

**MULTIPLE DISCRIMINATION AGAINST WOMEN ON THE GROUNDS OF
GENDER AND RACE: A COMPARATIVE ANALYSIS OF LEGISLATION AND
CASE LAW**

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EXECUTIVE SUMMARY

The issue of multiple discrimination appeared in the political and theoretical debate at the international level for more than two decades, both within the United Nations and United States. The European debate and academic discourse on multiple discrimination is quite recent. This research aimed to explore the existent conceptual framework on multiple discrimination and its challenges. It analyzed the legislation and case-law tackling the intersectionality of race and gender as grounds of multiple discrimination against women. The thesis presented possible solutions to ensure legislation and mechanisms which would protect women from multiple forms of discrimination.

During the research it was found that despite the existing initiatives to enclose the matter of multiple discrimination in legislation and court decisions, the efforts to address it are minimal. In this respect, it is necessary to enhance policies and practices which would correspond to multiple identities and protect the disadvantaged groups in society, among which are the women. Furthermore, the issue of multiple discrimination cannot become visible, unless the human rights activists, lawyers, judges and the whole international community will amplify it into their circles of discussion. They also should provide effective measures to prevent and combat the phenomenon of multiple discrimination.

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LIST OF ACRONYMS

ACHPR- African Charter on Human and Peoples' Rights

ACHR- American Convention on Human Rights

ADHR- American Declaration of Human Rights

ASEAN- Association of Southeast Asian Nations

CEDAW- Committee on the Elimination of Discrimination against Women

- Convention on the Elimination of All Forms of Discrimination against Women

CERD- Committee on the Elimination of Racial Discrimination

CoE- Council of Europe

CRC- Convention on the Rights of the Child

EC-European Commission

ECHR- European Convention for the Protection of Human Rights and Fundamental Freedoms

ECJ- European Court of Justice

ECtHR- European Court of Human Rights

EEC Treaty- Treaty Establishing the European Economic Community

EU- European Union

FGM- Female Genital Mutilation

ICCPR- International Covenant on Civil and Political Rights

ICERPD- International Convention on the Rights of Persons with Disabilities

ICESCR- International Covenant on Economic, Social and Cultural Rights

ILO- International Labour Organization

LAS- League of Arab States

OAS- Organization of American States

UDHR- Universal Declaration of Human Rights

UN- United Nations

UNDP- United Nations Development Program

INTRODUCTION

The principle of equality is essential for ensuring human rights to everybody. Despite the numerous international legal instruments which proclaim the equality of people in rights and dignity, equality before the law, and the equality between men and women, such as the UN Charter, the Universal Declaration of Human Rights, discrimination against women persists. Numerous states which are parties to these legal instruments, assuming the obligation to respect human rights and guarantee equality to people, enact laws which do not eliminate discrimination against women.¹ Furthermore, they fail to protect women who are subject to double or multiple discrimination.

The thesis will examine the current anti-discrimination legislation and relevant case law in a comparative perspective, addressing the issue of discrimination against women. It will particularly focus on the intersection of gender and race. The study will investigate the legislation and case law of three jurisdictions²: Council of Europe (ECtHR), South Africa and Republic of Moldova. The thesis will also illustrate the legal and social context in which the principle of equality operates. It will reflect upon the sources of equality legislation and the role of international provisions on equality. A specific attention will be dedicated to the aspect of multiple discrimination and how it is regarded by different jurisdictions.

The purpose of the thesis is to highlight the gaps in legislation and to show positive examples of laws and court decisions in realizing their obligation to ensure equality to women and protect them against multiple discrimination.

¹ FAREDA BANDA, PROJECT ON A MECHANISM TO ADDRESS LAWS THAT DISCRIMINATE AGAINST WOMEN, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS – WOMEN’S RIGHTS AND GENDER UNIT (2008),

http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf.

² Please note that the choice of jurisdictions will be explained in a subsequent section.

The thesis will research whether the existent legislation has any or sufficient mechanisms to enforce the right against gender and race based discrimination.

The incentive for exploring the issue lays in the consideration that the states do not provide adequate regulations to ensure women's right to equality, usually failing to approach the intersectionality of grounds.

Another factor which contributed to the interest in the topic is an extensive research done previously on Roma rights issues, revealing the fact that Roma women are in a particular difficult position when it comes to equal treatment and opportunities. Roma women face extensive discrimination in the fields of employment, education, health care, active citizenship, exercising civil and political rights, etc. The data on Roma women show that they are in a considerably worse socio-economic condition than Roma men or the non-Roma population as a whole. For example, in the European Union member states “only 21% of Roma women aged 20-64 were reported to be in paid work”³ compared to 35% of Roma men.

Additionally, from 2009 there were held eight consultative platform meetings⁴ on the EU Framework for National Roma Integration Strategies⁵. The Roma women participated in the platform meetings as part of civil society representatives. They attempted to include the gender component in the Framework. Nevertheless, until now there is no specific section in the Framework focusing on Roma women, regardless of the fact that Roma women are considered

³ THE SITUATION OF ROMA WOMEN: FRA DATA ANALYSIS; ROMA SURVEY RESULTS BY GENDER, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2013), <http://fra.europa.eu/sites/default/files/ep-request-roma-women.pdf>.

⁴ PREVIOUS MEETINGS OF THE EUROPEAN ROMA PLATFORMS, EUROPEAN COMMISSION, JUSTICE, ROMA PLATFORM. (2013), http://ec.europa.eu/justice/discrimination/roma/roma-platform/meetings_en.htm.

⁵ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, COM(2011) 173, European Commission(2011), http://ec.europa.eu/justice/policies/discrimination/docs/com_2011_173_en.pdf.

the most marginalized and discriminated group in Europe⁶ (whereby the discrimination is based on the intersection of gender and ethnicity). The numerous recommendations of the stakeholders, participating in the consultative meetings, to introduce such provisions which would be later reflected in the national strategies of the EU member states did not influence the decision-makers.

At the moment, the national strategies have been submitted to the European Commission, but none of them contains a clear section on Roma women. Instead they contain only cross-cutting references to the issues faced by Roma women.

The thesis will research deeper the aspect of multiple discrimination against Roma women along with the situation of different groups of discriminated women around the world.

The research on the intersectionality of gender and race is not a new one, as several scholars investigated this issue. The new component addressed by the present research is the case law and policies directed to Roma women in Europe centering on multiple discrimination, referring to the recent European Court of Human Rights decisions on this matter. Another new aspect targeted by the thesis is the examination of the Moldavian anti- discrimination legislation adopted last year and its potential case law⁷.

Structure of the Thesis

The thesis will be structured in three chapters:

The first chapter *Background and Conceptual Framework: Equality, Non-discrimination and the Intersectionality of Gender and Race as a Form of Multiple Discrimination against Women* will focus on the principles of equality, non-discrimination and the aspects of multiple discrimination on the account of gender and race. It will describe the evolution of the concepts of equality,

⁶ *Poverty, World Bank Data and Indicators*, The World Bank, <http://data.worldbank.org/topic/poverty>, accessed on 02.10.2012

⁷ Law on Equality of Chances of Republic of Moldova (2012), entered into force on 01.01.2013

intersectionality and will analyze the legislation addressing the issue of multiple discrimination with a particular focus on gender and race based discrimination.

The second chapter will examine in a comparative aspect *the Legislation on Equality, Non-Discrimination and Multiple Discrimination: Council of Europe (ECtHR), South Africa and Republic of Moldova*. The focus will be on equality and non-discrimination legislation but also on the peculiarities of the intersection of gender and race, especially when the state is involved as a direct actor in cases, thus, excluding women of a certain race or ethnicity from the enjoyment of equal rights. The same chapter will include positive examples of legislation, case law which protects the equality of women and enlists multiple discrimination.

The third chapter *Multiple Discrimination against Women on the Grounds of Gender and Race: A Comparative Perspective of the Council of Europe, South African and Moldovan Case Law* is a comparative analysis of the most relevant case of the European Court of Human Rights, South Africa and the existent discriminatory practices against women in Moldova. The aim of researching the case law is to see the different approach of the courts when deciding upon the cases in the light of their legislation and previous court decisions on the subject matter.

The thesis will conclude with a review of the existent good practices tackling multiple discrimination and will specify proposals based on the successful practices in different countries.

Choice of Jurisdictions

The thesis will provide a comparative legal analysis of case law and existent legislation which prohibits discrimination on the ground of gender and race in three jurisdictions: the Council of Europe, South Africa and Republic of Moldova.

Council of Europe contains the most comprehensive system in terms of case law, legislation addressing the issue of discrimination in respect to ethnic minority women. It contains the

jurisprudence of the European Court of Human Rights on cases concerning discrimination of Roma women, which are of a particular interest. Thus, there will be analyzed the discrimination issues and litigation cases where Roma women were subject to human rights infringements. The thesis will examine the existent CoE anti-discrimination legislation and the way it is addressing the issue of multiple discrimination, including on the grounds of gender and race, an increasing problem in the European society.

The second jurisdiction is the South African one. This country is of a special interest because it has adopted an ample legislation prohibiting multiple discrimination and developed relevant jurisprudence. Nevertheless, practices of discrimination are still persistent (women are still often deprived of their equality rights, including in cases of succession and inheritance, sexual orientation, etc. These happen despite the adoption of the Anti-discrimination Act prohibiting discrimination on gender and sex.

The third covered jurisdiction is Republic of Moldova, a non EU state, a former Soviet state, where even addressing discrimination in general is challenging, with additional difficulties when it comes to women. Moldova adopted its equality law in 2012⁸ and just started to investigate cases of alleged discrimination. The issue of discrimination against women in Moldova is problematic since there are numerous cases of discrimination against women with disabilities, Roma women, women members of minority religious groups, homosexuals, etc. Thus, the newly established Equality Body⁹ requires an effective mechanism of monitoring and sanctioning such cases.

⁸ Law on Equality of Chances of Republic of Moldova.

⁹ Anti-discrimination Council, <http://discriminare.md/tag/consiliul-nediscriminare/>.

METHODOLOGY

The legal research will examine in details the legislation, case law and academic literature. Desk research will be used as a first method. The comparative method will assess the common grounds and differences among the anti-discrimination laws and legislation which contains equality legal provisions and emphasize the more efficient ones. There will be analyzed case law (jurisprudence) whose primary sources are court decisions, and reports issued by international organizations and experts. A stress will be made on the successful or good practices of laws tackling (multiple) discrimination against women.

The thesis will conclude with specific examples, recommendations which can be used to address the issue of multiple discrimination against women through policies and legislation. The recommendations will be formulated based on the research performed in regard to this thesis.

CHAPTER 1. BACKGROUND AND CONCEPTUAL FRAMEWORK: EQUALITY, NON-DISCRIMINATION AND THE INTERSECTIONALITY OF GENDER AND RACE AS A FORM OF MULTIPLE DISCRIMINATION AGAINST WOMEN

1.1 Equality and non-discrimination

The principle of equality has originated as a legal norm in the French Declaration of the Rights of Man and Citizen¹⁰. It became judicially enforceable in the middle of the 19th century, when the 14th Amendment to the United States Constitution was adopted¹¹.

The concept of equality developed and has acquired a more complex meaning in the modern democratic states, where it is closely linked to human dignity and the fact that being humans is what makes us equal. A lot of modern Constitutions stipulate the principle of equality as a basis for democracy and rule of law. For example Article 3 of the Basic Law of the Federal Republic of Germany provides that all persons shall be equal before the law. More than that, it emphasizes equality in rights between men and women, stating that “the state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”¹²

Despite the constitutional provisions on equality and the numerous international legal instruments declaring the equality of humans in rights and liberties, nowadays millions of humans on the globe are facing social inequalities, discrimination, leading marginalization and societal regress.

¹⁰ Declaration Des Droits de l’Homme et du Citoyen, National Assembly of France (1789), http://avalon.law.yale.edu/18th_century/rightsof.asp.

¹¹ ALAN DASHWOODS & SIOFRA O’LEARY, THE PRINCIPLES OF EQUAL TREATMENT IN E.C. LAW 80, (CENTRE FOR EUROPEAN LEGAL STUDIES, CAMBRIDGE 1997).

¹² German Basic Law (1949, as amended up in 1993), <http://www.iuscomp.org/gla/statutes/GG.htm#4>.

The right to non-discrimination is a fundamental right, subsumed in the right to equality as specified by the Declaration of Principles on Equality¹³. Principle number 5 of the Declaration states that “Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, (...)”¹⁴ or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds”¹⁵. The Declaration pays particular attention to the intersectionality of grounds, affirming that the law must guarantee equal protection from discrimination “regardless of the ground or combination of grounds concerned”.¹⁶ Principle number 12 of the Declaration boosts the importance of tackling multiple discrimination by the law makers stating that “Laws and policies must provide efficient protection against multiple discrimination, that is, discrimination on more than one ground.”¹⁷ It highlights as well that “particular affirmative actions may be required to overcome past disadvantages related to the combination of two or more prohibited grounds”.¹⁸

The adoption of the Declaration and the fact that it indicates several principles on multiple discrimination and the combination of grounds strengthens the efforts of the international lawyers and human rights activists to advocate for the development of this area.

Women are a group which is often subject to discrimination and encounter inequalities in their daily life, job, family, politics, economics and society in general. The Council of Europe recalls that gender equality means an “equal visibility, empowerment, responsibility and participation of

¹³Declaration of Principles on Equality, The Equal Rights Trust (2008), <http://www.equalrightstrust.org/endorse/index.htm>.

¹⁴ “Pregnancy, maternity, civil, family or career status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness”

¹⁵ Principle No 5- Definition of Discrimination, the Declaration of Principles of Equality.

¹⁶ Principle No 6-Relationship between the Grounds of Discrimination, the Declaration of Principles of Equality.

¹⁷ Principle No 12- Obligations regarding Multiple Discrimination, the Declaration of Principles of Equality.

¹⁸ Ibid.

both sexes in all spheres of public and private life”.¹⁹ It emphasizes that through gender equality people should accept the differences between women and men and their roles in the society. CoE confirms that women are vulnerable, being marginalized in political and public life, suffer discrimination in employment or difficulties in reconciling private, family and professional life; women also earn less income than men for work of equal value and are more frequently victims of violence, poverty and unemployment than men do.²⁰

Gender inequality is inter-connected to social inequalities, which are the result of rapid economic development in some countries. During 80's and 90's, the income inequalities between men and women deepened in the Western industrialized states. As a result, women became the victims of a system with socio-economic inequalities.²¹ This leads to trafficking, domestic violence, exploitation, discrimination in the access to justice, health, education, employment services, etc.²² The international reports (UNDP, World Bank) show that the women represent the biggest percentage of the population living in poverty.

The Committee on Elimination of all Forms of Discrimination against Women is systematically publishing its general comments and recommendations²³ in regard to the state practices affecting women and existent legislation which discriminates against women. In these general comments and recommendations it calls on the member states to improve or nullify such legislation, e.g.

¹⁹ *Gender Equality Program*, Human Rights and Rule of Law, Council of Europe
http://www.coe.int/t/dghl/standardsetting/equality/02_GenderEqualityProgramme/Programme/Index_en.asp.

²⁰ Ibid.

²¹ PETER GOTTSCHALK & TIMOTHY M. SMEEDING, CROSS-NATIONAL COMPARISONS OF EARNINGS AND INCOME INEQUALITY 633-687, JOURNAL OF ECONOMIC LITERATURE 35 (1997).

²² WOMEN'S SOCIAL, ECONOMIC INEQUALITY LEADS TO TRAFFICKING, DOMESTIC VIOLENCE, EXPLOITATION, SAY SPEAKERS IN WOMEN'S COMMISSION, MEETING 5TH & 6TH, COMMISSION ON STATUS OF WOMEN, FORTY-SEVENTH SESSION, UNITED NATIONS (2003),
<http://www.un.org/News/Press/docs/2003/wom1390.doc.htm>.

²³ *General Recommendations*, United Nations Unity for Gender Equality and Women Empowerment,
<http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>.

discrimination by laws concerning nationality, citizenship, employment, age of marriage, criminal law and others.²⁴

Despite the recommendations of the UN Commission on Social, Economic and Cultural Rights, states are still lacking policies and fail to ensure equal protection to women, perpetuating their vulnerability.

1.2. The concept of multiple discrimination and the intersectionality of race and gender as a form of multiple discrimination against women

It is extremely important to highlight that discrimination against women is more complex. Not only is this phenomenon caused by their gender, but also due to the intersection with other aspects, such as race, ethnicity, nationality, religion, disability and others.

The concept of intersectionality evolved during the movement of the women of colour in the United States who did not share the idea that the white middle-class women have the same fate and experience the same type of lifestyle and oppression as the black, poor or disabled women. This determined the feminists to analyze how the race, gender and class, combined, can influence women's life.²⁵

The term “intersectionality” was firstly used by the legal researcher Kimberle Crenshaw²⁶ in 1989, in an article describing the experience of black women which are harmed as a result of sex discrimination and race discrimination.²⁷ She argues that the multiple discrimination of black

²⁴ FAREDA BANDA, PROJECT ON A MECHANISM TO ADDRESS LAWS THAT DISCRIMINATE AGAINST WOMEN, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS – WOMEN'S RIGHTS AND GENDER UNIT (2008), http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf.

²⁵ BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (2ND. CAMBRIDGE, MASSACHUSETTS: SOUTH END PRESS, 1984).

²⁶ DAGMAR SCHIEK & ANNA LAWSON, EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY, INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION 12 (UNIVERSITY OF LEEDS UK 2011).

²⁷ Ibid., 2

women can neither be compared with the situation of black men, nor to that of white women.²⁸

The example used by Crenshaw shows that discrimination based on multiple grounds is more severe than solely on a single one.

The theory of intersectionality comes to examine the way in which different social, biological, cultural, factors, such as: gender, race, class, religion, disability, sexual orientation and other components of one's identity interact and what is their role in the social inequalities, oppression and discrimination. The core of this theory is that the forms of oppression do not act independently (e.g. racism, sexism) but rather interact with each other, creating a multiple system of discrimination.²⁹

1.2.1. Additive and intersectional discrimination

Mentioning about the multiple system of discrimination it is essential to underline that multiple discrimination has different forms. In this respect, different legal problems and evidences are identified. Before analyzing the types of multiple discrimination it has to be noted that the concept of "multiple discrimination" was brought into light with the adoption of the Equality Act 2010³⁰ in the United Kingdom. It stipulates in section 14 that combined discrimination includes two of the protected characteristics³¹ in the Act. For example, in a work related case, multiple discrimination can occur when an employee is discriminated on more grounds, at the same time

²⁸ Ibid., pp.3-4

²⁹ Susanne Knudsen, *Intersectionality—A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks* 61 (2006) in *Caught in the Web or Lost in the Textbook?* (Éric Bruillard, Bente Aamotsbakken, Susanne V. Knudsen, Mike Horsley eds.), http://www.iartem.no/documents/caught_in_the_web.pdf.

³⁰ Equality Act 2010, Act of Parliament of the United Kingdom (2010), <http://www.legislation.gov.uk/ukpga/2010/15>.

³¹ Age, disability, gender reassignment, race, religion or belief, sex, sexual orientation in Equality Act 2010, Chapter 2, Section 14.

or on different occasions. In this sense, the intersectional (or combined or dual), additive (or cumulative) forms of multiple discrimination need further explanation.³²

Following the example of the aforementioned employee, intersectional discrimination refers to situations when the employer discriminates based on a combination of characteristics. For instance, a company does not employ black women or Roma women, having certain stereotypes about them, instead employing black men or white women only.³³ In this regard it has to be mentioned the case of *Mackie v G & N Car Sales Ltd*³⁴ in which the claimant, an Indian woman, complained for being discriminated on the ground of race and sex. The woman was employed as a bookkeeper. She was told once by a colleague that the directors do not want to have Asian women as employees but she got the job only because her husband was Scottish. She was dismissed after a visit by the director's father. The Tribunal decided that she was discriminated against on grounds of race and sex, finding that she was treated less favorable because she was an Indian woman. The Tribunal used a hypothetical comparator to assess the case (a man who had the similar qualities but was not of Indian origin).³⁵ Another case in which the Tribunal found the combination of sex and race as grounds of multiple discrimination is *Ali v (1) North East Centre for Diversity and Racial Equality (2) Jamiel Bux*³⁶ in which the claimant, a Muslim woman from Pakistan, was employed as a finance officer by the respondent. Her claim of being treated less favorable on the grounds of her sex and gender was successful. She declared that her boss asked her to cook for him and humiliated her in front of her family, adding that he had a

³² Tamara Lewis, *Multiple Discrimination: A Guide to Law and Evidence 2*, A Central London Law Centre Publication (2010) <http://www.londonlawcentre.org.uk/pdfs/Multiple%20Discrimination%20Guide.pdf>.

³³ *Ibid.*, 8

³⁴ *Mackie v G&N Car Sales Ltd, t/a Britannia Motor Co*, 2004, ET/1806128/03.

³⁵ *Multiple Discrimination Consultation Response*, Equality and Diversity Forum (2009), <http://www.edf.org.uk/blog/?p=6228>.

³⁶ *Ali v (1) North East Centre for Diversity and Racial Equality (2) Jamiel Bux*, 2005, No. 2504529/03.

“heavy-handed and bullying attitude” towards her.³⁷ The Employment Tribunal found that Mrs. Ali was humiliated on the grounds of sex and gender and that she would not be treated similarly if she was a man or a white woman.³⁸

These cases reflect the intersection of race and sex as grounds which only taken together represent the reason of the unequal treatment.

Comparing to intersectional discrimination, additive discrimination occurs when an employee is discriminated on basis of two or more protected grounds independently, but in the same case.³⁹

For example, an employer does not promote a Roma employee but only non-Roma. At the same time, the employer promotes the older employees in the detriment of the young ones. This illustrates separate discrimination on two different grounds (race and age) which can arise in a case of refusing the promotion of the same person (*e.g.* a young Roma). *Perera v Civil Service Commission*⁴⁰ is a case of additive discrimination which happened in the United Kingdom. Perera applied for a job but because of diverse factors he could not get it, among which age, nationality, and language skills. He would get the job if being prevented only by one of the factors but in these circumstances, the more factors affected the decision of the employer.

1.2.2 The challenges of multiple discrimination

Some feminists (such as Patricia Hill Collins) consider that it is essential to understand the intersectionality in order to gain political and social equality⁴¹. The intersectional discrimination is facing certain legal problems. One of them is that the anti-discrimination laws are single-

³⁷ *Equality Centre Worker Wins 63k in Discrimination Claim*, Personnel Today Online HR Publication of the Year (2005), <http://www.personneltoday.com/hr/equality-centre-worker-wins-63k-in-discrimination-claim/>.

³⁸ Sabine Duvefelt & Carolina Sjölander, *Multiple Discrimination Addressing Complex Discrimination in a Complex Society*, Bachelor Thesis, Legal Science Programme with International Approach, Department of Behavioural, Social and Legal Sciences, Örebro University (2008).

³⁹ *Ibid.*, 15

⁴⁰ *Perera v Civil Service Commission* No 2, 1983, IRLR 166.

⁴¹ VÉRONIQUE MOTTIER, *FEMINIST ANALYSES OF THE STATE, FEMINIST POLITICAL THEORY*, UNIVERSITY OF ESSEX (2010).

ground oriented or cover only certain grounds, but do not include the others⁴². For instance, a disabled woman of a certain ethnic origin would be in the situation to look for alternative laws in order to claim legal protection if the anti-discrimination law would not provide the ground of disability but include the grounds of sex and ethnicity. Facing a situation which affects her from the aspect of all three dimensions, she would not be able to seek for redress in the respective case.

Same is applied to cases when the laws do not include the ground of race or ethnicity. For instance, in Germany, the legislation was not prohibiting discrimination in employment based on race until 2006.⁴³ Until the modifications in the legislation, the women could restore their rights and seek justice merely on the ground of gender.

In her work, Gay Moon⁴⁴, is bringing into light the fact that the existent laws usually deal with one ground of discrimination, ignoring the multi-faceted identity one has. The author perfectly exemplifies the situation of Roma women, who are discriminated not only because of their race, ethnicity or colour but also because they are women.⁴⁵ In this sense, an important link is made to the “intersectional prejudice”, which can be identified when someone who is discriminated based on an aspect of their identity, is exposed to discrimination on another ground as well.⁴⁶

An anti-discrimination law may require a victim to choose a ground to place himself/herself in one of the categories (Roma, black, woman, man, etc.). If the enumerated categories of a discrimination law do not reflect victim’s perception of its own identity, he/she will still have to identify with one of them in order to make the claim against discrimination. In this way, the

⁴² DAGMAR SCHIEK & ANNA LAWSON, EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY, INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION 31 (UNIVERSITY OF LEEDS UK 2011).

⁴³ Ibid.

⁴⁴ Gay Moon, *Multiple Discrimination. Justice for the Whole Person*, Roma Rights 2, 2009: Multiple Discrimination, Roma Rights Journal (2010), <http://www.errc.org/cikk.php?page=1&cikk=3564>.

⁴⁵ Ibid.

⁴⁶ Ibid.

person might feel that his/her identity is not meaningful to the society, thus, being unprotected against discrimination.⁴⁷

The *Burton and Rhule v De Vere Hotels*⁴⁸ reflects the issue mentioned above. In the case, two Afro-Caribbean waitresses working in a hotel were insulted with racist remarks by an entertainer in the hotel while the women were sitting at a table. The speaker made jokes using racist language and sexual comments about the black women, among which were the claimants. They were even directly asked some sexual questions. The women witnessed sexist and racist treatment based on which they made their claim against the hotel since white women and black men would not be treated similarly. Nevertheless, the claimants invoked only race as a discrimination ground under the Race Relations Act 1976.

Paola Uccellari⁴⁹ is stressing that the policy and law makers should consider the human experience when designing equality legal frameworks. This is even more relevant, when it comes to multiple discrimination, since persons refrain from invoking more grounds of discrimination because the law does not specifically address their case of double discrimination or reflect their complex identity.⁵⁰ The author also points out that the policies should address not only the needs and of a group but to look at improving the situation of the subsets within a group, otherwise there is the risk to focus on the most dominant members of the society and leaving out the disadvantaged ones. In this way the policy makers will be able to identify not only the discrimination which was recognized, for instance against women, disabled people, etc. but also to discover the invisible discrimination. Thus, the obvious problems in the society will be

⁴⁷ Paola Uccellari, *Multiple Discrimination: How Law Can reflect Reality* 27, vol. I, Equal Rights Review (2008), <http://www.equalrightstrust.org/ertdocumentbank/Multiple%20Discrimination.pdf>.

⁴⁸ *Burton and Rhule v De Vere Hotels*, 1997, ICR 1

⁴⁹ Paola Uccellari, *Ibid*.

⁵⁰ *Ibid*, pp. 27-28

addressed while the specific issues will simply remain incognito.⁵¹ For example, a disabled woman who went for a postnatal surgery found out that the examination couch was inaccessible, meaning that medical facilities were not designed for women with disabilities. This example is proves that the equality legislation should protect even the “disadvantaged within the disadvantaged”⁵².

Another identified issue of multiple discrimination is the need to find adequate comparator(s). In order to prove that a person was subjected to differentiated treatment because of a certain factor, a comparator needs to be established. The way a woman is treated is compared to that of a man, of a Roma person with a non-Roma, etc. In case there is no person for comparison, the Court can hypothetically assume the treatment of a comparator.⁵³ This issue was raised in the United Kingdom where the discrimination law asks for a comparator and it can be used only for one characteristic, since the courts decided that it is possible to invoke only one comparison at a time and there cannot be combined more grounds.⁵⁴ In the case of *Bahl v the Law Society*⁵⁵ an Asian woman claimed discrimination on the grounds of sex and race. The Employment Tribunal held that she could compare herself to a white man⁵⁶ but later on stated that it cannot be considered as a combination of grounds because each ground has to be analyzed separately in order to ensure an accurate interpretation of the law.⁵⁷ This type of situation encounters lack of legal remedy and claimants simply cannot make their claim successful. If an Asian woman is discriminated when applying for a job, her claim on gender discrimination would not be

⁵¹ Ibid., p.29

⁵² Ibid.

⁵³ Gay Moon, *Multi-Dimensional Discrimination: Justice for the Whole Person*, *Equality and Diversity Forum and Justice 2* (2007); Gay Moon, *Multiple Discrimination- Problems Compounded or Solutions Found?* 6, *Justice Journal* (2006).

⁵⁴ Gay Moon, *Multiple Discrimination. Justice for the Whole Person 2*, *Roma Rights 2*, 2009: *Multiple Discrimination*, *Roma Rights Journal* (2010).

⁵⁵ *Bahl v the Law Society*, 2004, IRLR 799.

⁵⁶ Gay Moon, *Multiple Discrimination- Problems Compounded or Solutions Found?* 5, *Justice Journal* (2006).

⁵⁷ Ibid., pp.5-6.

considered if the employer will choose a white woman and her claim on race discrimination would fail if the employer promotes Asian men. At the same time, an obstacle may arise when choosing the comparator for multiple discrimination since not in all cases it is possible to find one. For instance, in a case involving a pregnant women, as in *Turley v Allders Department Stores Ltd*⁵⁸, is impossible to find as comparator a pregnant men and in subsequent cases the treatment of pregnant women was compared to that of sick men.⁵⁹ In this respect, there must be determined adequate mechanism for invoking and proving multiple discrimination on a combination of grounds.

1.3 International and regional legislation on equality and non- discrimination with a focus on the intersectionality of gender and race

1.3.1. International legal provisions

The right to equality and non-discrimination is a fundamental principle in the international human rights law. It is recognized by a series of international legal instruments, such as: Article 2 of the Universal Declaration of Human Rights (UDHR), the United Nations conventions: Article 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR); Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, (ICESCR), Article 2 of Convention on the Rights of the Child (CRC), Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD), Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, etc.⁶⁰ Furthermore, some of the Conventions expressly provide a definition of discrimination. Article 1(1) of the International

⁵⁸ *Turley v Allders Department Stores Ltd*, IRLR 4 (1980).

⁵⁹ Sarah Hannett, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination* 83, Oxford Journal of Legal Studies, Vol. 23, No. 1 (2003).

⁶⁰ *The Right to Equality and Non-discrimination*, Icelandic Human Rights Center, <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therighttoequalityandnonndiscrimination/>.

Convention on the Elimination of all Forms of Racial Discrimination (CERD), Article 1 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Article 2 CRPD, Article 1(1) of the Convention concerning Discrimination in Respect of Employment and Occupation.⁶¹

The Covenants prohibit discrimination on different grounds in a non exhaustive list, including race, sex, religion, language, political opinion, national or social origin, property, birth or other status as for example Article 2 UDHR, ICESCR, ICCPR. There are Conventions which prohibit discrimination on a concrete ground such as CEDAW protecting women from discrimination⁶² or CERD, protecting people against racial discrimination⁶³.

None of the mentioned treaties clearly specify the intersection of any grounds of discrimination⁶⁴ and do not contain a norm on multiple discrimination. Article 27 of the ICCPR provides the necessity to protect the culture, religion and language of the minorities. ICCPR also protects the rights of women (Article 3, 23). ICESCR is also addressing the special protection to women⁶⁵. CEDAW is wholly dedicated to protect and promote the rights of women. However, the fact that multiple discrimination does not belong to any of these instruments, cannot highlight its gravity and impose states to undertake measures in order to combat it. This leads to the perpetuation of double discrimination, thus, women being in bigger difficulty to prove they were discriminated against or to decide which ground to invoke for the alleged discrimination.

⁶¹ Convention Nr.111 concerning Discrimination in Respect of Employment and Occupation, 42nd ILC session (1958),
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312256:NO.

⁶² CEDAW, Article 2(e).

⁶³ ICERD, Article 2 (d).

⁶⁴ DAGMAR SCHIEK & ANNA LAWSON, EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY, INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION 33 (UNIVERSITY OF LEEDS UK 2011).

⁶⁵ ICESCR, Article 14.

A positive development is that the UN treaty bodies include the issue of multiple discrimination in their general comments and recommendations on subjects related to women. A special concern arises in regard to the intersection of ethnicity and religion when some communities invoke their traditional and cultural values to legitimize human rights violations, such as: the female genital mutilation, early marriages, deprivation of property etc. These practices constitute a direct harm to women and especially to women of a specific ethnic, racial or religious background. In this respect, the CEDAW Committee clearly stated that such practices represent a violation to women rights⁶⁶.

CEDAW has addressed the aspects of intersectional discrimination in its General Recommendations and its Concluding Observations to country reports in the area of health with a focus on women with disabilities and requires a special attention to the aspect of gender and age.⁶⁷

The CERD issued recommendations in regard to the problems faced by Roma women as victims of gender and ethnicity based discrimination⁶⁸ The Committee issued forty-nine recommendations, urging the member states to adopt measures which would protect Roma against racial violence, enhance their education, improve the living conditions, measures to eliminate racial hatred, incitement against Roma in media, to motivate their participation in public life, and other measures of general nature. It has to be highlighted that the recommendations play an important role in touching upon the issue of multiple discrimination of Roma women. Recommendation number six requests the member states “to take into account, in all programs and projects planned and implemented and in all measures adopted, the situation of

⁶⁶ CEDAW Committee General Recommendation Nr 19, para 11.

⁶⁷ CEDAW General Recommendation 24 on Women and Health, in Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.6 (2003).

⁶⁸ CERD General Recommendation No 27: Discrimination against Roma: 08/16/2000, CERD 57th session.

Roma women, who are often victims of double discrimination.”⁶⁹ The recommendations add that a special focus should be in the field of education and health⁷⁰. This was a remarkable step in recognizing double discrimination by an international institution which gradually has been increasing its capacity and efficiency of addressing issues of racial discrimination and the member states constantly report on their improvements in the given field.

Furthermore, CERD did emphasize its concern towards the issue of multiple discrimination, issuing the General Recommendation on the gender related dimensions of racial discrimination, asserting that the intersection of race and gender is only one example of its concern⁷¹.

It has to be remarked that human rights bodies manifest an increased willingness to tackle the issue of multiple discrimination in their provisions. The Human Rights Committee expressed that “discrimination against women is often interconnected with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, poverty, birth or other status”.⁷²

The mentioned recommendations and general comments do not have a compulsory character but rather an advisory one, meaning that it is up to the states to decide whether to comply with the recommendations of the international human rights bodies or simply to ignore them. Nevertheless, the fact that these bodies have already started to mention the aspect of multiple discrimination, shows an international recognition of the issue and attracts further developments in the field.

⁶⁹ CERD General Recommendation No 27: Discrimination against Roma: 08/16/2000, CERD 57th session, measure no. 6.

⁷⁰ CERD General Recommendation No 27: Discrimination against Roma: 08/16/2000, CERD 57th session, measure no.22 and 34.

⁷¹ CERD, Concluding Observations: Austria (21/3/2002), para.9 in Paola Uccellari, *Multiple Discrimination: How Law Can Reflect Reality* 32, The Equal Rights Review, vol. I (2008).

⁷² Human Rights Committee. General Comment 28 on Equality of Rights Between Men and Women, in Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.6 (2003), para.30 in Paola Uccellari, *Multiple Discrimination: How Law Can Reflect Reality* 31, The Equal Rights Review, vol. I (2008).

It has to be noted that the issue of multiple discrimination was brought into the attention of the international community with a strong language by the Durban Declaration and Program of Action⁷³ in 2001. It recognizes that the victims who have a certain racial, ethnic background can face multiple forms of discrimination “based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status”.⁷⁴

At the same time, the Durban Declaration reaffirms that the states should recognize the multiple forms of discrimination against women. Its robust approach stands in the recognition of the need to integrate a gender perspective into policies, strategies, programs against racism, racial discrimination and other forms of intolerance with the goal to confront multiple discrimination.⁷⁵

At the same time, it is worth to note that Durban Declaration urges the states to adopt public policies and programs aiming to promote the rights of indigenous women in political, social and economic areas. This intends to fight multiple discrimination on the grounds of gender and ethnicity.⁷⁶

The necessity to tackle multiple discrimination against women of a certain race or ethnicity suggests the gravity of the issue and the crucial responsibility of the states and international bodies to approach the issues with maximum efforts. Regretfully, since 2001, little assessment, laws and mechanisms that safeguard the victims of multiple discrimination exist. Several courts have already addressed the intersectionality of grounds of discrimination in their decisions.⁷⁷ However, a more dynamic approach of interpretation is needed to touch upon all segments of discrimination and its effect on the disadvantaged groups.

⁷³ The Durban Declaration and Program of Action adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa (2001), http://www.humanrightsvoices.org/assets/attachments/documents/durban_declaration.pdf.

⁷⁴ Ibid., Declaration, General Issues, Article 2.

⁷⁵ Ibid., Declaration, Victims of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Article 69.

⁷⁶ Ibid., Program of Action, Article 18, 31.

⁷⁷ Please see the examples indicated in Chapter Nr. III of the thesis.

Hopefully, the recognition of the issue by an increasing number of states will place it into the attention of law makers and relevant stakeholders at national, regional and international level. They should be responsible to assess and combat the manifestations of this phenomenon.

1.3.2 Regional human rights mechanisms

Different regional mechanisms have elaborated legal provisions tackling discrimination, fostering equality and human rights protection. The principle of equal treatment and non-discrimination is contained in regional instruments, such as Article 2 of American Declaration, Article 24 of the American Convention on Human Rights, Article 2 and 3 of the African Charter on Human and Peoples' Rights and Article 14 of the ECHR and a series of EU legal norms.

This section will present a brief overview of some regional legislative frameworks on equality and discrimination, with a centered interest on how the intersectionality of race and gender is approached when such practices occur. The included regional systems are: the European Union, the Inter-American and the African systems. The Council of Europe legislation will be explicitly analyzed in the third chapter of the thesis.

European Union

The European Union (EU) has developed a regional mechanism to fight discrimination and set out measures for equal treatment. Equality is a fundamental value to the EU member states, as stated in its founding treaty.⁷⁸ Further, the Charter of Fundamental Rights of the European Union⁷⁹ prohibits in Article 21 “any discrimination based on any ground such as sex, race, colour, 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”

⁷⁸ Treaty of the European Union, Article 2, Maastricht (1992), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF>.

⁷⁹ Charter of Fundamental Rights of the European Union (2007/C 303/01), <http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01000101.htm>.

and on ground of nationality “within the scope of application of the Treaties and without prejudice to any of their specific provisions”.⁸⁰

The EU legislation has evolved from prohibiting discrimination in employment on the ground of sex to a range of regulations ensuring equal protection to persons irrespective of their race or gender.⁸¹

More than that, the European Parliament advocated for the adoption of equal treatment policies against discrimination on all grounds.⁸² At the same time, the Council of the European Union issued a decision recognizing the importance of eliminating inequalities between men and women particularly because women are victims of multiple discrimination.⁸³

EU has included the grounds of race and gender as cross-cutting issues of concern, and addressed the intersectionality of these grounds in certain directives. The Article 13 EC⁸⁴ and other EC directives prohibit discrimination, including on the grounds of race and gender. Such directives are the Employment Framework Directive (Framework Directive)⁸⁵, the Race Equality Directive⁸⁶ and the Goods and Service Directive⁸⁷. The all directives are single-ground documents. None of the directives prohibits discrimination on more grounds. But the preambles of the Race Directive and the Framework Directive affirm that several grounds can intersect. Section 14 of the Race Directive states that “(...) the Community should aim to eliminate

⁸⁰ Charter of Fundamental Rights of the European Union, Article 21.

⁸¹ *European Union Directives on the Prohibition of Discrimination*, Icelandic Human Rights Centre, <http://www.humanrights.is/human-rights-and-iceland/equality--non-discrimination/>.

⁸² Council Decision 2000/750/EC Establishing a Community Action Programme to Combat Discrimination (2001 to 2006), Section 2 (2000), http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&type_doc=Decision&an_doc=2000&nu_doc=750&lg=en.

⁸³ *Ibid.*, Section 4.

⁸⁴ Treaty of Amsterdam (EU Treaty), Article 13, (1999), based on which the EU decided to confer its attention in combating discrimination.

⁸⁵ Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment and Occupation (2000).

⁸⁶ Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (2000).

⁸⁷ Council Directive 2004/113/EC Implementing the Principle of Equal Treatment of Men and Women in the Access to Supply of Goods and Services (2004).

inequalities and promote equality between women and men, especially since women are often victims of multiple discrimination.⁸⁸ However, the directive does not offer a definition of multiple discrimination, nor does it regulate it, which makes the concept uncertain.⁸⁹

Simultaneously, the European Union member states are not precluded from designing policies or laws which would enhance the protection of equal treatment. Both Race Directive and Framework Directive foresee that “Member States may introduce or maintain provisions which are more favorable to the protection of the principle of equal treatment than those laid down in this Directive”.⁹⁰ Thus, the member states are not restricted from tackling multiple discrimination by issuing laws or allowing claims on intersectional and additive discrimination.

In spite of its anti-discrimination regulations, the European Union does not ensure protection to the most vulnerable categories of women in Europe. The Muslim women in Europe, especially the immigrants and refugees, face continuous discrimination. They are the target of hate speech and debates concerning their religion, tradition, the wear of the Muslim women dress and other aspects which affect them.⁹¹ In certain European countries, there are policies which vary from the prohibition of religious symbols at state level to decisions issues by school administration.⁹² In France, the students are not allowed to wear in schools symbols or clothes which manifest their religion.⁹³ The Islamic headscarf has been specifically mentioned in this regard.⁹⁴ In

⁸⁸ Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (2000).

⁸⁹ Barbara Giovanna Bello, *Multiple Discrimination Between the EU Agenda and Civic Engagement: the Long Road of Intersectional Perspective* 15, in Roma Rights Journal of European Roma Rights Centre, Multiple Discrimination, Number 2 (2009), <http://www.errc.org/cms/upload/file/roma-rights-2-2009-multiple-discrimination.pdf>.

⁹⁰ Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment and Occupation (2000), Article 8 & Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (2000), Article 6.

⁹¹ *Muslims in the European Union Discrimination and Islamophobia* 10, European Monitoring Centre on Racism and Islamophobia (2006), http://fra.europa.eu/sites/default/files/fra_uploads/156-Manifestations_EN.pdf.

⁹² *Ibid.*, p.40

⁹³ France / Loi N 2004-228 Du 15 Mars 2004 Encadrant, En Application Du Principe De Laïcité, Le Port De Signes Ou De Tenues Manifestant Une Appartenance Religieuse Dans Les Écoles, Collèges Et Lycées Publics 5,190, In JORF N 65 (2004).

Germany, several states introduced legal provisions which ban the wear of headscarf while in public service or teaching in school. This took place after the Federal Constitutional Court stated that the states can pass such legislation if they invoke a clear legal foundation for it.⁹⁵ Both in Belgium and Netherlands, the schools can decide to prohibit the wear of religious symbols if there are any reasonable grounds to do it.

These types of prohibitions led to a series of cases in which the Muslim women in Europe claimed their right against discrimination.⁹⁶ Most of the states are still conducting policies which generally affect the Muslim women and subject them to multiple discrimination.

Despite the numerous issues of multiple discrimination faced in EU by Muslim women, Roma women and even EU nationals, EU does not undertake considerable efforts to tackle the question. Further, the European Court of Justice (ECJ) did not issue any decision recognizing the aspect of intersectionality of gender and race as a ground for discrimination but rather focused on a single aspect, usually gender⁹⁷ or nationality. It delivered some decisions on the matters of nationality, in *Scholz*⁹⁸, *Spotti*⁹⁹, *Schöning-Kougebetoulou*¹⁰⁰ and on gender in *Lindorfer*¹⁰¹ case.

In *Scholz* case, a German national who acquired Italian nationality by marriage challenged her place on the list of candidates for a post of canteen staff at an Italian university. She stated that the selection board unlawfully refused to take into account her previous employment in the German post office, as required by the competition conditions. In its judgment, the Court found

⁹⁴ *Muslims in the European Union Discrimination and Islamophobia* 41, European Monitoring Centre on Racism and Islamophobia (2006).

⁹⁵ *Ibid.*

⁹⁶ Please see several examples in the third chapter of the thesis.

⁹⁷ Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment and Occupation (2000), Article 8 & Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (2000), Article 6.

⁹⁸ *Scholz v University of Cagliari*, ECJ C-419/92, ECR I-505 (1994).

⁹⁹ *Spotti v. Freistaat Bayern*, ECJ C-272/92, ECR I-5202 (1993).

¹⁰⁰ *Schöning-Kougebetoulou*, ECJ C-15/96, ECR I-47 (1998).

¹⁰¹ *Lindorfer v Council of the European Union*, ECJ C-227/04 P, ECR I-6767 (2007).

that the refusal to consider plaintiff's previous work experience in public service in another EU member state, in order to gain additional points for the place on the list, represents unjustified indirect discrimination.¹⁰² In this case, the Court found discrimination on account of nationality and acknowledged the differentiated treatment which might advantage other Italian nationals with work experience.

In *Spotti* and *Schöning-Kougebetoulou* the claimants challenged the decisions of their employers who applied differentiated treatment towards them on the ground of their nationality. In *Spotti*, the plaintiff, an Italian national, was employed for 6 years in a German university as a foreign language assistant. After 6 years of employment her contract was not renewed. The plaintiff decided to challenge the German law regarding the extension of the employment contracts considering it incompatible to the EU Employment regulations, under Article 48 (2) of the EEC Treaty.¹⁰³ In its reasoning, the Court assessed that the majority of foreign language assistants are foreign nationals and that "this difference of treatment is such as to place them at a disadvantage by comparison with German nationals and consequently constitutes indirect discrimination".¹⁰⁴

In *Schöning-Kougebetoulou*, the claimant, a Greek national working in Germany, questioned the decision of the employer who did not include her in the group of high salary employees with a requirement of 8 years of work experience. The employer disregarded her previous work experience in Greece, an EU member state. The Court decided that the employer's decision to not take into account the work experience of the claimant is null and void because it discriminates towards the worker who is a national of an EU member state¹⁰⁵. In *Lindorfer*, the Court found gender based discrimination. The claimant, an Austrian national employed by the

¹⁰² *Scholz v University of Cagliari*, para 11.

¹⁰³ Treaty Establishing the European Economic Community, signed in 1957, renamed to Treaty on the Functioning of the European Union in 2009.

¹⁰⁴ *Spotti v. Freistaat Bayern*, para 18.

¹⁰⁵ *Schöning-Kougebetoulou*, para 30.

Council of the European Union (Council) questioned the decision of the employer not to transfer the occupational pension from Austria into the Council's pension scheme. According to Council's regulation, women receive less years of pensionable service than men while transferring the pension rights into the Council's scheme because women have higher life expectancy. The Court held that the rules applicable to transfer credits from national schemes to the Council's scheme must comply with the principle of equal treatment.¹⁰⁶

These cases ascertain the obligation of member states to not discriminate the nationals coming from EU member countries when applying laws and decisions without any justified ground. These decisions recall the obligation of EU member states to treat equally their nationals, regardless of the country they come from and their background.

An ECJ case in which a person claimed to be discriminated on more grounds is *Galina Meister v Speech Design Carrier Systems GmbH*.¹⁰⁷ The applicant stated she “suffered less favorable treatment than another person in a comparable situation, on the grounds of her sex, age and ethnic origin”. Mrs. Meister applied for a job advertised by *Speech Design* who was recruiting a software developer but her application was rejected and she was not invited for an interview. The company published the announcement for the second time and the applicant reapplied but again unsuccessfully. The applicant filed a suit against the company seeking compensation for employment discrimination. In this case, ECJ stated that “it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.”¹⁰⁸

¹⁰⁶ Lindorfer v Council of the European Union, para 51.

¹⁰⁷ *Galina Meister v Speech Design Carrier Systems GmbH* ECJ C-415/10 (2012).

¹⁰⁸ *Ibid.*

This case reflects a moderate involvement of the European courts in tackling multiple discrimination. They deal mainly with a single ground of discrimination. This factor should be a leading reason for bringing the issue to a more serious levels of discussion, at international conferences, workshops, policy design etc. The courts in EU, including the ECJ should address the complexity of discrimination and ensure that judges examine the complaints under the angle of multiple discrimination.

Inter-American system

The Inter-American Commission for Human Rights¹⁰⁹ highlighted in one of its annual reports that the Americas continue to be affected by social inequalities and human rights infringements. This has repercussions on women as well.¹¹⁰

At the Inter-American level, discrimination is prohibited by several Human Rights documents. Article 2 of the American Declaration on the Rights and Duties of Man¹¹¹ proclaims that all people are equal before the law “without distinction as to race, sex, language, creed or any other factor”. Article 1 of the American Convention on Human Rights (ACHR) as well provides that states should ensure equal right to all persons without discrimination on the enlisted grounds.¹¹² Additionally, Article 24 ACHR interdicts discrimination in the application of law and legal proceedings. This provision does not prescribe the grounds of discrimination but the Inter-

¹⁰⁹ ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS PARA8, OEA/SER. L/V/II.134, DOC. 5 REV.1, IACHR (2009).

¹¹⁰ LEGAL STANDARDS RELATED TO GENDER EQUALITY AND WOMEN’S RIGHTS IN THE INTER-AMERICAN SYSTEM. DEVELOPMENT AND APPLICATION, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1 (2009), <https://www.oas.org/en/iachr/women/docs/pdf/REGIONALst.pdf>.

¹¹¹ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

¹¹² American Convention on Human Rights, Article 1, "Pact of San Jose, Costa Rica" (B-32) http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf.

American Court stated that discrimination under Article 24 should be considered as under the list of prohibited grounds in Article 1(1) of ACHR.¹¹³

The Inter-American system addressed the intersection of different forms of discrimination since 1994, when it adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women¹¹⁴, known as the Convention of *Belém do Pará*. The principle of intersectionality of grounds was introduced by Article 9 of the Convention, imposing the duty on the member states

“to take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom.”¹¹⁵

This provision shows that the forms of discrimination against women may vary based on diverse factors which can interlink.

Recently, the Organization of American States (OAS)¹¹⁶ adopted two conventions which aim to fight discrimination and especially the racial discrimination: the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance¹¹⁷ and the Inter-

¹¹³ *The Right to Equality and Nondiscrimination*, Icelandic Human Rights Centre, <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therighttoequalityandnondiscrimination/>.

¹¹⁴ The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 24th Regular Session of the General Assembly, Inter-American Commission on Human Rights (1994), <http://www.oas.org/en/mesecvi/docs/Convention-Text-EN.pdf>.

¹¹⁵ The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, Article 9.

¹¹⁶ Organization of American States, available at http://www.oas.org/en/sla/dil/newsletter_inter-American_treaties_jun-17-2013.html.

¹¹⁷ (Hereinafter the Anti-Racism Convention). AG/RES. 2805 (XLIII-O/13) (2013), http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism.asp.

American Convention against All Forms of Discrimination and Intolerance¹¹⁸. The adoption of the conventions is considered to be an important step in fighting discrimination in the Americas. Basically, it reflects the commitment of the OAS member states to protect all persons against racial discrimination, multiple forms of discrimination and intolerance in any private or public area.

Before the adoption of the conventions, there were several negotiations on the protected grounds of discrimination. However, not all groups agreed the ground of sexual orientation to be included in the Anti- Racists Convention. As a result, it prohibits discrimination in Article 1(1) only on the grounds of “race, colour, lineage, or national or ethnic origin”. At the same time it was agreed that the Anti-discrimination Convention will include the rest of the grounds. This gives the OAS member states the possibility to choose which convention to join. Therefore the state would be more eager to join the Anti-racism convention because of the limited number of protected grounds rather than the Anti-discrimination one. Thus, the joint commitment undertaken in 2005 to strengthen the efforts and develop a mechanism to combat discrimination leaves an open door to the states in joining the Anti-discrimination Convention.¹¹⁹

Nevertheless, both conventions represent an incentive for the entire Inter-American Human rights system to advance its jurisprudence in the field of equality and anti-discrimination. The right to equality is proclaimed by the Inter-American Convention against Racism, Racial discrimination and Related Forms of Intolerance in Article 2 declaring that “Every human being is equal under the law and has a right to equal protection against racism, racial discrimination,

¹¹⁸ (Hereinafter the Anti-discrimination Convention). AG/RES. 2804 (XLIII-O/13) (2013), available at http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp.

¹¹⁹ Awaz Raoof, *The Inter-American Anti-Discrimination Conventions and the Concealed Challenges Ahead*, Oxford Human Rights Hub (2013), <http://ohrh.law.ox.ac.uk/?p=2134>.

and related forms of intolerance in any sphere of life, public or private.”¹²⁰ It is essential to mention that the Convention prohibits in Article 4 any form of racism, intolerance or racial discrimination.

Furthermore, the Convention emphasizes the prohibition of multiple discrimination referring to

“Any distinction, exclusion, restriction, or preference applied to persons, because of their status as victims of multiple or aggravated discrimination, the purpose or result of which is to deny or impair the equal recognition, enjoyment, exercise, or protection of rights and fundamental freedoms.”¹²¹

It is essential to mention that the issue of multiple discrimination is several times addressed in the text of the Convention. It defines it as follows:

“Multiple or aggravated discrimination is any preference, distinction, exclusion, or restriction based simultaneously on two or more of the criteria set forth in Article 1.1, or others recognized in international instruments, the objective or result of which is to nullify or curtail, the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties, in any area of public or private life.”¹²²

The Anti-Racism Convention considers multiple discrimination as an aggravating act, underlining that the members states should take into consideration this aspect in cases of exclusion, distinction, restriction that are based on two or more grounds as specified by the Convention.¹²³

The Inter-American Convention against All Forms of Discrimination and Intolerance is utterly important to fight the phenomenon of discrimination in the Inter-American system. It is

¹²⁰ The Inter-American Convention against Racism, Racial discrimination and Related Forms of Intolerance, Chapter II, Article 2, http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism.asp.

¹²¹ Ibid., Article 4 (vii)

¹²² Ibid., Article 1(3)

¹²³ Ibid., Article 11

considered to be the first legally binding document in Latin America that condemns discrimination on such a comprehensive list of grounds.¹²⁴ It defines discrimination as “any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of *one or more* human rights and fundamental freedoms enshrined in the international instruments.”¹²⁵ The Convention offers the same definitions of equality (Article 2) and multiple discrimination (Article 1.3) as the Anti-Racism Convention.¹²⁶

The Inter-American Commission for Human Rights started to emphasize the duty of the states to address the issue of multiple discrimination, especially when women are exposed to discrimination based on race, ethnicity, age, religion, economic position, and other grounds. The Commission particularly highlighted the alarming incidents involving indigenous women.¹²⁷ A case in which the Commission stresses out the necessity to take into consideration the status of indigenous women is *Ana, Beatriz and Celia González Pérez*¹²⁸. In this case, three sisters, indigenous Tzeltal women from Mexico, were divided from their mother, placed in illegal detention where they have been raped and subject to torture by a group of soldiers. Taken into account these circumstances, the Commission indicated that the treatment to which the women have been subjected to was exacerbated by the failure of the state to consider that the women

¹²⁴ “Nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition”, provided in Article 1(1) of the Anti-Discrimination Convention, http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp.

¹²⁵ The Inter-American Convention against All Forms of Discrimination and Intolerance, Article 1(1).

¹²⁶ The Anti-Discrimination Convention, Article 1(3).

¹²⁷ LEGAL STANDARDS RELATED TO GENDER EQUALITY AND WOMEN’S RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: DEVELOPMENT AND APPLICATION, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 9, OEA/Ser.L/V/II. 143 Doc. 60 (2011), <https://www.oas.org/en/iachr/women/docs/pdf/REGIONALst.pdf>.

¹²⁸ Ana, Beatriz, and Cecilia González Pérez (Mexico) Case 11.565, Report No. 53/01, IACHR (2001).

were indigenous.¹²⁹ It stated that “the pain and humiliation suffered by the women was aggravated by their condition of members of an indigenous group”.

This kind of cases impose a duty on the members states to start reviewing the cases under a different standpoint and namely to consider multiple aspects of human rights violations, including several grounds of discrimination.

The development of the Latin American jurisprudence and namely tackling the issue of multiple discrimination is an advantage for the local lawyers and people to redress the injustices they suffer. At the same time, this is an example worth following by the international community.

African Human Rights system

The African Charter on Human and Peoples’ Rights is prohibiting discrimination from the very first substantive right listed in Article 2, even being placed before the right to life (Article 4). It stipulates that “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, (...) or any status.”¹³⁰ The statement “any status” gives the non-exhaustive list of grounds, similarly to the ICCPR or ICESCR application. ACHPR also states in Article 3 that each person shall be equal before the law.¹³¹

The African Charter is repeatedly guaranteeing equal protection and equal opportunities to individuals. Article 12 (5) forbids discrimination in the mass expulsion of non-nationals, referring explicitly to national, racial, ethnic or religious groups.¹³² Article 12 claims equal access of all citizens to public services, property.¹³³ Women and children are also protected

¹²⁹ Ibid., para 95

¹³⁰ African Charter on Human and Peoples’ Rights, Eighteenth Assembly of Heads of State and Government (1981), Article 2, available at <http://www.achpr.org/instruments/achpr/#a2>.

¹³¹ Ibid., Article 3

¹³² Ibid., Article 12(5)

¹³³ Ibid., Article 13

under the Charter. Article 18(3) asks the states to eliminate any discrimination against women and ensure their rights.¹³⁴

Despite the equality provisions in the Charter, there is nothing stipulated about multiple discrimination. Some countries enact laws tackling racial discrimination¹³⁵ or establish commissions to address the gender inequalities faced by women especially, as for instance the Zimbabwe Gender Commission¹³⁶. Although in Africa, women face discrimination in employment, over their right to property or based on their ethnicity, caste etc.¹³⁷ the laws do not protect them against multiple discrimination.

In Kenya, the minority or indigenous women are discriminated on multiple grounds because they belong to and identify themselves with these groups through their cultural practices or because of their gender. For instance, the pastoralist women encounter violence and insecurity while cattle-rustling, as a lot of conflicts arise between neighboring communities. At the same time, some cultural practices prevent the pastoralist girls from attending school, comparing to the boys, because of the harmful practices they face, such as female genital mutilations (FGM), “child-beading”¹³⁸ or child marriage.¹³⁹ The Kenyan Constitution recognizes the particular need of vulnerable groups in society, including women, minority or marginalized communities, particular ethnic, religious or cultural communities.¹⁴⁰ Even though it recognized these groups as

¹³⁴ Ibid., Article 18 (3,4)

¹³⁵ Discrimination at Work in Africa, Work in Freedom, International Labor Organization, http://www.ilo.org/global/topics/equality-and-discrimination/lang-en/index.htm#declaration/documents/publication/wcms_decl_fs_88_en.pdf.

¹³⁶ Zimbabwe Gender Commission, <http://www.sokwanele.com/zimbabweconstitution/sections/475>.

¹³⁷ Discrimination at Work in Africa, Work in Freedom, International Labor Organization.

¹³⁸ A practice under which the “warriors” are allowed to sexually exploit the young girls aged between 9 and 15 without any obligation to marry them.

¹³⁹ LAURA A. YOUNG, CHALLENGES AT THE INTERSECTION OF GENDER AND ETHNIC IDENTITY IN KENYA 12, MINORITY RIGHTS GROUP INTERNATIONAL REPORT (2012), <http://www.minorityrights.org/11581/reports/challenges-at-the-intersection-of-gender-and-ethnic-identity-in-kenya.html>.

¹⁴⁰ Constitution of Kenya (2010), Article 21(3).

vulnerable and despite the creation of National Gender and Equality Commission in 2010¹⁴¹, the situation of the affected groups did not change. Moreover, the passed legislation is not enforced. The marginalized communities and several advocacy organizations in Kenya pointed out their concerns regarding the issues affecting them. They indicated that a primary solution to end their human rights violations would be to ensure civic education for the community, especially for minority and ingenious women and girls who will get aware of the possible ways to address their problems.¹⁴² Another raised concern is related to the contradiction of customary and formal law. They state that their daily life is governed by the informal justice system and that the Constitutional provisions do not have an effect on them. More than that, the practice shows that these communities cannot benefit of the formal justice due to their remoteness, illiteracy.¹⁴³ Women cannot make their constitutional claims and believe the Constitution is for elite women from towns.¹⁴⁴

In Nigeria, the women in the Muslim communities, under customary law, cannot have access to their husband's property and income if they divorce. They are also subject to multiple discrimination if they have children and divorce. This is because they are considered the primary responsible for childcare.¹⁴⁵

¹⁴¹ National Gender and Equality Commission Act, Kenya (2011).

¹⁴² E.g., Interview with Joseph Samal Lomwa, PREMAP, Nanyuki, Kenya, June 12, 2012 in LAURA A. YOUNG, CHALLENGES AT THE INTERSECTION OF GENDER AND ETHNIC IDENTITY IN KENYA, MINORITY RIGHTS GROUP INTERNATIONAL REPORT (2012).

¹⁴³ LAURA A. YOUNG, p.9.

¹⁴⁴ Interview with Dominic Lepamarai, Samburu Women Trust, Nanyuki, Kenya, June 13, 2012 in LAURA A. YOUNG, CHALLENGES AT THE INTERSECTION OF GENDER AND ETHNIC IDENTITY IN KENYA, MINORITY RIGHTS GROUP INTERNATIONAL REPORT (2012).

¹⁴⁵ Mojbol Olnk Okome, *Domestic, Regional, And International Protection of Nigerian Women against Discrimination: Constraints and Possibilities*, African Studies Quarterly 6, no. 3: [online] URL: <http://web.africa.ufl.edu/asq/v6/v6i3a2.htm>.

These types of cases can be found in more countries in Africa (the Batwa women in Uganda¹⁴⁶, the Muslim women in East Africa¹⁴⁷, etc.), proving the vulnerability of the marginalized women in challenging multiple discrimination. A bigger visibility of the issue is needed in order to address these problems and educate women about their rights.

The functions of the EU, Inter-American and African human rights mechanism but also of the CoE (which will be discussed further) are similar from the aspect of receiving individual complaints on alleged human rights violations, being quasi-judicial bodies. In this regard, these systems can determine states' international responsibility. Another similar aspect of these jurisdictions is that they render and apply the legal provisions contained in regional instruments, in the frame of their legal competence. Additionally, almost all these human rights circuits engage at a certain degree in human rights promotion and monitoring. The Inter-American Commission and the African Commission have created different thematic rapporteurships while the Council of Europe instituted the Human Rights Commissioner.¹⁴⁸ The weak approach of these bodies to the issue of multiple discrimination does not offer the victims of multiple discrimination the possibility to assert their rights.

Multiple discrimination faced globally

It has to be mentioned that besides the discussed regional systems, women face multiple discrimination all around the world. Women are harmed because of their culture, belonging to a certain caste, ethnicity, and other groups. Just to highlight some examples, in India, the Dalit

¹⁴⁶ High Rates of Violence against Women from Africa's Indigenous Batwa Community – New Research (2010), <http://www.minorityrights.org/9985/press-releases/high-rates-of-violence-against-women-from-africas-indigenous-batwa-community-ndash-new-research.html#sthash.8auNWWqz.dpuf>.

¹⁴⁷ Amina Zuberi, *Double discrimination in East Africa*, <http://www.minorityrights.org/7372/meet-minority-rights-activists/double-discrimination-in-east-africa.html>.

¹⁴⁸ Regional Systems, International Justice Resource Center, <http://www.ijrcenter.org/ihr-reading-room/regional/>.

women, who are in the most inferior position of the cast, class and hierarchy, are sexually abused, harassed and kidnapped in order to be subordinated in the community.¹⁴⁹

In 2002, the UN Special Rapporteur on Violence against Women¹⁵⁰ provided significant evidence on harmful cultural and traditional practices against women in the *Report on violence against women*.¹⁵¹ Among the enumerated practices which violate women's rights at the intersection of their origin, gender and culture are Female Genital Mutilation (FGM), Honor Killings and Forced Marriages.

FGM is practiced in at least twenty states in Africa, Middle East and Asia and affects almost two million girls every year.¹⁵² The reasons of FGM, as pointed out by the Special Rapporteur, vary from the preservation of the religion or culture of certain ethnic/religious groups to the maintenance of patriarchal structures and control of women.

The Honor Killings occur in some Asian countries, such as Pakistan, Iraq and even in Turkey in certain communities. Women are “sacrificed” when men pass into the manhood, because they believe that women symbolize “honor” and their behavior should be guarded by men.¹⁵³

The unwanted marriages represent another issue of multiple discrimination. In particular communities, the girls even before reaching the puberty age are forced by their parents or “sold”

¹⁴⁹ BETHAN COBLEY, REPORT INTERNATIONAL CONSULTATION ON CASTE-BASED DISCRIMINATION, INTERNATIONAL DALIT SOLIDARITY NETWORK 19, 37, NEPAL (2011), http://idsn.org/fileadmin/user_folder/pdf/New_files/IDSN/Consultations/Report/Report_IntConsultationOnCBD_2011.pdf.

¹⁵⁰ UN Special Rapporteur on Violence against Women, Ms. Radhika Coomaraswamy.

¹⁵¹ RADHIKA COOMARASWAMY, REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, COMMISSION ON HUMAN RIGHTS, ECONOMIC AND SOCIAL COUNCIL, E/CN.4/2002/83 (2002), <http://www.refworld.org/docid/3d6ce3cc0.html>.

¹⁵² Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* 29, Institute For Human Rights, Abo Akademi University (2002), <http://cilvektiesibas.org.lv/site/attachments/01/02/2012/timo.pdf>.

¹⁵³ Ibid.

to the groom and his family to control girl's sexual conduct and preserve certain cultural ideas. Another reason is to secure the financial situation of girl's family.¹⁵⁴

The unwanted marriages as well as FGM and the honor killings reveal the weak position of women in some societies. They are victims of an evil system which negatively affects and discriminates them because they are women, because they are part of the respective group, ethnicity, religion, caste and because they are powerless to change it. It is important to highlight in this respect the struggle of the Special Rapporteurs who try to bring into the public attention the issue of multiple discrimination. More than that, they ask the states to ensure protection to women by adopting adequate strategies and address the structural causes.¹⁵⁵

In the last decade, there have been some sparkles to develop a legislative framework proclaiming human rights in Arab countries by adopting the Arab Charter on Human Rights¹⁵⁶ by the League of Arab States¹⁵⁷ and the establishment of ASEAN Intergovernmental Commission on Human Rights.¹⁵⁸ ASEAN Commission adopted the ASEAN Human Rights Declaration¹⁵⁹, a guiding document in the area of human rights in ASEAN countries. Even though the documents provide equal treatment for all citizens without any distinction¹⁶⁰, prohibiting discrimination¹⁶¹, the development of these institutions is evidently needed to intensify the rule of law and democracy in the region where women frequently suffer human rights violations.

¹⁵⁴ Ibid., p.30

¹⁵⁵ RASHIDA MANJOO, REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, PARA 8, 96, UN HUMAN RIGHTS COUNCIL (2012), http://www.ohchr.org/Documents/Issues/Women/A.HRC.20.16_En.pdf.

¹⁵⁶ Arab Charter on Human Rights 2004, entered into force March 15 (2008), <http://www1.umn.edu/humanrts/instree/loas2005.html>.

¹⁵⁷ The League of Arab States was established in Cairo on March 22 (1945). more info at http://www.lasportal.org/wps/portal/las_en/home_page!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gXy8CgMJMgYwOLYFdLA08jF09_X28jIwN_E6B8JG55C3MCuoNT8_TDQXbiNwMkb4ADOBro-3nk56bqF-RGVHjqOioCAKQoUKM!/dl3/d3/L2dBISEvZ0FBIS9nQSEh/.

¹⁵⁸ ASEAN Intergovernmental Commission on Human Rights (2009), <http://aichr.org/about/>.

¹⁵⁹ ASEAN Human Rights Declaration, Adopted on November 18 (2012), <http://aichr.org/documents/>.

¹⁶⁰ Ibid., Article 2, 3

¹⁶¹ Arab Charter on Human Rights, Article 3(1) and 3(2), <http://www1.umn.edu/humanrts/instree/loas2005.html>.

A global movement in regard to the issue of multiple discrimination might improve the endeavors to ensure the effective right to equality to everybody.

CHAPTER 2. COMPARATIVE OVERVIEW OF THE LEGISLATION ON EQUALITY, NON-DISCRIMINATION AND MULTIPLE DISCRIMINATION: COUNCIL OF EUROPE (ECtHR), SOUTH AFRICA AND REPUBLIC OF MOLDOVA

2.1 Council of Europe

The Council of Europe has developed a number of programs, declarations, recommendations to ensure equality and protect the individuals against discrimination. Two of its main established human rights treaties are the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) and the European Social Charter (1961, revised in 1996).¹⁶²

The Council of Europe is constantly developing its equality legislation, addressing discrimination issues from different perspectives. Article 14 ECHR and Article 1 of the Protocol No. 12 to the Convention prohibit discrimination in the enjoyment of rights and freedoms set in the Convention on grounds of “sex, race, colour, language, religion, political or other opinion, national or social origin, associated with a national minority, property, birth or other status”. The list of grounds is not exhaustive since the European Court of Human Rights has applied article 14 in cases when individuals were discriminated based on their sexual orientation¹⁶³ or on the ground of birth out of wedlock.¹⁶⁴ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground...” mentioning a list of the grounds.

¹⁶² DAGMAR SCHIEK & ANNA LAWSON, pp. 36-37

¹⁶³ Salgueiro de Silva Mouta v. Portugal, No.33290/96, ECtHR, IX, para 28, (1999).

¹⁶⁴ Mazurek v France, No.34406/97, ECtHR (2000).

The meaning of the term ‘discrimination’ under both Article 14 of the Convention and the additional Article 1 Protocol No 12 is identical, the prohibited grounds are also the same and non-exhaustive.

However, it is important to mention that there is a distinction between the two provisions on the matter of limiting the protection against discrimination. Article 14 of the Convention confines the prohibition of discrimination only in regard to the rights and freedoms specified in the Convention while Protocol No. 12 comes to fill the gap. It establishes a free standing right to equality, offering a general non-discrimination clause, thus, extending the limits of protection beyond the rights and freedoms included in Article 14.

The extension of Convention’s scope plays a significant role in addressing the issues of discrimination in a developing world where they take a more complex form, as for instance in case of multiple discrimination or grounds omitted by the Convention.

As mentioned above, Article 1 Protocol 12 ECHR has a complementary value to protection when an individual is discriminated against. The examples of discrimination vary from the enjoyment of a right provided by national law to cases in which the authorities are imposed to behave in a particular manner subject to national law or when they have to exercise discretionary power. It may also apply in cases of action or omission (for instance the actions undertook to ensure security during mass disorders or protests etc.¹⁶⁵

Since the adoption of the Protocol 12 to the Convention on non-discrimination in 2000, only 18 states out of 47 member states had ratified it.¹⁶⁶ Therefore, the development in the field depends

¹⁶⁵*The Right to Equality and Non-discrimination*, Icelandic Human Rights Centre, <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therighttoequalityandnondiscrimination/>.

¹⁶⁶ Please see the list of countries which ratified the Protocol at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG>.

on the Courts' interpretation of the cases¹⁶⁷. Even though the Convention does not explicitly contain a provision on the intersectionality of gender and race and the Court did not address this dimension, in a set of decisions it has tackled it in cases concerning Roma women¹⁶⁸ and Muslim women. These decisions demonstrate the necessity of the member states to adjust their legislation in order to properly address the concerned issue. At the moment, the ECHR has a comprehensive jurisprudence on discrimination focusing on the axes of gender, race/ethnicity.

The Council of Europe was concerned even before 1990's with the issue of intersectional discrimination. It has established a Commission working against Racism and Intolerance (ECRI) in all member countries, building relations with the non-governmental sector.¹⁶⁹

It is important to note the efforts of the Council of Europe to address the difficulties Muslim women face in Europe, including multiple discrimination. It adopted the Resolution "Multiple discrimination against Muslim women in Europe: for equal opportunities"¹⁷⁰ which recognizes the problems of Muslim women such as honor killings, stigmatization, isolation and the issue of headscarf.¹⁷¹ More than that, the resolution calls the introduction of measure which would end multiple discrimination faced by the Muslim women in the health care system, education, and employment.¹⁷² The adoption of the resolution is a success, taking into consideration that the Assembly calls the CoE member states to include the notion of "multiple discrimination" in their

¹⁶⁷ ODDNY MJOLL ARNARDOTTIR, MULTIDIMENSIONAL EQUALITY FROM WITHIN THEMES FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 53-55 (DAGMAR SCHIEK AND VICTORIA CHEGE EDS. 2009).

¹⁶⁸ For *e.g.* DH and Others v. Czech Republic.

¹⁶⁹ DAGMAR SCHIEK & ANNA LAWSON, p. 36.

¹⁷⁰ Council of Europe Parliamentary Assembly Resolution 1887 (2012).

¹⁷¹ *Ibid.*, section 1

¹⁷² *Ibid.*, section 4

legislative frameworks.¹⁷³ This gives a stronger base to advocate intensively for the adoption of a comprehensive legislation on multiple discrimination and filing complaints before the ECtHR.

2.2 South Africa

Having the history of the institutionalized racial discrimination during the apartheid when the discriminatory laws were enacted in 1948¹⁷⁴, South Africa represents the country which undertook considerable efforts in reducing the inequalities among the people and end discrimination. The long period of apartheid policies excluded blacks from leading positions, restricted their access to jobs and economic resources.

The existing laws during the apartheid infringed the most fundamental rights and freedoms: the political rights, freedom of movement and residence, property rights, right to work and to choose the occupation, freedom of marriage and other family rights.¹⁷⁵ Referring to the status of black women during the apartheid, it has to be acknowledged that they were the most vulnerable category in society, often deprived of their rights. Black women were especially affected by the existent unequal laws which were doubly and triply discriminating against them in cases of divorce, inheritance, marriage, the right to property, etc.¹⁷⁶

To have a deeper understanding of the current need of sophisticated legislative framework in South Africa there should be mentioned several laws during the apartheid which negatively affected all areas of political, economic, social and cultural life in South Africa.¹⁷⁷

¹⁷³ Ibid., section 7.1.2

¹⁷⁴ Tameshnie Deane, *Understanding the need for anti-discrimination legislation in South Africa* 2 (2005), <http://umkn-dsp01.unisa.ac.za/bitstream/handle/10500/3628/Deane%208%20December%202005.pdf?sequence=1>.

¹⁷⁵ Ibid., p.8

¹⁷⁶ SANDRA FREDMAN, *COMPARATIVE STUDY OF ANTI-DISCRIMINATION AND EQUALITY LAWS OF THE US, CANADA, SOUTH AFRICA AND INDIA*, EUROPEAN COMMISSION (2012), http://www.migpolgroup.org/public/docs/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf.

¹⁷⁷ Ibid., p.2

The *Industrial Conciliation Act*¹⁷⁸ was an affirmative action for whites against the cheap black labor in order to preserve the white dominance in the labor market. The *Native Building Workers Act* was not allowing blacks to build in white urban areas. In 1950 there was issued a law based on which blacks had to carry identification documents with them. Thus, it was created a national register where the race of the persons was recorded. Following these policies, the blacks were refrained from obtaining good trainings, if any, for work purpose.¹⁷⁹ The *Native Labour Regulation Act* discriminated against blacks in employment, prohibiting them to strike and to get skilled jobs. The *Bantu Building Workers Act* was criminalizing the Africans if they performed any skilled work in urban area, allowing them to work only in the areas designated for them.¹⁸⁰

The South African Constitution came as a result of people's awareness of the injustices happened during the non-democratic country's past. At the moment, the Constitution of South Africa is considered the most comprehensive in the world, containing a very well developed Bill of Rights.¹⁸¹

The Founding Provisions of the South African Constitution assert its commitment to set equality as a fundamental value along with law, democracy, human dignity, human rights and freedom.

Among the founding provisions, the Constitution is also providing non-racialism and non-sexism, two values of research of the present thesis¹⁸².

Chapter 2 of the Constitution is entirely dedicated to the Bill of Rights. Equality is the first mentioned right in the Bill. Section 9 provides that "Everyone is equal before the law and has the

¹⁷⁸ The Industrial Conciliation Act 28 (1956).

¹⁷⁹ Tameshnie Deane, p.6.

¹⁸⁰ Ibid., pp.7-8

¹⁸¹ *The Constitution of South Africa*, Democracy, SouthAfrica.info, <http://www.southafrica.info/about/democracy/constitution.htm#.UnQN1vmkqQB>

¹⁸² Constitution of the Republic of South Africa, No. 108, Article 1 (a, b) (1996), <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

right to equal protection and benefit of the law”.¹⁸³ Section 9 (3) enshrines the prohibited grounds for discrimination, such as “race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.

An important element of this legal provision is that it clearly states that “the state/ a person may not unfairly discriminate directly or indirectly against anyone on one or more grounds...”.

Comparing to other jurisdictions prohibiting discrimination and promoting equality, as in case of Council of Europe and Moldova, the South African Constitution has a leading position in prohibiting multiple discrimination. It, thus, takes a remarkable role in promoting the idea of prohibiting multiple discrimination and considering future prospects to prevent it. We can see this as a unique model of building the ground for country’s democracy and rule of law.

Since the South African Constitution provided that the state has to enact laws to enforce its stipulations by 2000, there was adopted the Promotion of Equality and Prevention of Unfair Discrimination Act (2000) or the so called Equality Act.¹⁸⁴

The Equality Act defines discrimination as ”any act or omission, including a policy or a law, rule, practice, condition, situation which directly or indirectly a) imposes burdens, obligations or disadvantage on, or b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”¹⁸⁵

Chapter 2 of the Act “Prevention and general prohibition of unfair discrimination” explicitly states that “neither the state nor any individual may unfairly discriminate against any person”. More than that, it specifically addressed in two provisions the prohibition of unfair

¹⁸³ Ibid., Chapter 2, Section 9

¹⁸⁴ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA or the Equality Act, Act No. 4 (2000), <http://www.justice.gov.za/legislation/acts/2000-004.pdf>.

¹⁸⁵ Ibid.

discrimination on ground of race (Section 7 of the Act) and on the ground of gender (Section 8 of the Act). Section 7 prohibits the dissemination of propaganda or idea which suggest the racial superiority or inferiority of any person (point a), activities which promote a certain race only (point b), exclusion of persons of a particular race to maintain control by a certain racial group (c), to provide inferior qualitative service to a racial group comparing to another one (d) and to deny service and opportunity to persons of a particular racial group. Section 8 dedicates 9 provisions which prohibit discrimination based on gender ground and it bans any kind of violence against women including female genital mutilation (a,b) traditional practices which limit the women to inherit property, access rights to their lands, preclude the equality between women and men or discriminate on ground of pregnancy (c,d,e,f). It also interdicts discrimination which limits or denies women's access to health, social, employment services or opportunities.

The role of Equality Act in approaching multiple discrimination is very important. It creates the opportunity to claim multiple discrimination under the definition of discrimination which includes the wording "on one or more of the prohibited grounds". Thus, the courts would not be able to excuse intersectional discrimination, as a lot of European judges do, but rather seek for solutions how to address it properly and establish effective mechanisms to protect potential victims.

Comparing to ECHR which lists in Article 14 the grounds protected from discrimination and concludes with "or other status", the South African Equality Act is an eloquent example of legislation which addressed the real problems affecting the individuals in society and does not ignore one issue in favor to another one.

Another South African act which seeks to redress the effects of discrimination, advance equality and take out unfair discrimination is the *Employment Equity Act*. The Act aims to ensure a diverse labor force and contribute to the economic growth of the country.¹⁸⁶ More than that, the Act dedicates an entire section to affirmative action measures which has the goal to ensure that people from the “designated groups” which means black people, women and people with disabilities, have equal employment opportunities and are equitably represented in the labor market.¹⁸⁷ The inclusion of women in the “designated groups” reminds once again about the unjust past faced by the black women. It refers to the period after the apartheid, when it is twice hardly for African women to succeed in the labor market and advance in society after being discriminated.

Another institution addressing especially the gender discrimination of the African women is the Commission for Gender Equality.¹⁸⁸ The undemocratic political system which governed South Africa and the hundreds of years of patriarchy and male dominance have left their fingerprints into the today’s society. As a consequence, the African women in South Africa face exclusion in all aspects of life. For the African women to succeed there is a demand of transformation of gender relations. In this way, the African women, as a disadvantaged group can substantively improve their life and be equal to men in the enjoyment of their rights.¹⁸⁹ The Commission for Gender Equality has a particular role in fighting gender based discrimination. Its activity has a tremendous importance in lobbying and addressing the issues faced by the African women in South Africa, by constantly reporting before CEDAW, interacting with civil society, South

¹⁸⁶ Tameshnie Deane, *Understanding the need for anti-discrimination legislation in South Africa* 11 (2005)

¹⁸⁷ Employment Equity Act, No 55, Chapter 3, Section 15 (1), South Africa (1998), <http://www.hsph.harvard.edu/population/aids/southafrica.aids.98.pdf>.

¹⁸⁸ Commission for Gender Equality Established under Chapter 9, section 181 (d) of the South African Constitution, http://www.cge.org.za/index.php?option=com_content&view=article&id=47&Itemid=69.

¹⁸⁹ *Who We Are?* Commission for Gender Equality, http://www.cge.org.za/index.php?option=com_content&view=article&id=47&Itemid=69.

African Human Rights Commission, governmental bodies, pushing for gender equality in public policies. The Commission is also committed to research, hold educative campaigns, participate and lobby for legislative initiatives, but also has a legal department responsible for monitoring and litigation.¹⁹⁰ The legal department performs a more extensive activity. It investigates complaints, evaluates laws, customs issued by informal justice forum or any other laws that have a bad effect on women and their equal enjoyment of rights. The department has the responsibility to keep evidence on how the national legislation complies with the international covenants to which South Africa is part of.¹⁹¹

2.3 Republic of Moldova

The transition of the Republic of Moldova to market economy after the collapse of the Soviet Union worsened the socio-economic situation of women. A lot of them are in a vulnerable position, partly because of the male dominance in society. Even if the number of women is significantly higher than men, only 22 % of the women in Moldova are represented in Parliament. At the same time, women have a lower income than men, with approximately 30 % less.¹⁹² This happens mostly because they are employed in budgetary areas which are not well paid and men acquire the leading positions with a higher income. Women are traditionally those who leave their jobs for maternity leave, becoming financially dependent on their husbands.¹⁹³

The situation is even more dramatic when we refer to women of a specific ethnic background, as for example the Roma women in Moldova. Women in Moldova are in general underrepresented but if we talk about the participation of Roma women in socio -political life, we can say that they

¹⁹⁰ “Mission and Vision”, Commission for Gender Equality.

¹⁹¹ “Legal department”, Commission for Gender Equality.

¹⁹² WOMEN AND MEN IN THE REPUBLIC OF MOLDOVA, NATIONAL BUREAU OF STATISTICS IN MOLDOVA WITH THE SUPPORT OF UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (2008), http://www.statistica.md/public/files/publicatii_electronice/femei_si_barbati/Women_Men_2008.pdf.

¹⁹² Ibid.

¹⁹³ Ibid.

are almost absent from it. According to UNDP Moldova data¹⁹⁴, Roma women demonstrate a lower participation in labor market, one of the reasons being their educational level. Due to the educational reason, Roma women are as well invisible in the political life, there is no any Roma women holding a position in the local or central administration.

In the last decade, Moldova made significant efforts to regulate the equality between men and women. It has adopted a series of laws based on EU requirements as part of the Pre-accession Agreement but also based on the recommendations of the UN bodies to reduce the gap between men and women and promote women's participation in public life. More than that, the international organizations in Moldova and the Moldavian Government brought their efforts together to promote gender equality and reduce the injustices towards women in society.

The Constitution of the Republic of Moldova¹⁹⁵, Chapter II, Fundamental Rights, Article 16 (2) provides that all people are equal in front of the law, without distinction of race, nationality, ethnicity, language, religion, sex, political view, social status etc. Moldova ratified CEDAW in 1994, participating in the country reviewing process.

Republic of Moldova adopted the following legislation on gender equality and protection of women's rights:

The Law on equal chances between men and women, Nr.5-XVI dated 09.02.2006; -Law on the prevention and combating human trafficking, Nr.241-XVI dated 20.10.2005; - Law on the prevention and combating domestic violence, Nr. 45 dated 01.03.2007; -The National Plan "Promotion of gender equality in society for the period 2006-2009", the Decision of the Government of the Republic of Moldova Nr. 984 dated 25.08.2006; -The National Human Rights

¹⁹⁴ ROMA IN MOLDOVA 71, UNDP MOLDOVA REPORT (2007), http://www.undp.md/publications/roma%20_report/Roma%20in%20the%20Republic%20of%20Moldova.pdf.

¹⁹⁵ The Constitution of the Republic of Moldova, 311496, (1994), http://lex.justice.md/document_rom.php?id=44B9F30E:7AC17731.

Action Plan for the period 2004-2008, the decision of the Parliament of the Republic of Moldova Nr.415-XV dated 24.10.2003; -The European Union- the Republic of Moldova Action Plan, the Decision of the Government of the Republic of Moldova Nr.356 dated 22.04.2005; -The National Development Strategy for the period 2008-2011, the Law of the Parliament of the Republic of Moldova Nr. 295 dated 21.12.2007; -The Strategy of the National System on the protection and assistance of the victims of the trafficking in humans and of the Action Plan on implementing the Strategy of the National System related to the protection and the assistance of the potential victims of the trafficking in humans for the period 2009–2011, the Decision of the Parliament of the Republic of Moldova Nr. 257 dated 05.12.2008; - The National Program “The Moldovan village” for the period 2005-2015, the Decision of the Government of the Republic of Moldova Nr. 242 dated 01.03.2005; -The Convention on the Elimination of All Forms of Discrimination Against women, the Decision of the Parliament of the Republic of Moldova Nb. 87 dated 28.04.1994; -Governmental decision of March 2005 on the Millennium Development Goals (2005-2015) etc.¹⁹⁶

The Law on Equality of Chances between men and women from 2006¹⁹⁷ was designed in order to ensure the exercise of equal rights by men and women in the political, social, economic, cultural and other areas of life, in order to prevent and eliminate all forms of gender based discrimination.¹⁹⁸ Specifically, it legally settles the equality of chances in the public domain such as participation in public life, occupying public functions, activity in elections and parties, mass-media. It also provides equality in treatment of men and women in employment, education and health, including affirmative actions (without specifying that the affirmative actions should be

¹⁹⁶ *Gender Equality*, UNFPA Moldova,

http://countryoffice.unfpa.org/moldova/2009/08/24/1149/frequently_asked_questions/.

¹⁹⁷ The Law on Equality of Chances between Men and Women, Nr.5-XVI (2006),

<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=315674>.

¹⁹⁸ Law on Equality of Chances between Men and Women, Article 1.

elaborated for women but rather for the both sexes). The law does not stipulate anything about the affirmative actions belonging to a certain minority (ethnic, racial, sexual etc.).

One of the biggest achievements in the field of ensuring equality of women and other groups in society and combating discrimination against is the recently adopted Moldovan Law on Equality of Chances.¹⁹⁹ The law comes to prevent, combat discrimination and ensure equal opportunities and treatment to all persons in Republic of Moldova. Among the criteria it is stipulating race, ethnicity, colour, nationality, sex etc.²⁰⁰ It prohibits discrimination in both private and public spheres, specifically in education, health, employment, access to goods and services available to public.²⁰¹ In order to enforce the law, an equality body has been established, the Non-discrimination Council²⁰². The equality body has started its activity and has already undertaken several cases for examination. Most of the claims allege discrimination based on the ground of disability, ethnicity, language, legal status, age, etc.²⁰³

As to the Moldavian Law on Equality of Chances, it has to be underlined that it does not specify anything about intersectional discrimination. Taking into consideration that it is a recently adopted law, the expectations were that multiple discrimination will be addressed by the law but unfortunately the law-makers did not go so far. Hopefully, the practice of the Non-discrimination Council will prove the necessity to protect the persons who are subject to multiple discrimination and the law will be developed further.

¹⁹⁹ Law on Equality of Chances (2012).

²⁰⁰ Ibid., Article 1

²⁰¹ Law on Equality of Chances, Chapter II, Article 7,8, 9.

²⁰² Non-discrimination Council, Created under the Law No. 298 regarding the activity of the Council for prevention, elimination of discrimination and insurance of equal chances (2012), entered into force on 01.01.2013, <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=346943>.

²⁰³ Banca Discriminariii, Discriminare Media, <http://discriminare.md/category/banca-discriminari/>.

CHAPTER III. MULTIPLE DISCRIMINATION AGAINST WOMEN ON THE GROUNDS OF GENDER AND RACE: A COMPARATIVE PERSPECTIVE OF THE COUNCIL OF EUROPE, SOUTH AFRICAN AND MOLDOVAN CASE LAW

This chapter will present several cases and legal developments which took place in the area of multiple discrimination on the grounds of gender and race and will reflect on the existing case-law in the area.

The concept of multiple discrimination has been already addressed in the legislation of several CoE member states such as Austria, Bulgaria, Germany, Greece, Italy, Romania, and Croatia.²⁰⁴

Some CoE countries started to develop their case-law by establishing human rights violations that occur on the grounds of gender and race as multiple discrimination. The advancement of anti-discrimination legislation and case law leads to the possibility to address the intersectionality aspects in cases when people are exposed to double or multiple discrimination. In this way, the discriminated persons are not deprived of the right to invoke all grounds they have been discriminated against.

There are some cases which reflect the opinion of the judges, equality bodies, ombudsmen on multiple discrimination on grounds of gender and race.

In Europe, the women of African, Asian and Roma origin are the most discriminated against, including under the axis of multiple discrimination. Some examples show how this phenomenon takes place. In Sweden, for instance, a woman of African origin who was accompanying a resident was harassed by a taxi driver. The Equality Ombudsman found that the incident was

²⁰⁴ FUNDAMENTAL RIGHTS: CHALLENGES AND ACHIEVEMENTS IN 2012, 160-161, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, ANNUAL REPORT 2012 (2013).

based on the grounds of sex and ethnicity, as only she was harassed compared to the other person sitting next to her in the car, a Swedish male.²⁰⁵

Another case concerns the freedom of movement of the Roma women in Sweden and namely in situations concerning goods and service delivery. Four Roma women were stopped by the owner when trying to enter a fur shop. He shouted at them and mentioned that the shop was closed for lunch. In their application to the Equality Ombudsman, the women stated that on the door of the shop was no sign of lunch time or break. They also alleged that the owner told them “come back another day in your folk costumes”. The women returned to the shop fifteen minutes later and the shop was open as before. The Ombudsman investigating the case found that this was an act of discrimination and referred the case to the district court. Accordingly, the district court found that the women have been discriminated because of their ethnicity and have been harassed for being women, taking into consideration the statement of the shop owner about their clothing. The women had been adjudicated to moral damages.²⁰⁶ Although the Court established ethnicity and gender as grounds for discrimination in the present case, it did not specifically indicate that the intersection of the grounds constituted the discrimination itself. Sweden adopted the Discrimination Act in 2008²⁰⁷ replacing several acts prohibiting discrimination on a single ground or field. Unfortunately, the Act does not include a provision on multiple discrimination but rather deals with discrimination on a single ground.²⁰⁸

²⁰⁵ Case NB ANM 2010/1289, Equality Ombudsman, Sweden (2012) in FUNDAMENTAL RIGHTS: CHALLENGES AND ACHIEVEMENTS IN 2012, 161, ANNUAL REPORT 2012, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2013).

²⁰⁶ Case No. T 4710-08, Judgment by the Örebro District Court (2009) and Case No. T 3330-09, Judgment by the Göta Court of Appeal, Swedish Equality Ombudsman (2010), *Roma Rights Discrimination, Paths of Redress and How the Law Can Improve the Situation of Roma* 30-31 (DanagardLITHO, Ödeshög 2011), <http://www.do.se/Documents/sprak/english/Roma%20rights.pdf>.

²⁰⁷ Swedish Code of Statutes Discrimination Act SFS 2008:567 (2008).

²⁰⁸ Coleen Sheppard, *Multiple Discrimination in the World of Work*, International Labour Office, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work 17, Geneva: ILO, 1 v (2011), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_170015.pdf.

This example of refusing the entrance to Roma women solely on the basis of the way they look (traditional costumes, long skirts) perfectly illustrates how the grounds of gender and ethnicity intersect and lead to multiple discrimination. When it comes to commuting or entering public places such as shops, restaurants, hotels, swimming pools, etc., Roma women are particularly vulnerable to discriminatory attitudes and behavior. That is why, enhancing the case law on such practices is substantial in preventing further situations of this kind and ensuring a proper judicial redress.

Examining the ECtHR jurisprudence, there can be noticed that the Court has not yet delivered a judgment reflecting its definite opinion upon the issue of multiple discrimination. However, it has raised the problem of vulnerability of women which are subject to multiple discrimination.²⁰⁹ For instance, *N.B. v Slovakia*²¹⁰ is a case of forced sterilization of a Roma woman who could not obtain redress as a victim of discrimination. The Roma woman was underage when sterilized in a public hospital after delivering her second child. She claimed that she signed the “consent” for sterilization while being intoxicated with medication and after a doctor told her she would die if not sign, then she did not object to sign the paper with the assistance of a staff member. The applicant added that she was placed in a room with Roma women only, being segregated from the non-Roma patients. This is an additional reason supporting her arguments of alleged discrimination. The Roma women claimed that her ethnic origin was the reason the doctors decided to sterilize her. The applicant complained for being discriminated against on the grounds of race/ethnicity and sex in the enjoyment of her rights under Article 14 in conjunction with Articles 3, 8 and 12 of the Convention.²¹¹ In its judgment the Court highlighted that “the practice

²⁰⁹ FUNDAMENTAL RIGHTS: CHALLENGES AND ACHIEVEMENTS IN 2012, 161, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, ANNUAL REPORT 2012 (2013).

²¹⁰ *N.B. v. Slovakia*, No. 29518/10, ECtHR (2012).

²¹¹ *Ibid.*, para 111

of sterilization of women without their prior informed consent affected vulnerable individuals from various ethnic groups” and that the State failed “to secure to the applicant a sufficient measure of protection enabling her, as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life in the context of her sterilization”.²¹² Despite the fact that the Court recognized in its reasoning the vulnerable condition of the Roma woman, it did not specify that this was a case of discrimination. Instead, it examined the case only under the Article 3 and 8 of the Convention.

This case is presenting a practice which affected probably more than a hundred thousand of Roma women in Central Europe since 1980’s, including in Czech Republic, Slovakia, and Hungary. The Roma women had been sterilized against their will solely because they are Roma.²¹³ An explicit reference to the issue of discrimination in cases of forced sterilization is substantial. Furthermore, a clear explanation about the link between the forced sterilization and multiple discrimination based on the grounds of gender and ethnicity/race is indispensable for addressing the complexity of the issue. This would develop a legal precedent in the field, a step forward in preventing further practices of biased medical personnel.

*B.S.v Spain*²¹⁴ is another ECtHR judgment in which the applicant claims she has been discriminated against based on the grounds of sex, race and profession. In this case, the applicant is a woman of African origin, working as a prostitute on a public highway. She alleged several incidents when police officers were asking her to leave the place where she was working and when finding her back in the same place, applied physical force, using truncheons, provoking injuries to the applicant. She claims that during one of the disputes, a police officer verbally

²¹² Ibid., paras. 121-122

²¹³ Albert Gwendolyn, *Forced Sterilization and Romani Women’s Resistance in Central Europe*, DifferenTakes, Population and Development Program, Publication No. 71, Hampshire College (2011), <http://popdev.hampshire.edu/sites/default/files/uploads/u4763/DT%2071%20Albert.pdf>.

²¹⁴ B.S. v Spain, No. 47159/08, ECtHR (2012).

insulted her, saying “get out of here you black whore” in front of several witnesses. She adds that the other women working in the same area, carrying out same activities but with a “European phenotype” were not approached by the police officers. The applicant argued that being a black woman working as a prostitute made her extremely vulnerable to discrimination. Furthermore, these factors cannot be considered separately but together, since the interplay between the two grounds are important in fact finding and examination.²¹⁵ The Strasbourg Court found a violation of Article 3 in conjunction with Article 14 of the Convention, stressing out that the national courts “failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute.”²¹⁶ The Court added that the authorities did not take all measures to assess if a discriminatory behavior influenced the incident under Article 3 in conjunction with Article 14 of the Convention.²¹⁷ This case denotes the authorities’ lack of fulfilment of the obligation to ensure special protection to disadvantaged persons who may face multiple discrimination.

Comparing to the ECtHR approach to multiple discrimination, focusing on the vulnerability of the women who are in a disadvantaged situation, the South African Constitutional Court has a different reach to the matter. Most of its decisions on the subject are related to cases involving Black women. They are the most disfavored because of their race and gender, especially in relation to customary laws, which are still existent. In a lot of African countries these laws deprive women of the right to inherit, to own property, land or even the right over their children.²¹⁸ These cases reflect how the customary law contradicts the South African constitutional provisions on equality.

²¹⁵ Ibid., para 52

²¹⁶ Ibid., para 62

²¹⁷ Ibid.

²¹⁸ See the Pastory case (1992) & Tanzania and the Magaya case (1999), Zimbabwe.

The below cases will provide the South African Constitutional Court's view on situations when women are powerless in the hands of a discriminatory system.

In *Gumede v President of the Republic of South Africa and Others*²¹⁹ the applicant submitted a claim of unfair discrimination on the grounds of race and gender against women who are in customary marriages and decide to divorce. The case was initially addressed to the High Court. The applicant was a woman who divorced after 40 years living with her husband and their four children. Their marriage was not officially registered but conducted under customary law. The applicant was never employed since her husband had forbidden her to work, so she was responsible for household maintenance and children's care. She states that the family acquired two houses during their life together as spouses.

Based on the customary law in the province of the applicant, the women who terminate their customary marriage cannot have access to and control the property detained with their husbands during the marriage. It has to be specified that the applicant had neither place to live in after the termination of the marriage nor another family to take care of her.²²⁰ The applicant asked the Court to invalidate the customary provisions and namely that the man is the head of the family and owns all its property. The High Court decided that the customary law was discriminatory in this case on the grounds of gender and race and violated the principle of equality proclaimed by the South African Constitution in Section 9(3) and (5).²²¹

The Constitutional Court highlighted the Section 6 of the *Recognition Act* while analyzing the equality issue in the case. It affirmed that "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the

²¹⁹Gumede v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC), Constitutional Court, South Africa (2008).

²²⁰ Ibid., paras 6,7.

²²¹ Ibid., para 2

marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.” (Emphasis added by the Constitutional Court.). The Court is also pointing out the contradictions to this act, referring to some customary norms which position the man as the head of the family and owns the property and that all family members should obey to him.²²²

The Constitutional Court found that the customary law provisions unfairly discriminate against the applicant and other women which are in similar condition. Comparing to the ECtHR approach to multiple discrimination, the South African Constitutional Court is focusing as well on the dignity of the women along with the vulnerability. It says that the mentioned customary laws render them poor. It also has a broader look to the issue, being in the position to cancel laws which are discriminatory against women because of their race and gender.

This case thoroughly exemplifies how a woman is in the position to be discriminated based on her gender since only men can own property and rule the family but also based on their race, since these type of customary rules are applied only in certain provinces, usually where black people live, as a continuation of the pre-colonial system.²²³

The next two cases, *Bhe and Others v The Magistrate, Khayelitsha and Others*²²⁴ and *Shibi v Sithole and Others*²²⁵ also concern the invalidation of customary law but in regard to the laws of male primogeniture. In the *Bhe* case, the law is challenged by a widow in the name of her two daughters and in the interest of all female descendants. After her husband died, her father in law decided to sell all the goods they had to cover the expenses of his sons’ funeral. It has to be mentioned the applicant and the deceased husband had never entered into any type of official or

²²² KwaZulu Act, Section 20 and the Natal Code, Section 20, 22, Province of KwaZulu-Natal, South Africa

²²³ Gumedde v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC), paras 16-19, Constitutional Court, South Africa (2008).

²²⁴ Bhe and Others v The Magistrate, Khayelitsha and Others, Case CCT 49/03.

²²⁵ Shibi v Sithole and Others, Case CCT 69/03.

customary marriage. Thus, the question regarding the legal condition of the daughters appeared in the dispute before the Cape Town High Court, which established that the children do not have extra-marital status. Under the *Black Administration Act*²²⁶, which asserts the customs of the Black people in South Africa, males are the only persons in a family who can inherit, because succession is a “principle of male primogeniture”.²²⁷

In the *Shibi* case, the applicant cannot inherit the property of her brother who died. The deceased was neither married, nor having children. The only surviving males in the family were two cousins (the respondents in the case). The deceased was an African, therefore his property falls under the coverage of Black Administration Act, section 23 (10) which decides the way the estates of the blacks should be administered.

These cases challenged and succeeded to overturn the rule of male primogeniture applied in African customary law of inheritance. It was challenged the Section 23 of the Black Administration Act and the regulations 1(4) (b) of the Intestate Succession Act²²⁸. In its decision the Constitutional Court endorsed applicants’ claims, dismissed the disputed laws and set the new laws and system which will regulate the succession in case of properties owned by Africans. The Constitutional Court upheld that the contested Section 23 of the Black Administration Act “construed in the light of its history and context, is an anachronistic piece of legislation which ossified official customary law and caused egregious violations of the rights of black African persons”. The court added that the Section 23 and its regulations are “manifestly discriminatory and in breach of the rights to equality in section 9(3) and dignity in section 10 of our Constitution, and therefore must be struck down. The effect of this order is that not only are the

²²⁶ The Native Administration Act, No 38 (1927), subsequently renamed the Black Administration Act 38 (1927).

²²⁷ *Bhe and Others v The Magistrate, Khayelitsha and Others CCT 49/03 and Shibi v Sithole and Others CCT 69/03*, Para 3, (2004).

²²⁸ The Intestate Succession Act, 81, Section 1(4) (b) (1987).

substantive rules governing inheritance provided in the section held to be inconsistent with the Constitution, but also the procedures whereby the estates of black people are treated differently from the estates of white people are held to be inconsistent.” The judgments also assert that the customary laws “unfairly discriminates against women”, thus are declared invalid and unconstitutional.²²⁹

The decisions in these two cases are historically significant as they came to combat, or at least diminish the discrimination to which women are subject not only on the base of their gender but also of their race. The reason for such discrimination is endorsed by the fact that the black women are those subject to customary system in South Africa. These cases show how a law responded to the sensitive issue of multiple discrimination.

Other instances of multiple discrimination against women on the grounds of gender and race occur in situations when the culture or religion²³⁰ of certain ethnic groups are the reasons for unfair treatment. The *KZN MEC of Education v Pillay*²³¹ case concerns a girl (Sunali Pillay) who appeared to school with a nose stud. The school forbade her to wear the nose stud during the classes, as contravening to the school regulations. The applicant stated that this practice is part of her South Indian Tamil Hindu culture²³², very interrelated with the Hindu religion.²³³ She is coming from a South Indian family and practicing this ritual contributed to the maintenance of the cultural identity, allowing women to keep the traditions.²³⁴ According to this practice, a

²²⁹Media summary, Bhe and Others v The Magistrate, Khayelitsha and Others CCT 49/03 and Shibi v Sithole and Others CCT 69/03, (2004), <http://www.saflii.org/za/cases/ZACC/2004/17media.pdf>.

²³⁰ Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (South African Constitutional Court) (2009).

²³¹ CCT 51/06 Handed down: 5 October 2007.

²³² Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99, Para 11, MEC for Education, (CC) (2007).

²³³ Ibid., Para 60

²³⁴ Ibid., Para 7

young woman gets the stud inserted to her nose when she is reaching the age of physical maturity, meaning that she is ready for marriage, an honorable tradition in the family.

The applicant challenged the school decision to the equality body which subsequently upheld the position of the school. In the appeal, the High Court dismissed the school decision, asserting that it amounted to unfair discrimination.²³⁵ The decision was appealed to the South African Constitutional Court. The Court found the school decision to be discriminatory against the applicant, since she could not exercise her cultural/religious practices while the other colleagues did.²³⁶ This decision was important to ensure diversity in the South African schools and protect the pupils against discrimination in relation to their cultural/religious customs.

Even though in the Pillay case the South African Constitutional Court did not explicitly refer to multiple discrimination and its effect in such situations, the judgment perfectly characterizes how a school regulation can unfairly discriminate against a young woman belonging to a minority ethnic/religious group. The judgment also reaffirms the need to reasonably accommodate cultural and religious differences of people who are of a different race/ ethnicity.

In comparison with the CoE and South African jurisprudence, who take more steps forward in addressing the issue of multiple discrimination, Moldova is at the beginning of its path. The newly established Equality Body has already started to review complaints alleging discrimination. However, by now there is not a single case claiming the assertion of multiple discriminatory treatment.

²³⁵ Ibid., para 17

²³⁶ Ibid., para 166

However, the Roma National Center²³⁷ identified and received complaints on cases of discrimination against Roma, including Roma women, on different matters: access to employment, health, social services, education, etc.

In one case, a Roma woman applied for the position of shop assistant in the village where she was living. When she came to the interview, the owner of the shop told her that probably he will not employ her, saying that “there is a big probability that you as gypsy will steal something from the shop”. He also added that probably the woman will make more children and will have to go on maternity leave, so this is another reason to not employ her²³⁸. This case encompasses the junction of discrimination on the grounds of gender and race. Based on his words, the employer would rather employ a non-Roma and probably a man who will not have to deliver a birth than a Roma woman. After several weeks, the Roma woman went to the shop and the employed shop assistant was a non-Roma man.

Since at that moment of the complaint the anti-discrimination law did not exist, the Roma National Center could not address this case to an equality body. But this example served as basis for a project which tested discrimination in employment upheld in Moldova in 2011-2012²³⁹ by the Roma National Center.

Another case concerns the right to access to education in which a Roma girl after graduating from secondary school decided to continue to high school in the same educational institution. The head of the school told her and her father that maybe they should look for another school since the program in this one is too complicated for her and she might not achieve good results. She school director suggested them to move to a school which is preponderantly attended by

²³⁷ Roma National Center is a human rights NGO, involved from 2009 in monitoring and litigating cases of discrimination and human rights abuses towards Roma in Moldova, available at www.roma.md.

²³⁸ Case registered by Roma National Center (2008).

²³⁹ Roma National Center, *Testing Discrimination against Roma*, Project Supported by UNDP Moldova (2012), <http://www.roma.md/ro/home/anunuri/115-concurs-de-angajare-consultant.html>.

Roma students. The school director added that the practice among Roma is that the girls drop out their studies as they have to marry and make children, so there is no sense to continue.²⁴⁰ The incident contemplates an institutional discrimination, where the persons who should encourage the students to study and are responsible for the education of a new generation invoke biased reasons to keep their school only for non-Roma students. This case exemplifies the double discrimination faced by Roma girls. The stereotype against them is that usually only some Roma boys graduate and the girls resign in early ages from their studies.

There are other cases involving Roma women who were refused to get an apartment for rent because of their ethnic origin²⁴¹ or who were discriminated by social assistants because of the number of their children, etc. Numerous reports show that Roma women are in a particular disadvantaged situation in Moldova²⁴², as in whole Europe, being totally absent in the decision making process and political life, facing discrimination in the access to public services.

Filing complaints before the equality body on such matters and building a legal precedent in Moldova will definitely contribute to the development of the matter locally and internationally.

By then, the equality body should certainly deepen its analysis on multiple discrimination and consult with institutions from different countries that already apply sanctions and expose their opinion in such cases (for instance the National Council of Combating Discrimination from Romania).

²⁴⁰ RESPECTING THE HUMAN RIGHTS OF ROMA IN MOLDOVA, ROMA NATIONAL CENTER, REPORT (2010), <http://www.roma.md/ro/rapoarte.html>.

²⁴¹ Cristina Zavatin, A refuzat să-i dea chiria, pentru că e romă (Refused to offer her the rent, because she is a Roma), Newsletter, Ethnic Minorities (16.01.2013), <http://discriminare.md/a-refuzat-sa-i-dea-chiria-pentru-ca-e-roma/>.

²⁴² VASILE CANTARJI, MARIA VREMIȘ, VIORICA TOARTĂ, NATALIA VLADICESCU, ROMII DIN REPUBLICA MOLDOVA IN COMUNITATILE COMPACT POPULATE DE ROMI 14-19 (ROMA FROM MOLDOVA IN THE COMPACT POPULATED AREAS BY ROMA), UNDP MOLDOVA, CHISINAU (2013), http://www.un.md/key_doc_pub/Raport_ROMA_rom2013.pdf.

CONCLUSIONS

The thesis aimed to investigate the existent legislation on equality, non-discrimination and how it is applied in the context of multiple discrimination against women, on the grounds of race and gender. It also sought to examine case law and opinions on the intersection of race and gender in cases which affect women.

The thesis found that the international specialized legislation has already included the concept of multiple discrimination in its provisions. The research also established that the judicial and equality bodies started to include their opinion about multiple discrimination against women in their reasoning even though it is not explicitly part of the judgment. When it comes to the intersection of gender and race, they do not precisely invoke it as a ground of discrimination but rather refer to it as an issue to which the states should pay more attention.

Nevertheless, the attempts of the ECtHR and South African Constitutional Court to acknowledge the vulnerable status of women of a certain ethnic or racial background, bring the issue of multiple discrimination into the light. Therefore, it creates an open floor for the litigators to address the issue without reluctance. More than that, the special attention to the issue, contributes to the development of jurisprudence in the field and serve as example for other legislative, judicial bodies when enacting laws or delivering judgments, opinions, etc.

The present research also affirms that the equality debate is more complex. In assessing a case, the equality and judicial bodies should value the individual independently and not on the basis of the group he is living in. The reason is that such an interpretation would fail to take into consideration the true identity of the individual and accommodate diversity. It would rather focus on the majority identity and not explore the aspects of multiple discrimination.²⁴³

²⁴³ Paola Uccellari, pp. 44-45

That is why, it is extremely important that when policies and laws are designed, they should correspond to multiple identities and disadvantage.²⁴⁴

Since the equality law should ensure social inclusion, accommodate tolerance and diversity, several measures should be regarded as to protect women against oppression and inequality.

First of all the Governments should pay a particular attention and investigate the cases of multiple discrimination. They should also consult with relevant non-governmental organizations, experts about the possible situations of multiple discrimination against women. Based on the gained input and expertise they should design and implement proper regulations.

The governments should monitor the gender sensitive policies which disadvantage women belonging to certain categories in society, amend or cancel them.

Another recommendation for governments is that they should provide trainings to legislators, judicial bodies about the accommodation of diversity in their laws and judgments, especially focusing on the multiple discrimination against women. This would eliminate as well the sexists and racist stereotypes against women among the responsible bodies.

To amplify the developments in tackling multiple discrimination against women, the human rights international bodies should also increase their efforts in this respect. For instance, the United Nations system should mainstream the analysis of intersectional discrimination against women into its human rights mechanism, treaty bodies, thematic rapporteurs, working groups etc. A special emphasis should be put on the Committee on Economic Social and Cultural Rights (CESCR), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on Racial Discrimination (ICERD), the Committee against Torture (CAT), Human Rights Committee (HRC) and their review mechanism bodies, which are responsible for delivering country observations and recommendations. They should point out the issues of

²⁴⁴ Ibid., p. 45

multiple discrimination and ask the member states to perform advanced investigation and analysis on human right violations intersecting the gender and race aspects.

Last but not least, the lawyers, litigators and the human rights organizations should extensively invoke multiple grounds of discrimination in their claims. They should also deliver legislative proposals or initiatives to discuss the issue at governmental level for possible policy design.

By protecting women from multiple discrimination, the society will be “free from gender oppression and inequality”.²⁴⁵

²⁴⁵ Vision of the Commission, South African Commission for Gender Equality,
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