it was stated that the so-called gender approach must be applied in all services, programs and policies to ensure integration and full affirmation of the principle of gender equality.

The gender approach involves the following activities: obtaining disaggregated data by gender; identification of discriminatory factors between men and women, or in any case, of inequalities; analysis of these disparities; formulation of specific objectives to overcome these disparities; definition of indicators to measure the reduction of disparities; identification of the necessary resources; elaboration of specific strategies; updating of strategies in the field. The above list indicates a roadmap, which in many respects has already embarked on its path. [...]. In this sense, we are well aware that RSC women are doubly discriminated against: we must not only stem this situation, but we must act to ensure female empowerment, as it is instrumental to improving the condition of the person and also of the family structure as a whole” (p. 24).

The LGBT National Strategy

The National LGBT strategy⁹⁴ (lesbian, gay, bisexual, trans) is a document produced by the Department of Equal Opportunities and by UNAR. It aims to implement concrete measures and actions to prevent and tackle discrimination based on sexual orientation and gender identity. It implements the Recommendation CM / Rec (2010) 5 of the Committee of Ministers of the Council of Europe (CoE), the first CoE non-binding law mentioning multiple discrimination⁹⁵.

This Strategy’s governance is also multi-level and multi-actors: it engages institutions, civil society, social partners and associations, who cooperate to define the policies in the subject matter.

The National Strategy identifies four strategic axes of intervention: a) education; b) work; c) security and prisons; d) media and communication. It also considers two – often intertwined – horizontal aspects, which concern the phenomenon of multiple discrimination and the transversality of gender issues. With regard to employment related issues, this Strategy underlines the need to “differentiate between the situation of gay and lesbian people compared to that of transsexual and transgender people, in particular in relation to “visibility”, both in terms of access to work and working conditions. Considerable differences are also found with respect to the territorial contexts (metropolises and areas of Northern Italy compared to the South). The main critical issues concern discrimination in access to work, bullying, demotion,

⁹³ The rationale is to definitively overcome the emergency phase characterized by fingerprinting, forced eviction from Roma settlements and marginalization, especially in large urban areas. These discriminatory practices have several repercussions in a gender and intersectional perspective, because they prevented Roma women from accessing healthcare and Roma children from regularly attend school.

⁹⁴ Source: <http://www.unar.it/cosa-facciamo/national-strategies/national-lgbt-strategy/?lang=en>;
<http://www.portalenazionalelgbt.it/>

⁹⁵ Available at <https://www.coe.int/en/web/sogi/rec-2010-5>

blocking of career progression, multiple discrimination” (p. 25). For the aim of this report, this Strategy is particularly important because it is linked to the CoE Recommendation

The National Action Plan against Racism, Xenophobia and Intolerance (2014-2016)

The National Action Plan against Racism, Xenophobia and Intolerance⁹⁶ is a three-year program (2014-2016) which aims to implement the principle of equal treatment and anti-discrimination. This document was approved by D.M. 7 August 2015 by the Minister of Labor and Social Policies and represents the first example, at Italian national level, of a coordinated institutional and civil society’s response to racism.

The Plan assumes that any form of fight against racism, xenophobia and intolerance should concern all forms of discrimination based on race, national or ethnic origin, age, disability, sex, beliefs and religious practices.

The main objectives of the Plan are collecting data to track the discrimination into the working fields; stimulating the introduction of the diversity management policies and the opposition to discrimination by public and private businesses.

At the moment there is no National Strategy for Gender Equality (Strategia Nazionale per la parità di genere) that has been urged by civil society and some political representatives

Case law

For the time being, there are no judgements explicitly sanctioning intersectional discrimination in Italy. It is a major challenge to identify cases even “implicitly” dealing with more discrimination grounds, as far as first instance’s decisions are concerned, because their full texts are often not easily available. Based on secondary data and empirical research, this study has identified a number of cases in which multiple grounds of discrimination were jointly considered, even though “implicitly” (i.e. without explicitly mentioning multiple or intersectional discrimination).

Age and gender in early retirement cases

A number of cases deal with the discriminatory use of pensionable age or the possibility of accessing early retirement as a criterion for reducing staff. In Italy, a person is allowed to work after reaching the pensionable age. Until 2018, the pensionable age and, therefore, the age of early retirement was lower for women than for men. Consequently, women were dismissed at a younger age than men, without taking into consideration their lower pensionable age. While handling these cases, courts considered them under “age discrimination only”, the ground of gender being ignored (for example Tribunal of Milan, 27 April 2005) or denied the existence of gender discrimination while ‘age’ was not taken into consideration at all⁹⁷.

Non-EU migrants with disability

⁹⁶ The document is not available online, see at: <http://www.unar.it/cosa-facciamo/national-strategies/?lang=en>

⁹⁷ Court of Cassation, No. 9866/2007; Court of Cassation, No. 20455/2006; Tribunal of Genova 30 September 1997, see Renga 2020 for an in-depth analysis.

A number of cases concern Third country nationals' access to social protection benefits and advantages. In these cases, the grounds of discrimination are 'nationality' and 'disability'⁹⁸(Siccardi 2017).

The Constitutional Court acknowledged Third Country nationals with disability who are residents in Italy the right to use public transport free of charge on the basis of the equality principle and art. 32 of the Constitution (health rights), thus recognizing both discriminatory grounds 'nationality' and 'disability'. The judgement No. 432/2005 declares the "constitutional illegitimacy of art. 8, paragraph 2, of the Law of the Lombardy Region of 12 January 2002, n. 1 (Interventions for the development of regional and local public transport), as amended by art. 5, paragraph 7, of the Law of the Lombardy Region of 9 December 2003, no. 25 (Interventions in the field of local public transport and traffic), in the part in which it does not include foreigners residing in the Lombardy Region among those entitled to free public transportation provided to disabled people.

Furthermore, the Constitutional Court played a fundamental role in acknowledging that a legal provision⁹⁹ discriminated on both nationality and disability. With Judgement No. 306/2008¹⁰⁰ the Court granted the accompanying allowance to non-EU residents and considered both grounds by referring to Articles 3 (principle of equality), 10 (status of foreign persons), 32 (health rights) and 38 (social protection) of the Constitution. The Court states that:

[it] considers that it is manifestly unreasonable to subordinate the award of a welfare benefit such as the accompanying allowance - the prerequisites of which are, as mentioned, total disability at work, as well as the inability to walk autonomously or to perform alone of the daily acts of life - to the possession of a title of legitimacy to stay in Italy which requires, among other things, the ownership of an income for its release".

It then concludes that:

"The contested provisions are therefore illegitimate in the part in which - in addition to the health requirements and duration of stay in Italy and in any case relating to the person, already established for the entitlement of the residence card [...] ¹⁰¹ - also require income requirements, including the availability of accommodation, for the purpose of awarding the accompanying allowance, characteristics indicated by the new text of art. 9, paragraph 1, of the Legislative Decree n. 286 of 1998"¹⁰².

Missed opportunities: Muslim women wearing a headscarf

⁹⁸ Siccardi, Cecilia, 2017. Crisi economica e discriminazioni multiple: il caso degli stranieri extra-comunitari con disabilità. In Marilisa D'Amico, & Francesca Biondi, *Diritti sociali e crisi economica*. Milano: Franco Angeli

⁹⁹ Art. 80, paragraph 19, of the Law n. 388 of 23 December 2000 (Provisions for the preparation of the annual and multiannual State budget - financial law 2001), and art. 9, paragraph 1, of the Legislative Decree n. 286 of 25 July 1998 (Consolidated text of the provisions concerning the discipline of immigration and rules on the condition of the foreigner) - as amended by art. 9, paragraph 1, of the Law n. 189 of 30 July 2002, and then replaced by art. 1, paragraph 1, of the Legislative Decree 8 January 2007, n. 3.

¹⁰⁰ Constitutional Court, Judgement 306/2008 (ECLI:IT: COST:2008:306).

¹⁰¹ This extends now (due to the Legislative Decree n. 3 of 2007) to the EC residence permit for long-term residents, not suspected of illegality by the remitter.

¹⁰² Renga, Simonetta, 2020. Country report Gender equality How are EU rules transposed into national law? <https://www.equalitylaw.eu/downloads/5242-italy-country-report-gender-equality-2020-1-26-mb>

Women's' dress code cases have reached the European Court of Justice (case Achbita and case Bougnaoui). In Italy it is worth mentioning a case concerning a young Muslim woman that could have been decided in an intersectional perspective, but it was not.

The case concerns Sara Mahmoud, a 19-year-old girl at the time of the discriminatory incident. She was born in Italy of Egyptian parents and holds the Italian citizenship¹⁰³. She was denied a flyer job at a fair because she was unwilling to remove the veil. Instead, she suggested to match it to the uniform. The job agency motivated their decision not to hire her by stating that "customers would never be so flexible" to understand the veil and that their selection criteria also included having "long and fluffy hair".

Sara, assisted by her lawyers, took the case to the local first instance court (Tribunale di Lodi) that answered the question whether "the use of the hijab has a religious connotation and, if so, whether in the present case the exclusion of the applicant from the selection precisely because of the headscarf can be considered indirect discrimination".

Having ascertained the religious nature of the veil, the Tribunal does not judge Sara's exclusion from the selection as indirect discrimination, either on the basis of religion or on the basis of gender. In this decision, the two discriminatory grounds were considered separately and not as an intersection between them. The argumentative process followed by the Tribunal was the "centrality and essentiality of the image of the candidate with respect to her professionalism", justified by the place where Sara should have performed the service (a footwear fair). The ruling excludes indirect discrimination on a religious basis because it believes that the discrete element is not the applicant's religion, but the fact that the hair was covered, removing an element of "charm and seduction". In short, the fashion sector justifies the request for a "pleasant and attractive woman" or better not only for "a pleasant figure but a certain 'type' of person, with certain physical characteristics [...]". The Tribunal considered it likely that if, in Sara's place, there had been a woman who "for reasons not religious but cultural, ethnic or more simply of taste or health (think for example of the case baldness or hair loss resulting from chemotherapy treatments)" had not wanted or been able to offer the job without headscarf, she too would not have been selected. At the same time, the Tribunal also excludes that there has been indirect discrimination based on gender since "the head and hair can be elements of seduction and charm even for the male sex and could also be legitimately required of men" in a sector such as that of fashion. The step that the decision has not taken is to consider these two discriminatory factors jointly in Muslim women's everyday life in today's Italian society

In 2016 the Court of Appeal in Milan¹⁰⁴ reversed this judgement and declared the behavior of the recruiting company to be discriminatory on the basis of religion (not on the intersection of religion and gender).

One can conclude that the lack of definition of intersectional discrimination in domestic legislation and the low judges' and lawyers' awareness of the concept might explain why there are not yet judgements explicitly sanctioning intersectional discrimination. Italian lawyers are generally prone to lodge antidiscrimination cases on the ground that is likely to have highest

¹⁰³ Bello, Barbara G., 2015. Diritto e genere visti dal margine: spunti per un dibattito sull'approccio intersezionale al diritto antidiscriminatorio in Italia, *Diritto & Questioni pubbliche*, pp. 141-171.

¹⁰⁴ Corte d'Appello di Milano, sentenza del 20 maggio 2016, pres. Vitali, rel. Casella, XXX c. Evolution Events srl

possibilities to lead to a favorable judgement and, sometimes, in subordination, on another ground, but not on the basis of the intersection of grounds.

2. Romania

General overview of the legislation

The notion of intersectionality is not currently regulated by the Romanian legislation on discrimination, which includes the Constitution, the Civil and Criminal Code and Government Ordinance 137/2000 on the prevention and sanctioning of all forms of discrimination and Law 202/2002 on equal opportunities and equal treatment for women and men.

The closest references to this concept can be found in the specific legislation on sanctioning discrimination, Government Ordinance 137/2000 and in Law 202/2002 prohibiting discrimination. Both laws, either directly or indirectly provide against multiple discrimination, stating that discrimination on multiple grounds is an aggravating circumstance.

However, on 20th October 2020, a draft law¹⁰⁵ aimed at sanctioning intersectional discrimination, as well as other forms of discrimination, was submitted before the Romanian Parliament on October 20th, 2020. If adopted, Romania will be the first EU member state to explicitly define and prohibit intersectional discrimination. The legislative initiative was submitted by a number of MPs from different political parties and advocated for by the Center for Advocacy and Human Rights (CADO).

The proposed changes are to be included in the main law on discrimination in Romania (Government Ordinance 137/2000 on preventing and combating all forms of discrimination) and they concern the regulation of intersectional discrimination, segregation, discrimination by association and supplementing the explicitly prohibited criteria for discrimination with those of “citizenship” and “skin color”.

Intersectional discrimination is defined in the draft law, as “Any difference, exclusion, restriction or preference based on two or more [prohibited criteria] that manifests itself simultaneously and inseparably”. Such an act “is to be considered an aggravating circumstance in establishing the contravention, unless one or more of its components fall under the criminal law.”¹⁰⁶

The Draft Law is currently being reviewed by the Senate (as the first chamber) and has already received a recommendation for approval by the Economic and Social Council in Romania. After being discussed by the Senate, the initiative will be sent to the Chamber of Deputies for the final vote.

This is not the first initiative to regulate intersectional discrimination in Romania. Back in 2015, the Anti-Discrimination Coalition sent an open letter for improving the anti-discrimination legislation, in the context of a previous proposal for a bill modifying the Government Ordinance 137/2000. The changes advocated for by the Anti-Discrimination Coalition included the definition of concepts, such as segregation, reasonable accommodation and intersectional discrimination, as an aggravated circumstance. The intersectional discrimination was defined

¹⁰⁵ The Draft Law B602/2020 amending Government Ordinance no. 137/2000 in Romania, <https://www.senat.ro/legis/PDF/2020/20b602FG.PDF>, Accessed 2.12.2020

¹⁰⁶ Art. 2 para. (6¹) of the Draft Law B602/2020 amending Government Ordinance no. 137/2000 in Romania, <https://www.senat.ro/legis/PDF/2020/20b602FG.PDF> Accessed 2.12.2020

as “simultaneous overlapping of certain identity elements resulting from various protected grounds”. Unfortunately, the intersectional discrimination was not retained at that time by the legislator.

Article 4 of the Constitution establishes the equality of all citizens, and forbids any form of discrimination:

(1) The State foundation is laid on the unity of the Romanian people and the solidarity of its citizens.

(2) Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin¹⁰⁷

Also, article 16 regarding equality of rights, para. (1)-(2) states that:

(1) Citizens are equal before the law and public authorities, without any privilege or discrimination.

(2) No one is above the law.

The new Criminal Code, adopted in 2009 and in force since 1st of February 2014, sanctions the discriminatory motivation in committing any crime as an aggravating circumstance, as well as incitement to discrimination as a separate crime. Thus, article 77 of the Code implements an obligation under Framework Decision 2008/913/JHA, stating that committing a crime for reasons of *race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political belonging, financial situation, age, disability, chronic disease, HIV/AIDS infection or for other reasons seen by the criminal as a ground for inferiority of a person¹⁰⁸* represents an aggravating circumstance. Meanwhile, article 369 of the Code states that: *Inciting the public, through any means, to hatred and discrimination, against a category of persons is punishable by a term of imprisonment of between 6 months and 3 years or a fine¹⁰⁹*. Unlike in the previous legislation, the enumeration of the criteria of discrimination was eliminated from the text, as these are included in the specific legislation (Ordinance 137/2000).

The New Civil Code (Law 287/2009) also provides for equality before the law, stating that:

Race, color, nationality, ethnic origin, language, religion, age, sex or sexual orientation, opinion, personal beliefs, political affiliation, trade union, social category or to a disadvantaged category, wealth, social origin, level of culture, as well as any other similar situation have no influence upon the civil capacity.¹¹⁰

The main Romanian anti-discrimination legislation is Government Ordinance 137/2000, which transposes the European equality directives¹¹¹. The Ordinance defines discrimination as any „distinction, restriction or preference based on race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability, as well as chronic non-contagious disease, HIV infection, being part of a disadvantaged category, as well as any other criterion which, is intended to, or leads to the restriction, the lack of recognition or use under

¹⁰⁷ Constitution of Romania, <http://www.cdep.ro/pls/dic/site.page?id=371>, Accessed 2.12.2020

¹⁰⁸ New Romanian Criminal Code, <http://legislatie.just.ro/Public/DetaliiDocument/109855>, Accessed 2.12.2020

¹⁰⁹ Ibid

¹¹⁰ Art. 30 of the Romanian Civil Code, <https://www.codulcivil.ro/>, Accessed 4.12.2020

¹¹¹ Government Ordinance 137/2000 on Preventing and Combating all forms of discrimination, <http://legislatie.just.ro/Public/DetaliiDocument/24129>, Accessed 5.12.2020

conditions of equality, of fundamental human rights and or political, economic, social and cultural rights recognized by law."¹¹².

Art. 2 para. (6) of the ordinance covers multiple discrimination, while not explicitly using the term, by stating that:

Any difference, exclusion, restriction or preference based on two or more criteria provided in par. (1) constitutes an aggravating circumstance when establishing the misdemeanor, unless one or more of its components are sanctioned by the criminal law.

Law 202/2002 on equal opportunities and equal treatment for women and men defines direct discrimination as "the situation in which a person is treated less favorably, on the basis of sex, than another person is, has been or would be treated in a comparable situation"¹¹³ and multiple discrimination as "any act of discrimination based on two or more criteria of discrimination"¹¹⁴

Emergency Ordinance no. 67/2007 on the application of the principle of equal treatment between men and women within the professional social security schemes (approved by Law 44/2008) defines the concept of equal treatment as "the absence of any discriminatory treatment, directly or indirectly, on the grounds of sex". Also, a discriminatory treatment is understood as "any exclusion, restriction or difference in treatment, directly or indirectly, between women and men."¹¹⁵

Meanwhile, Emergency Ordinance no. 61/2008 on the implementation of the principle of equal treatment between women and men regarding access to and provision of goods and services (approved and modified by Law 62/2009) refers exclusively to discrimination on the basis of sex and relies mostly on the definitions of the different forms of discrimination from Law 202/2002. However, it also addresses multiple discrimination indirectly, by instituting higher fines for discrimination based on two or more criteria¹¹⁶.

Strategies and policies

The main piece of legislation in Romania on anti-discrimination is, as mentioned above, the Government Ordinance no. 137/2000¹¹⁷. In fact, the first time piece of legislation drafted in Romania with Roma directly in mind was the act transposing Directive 43/2000/EC (or the Racial Equality Directive) into Romanian Law.¹¹⁸ From the onset, this piece of legislation was considered to be most relevant to Roma, as the Hungarian minority is felt to be 'under-represented' rather than 'discriminated' against.¹¹⁹ Romani NGOs were very much involved in the drafting of the transposing act, which resulted in the adoption by the Romanian authorities of a very comprehensive piece of legislation: Government Ordinance no. 137/2000. Romani

¹¹² Idem

¹¹³ Art. 4 a) of Law 202/2002, <http://legislatie.just.ro/Public/DetaliiDocument/35778>, Accessed 5.12.2020

¹¹⁴ Idem

¹¹⁵ Art. 2 b)-c) of Emergency Ordinance no. 67/2007, <http://legislatie.just.ro/Public/DetaliiDocumentAfis/83246>, Accessed 5.12.2020

¹¹⁶ Art 13 para. (3) of Emergency Ordinance no. 61/2008, approved and modified by Law 62/2009

¹¹⁷ GO 137/2000

¹¹⁸ However, from 1997 onwards, Roma have received constant European attention in the Annual Reports monitoring the progress made by candidate countries but also in other European documents. Council Decision of 28 January 2002 on the principles and objectives in the Partnership accession with Romania (2002/92/EC), for instance, contains many recommendations regarding the Roma minority.

¹¹⁹ Renate Weber, *Report on Measures to Combat Discrimination in the 13 Candidate Countries* (VT/2002/47), Country Report Romania, 22, (2003).

NGOs were, for example, pivotal in the introduction of the concept of 'indirect discrimination' into the Romanian legal order and in the creation of the National Council for Combating Discrimination.¹²⁰

Ten years before the European Commission was to propose an EU Roma Strategy, in 2011, Romania had adopted a national strategy for improving the situation of Roma.¹²¹ In response to the European and international preoccupation with the situation of Roma in Romania,¹²² the newly created National Office for Roma¹²³ began, in 1997, drafting a strategy to improve the situation of Roma.¹²⁴ The Romanian government finally adopted the 'National Strategy for improving the situation of the Roma' in April 2001. The intention was to make significant improvements to the lives of Roma and within a reasonable deadline.¹²⁵ The strategy covered 10 years (2001-2010) and comprised of ten different areas: administration, social security, health, economy, justice, children welfare, education, housing, culture, communication and civic involvement. The one major result of this Strategy was that it built an institutional framework at all administrative levels, the main objective of which has been to implement this strategy.¹²⁶

The National Agency for Roma, established in 2004,¹²⁷ is the main institution in charge of implementing the strategy. A number of ministries (such as employment and education) created special ministerial committees responsible for elaborating measures to promote the goals of the Roma Strategy within their relevant domains, such as social protection, health, etc. A Joint committee was in charge of coordinating the activities of the various ministerial committees.¹²⁸ Eight regional offices ('*birouri regionale*') were established and there is a county

¹²⁰ One NGO in particular, Romani Criss, has played a significant role in the implementation of this anti-discrimination law, introducing strategic litigation, a legal method previously unknown in the Romanian legal system.

¹²¹ Government Decision no. 430/2001 on approving the Strategy for improving the situation of the Roma persons. In 2011, the Romanian Government adopted a new strategy for the inclusion of Romanian citizens of Romani ethnic origin for the period 2012-2020. The strategy was adopted by Government Decision no. 1221 of 14 December 2011 and published in the Official Gazette no. 6 of 4 January 2012. According to this strategy, 'Roma inclusion is a dual process, which involves a change in the mentality of the majority, and also in the mentality of the members of Roma community, a challenge that requires firm actions, developed in an active dialogue with the Roma minority, both at national and EU level' (p. 5).

¹²² In 1997, the European Commission 'Agenda 2000' noted that integration of minorities in candidate countries was generally satisfactory except for Roma. Further pressure was placed on candidate countries and continuing EU activity can be seen through a Monitoring and Advocacy Programme (EUMAP) which reported on the position of Roma in Central and East European Countries.

¹²³ The National Office for Roma was created within the Department for the Protection of National Minorities.

¹²⁴ The document of the 2001 Strategy mentions that it is the result of a joint effort between the Romanian Government and organisations representing the Roma. It is also mentioned that the implementation of this Strategy will be done in consultation with the representatives of Roma organisations.

¹²⁵ The main aims were: to fight against discrimination, to ensure quality of opportunities for a decent life, to preserve Romani culture and identity; to delegate responsibilities to local public authorities and to encourage the participation of Roma in economic, social, cultural and political life.

¹²⁶ Within the Strategy, a number of projects have been adopted: 4327 houses have been built, running water installed for 42 villages, jobs created for 701 persons. Despite these results, the implementation of the strategy has been difficult: deadlines were not respected; there were frequent changes in the institutions in charge of implementation; politicization (due to an agreement between the Social Democrat Party and the Roma Party, the Roma Party was the only NGO involved in the selection of the staff for departmental offices).

¹²⁷ The National Agency for Roma is a central public institution, under the subordination of the Government. It is charged with the implementation of the 2011 Strategy for the Inclusion of Roma.

¹²⁸ In 2011, the Romanian Government adopted a new national strategy for the Roma: Strategy of the Romanian Government for the inclusion of Romanian citizens of Roma ethnicity for 2012-2020, published in the Official Journal, no. 6 of 4 January 2012. This new strategy introduces some changes at the level of implementation structures in light of the European Roma Framework-Strategy. The Joint Committee was replaced by a Central Unit for Implementation and Evaluation, which will act as a national contact point in relation to the European Commission. The Unit will also assume the inter-institutional coordination and communication between the various ministerial committees and it will be responsible for drafting an annual report on the progress of

office (*'birouri judetene'*) in all 42 counties across the country. Roma councilors, who are usually drawn from the Romani community, work for these offices and collaborate with the schools, police, and employment agencies. Their role is to assess the situation of Roma in the respective counties, to ensure that Roma have access without discrimination to education, health, employment and public services, and to improve school attendance and the access of Romani individuals to the job market.

Furthermore, in areas in which Roma exceed 5% of the population, the local authorities must employ Roma experts. These experts have the role of facilitating the communication between Roma and local authorities, of developing activities for improving the situation of Roma locally and to ease possible tensions and conflicts between the Roma and the majority population.¹²⁹ In addition to these territorial institutions, the authorities have also created thematic structures for implementing the strategy: school mediators and health mediators.¹³⁰

In 2011, a new strategy was drafted: National Strategy for Improving the Situation of Roma. The Strategy was subsequently revised in 2013. Reducing discrimination is listed as one of its four major objectives¹³¹, but does not mention multiple discrimination or intersectional discrimination. Also the strategy does not provide specific remedies, as it focuses mainly on highlighting discrepancies between the majority population and Roma persons in several instances: education, housing, employment.

In 2016, the National Council for Combating Discrimination commissioned the drafting of a National Strategy to prevent and fight against discrimination "Equality, inclusion, diversity" for 2018-2022¹³².

The scope of the strategy was to set directions of action in the area of prevention and fight against discrimination as well as in view of achieving an inclusive society. It has five general objectives were: to develop a culture of nondiscrimination, of equality of opportunities, of tolerance and diversity in the public and private spheres; to achieve uniform legislation by writing a unique Code for fighting discrimination and by promoting the equality of opportunities; to strengthen the institutional framework in this area, in order to ensure a better implementation of the principle of equality and non-discrimination; To promote cross-sector cooperation and to support partnerships with the civil society in order to elaborate and implement policies in this area; to improve data collection in the area of equality, nondiscrimination and diversity; to monitor, assess and report the results every year.

Although the strategy did not mention intersectionality or multiple discrimination, it included "mainstreaming equality" as one of its core principles. Also, given the focus on "developing a

implementing the Strategy. The county offices and the institution of local Roma experts have remained unchanged. However, the regional offices have been abolished.

¹²⁹ It was rather difficult to satisfy this requirement because of scarce human resources with the necessary qualifications. In order to qualify for the position of Roma expert, the candidate has to hold a university degree, have experience in Roma projects and the ability to help Roma in such domains as computer literacy, language skills and clerical work. Nevertheless, there is now a significant Romani presence at local level as more young Roma complete undergraduate studies.

¹³⁰ The health mediators have the task of facilitating communication between Romani individuals and medical personnel, whilst the school mediators focus on enhancing Romani access to education.

¹³¹ The other ones are: increase education, employment and to fight poverty and social exclusion.

¹³² Hotărâre a Guvernului privind aprobarea Strategiei naționale pentru prevenirea și combaterea discriminării „Egalitate, incluziune, diversitate” pentru perioada 2018-2022 [Government decision for the approval of the National Strategy "Equality, Inclusion, Diversity" for 2018-2022], https://stiripentruviata.ro/wp-content/uploads/2018/10/Proiect_HG_Strategie_EID_cu_observatii.pdf, Accessed 3.12.2020

culture of nondiscrimination”, and of promoting a unique Code for fighting discrimination, it is possible to interpret the intentions behind the strategy as a comprehensive, innovative policy, which would also consider multiple as well as intersectional discrimination.

Some clues can be found as to the possibility of interpreting parts of the strategy towards intersectionality, especially by considering the interplay of various grounds: socio-economic status, parental status, economic independence, disability, low income. One specific measure could be interpreted as including an intersectional implicit dimension: “Encourage, respectively maintain such measures where they already exist, of economic opportunities for women in the rural area, single mothers and monoparental families, women who are victims of domestic violence, poor women, by eliminate taxes paid by the employers”. In fact, poverty constitutes a ground of interest for the drafters. For instance, in relation to the specific objective of housing, the Strategy mention the measure to “grant financial help to the local public authorities in order to adapt the houses for the persons with special needs, depending on their income, including by tax reduction”, as well as to “Build shelters for victims of domestic violence”.

In relation to health, the Strategy mention two measures, which are implicitly connected to an intersectional dimension: “Extend the categories of persons benefiting of medical insurance without paying the contribution, so that art. 213 of Law 95/2006 will also include single mothers with low income, as well as victims of domestic violence”, and “Extend the competences of the health mediators in order to address more vulnerable categories: persons with disabilities, elders, persons belonging to religious or sexual minorities, persons without income or unemployed”.

There is, however, another strategy enacted in 2018¹³³ by the Romanian authorities, which mentions “multiple discrimination” and hints to “intersectionality.” *The Romanian national strategy to promote equality of chances and of treatment between women and to fight against domestic violence for 2018-2021* is an important piece of legislation in relation to gender equality. It offers a detailed depiction of the state of affairs in the area of gender and it highlights principles and courses of action, such as in relation to employment, especially regarding payment, work-life balance and reproductive health.

The strategy mentions “multiple discrimination” in three instances: in chapter III, it is mentioned that “equality of chances and of treatment between women and men is a fundamental principle of human rights” (and) it is enacted by Law 202/2002, which defines several terms, such as “multiple discrimination”¹³⁴. Secondly, in chapter VII, courses of action, under the sub-chapter “fighting against gender stereotypes amongst the young people”, the strategy mentions “the organization of an awareness campaign in order to (...) eliminate stereotypes, prejudices and any types of discrimination against women and young girls, including any multiple discrimination against women and young girls with disabilities”.

Nevertheless, the strategy misses the opportunity to address intersectionality, to its history and merit, but it does mention, in regard to domestic violence, that “family is one of the spaces where gender violence manifests itself and this is why gender violence intersects domestic violence”.

Case law

¹³³ Romanian Government Decision 365 of 24.05.2018

¹³⁴ Other terms defined by the strategy: direct and indirect discrimination, sexual harassment, affirmative action, etc.

A landmark case decided by the NCCD in which intersectional discrimination could have been analyzed was that of a statement from 2007 of then President Traian Băsescu¹³⁵. While leaving a supermarket with his wife, a (female) journalist questioned Mr. Băsescu about the referendum for his impeachment and recorded the conversation with her cell phone. He initially addressed the journalist with „Pussycat” (“pășărică”), a word which – as the NCCD also remarked – has multiple understandings, some of which can be considered derogatory against women. Subsequently, Ms. Băsescu took the cell phone away and left, not knowing that the device was still recording. He then told Ms. Băsescu „That dirty gypsy woman was so aggressive”. The cell phone was later returned to the journalist and her media trust decided to broadcast the recording.

The NCCD decided that the first statement, „Pussycat”, which was made in a public space while interacting with the journalist, does not reach the threshold of discrimination. With regard to the „dirty gypsy” statement, firstly, the NCCD ruled that, although made in a private conversation, which later became public, it can be considered “public speech”, so as to be examined for discrimination under the law, citing ECHR decisions. Next, the NCCD found that through this statement, the journalist was subject to an unjust treatment as compared to other persons, and subsequently, the Roma community (and not Roma women in particular) were subjected to a less favorable treatment, as compared to other persons¹³⁶. Also, the NCCD considered that racial insults constitute a more severe form of discrimination than differentiation on other grounds and stated that the statement is not protected by free speech, because it affected the dignity of Roma people. It argued that the association of the term „dirty” with the term “gypsy” constitutes the prohibited differentiation. Therefore, members of the NCCD decided unanimously that this statement represents an unjust and degrading treatment for the Roma people.

One NCCD decision in 2010¹³⁷ is a truly missed opportunity for mentioning intersectional or, at least, multiple discrimination. In the case, a pregnant woman of Roma ethnicity claimed to have been the victim of discrimination by the gynecologist at her nearest hospital, not only by refusing her treatment, but also by addressing her insults such as: “this is how you all you, gypsies, behave”, or by telling the nurses: “stop receiving gypsies, instead just kick them with a broom”. NCCD indeed found the facts discriminatory and sanctioned them, but it put little emphasis at the cumulative nature of grounds on which the woman was discriminated against gender, ethnicity, pregnancy.

It referred more to the general category of her ethnicity, and the need to take it into consideration, in particular the ECtHR’s rulings in D.H. and others v. the Czech Republic and Orsus and others v. Croatia, where the Court considered that “it cannot be ignored the fact that the applicants are of Roma ethnicity, and therefore one has to take into consideration the unique situation of the Roma population”. The (European) Court, continued NCCD, “retained that, due to its history, Roma have become a vulnerable and disadvantaged population”. And that “this vulnerable situation requires special attention to the needs and differences in their lifestyle when deciding in particular cases”.

At one point (paragraph 6.27) the NCCD discussed the fact, alleged by the defendant, that the claimant had not requested to be hospitalized or that the doctor performed tests to assess her

¹³⁵ Romanian NCCD Decision 92 of 23.05.2007

¹³⁶ Romanian NCCD Decision 92 of 23.05.2007, p. 13.

¹³⁷ Romanian NCCD Decision 149 of 07.07.2010

medical situation. NCCD considered that it was impossible for the claimant to have made such requests, and rhetorically asked: how realistic was it for the claimant to have made such requests given “the fact that the claimant was in a delicate situation – pregnancy, that she is part of the Roma community and that she was placed in a socio-economic and educational disadvantage in comparison with the majority of the population”. But, despite the fact that the NCCD is aware of the multiplicity of the grounds complicating the situation of the claimant, the equality body immediately discards her ethnicity and even her gender and adds that “the same could happen to a person belonging to the majority of the population, and having the same lack of information as regards medicine and who cannot, as such, make pertinent requests toward hospitalization or specific medical tests”.

The NCCD position could be partially explained by the answers given by Istvan Haller, vice-president of the NCCD, when approached for comments on intersectionality for the purposes of this research¹³⁸. According to Mr. Haller, the most important aspect is to comply with the already existing regulations. More precisely, as intersectional discrimination is not covered by law, the NCCD could only recognize and sanction multiple discrimination, which constitute an aggravating circumstance of discrimination according to G.O. 137/2000, and therefore the fine should be higher than in the case of a “simple discrimination”. Very few cases of multiple discrimination reach NCCD, 1-2 per year. Moreover, Mr. Haller considers that multiple discrimination covers the concept of intersectional discrimination, as well, and a proliferation of forms of discrimination poses at least two risks: that judges and lawyers interpret the concepts as it pleases them and that courts could annul NCCD’s decisions for the wrong legal framing. For Haller, the important thing is “not to have both multiple discrimination and intersectional discrimination in law, but that these forms of discriminations are sanctioned”.

An interview with Romanita Iordache¹³⁹, expert in the matter, could give some clues on understanding such position, as expressed by Mr. Haller. According to Ms. Iordache, a certain resistance to considering intersectional discrimination could be linked to lack of exposure to and familiarity with the concept, its application and impact, as well as with theoretical debates, such as the critical race theories, conducted in the US.

This research has identified several court decisions in which the intersectional dimension of discrimination could have been analyzed but was completely overlooked by the judges.

The first case concerns the discriminatory statements of Rareş Buglea, a member of a Local Council of the Alba county. In 2013, Mr. Buglea stated on this Facebook profile that he “supports the sterilization of the Roma woman, if following the birth of their first child, the social investigation concludes that they have neither the means nor the intention to raise him/ her decent conditions ”¹⁴⁰. He also mentioned that he is aware that “fake humanists will criticize him harshly” for his statement. A number of NGOs, including RomaniCRISS and E-Romnja filed a criminal complaint¹⁴¹ against Mr. Buglea, on the basis of incitement to discrimination

¹³⁸ Answers received on the 26th of October 2020.

¹³⁹ Interview 27 October 2020.

¹⁴⁰ The topic of forced sterilization of Roma women has also been addressed by the European Court of Human Rights in multiple cases. Please see: V.C. v. Slovakia (no. 18968/07), N.B. v. Slovakia (no. 29518/10), I.G., M.K. and R.H. v. Slovakia (no. 15966/04).

¹⁴¹ Criminal file no. 69/P/2013

(art. 317 of Criminal Code¹⁴²) and for racist propaganda (art. 5 of E.G.O. 31/2002¹⁴³). The prosecutor analyzed the complaint and decided not to prosecute him, thus the NGOs which initially filed the complaint challenged his decision before the court. In this decision, the NGOs themselves did not raise the subject of intersectionality, arguing that the statements in question “seriously affected the perception of the Roma [as an] ethnic group” and that “it is unacceptable for a public official to present his opinion regarding the Roma ethnic minority in such a way, especially on a social network.” The court was even less aware of the discriminatory nature of the statement and decided in favor of maintaining the prosecutor’s resolution. It found that the statement was not racist propaganda because it did not have a repeated character but was a singular event and neither did it incite to discrimination because Mr. Buglea’s lack of support for other online discriminatory initiatives and his public apologies for the initial statement “underline his lack of intention to incite hatred on the grounds of ethnicity.”

Three years later, on April 8, 2016, during a celebration of the International Roma Day organized by the Alba City hall, Mr. Buglea declared “No one can persuade [him] to withdraw [his] statement that any mother, and [also] referring to parents, must have as many children as they can raise. Never, regardless of whether you are a gypsy, Romanian, Hungarian, can you have more children [that you can afford to raise] thinking that the state, the relatives, the neighbors or community are going to take care of them.” Also, in reference to his 2013 statement, he said that “in the Romanian dictionary, beyond ‘sterilization’ we should also look at words such as ‘abandonment’, ‘begging’ and ‘relapse’”. A number of NGOs, including E-Romnja filed a petition at the NCCD for this new statement and the NCCD ruled the statement as discriminatory, but only sanctioned Mr. Buglea with a warning and recommended him to “take into account his status as a public person and the margins of appreciation concerning his speech”¹⁴⁴. The plaintiffs asked the court to annul the NCCD decision and oblige the equality authority to establish the severity of the action and to apply an “adequate, proportional and dissuasive sanction”. This time, the NGOs signing the petition did emphasize the intersectional character of the discriminatory statement before the NCCD and the court, both explicitly and by stating that the target of discrimination is a particularly vulnerable group, found at the intersection between ethnicity, gender and social class. They also underlined the repeated character of his discriminatory statements. The NCCD acknowledged in its decision that the target group of Mr. Buglea’s statement – Roma women – are subject to discrimination on multiple grounds: ethnicity, gender and social class. Yet, the equality authority did not apply the aggravating circumstance foreseen in art. 2 para. (6) of G.O. 137/2000. Meanwhile, the court focused primarily on procedural aspects and failed to address the subject of intersectionality, even when discussing the applicability of art. 2 para. (6) of G.O. 137/2000¹⁴⁵.

¹⁴² Art. 317 para. (1) of the Criminal Code of 1968, republished and modified by Law 278/2006 stated “Incitement to hatred on the grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political affiliation, beliefs, wealth, social origin, age, disability, chronic non-contagious disease or HIV / AIDS is punishable with imprisonment from 6 months to 3 years or a fine.

¹⁴³ Art.5 of G.E.O. 31/2002 stated that “Promoting the cult of persons guilty of committing a crime against peace and humanity or promoting fascist, racist or xenophobic ideology, through propaganda, committed by any means, in the public space, is punishable by imprisonment from 3 months to 3 years and the suspension of certain rights.” Paragraph 2 of the same article stated that “Propaganda consists in the systematic dissemination or the justification of certain ideas, concepts or doctrines, with the intention of convincing and attracting new followers.”

¹⁴⁴ NCCD Decision no. 127/2017.

¹⁴⁵ When analyzing the applicability of art. 2 para.(6) of G.O. 137/2000 invoked by the plaintiff, which provides that discrimination on the basis of multiple grounds represents an aggravating circumstance, the court stated that “the fact that Mr. Buglea has previously been sanctioned for discrimination does not belong to the category of aggravating circumstances, as these criteria are exclusively listed in the law.”

It found that the sanction applied by the NCCD is not symbolic, but proportional to the severity of the act of discrimination¹⁴⁶.

The failure of Romanian courts to address the intersectional dimension of discrimination in their decisions has also been confirmed by one of the lawyers interviewed for this paper¹⁴⁷ and by other reports¹⁴⁸. She cited the case of a HIV-positive woman who was denied emergency Caesarean section in 2010, at week 38 of pregnancy, although this medical procedure is recommended in such circumstances, in order to prevent mother-to-child HIV transmission. In this case, all the courts which examined the case overlooked the fact that the victim had been subject to intersectional discrimination on the basis of her gender and HIV positive status – which placed her in a particular situation, different from both that of non-HIV positive pregnant women and that of non-pregnant HIV-positive persons. Thus, the court of first instance found that she had been discriminated against on the basis of her HIV-positive status¹⁴⁹, while the second court overturned that decision and ruled that she was not subject to discrimination, because she was not an emergency case and she was treated similarly to other pregnant women who did not require emergency Caesarean section¹⁵⁰. This judgement was subsequently upheld by the Bucharest Court of Appeal¹⁵¹.

3. Finland

General overview of the legislation

The legislation providing for equality and prohibiting discrimination in Finland is relatively broad and multilayered. Intersectional and multiple discrimination are not explicitly mentioned in the legislation itself, but have been considered in the preparatory works as will be described more in detail below. Nevertheless, as in the other EU countries, the full understanding and recognizing of the concept of intersectional discrimination has only been properly emerging in the recent years.

For example, the Ministry of Justice has published a Policy Brief in 2019 concerning multiple and intersectional discrimination, calling out for a better identification and understanding of the intersectionality, as awareness of this concept is essential in preventing discrimination. It was noted that many of the vulnerable groups might be victims of discrimination based on several grounds; usually gender is being one of them.¹⁵²

The Constitution and the Criminal Code

¹⁴⁶ Bucharest Court of Appeal (Curtea de Apel București), Civil decision no. 4355/2017 in File no. 2625/2CAF/2017.

¹⁴⁷ Interview with Iustina Ionescu, November 3rd, 2020.

¹⁴⁸ European Network of Legal Experts in Gender Equality and Non-discrimination, Country Report: Romania 2020, p. 16, <https://www.equalitylaw.eu/downloads/5246-romania-country-report-gender-equality-2020-1-07-mb>, Accessed 2.12.2020

¹⁴⁹ First Instance Court Second District Bucharest (Judecatoria Sector 2 Bucuresti) (2013), Judgment No. 4999 of 27.3.2013 cited in the Country Report: Romania 2020 by

¹⁵⁰ Bucharest Tribunal (Tribunalul București) (2014), Decision No. 582A of 12.5.2014 cited in the Country Report: Romania 2020

¹⁵¹ Bucharest Court of Appeal (Curtea de Apel București) (2015), Second Appeal Decision No. 399R of 30.3.2015 cited in the Country Report: Romania 2020

¹⁵² See at:

<https://yhdenvertaisuus.fi/documents/5232670/5376058/Policy+Brief+moniperusteinen+syrjintä+EN/cb153ed3-ad4a-fd32-8bec-bd2c7580240f/Policy+Brief+moniperusteinen+syrjintä+EN.pdf>

First and foremost, the principle of equality and non-discrimination is included in the Finnish Constitution¹⁵³. In the Section 6 it provides for that. “everyone is equal before the law and no one shall, without any acceptable reason, be treated differently on the grounds of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. As it may be noted, the list open ended, leaving also possibility that discrimination is established for “other personal characteristics”. The Constitutional Law Committee of the Parliament¹⁵⁴ has noted that these other personal characteristics may include, for example, a person’s socio-economic status or a place of residence.¹⁵⁵ The Constitution also includes an obligation in the Section 22 for the public authorities to safeguard the implementation of fundamental rights.

Discrimination is furthermore penalized in Section 11 of the Chapter 11 of the Finnish Criminal Code¹⁵⁶. It reads as follows:

A person who in his or her trade or profession, service of the general public, exercise of official authority or other public function or in the arrangement of a public amusement or meeting, without a justified reason:

(1) refuses someone service in accordance with the generally applicable conditions;

(2) refuses someone entry to the amusement or meeting or ejects him or her;
or

(3) places someone in a clearly unequal or otherwise essentially inferior position owing to his or her race, national or ethnic origin, skin color, language, sex, age, family ties, sexual preference, inheritance, disability or state of health, or religion, political orientation, political or industrial activity or another comparable circumstance shall be sentenced, unless the act is punishable as work discrimination or extortionate work discrimination, for discrimination to a fine or to imprisonment for at most six months.

As it can be noted, while the grounds of discrimination recognized by the Criminal Code are wide and open-ended, the applicability of this sanction has nevertheless been limited to the specific conditions set in the provision, namely that discrimination occurs in the exercise of a trade or professional life, a service of the general public or in other circumstances mentioned above. Furthermore, there is a relatively high burden of proof, “beyond reasonable doubt”, which has to be met.

Meanwhile, discrimination in the labor market is prohibited by Chapter 47 Section 3 of the Criminal Code, which reads as follows:

“An employer, or a representative thereof, who when advertising for a vacancy or selecting an employee, or during employment, without an important and justifiable reason puts an applicant for a job or an employee in an inferior position:

¹⁵³ Perustuslaki (731/1999) <https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>

¹⁵⁴ Perustuslakivaliokunta, Committee whose principal function is to issue statements on bills sent to it for consideration and on the constitutionality of other matters and their bearing on international human rights instruments, <https://www.eduskunta.fi/EN/valiokunnat/perustuslakivaliokunta/Pages/default.aspx>

¹⁵⁵ PeVL 3172014 vp, https://www.eduskunta.fi/FI/vaski/Lausunto/Documents/pevl_31+2014.pdf

¹⁵⁶ Rikoslaki (39/1889) https://www.finlex.fi/en/laki/kaannokset/1889/en18890039_20150766.pdf

(1) because of his/ her race, national or ethnic origin, nationality, color, language, sex, age, family status, sexual preference, inheritance, disability or state of health, or

(2) because of religion, political opinion, political or industrial activity or a comparable circumstance

shall be sentenced for work discrimination to a fine or to imprisonment for at most six months."

Furthermore, Chapter 6 Section 4 provides grounds for increasing the punishment, which include "the commission of the offence for a motive based on race, skin color, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or other corresponding grounds". This provision is not, however, applied when it comes to sanctioning the criminal offence of discrimination or work discrimination as the offence already contains this element. This so called "hate-crime motivation" is rather used when sanctioning defamation, assault or other regular offences that were motivated by the above reasons. Gender is not included in the list at the moment, but the Ministry of Justice is preparing a proposal to amend this provision in order to clarify its application and to include gender as one of the hate-crime motives.

The Act on the Equality of Men and Women¹⁵⁷

The special anti-discrimination laws are furthermore divided in two, first, there is an older law providing for equality between men and women (so called Equality Act) and prohibiting discrimination based on gender, gender identity and gender expression, whether direct or indirect. In addition, pregnancy, childbirth, parenthood and family responsibilities are also specifically mentioned as possible grounds of discrimination. The definitions are the following:

In this Act, direct gender-based discrimination means:

- 1) *treating women and men differently on the basis of gender.*
- 2) *treating someone differently for reasons of pregnancy or childbirth.*
- 3) *treating someone differently on the basis of gender identity or gender expression.*

In this Act, indirect gender-based discrimination means:

- 1) *treating someone differently by virtue of a provision, criterion or practice that appears to be gender-neutral in terms of gender, gender identity or gender expression, but where the effect of the action is such that the persons may actually find themselves in a less favorable position on the basis of gender;*
- 2) *treating someone differently based on parenthood or family responsibilities.*

The application of this law is supervised by the Finnish Ombudsman for Equality and it also includes the prohibition of harassment based on gender and sexual harassment, as well as the right of the victim of discrimination to receive compensation as well as the burden of proof and prohibition of countermeasures.

In addition the law provides an obligation for public authorities and agencies, employers and educational institutes to promote gender equality Multiple discrimination or intersectionality is not mentioned in the law nor in its preparatory works.

¹⁵⁷ Laki miesten ja naisten tasa-arvosta (609/1986)
https://finlex.fi/fi/laki/kaannokset/1986/en19860609_20160915.pdf

The Act on Non-Discrimination ¹⁵⁸

The other special law providing for equality and prohibiting discrimination is the newer Act on Non-Discrimination, which is monitored by the Finnish Non-Discrimination Ombudsman. In Section 8 of the Non-Discrimination Act, discrimination is prohibited on the grounds of age, ethnic or national origin, nationality, language, religion, conviction, opinion, political activity, trade union activity, family relations, health, disability, sexual orientation or other personal characteristics. As is in the Constitution, the list is open-ended and thus discrimination may also be established on other personal characteristics than those mentioned in the list (for example, socio-economic status).

Discrimination is forbidden regardless of whether it is based on a fact or on an assumption of the person him/herself or someone else and whether it is direct or indirect. Positive discrimination is defined in the Act and noted that it does not constitute discrimination. Furthermore, harassment, refusal of reasonable accommodation for a disabled person and an instruction or an order to discriminate are all defined as discrimination in the Act. The application of the Act is broad, including both in public and private spheres of society. Only private and family life and religious worship are excluded from the application of the Act.

In the Act an obligation is set for all public authorities, all training providers (including schools, but excluding kindergartens) and employers that have more than 30 employees to actively promote equality and to draft an equality plan to that end. This obligation has been considered relatively progressive and a great tool to advance equality and non-discrimination, identify the needs of the vulnerable groups including situations of intersectionality. Also in the preparative works of this provision, it is explicitly mentioned that by way of drafting the non-discrimination and equality plans, organizations may take into account the specific situation of elderly women, for example.

According to the Act, in case of a plausible claim of discrimination the burden of proof shall be inverted, meaning that it is for the respondent to show that s/he has not acted discriminatively. The Act also prohibits victimization and states the victims of discrimination have the right to compensation. The obligation to pay compensation is for public authorities, employers, training providers or providers of goods or services, who have discriminated against or victimized someone, according to the law. The obligation does not extend to private persons (for example in case of harassment). The compensation in accordance with the Non-Discrimination Act is separate from the traditional Tort Law and does not affect on the victim's right to seek damages in accordance with the Tort Law.

The Non-Discrimination Act does not explicitly mention multiple discrimination, although the Working Group proposing the amendment to the anti-discrimination law proposed to include a specific provision in this regard. However, this was rejected in the final legislative proposal as it was considered that the multiple discrimination is implicitly covered by the legislation (by the proposed Non-Discrimination Act and the Equality Act). During the preparatory works, in the explanatory memorandum of the Non-Discrimination Act¹⁵⁹ it was noted that the Non-Discrimination Act also covers multiple or intersectional discrimination, where one of the grounds is gender (including gender identity and expression). The Equality Act, however, could

¹⁵⁸ In Finnish Yhdenvertaisuuslaki, in English Non-Discrimination Act (1325/2014)
<https://finlex.fi/fi/laki/kaannokset/2014/en20141325.pdf>

¹⁵⁹ HE 19/2014 vp , available at https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Documents/he_19+2014.pdf

not be applied in a case that concerns other grounds of discrimination than gender. In practice, this means the division of competences between the two different Ombudsmen and the Tribunal, i.e. a multiple discrimination case that includes gender as one of the discrimination grounds would fall within the mandate of the Non-Discrimination Ombudsman in its entirety as well as the Non-Discrimination and Equality Tribunal. For example, if such a case concerning multiple discrimination on the basis of gender and ethnicity would be before a general court, it would apply both laws and the victim would be entitled to compensation based on both laws (the Equality Act includes specifies minimum amounts, higher than the average compensation level under the Non-Discrimination Act).

Remedies - Equality Bodies and Their Mandates

Strictly speaking, Finland has three equality bodies, the Non-Discrimination Ombudsman¹⁶⁰, the Ombudsman for Gender Equality¹⁶¹ and the Non-Discrimination and Equality Tribunal¹⁶², but the question of appropriate remedies in case of discrimination is more complex, as presented below.

If the act of discrimination is defined as a crime, the victim may turn to the police, who is responsible for investigating the case and sending the file to the prosecutor, who would thereafter press criminal charges. The victim may claim both damages according to the Tort Law and the compensation according to the Non-Discrimination Act in the criminal proceedings or ask the public prosecutor to do it on his/ her behalf.

The victim may also decide to contact either the Non-Discrimination Ombudsman or the Ombudsman for Gender Equality or to file a complaint directly to the Non-Discrimination and Equality Tribunal. If the discrimination has occurred in the field of employment and based on grounds other than gender, the monitoring authority is the Regional State Administrative Agency.

In addition, the general Parliamentary Ombudsman and the Chancellor of Justice who are responsible for the supervision of the legality of the actions of public authorities and those using public powers may examine claims of discrimination concerning the actions of public authorities.

Mandates of the Ombudsmen

The victim may seek advice from the Non-Discrimination Ombudsman or the Ombudsman for Gender Equality in case of discrimination based on gender, who both provide guidance and advice in relation to anti-discrimination law and concrete discrimination cases.

The mandates of the two different Ombudsmen are very similar, but they also have one difference in addition of the discrimination grounds covered.¹⁶³ The main difference in their mandates is that in case of discrimination in relation to employment, the mandate of the Non-Discrimination Ombudsman is limited and thus such cases shall be dealt with by the Regional State Administrative Agencies. Meanwhile, the mandate of the Ombudsman for Gender Equality also covers employment. This limitation was based on strong lobbying by the trade

¹⁶⁰ Yhdenvertaisuusvaltuutettu, the website available at <https://www.syrjinta.fi/web/EN>

¹⁶¹ Tasa-arvovaltuutettu, the website available at <https://tasa-arvo.fi/etusivu>

¹⁶² Yhdenvertaisuus ja tasa-arvolautakunta, the website available at: <https://www.yvtltk.fi/en/index.html>

¹⁶³ Laki yhdenvertaisuusvaltuutetusta (1326/2014) available at <https://www.finlex.fi/fi/laki/alkup/2014/20141326>, Laki tasa-arvovaltuutetusta (1328/2014), <https://www.finlex.fi/fi/laki/ajantasa/2014/20141328>

unions and it has been assessed to be quite problematic. The Non-Discrimination Act is currently under review.

Cases of multiple discrimination including gender (or gender identity or expression) as one of the discrimination grounds would fall within the mandate of the Non-Discrimination Ombudsman.

*Regional State Administrative Agencies*¹⁶⁴ Discrimination within the field of employment is excluded from the mandate of the Non-Discrimination Ombudsman and it belongs to the authority of the Regional State Administrative Agencies, which are responsible for the Occupational Health and Safety, including discrimination within recruitment and in work relationships. The Agencies are not mandated to mediate the cases, thus a case of discrimination within employment could still be mediated for a reconciliation and compensation by the Non-Discrimination Ombudsman. From the perspective of intersectional discrimination, if a person claims to have been discriminated against, in the field of employment, based on grounds such as ethnicity/nationality and disability, the complaint should be addressed to the Regional State Administrative Agencies, instead of the Ombudsman or the Non-Discrimination and Equality Tribunal.

The Non-Discrimination and Equality Tribunal

The Non-Discrimination and Equality Tribunal is a quasi-judicial body, which examines and adjudicates claims of discrimination, governed by the Act on the Tribunal¹⁶⁵. The victim may bring a case to the Tribunal by himself/ herself when it concerns the application of the Non-Discrimination Act in field of life, other than employment, and on any grounds of discrimination, other than gender or multiple discrimination cases including gender as one of the grounds. If the case concerns discrimination based solely on gender, then only the Equality Ombudsman or Trade Unions may bring the case before the Tribunal.

The Tribunal will examine the case and give a reasoned opinion on whether discrimination has occurred or not and it may impose a conditional fine to the respondent in order to end the possibly ongoing discrimination. However, the Tribunal does not have powers to order compensation to be paid to the victims. That must always be sought from the general courts in civil proceedings. The decisions of the Tribunal may be appealed against in the administrative courts.

The Tribunal does not examine cases that are pending before other authorities (including in the Ombudsmen's office) and its mandate also includes issuing reasoned opinions on the application of the anti-discrimination legislation. In this regard its competence is overlapping with the Ombudsmen.

General Courts

In a case of discrimination, civil proceedings may also be instituted in the general courts directly, in order to establish that discrimination has occurred and obtain a judgment for the damages and compensation.

Conclusion of the legislative framework from the viewpoint of intersectionality

¹⁶⁴ Aluehallintovirastot, see: <https://www.avi.fi/en/web/avi-en/tyosuojelu>

¹⁶⁵ Laki yhdenvertaisuus- ja tasa-arvolautakunnasta (1327/2014), available at <https://www.finlex.fi/fi/laki/alkup/2014/20141327#Pdp445674896>

A recent report of the project set to evaluate the amendment of the Non-Discrimination Act in 2014 concluded in its observations that: “discrimination on different grounds is reported and addressed through different legal channels, which results in differences in legal protection and remedies. This problem can be partially addressed by promoting non-discrimination and through legislative reform. Wider issues concerning the non-discrimination and equality legislation relate to the question of the competence of different authorities”.¹⁶⁶ The report also addressed issue of multiple discrimination and intersectionality, noting that the legal assessment of multiple discrimination can be challenging because the level of protection against discrimination, the application of the relevant provisions and the remedies and sanctions may vary depending on the grounds of discrimination. Defining a comparable situation, as required by the Equality Act and the Non-Discrimination Act, may be difficult in a situation of a multiple or compound discrimination. If there is no real comparable situation that may be applied, in the preparatory works of the Non-Discrimination Act it has been explained that the assessment may be based on the assumption of what would constitute fair treatment in such a situation. In practice, this may be complicated.

Strategies and policies

In terms of relevant policies, the Government Action Plan for Gender Equality for 2020-2023 was recently finalized¹⁶⁷ and an Action Plan against Racism, Discrimination and Promoting Good Ethnic Relations will be drafted by the beginning of 2021¹⁶⁸.

The Plan for Gender Equality aims to keep on improving the gender equality in all areas of life and includes actions to be implemented by all the ministries. The goal is to take a global lead in gender equality. This ambitious plan contains 54 defined measures, including, for example, using quotas in corporate governments, improving conditions for part time workers and increasing the flexibility of working time legislation in order to better combine the demands of working life and family life.

The plan states that promoting equality requires considering the intersectional perspective, which means that, for example, age, origin and socio-economic status are to be taken into consideration. The emphasis is placed on the fact that such factors impact the position of the person in society. Intersectionality is explained to examine the cross-cutting discriminatory mechanisms.

For example, when assessing a person’s educational choices, the intersectional perspective should be considered, since factors such as gender, socio-economical background and immigrant background have a combined effect. Intersectionality is also emphasized in EU-policy on gender equality and the GVMT Action Plan welcomes the perspective of diversity among genders at the EU policy level. Also, one of the Finland’s Foreign Policy’s goals is to

¹⁶⁶ Kati Nieminen, Laura Jauhola, Outi Lepola, Kati Rantala, Risto Karinen, Tuomas Luukkonen. “Aidosti yhdenvertaiset Yhdenvertaisuuslain arviointi”, Valtioneuvoston Selvitys- ja Tutkimustoiminta (2020) ISBN PDF 978-952-287-959-2

¹⁶⁷ In Finnish: “Hallituksen tasa-arvo-ohjelma 2020-2023, Suomi tasa-arvon kärkimaaksi”, in English: “The Government Action Plan for Gender Equality 2020-2023, Finland to lead in Gender Equality”, available at: https://valtioneuvosto.fi/documents/1271139/20825107/Valtioneuvoston_periaatepaatos_hallituksen_tasa-arvo-ohjelma_2020-2023+.pdf/abc3b771-8611-8b85-937d-34531e90f712/Valtioneuvoston_periaatepaatos_hallituksen_tasa-arvo-ohjelma_2020-2023+.pdf?t=159308333541

¹⁶⁸ Available at: <https://oikeusministerio.fi/en/-/government-invites-civil-society-to-participate-in-seeking-ways-to-combat-racism>

promote the equality of girls and women globally and to promote an intersectional perspective in ensuring equality in the labor market.

Case law

Over the past 15 years, the number of discrimination cases has been slowly increasing. There is a nation-wide monitoring system of discrimination cases carried-out by the Ministry of Justice.¹⁶⁹ For example, in 2017, the district courts adjudicated 9 cases of criminal offence of discrimination, 18 cases of work discrimination, 14 cases concerning the Equality Act and the 25 cases concerning the Non-Discrimination Act. In 2018, there were 12 cases of criminal offence of discrimination, 10 cases of work discrimination, 10 cases concerning the Equality Act and 11 cases concerning the Non-Discrimination Act¹⁷⁰. The Non-Discrimination and Equality Tribunal adjudicated 70 cases in 2017 and 113 cases in 2018. The topic of multiple discrimination has been raised in very few cases, while intersectionality has not addressed in the case-law, as confirmed by the newly published report¹⁷¹ on the evaluation of the non-discrimination act, which examined all the cases between 2015-2018.

Meanwhile, the statistics of the Non-Discrimination Ombudsman shows, that the two main grounds for discrimination are ethnic origin and disability. In its Annual Report for 2019, intersectionality was explicitly addressed in the issue of Muslim women's right to use burkini in the public swimming pools. The Ombudsman gave a reasoned opinion in the Annual Report that the refusal by the swimming pools (municipality governing the pools) to allow burkinis may amount to prohibited discrimination.¹⁷² The Ombudsman noted that, in practice, the ban on wearing burkini while attending the swimming pool only affects women of certain religious/ethnic groups.

A case of multiple discrimination reviewed by the Non-Discrimination and Equality Tribunal concerned the use of automatic decision-making /algorithm that a bank used to process credit applications. The complainant was refused a credit although he fulfilled the conditions (if assessed individually his personal situation) because the decision was automatized and based on the info received in the application form (certain amount of points based on gender, language, age and address /area where living).- As he was a certain aged man, speaking Finnish and not Swedish, and lived in a certain bad-reputed area, he received lower points than had he been Swedish speaking female living somewhere else. The Non-Discrimination Tribunal considered that this process was based on considerations of prohibited discrimination grounds and instead it should have been an individual assessment on the applicant's personal situation. The Tribunal's essential assessment goes as follows: "the scoring system-based assessment used by the credit institution company, relying on statistical data and payment default information related to other people, based on which assumptions regarding the financial standing of A were made. The company, based on prohibited grounds of discrimination such as gender, first language, age and residential area, assumed that the financial standing of A was weaker than it would have been if measured with other properties. At the same time, the company ignored the information regarding A's own credit behavior and creditworthiness even though these factors would have favored extending credit to A. Disregarding such information

¹⁶⁹ Please see <https://yhdenvertaisuus.fi/en/dataondiscrimination.fi>

¹⁷⁰ Please see <https://yhdenvertaisuus.fi/syrjintailmoitukset-ja-ratkaisut>

¹⁷¹ Nieminen et al. "Aidosti yhdenvertaiset Yhdenvertaisuuslain arviointi"

¹⁷² Please see <https://syrjinta.fi/documents/25249352/34271289/Vuosikertomus+2019.pdf/4127658e-19c6-4736-a02b-f51c98c382bc/Vuosikertomus+2019.pdf?version=1.2&t=1600437256136>

about A, by using formal and abstract statistical credit data based on the credit behavior of others, without performing an individual assessment of A's financial standing, was disproportionate and therefore not acceptable as intended by section 11 of the Non-Discrimination Act.

Therefore, the method used by the company for the assessment of A's creditworthiness was not based on an individual assessment of A's creditworthiness but a statistical assessment method, that was essentially based on prohibited grounds of discrimination as defined in the Act on Equality between Women and Men and in section 8 of the Non-Discrimination Act."

Another case decided on by the Non-Discrimination and Equality Tribunal in 2006 concerned Roma women, but intersectionality or multiple discrimination was not addressed.¹⁷³ Four women of Roma ethnicity were not accepted in a clothing shop and were asked to leave, threatened that a security guard will be called at the scene, because the shop owner considered that "the big size of the group" (number of women) endangered the security in the shop. The shop was in a big outlet fashion market and the women claimed to have been treated in a humiliating way, as there were other people in the shop and one of the women held a position as a civil servant. The shop assistant told them that "they do not attend /serve Roma people because they have bad experiences with them" and that in particular the Roma women use their traditional big size dresses to hide items (steal) under the dress. In the Tribunal's proceedings the shop owner and assistant denied making such statements and claimed that it was only a matter of security. They argued that the shop was big, and they did not have enough staff to supervise the clients and they had had a lot of thefts. The Tribunal did not find this explanation plausible and considered that the shop had not managed to rebut the assumption of discrimination. Therefore, it prohibited the clothing shop and its owner from continuing discrimination against the Roma and issued a 500 euros conditional fine.

According to the 2020 evaluation of all case-law concerning discrimination filed under the Non-Discrimination Act, between 2015-2018, the notions of multiple and intersectional discrimination were very rarely present in the data. In two civil cases the complainant had claimed multiple discrimination based on sexual orientation, health and economical status in the first one and opinion, health, age and gender in the second one, but in both cases the courts found that the defendant had not been aware of such personal characteristics of the complainants and thus there was no indication of discrimination.¹⁷⁴

There was one civil judgement from the District Court in 2016, which concerned multiple discrimination, based on both the Equality Act and the Non-Discrimination Act. The case concerned a female police officer who applied for a higher position, but a less qualified male officer was appointed, instead of her. The chief of the police argued that the female officer could not be appointed to this particular position, because at the moment she was a suspect in an ongoing criminal investigation, concerning neglect of duty. She was later acquitted. The officer claimed that she was discriminated based on her gender, since a less qualified male colleague was chosen over her. She also claimed discrimination based on "other personal characteristic", as foreseen in the Non-Discrimination Act, which in her case was the ongoing

¹⁷³ For details please see:

https://www.yvtltk.fi/material/attachments/ytalk/sltkntapausselosteet2007/QHUfbT1ap/38982_SLTK-tapausseloste_7.6.2007.pdf

¹⁷⁴ For details please see:

https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162552/VNTEAS_2020_50.pdf?sequence=1&isAllowed=y

criminal investigation. The court considered these two grounds separately and found the chief of police's justification for appointing a less qualified male officer, instead of the claimant, to be unconvincing and not in a position to overturn the presumption of discrimination based on gender. As for the ongoing criminal investigation, the court noted that the officer had been able to continue her duties normally, despite of the ongoing criminal investigation, thus it concluded that the investigation did not make her unfit for the position that she had applied for. Furthermore, the court noted that in the case of other police officers, being subject to investigation had not prevented their promotion. Therefore, the chief police could not overturn the presumption of discrimination. The claimant was awarded a compensation of 5.000 Euro, under the Equality Act and 5.000 Euro, under the Non-Discrimination Act. The judgment has been appealed and is not yet final.

Another civil law case concerning intersectional discrimination, dating from 2017, was that of a woman holding a Master's degree in economics, who filed a discrimination case against a hospital that had been her long-term employer. She claimed that she had been discriminated against based on her gender and educational background, as she had been stripped of her duties and her position had eventually been lowered compared to the one for which she was initially appointed. She had been recruited in 2007 for a relatively high expert position, whose mission was to improve the functioning of the hospital and bring business expertise to its management. She claimed that she had not been taken seriously in the male and doctor-dominant environment, all her ideas were rejected and, gradually, her attributions were transferred to a newly established unit and newly recruited person. The district court considered that according to the Non-Discrimination Act, a person may be discriminated against based on multiple or intersectional grounds, one of which may be gender. Examining each of the events presented and the actions of the employer, the court concluded that, on some occasions, the claimant was discriminated against, according to the Non-Discrimination Act, while on another occasions she was not discriminated against. The claimant was awarded 8.000 Euro compensation under the Non-Discrimination Act. However, the judgment has, been appealed and is not yet final.

Conclusion

A first conclusion to be drawn from the present analysis is that the notion of intersectionality has only recently started to transcend from the academic literature into policies and law. While intersectional discrimination is not currently defined and regulated as such in international conventions nor in EU policies and legislation, the study has identified several legal provisions offering protection to victims of discrimination on more than one ground and belonging to multiple groups. Oftentimes, the phrasing of such provisions employ the notion of multiple discrimination, rather than having an intersectional approach, as they enumerate a number of different prohibited grounds for discrimination. The recent developments in the judgements of the European Court of Human Rights, which acknowledge the intersectional character of discrimination, are a notable exception.

This results from the fact that most international, European and national antidiscrimination legislation, policies and institutions were instituted to protect against discrimination on one specific ground, often gender or race/ ethnicity. In some cases, the scope of such legal instruments or policies has been extended to also include other grounds, relevant for their protected groups (for example: socio-economic status, disability etc.), which could implicitly

allow for an intersectional approach. Meanwhile, other legal instruments and institutions do focus on all of the grounds of discrimination at the same time, but often not in a crosscutting way and not in all fields of activity.

More specifically, none of the three countries analyzed in depth, Italy, Romania and Finland, nor the others EU member states briefly included in this study, has included the notion of intersectional discrimination in their legislation. While some attempts to regulate it have been identified, none of them has been successful so far. As other authors have noted, in most European states, even the notion of multiple discrimination is marginal in the law, policies and in court decisions.

Also, the study has not identified any court decision from the three countries analyzed in-depth (Italy, Romania, and Finland) explicitly sanctioning intersectional discrimination. Even judgements adopting a progressive approach and implicitly using an intersectional perspective were extremely rare and difficult to identify. In most cases when the victim belonged to multiple disadvantaged groups and when the facts of the case could have been analyzed from an intersectional perspective, the courts either analyzed the grounds of discrimination separately or just focused on one of the grounds and overlooked the others, or implicitly addressed both. This is both due to the lack of legal provisions on intersectional discrimination as well as due to the lack of awareness about this concept among legal professionals, lawyers and judges alike.

Understanding, regulating and sanctioning intersectional discrimination is crucial for attaining full equality for everyone. While some argue that victims of such discrimination could obtain justice under the current provisions, without examining their case from an intersectional perspective, there are a number of reasons for rebuking this argument. Firstly, because victims of intersectional discrimination are often in the most underprivileged position in society and need additional protection. Secondly, using the classical approach to discrimination, which only focuses on one ground, could leave victims of intersectional discrimination unprotected, as there is no comparable subject, in their case. Last, but not least, the failure to adopt an intersectional approach applicable to all grounds leads to numerous obstacles in tackling cases of multiple/intersectional discrimination in practice. It also leads to an unequal treatment of victims as, depending on the specific grounds relevant for them, some grounds benefit from more protection under the law than others.

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