Multiple Discrimination
Addressing Complex Discrimination in a Complex Society

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Abstract

This thesis show how the European Community, through legislation and case law, is addressing the problem of multiple discrimination and what the possible solutions to it are.

Multiple discrimination describes a situation where an individual experiences discrimination on more than one ground. This can occur in two different ways; additive or intersectional. Additive discrimination describes a situation where an individual is discriminated against on more than one ground and these grounds are added on top of each other. Intersectional discrimination explains how an individual’s multiple identities may be the cause of discrimination in such a way that the grounds for discrimination cannot be considered separately.

Expanding the list of grounds in Article 13 EC could help multiple discrimination claims but cannot be seen as the exclusive solution to such a complex problem. Many more problems surround multiple discrimination claims. One is to find an adequate comparator in order to prove discrimination. Another is that the case law shows a higher rate of success for plaintiffs claiming only one ground of discrimination even if they have experienced multiple discrimination, causing a disparity between the facts of the case and the reality experienced by the plaintiffs.

In conclusion, such a complex matter cannot be solved by one simple solution but the Community would benefit from an explicit prohibition as well as a common definition of multiple discrimination.
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1. Introduction

The year 2007 was made the year of equal opportunities for all by the European Commission.¹ This was an effort to combat discrimination in the European Community, making sure that all its citizens are treated equally regardless of sex, ethnic origin, sexual orientation or other such characteristics. Discrimination of individuals is generally thought to be based on one characteristic but there are more complex and severe situations where people are treated unfavourably on the basis of several such characteristics. This is called multiple discrimination. The awareness of this problem has grown increasingly, and with it, the will to combat it. However, there is still no common definition of the problem in Community law, nor is it explicitly prohibited.

A democratic society demands that all its citizens be treated as equals and the relevant legislation is one tool to make it so. The question then becomes whether the current law is sufficient to deal with a concept of discrimination not available at the time of the drafting of those same laws. As complex as we are as human beings, the problem of multiple discrimination is equally complex. Unless the problem is addressed and dealt with, the people being treated the most unfairly risk being left without any judicial recourse.

1.1 Aim of Thesis

The aim of this thesis is to investigate problems concerning multiple discrimination. We begin by establishing what this problem entails and why it is a problem. Furthermore, we analyse how it is addressed and dealt with by Community law and whether the legislation is sufficient. As such is not the case, possible solutions to the problems are presented.

1.2 Method

This investigation from a legal perspective is based on the relevant Community legislation as well as scholarship. We also analyse cases from the European Court of Justice and investigate a

number of discrimination cases from the United Kingdom in order to determine the current state of law.

Multiple discrimination was first judicially recognised in the United States where there has been an interesting development there in the case law. The current solution created by the American courts is of relevance since one of the aims of this thesis is to investigate possible solutions to the problem of multiple discrimination. The reason for investigating a nation outside the Community is therefore to establish whether or not this could be an appropriate solution for the European Community as well as for the United States.

1.3 Limitation

Due foremost to space and time limits, certain limitations are made here. We have chosen to investigate mostly cases concerning multiple discrimination from the United Kingdom as there is not enough time or space, to investigate all domestic cases from all the Member States of the Community. The United Kingdom has interesting cases concerning our topic and the problem of multiple discrimination can be investigated through these.

Moreover, when investigating possible solutions to multiple discriminations, parts of the United States case law have been researched. The authors of this thesis recognise that there are other nations that would also be interesting for this thesis, such as Canada. However, due to the reasons discussed above, the number of nations have been limited to simply the United States.

We have also chosen to focus on the European Charter of Fundamental Rights2 and the European Convention on Human Rights3 (ECHR) and not to include, for example the Social Charter of the European Union. We find it enough to analyse the ECHR and the Charter of Fundamental Rights in order to establish the facts relevant to this thesis.

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2 Charter of Fundamental Rights of The European Union.
2. Development and Definitions

2.1 Legal Development

Community discrimination law was primarily developed to prohibit sex discrimination in the field of employment.\(^4\) Since then, dramatic changes have occurred in this area, especially with the inclusion of Article 13 EC in the treaty of Amsterdam.\(^5\) Of great significance has also been the European Court of Justice’s recognition of the principle of equal treatment as a fundamental principle of Community law.\(^6\)

The term multiple discrimination was first introduced, however, in the United States by African American women, foremost Kimberlé Crenshaw, in the 1980s. They criticized how the legislation only dealt with one ground of discrimination and not the combination or the addition of more grounds. They therefore found that the legislation did not properly address the type of discrimination suffered by many African American women.\(^7\)

Since then there has been an enhanced recognition of the problem of multiple discrimination worldwide. A report from 2000 by a group of experts of the United Nations, addressed the problem of multiple discrimination. It recognised a demand of a greater understanding of the full complexity of discrimination against women “including the intersection of the various different forms of such discrimination.”\(^8\)

The European Parliament had encouraged for a long time the strengthening of policies concerning equal treatment across all grounds of discrimination.\(^9\) In the year 2000 the Council of the European Union (The Council) gave a decision in which they recognised, among other things, the importance of equal treatment, especially since women are often exposed to multiple discrimination.\(^10\)

\(^9\) Council Decision 2000/750 establishing a *Community action program to combat discrimination*, at recital 2.
\(^10\) Ibid. at recital 4.
The European Commission made the year of 2007 the “European Year of Equal Opportunities for All”. This is part of a resolute effort to combat discrimination, to celebrate diversity and to ensure equal opportunities to all.

2.2 The Concepts of Discrimination

The concept of direct discrimination has been defined by the European Court of Justice as the “application of different rules to comparable situations or the application of the same rule to different situations.” Furthermore, in the directives concerning discrimination it is established that direct discrimination is when a person is treated less favourably than another, based on the grounds against which discrimination is prohibited, for example sex or ethnic origin.

Indirect discrimination on the other hand occurs when individuals of a protected group are indirectly put at a disadvantage from an apparently neutral practice while others seem not to be affected. The effects, rather than the rule itself, are considered. This is, however, unless it can be proven that such a rule is objectively justified, proportionate and necessary.

Multiple discrimination is one of many terminologies used to describe several interacting forms of discrimination. Other terms commonly used are ‘cumulative discrimination’, ‘double discrimination’ and ‘compound discrimination’. What all of these terms describe is a situation where a person is discriminated against on several grounds at the same time. For instance, a person can be discriminated because she or he is disabled, has a particular belief and is homosexual.

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12 Ibid.
16 Makkonen Timo, Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore, pp 9-10.
17 Ibid.
On the other hand, the terminologies are used differently by different scholars and in some cases may be very ambiguous. Therefore, throughout this thesis, the terms multiple, additive and intersectional discrimination will be used. Multiple discrimination will be used as an overall term to describe discrimination occurring on more than one ground. Multiple discrimination can also occur in two different ways; in an additive and intersectional way.

2.2.1 Additive Discrimination
When a person experiences additive (or double/compound) discrimination she or he is discriminated on two or several grounds at the same time. One ground is added to another, creating an added burden on that individual.

A person, for instance, can be discriminated on the grounds of ethnic origin and gender. On a segregated labour market some jobs can be considered more appropriate for men, like extremely demanding physical jobs. Other jobs related to national security might be considered only for non-immigrants due to the great importance of the nations and its citizen’s interest. On these particular labour markets it would be very difficult for an immigrant woman to find a job because of additive discrimination.

The case Perera v Civil Service Commission from the United Kingdom gives an example of additive discrimination. Perera applied for a job where the employer had numerous requirements on the potential employee. Several factors resulted in that Perera was not offered the job: his English language skills, his nationality, age and experience in the United Kingdom.

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18 Makkonen Timo, Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore, p 9.
19 Moon Gay, Multi-dimensional discrimination: Justice for the whole person, Justice, p 1, Hannett Sarah, Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination, p 66.
20 Hannett Sarah, Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination, p 68, and Makkonen Timo, Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore, pp 10-11 (Makkonen uses compound instead of additive), Moon Gay, Multi-dimensional discrimination: Justice for the whole person, Justice, p 1.
21 Hannett Sarah, Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination, p 68, Makkonen Timo, Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore, p 11.
22 Makkonen Timo, Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore, p 11.
23 Ibid.
One of these factors did not prevent him from getting the job, but the more “negative” factors he had, the less likely he was to get the job.\textsuperscript{25}

\subsection*{2.2.2 Intersectional Discrimination}

Intersectional discrimination has been defined as a “combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone”.\textsuperscript{26} In other words intersectional discrimination differs from additive discrimination in that the grounds upon, which the discrimination is based, are inseparable. An example of a person exposed to intersectional discrimination can be a black woman. She is not discriminated because she has a different race or a different sex; she is discriminated because she is black and a woman at the same time.\textsuperscript{27}

Another example is a disabled woman who can experience discrimination that a disabled man or a woman without a disability would not. If disabled women are forced by governmental authorities to undergo sterilization, the same would not be demanded of women in general or disabled men, consequently they would not be discriminated against in the same manner.\textsuperscript{28} This discrimination would only occur because of the combination of both sex and disability.

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\textsuperscript{25} Moon Gay: \textit{Multiple discrimination – problems compounded or solutions found?} p 4.
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\textsuperscript{28} Makkonen Timo, \textit{Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore}, p 11.
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3. Community Legislation

In the area of anti-discrimination, the current Community legislation consists of primary and secondary legislation. Of paramount importance is case law from the European Court of Justice and the Advocate General’s opinions. Decisions taken by the Council and the General Principles of Community law are also of large importance. The European Charter of Fundamental Rights and the European Convention on Human Rights are also of great value in giving a broader perspective of Community discrimination legislation.

3.1 Primary Legislation

The primary legislation in the anti-discrimination area consists of the Treaty Establishing the European Community (EC Treaty). It consists of a number of articles that aim to combat discrimination and promote equal treatment between men and women. The Community’s policies in the field of discrimination are mainly based on Article 13.\(^\text{29}\) It contains a general power for combating discrimination\(^\text{30}\) and is not to be applied when more specific legislation is applicable.\(^\text{31}\) Article 13 specifies against which groups discrimination is forbidden: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.\(^\text{32}\) Through Article 13, the Community has the competence to safeguard these interests; however, the article has not been given direct effect.\(^\text{33}\)

The task of the Community which is expressed in Article 2, is to set up “a common market and an economic and monetary union.” Included in this task is the promotion of equality between men and women. To achieve the goals in Article 2, Article 3 contains several activities that the Community is supposed to set out. Included in these activities is the aim to eliminate inequalities and promote equality between men and women.\(^\text{34}\)


\(^{31}\) Article 13 EC Treaty.

\(^{32}\) Ibid.


\(^{34}\) Article 3.2 EC Treaty.
3.2 Secondary Legislation

The secondary legislation consists of a number of directives regarding equality and equal treatment. The new Race Directive and Framework Directive from the year of 2000 have especially changed the anti-discrimination law within the Community.\(^{35}\) The secondary legislation also consists of decisions taken by the Council.

3.2.1 Directives

Many directives in the equal treatment and discrimination areas have been adopted over the years. One that was first out in 1975 was the Equal Pay Directive.\(^{36}\) The purpose was to eliminate discrimination emerging from laws that breached the Treaty principle of equal pay for men and women.\(^{37}\)

The Equal Treatment Directive from 1976 concerned equal treatment with regard to working conditions.\(^{38}\) Thereafter directives were adopted concerning equal treatment regarding social security, occupational pension schemes and self-employment.\(^{39}\)

In 2000, two new directives were adopted in the area of anti-discrimination; the Race Directive and the Framework Directive.\(^{40}\) This was to make it easier for discrimination victims to successfully assert rights.\(^{41}\) Discrimination based on race and ethnic origin is regulated by the Race Directive. Discrimination based on religion, belief, disability, age and sexual orientation in

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38 Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
the field of employment is covered by the Framework Directive. However, neither of the two directives covers sex discrimination.42

Through these two directives the notion of discrimination was expanded. At the same time it became necessary for the Member States to also pass the new Equal Treatment Directive 2002/7343 in order to bring sex discrimination into the fold.44 The new Equal Treatment Directive was a result of the expanded concept of discrimination.45 It amends the old Directive from 1976, but it does not replace it.46

On the 15th of August 2008 the Member States shall have implemented the new directive 2006/54/EC regarding the principle of equal opportunities and equal treatment in terms of employment.47 It is replacing four directives.48

None of the directives above expressly prohibit discrimination on several grounds. But in the preamble of the Race Directive and the Framework Directive it is recognised that several grounds can interconnect. In the preamble, at recital 14 of the Race Directive it states that

“In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should [...] aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”49

The existing Community law does not prevent the Member States from legislating a more favourable protection; thereby it enables prevention of multiple discrimination. Both the Race Directive and the Framework Directive allow the Member States to have a more favourable protection to the principle of equal treatment than the ones laid down in the directives.50

44 Gordon Richard, EC law in Judicial Review, p 479.
46 Ibid. p 478.
3.2.2 Council Decision Combating Discrimination

In the year 2000 the Council of the European Union took a decision establishing an action program to combat discrimination. The aim of this programme was, within Community competence, to “promote measures to prevent and combat discrimination whether based on one or on multiple factors”. Its objective was to deepen the understanding and heighten the awareness of the complex matter that is discrimination, and to develop the capacity to deal with this problem effectively. It encouraged an integrated approach to this problem that could not be sufficiently achieved by each Member State alone. To deal with this problem, it is written in the decision, is especially important since women are often exposed to multiple discrimination. Another important factor of this decision was that it clarified that no ground of discrimination is more important than another; “all are equally intolerable”. This means that no hierarchy among the grounds shall exist.

3.3 Other Legislation

In addition to the primary and the secondary legislation the general principles of Community law are of large importance. In the area of anti-discrimination the most relevant are the principle of equality and the principle of effective judicial protection. Other relevant legislations are the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights.

3.3.1 Principles of Community Law

The general principles of Community law are a source of law that can be found in the articles of the EC Treaty and in case law from the European Court of Justice. They are to fill the gaps of the treaty rules to gain a working legal order in the Community.

51 Council Decision 2000/750 establishing a Community action program to combat discrimination, Article 2.
52 Ibid. at recital 4-5, 17, Article 2, Article 4.
53 Ibid. at recital 5.
54 Ibid.
Throughout a number of cases the European Court of Justice has held that there are several general principles of non-discrimination in Community legislation.\(^{55}\) Furthermore, in \(P v. S\)\(^{56}\) the European Court of Justice stated that “the principle of equality [...] is one of the fundamental principles of Community law”.\(^{57}\) The principle therefore binds both the Community and the Member States. In order to fulfil the obligations under Community law the Member States are thereby obliged to secure equality among its citizens.

Related to the fundamental principle of equality is the principle of effective judicial protection. This principle states that everyone in the Community, whose rights have been violated, has the right to an effective remedy before a tribunal. This principle can be found in the European Charter of Fundamental Rights Article 47 and in the ECHR, Articles 6 and 13.

The right to an effective remedy has however gotten a more extensive protection within Community law. The European Court of Justice has through case law guaranteed a right to an effective remedy before a \textit{court}. In the judgement of \textit{Johnston} the European Court of Justice has stated that this principle is to be taken into consideration and it is applicable throughout the Community.\(^{58}\) It was in \textit{Johnston} that the European Court of Justice recognized that the right to an effective remedy is a general principle of Community law.\(^{59}\)

\subsection*{3.3.2 ECHR and Charter of Fundamental Rights}

All the Member States have ratified the ECHR and it is thereby binding.\(^{60}\) Alleged violations of the convention by Member States are tried by the European Court of Human Rights, whose decisions are legally binding.\(^{61}\) Unlike the ECHR the European Charter of Fundamental Rights


\(^{57}\) See also Case 245/81 \textit{Edeka Zentrale AG v Federal Republic of Germany} [1982] “general principle of equality [...] is one of the fundamental principles of Community law”, Joined Cases C-117/76, Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen and C-16/77, Diamalt AG v. Hauptzollamt Itzehoe, 1977 ECR 1753 “general principle of equality [...] is one of the fundamental principles of community law.”

\(^{58}\) Case 222/84 \textit{Johnston v Chief Constable of the Royal Ulster Constabulary} [1986] ECR 1651 para. 18.

\(^{59}\) Ibid.


lacks legal status. It is not yet legally binding, but might be so if the new European Constitution is ratified.  

Even if the European Charter of Fundamental Rights has no formal binding force, its effect shall not be underestimated. It can be argued that the Charter has started to have legal effect already. Three Advocates General, Tizzano, Léger and Mischo have declared that “the Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States.” Other Advocate Generals have also referred to the Charter of Fundamental Rights, as have the Spanish Constitutional Court and the Italian Constitutional Court.

The current Community legislation uses a list of specific and closed grounds when prohibiting discrimination. By contrast, both the ECHR and the European Charter of Fundamental Rights have a more open and wider text when prohibiting discrimination. Article 14 in the ECHR prohibits discrimination based on

“any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The European Charter of Fundamental Rights has a similar wording 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 shall be prohibited.”

63 Craig and de Búrca, EU law: text, cases and materials p 389.
66 Chalmers, Hadjiemmanuil, Monti, Tomkins, European Union Law, p 249.
68 Italics added.
69 Italics added.
4. The Problem of Multiple Discrimination

For those individuals claiming multiple discrimination several difficulties can arise. Through the case law in the United Kingdom it is clear that the need of a comparator in discrimination claims is of decisive importance. One problem thereby is the need to find an adequate comparator. Another problem is that case law has shown that claimants tend to plead only one ground, even if they have suffered discrimination on several grounds. The result is an incomplete description of the discrimination suffered by the claimant.70

4.1 The Need of a Comparator

To determine whether discrimination has occurred or if a person has been treated differently because she or he belongs to a special group, a comparator is necessary. A comparison is made between the individual claiming discrimination and someone of the opposite sex, race, religion or other ground.71 The treatment of a woman is compared to that of a man; a Christian is compared to a Muslim and so forth. If there is no real person to compare the claimant with, the Court can consider how a hypothetical comparator would be treated.72

This problem has especially been noted in the United Kingdom. At present they have no remedy regarding intersectional discrimination.73 The reason is that discrimination law in United Kingdom requires a comparator and only permits a comparison with one characteristic.74 A person cannot compare her or his experience with others that have the same sex/race/religion/disability or belief/sexual orientation/age. Furthermore the national courts in the United Kingdom have also ruled that it is not possible to combine the different grounds; only one comparison can be chosen at a time.75

In Bahl v the Law Society76 a woman from Asia claimed that she had been discriminated on the grounds of sex and race. The Employment Tribunal in the United Kingdom at first held that

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71 Ibid. pp 81-82.
74 Ibid. pp 1-2.
75 Ibid. p 2.
she could compare herself to a white man and thus it was possible to consider the combined effect of both her race and her sex. Nevertheless, the Employment Appeal Tribunal and the Court of Appeal ruled that it was not possible to consider a combination of both grounds, even if the claimant experienced them as linked to each other. Each ground has to be separately considered; otherwise it would be an inaccurate interpretation of the law. This resulted in that Ms Bahl could not prove discrimination, since she could not identify only one ground.

The ruling from the Court of Appeal binds the lower courts and demonstrates how they are in the future to handle intersectional discrimination cases.

Since it is only possible to compare one ground at a time, this means in practice that a black woman can only compare herself with either a black man or a white woman, and not with a white man. Likewise, a Christian lesbian cannot compare herself with an atheist man, and an old woman cannot compare herself with a young man. This becomes problematic since it creates cases where the claimant has no legal remedy. If a black woman is discriminated when applying for a job, a sex discrimination claim would fail if the employee hires white women. At the same time a race discrimination claim would fail if the employee promotes black men. The result is that there is no possibility for a black woman to make a successful claim. The chart below illustrates this problem.

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<td>Black man</td>
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*Chart 1. In United Kingdom it is only allowed with horizontal or vertical comparison. The laws do not allow diagonal comparison or a combination of horizontal or vertical.*

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77 Moon Gay, *Multiple discrimination – problems compounded or solutions found?* p 5.
78 Ibid. pp 5-6.
80 Ibid.
81 Ibid. p 2.
Several problems arise when selecting a comparator. First is the issue for those claiming multiple discrimination of finding an adequate comparator. Comparators are not always available and those who are may or may not be helpful. For instance, comparators are difficult to find if a case of discrimination is based on pregnancy. In *Turley v Allders Department Stores Ltd* the Employment Appeal Tribunal held that the claimant, a pregnant woman, had not been treated less favourably than a man since it was not possible to compare her to a pregnant man. Subsequently cases have instead compared pregnant female employees with sick male employees.

The second problem consists of the fact that the courts consider irrelevant factors when selecting a comparator. In *Secretary of State for Defence v MacDonald* an officer in the British Royal Air Force was revealed to be homosexual. After coming out he was forced to resign and therefore claimed sex discrimination. According to the Court of Session, MacDonald’s treatment was to be compared with the treatment of a lesbian. This would demonstrate whether a lesbian would have been treated differently than MacDonald. If MacDonald’s treatment instead would have been compared to the treatment of a heterosexual woman, he would most likely have been seen to have been treated unfavourably. However, is MacDonald’s homosexuality a relevant factor? Why not compare him with a heterosexual woman who also has a male partner?

In conclusion, finding an adequate comparator is problematic for plaintiffs claiming discrimination on the basis of only one ground. For those claiming multiple discrimination, the case law has shown it to be even more difficult.

### 4.2 Several Grounds Become One

As previously explained, the current Community legislation concerning discrimination consists of fixed categories; sex, racial or ethnic origin, religion or belief, disability, age or sexual

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84 Hannett Sarah, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, p 83.
85 *Turley v Allders Department Stores Ltd. (1980) IRLR 4.*
86 Hannett Sarah, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, p 83.
87 *Secretary of State for Defence v MacDonald [2001] IRLR 431.*
88 Hannett Sarah, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, p 82-83.
89 Ibid. p 84.
The practical problem for plaintiffs suffering from discrimination is fitting their claim within these isolated categories. It is more difficult for individuals suffering from discrimination based on more than one characteristic or the combination of two or more characteristics.  

A claimant might experience discrimination based on several grounds; perhaps because she or he is gay, disabled and a Muslim. It would most adequately reflect her or his experience to plead discrimination on all three grounds; sexual orientation, disability and religion. Instead of doing so, many claimants plead only one ground and as a consequence not all the facts of the case are evidenced, thus the result does not fully reflect the experience of the plaintiff.

### 4.2.1 Pleading Only One Ground

The jurisprudence in the United Kingdom shows that claimants appear to plead only one ground even if they have been discriminated on several grounds and have suffered additive or intersectional discrimination. Lawyers tend to focus on the strongest ground and ignore the others, otherwise they risk losing the case completely. This constitutes a problem because it does not show the entire dimension of the case and it forces individuals to choose between different parts of their identities. It becomes a hierarchy among the grounds, even though the Council has stated that all grounds are to be treated as equally important.

The case *Burton and Rhule v De Vere Hotels* clearly illustrates this problem. Two black waitresses worked at a hotel during a function where the speaker, along with several guests made jokes about black men’s genitalia, used racist language and made sexual comments about

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90 Article 13 EC Treaty.
94 Moon Gay, *Multiple discrimination – problems compounded or solutions found?* p 2.
96 Moon Gay, *Multiple discrimination – problems compounded or solutions found?* p 2.
97 Hannett Sarah, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, p 72.
98 Ibid. p 80.
99 *Council Decision 2000/750 establishing a Community action program to combat discrimination*, at recital 5.
100 *Burton and Rhule v De Vere Hotels* [1997] ICR 1.
black women including the claimants. The comments continued during the night and the guests became physical at the same time as they made comments about black women’s sexuality and asked sexual questions to the claimants.

It was obvious in this case that the treatment experienced by the two women, was both sexist and racist. White women and black men would not have been treated in a similar fashion. The claimants were not exposed to the treatment only because of their sex or only because they were black. Instead the treatment was a combination of their race and sex, two grounds that could not be seen isolated. Despite this, the claimants only pled discrimination based on one ground; race.\textsuperscript{101}

This also often occurs in discrimination cases brought by women claiming discrimination because of religious or cultural clothing at a workplace. Dress codes result in employees having to wear specific clothing; they might have to wear skirts or might not be allowed to wear trousers or head scarves. In such cases, it is common to only plead discrimination based on race and not discrimination based on race and sex.\textsuperscript{102}

In \textit{Kingston & Richmond AHA v Kaur},\textsuperscript{103} the respondent had a dress code that prevented the claimant, a Sikh woman, from wearing trousers. Not wearing trousers made the claimant feel improper. She did not plead sex discrimination, only race discrimination.\textsuperscript{104} A similar case is \textit{Malik v Bertram Personnel Group},\textsuperscript{105} where the claimant did not claim sex discrimination, only race discrimination. The claimant was a Muslim woman who wished to wear trousers at work, which led to refusal of employment.

\textsuperscript{101} Hannett Sarah, \textit{Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination}, p 72.
\textsuperscript{102} Ibid. p 73.
\textsuperscript{103} \textit{Kingston & Richmond AHA v Kaur} [1981] ICR 631.
\textsuperscript{104} Hannett Sarah, \textit{Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination}, p 73.
\textsuperscript{105} \textit{Malik v Bertram Personnel Group} (1991) 7 EOR 5.
4.2.2 Pleading Several Grounds

In cases where the claimant pleads discrimination based on two or several grounds, the results tend to be deceptive. The courts either concentrate only on one of the grounds or they treat the discrimination as additive.\(^{106}\)

In *Atijosan v Lambeth Service Team*,\(^{107}\) the claimant was determined to be redundant at her workplace and thereafter claimed discrimination based on sex and race. The Employment Appeal Tribunal in the United Kingdom was not clear on exactly what kind of discrimination they thought the claimant had suffered. Instead the tribunal referred to the claimed grounds as “race/sex.”\(^{108}\)

The consequence of the tribunal’s fusion of the grounds was that it made it impossible to tell what the tribunal regarded the discrimination to be based upon. It is unclear whether the tribunal considered the discrimination to be a result of her race or her sex, or as additive discrimination separating race and sex into two categories, or as intersectional discrimination combining the categories of race and sex.\(^{109}\)

4.3 “Successful” Multiple Discrimination Claims

There are a few cases in the United Kingdom where the claimants have pleaded intersectional discrimination and the tribunal has regarded both grounds.

In *Mackie v G & N Car Sales Ltd*\(^ {110}\) Mrs. Mackie, a woman of Indian origin, claimed discrimination based on sex and race. She had been dismissed after five months of work and given no reason why. According to a colleague she had only been permitted to work there since she was married to a man from Scotland. The tribunal found that Mrs. Mackie had not been treated less favourable (compared to a hypothetical comparator) because she was Indian or because she was a woman. Instead she had been treated less favourable because she was an Indian woman.

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\(^{106}\) Hannett Sarah, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, pp 72-73.

\(^{107}\) *Atijosan v Lambeth Service Team* unreported EAT/968/99, 26 June, 2000.

\(^{108}\) Hannett Sarah, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, pp 72-73.

\(^{109}\) Ibid. p 73.

\(^{110}\) *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co* [2004] ET/1806128/03.
In Ali v (1) North East Centre for Diversity & Racial Equality (2) Jamiel Bux\textsuperscript{111} the tribunal found that the claimant, a Muslim woman brought up in Pakistan, had been humiliatingly treated on the grounds of sex and race. Her employer would not have treated her in the same way if she was a man, a white woman or a Muslim woman that had been brought up in Britain.\textsuperscript{112}

Newer case law, however, no longer gives the possibility of claiming intersectional discrimination. The Court of Appeal ruled in 2002 in Bahl v the Law Society\textsuperscript{113} that even if the claimant experiences the grounds as linked; the court has to consider each ground separately. Since this ruling the outcome in other cases has been similar, and intersectional discrimination has further not been considered.\textsuperscript{114}

\textsuperscript{111} Mrs S Ali v (1) North East Centre for Diversity & Racial Equality (2) Jamiel Bux Case No: 2504529/03.
\textsuperscript{112} See also case Ms R De Thomas v Patrick Thompson Case No: 1201589/00 and 1202242/00 (sex and race) and case Miss A Rawat v Kirkless Metropolitan Council (1) Mr Singh (2) Mr G Harker(3) Ms J Lancaster(4) Mr S Laher(5) Case No: 1804500/98 (sex and/or race).
\textsuperscript{113} Bahl v the Law Society [2004] IRLR 799.
\textsuperscript{114} See also Network Rail v Griffiths-Henry [2006] IRLR 865.
5. Possible Solutions of Multiple Discrimination

Without being in violation of the Race Directive or the Framework Directive, Member States today can give stronger protection to the principle of equal treatment and at the same time fulfil the objective of the directives. Each directive establishes that “Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.”\(^{115}\) The directives thereby do not prevent Member States from allowing multiple- or intersectional discrimination claims.

In the following, three possible solutions are described: expanding the grounds of discrimination, allowing multiple comparators and the American approach.

5.1 Expanding the Grounds of Discrimination

The concept of discrimination in many Member States has been expanded with the new Race Directive and the Framework Directive.\(^{116}\) Due to the expansion of the grounds of discrimination, this has enabled for new opportunities in the recognition of multiple discrimination. On the other hand, the list of discrimination grounds in these directives is exhaustive, so there is no possibility for the European Court of Justice to expand it.\(^{117}\)

This can be compared with Article 21 in the European Charter of Fundamental Rights and Article 14 in the ECHR where discrimination is prohibited on grounds “such as sex, race, colour […] or other status”. Since the list of grounds in ECHR is non-exhaustive the European Court of Human Rights has been able to expand it and include disability and sexual orientation. This is something the European Court of Justice cannot do.\(^{118}\)

Several Member States have added a phrase such as ‘or any other circumstances’ and are thus using a non-exhaustive list.\(^{119}\) For the national courts in the Member States this means that they are allowed to recognize additional grounds of discrimination. Member States like Finland,
Hungary, Latvia, Poland and Slovenia has implemented the Directives by using a non-exhaustive list. They thereby give a more favourable protection than those laid down in the directives.

If multiple discrimination was recognised and the European Court of Justice had the possibility to expand the list of grounds, sub-categories like ‘Minority Women’ could be added. At the same time, this could be problematic since minorities and women are covered by different directives. The protection would therefore be straddled and the directives overlapped.

Instead of adding sub-categories, Sandra Fredman, Professor of Law at Oxford University, suggests another solution. According to her, a better solution would be to allow the courts to combine two or more grounds of discrimination. Instead of having several fixed grounds, one should be allowed to combine them so that the discrimination can be explained more precisely.

5.2 Allowing Multiple Comparisons

By expressly permitting multiple comparisons the courts would be able to combine two or more grounds of discrimination. This would result in the possibility for a black woman to compare her treatment with a white man, instead of being compared with a black man or a white woman. The possibility for a black woman to make a successful claim would then be greater since it is more likely to prove that a white man would not have been treated in the same way.

On the other hand, the more grounds that are claimed, the more problematic it is to find a comparator. What comparator is to be used when a black lesbian disabled women has been discriminated? Is it a white able-bodied heterosexual man or a white able-bodied heterosexual woman, or any other combination? By permitting multiple comparisons, there is a risk that the comparison would become too complicated and impractical.

\[\text{Fredman Sandra, Double Trouble: multiple discrimination and EU law, p 17.}\]
\[\text{Ibid. p 16.}\]
\[\text{Ibid. p 16.}\]
\[\text{Moon Gay, Multiple discrimination – problems compounded or solutions found? p 16.}\]
\[\text{Ibid. p 16.}\]
5.3 The American Sex plus Race Approach

The concept of multiple discrimination, as mentioned above, was pioneered by African American women.\textsuperscript{125} The American courts have through case law created a sex plus race approach to deal with this problem.\textsuperscript{126}

In \textit{DeGraffenreid v General Motors},\textsuperscript{127} five black women claimed intersectional discrimination based on race and sex. They alleged that they, as black women, belonged to a special group that needed to be protected from discrimination. The United State’s Federal Court of Appeals held that black women were not a separate category to be protected against discrimination since this would give them a greater standing than white women and black men.\textsuperscript{128} Since then, there have been American cases recognising that discrimination against black women can exist where such discrimination is not directed at either white women or black men.\textsuperscript{129}

Moreover, there has been a fear against what the Court called a many-headed Hydra in the case \textit{Judge v Marsh}.\textsuperscript{130} This phenomenon is often referred to as the opening of Pandora’s box and means that there is a possibility that by allowing a combination of several grounds it might result in a torrent of claims by multiple sub groups.\textsuperscript{131}

This development in the United States discrimination law has resulted in the sex plus one methodology. At first the plaintiff could plead sex discrimination, plus one other discriminating factor related to sex. Because of fear for the Pandora’s box this came to be limited to meaning sex plus race.\textsuperscript{132}

The American solution to multiple discrimination is therefore an additive sex plus race approach, leaving other grounds of discrimination unaddressed.\textsuperscript{133} In addition to this it does not

\textsuperscript{125} Fredman Sandra, \textit{Double Trouble: multiple discrimination and EU law}, p 13, see also Makkonen Timo, \textit{Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore}, p 1.
\textsuperscript{126} Fredman Sandra, \textit{Double Trouble: multiple discrimination and EU law}, p 14.
\textsuperscript{127} \textit{DeGraffenreid v General Motors} 413 F Supp 142 (ED Mo 1976).
\textsuperscript{128} Ibid.
\textsuperscript{129} Fredman Sandra, \textit{Double Trouble: multiple discrimination and EU law}, p 14.
\textsuperscript{130} \textit{Judge v Marsh} 649 F Supp 770 (DDC 1986).
\textsuperscript{131} Fredman Sandra, \textit{Double Trouble: multiple discrimination and EU law}, p 14.
\textsuperscript{132} Hannett Sarah, \textit{Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination}, p 75.
\textsuperscript{133} Fredman Sandra, \textit{Double Trouble: multiple discrimination and EU law}, p 14.
leave any possibility for an intersectional approach where two grounds are combined instead of stacked on top of each other.\textsuperscript{134}

This sex plus race approach has been criticized by many. Sandra Fredman, professor of law at Oxford University, writes that “The more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection.”\textsuperscript{135}

Scholars argue that this methodology creates a misunderstanding of the problem of multiple discrimination, and that it does not fully address the nature of discrimination that these women are experiencing. It forces black women to choose gender as their main identification when in reality it might not be so.\textsuperscript{136}

Sarah Hannett, legal scholar, argues that the sex plus race methodology “reflects a desire by the courts [...] to minimize complexity in discrimination law.”\textsuperscript{137} By this Hannett proposes that out of fear of making complex law out of a problem based in the complexity of human relations, the Court retreats from acknowledging this complexity. Instead it chooses to view discrimination as a simple problem in order to deal with it through simple, discrete law. That is, sex plus race. However Hannett continues, judging by the experiences of claimants in the US, instead of trying to make multiple, and separate, anti-discrimination statutes compatible through changes to the current law, a re-conceptualization of the law itself, that takes into account the complexity of discrimination itself, might be a better way of addressing the experiences of the claimants.\textsuperscript{138}

\textsuperscript{135} Fredman Sandra, \textit{Double Trouble: multiple discrimination and EU law}, p 14.
\textsuperscript{136} Hannett Sarah, \textit{Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination}, pp 75-76.
\textsuperscript{137} Ibid. p 76.
\textsuperscript{138} Ibid. p 76.
6. Analysis and Conclusion

6.1 Analysing Definitions and EC Legislation

There is no common definition of multiple discrimination within the Community and, as stated above, this concept is used differently by different scholars. Even more terms are invoked, to explain additive and intersectional discrimination. A common Community definition of the problem could therefore help both with bringing awareness to the existence of the problem and combating it.

There is no prohibition of multiple discrimination within Community legislation, but through the Directives, as well as the decision by the Council, it is clear that there is an awareness of the existing problem. Since there is an awareness, as well as an expressed wish to combat that problem, an explicit prohibition seems an obvious next step.

The Member States are allowed to have stronger discrimination rules in order to safeguard their citizens. There is therefore the possibility for Member States to explicitly prohibit; in the domestic legislation, multiple discrimination as well as make rules to allow for grounds to intersect. One could argue that this could be sufficient, as there is a way through the minimum-rules in the Directive, and since the principle of subsidiarity states that decisions should be taken on the lowest possible level to achieve the set out goal. However, one could also argue that the complexity of multiple discrimination must be dealt with on an overall Community level that ensures equal protection to all citizens no matter what Member State they live in, not just the Member States that have decided on stronger rules.

This seems to be the line with the opinion of the Council who, in the decision (discussed in Section 3.2.2 above) clearly states that “combating discrimination cannot be sufficiently achieved by the Member States because, inter alia, of the need for multilateral partnerships, the transnational exchange of information and the Community-wide dissemination of good practice.”\(^{139}\) In conclusion, the possibility of stronger domestic rules on discrimination is not enough to combat multiple discrimination.

Moreover, ECHR and the Charter of Fundamental rights use more open grounds when prohibiting discrimination which creates a possibility of protecting against unforeseen types of discrimination. Having open grounds mean that, in theory, every possible type of discrimination,

\(^{139}\) Council Decision 2000/750 a Community action program to combat discrimination, at recital 17.
known now or in the future, is represented and protected against, making it easier for the plaintiff to make a claim that accurately depicts her or his situation. In the same way it seems to include grounds that are a combination of other grounds in the intersectional sense, e.g. the unique type of discrimination experienced by minority women. However, this does not necessarily ensure that a claim of additive or intersectional discrimination is given the same merit as a claim with only a single ground.

The only grounds protected against discrimination in any field apart for employment are gender and ethnic origin. All other grounds, in all other sectors, are left without protection. This does not go hand in hand with the idea of a Community that ensures equal treatment and opportunities to all its citizens. Not only does this mean that the protection outside of employment is highly limited, but also that the possibility of making a claim of multiple discrimination, additive or intersectional, is next to none in practice.

6.2 Analysing Problems and Solutions

A comparator is necessary in discrimination claims. The problem is, however, determining who is an appropriate comparator and what happens if one is not available. Arguably, it is appropriate to use a societal norm, in the Community this would be a white Northern European man, as a basis for comparison as he is the most privileged individual. This is not the current practice and when using a comparator further from the norm, the individual discriminated against still runs the risk of being treated unfavourable to the norm even if the court rules in her or his favour. Allowing multiple comparators would greatly mitigate this problem and allow for comparisons to the societal norm.

Through the above presented case law it is clear that there is a tendency to claim only one ground of discrimination even if the plaintiff has been exposed to additive or intersectional discrimination. The reasoning behind this is well founded in empirical analysis of court rulings and based on the increased chance of a ruling in the plaintiffs favour if the claim only features one ground. This creates a hierarchy between the grounds that is not in line with the Council’s statement that all grounds for discrimination “are equally intolerable.”¹⁴⁰ It also puts the individual in a position of having to choose between the different parts of his or her identity.

¹⁴⁰ Council Decision 2000/750 establishing a Community action program to combat discrimination, at recital 5.
Furthermore, all the facts of the case are never revealed to the court and this creates a disparity between the case and the reality it purports to represent.

The case of Atijosan v Lambeth Service Team\textsuperscript{141} where the British court referred to the multiple discrimination claim as “race/sex,” shows the court’s confusion in dealing with cases addressing multiple discrimination without the availability of a common Community definition. There have been cases where the Courts have taken multiple grounds for discrimination into consideration. However, this has mainly been done through an additive approach leaving the intersectional experience unaddressed. The fact that there have been a few such cases can therefore not be seen as an appropriate way of dealing with the problem of multiple discrimination.

The expansion of the grounds for discrimination is thoroughly discussed in the previous section about ECHR and the Charter of Fundamental Rights. In conclusion, that stated there is that the opening of the grounds may help multiple discrimination claims, but cannot be seen as a solution to the problem. Allowing more grounds or widening the already existing grounds does not automatically solve such a complex matter, particularly where the societal norm is not compared against. Moreover, the different grounds for discrimination are covered by different directives with different competence. This creates a problem if discrimination on more than one ground, for instance race and religion, is claimed since these two grounds are covered by different directives.

The current American solution to the problem is a sex plus race methodology. This approach does not recognize any other grounds for multiple discrimination and as a result does not fully deal with the complexity of the problem. Since the court created a sex plus one approach, it is clear that there is a recognition that multiple discrimination may occur on more grounds than sex and race. The conclusion can also be drawn that sex is the ground considered most important and, when changing the approach to sex plus race, that race is the second most important. Remaining grounds seem to be considered as not as important. Through this way of reasoning the American way of combating discrimination cannot be seen as an appropriate way for the European Community since it has proclaimed that the grounds in Community legislation shall be equal to one another. Sex plus race clearly gives more merit to sex and race than the rest of the grounds for discrimination.

\textsuperscript{141} Atijosan v Lambeth Service Team unreported EAT/968/99, 26 June, 2000.
Furthermore, the American approach allows for additive claims (of sex and race) but not for an intersectional approach. Since additive discrimination is only part of the complex problem this cannot be considered an appropriate solution for the European Community.

A third reason for why this is not a solution that fully tackles the problem is the fact that the whole purpose of discrimination legislation is to protect the most vulnerable groups in our society from uneven treatment. So by allowing extra protection for individuals with disabilities for example, we do not give them a “super-remedy”\textsuperscript{142} or a higher protection than people without disabilities. What it does is that it recognises that some individuals are in need of extra protection in order to reach an adequate standard of treatment. Given that the “American Solution” clearly states that some groups of individuals are given less favourable treatment than individuals from the societal norm – and are thus in need of greater protection than them – it is difficult to see why this reasoning is not taken to its logical conclusion: some groups are more discriminated against than others and, as such, the protection needs to be proportionate to the level of discrimination.

6.3 Conclusion

Multiple discrimination is used as an overall term that describes a situation where an individual experiences discrimination on more than one ground. This concept can be divided into the concepts of additive discrimination and intersectional discrimination. The first of these describes a situation where an individual is discriminated against on more than one ground and these grounds are stacked on top of each other. Intersectional discrimination on the other hand explains how an individual’s multiple identities may be the cause of discrimination in such a way that the grounds for discrimination cannot be considered separately.

Multiple discrimination is recognised within the Community as a problem but there is no common definition or an explicit prohibition of it within Community law leaving it up to the courts and domestic legislation to deal with it. This, along with the other mentioned problems, result in that the Community legislation is not sufficient when addressing multiple discrimination. This is a clear violation of the important principles of equal treatment and effective judicial protection.

\textsuperscript{142} See DeGraffenreid v General Motors 413 F Supp 142 (ED Mo 1976).
When analysing the problems and possible solutions of multiple discrimination the first thing one discovers is that such a complex problem can never have a simple solution. There is no one single remedy. The first aim must therefore be to mitigate the problem. The problems and solutions discussed in this thesis must be seen as dealing with multiple discrimination as it is currently understood seeing as the concept itself is both complex and only recently defined as a problem.

The current Community legislation with regards to discrimination is covered by different directives with differing levels of competence. Even when just dealing with claims of a single ground this is problematic because it creates a hierarchy of grounds. With regards to multiple discrimination claims this poses an even greater obstacle to an adequate way of dealing with them. A single statute that manages to compound these different competences and directives will make claims with multiple grounds both easier to make and give the legal instances a way of better dealing with them.

Having no Community definition leaves the enforcement up to the courts that, as has been demonstrated, both lack a willingness to deal with the problem as well as a tendency to rule against the plaintiff when multiple grounds are claimed. This makes the situation unacceptable. Arguably this can be claimed to be proof of the need for dealing with the problem on a Community level as such a problem is likely to be poorly addressed otherwise, if at all. This Community definition should include open grounds as well as an opportunity for claiming multiple grounds and allow them to intersect. When a comparator is used she or he should be able to be chosen on more than one ground preferably this comparator will be as close to the societal norm as possible.

6.4 Reflections by the Authors

The reason for choosing this topic was not just the lack of attention, but the lack of measures in practice within the Community, that deal with multiple discrimination. The existing literature on the subject is limited. The authors that we found and used for this thesis all tend to give cross-references to each other. This further indicates that there are few scholars who have focused on multiple discrimination and in addition to that, it made it difficult to find sources that dealt with the problem from different perspectives.
While writing this thesis we noticed that a clear majority of our sources were written by women. Articles and books, by or about the Community, are all written by men. In contrast, all articles focusing on multiple discrimination are written by women, with one exception. That we, the authors of this thesis, are also women do not change this trend or give any further gender perspective to this thesis or to the discrimination debate in general.

Our conclusion on this matter is that since women in general are more likely to be directly concerned with the problem, they are also more inclined to want to solve it. We would however, look favourably upon an increased interest in this subject by men. The fact that some individuals, predominantly women, are subject to severe forms of discrimination is something that ought to be of grave concern for everyone in the Community, regardless of whether or not they belong to a group given preferential treatment as a result of this discrimination. A just and non-discriminatory society ought to be, and in rhetoric often is, something for every citizen of that society to strive for, but experience tells us that doing away with unjust preferential treatment, or even being aware of it, is something of little concern for those on the receiving end of it.

However, the fact that multiple discrimination has not only been recognised by scholars, but also by the Community itself, means that this problem is hardly something that can be ignored.
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