

INTERSECT VOICES IN EUROPE PROJECT / DEACONESS FOUNDATION

Policy Brief:

Intersectionality in the Finnish Anti- Discrimination Legislation - Focus on the Experience of Migrant Roma Women

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I. Summary

The concept of intersectionality used to address discrimination is by no means new, but yet it has been very rarely employed in the legislation, policies and case-law of the three European states, examined in the EU-funded project IntersectVoices: Finland, Italy and Romania. An intersectional perspective refers to a situation in which two or more grounds of discrimination interact with each other in an inseparable manner and produce distinct and specific experiences of discrimination. The traditionally used unidimensional approach has proven often inadequate and insufficient to address these experiences. This kind of discrimination can be arguably considered qualitatively different than those committed based on only one ground. It also requires an understanding of power structures in society and how privileges are divided.

A comparative legal analysis was performed to study the practices across Europe and more in-depth in these three distinct states. It was noted that while the formal laws still remain silent on intersectionality, there are increased efforts to include it in the policies against discrimination and advocacy to appropriately apply the perspective in litigation and in the possible legislative reforms. The progress is still, however, quite slow. While some attempts to regulate it have been identified, none of them has been successful so far. Also, the study has not identified any court decision from the three countries explicitly sanctioning intersectional discrimination. So far, the most progressive approach has been the one applied by the European Court of Human Rights, although it also does not explicitly use the wording of multiple or intersectional discrimination.

In the project the experience of migrant Roma women was also collected. Many of them tell a similar story of repeated discrimination, however, there are no cases formally brought forward due to lack of knowledge and resources. In sum, more efforts are needed both in advocating and reaching out to the most vulnerable victims in order for them to seek redress on one hand, and on the other hand, more training and awareness-raising of legal professionals about intersectional approach to discrimination to properly understand, regulate and sanction it is needed in order to obtain substantive equality for all.

II. What does an intersectional approach mean to discrimination policies?

As the comparative analysis showed, anti-discrimination legislation, case-law and policies have traditionally approached discrimination from a unidimensional and sectorial perspective, considering that a person can be discriminated against on the basis on one ground at a time. Thus, the solutions to discrimination are also designed to address each grounds separately. However, it has been recognized that people can belong to more than one disadvantaged group and thus face complex and potentially unique forms of discrimination, which cannot be narrowed down to a single ground of discrimination. It has been rightfully argued that disadvantages tend to accumulate, in particular in the case of ethnic minority groups with a lower socio-economic status. Such unidimensional approach is therefore often inadequate and insufficient in addressing experiences of discrimination. In order to better deal with the problem and the unique experiences of discrimination people from diverse background face, terms such as multiple, compound or cumulative and intersectional discrimination have been proposed. These concepts are not fully established and they are partially overlapping.

The term intersectionality was first used in late 1980's

The term "intersectionality" was introduced first time by Kimberle Crenshaw in 1989 as part of her black feminist critique to the traditional anti-discrimination doctrine. In the black feminist movement it was highlighted that feminism had, unfortunately, been understood as homogeneous and white-essentialist, thus ignoring the experiences and voices of women of colour and of other minority women. In addition, the concept was also used in the critical legal studies and critical race theory. Over the years, the term has evolved towards various other areas.

Complex problems need comprehensive solutions

When addressing discrimination, the concept of intersectionality is considered by most scholars to be the best approach when trying to provide remedy to situation of "minorities within minorities". Intersectional discrimination describes a situation in which two or more grounds of discrimination interact with each other in an inseparable manner and produce distinct and specific experiences of discrimination. This kind of discrimination can be arguably considered as qualitatively different than those committed based on only one ground. It also requires an understanding of power structures in society and how privileges are divided. The approach requires a wider perspective of the society than concentrating on merely one situation of discrimination. It can make visible experiences of discrimination that would not otherwise be noticed. For example, the disabled women may experience different forms of discrimination where both disability and gender are interlinked than those disabled men

face. Same applies for example to a Muslim belonging to the LGBTQI-community in comparison to a heterosexual Muslim. In an intersectional analysis the existing homophobia or the sexism that women face should be taken into account when assessing the situation of discrimination. Therefore, an intersectional approach is arguably needed in order to improve substantive equality in society.

The European Court of Human Rights approach in its case-law concerning Roma does not strictly speaking address intersectional discrimination, however the Court has taken into account wider societal situation of Roma instead of concentrating only on the one event of discrimination. The Court has stated on various occasions that the Roma are a severely underprivileged group in Europe and therefore require a special protection (e.g. D.H. and Others v. the Czech Republic, Chapman v. The United Kingdom, Jansen v. Norway, Hirtu and others v. France). When assessing a situation of discrimination the intersectional approach calls for looking at the full picture and taking into account the different factors affecting the situation.



III. Regulation of intersectional discrimination in Europe

Intersectionality is mainly absent from the LEGAL framework

As in the national legislations of its Member States, also EU anti-discrimination laws do not contain explicit regulations or definitions of intersectional discrimination. In the recent years, however, there has been an increasing appeal to include it. For example, the European Network Against Racism urged in its brief of 2018 policy makers to adopt an intersectional approach for at least five reasons:

- 1) To better understand the reality of discrimination;
- 2) To acknowledge the severity of multiple marginalization;
- 3) 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;
- 4) To build a strong basis for solidarity;
- 5) To achieve full equality.

The main debates on intersectionality in the EU are related to whether intersectional discrimination should be recognized as a different form of discrimination within the already existing anti-discrimination law. The legislation currently covers direct discrimination, indirect discrimination, instruction to discriminate and, based on the Court of Justice's case-law, discrimination by association. However, some criticism has also been made claiming that the concept is too complex and too difficult to implement. Nevertheless it is to be noted, that while intersectionality is not explicitly part of the EU legislation, the recitals of the two anti-discrimination directives, namely the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) do recognize multiple discrimination and the fact that women are frequently victims of it.

Towards A more comprehensive approach in the new EU Anti-discrimination legislation

The EU legislation prohibiting discrimination is currently under review, and in the latest version of the proposed new Council Directive on Equal Treatment between persons irrespective of religion or belief, disability, age or sexual orientation, the notion of multiple discrimination is also included in the recital. It contains a mention that: "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". An intersectional approach to discrimination has also - been taken into account in the European Parliament Resolutions concerning women with disabilities, on violence against women, as well as in the Resolution on Roma women, where it has been considered that multiple discrimination is an aggravating factor in a situation of discrimination.

In addition, the new Gender Equality Strategy 2020-2025 includes intersectionality as a horizontal, cross-cutting principle for its implementation.

EU court is cautious in its approach

In contrast, the European Court of Justice has been very cautious in its approach to cases that contained elements of intersectional discrimination. In the case of Parris, the Court disregarded the Advocate General Kokott's proposition of combined discrimination that concerned indirect discrimination on grounds of sexual orientation and direct discrimination on grounds of age. Also, the two cases concerning the use of headscarves at work, Achbita and Bougnaoui, have been widely criticized due their failure to address the issue of intersectional discrimination despite the fact that the Islamic headscarf remains a prominent expression of intersectional discrimination on grounds of religion, gender and ethnic origin. Also, a number of cases before the CJEU concerned discrimination on multiple factors, but the judges failed to make any intersectional analysis or even mention multiple discrimination

Intersectionality in the council of Europe

Within the Council of Europe, an organisation set up to promote democracy, rule of law and human rights, the Member States have agreed on a number of Conventions that are important also from the perspective of combating discrimination. Multiple or intersectional discrimination are not mentioned in the formal legal texts as such, but for example the so called Istanbul Convention on preventing and combating violence against women and domestic violence contains an explanatory memorandum which mentions that: "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.."

The Council of Europe's Committee of Ministers have adopted several recommendations, which contain special sections on multiple discrimination. The first one concerned the gender equality standards and mechanisms (Recommendation CM/Rec(2007)17), where it was noted that there are certain vulnerable groups that are often subjected to one or several other types of discrimination simultaneously. It called out to Member States to adopt and implement positive actions to combat multiple discrimination, in view of achieving de facto equality. Also, in the recommendation on sexual orientation or gender identity (Recommendation CM/Rec(2010)5) the Member States were encouraged to "ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds". The recommendation on Young People's Access to Rights (Recommendation CM/Rec(2016)7), calls on the Member States to address the discriminatory practices faced by young people, with special attention to multifaceted identities and the intersectional nature of discrimination.

The European Convention on Human Rights prohibits discrimination, but as other legal texts, does not in itself contain mentions of intersectionality or multiple discrimination. The European Court of Human Rights' interpretation of the Convention has been dynamic and in light of present day conditions in its case-law and it has not been as cautious as the Court of Justice of the European Union. Nevertheless, the cases dealing with multiple or intersectional discrimination are still quite few. The Court seems to recognize the phenomenon of intersectional discrimination and clearly takes into consideration a multiple-grounds approach, although without using the terms multiple or intersectional discrimination. The most notorious of such cases concerned the sterilization of Roma

women in Slovakia (N.B. v. Slovakia and V.C. v. Slovakia) and the ill treatment of a female sex-worker in Spain (B.S. v. Spain). In the latter, the Court found a violation of the non-discrimination provision because the domestic courts had failed to take into account the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute and thus the approach of the Court was in practice intersectional, although not explicitly explained as such. Also, the case of Carvalho Pinto de Sousa Morais v. Portugal is relevant as it concerned the payment of nearly 50 % less compensation for medical negligence to an elderly woman than to a man, although they both had suffered comparable injury due to genital surgery.

IV. Regulation of intersectional discrimination in Finland

System of protection against discrimination is fragmented

The legislation providing for equality and prohibiting discrimination is relatively broad and multilayered in Finland. Discrimination is prohibited first of all in the Constitution with an open-ended list of grounds that may include also reasons such as a person's socio-economic status. Furthermore, the Criminal Code contains the description of discrimination and work discrimination is punishable with a fine or maximum 6 months imprisonment. Establishing a criminal offence however requires that there is evidence beyond reasonable doubt, the burden of proof lies with the prosecutor. The Criminal Code also includes the crime of ethnic agitation and if any other crime is committed for a motive based on race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or another corresponding ground, it is a reason to increase the punishment (so called hate motivation). Gender is not included in the list, but a legislative proposal (HE 7/2021) to include it in the list is currently being discussed in the Parliament.

In addition, discrimination based on gender, gender identity and expression is prohibited in the Equality Act Between Men and Women and based on the rest of the grounds (the Act contains an open-ended list of grounds, as in the Constitution), in the Non-Discrimination Act. These laws contain definitions of direct and indirect discrimination, including the failure to provide reasonable accommodation to disabled persons and they prohibit instructions to discriminate, victimization, discriminative work advertisement and harassment. They also provide for an obligation for public authorities and employers with over 30 employees to promote equality and to draw up an equality plan to that end. The laws have wide application to all fields of life except religious worship and the private sphere and family life. According to these laws, the burden of proof is shifted from the victim to the natural or legal person accused of discrimination when a plausible claim of discrimination has been made. The discrimination can be based on fact or perception and it does not require an intention to discriminate. Although the protection provided for by the laws is relatively extensive, the system has been criticized

for being overly complicated from the victim's perspective as the provisions are divided between several laws. Moreover, the actors providing advice, protection and supervision of the laws are multiple and their mandates are limited. Overall, it can be said that the system protecting from discrimination in Finland is fragmented.

The supervisory bodies and their mandates are numerous which may confuse the victim

In addition to the general authorities that may be contacted in case of discrimination, such as the police, the Parliamentary Ombudsman and the Chancellor of Justice that oversee the actions of public authorities, there are three equality bodies in Finland. The Equality Ombudsman deals with the discrimination based on gender, gender identity and expression, while the Non-Discrimination Ombudsman with the rest of the grounds. They can provide assistance and advice to the victims, give reasoned opinions and recommendations and mediate a reconciliation agreement between the parties. The third body is the Equality and Non-Discrimination Tribunal, which is a quasi-judicial body competent to examine discrimination complaints free of charge, but not powered to order any compensation to be paid to the victim. Also, the Non-Discrimination Ombudsman does not have a mandate over discrimination in the field of employment, but the competent authority to examine those claims is the Occupational Safety and Health Authority within the Regional Administrative Agency. The Tribunal can examine complaints of work discrimination only based on gender and only at the request of the Equality Ombudsman or the Labour Unions. In practice, it has not dealt with cases of gender discrimination, but those cases are brought before the general courts. The general courts have wide powers to apply the laws and award compensations, but there may be legal expenses involved and the proceedings often are lengthy.

Intersectional or multiple discrimination are not explicitly mentioned in the legislations itself, but they have been considered in the preparatory works of the Non-Discrimination Act. The notion concerns mainly the division of powers between the Equality Ombudsman and the Non-Discrimination Ombudsman. The explanatory memorandum

of the 2014 Non-Discrimination Act noted that in case a person is discriminated against due to various grounds, it is for the Non-Discrimination Ombudsman to deal with the matter also when one of the grounds is gender. For the victim of discrimination it may be difficult to identify how she or he should pursue her or his case.

The case-law on intersectional discrimination is still very scarce

The number of discrimination cases has been slowly increasing over the past 15 years, as shown by the nationwide system of monitoring discrimination cases coordinated by the Ministry of Justice. However, 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 a total of four cases, the complainant had raised the issue of multiple discrimination, but in only two of the cases the claims were partially accepted. In the two other cases the courts found that the defendants had not been aware of the claimed personal characteristics of the complainants and thus there was no indication of discrimination.

The Non-Discrimination and Equality Tribunal has ruled on one case where it considered that a multiple discrimination had occurred in the use of automatic decision-making algorithm that a bank used to process credit applications.

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 public debate regarding the right of Muslim women to use burkini in the public swimming pools. The Ombudsman gave a reasoned opinion in the Annual Report that the refusal of the swimming pools to allow burkinis may amount to prohibited discrimination. The Ombudsman noted that in practice, the ban on wearing burkini while attending the swimming pool only affects women belonging to certain religious and ethnic groups.

Calls for better understanding of intersectionality

In Finland, as in the other EU countries, the full understanding and recognition of the concept of intersectional discrimination has only been properly emerging in the recent years. 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 being one of them.

A report evaluating the implementation of the Non-Discrimination Act has concluded that discrimination on different grounds is reported and addressed through different legal channels, which results in differences in legal protection and remedies. The report addressed the 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 the 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.

In terms of relevant policies, the intersectional perspective has been included in the Government Action Plan for Gender Equality for 2020-2023 and the Action Plan against Racism, Discrimination and Promoting Good Ethnic Relations 2020-2023. Both call for a better understanding and recognition of multiple and intersectional discrimination.

As for research data, there are notably three studies that deal with intersectional aspects of discrimination. The first one is a survey from 2014 on discrimination in access to social and health care services experienced by elderly people from minority groups. The second is from 2017 and concerned the multiple discrimination of minorities within minorities: experiences of disabled Sami or Sami belonging to LGBTIQ community. Finally, the third one is from 2017 and concerned the multiple discrimination experienced by people belonging to sexual and gender minorities. It is recognized that we need more information about the different forms of discrimination people face, in particular those belonging to various disadvantaged or minority groups.



V. Experience of migrant Roma women

According to the National Roma Policy 2018-2022, Roma are a traditional linguistic and cultural minority in Finland and have lived in Finland for more than 500 years. The number of Roma in Finland is estimated to be around 10.000, but a few thousand members of the same, Finnish speaking or Finnish origine Roma group also live in Sweden. In addition, there are members of other Roma groups of Eastern European origin, such as Bulgarian and Romanian Roma, who have settled temporarily or permanently in Finland. The Roma Policy seeks to address the improvement of their rights and status.

It has been noted in the Policy that, unfortunately, even the best of legislation or positive integration approach cannot alone guarantee substantive equality. Discrimination and prejudice against the Roma is a persistent problem in Finland, in particular when applying for housing and employment. Also hate speech and crimes against Roma seem to have increased in recent years. There are also a lot of lived experiences of microaggressions, normative prejudices and different forms of othering and racialization among the Roma communities. The only positive development appears to be that the national Roma are more aware of their rights and they bring more cases before the courts, seeking redress against discrimination.. Intersectional approach has been absent from the judgments of public authorities even when it could have been considered. For example, a case from Equality and Non-Discrimination Tribunal from 2006 concerned the discrimination of Roma women when attending a clothing shop. In the facts of the case, it transpired that the discriminative attitude of the shop-owner was directed in particular towards Roma women due to the traditional clothing they wear. The gender-aspect was not, however, considered in any way, but the discrimination was established only based on the ethnic origin.

The migrant Roma in Finland experience various forms of discrimination, but they rarely make any complaints to the authorities. The Roma women and gender minorities are especially vulnerable. Reports released by the assisting human rights NGOs have documented cases of harassment, hate speech, chasing the people away from public spaces, being stopped and searched and even detained by the police without understanding the reasons.

When it comes to Roma migrant women's experiences in Finland, the elements of multiple discrimination are present especially in situations of poor housing conditions, limited opportunities to participate in the labor market and limited access to education. There are also very little opportunities for societal activity and agency, and when it comes to access to basic health and social services, there are several obstacles – which makes it obvious that the National Policy on Roma should be better implemented in cases of people with migrant background and lack of knowledge of local languages.

Public discourses around Roma migrant women tend to focus on issues of criminality - of their work, income, livelihood and accommodation. Anti-Roma sentiments and hate speech are very common and include many stereotypes and false rumors. Everyday life of the migrant Roma in Finnish cities and municipalities is full of

insecurities and vulnerabilities, through street work, precarity patterns and in many cases also poverty. Representations, stereotypes and media discourses strengthen those structures.

Minorities within the Roma minority are disproportionately affected by exclusion, racism and discrimination, while specific responses addressing their human rights violations are quite limited. Many of the migrant Roma women are outside of their national health insurance scheme, which means they cannot obtain the European Health Insurance Card and are entitled to health services only in case of emergency within the EU, which includes Finland. All non-residents have access to emergency social care, while minors (persons younger than 18) and pregnant women have the right to more extensive health services. A large percentage of Roma migrants are also not registered as residents within the local municipalities, and therefore remain outside of the national welfare system as well as social housing policies. The lack of residence and the impossibility of gaining formal employment reinforce each other: Roma migrants cannot register if they are unable to prove sufficient income, but in the same time, they face difficulties securing employment without proof of residence. Thus, the majority of migrant Roma women face difficulties gaining employment in the Finnish formal economic market. Commonly, they generate income through various other activities, such as selling a street magazines, short-term employment, collecting deposit bottles or begging. Lack of housing often limits their ability to satisfy their everyday basic needs, such as cooking, washing or storing one's belongings. It also exposes the migrants to dangers and the fear of violence.

The local policies related to EU mobile citizens tend to focus on the provision of emergency and social support rather than on medium and long-term inclusion and integration. Oftentimes, services and projects directed to support Roma migrants' inclusion tend to be temporary or limited to certain areas and cities.

VI. Conclusions and recommendations aiming for substantive equality

Aiming for substantive equality

The concept of intersectional approach to discrimination was first discussed over 30 years ago, but it has been only relatively recently that there are calls raising awareness about it and asking for it to be included in the legislation, policies and litigation of discrimination cases. So far, the progress has been somewhat slow and the concept has found its way mainly to policy programs and recitals or preparatory works of legislation.

In the comparative legal analysis done in the EU-funded project “IntersectVoices” it was noted that none of the three countries that were analyzed in depth (Italy, Romania and Finland) nor the others EU member states briefly included in the 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. Also, the study has not identified any court decision from the three countries explicitly sanctioning intersectional discrimination. Even judgements adopting a progressive approach and implicitly using an intersectional approach were extremely rare and difficult to identify. In most cases when the victim belonged to multiple disadvantaged groups and 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.

However it is widely recognized, that addressing discrimination from the perspective of a single ground fails to capture or adequately tackle the various manifestations of unequal treatment that people may face in their daily lives. Thus, it appears that more needs to be done for the concept to be fully implemented both in law and in practice in order to obtain substantive equality for all.

Based on the analysis, the following recommendations can be made:

- 1) More awareness-raising efforts, education and advocacy is needed in order for the concept to be properly understood and applied in practice.
- 2) Training of relevant professionals, such as lawyers, advocates, prosecutors and judges so that the cases having an intersectional aspect are recognized and this aspect is used in litigation and in the judgments reflecting the seriousness of the issue. Also other authorities need better training – both vocational and supplementary training – in Roma inclusion and multiple discrimination as part of their professional responsibilities. This includes especially social and healthcare professionals, educators and the police.
- 3) When preparing a legislative reform of anti-discrimination legislation, it is to be considered whether a specific provision to cover multiple or intersectional discrimination should be included.

4) Intersectional analysis should be used when performing impact assessments of legislative bills, budgetary documents and other government plans.

5) When conducting research on discrimination, an intersectional analysis should be used. We need more data and information about the different types of discrimination people belonging to various disadvantaged groups face.

6) In Finland the anti-discrimination framework is fragmented and complicated, which should call for a legislative reform from the victim's perspective.

7) Many people experience discrimination so often that they are tired of bringing the cases forward or there is a lack of knowledge and resources to do so. Hence, more efforts are needed to reach out to the most vulnerable people in order to hear their experiences and to seek to remedy them.



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