



# Let's play courtroom – How do we fight against multiple discrimination?

by Barbara Giovanna Bello

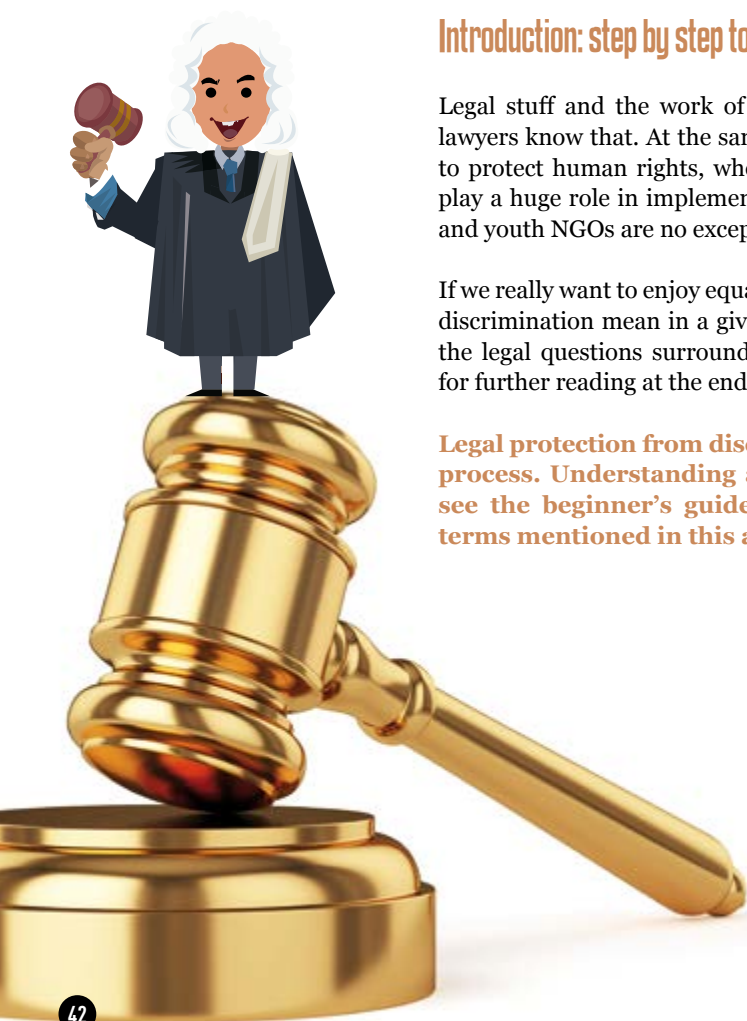


## Introduction: step by step towards equality

Legal stuff and the work of lawyers can be very boring and heavy, even lawyers know that. At the same time, knowing legal stuff can be very useful to protect human rights, whether they are yours or someone else's. NGOs play a huge role in implementing human rights and antidiscrimination law and youth NGOs are no exception to this rule.

If we really want to enjoy equality, we need to know what “equality” and non-discrimination mean in a given legal context. This article aims at clarifying the legal questions surrounding multiple discrimination, with suggestions for further reading at the end of the contribution.

**Legal protection from discrimination has been a slow, step-by-step process. Understanding all the arguments is worthwhile. Please see the beginner's guide article for definitions of some of the terms mentioned in this article.**



The general statement that “all human beings are equal in front of the law”, which affirms the principle of “formal equality”, was considered as a huge achievement in the fight against blatant forms of direct discrimination against people belonging to certain groups. After this principle was integrated into law, it became clear that differences which were preventing people from accessing services and opportunities on equal footing were not taken into consideration.

The legal principle of substantive equality recognises that law, policies and practices that try to suit everyone are apparently neutral and non-discriminatory, but fail to address the specific needs of certain people. In fact they can be indirectly discriminatory.

In the same way, it became increasingly clear that people can be discriminated against on more than one ground. However law, policies and practices are mainly based on a single-ground approach and are therefore inadequate to fight multiple discrimination. This depends on many factors:

- a.** international, European and national legislations adopted different approaches towards the protected grounds (gender, ethnic origin, etc.). For example, the EU antidiscrimination directives limit protection against a limited number of grounds and cases cannot be litigated on other grounds or on a “combination” of more than one ground. In this perspective, the European Convention on Human Rights (ECHR)<sup>1</sup> opens up more possibilities because it bans discrimination based on an open-ended list of grounds;
- b.** victims of multiple discrimination, as well as legal practitioners, lack awareness of this kind of discrimination;
- c.** law practitioners choose to litigate cases on the discrimination ground that is most likely to “win”;
- d.** it is not clear whether evidence that unequal treatment does not amount to discrimination should be given concerning all the discrimination grounds involved or just some of them.

## Does the law cover multiple discrimination?

“It depends on...”, this is what a lawyer would answer if asked whether the law covers multiple discrimination. In fact, the scope of antidiscrimination law changes depending on the context and what is not written in the legal texts has been sometimes interpreted by judges in an extensive way.

This means that the definitions of discrimination and the recognised grounds need to be contextualised in order to know whether and how “multiple discrimination” cases can be litigated.

The United Nations Fourth World Conference on Women in Beijing (1995) is commonly credited as the event where “multiple discrimination” was first discussed in an international context. On that occasion, it was demonstrated that minority women face “multiple barriers” around the world. The topic has then been brought to the fore of many international debates ever since, such as at the Beijing+5 Global Feminist Symposia and the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa in 2001. At this last conference, the concept of multiple discrimination was explicitly addressed in the final declaration and the programme of action. Another recent example of progress is the UN Convention on the Rights of Persons with Disabilities which recognises<sup>2</sup> “that women and girls with disabilities are subject to multiple discrimination, and in this regard [Parties] shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms” (Article 6).

1. Council of Europe, 1950. Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

2. United Nations, 2006. Convention on the Rights of Persons with Disabilities. Available at: [www.un.org/disabilities/convention/conventionfull.shtml](http://www.un.org/disabilities/convention/conventionfull.shtml)

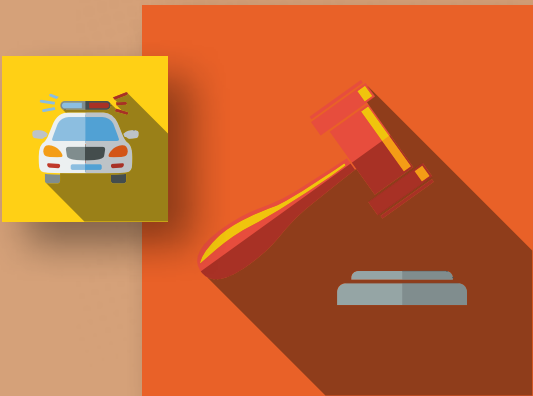


# Let's play courtroom — How do we fight against multiple discrimination?



Within the Council of Europe, no binding document encompasses multiple discrimination. However, the ECHR does not hinder the possibility to litigate cases of multiple discrimination because its Article 14 bans discrimination on a non-exhaustive list of grounds and this provides the pre-condition for covering multiple discrimination. The recognised grounds are sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The limit of the ECHR though consists in the fact that discrimination is prohibited only in relation to the rights and freedoms provided for in it (freedom of expression, right to a fair trial, etc.). Protocol 12 to the ECHR<sup>3</sup> extends the protection from discrimination beyond the ECHR, but as of 2014, it has been ratified by just 18 member states out of 47. In addition, Article E of the revised European Social Charter<sup>4</sup> states that the rights set forth in the Charter are without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. Among other treaties, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence,<sup>5</sup> which entered into force

on 1 August 2014, has the potential to protect against multiple discrimination. Even if it does not explicitly address this kind of discrimination, its explanatory report stresses that “migrant and refugee women may also be excluded from support services because of their residence status. It is important to point out that women tend to experience multiple forms of discrimination as may be the case of women with disabilities and/or women of ethnic minorities, Roma, or women with HIV/Aids, to name but a few. This is not different when they become victims of gender-based violence.” In the light of this convention and its explanatory report, “violence against women” is considered as a violation of human rights and a form of discrimination against “all” women. Among non-binding documents, the Committee of Ministers Recommendation to member states on measures to combat discrimination on the grounds of sexual orientation and gender identity (Recommendation CM/Rec(2010)5)<sup>6</sup> urges the states “to take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including on grounds of sexual orientation or gender identity; national human rights structures should have a broad mandate to enable them to tackle such issues” (paragraph 46).



In the European Union the Charter of Fundamental Rights of the European Union signed in Nice in 2000<sup>7</sup> and with a binding effect since the entry into force of the Treaty of Lisbon on 1 December 2009, covers the following grounds: 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. Secondary legislation, however, covers a narrower and fragmented list of grounds:

- Directive 2000/43/EC<sup>8</sup> – Racial Equality Directive, prohibits discrimination based on racial or ethnic origin in the labour market; education; membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession; social protection, including social security and health care; social advantages; access to and supply of goods and services which are available to the public, including housing;
- Directive 2000/78/EC<sup>9</sup> – Employment Equality Directive establishes a framework for equal treatment in employment and occupation, on the grounds of religion or belief, disability, age or sexual orientation;
- Directive 2004/113/EC<sup>10</sup> provides a framework for equal treatment between men and women in the access to and supply of goods and services;
- Gender Recast Directive 2006/54/EC<sup>11</sup> enforces the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

### In EU antidiscrimination legislation, there are the following protection gaps:

😊 areas covered by antidiscrimination law    😞 areas not covered by antidiscrimination law

	Directive 2000/43	Directive 2000/78	Directive 2004/113 and Directive 2006/54
	Racial ethnic origin	Religion or belief, age, sexual orientation, disability	Gender
Employment and occupation	😊	😊	😊
Education	😊	😊	😞
Social security	😊	😞	😊
Health care	😊	😞	😞
Housing	😊	😞	😊
Goods and services	😊	😞	😊

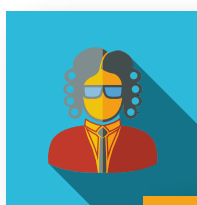
On 2 July 2008, the Proposal for a Horizontal Directive was presented by the European Commission to try to eliminate the hierarchy of discriminatory grounds and to abolish the discrepancies between the objective scopes of Directive 2000/78/EC and Directive 2000/43/EC. Despite the attempts to discuss and redefine its content, the proposal is still frozen.

7. [www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)  
8. Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>  
9. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>  
10. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:en:HTML>  
11. Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:EN:PDF>

3. Council of Europe, 2000. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177). Available at: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>  
4. The text of the European Social Charter is available at: [www.coe.int/t/dghl/monitoring/socialcharter/presentation/escrbooklet/English.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/escrbooklet/English.pdf)  
5. Council of Europe, 2011. Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210). Available at: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>  
6. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies). Available at: [www.coe.int/t/dg4/legislation/reccm2010\\_5\\_EN.asp](http://www.coe.int/t/dg4/legislation/reccm2010_5_EN.asp)



## Let's play courtroom — How do we fight against multiple discrimination?



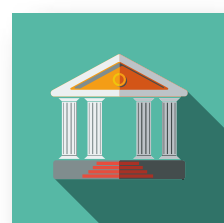
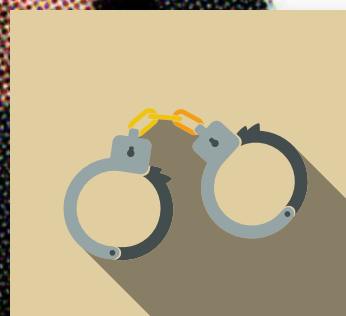
A couple of legal instruments also fill in some gaps concerning third-country nationals residing in the EU and can help fight against multiple discrimination against them: Directives 2003/109, ensuring that long-term residents enjoy equal treatment with nationals in areas such as employment, education, social protection, tax benefits, etc. (Art.11); and Directive 2011/98 granting third-country workers legally residing in a member state a common set of rights, “based on equal treatment with nationals” (Art. 1.b).

### Why is it so difficult to combat multiple discrimination?

There are several factors that interconnect to make it difficult to litigate cases of multiple discrimination:

- the lack of harmonisation of EU antidiscrimination protection and the hierarchy of recognised grounds (how can we litigate multiple discrimination if one ground of discrimination is covered by the law and another is not?);
- only multiple discrimination occurring to women was taken into account by Directives 2000/43 and 2000/78, whereas the combination of other grounds is not mentioned;
- when implementing the EU antidiscrimination directives, only a few states took into consideration multiple discrimination (Austria, Bulgaria, Croatia, Germany, Greece, Italy, Poland, Romania, Spain and the United Kingdom) and for even those it is not sufficiently in depth;
  - the fact that lawyers often prefer to litigate discrimination cases by picking only the ground of discrimination that is most likely to be successful before national courts;
    - lack of awareness by lawyers and judges of national antidiscrimination law and in particular that regarding multiple discrimination;
    - European Union equality bodies were only established under Directives 2000/43/EC and 2006/54/EC. Few member states entrusted equality bodies with a holistic and multi-ground agenda (see [www.equineteurope.org/](http://www.equineteurope.org/)).

There are many questions to be answered about the burden of proof in cases of intersectional discrimination, the justification of discrimination, the adequate remedies and the suitable methods of comparing cases of multiple discrimination.



### What can youth NGOs do?

Antidiscrimination law and the fight against multiple discrimination are not just for lawyers. Without civil society exerting bottom-up pressure to extend antidiscrimination law and enforce it, lawyers have a very hard life. Youth NGOs can play a tremendous role in raising awareness, lobbying and advocating for an end to multiple discrimination.

Here are some suggestions that youth NGOs might want to explore (to be taken in conjunction with those in Mara Georgescu’s article “Work in progress: youth work addressing multiple discrimination”). Youth NGOs can:

- integrate the concept of multiple discrimination into their own statutes and regulations or equality policy;
- write letters to local, national and European authorities to ask to extend the national law to cover multiple discrimination or to recognise an open-ended list of grounds for discrimination;
- launch a campaign against multiple discrimination;
- apply for projects encompassing an intersectional approach and the concept of multiple discrimination. They can collect data on how multiple discrimination affects young people. Since discrimination occurs in different ways depending on the context, different types of data can help to map the situation on a larger scale. For example, Muslim women are not discriminated against in a Muslim country because they wear the veil, but they might be when they move to or grow up in a non-Muslim country. They experience a kind of discrimination that is qualitatively different both from Muslim men and non-Muslim women. Research carried out in different countries may reveal different target groups at risk of multiple discrimination;
- act as paralegals and co-operate with human rights lawyers and equality bodies and provide them with cases of multiple discrimination or measures to combat discrimination;
- work with victims of multiple discrimination to raise awareness about this form of discrimination and support them to find legal aid for these cases;
- organise situation testing;
- get engaged in the monitoring and reporting systems of international legal documents and in the collective complaints procedure regulated by the revised European Social Charter to “mainstream” the intersectional approach.

It goes without saying that this is itself an open-ended list and just a starting point to fighting against multiple discrimination in your own communities.

### Further reading

- Bello B.G. (2013), “Multiple Discrimination: Challenges and Potentialities”, Presentation at the seminar for legal practitioners “Applying EU Anti-Discrimination Law” (113DV14), European Academy of Law, 23 April 2013. Available at: [www.era-comm.eu/oldoku/Adiskri/11\\_Multiple\\_discrimination/Bello\\_Trier\\_April\\_2013\\_EN.pdf](http://www.era-comm.eu/oldoku/Adiskri/11_Multiple_discrimination/Bello_Trier_April_2013_EN.pdf)
- Danish Institute of Human Rights (2007), *Tackling multiple discrimination – Practices, policies and laws*, Office for Official Publications of the European Communities, Luxembourg.
- European Union Fundamental Rights Agency (2011), *Handbook on European non-discrimination law*, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/1510-FRA-CASE-LAW-HANDBOOK\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf).
- Lewis T. (2010) *Multiple Discrimination. A Guide to Law and Evidence*, Available at: [www.londonlawcentre.org.uk/pdfs/Multiple%20Discrimination%20Guide.pdf](http://www.londonlawcentre.org.uk/pdfs/Multiple%20Discrimination%20Guide.pdf).
- Makkonen T. (2002), *Multiple, compound and inter-sectional discrimination: bringing the experiences of the most marginalised to the fore*. Institute for Human Rights, Åbo Akademi University.

