



THE HUMAN RIGHTS REGIME AND RIGHT TO EQUALITY DO NOT SUFFICIENTLY ACCOUNT FOR INTERSECTIONALITY OF DISCRIMINATION

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I. INTRODUCTION

What is Intersectional Discrimination? Intersectional Discrimination refers to the discrimination on the basis of personal grounds or characteristics like age, sex, ethnicity, sexual preference, disability, etcetera, which ‘interact with each other at the same in such a way that they are inseparable.’¹ However, it is imperative to mention that ‘multiple discrimination’, ‘cumulative discrimination’, ‘combined discrimination’ and ‘intersectional discrimination’ are often used interchangeably but needless to say they ‘subtly have different meaning.’² It has been noticed that discrimination can occur on the basis of more than one ground. This throws light on the topic of cumulative discrimination and subsequently intersectional discrimination where a person can be discriminated not only on the grounds of her race but also on the grounds of her sexual orientation, age and religion. Hence, the ‘ethnic minority women, older women, black women and disabled women’³ are among the most disadvantage classes in the world.

The question of intersectional discrimination is growing with great popularity in the world as most people are being subjected to it. Most countries in the world are still figuring out the way to counter the problem and incorporate it with the international regime and the right to equality that is there in the International Human Rights Statutes. This paper aims to elucidate the insufficiency of the international human rights regime and right to equality to not account for the question of intersectionality of discrimination. The paper is divided into five different section to address the topic. The first part will highlight the problems and challenges that is associated with intersectionality i.e. discrimination on multiple grounds. The second section forms the backbone of the paper and addresses the question of right to equality and intersectional discrimination. The third section elucidates the approaches taken by different nations to address and tackle the question of intersectional discrimination in their nation. The fourth section is a continuation of the preceding section and throws light on the different decisions given by the international human rights monitoring mechanisms to reach to a conclusion. The last section will evaluate all the evidences produced in the paper and include the comments of the author to show whether intersectional discrimination finds its way in the current framework of the international human rights regime and right to equality.

¹ Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: The Social Situation, European Union Agency for Fundamental Rights 25 (2009).

² Sandra Fredman, Intersectional discrimination in EU gender equality and non-discrimination law, European network of legal experts in gender equality and non-discrimination 27 (2016).

³ *Id* at 27.



II. CHALLENGES TO THE ANTI-DISCRIMINATION LAWS

This section will elucidate on the challenges faced by anti-discriminatory laws as intersectional discrimination is recognized. The contributions of Kimberle Crenshaw to articulate the concept of intersectionality has been of utmost importance. Although the theory has been well received by global community but the associated problems are yet to be resolved. Crenshaw criticized the anti-discrimination laws that 'tend to homogenize protected groups, rendering invisible those who experienced discrimination from more than one direction.'⁴. She explained through her work that 'discrimination is experienced very differently by differently situated individuals sharing a protected characteristic.'⁵. In one word, intersection theory 'aims to disrupt the group descriptions'⁶ that has been portrayed in the anti-discrimination laws. Intersectional theory highly criticises the flaws in the notion of discrimination based on one ground. It completely disregards the fact that similar characteristics are attributed to a class or group. It criticises the fact that the law completely ignores the exclusivity of each individual. Every individual is attributed with different sexual orientation, religious beliefs and ethnicity. Such unique characteristics cannot be ignored. Further, the concept can be better explained in the scenario when the middle-class white feminists were highly criticised by black women for giving a

universal nature to the feminist movement for the struggle against discrimination based on gender. However, as Larissa Behrendt puts it, the struggle of the black women cannot be associated with that of the feminist movement that is led on by the middle-class white women. This is because black women not only face discrimination on the grounds of gender but also on the ground of race. In order of words, they face multiple discrimination. Additionally, there have been instances when they were discriminated by white women. Hence, attributing a universal nature of discrimination on the grounds of gender to the entire sex and subsequently associating it with the feminist movement cannot be accepted since black women have their own sorrows.⁷

It is important to mention that anti-discrimination law only considers 'a single source of identity'⁸ and ignores the 'power in structuring relationships.'⁹. As Timo Makkonen successfully explains the term 'social location' and claims that discrimination 'focuses on power rather than a group or even a personal characteristic'¹⁰, such challenge cannot only be countered with the individuals' social location. Also, power not only operates symmetrically but also operates diagonally and vertically. To simplify things, it is important to refer to the black men too who faces discrimination on basis of their race but in a position of power on the basis of their

⁴ Fredman, *supra* note 2.

⁵ *Id* at 30.

⁶ *Id*.

⁷ Larissa Behrendt, ABORIGINAL WOMEN AND THE WHITE LIES OF THE FEMINIST MOVEMENT: IMPLICATIONS FOR ABORIGINAL WOMEN IN RIGHTS DISCOURSE, 1 Australian Feminist Law Journal (1993).

⁸ Fredman, *supra* note 2.

⁹ *Id*. at 30.

¹⁰ Timo Makkonen, MULTIPLE, COMPOUND AND INTERSECTIONAL DISCRIMINATION: BRINGING THE EXPERIENCES OF THE MOST MARGINALIZED TO THE FORE, Institute For Human Rights: Åbo Akademi University (2002).



gender. Similarly, white women are in a position of power when it comes to their race but discriminated on the basis of their gender. Such differences are not addressed in the anti-discrimination laws and subsequently poses challenge to the international human rights regime which required immediate attention so that humanity can benefit from it.

III. RELATIONSHIP BETWEEN RIGHT TO EQUALITY AND INTERSECTIONAL DISCRIMINATION

This section will elucidate on the relation between the right to equality and intersectional discrimination. Equality can be divided into two major types i.e. formal equality and substantive equality. Formal equality has been heavily criticized for its approach to treat all human beings equally and ignoring other attributes that can be a source of discrimination. For example, a white gay man may be subjected to discrimination for his sexual preference and subsequently ostracised by the society. Hence, a more reasonable approach towards equality should be adopted to take all factors into account. Substantive equality has been developed under the principle of inclusivity of all factors. It has grown in popularity and has taken into consideration that each individual is unique and should be respected. Substantive equality has four different approaches to solve the problem of intersectional discrimination. Firstly, substantive equality aims to remove disadvantages among different groups. Secondly, it counters prejudice, stigma, stereotyping and violence based on protected

characteristics. Thirdly, it 'voice (s) and (allows) participation, countering both political and social exclusion.'¹¹. Lastly, it should be aimed towards accommodating the differences and structural changes.¹² Thus, substantive equality aims to eradicate ethnic minority groups and other groups which have a higher chance of being discriminated. Such marginalised groups should be put at a higher pedestal to accommodate them in the society and strike a balance among the different communities. This will ensure that every human being irrespective of their caste or race or gender is equal and subsequently prevent discrimination. However, progressive nations like UK and USA have failed to appreciate the merits of substantive equality whereas South Africa and Canada have used the principles of substantive equality in order to tackle the problems of intersectional discrimination.

IV. APPROACH TAKEN BY DIFFERENT COUNTRIES IN EUROPEAN UNION

There was a survey conducted on the legal framework of different countries in Europe to study the laws on multiple and intersectional discrimination which are present in the countries. An interesting picture was revealed as a result. This section will highlight the approaches of different countries in the European Union to tackle the problem of intersectionality in their jurisdiction. This will mainly highlight and analyse the legislation of different countries and the approaches of the court towards the issue of intersectional discrimination. While, in most of the occasions it is seen that the

¹¹ Sandra Fredman, Substantive equality revisited, 14 International Journal of Constitutional Law 727 (2016).

¹² *ibid.*



concept of multiple discrimination has been side-lined, the courts have made a fair approach in order to tackle such issue. But the question still lies; Is it enough?

Although most states condemn the idea of multiple discrimination and has taken effective measures such as compensating the victim in order to address the issue of multiple discrimination. But, sadly only Serbia has explicitly referred to 'intersect discrimination' in their legislation. Countries like Germany, Austria, Spain, Macedonia, Greece have appreciated the concept of multiple discrimination and subsequently referred to it in their legislation. Several countries have referred to multiple discrimination without defining it.

Several Countries focusses on 'enhanced compensation.'¹³. Countries like **Croatia**, **Austria** and **Serbia** have referred to multiple discrimination as serious form of discrimination which has been taken into account when 'determining the sanction or amount of compensation.'¹⁴. Some countries integrate 'multiple discrimination' into positive duties of powers of inspectorates.'¹⁵. **Bulgarian** legislation places a statutory duty to give 'priority to positive measures for the benefit of multiple discrimination victims.'¹⁶. Similarly, countries like **Germany**, **Italy** and **Greece** have taken a step forward to integrate multiple discrimination into the picture while assessing the conditions of the people in their respective country. It is imperative to mention several countries like **France**, **U.K**, **Belgium** do not have 'multiple grounds' addressed in their legislation. Often, it has been noticed in France and Belgium that

citizens have to bring separate grounds in the court which is then cumulatively recognized by the courts. Now that we have seen how the legislation of the EU nations approach the question of intersectionality and multiple discrimination, it is important to see how the judiciary interprets in the region. It has been reported that very few case laws based on multiple discrimination have been notified. However, even when they have been adjudicated upon, they have not been able to provide with a constructive solution. The **Italian courts** have rightly recognized the discrimination that the non-EU disabled members were subjected to and have adequately compensated them. Reference has to made to courts in France too. Although, **France** do not have a legislation on multiple discrimination, it has cumulatively considered discrimination as a whole from the many grounds of discrimination that French law prohibits. Similarly, **Swedish courts** have found it difficult to adjudicate on the grounds of multiple discrimination since there is no explicit reference to it. A reference should be drawn to a Swedish Case¹⁷ where the courts have provided compensation to the plaintiff for alleging sexual harassment at work based on ethnicity and race. Lastly, **UK** judiciary has never appreciated the merits of multiple discrimination. In UK, it is important to prove each ground separately to successfully bring a claim on it. References has to be made on the famous case of *Ministry of Defense vs. DeBeque*¹⁸ where one of the claims of the women who was recruited in the British Army was accepted, the others were rejected. Such practice clearly indicates that each ground of discrimination needs to

¹³ Fredman, *supra* note 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ AD 2011 No. 13. v. Municipality of Helsingborg, 16th February, 2011.

¹⁸ [2010] IRLR 471.^[1]_{SEP}



be proved and accepted by the court rather than the court cumulatively considering the grounds of discrimination.

V. INTERNATIONAL HUMAN RIGHTS LAWS AND DIFFERENT BODIES ADVOCATING FOR HUMAN RIGHTS

International human rights mechanisms have majorly focused on the ‘single-axis’ approach to implement legal provision against discrimination.¹⁹ The focus of these international mechanisms like Committee on Elimination of Discrimination against Women (CEDAW), Committee on Elimination of Racial Discrimination (CERD), etcetera was mainly discrete and worked together to uphold the mutually exclusive grounds of discrimination as enshrined in the UN Declaration Charter. The trend followed by these committees in giving remedies on various cases that come to them indicate the fact that they have tended to ‘singular conception of discrimination.’²⁰ This section will specifically analyze the existence of the international human rights laws and the different human rights bodies adjudicating on the issues of discrimination. The section will heavily rely on four major cases to show the change in the attitude of the CEDAW in determining the remedies awarded in each case. The cases being *A.S vs Hungary*,²¹ *Kell vs. Canada*²², *R.P.B vs Philippines*²³ and *E.S and S.C vs Tanzania*²⁴. In the case of *A.S vs Hungary*, the CEDAW

failed to appreciate the different grounds of discrimination that was faced by the Roma Women in Hungary. However, subsequently in the years to come there was a change in the attitude of the CEDAW and CERD and their ambit to interpret the question of discrimination, widened. The CEDAW’s initial failure to include intersectional discrimination was ‘counterbalanced with a strong affirmation of intersectionality in its decision *Kell vs. Canada*.’ However, in the recent cases of *R.P.B vs. Philippines* and *E.S and S.C Tanzania*, the CEDAW took a step backward by ignoring the disability factor in the girl which contributed towards discrimination, in the former case and did not engage with the claimant’s status in the latter case. Hence, it can be said that the international human right laws though have addressed the question of intersectionality and discrimination in the recent times but there is a huge loophole in the law which needs to be rectified and updated by the global community and different organizations advocating for human rights.

VI. CONCLUSION

Thus, in light of topics enumerated in the previous sections, it can be concluded that international human rights regime and the right to equality does not sufficiently appreciate for intersectionality of discrimination. Intersectional discrimination was introduced as a result of the criticisms of the African Americans towards the white middle-class feminists who attributed the

¹⁹ May, V.M, Pursuing Intersectionality. Unsettling Dominant Imaginaries, Routledge, 2015.

²⁰ Truscan I and Bourke-Martignoni J, “International Human Rights Law and Intersectional Discrimination” (2016) 16 The Equal Rights Review 103.

²¹ Communication No.4/2004, U.N Doc. CEDAW/C/36/D/4/2004, 29th August, 2004.

²² Communication No.19/2008, U.N Doc. CEDAW/C/51/D/19/2008, 26th April, 2012.

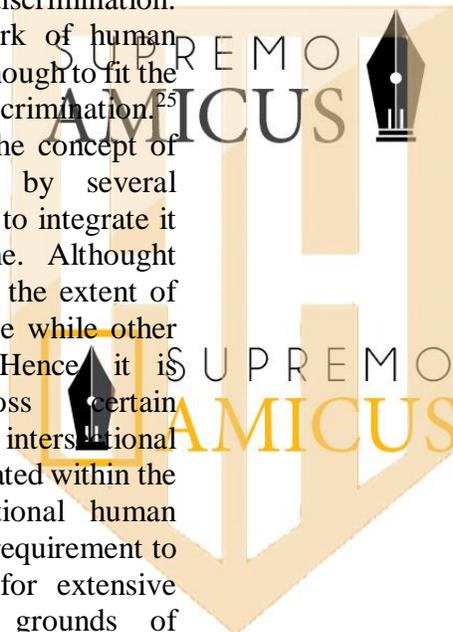
²³ Communication No.34/2011, U.N Doc. CEDAW/C/57/D/34/2011, 12th March, 2014.

²⁴ Communication No.48/2013, U.N Doc. CEDAW/C/60/D/48/2013, 13th April, 2015.



movement to the entire sex. It was proclaimed the experiences of the African Americans cannot be attributed towards the white women. Hence, there exists the requirement for the international regime to recognize the fact that each individual is different and have characteristics like ethnic group, sexual orientation, religious belief which are unique. Intersectional discrimination poses two major challenges to regime of human rights. In the past, human rights have not appreciated the discrimination which remained unrecognized. Therefore, it will take a lot of effort in order to recognize each and every ground of discrimination. Secondly, the legal framework of human rights regime is not adequate enough to fit the topic of intersectional discrimination.²⁵ However, the acceptance of the concept of intersectional discrimination by several countries brings a ray of hope to integrate it within the human rights regime. Although the scope has been limited to the extent of intersection of gender and race while other grounds remain ignored²⁶. Hence, it is required to put across certain recommendations so that intersectional discrimination can be incorporated within the legal framework of international human rights. There is an immediate requirement to promote and provide funds for extensive research on the possible grounds of discrimination. Secondly, all the institutions associated with human rights should adopt the intersectional approach and propagate it. Thirdly, there is a requirement to draft new policies and human rights instruments in order to accommodate the idea of intersectional discrimination. Fourthly, a new kind of approach such as holistic approach of

discrimination should be adopted. Lastly, it is required to empower the 'vulnerable groups and persons.'²⁷. Hence, it can be concluded by saying that each individual is different and a blanket attribution of characters cannot be applied to all. There is a requirement to appreciate the ambit of intersectional discrimination and subsequently, recommendations need to be acted upon to eradicate the gap among different groups of human beings and uplift the dignity of each individual.



²⁵ Makkonen, *supra* note 10.

²⁶ Makkonen, *supra* note 10.

²⁷ *Id.*