Legal Perspectives on the Intersections of Religion, Race and Gender – Problems and Solutions

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***Abstract**: The paper analyses the intersections of religion, race and gender from a legal perspective. Existing legal scholarship in this area has provided a number of accounts, reporting mainly from European jurisdictions, as well as from the jurisprudence of the European Court of Human Rights. The aim of this paper is to first explain how law has contributed to the exclusion of individuals linked to a specific religion, race and gender. Examples of religious discrimination claims highlight particular detriment experienced mostly, but not exclusively, by religious and ethnic minority women in the majority of jurisdictions. These instances reflect that religion is more often than not the main or sole focal point in court or legislation, whereas the deliberate or accidental effect on women and/or ethnic minorities is conveniently ignored. In its second part, the paper will then move on to elaborating potential solutions for such undesirable outcomes of law. The available legal solutions entail various advantages and disadvantages, however, a model of 'reasonable accommodation' will be proposed as the preferable answer at this point in time. Nevertheless, the paper also provides reasons for complementing legal solutions with non-enforceable measures, such as the facilitation of interfaith dialogue and the raising of awareness of equality and diversity.*

1. Introduction

Broadly framed, individuals may bear separate or overlapping categories of difference from mainstream society, or from more empowered sections of society. These categories, such as, for instance, gender, race, religion, ability, class and sexual orientation, are constituting factors of personal identity on the one hand and factors subjected to societal power structures on the other hand. An imbalance of power relations in society can have severe detrimental effects on individuals who do not "fit" into the written and implicit rules prevalent in any community. Typically, the aspects of life that are affected by such rules are the provision of services, education and employment. Amongst the main aims of non-discrimination law are, therefore, social inclusion, equal opportunities, the protection of individual dignity and identity, depending on how one defines equality (Fredman, 2002: 15-23).

Categories of identity tend to appear in the area of human rights law, and when related to societal power structures, often within non-discrimination law. Most jurisdictions contain provisions protecting against religious discrimination. However, members of religious groups may, knowingly or unknowingly, sometimes also be subjected to additional, incidental forms of discrimination due to characteristics other than religion, they may necessarily or frequently share. For instance, religious adherents in one jurisdiction may predominantly share a similar racial background, or a religious requirement may only apply to male or female adherents of a religion. Such problems of multiple or intersectional discrimination grounds are not always appropriately addressed in law (Schiek & Lawson: 1-3) and pose specific difficulties that are described in the paper's first section. In its second half, the paper then moves on to potential solutions that law may be able to offer in cases of intersectional discrimination. This paper will examine a particular case of the intersecting categories of religion, race and gender from a legal perspective. It strives to clarify the relationship between intersectionality and law, and subsequently attempts to offer some pathways towards alleviating this problem. Where used, the terms race and gender are understood to be social perceptions, rather than actual, biological constructs. In order to make the topic accessible across disciplines and borders, this paper attempts to deliver the relevant information in a non-technical language and from a general, European perspective, without focussing on one jurisdiction.

2. Legal Issues surrounding the Intersection of Religion, Race and Gender

Direct discrimination is commonly defined as less favourable actual, or potential treatment of one person compared to another, because of a personal factor that is safeguarded by non-discrimination law (Fredman, 2002: 93-95). Cases established on the basis of direct discrimination are unusual, since this form of behaviour is no more seen as acceptable in most environments and, therefore, cannot be justified unless there is a rare exception. Most case law, accordingly, surrounds the concept of indirect discrimination. This form of discrimination basically occurs, when a seemingly neutral rule, criterion, or practice places those sharing a characteristic at a disadvantage in contrast to others. Indirect

discrimination is *per se* justifiable. Typically, across jurisdictions, justification requires the measure in question to be proportional and aiming to achieve a legitimate aim (Fredman, 2002: 106-121). An example of indirectly discriminating rules are working time arrangements that require employees to attend work Mondays to Fridays from 9am to 5pm. As such, this working pattern a neutral condition that applies equally to all employees. Some religions, however, may require followers to worship during these working hours, which means they either have to compromise their employment opportunities, or moral obligations. Such working hours normally do not intend to discriminate, but are historically based on accommodating Christian worship and are today in many cases necessary to make a business economically viable. The latter factor would be a typical example where indirect discrimination can be justified.

Intersectional discrimination occurs when a person experiences discrimination specifically because s/he bears more than one characteristic due to which s/he may have been discriminated against (Crenshaw, 1989: 145). From the potential victim's perspective the severity of the interference may be increased, if more than one characteristic of their identity is detrimental (Schiek & Lawson, 2011: 2). Prominent incidents exemplifying intersectional discrimination are the debates surrounding Muslim women's dress around many Western European jurisdictions. Prominently, since 2004 a French statute prohibits ostentatious religious dress in state schools. Similarly, Turkey and some German *Länder* do not permit their public servants visualisations of religious association. Muslim women who wear a headscarf are, in these cases, not discriminated against, because of being women only, since the prohibition does not affect women only and only a small percentage of women. Equally, they are not discriminated against, because they are Muslim as such, since mainstream Islam does not require its male adherents to cover their hair. Rather, the relevant individuals are affected based on being women and Muslim in conjunction.

In practice clearly more women have been affected by the rules in these jurisdictions than men. Nevertheless, it has been difficult to claim sex discrimination in such constellations due to claims that the rules are not aimed at discriminating against women, or because the claimant had not explicitly argued sex discrimination (McGoldrick, 2006: 263). Additionally, all these scenarios disproportionally affect members of ethnic minorities. In France, for instance, Christian crosses and Jewish skullcaps have explicitly been taken out of the 2004 legislation, leaving the ban applicable to headscarves, Buddhist robes and turbans only. Although there are converts or reverts to the relevant religions, even these are at times exposed to racial discrimination exactly because of the visible religious affiliation. Neither the deliberate or accidental effect on men or women respectively, nor on ethnic minorities has been acknowledged in case law or statutory law. Where a comparator is required by law, these intersectional cases are left out of full protection, perhaps also because neither a majority of the relevant sex, nor a majority of ethnic minority persons can be positioned in contrast to comparators. In the absence of alternatives, cases have to rely entirely on establishing religious discrimination. This type of discrimination is much easier justified than discrimination based on race or sex. Race and sex are so-called suspect categories in non-discrimination law, which means there is a high likelihood of these being irrelevant factors. It is hoped that at least the cases that fall under the competence of the European Union will receive a more comprehensive response before its Court of Justice, which more likely addresses issues of inherent sex and race discrimination (Loenen, 2009: 320-325). Until then the outcome is particularly problematic, because both women and ethnic minorities tend to be at a disadvantage in most societies. Exclusion is, hence, maintained and contributes to a cycle where the absence of debate on intersectionality and focus on religion in media and courtrooms may also lead to the potential victims not being aware of the importance of framing claims also in terms of sex and race discrimination.

3. Dealing with Intersectional Discrimination Scenarios – Potential Solutions

The previous section showed that, arguably, non-discrimination law does not always provide individuals at the intersection of categories, such as religion, race and gender, with appropriate protection, if it requires the claimant to provide a comparator, or does not acknowledge dimensions other than religion. There are a limited number of strategies, within law and non-enforceable measures that appear promising in order to improve safeguards. Amongst these options, law can respond to discrimination by introducing a duty of reasonable accommodation. Such a duty basically compels the authority in question to evaluate the manner and extent to which it can accommodate individuals' needs, for instance, those of employees, or users of public services. Importantly, a duty to accommodate shifts the burden of proof in alleged discrimination cases to the authority or person accused. So far, a duty to accommodate only exists in relation to disabled persons in Britain, but unlike in a few other jurisdictions, for instance, Canada and the USA, not concerning other discrimination grounds. Such an extension of the duty to accommodate personal requirements would open the possibility for those alleging discrimination to determine which facets of their identity are affected by the interference under dispute. Thus, individuals so far excluded from legal protection due to an absent comparator would have enhanced chances to successfully pursue their claim. It appears there are mainly political hurdles to overcome, if such a duty was also to be

introduced to a wider spectrum of non-discrimination factors.

Accommodating individual needs is, nevertheless, not unproblematic and therefore subject to criticism. Regrettably and foremost, accommodation is by nature reactive and thus fails to consider discrimination before it occurs. Due to this technicality, structural conditions and underlying causes that facilitate inequality are not addressed effectively (McColgan, 2008: 27-28; Vickers, 2008: 221). It is also argued that accommodation as regards religion, specifically, could unduly favour the relevant individuals over others, who may have competing interests (Allen & Moon, 2000: 601; McColgan, 2008). A third set of critical points involves the detriment to the entity that holds the duty to accommodate. In particular, hardships may include financial and practical limitations, as well as negative reactions from other individuals (Vickers, 2008: 222). Despite these tangible problems associated with a duty to accommodate religious requirements, there are a number of advantages that appear to outweigh the points criticised. Firstly, the problem of reactiveness, rather than proactivity may partially be remedied by the accommodation duty being imposed for the first time on many public and private entities, thus creating a publicity tool and signalling to the public that accommodating individuals is not a favour but an expectation. Secondly, indeed, conflicts between rights are at times inevitable in accommodation scenarios, however, can be resolved by defining what is reasonable. In any case the same dilemma emerges when part of the justification for indirect discrimination involves the rights of others. Thirdly, the seemingly harsh requirement to accommodate can be, if necessary, moderated by applying a lower standard of justification than is required for indirect discrimination (Vickers, 2008: 224). As long as the accused person or entity can show an actual effort to accommodate and that the obstacles to accommodation are tangible, the duty will still provide considerable protection (Vickers, 2008: 222-223). Fourthly, and most relevant for this paper, a duty to accommodate as regards all discrimination grounds comprises an infinite range of personal requirements, thereby being widely inclusive, for example, also of religious practices that may be tied to a region or minority within a minority. In such cases religion, race and gender identity may more likely overlap in ways not commonly known. Finally, accommodation can be fundamentally useful in cases where distinctions between direct and indirect discrimination are blurred and may result in unnecessary disputes, for instance, over the meanings of religious symbols, instead of addressing the actual issues of disadvantaged and excluded religious groups (Hepple, 2011: 43). In parallel, where gender or sex discrimination is alleged, reasonable accommodation can avoid compartmentalising issues as male of female and thus prevents stereotyping. On the basis of these reflections, a duty to accommodate appears a predominantly advantageous legal option to tackle intersectional discrimination.

Another potential method to tackle intersectional discrimination by legal means is the explicit recognition of the problem in conjunction with the option of establishing a discrimination claim based on either characteristic. In the British Equality Act 2012, Section 14 would have accounted for dual discrimination, where discriminatory treatment occurs, due to a combination of two characteristics and this treatment is different to the one experienced by someone who does not share either factor. Under this provision, discrimination only needed to be shown regarding one characteristic. Section 14 has, however, not entered into force due to objection from the new government at the time. The same fate was faced by the so-called public sector duty, also introduced by the Equality Act 2010. This duty was aimed at reducing effects of socio-economic disadvantage by mainstreaming (in this context basically a strategy which strives for taking into account and embodying equality from the beginning, not in hindsight, when establishing policies, or making decisions), extinguishing discrimination and advancing equal opportunities, to even entertaining good relations between those who share a discrimination ground and those who do not. Since this would have applied to all functions of public authorities, it potentially had significant effect on advancing inclusion, also benefitting those at the intersection of discrimination grounds. In this regard, it would have been particularly interesting to see, how frequent and successful Section 14 and the public sector duty were to be invoked in court. The fact that the Conservative party government has prevented the entry into force of both above rules, reflects the political nature of the subject of non-discrimination and also the general difficulty to advance this area of law. Currently, such measures therefore appear to be ahead of their time.

Complementary, non-enforceable measures beyond law, can significantly contribute to construct a society that endorses non-discrimination more comprehensively in the first place. Educating society is a key factor in the battle against discrimination, given that stereotypes and corresponding prejudice are the root causes of discrimination (Tahzib: 29-34). There is a multitude of options available to convey the message of non-discrimination to the public. Fruitful advances are particularly thinkable through the means of interfaith dialogue, as well as general and targeted publicity and training in relation to equality and diversity. Limits to such measures are, necessarily, financial restraints and individual choice not to participate in any such activities or learning processes. Accordingly, education as regards non-discrimination ought to commence and be integrated at the earliest point in a person's life, for instance, within the pre-school and primary school curriculum. Early intervention and awareness, though not based on a full understanding, can still pave the way for a critical mindset. In view of the significance of an inclusive society, it is necessary to engage and coordinate legal and non-legal tools to combat all forms of discrimination. Thus, individuals would expectably also be

more sensitised to identify and understand intersectional discrimination.

4. Conclusions

Where discrimination affects individuals at the intersection of two or more characteristics, law has until now faced several obstacles in offering comprehensive protection. This paper illustrated this issue, using the example of cases where religion, race and gender typically overlap, but focus on religion only. The result is that already disadvantaged individuals may suffer further exclusion and marginalisation, accidentally, or under the cover, of an examination based on religious discrimination. Legal options to solve such a dilemma are limited, however, exploring the concept of reasonable accommodation appears to be a valid and promising choice at this point. This is particularly the case, because political obstacles to more effective responses are currently hard to overcome. Although reasonable accommodation is not a clear-cut solution to intersectional discrimination, its advantages are promising, especially if efforts are made to provide additional, coordinated activities, in particular interfaith dialogue, publicity and training in relation to equality and diversity.

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