



FACULTY OF LAW
Lund University

Master of International Human Rights Law

Master thesis

By

Kajsa Öbrink

Multiple Discrimination and the System of International Human Rights Law

The example of Haitian women in the Dominican
Republic

Supervisor: Gregor Noll

Field: International Law

Spring 02

Contents

1. Introduction	3
2. Theoretical framework	4
Discrimination	4
The relationship between material rights and discrimination	4
Multiple discrimination	5
Intersectionality	5
Multiple identities	6
Over-inclusion and under-inclusion	6
Dealing with discrimination	7
3. UN bodies	8
The Beijing Platform for Action	8
Committee on the Elimination of Racial Discrimination	8
Women 2000	8
Report of the Expert Group Meeting	9
Commission on the Status of Women	9
World Conference Against Racism	10
4. Case law	10
HRC Sandra Lovelace v Canada	10
ECtHR Airey v Ireland	11
CERD Mrs A Yilmaz Dogan	13
5. Haitians in the Dominican Republic	14
Background	14
Living conditions	14
Prejudice against Haitian and other blacks	15
Haitian women	16
Permanent illegality	17
National and international obligations	18
6. Women in the Dominican Republic	19
Background	19
Black women	20
National and international obligations	21
7. Method to identify multiple discrimination	22
The example of Haitian women in the Dominican Republic	22
Comparisons	22
Haitian women and international human rights law	24
8. Conclusion	24
9. Bibliography	26

1. Introduction

The international system of human rights has long fought against discrimination. New grounds for discrimination have been discovered along the way. Today, we speak not only of discrimination against minorities or women, but also against homosexuals and disabled persons. Recently, scholars have started recognising that some of these discrimination grounds may exist at the same time. Many people are, e.g., not only members of a minority but at the same time burdened by being women and poor. These cases of multiple discrimination need to be detected in order to be remedied appropriately. As the international system has focused on one ground of discrimination at the time, cases of multiple discrimination have gone undetected. If we focus on only one aspect of discrimination at the time, other discrimination grounds may be rendered invisible. Indeed, such a system is likely to benefit those who are the most advantaged in the disadvantaged group, such as black men or white women. Lately, various UN bodies have recognised the problem. I will in this thesis show some examples of how international judicial bodies have failed to address the problem of multiple discrimination. I will argue that these failures are due to the structure of the system of international human rights law, which treats the various discrimination grounds as separate issues. The treaty structure and the separation of the monitoring bodies make a holistic view difficult, if not impossible.

As an illustration of the problem of multiple discrimination, I will use Haitian women in the Dominican Republic. I will first describe the situation of all Haitians in the country, and thereafter the situation of all women. The reader will discover how the racism, anti-haitianism and the patriarchy in the Dominican Republic disadvantage the Haitian women. They are Haitian, black, women and poor, all of which work against them in their daily life. To detect various grounds of discrimination, I will propose a method of comparisons. To discover discrimination, a comparison is always needed. Discrimination can be established when two similar cases, e.g. a man and a woman, are treated differently. To discover multiple discrimination, e.g. in the Dominican Republic, we need only to continue such comparisons between different but similar groups in the Dominican society, i.e. Haitians and Dominicans, women and men and blacks and whites. In doing so, the whole pattern of discrimination will appear. The thesis will show that it is impossible for the international organs to take such a holistic view on the problem, since they are tied down by the structure of the system they belong to.

In the following chapter on the theoretical framework, I will elaborate on the concepts of discrimination and multiple discrimination, or intersectionality. I will argue that the international system has not dealt with such cases successfully, which has led to that grounds of discrimination have not been detected or even rendered invisible.

Various UN bodies have expressed a growing awareness of the problem of multiple discrimination. In chapter 3, I will go through various UN reports, recommendations and conclusions, in which the reader will find support for the need for an holistic approach and for a method to detect intersectional discrimination.

To illustrate the failure of the international system to detect and deal with multiple discrimination, I will in the next chapter (called "Case law") describe how three international judicial or quasi-judicial bodies have dealt with cases of multiple discrimination.

Chapter 5 and 6 is a description of the situation of, respectively, Haitians and women in the Dominican Republic. I will use this as a concrete example when I propose, in chapter 7, a method of comparisons for detecting multiple discrimination. In the concluding chapter I will sum up the thesis and my main points.

2. Theoretical framework

Discrimination

In the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹, discrimination against women is defined in article 1 in the following way:

“For the purpose of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC), which deal with discrimination issues connected to the European Convention² and the International Convention on Civil and Political Rights (ICCPR)³ respectively, have elaborated the core elements of discrimination. There is a violation of the right not to be discriminated against if there is a) differential treatment of b) comparable and equal or similar cases, without there being c) an objective and reasonable justification and when d) proportionality between the aim sought by the measure and the means employed is lacking.⁴

The relationship between material rights and discrimination

Human rights are universal. No matter what features or characteristics a human being may have, they cannot affect that person’s entitlement to a number of material human rights, such as the right to life, liberty, food and education. No one can be lawfully deprived of these rights. From that perspective, non-discrimination provisions should not be necessary. However, many violations of human rights take place precisely because of a person’s accidental or irrelevant features – be it sex, colour, religious belief or something else. Therefore, there is a need for emphasising the illegitimacy of discrimination.

Moreover, even if a person’s material human rights have not been violated at all, he or she may well have been discriminated against because he or she has not been treated like his or her fellow citizens. The principle of non-discrimination is linked to the concept of equality.⁵

¹ 18 December 1979, GA res. 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46.

² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, EST No 005.

³ 19 December 1966, GA res. 2200 A (XXI), 999 UNTS 171.

⁴ Athanasia Spiliopoulou Åkermark, *Minority Women: International Protection and the Problem of Multiple Discrimination* in Hannikainen and Nykänen (eds), *New Trends in discrimination law – international perspectives*, Publications of Turku Law School, Vol 3, No 1/1999, 85, 98.

⁵ Some scholars even argue that they are positive and negative statements of the same principle. See, e.g., Bayefsky, Anne F, *The Principle of Equality or Non-Discrimination in International Law*, *Human Rights Law Journal*, 1990, 1.

The idea that we are equal and should be treated as such is the basis for the idea that no one should be discriminated against. The very first article of the Universal Declaration of Human Rights (UDHR)⁶ asserts that “all human beings are born free and equal in dignity and rights”. Unequal treatment is only accepted in certain circumstances, which differ over time and from culture to culture. To treat women differently from men is, for example, still accepted in many parts of the world. Non-discrimination is thus a way to safeguard or achieve equality. The state has a duty not only not to violate its citizens’ material rights, but also to treat them equally. In Ronald Dworkin’s words, a government owes everyone “equal concern and respect”⁷.

The right not to be discriminated against is different from the material rights. Unlike material rights, non-discrimination provisions do never include any independent material norms about how people should be treated. A non-discrimination provision always refers to other material norms, and makes sure that those are not applied in a discriminatory way. If all women in a country are paid less than their male colleagues, a non-discrimination provision will not guarantee a higher salary for all women. The violation could just as well stop through reducing the salary of the men. A non-discrimination provision thus presupposes an underlying right to equality.

Multiple discrimination

The term multiple discrimination is used to describe discrimination on several prohibited grounds at the same time, such as gender, class, race, religion etc. This is the main understanding of the term. As Sia Åkermark points out, the term may also be used to describe discrimination in relation to several different rights, or discrimination by various actors (e.g. the state, the husband and the employer).⁸

Intersectionality

The term intersectionality (or intersectional discrimination) is used to describe the interaction between different forms of discrimination and thus includes a structural element. It describes how different discriminatory systems, such as racism, patriarchy and economic disadvantages, create “layers of inequality that structures the relative positions of women and men, races and other groups”.⁹ The phenomenon can perhaps be better understood through the following metaphor.

“In this metaphor, race, gender, class and other forms of subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares that dynamics of disempowerment travel. These thoroughfares are sometimes framed as distinctive and mutually exclusive avenues of power. But these thoroughfares often overlap and cross each other, creating complex intersections at which two, three or four of these avenues meet. Marginalized groups of women are located at these intersections by virtue of their specific identities and must negotiate the ‘traffic’ that flows through these intersections to avoid injury and to obtain resources for the normal activities of life. This can be dangerous when the traffic flows simultaneously from many directions. Injuries are sometimes created when the impact from one direction throws victims into the path of oncoming traffic, while on other occasions, injuries occur from simultaneous collisions. These are the contexts in which intersectional

⁶ UN GA res 217 A (III), 10 Dec 1948.

⁷ Dworkin, Ronald, *Taking Rights Seriously*, 1977, 180.

⁸ Åkermark, see *supra* note 4, 98 f.

⁹ Gender and racial discrimination, Report of the Expert Group Meeting, 21-24 November 2000, available at <http://www.un.org/womenwatch/daw/csw/genrac/report.htm>, 31 October, 2001.

injuries occur – when multiple disadvantages or collisions interact to create a distinct and compound dimension of disempowerment.”¹⁰

In this thesis, I will use the terms multiple discrimination and intersectionality interchangeably. To understand the phenomenon of intersectionality or multiple discrimination it is necessary to consider a person’s multiple identities.

Multiple identities

Each one of us belongs to various different categories. I can identify myself, e.g., as a white woman from the middle class. I could add that I am Swedish, unmarried, protestant and heterosexual. All these parts of me are integrated. Some of the identities may privilege me, such as being white and middle-class, while others may discriminate against me, such as being female. Everyone has such multiple identities. The Haitian women that we are going to meet later in this thesis can be described as black, poor, female Haitian immigrants. All these identities happen to be grounds for discrimination in the Dominican Republic. Existing at the same time, they may intensify or in other ways affect each other.

To examine the situation of a person from the perspective of only one of these categories would give us a very limited, and thus inaccurate, picture. To assist women, who face discrimination, in an appropriate way it is necessary to assess all of these identities. Various scholars, such as Adrien Katherine Wing¹¹ and Kimberlé Crenshaw¹², have pointed this out. To focus only on the discrimination women face because of their gender will obscure other power relations, such as discrimination suffered on grounds of ethnicity or class. Dealing with racial discrimination or poverty without noticing gender-specific violations will mean that such problems will remain unsolved.

Over-inclusion and under-inclusion

The consequences of the traditional one-eyed approach to discrimination may be that specific problems of discrimination are rendered invisible. This can be illustrated through the concepts of over-inclusion and under-inclusion.

The notion of over-inclusion refers to the situation when a racial aspect of discrimination is ignored, while a gender aspect is addressed. For example, as Pragna Patel points out, trafficking of women is often perceived as an example of gender subordination.¹³ This being true, it is, however, often the case that specific groups are targeted. It is almost always poor women and girls that are recruited. As the socio-economic position in many countries, such as the Dominican Republic, is reflected in the colour of your skin, there is often also an element of racial discrimination.

¹⁰ Ibid.

¹¹ A Critical Race Feminist Conceptualisation of Violence: South African and Palestine Women in Adrien Katherine Wing (ed) *Global Critical Race Feminism, An International Reader*, 2000, 332.

¹² Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color in Kimberlé Williams Crenshaw et al (eds), *Critical Race Theory, The Key Writings That Formed the Movement*, 1995, 357.

¹³ Pragna Patel, Notes on Gender and Racial Discrimination: An urgent need to integrate an intersectional perspective to the examination and development of policies, strategies and remedies for gender and racial equality, available at www.un.org/womenwatch/daw/csw/Patel45.htm, 31 October 2001.

The notion of under-inclusion refers to the opposite situation, when the gender aspect of discrimination is underplayed while the racial aspect is underlined. An example of this is forced sterilizations, such as in Sweden, in the 1930's, of among others Roma women. Such practice is often perceived as being racist, not taking into account that it is also a flagrant violation of women's bodies.

Dealing with discrimination

Traditionally, cases of discrimination have been dealt with on the basis of only one ground for discrimination. Bodies like the HRC, the ECtHR and the Committee on the Elimination of Racial Discrimination (CERD) have failed to deal with the problem of multiple discrimination appropriately.¹⁴ Similarly, UN instruments on discrimination target only one aspect of discrimination. CEDAW focuses on equality between the sexes, while the subject matter of the Convention on the Elimination of Racial Discrimination (ICERD)¹⁵ is exclusively race. Only recently have UN bodies started acknowledging the problem of multiple discrimination.¹⁶ Consequently, the data collected in connection with discrimination has so far not focused on the whole situation of the persons affected.

The very treaty structure and the separation of the monitoring bodies leads to that multiple sources of discrimination are not detected. The international system fails to address the complexity of the world.

In fact, a system which only deals with one aspect of discrimination at the time is likely to benefit the already privileged in the disadvantaged group, such as non-white men and white women. Kimberlé Crenshaw has described this problem in the following way:

“Imagine a basement filled with people who are disadvantaged on the basis of race, sex, class, sexual preference, age and or physical ability. These people are stacked on top of each other – feet standing on shoulders – with those on the bottom being disadvantaged by the full array of factors, up to the top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually a floor above which only those who are not disadvantaged in any way reside. In effort to correct some aspects of domination, those above the ceiling admit from the basement only those, who can say that ‘but for’ the ceiling, they too would be in the upper room. A hatch is developed through which those placed immediately below can crawl. Yet this hatch is generally available only to those who – due to the singularity of their burden and their otherwise privileged position relative to those below – are in the position to crawl through. Those who are multiply burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch.”¹⁷

Fair-skinned and rich Dominican women may sometimes reach high positions in the society. When meeting discrimination on grounds of their sex, national and international instruments against sex discrimination are relevant for them. “But for” their sex, they would be in Crenshaw's upper room and therefore they have a possibility to crawl through the hatch. The problem is that the instruments which target only one aspect of discrimination fail to reach the people further down in the basement, who are multiply burdened.

¹⁴ See chapter 4 below.

¹⁵ 21 December 1965, GA res 2106 (XX), 660 UNTS 195.

¹⁶ See chapter 3 below.

¹⁷ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* in Weisberg, D. Kelly (ed) *Feminist Legal Theory Foundations*, 1993, 383, 387 f.

3. UN bodies

In recent years, various UN bodies have increasingly recognised the problem of multiple discrimination and the failure to deal with it. The problem has been highlighted in connection with gender issues. The importance of taking all forms of discrimination into account has been underlined, and some of the bodies have also stressed the need for a method to identify various layers of discrimination.

The Beijing Platform for Action

In the Beijing Declaration and Platform for Action¹⁸, which was the outcome of the Fourth World Conference on Women (1995), the problem of double discrimination is mentioned. The document clearly states that women often are faced with various barriers to full equality in addition to their gender. It is also acknowledged that indigenous women and women that are members of minority communities are particularly vulnerable.¹⁹

Committee on the Elimination of Racial Discrimination General Recommendation on gender-related dimensions of racial discrimination

CERD issued a general recommendation on gender-related dimensions of racial discrimination²⁰ in March 2000. The Committee notes that racial discrimination does not affect men and women equally or in the same way. It may affect primarily women, or affect men and women in different ways. Thus, the different life experiences of men and women have to be recognised. The Committee further argues that certain forms of discrimination may be directed towards women specifically because of their gender, such as sexual violence or abuse of illegal women workers. This form of discrimination will sometimes only have consequences for women, such as pregnancy as a result of rape. Women may also have specific problems with getting redress for racial discrimination, due to gender bias in the legal system.

The Committee concludes that since racial discrimination may have a unique impact on women, there is a need to take gender factors, as well as other issues that may be interlinked with racial discrimination, into account when monitoring racial discrimination. It also asserts a need for a method to evaluate and monitor racial discrimination against women and the difficulty women meet because of violations of their human rights on various different grounds.

General Assembly 23rd session Beijing +5 Women 2000: Gender Equality, Development and Peace for the 21st Century

In June 2000, during its 23rd special session, the General Assembly reviewed and assessed the progress achieved in the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women (adopted in 1985) and the above-mentioned Beijing Platform for Action. It also considered future actions.

¹⁸ A/CONF.177/20, 15 September 1995.

¹⁹ Platform for Action, para. 31-32, 46, 225, 256c.

²⁰ Fifty-sixth session, 2000, UN Doc.A/55/18, annex V.

The General Assembly adopted a resolution on further actions and initiatives to implement the Beijing Declaration and Platform for Action.²¹ It noted that barriers to full equality for women still remain and that further implementation was needed.²² It further stated that women increasingly are involved in labour migration, which exposes them to inadequate working conditions, increased health risks, economic and sexual exploitation, risk of trafficking and racism.²³

Report of the Expert Group Meeting

In November 2000, an expert group meeting on gender and racial discrimination was held in Zagreb, Croatia. The meeting was organised by the Division for the Advancement of Women (DAW), in collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Fund for Women (UNIFEM).

Similarly to the CERD recommendation, it is asserted in the report²⁴ that various categories of discriminations do not affect men and women in the same way. Some problems may be unique to particular groups of women or affect some women disproportionately. The acknowledgement of different life-experiences of men and women is thus necessary to ensure detection of all forms of discrimination and thereby appropriate remedy.

It is further stated that multiple discrimination often is considered to consist of separate and mutually exclusive forms of discrimination, which may lead to that victims of multiple discrimination are not recognised as such and thus do not have access to redress. The report further argues that the UN approach to discrimination is to address specific categories of discrimination, rather than taking a holistic approach. Thus, consequences of intersectionality may remain unaddressed by today's human rights approaches because they tend to focus on one category of discrimination. The report finally stresses the need to develop a method to identify intersectional discrimination and its effects on women and girls.

Commission on the Status of Women, 45th session

Draft agreed conclusions on gender and all forms of discrimination, in particular racism, racial discrimination, xenophobia and related intolerance

The 45th session of the Commission on the Status of Women (SCW) was held in March 2001. The draft agreed conclusions on gender and all forms of discrimination²⁵ acknowledge that it has been increasingly recognised that gender analysis of all forms of discrimination is needed to ensure that violations of human rights of women is detected and remedied. Thus, consideration of all forms of discrimination is important when addressing gender discrimination.

The Commission underlines the importance of a holistic approach to multiple discrimination of women and girls. It further asserts the need for developing methodologies to identify the ways in which various forms of discrimination affect women, and for collecting and analysing data on multiple discrimination.

²¹ A/RES/S-23/3, available at <http://www.un.org/womenwatch/daw/followup/ress233e.pdf>, 31 October, 2001.

²² Para 6 and 27.

²³ Para 41.

²⁴ Gender and racial discrimination, see supra note 9.

²⁵ Available at <http://www.un.org/womenwatch/daw/csw/draftacrace.htm>, 31 October, 2001.

World Conference Against Racism At the crossroads of gender and racial discrimination

In preparation for the World Conference Against Racism, Mary Robinson issued a document on the intersection of racial and gender discrimination.²⁶ She quotes the Beijing Platform for Action and states that it is important since it speaks of double discrimination. It is recognised that the problem is more complex than that; “there are, in fact, multiple potential forms of discrimination”.

In an official document on the United Nations website, parts of Mary Robinson's statements is repeated.²⁷ It is recognised that factors such as race, colour and ethnicity can create unique problems for certain groups of women, or affect them disproportionately. Examples of problems for these groups of women are given, such as illiteracy, poverty, problems in the labour market, trafficking and race-based violence. As the problems have been seen as manifestations of one form of discrimination only, the full scope of the problem have escaped analysis and lead to ineffective/inadequate remedies.²⁸

4. Case law

International judicial and quasi-judicial bodies are frequently faced with cases of discrimination. Their findings are important for victims of discrimination. Not only may they lead to reform of the legislation or practice of the state concerned but, even more importantly, the findings will also be of relevance for many other states when they review their systems.

In the following, I will describe how three international bodies (HRC, ECtHR and CERD) have dealt with clear cases of multiple discrimination.

HRC

Sandra Lovelace v Canada²⁹

Sandra Lovelace was born and registered as a Maliseet Indian, in Canada. When she married a non-Indian, she lost her Indian status, pursuant to Canadian law. When she ceased to be a member of the band, she also lost other rights, such as her right to reside on a reserve. The law affected only women; when an Indian man married a non-Indian, he did not lose his Indian status.

Sandra Lovelace filed a complaint to the HRC, claiming that the law was discriminatory on the grounds of sex and contrary to some of the provisions of the ICCPR. The HRC gave its

²⁶ Mary Robinson, United Nations Office of the High Commissioner for Human Rights, Gender Dimensions of Racial Discrimination, available at www.unhcr.ch/pdf/wcargender.pdf, 30 October 2001.

²⁷ World Conference Against Racism, At the crossroads of Gender and Racial Discrimination, available at www.un.org/WCAR/e-kit/gender.htm, 30 October 2001.

²⁸ At the time of writing, the final declaration of the conference was not available.

²⁹ Communication No 24/1977, Views of the Human Rights Committee in CCPR/C/13/D/24/1977, available at http://www.unhcr.ch/tbs/doc_nsf/FramePage/TypeJurisprudence?OpenDocument, 31 October 2001. See also Åkermark, see supra note 4, 109 f.

views in 1981. Although Sandra Lovelace had invoked several provisions of the ICCPR, the Committee considered that the one, which was “most directly applicable”³⁰ to the complaint, was article 27, which protects minority rights³¹. As a member of a minority, Sandra Lovelace had the right to her native language and culture in community with other members of the group. Since she had been denied the right to reside on her reserve, article 27 had been breached. The Committee did not consider it necessary to examine whether other rights had been violated or the discrimination claim. Article 27 was, however, “construed and applied” in the light of some of the other invoked articles, including the provisions against discrimination.³² The finding of the breach of article 27 made it unnecessary to examine the other rights invoked and the general provisions against discrimination.³³

It is clear from the facts of the case that Sandra Lovelace had not only suffered from a violation of her rights as a member of an Indian community. It is just as obvious that she had also been discriminated against on grounds of her sex. A comparison between male and female Maliseet Indians clearly show that a person’s sex would determine whether or not he or she would lose Indian status when marrying a non-Indian. Nevertheless, the HRC confined itself to comment upon minority rights.

The views of the HRC led the Canadian government to give Sandra Lovelace the right to reside on a reserve. The problem that only women faced the risk to lose their Indian status was not, however, addressed. Thereby, the views of the HRC are not complete. It is not sufficient, in this case, to determine a breach of article 27 - the sex discrimination must be determined as well. By not commenting upon the issue of sex discrimination, part of the problem remained unsolved.³⁴

In an individual opinion, Mr Néjib Bouziri found that several other rights had similarly been violated and that Sandra Lovelace was “still suffering for the adverse discriminatory effects of the Act in matters other than that covered by article 27”.

ECtHR

Airey v Ireland³⁵

Johanna Airey was an Irish woman who tried to separate from her abusive husband and could not receive legal aid to do so.

In Irish law, divorce does not exist. However, it is possible to annul a marriage or to obtain a judicial separation on certain grounds. The cost for such a proceeding is very high, and legal aid was not available for such a case or any other civil matters.

Johanna Airey complained to the ECtHR and claimed that the State had not protected her from physical and mental cruelty from her husband. She further claimed that her right of access to a court, her right to respect for her family life and her right to an effective remedy

³⁰ Para 13.2.

³¹ Article 27 states: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

³² Para 16.

³³ Para 18.

³⁴ Even though it was not required in the views of the HRC, Canada did change its legislation so that it no longer discriminated on the basis of sex.

³⁵ Judgement of the ECtHR of 9 October 1979, A32 (1980).

were violated. Moreover, she claimed to be discriminated against in comparison with those who have financial resources to pay for the proceedings for a judicial separation (i.e. discrimination on the grounds of property or socio-economic position).

The Court found in 1979 that Johanna Airey had not enjoyed an effective right of access to a court, and that there had been a breach of the European Convention. Regarding her discrimination claim, the Court stated that the article on discrimination (article 14) did not have an “independent existence”. Only if the Court does not find a separate breach of one of the other articles that has been invoked does it have to examine the case under article 14. When a material right has been violated, an examination under article 14 is only necessary if “a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case”. As this did not apply to Johanna Airey’s case, no examination under article 14 was necessary. Similar arguments have been used in other cases, e.g. *Dudgeon v UK*³⁶, in which the Court states “(o)nce it has been held that the restriction (...) gives rise to a breach of Article 8 (...) there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right”³⁷.

Article 14 states as follows.

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination 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.”

Article 14 does not have an independent existence. It only protects the citizens from discrimination against the rights and freedoms in the Convention - it does not create a general “right to equality”. This is what the Court means when they state that the article does not have an “independent existence”. However, the article does have an autonomous meaning. It is not only applicable when a Convention right has been *violated*; as soon as any of the rights are at all affected, the restriction must be made in a non-discriminatory way. If this had not been the case, the only effect of the discrimination would be to aggravate another violation.

The Court does not find it necessary to consider the discrimination claim, as soon as they have discovered that a violation of Johanna Airey’s right of access to a court has been violated. As Asbjørn Eide and Torkel Opsahl puts it: “(i)f a violation of a Convention right is established as such, the added claim that there was also a case of prohibited discrimination has at times been deliberately left aside”³⁸.

This interpretation of the Court has been criticised by various scholars. Van Dijk and Van Hoof³⁹ assert that in cases when a violation of one of the articles is found, “article 14 is not treated as an autonomous and complementary, but only as a subsidiary guarantee”. They continue: “(i)t cannot be appreciated why article 14 should have another character in cases where a violation of another article of the Convention has been found than in cases where there is no question of a violation of any of these articles as such”. In their opinion, the argument of the Court ignores the fact that its judgements have far-reaching effects, which

³⁶ 22 October 1981, A45. See also e.g. *Johnston*, 18 December 1986, A112 and *Philips*, 27 August 1991, A209.

³⁷ Para 69.

³⁸ Asbjørn Eide and Torkel Opsahl, *Equality and Non-Discrimination*, Norwegian Institute of Human Rights, Publication No 1 – 1990, 21.

³⁹ P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1998, 716 f.

have implications of a general character. Sia Åkermark argues⁴⁰ that the Court seems to assume that issues of discrimination are of secondary importance if another right also has been violated. She fears that such a practice will lead to that discriminatory practices in a State will pass uncommented by the Court, and thus remain unsolved.

The reasoning of the Court is, indeed, unfortunate if one wishes to make visible and remedy all different discrimination-grounds behind a violation of a human right. It may seem like the Court presupposes that the discrimination claim has already been dealt with as soon as a violation of a material right has been found. A violation of a material right does indeed always include an element of discrimination. But why then does the court take the time to consider the discrimination element in cases of “clear inequalities” which are a “fundamental aspect of the case”⁴¹?

The reasoning is probably due to procedural considerations. When the Court concludes that Johanna Airey’s right of access to a court has been violated, that makes the discrimination claim less interesting. The discrimination claim is linked to the material right, why it might very well seem superfluous to the Court to go into that claim. Since the Court does not decide on the sanction for the state, it might be less inclined to pin down all discriminatory effects, on top of the material rights violations.

CERD

Mrs A Yilmaz Dogan⁴²

Mrs A Yilmaz Dogan was a Turkish national, residing and working in the Netherlands. When she got pregnant, her employer requested permission from the relevant Dutch authority, the Cantonal Court, to terminate her employment contract. Such permission was needed since Dutch law in principle forbid termination of contracts during the pregnancy of the employee. The request included the following passage.

"When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest setback disappear on sick leave under the terms of the Sickness Act. They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on."⁴³

The employer was given the permission he requested. Mrs Yilmaz Dogan tried in vain to get the decision of the Cantonal Court annulled and to get her former employer prosecuted.

Mrs Yilmaz Dogan filed a complaint to the CERD and the Committee found in 1984 that she had not been afforded protection in respect of her right to work.

It is fair to assume that Mrs Yilmaz Dogan was in fact subject to a combination of racial and gender discrimination. It is not probable that any Turkish men risked being dismissed because they were to become fathers. The Committee was, however, silent on this gender issue, probably at least partly because of the construction of the treaty, which focuses strictly on race discrimination. Sixteen years later, the Committee stressed in a general recommendation the importance of taking gender factors into account.⁴⁴

⁴⁰ Åkermark, see supra note 4, 100.

⁴¹ Airey v Ireland, see supra note 36.

⁴² CERD/C/36/D/1/1984, Communication No 1/1984.

⁴³ Para 2.2.

⁴⁴ See chapter 3 above.

5. Haitians in the Dominican Republic

Background

The Dominican Republic is situated on the eastern part of the island Hispaniola. The island is found in the West Indies, between Cuba and Puerto Rico. Columbus reached it in 1492 and was the one who gave it its name. The Indian population was soon almost exterminated and replaced by slaves from Africa. In the mid 17th century, the west part of the Island was given to France. After a slave mutiny in the French colony, the republic of Haiti emerged in 1804.⁴⁵ In mid 19th century, the Dominican Republic, still a Spanish colony, was invaded by Haiti. Dominican independence occurred as a separation from Haiti 22 years later.⁴⁶

With the development of the sugar industry at the end of the 19th century, Haitians started immigrating to the Dominican Republic to work in the cane fields. The industry still depends on this cheap foreign labour force.⁴⁷ During the Trujillo dictatorship (1930-1961), anti-haitianism and racism was part of the leadership ideology.⁴⁸ In 1937, at least 20.000 Haitians or Dominicans of Haitian origin (both groups hereinafter referred to as Haitians) were killed by government troops in an attempt to “clean the race”.⁴⁹ Today (1990), 15% of the Dominican population is white, 15% black and the rest mulattos. The upper class still consists of the white minority, while the blacks are to be found among the poorest part of the population.⁵⁰ In Haiti, where the French colonials never mixed with the local population or the slaves, 90 % of the population is black and does not speak French.

Living conditions

Haitians still come to the Dominican Republic to work during the sugar harvest every year and many of them remain there. Gradually, they have also started working in other agricultural areas, as well as in various types of work in the urban area.⁵¹ The State Sugar Council (Consejo Estatal de Azúcar - CEA) that used to contract them has to a large part been privatised, and foreign companies now own many of the camps. The Haitians still live with their families in the special work camps once established by the CEA – the bateyes.⁵² Police and military forces participate in the recruiting of the workers. The workers receive very low wages and live under extremely difficult conditions.⁵³ The housing, mostly barracks, is inadequate, without electricity or sewerage. There is overcrowding and a lack of hygiene, drinking water, medical facilities and latrines.⁵⁴ Health centres are often located far away

⁴⁵ The country was thus the first in the Americas to free their slaves, *Etapas del anti-haitianismo en la República Dominicana*, Union Latinoamericana de Juventudes Ecumenicas (ULAJE), Santo Domingo, 1990, 28.

⁴⁶ *Dominikanska Republiken*, Utrikespolitiska Institutet, 1997, 3.

⁴⁷ Jansen, Senaida and Millan, Cecilia, *Género, Trabajo y Etnica en los Bateyes Dominicanos*, Santo Domingo, 1991, 37.

⁴⁸ *Etapas del anti-haitianismo*, see supra note 45, 51.

⁴⁹ *Solidarity with the struggle of the Dominican minority of Haitian descent for citizenship and justice*, MUDHA 2001, 5.

⁵⁰ *Dominikanska Republiken*, see supra note 46, 4 ff.

⁵¹ Jansen and Millan, see supra note 47, 37.

⁵² There are also many Dominican families in the bateyes. They tend to live under slightly better circumstances than their Haitian neighbours.

⁵³ The medium income per month in the bateyes is around 40 US dollars. Yangüela, Argelia Tejada, *Bateyes del Estado*, *Encuesta Socioeconomica y de salud de la población materno-infantil de los bateyes agrícolas del CEA*, Diciembre 1999, 26.

⁵⁴ *Ibid*, 13 ff.

from the bateyes, roads are in bad condition and transport and medicines expensive. 15 % of the Haitians have aids or HIV.⁵⁵ The children are often suffering from malnutrition⁵⁶ and illnesses such as diarrhoea and fever.⁵⁷ Many of them do not go to school since they are not allowed by the government or needed at home.⁵⁸ About one third of the Haitians are illiterate, which is more than double the national level.⁵⁹ Some of them do not speak Spanish.⁶⁰ Armed guards are present in the cane fields. Violence is part of the daily life. Men fighting, men beating women, parents beating children and children beating each other are all common features of the bateyes.

In its concluding observations on the third periodic report of the Dominican Republic, the Human Rights Committee expressed its concern over the lack of protection afforded to Haitians in the Dominican Republic and over the degrading living and working conditions of Haitian labourers.⁶¹ They even called their situation a “slave-like exploitation”⁶².

Prejudice against Haitians and blacks

There is a strong prejudice against Haitians and other blacks in the Dominican Republic, which disadvantages all foreigners of African descent. Race and class are closely tied together. Whites (descendants of the Spaniards) tend to be wealthier and to form the elite and the middle class is in general mulatto (about two-thirds of the population). The urban and rural working classes are in general black or dark mulatto, descendants of the original slaves or arrivals from Haiti. The Haitians are believed to have an inferior culture, and violence and calls for a lessening of Haitian emigration have emerged.⁶³

Despite the majority of colour, almost everybody on television or in magazines is white. The beauty ideal is clearly occidental and most Dominican women make efforts to appear more European. Pupils are encouraged not to wear plaits in school (which is the preferred hairdo for black girls and women) and children are often distinguished by their colour.⁶⁴ When getting married, it is preferred to find a partner of lighter skin.

Dominican scholars, such as Dr Carlos Andújar⁶⁵, think that the origin of this prejudice is to be found in the history of the island. The roots of the racism can be found in the colonial time. A system of differentiation between ethnical groups was a way to justify the social inequality.⁶⁶ The anti-haitianism did not appear until the Haitian occupation, during which the Dominican/Spanish culture was oppressed and Haitian leadership harsh.⁶⁷ The Dominican sense of nationality developed in opposition to Haiti. Even very dark-skinned Dominicans today define themselves as white or of Indian origin, as opposed to the black Haitians. The

⁵⁵ Ibid, 29.

⁵⁶ Around 40 % of the children are malnourished. Ibid, 39.

⁵⁷ Ibid, 34 f.

⁵⁸ 20-25 % of the children never reaches any educational level. Those who do have often been born on Dominican territory. Ibid, 9.

⁵⁹ Ibid, 8.

⁶⁰ The official language in Haiti is French and most Haitians speak Creole.

⁶¹ Concluding observations of the Human Rights Committee: Dominican Republic, 05/05/93. CCPR/C/79/Add. 18.

⁶² Para 9.

⁶³ Wiarda, Howard J and Kryzaneck, Michael J, *The Dominican Republic A Caribbean Crucible*, 1992, 5 f.

⁶⁴ e.g. “el negrito” (the little black) or “la morenita” (the little brown).

⁶⁵ Carlos Andujar is sociologist and the director of Museo del Hombre Dominicano.

⁶⁶ *Etapas del Anti-haitianismo*, see supra note 45, 5-6.

⁶⁷ Ibid, 19.

Haitian people is seen as black, barbaric, voodoo practising, illiterate and of African descent, as opposed to the white, mestizo, catholic Dominican people of Spanish or Indian origin.⁶⁸ In the 19th century, the Haitians were even accused of being cannibals.⁶⁹ After the occupation, there were constant border disputes between the two countries, until 1936.⁷⁰ The relationship between the two countries is still very tense. There is still a fear of Haiti, and the Haitian immigration is by many Dominicans regarded as a passive invasion.⁷¹ Ever since the 19th century, blacks and dark mulattos have often been accused of being pro-Haitian.⁷² When the black leader Peña Gómez tried for president in the 1990's, his political opponents underlined that he originated from Haiti and implied that he might allow Haiti to "take over" the country. Naturally, the ethnical stigma of being Haitian stands in the way of finding a descent job or moving upwards on the scale of society.⁷³

During the World Conference Against Racism in Durban, the President of the Dominican Republic⁷⁴ repeatedly stated in the national newspapers that the Dominican Republic is not a racist country and that the Haitian immigrants are well respected. In its eighth periodic report to CERD, the Dominican Republic denied that any racial prejudice exists in the Republic, and emphasised that there is no discrimination against Haitians living in the country.⁷⁵ CERD has expressed its concern over this denial and over the existence of racial prejudices, not only against Haitians but also against darker-skinned Dominicans.⁷⁶

Haitian women

About 5 % of the cane cutters are women, who are paid half of what the men receive, the same as the children get. The CEA does not keep any record of the female workers. Since the women are not acknowledged, they have no access to any documentation, benefit or service that the CEA provides. If there is no man in the household, e g if the husband dies or is deported, the rest of the family does not get any of that protection. The women have the responsibility for the household and the children, and it is the girls who help their mother in this task.⁷⁷ Around 40 % of the women in the bateyes are unemployed, in contrast to 10 % of the men.⁷⁸ While the women spend their entire income on their family, buying e g food and medicine, the men spend at least part of theirs on alcohol and cigarettes.⁷⁹ The majority of the women who work are found in the informal sector, e g selling food in the streets or working as domestic servants.⁸⁰ Since they often have children, they have to choose between staying at home or trying to find work and leave their children alone or with a neighbour. The medium income for women in the bateyes is

⁶⁸ Jansen and Millan, see supra note 47, 38.

⁶⁹ Etapas del Anti-haitianismo, see supra note 45, 37.

⁷⁰ Moya Pons, Frank, Las tres fronteras: Introducción a la frontera dominico-haitiana, in Lozano, Wilfredo (ed), La cuestión haitiana en Santo Domingo, 1992, 19-20.

⁷¹ Jansen and Millan, see supra note 47, 37.

⁷² Etapas del Anti-haitianismo, see supra note 45, 29.

⁷³ Jansen and Millan, see supra note 47, 152.

⁷⁴ Hipoliot Mejía.

⁷⁵ Eighth periodic report of State Parties due in 1998: Dominican Republic. 11/02/99. CERD/D/331/Add. 1, para 6.

⁷⁶ Concluding observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic. 26/08/99, A/54/18, paras 504-522.

⁷⁷ Jansen and Millan, see supra note 47, 33 ff.

⁷⁸ Yangüela, see supra note 53, 19.

⁷⁹ Jansen and Millan, see supra note 47, 123 f.

⁸⁰ Ibid.

half of the men's.⁸¹ A single mother heads a high percentage of the households in the bateyes.⁸² The Haitian women are often reluctant to seek medical assistance by fear of being badly treated by the doctors. This fear seems not unfounded, since in 1999, a law was proposed to the Congress, which sanctioned doctors giving medical attention to Haitian women who give birth without proper documentation.⁸³ Even though the law did not pass, it is not uncommon that Haitian women are refused help when arriving to a hospital at the time of delivery. The Haitian women are also victims of sexual exploitation by various agents, such as the camp guards and the migration agents. Prostitution is widespread and there are many racist and sexist stereotypes of the women in the bateyes.⁸⁴

Permanent illegality

There are at least 500.000 Haitians in the Dominican Republic, which represents 5 % of the whole population.⁸⁵ Only around half of them have identification documents.⁸⁶ According to the Dominican law on Migration of 1939⁸⁷, all immigrants have the right to a residence permit. However, the law states expressly that temporary day-workers and their families are not considered as such.⁸⁸ Instead, the agricultural industries that need workers during the harvest may apply for a permission to import such labour for a certain time.⁸⁹ Undocumented immigrants that enter the country "by land", i.e. from Haiti, may be arrested without express authorisation.⁹⁰

Article 11 (a) of the Constitution defines as Dominicans the following.

"All persons born in the territory of the Republic, with the exception of the legitimate children of foreigners resident in the country as diplomatic representatives or foreigners in transit through the country"

To avoid the consequences of this article, authorities regard the Haitian workers as being "in transit", even though a period of transit is supposed to be no longer than ten days.⁹¹ The government refuses to recognize and document as Dominican citizens individuals of Haitian ancestry born in the country. When babies are born, the authorities often refuse to issue birth certificates, especially if the parents do not have proper documentation. Without a birth certificate, the Haitian children will not receive an identity- and electoral card when they turn 18, which would give them the same rights as all other Dominicans.⁹²

It is thus very difficult for the Haitians to receive legal status, even when they have lived 30 or 40 years in the country or have been born there. Without documentation, they are not allowed to vote, work, own land, get married or even open a bank account. Their children cannot go to

⁸¹ Yangüela, see supra note 53, 22.

⁸² Ibid, 4.

⁸³ Solidarity, see supra note 49, 21.

⁸⁴ Jansen and Millan, see supra note 47, 116.

⁸⁵ La República Dominicana, 1998, *Visión del Sistema de las Naciones Unidas sobre la situación del País desde la perspectiva de los Derechos Humanos*, 1999, 40.

⁸⁶ Yangüela, see supra note 53, 6.

⁸⁷ Ley Número 95.

⁸⁸ Art 2(4).

⁸⁹ Art 7.

⁹⁰ Art 108 (b).

⁹¹ Law on migration, article 5.

⁹² Yangüela, see supra note 53, 6.

school. Their medium income is much lower than that of persons with documents.⁹³ Officially, they do not exist. On top of that, they constantly face the risk of being deported, which restricts their freedom of movement. During the 1990's, massive and violent expulsions of persons of Haitian origin took place. Between January 2000 and April 2001, 20.121 Haitians were deported against their will.⁹⁴ A case is pending before the Inter-American Court of Human Rights concerning deportations and expulsions of a number of Haitian men. The Court has found the case grave enough to take provisional measures. In various resolutions⁹⁵, the Court has urged the Dominican Republic to protect the lives and the personal integrity of the men in question, and of the two witnesses that have appeared before the Court and later been victims of harassment.⁹⁶

The unprotected status of the Haitians in combination with the anti-haitianism in the country help to keep the salaries low and is beneficial for the industries that employ them.⁹⁷

National and international obligations

Article 8 of the Dominican Constitution contains several human rights, which apply to all persons on Dominican territory. The article establishes the principle that the law is equal for all and includes the right to education (primary school is free and obligatory) and the protection of mothers. The state also takes upon it to provide food, clothes and housing to the poor, to the extent possible. The right to vote and to be elected are confined to citizens.⁹⁸

Article 3 of the Dominican Constitution states that the Dominican Republic recognises and applies all norms of International Law that the country has adopted.⁹⁹

The American Convention on Human Rights¹⁰⁰, which was adopted by the Dominican Republic in 1993,¹⁰¹ puts down the right to a nationality and to a name in articles 18 and 20. The right to a nationality is further laid down in the UDHR¹⁰² and in the ICCPR¹⁰³, adopted by the Dominican Republic in 1978¹⁰⁴. The right to recognition as a person before the law is laid down in article 16 of the ICCPR. Article 13 of the same covenant lies down the rights in connection with expulsions.

⁹³ Ibid, 23.

⁹⁴ Solidarity, see supra note 49, 17.

⁹⁵ 18 August 2000, 12 November 2000 and 26 May 2001.

⁹⁶ Resolución de la Corte Inter-Americana de Derechos Humanos de 26 de mayo de 2001. Medidas Provisionales solicitadas por la Comisión Inter-Americana de Derechos Humanos. Caso de Haitianos y Dominicanos de origen haitiano en la República Dominicana.

⁹⁷ La República Dominicana, see supra note 85, 40.

⁹⁸ Article 13.

⁹⁹ “La República Dominicana reconoce y aplica las normas del Derecho Internacional general y americano en la medida en que sus poderes públicos las hayan adoptado (...)”.

¹⁰⁰ American Convention on Human Rights, Nov 22 1969, 1144 UNTS 123.

¹⁰¹ Organization of American States, American Convention on Human Rights, Signatories and Ratifications, available at <www.oas.org>, 30 October 2001.

¹⁰² Article 15, p 1: “Everyone has the right to a nationality”.

¹⁰³ Article 24, p 2: “Every child shall be registered immediately after birth and shall have a name.” Article 24, p 3: “Every child has the right to achieve a nationality”.

¹⁰⁴ Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties as of 22 Oct 2001, available at <http://www.unhchr.ch/pdf/report.pdf> 31 October 2001.

Economic, social and cultural rights are ensured in the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁵, adopted by the Dominican Republic in 1978¹⁰⁶.

The definition of racial discrimination in CERD, adopted by the Dominican Republic in 1983¹⁰⁷, includes discrimination based on “race, colour, descent, or national or ethnic origin”.¹⁰⁸ The States parties undertake to pursue a policy of eliminating racial discrimination, promote “understanding among all races” and “to engage in no act or practice of racial discrimination”.¹⁰⁹

The rights in the American Convention, the UDHR, the ICCPR and the ICESCR referred to above are all to be exercised without discrimination of any kind.¹¹⁰

When refusing to register the children of Haitian descent, the Dominican Republic violates the right of these children to acquire a name and a nationality. The right to be recognised as a person before the law is breached when the state sugar council does not acknowledge female workers as bearers of rights and obligations. When the Haitian immigrants are being immediately deported, the rights to submit reasons against the expulsion and to have the case reviewed, ensured in article 13 of ICCPR, are breached. The rights to an adequate standard of living, to the highest attainable standard of health, to special protection to mothers in connection with childbirth and to be free from hunger, are all violated. The denial of the Dominican Republic of the existence of racial prejudice in the country goes to show that it does not live up to their obligation to seek to eliminate racial discrimination.

6. Women in the Dominican Republic

Background

As in many Latin American states, the male dominance is apparent in the Dominican Republic. The machismo is obvious; groups of men giving sexual comments to passing women are part of the street life. A condescending attitude towards women is the norm, respect the exception. The Dominican authorities do not respect the laws designed to protect women and discrimination of women is a serious problem. Women have lower salaries than men¹¹¹, are much more often unemployed¹¹² and have difficulties reaching any position of power in all levels of society¹¹³. They work mainly in the sectors of the labour market that are most poorly paid, such as domestic services.¹¹⁴ Representation of women at top political and economical levels is extremely low. Mass media and the educational system reinforce

¹⁰⁵ UN GA res 2200 A (XXI), Jan 3, 1976.

¹⁰⁶ Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties as of 22 Oct 2001, available at <http://www.unhchr.ch/pdf/report.pdf> 27 December, 2001.

¹⁰⁷ See www.unhchr.ch, available 30 October 2001.

¹⁰⁸ Article 1.

¹⁰⁹ Article 2.

¹¹⁰ The American Convention, article 1, UDHR, article 2, ICCPR, article 2, ICESCR, article 2.2.

¹¹¹ Báez, Clara, Estadísticas para la Planificación Social con Perspectiva de Género, 2000, 52.

¹¹² Ibid, 49.

¹¹³ Acción para la igualdad, el desarrollo y la paz, Plataforma de Acción para el Avance de la Mujer Dominicana, 1995-2000, 1995, 1.

¹¹⁴ Análisis de situación de la niñez y la mujer en la República Dominicana, UNICEF, 1996, 13.

stereotypes of women and conserve a traditional role for women in society.¹¹⁵ Adolescent pregnancies are widespread and there are many poor single mother households.¹¹⁶ In recent years, a sex tourism has emerged. Poor women turn to prostitution to support their families, and they are exposed to physical violence, rape, and trafficking. The Dominican Republic is the fourth biggest exporter of female prostitutes in the world.¹¹⁷ There are more than 50.000 Dominican women working abroad as prostitutes.¹¹⁸ Poor women often have to choose between working as domestic servants or in the export zones (“zonas francas”), both of which is very poorly paid, or become prostitutes.¹¹⁹

Domestic violence is a huge problem. Physical violence is the second death cause for Dominican women.¹²⁰ Within one year of the adoption of the law on domestic violence, a department for protection of women was created, which soon received 60-90 complaints a day.¹²¹ Authorities, from the police to the judges, tend to discourage reports from abused women and neglect such cases. Women who report their husbands are sent back with the summons addressed to their abusers. There is no mechanism to guarantee the safety of the women who do receive a ban on visitors. No reliable statistics are available on domestic violence.¹²²

In its concluding observations on the second, third and fourth periodic reports of the Dominican Republic, the Committee on the Elimination of Discrimination against Women expressed concern over women’s poverty, their susceptibility to sexual exploitation, the lack of creation of jobs for women in growth sectors, the persistence of machismo, women’s low participation in public life and decision-making, stereotypical portrayal of women’s role and the segregated labour market. It also noted that no measures had been taken to support women’s efforts to break the cycle of poverty and that no public awareness and information campaigns had been undertaken. Other areas of concern mentioned were the considerable discrimination in income and benefits, the high unemployment rate for women, the insecure situation of domestic workers and the high rates of single mothers and maternal mortality.¹²³

Black women

Black women in the Dominican Republic do not consider themselves as black, but as Indian or mulatto. Similarly, there is no official statistics that target this group, which is thus rendered invisible. In many countries, blacks are portrayed as being more sexual than others. This is also true in the Dominican Republic. For black women, this sexualised image may discriminate against them in two ways. It makes them more vulnerable to unwelcome sexual invitations or even rape, and it may make them less credible in the legal system.

¹¹⁵ Acción para la igualdad, see supra note 113, 1.

¹¹⁶ Ibid.

¹¹⁷ The top three are Thailand, Brazil and the Philippines. Trabajo, Salud y Sida, Centro de Orientación e investigación Integral, COIN, 1998, 55.

¹¹⁸ Ibid.

¹¹⁹ Ibid, 56.

¹²⁰ La República Dominicana, see supra note 85, 21.

¹²¹ La Ley 24-97 Una mirada crítica a su implementación, Quehaceres, Centro de Investigación para la Acción Femenina, Noviembre 2000.

¹²² Ibid.

¹²³ Concluding observations of the Committee on the Elimination of Discrimination against Women: Dominican Republic. 14/05/98. A/53/38, paras 312-353.

National and international obligations

The Dominican Constitution includes a non-discrimination provision in article 100.

“The Republic condemns all privilege and any situation that tends to break down the equality of all Dominicans, among whom no differences should matter other than those that result from talent or virtue (...)”

Article 12 of the Constitution states that all Dominicans, of both sexes, that have reached the age of 18, are citizens.¹²⁴

Sexual harassment of women workers is prohibited in article 47 of the Labour Code.

“It is prohibited for employers (...) to take actions against the worker that may be considered sexual harassment, or support, or not intervene if such actions are taken by their representatives.”

There is a specific law against domestic violence.¹²⁵ In the preamble, reference to CEDAW and the Interamerican Convention on the Prevention, Punishment and Eradication of Violence against Women¹²⁶ is made and it is stated that domestic violence is a violation of human rights. The law, which is mainly a modification of the Penal Code, defines violence against women, increases the penalties for sexual violence, and introduces the possibility to issue bans on visitors.

By adopting CEDAW in 1980¹²⁷, the Dominican Republic has agreed to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women” and “to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.¹²⁸ The republic has also undertaken to “take all appropriate measures (...) to suppress all forms of traffic in women and exploitation of prostitution of women”.¹²⁹

The republic has also in 1996¹³⁰ adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which expressly includes violence in the private sphere.¹³¹ According to the convention, women have the right to be free from violence in both the public and the private sphere¹³², and the states agree to “pursue policies to prevent, punish and eradicate violence against women”.¹³³

Considering the low salaries that women receive, their high rate of unemployment, the high level of prostitution and the amount of violence against women, it is apparent that the Dominican Republic has failed to live up to their international obligations.

¹²⁴ “Son ciudadanos todos los dominicanos de uno y otro sexo que hayan cumplido 18 años de edad (...)”.

¹²⁵ Ley Número 24-97.

¹²⁶ 33 ILM 1534 (1994).

¹²⁷ See www.unhchr.ch, available 30 October 2001.

¹²⁸ Article 2.

¹²⁹ Article 6.

¹³⁰ Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, UN Registration, available at www.oas.org, 30 January 2002.

¹³¹ Article 1-2.

¹³² Article 3.

¹³³ Article 7.

7. Method to identify multiple discrimination

The example of the Haitian women in the Dominican Republic

The Haitian women in the Dominican Republic are obvious victims of multiple discrimination. The discrimination they face is at least four-fold; they are black, poor, Haitian and female. All these factors interact and disadvantage them in various ways. Some of their problems are shared by Dominicans of colour, others by poor Dominicans, by all Haitians in the country and by the Dominican women.

Deprived of the right to a Dominican nationality, they have no right to work or to put their children in school. They are confined to the informal sector, where they are badly paid and met with suspicion. They live in barracks or sheds and are often illiterate. When they are beaten or abused sexually, they get no protection from the society, as they often have no documents. Language barriers, sexualised images of black women, high legal costs and fear of state authorities (agents of which, indeed, may be the abusers) are all obstacles to escaping violence. Health centres are located far away from where they live, medicines are expensive and they face the risk of being badly treated by the medical personnel.

Comparisons

To identify situations of multiple discrimination such as the case of the Haitian women, an holistic approach is necessary. One way of gaining understanding of the inequalities may be to compare the situation of the group in question with other members of society. Using comparisons is the usual way of detecting cases of discrimination and we need only to continue such comparisons with several groups. In cases involving discrimination, a comparison must always be made between the alleged victim of discrimination and equal or at least analogous cases. To determine whether two cases are analogous, a comparability test must be made. Since different cases are bound to be equal in some respects and unequal in others, criteria that relate to the rights in question must be used. When two cases have been found analogous, the next step will be to consider if the different treatment is legitimate.

For example, when comparing the situation of the Haitians in the Dominican Republic with citizens of the republic (as well as other immigrant groups) discrimination against Haitians is discovered. That children of Haitians are not granted citizenship is an apparent discrimination, in breach of the Dominican constitution as well as several international conventions on human rights¹³⁴. Similarly are other material rights, such as the right to recognition as a person and the rights in connection with expulsions, violated. Moreover, the Dominican Republic are breaching the non-discrimination provisions of the UDHR, the ICCPR and ICESCR, as the rights to, e g, a nationality, education and health are exercised differently depending on the ethnicity of the person concerned. Both material rights and the right to non-discrimination are thus breached. When comparing the men with the women within the Haitian group, gender-specific violations appear. For example, Haitian men suffer a greater risk of being beaten up in the work field, while Haitian women risk being raped or sexually harassed. So far, our comparisons have revealed *ethnic* discrimination, and gender differences within the group.

¹³⁴ The American Convention on Human Rights, article 18 and 20, the Universal Declaration of Human Rights, article 15, and the International Covenant on Civil and Political Rights, article 24.

If we take the process one step further, we can compare the situation of all women living in the Dominican Republic with that of the men. This shows us that the whole female community in fact shares some of the discrimination suffered by Haitian women. They all have lower salaries, work to a greater extent in the informal sector and face a greater risk of being subject to violence. Apparently, the Dominican Republic does not take all appropriate measures to suppress exploitation of prostitution or to ensure equal rights in the field of employment. The right to be free from violence is very far from the reality. Women and men are not treated equally and thus the right to non-discrimination is breached. Part of the discrimination is thus related to *gender*, which partly can explain the gender differences within the Haitian community (such as the risk of sexual violence).

If we then compare the blacks with the white in the republic, we find that all blacks face racial prejudice, which disadvantages them in all areas of their lives, such as education and career. The Dominican Republic denies the existence of racial prejudice and thus does not live up to its international obligations to eradicate such discrimination. Since blacks are treated differently from whites, the right to non-discrimination is not respected. Part of the problems Haitian women face it thus due to *racial* discrimination, or discrimination because of the colour of their skin.

Finally, we can compare all poor people on the island with middle-class people, and discover that they all suffer from bad housing and lack of medical and legal help. Their right to an adequate standard of living is not respected. We have found discrimination on grounds of *class* or socio-economic position.

We could continue such comparisons to discover other discrimination grounds. For example, we could compare different religious groups, such as Catholics and voodoo-believers and probably find discrimination on grounds of religion. Heterosexuals could be compared with homosexuals, disabled with healthy and so forth. Only when all grounds of discrimination are realised do we get a whole picture of the situation of the person who we want to help and only then can the help be appropriate. As more and more grounds of discrimination are being considered, a more and more comprehensive picture of the society and its differences will emerge.

A different sort of comparability test has been proposed by Sia Åkermark in connection with the case of *Abdulaziz, Cabales and Balkandali v the UK*¹³⁵, dealt with by the ECtHR in 1985. *Abdulaziz, Cabales and Balkandali* were all women with permanent residence permits in the United Kingdom and they were all denied to have their spouses join them. If they had been men, it would have been easier for their family members to get a residence permit. The Court chose to compare the women concerned with men in a similar position (non-citizens with permanent residence permit), and concluded a violation on the grounds of sex. This is, perhaps, the most obvious ground for discrimination in the case. As Sia Åkermark points out, there are, however, other possible comparable categories.¹³⁶ If the women in the case were to be compared with citizen women, discrimination on grounds of birth might appear. Sia Åkermark further suggests a comparison between the women concerned with citizen men, to take into account both criteria (sex and birth). She draws the conclusion that an alleged victim of discrimination must be compared with the most privileged group in a comparable situation. The problem

¹³⁵ Judgement of the ECtHR of 28 May 1985, A94.

¹³⁶ Åkermark, see supra note 4, 101 ff.

with that comparability test is that it will not tell us the specific grounds of discrimination. We will quickly be able to assess discrimination, but we will not know if it was citizenship or gender or both that was the reason for the different treatment.

Haitian women and international human rights law

How may the international human rights law help the Haitian women in the Dominican Republic? To get their children registered as Dominicans, they can turn to the HRC. The Committee on the Elimination of Discrimination against Women can criticise the lack of measures taken to combat discrimination against all women in the country. Problem with finding adequate jobs due to the colour of their skin may be dealt with by the CERD.

None of these bodies will, however, take all the discrimination factors into account. None of them will go through the different comparisons described above. The whole life situation of these women and the multiple burdens of discrimination they are subject to will not be considered by any international organ. All their identities will not be assessed. In fact, whichever international organ that deals with the case, it is bound to render some parts of the problem invisible. The structure of the system of international human rights law makes it impossible for the organs to take all discrimination factors into account. The Haitian women are too deep down in Crenshaw's basement to get help with getting through the hatch. The international system of human rights law is simply inadequate when facing such, not unusual, fates.

8. Conclusion

The phenomenon of multiple discrimination is not new. Millions of people around the world have lived their lives suffering from multiple burdens. Now, the international community is beginning to recognise the problem and will have to find a way to deal with it. To recognise multiple discrimination is to recognise the complexity of the world. Only when all aspects of a person's existence are considered will we be able to help even those who face several disadvantages in their daily lives. To focus on only one aspect of a person's identity, such as gender, will obscure other kinds of discrimination, e.g. on the grounds of race. To deal only with one ground of discrimination will benefit those who suffer only from one aspect of discrimination, such as white women.

Several UN bodies have recently addressed the problem of multiple discrimination. In documents such as the Beijing Platform for Action and the report of the Expert Group Meeting the facts that women often face various barriers to equality and that the UN system may be inadequate to deal with such cases have been underlined. Bodies like the CERD and the Commission on the Status of Women have asserted the need for a method to monitor multiple discrimination. Most recently, in Durban, the life at the crossroads of gender and racial discrimination was specifically addressed.

The UN system has concentrated on one issue of discrimination at the time, which have led to that cases of multiple discrimination have not been detected. In this thesis, I have shown how three international judicial and quasi-judicial bodies have failed to deal with the question of multiple discrimination appropriately. In the case of Sandra Lovelace, the HRC only considered the discrimination against the Indian minority and failed to address the gender

issue. The ECtHR treats discrimination issues in an unfortunate, step motherly way, as it will not consider them if one of the Convention rights has been violated. The CERD did only consider the racial discrimination against Mrs Yilmaz Dogan and overlooked the gender issue.

The Haitian women in the Dominican Republic are a good example of a group suffering from multiple burdens. Their living conditions, their undocumented status, the prejudice against them and the situation of the women in the country all contribute to their vulnerable existence. Their path to a better life is constantly being blocked, the obstacles being their colour, their sex, their origin and/or their poverty. Using the intersection metaphor, they are constantly being hit by the traffic, which, coming from four different directions, endangers their lives. Indeed, many of the problems for vulnerable groups of women that are specifically mentioned in the document from the World Conference Against Racism in Durban, such as illiteracy, problems in the labour market and poverty, are directly applicable to the situation of the Haitian women in the Dominican Republic.

As a way to identify and deal with cases such as the one of the Haitian women, I have proposed a procedure of comparisons. Indeed, detecting cases of discrimination always includes a comparison between the disadvantaged group with an advantaged (e.g. women with men). To discover multiple discrimination, one needs only continue such comparisons with other advantaged groups in the society. This more holistic approach will reveal that several discrimination grounds in fact often interact and exist at the same time. Only when all such grounds are assessed will we be able to remedy the situation for those who are the very most disadvantaged in our society.

Today's system of international human rights law is not adequate when it comes to dealing with cases of multiple discrimination, such as the case of the Haitian women in the Dominican Republic. The system is simply not built for dealing with such multi-faceted cases. The one-eyed approach of the system and the way it has grown one step at a time have led us to a situation when our instruments are too blunt to deal with the complex reality.

9. Bibliography

Books and articles

Acción para la igualdad, el desarrollo y la paz, Plataforma de Acción para el Avance de la Mujer Dominicana, 1995-2000, 1995

Análisis de situación de la niñez y la mujer en la República Dominicana, UNICEF, Santo Domingo, 1996

Anderson, Charles W, Pragmatic Liberalism, 1990

At the crossroads of gender and racial discrimination, World Conference Against Racism, available at www.un.org/WCAR/e-kit/gender.htm

Báez, Clara, Estadísticas para la Planificación Social con Perspectiva de Género, Santo Domingo, 2000

Bayefsky, Anne F, The Principle of Equality or Non-Discrimination in International Law, Human Rights Law Journal, 1990

Crenshaw, Kimberlé et al (eds), Critical Race Theory, The Key Writings That Formed the Movement, 1995

Deere, Carmen Diana et al (eds), Impact of the Economic Crisis on Poor Women and Their Households, in Visvanathan, Nalini et al (eds), The Women, Gender and Development Reader, 1997

Dominikanska republiken, Utrikespolitiska institutet, Stockholm 1997

Dworkin, Ronald, Taking Rights Seriously, 1977

Eide, Asbjørn and Opsahl, Torkel, Equality and Non-Discrimination, Norwegian Institute of Human Rights, Publication No 1 –1990

Etapas del anti-haitianismo en la República Dominicana, Union Latinoamericana de Juventudes Ecumenicas (ULAJE), Santo Domingo, 1990

Fletcher, George P, Basic Concepts of Legal Thought, 1996

Hellström, Eva, Invandrare utan rättigheter, Latinamerika 4/1999

Jansen, Senaida and Millan, Cecilia, Género, Trabajo y Etnica en los Bateyes Dominicanos, Santo Domingo, 1991

La Ley 24-97 Una mirada crítica a su implementación, Quehaceres, Centro de Investigación para la Acción Femenina, Noviembre 2000

Lozano, Wilfredo (ed), La cuestión haitiana en Santo Domingo, 1992

Moya Pons, Frank, El Batey, Estudio socioeconomico de los bateyes del consejo estatal del azúcar, Santo Domingo, 1986

Numhauser-Henning, Ann (ed), Perspektiv på likabehandling och diskriminering, 2000

Patel, Pragna, Notes on Gender and Racial Discrimination: An urgent need to integrate an intersectional perspective to the examination and development of policies, strategies and remedies for gender and racial equality, available at www.un.org/womenwatch/daw/csw/Patel45.htm 14 august 2001

Racismo en las diferentes instancias sociales y políticas, Casa por la Identidad de las Mujeres Afro, 1999

La Republica Dominicana, 1998, Visión del Sistema de las Naciones Unidas sobre la situación del País desde la perspectiva de los Derechos Humanos, Santo Domingo, 1999

Robinson, Mary, Gender dimensions of racial discrimination, United Nations Office of the High Commissioner of Human Rights, available at www.unhchr.ch/pdf/wcargender.pdf

Safa, Helen I, Ger pengar makt? Jobb för kvinnorna i frizonerna, männen slås ut, Kommentar 3/93

Sara-Lafosse, Violeta, Machismo in Latin America and the Caribbean, in Stromquist, Nelly P (ed), Women in the Third World, 1998

Sieghart, Paul, The International Law of Human Rights, 1983

Solidarity with the struggle of the Dominican minority of Haitian descent for citizenship and justice, MUDHA, august 2001

Spiliopoulou Åkermark, Athanasia, Minority Women: International Protection and the Problem of Multiple Discrimination in Hannikainen and Nykänen (eds) New Trends in Discrimination Law – International Perspectives, Publications of Turku Law School, Vol 3, 1999

Trabajo, Salud y Sida, Centro de Orientación e investigación Integral, COIN, Santo Domingo 1998

U.S. Department of State, Dominican Republic, Country Reports on Human Rights Practices – 2000.

Weisberg, D. Kelly (ed), Feminist Legal Theory, Foundations, Philadelphia, 1993

Wiarda, Howard J and Kryzaneck, Michael J, The Dominican Republic A Caribbean Crucible, 1992

Wing, Adrien Katherine (ed), Global Critical Race Feminism, 2000

Yangüela, Argelia Tejada, Bateyes del Estado, Encuesta Socioeconomica y de Salud de la Población Materno-Infantil de los Bateyes Agrícolas del CEA, Diciembre 1999, Resumen Ejecutivo, Santo Domingo, 2001

Material from international bodies

Beijing Declaration and Platform For Action, A/CONF.177/20, 15 September 1995, available at <http://www.un.org/womenwatch/daw/followup/ress233e.pdf>

Commission on the Status of Women, 45th session: Draft agreed conclusions on gender and all forms of discrimination, in particular racism, racial discrimination, xenophobia and related intolerance, available at <http://www.un.org/womenwatch/daw/csw/draftacrace.htm>

Committee on the Elimination of Racial Discrimination: General Recommendation on gender-related dimensions of racial discrimination, 2000, U.N. Doc.A/55/18, annex V.

Concluding observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic. 26/08/99, A/54/18.

Concluding observations of the Human Rights Committee: Dominican Republic, 05/05/93, CCPR/C/79/Add. 18.

Eighth periodic report of State Parties due in 1998: Dominican Republic. 11/02/99, CERD/D/331/Add. 1.

GA Resolution A/RES/S-23/3 on further actions and initiatives to implement the Beijing Declaration and Platform for Action.

Gender and Racial Discrimination, Report of the Expert Group Meeting in Zagreb, 21-24 November 2000, available at <http://www.un.org/womenwatch/daw/csw/genrac/report.htm>

Inter-American Commission on Human Rights, Report on the situation of Human Rights in the Dominican Republic, OEA/Ser. L/V/II.104.

Resolución de la Corte Interamericana de Derechos Humanos de 26 de Mayo de 2001, Medidas Provisionales solicitadas por la Comisión Interamericana de Derechos Humanos respecto de la República Dominicana, Caso de Haitianos y Dominicanos de Origen Haitiano en la República Dominicana

World Conference against Racism, United Nations Development Fund for Women, Integrating Gender into the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UNIFEM Background Paper, available at www.unifem.undp.org/hr_racism.html 14 august 2001

Cases

Abdulaziz, Cabales and Balkandali v the UK, Judgement of ECtHR of 28 May 1985, A94

Airey v Ireland, Judgement of ECtHR of 9 October 1979, A32

Dudgeon v UK, Judgement of ECtHR of 22 October 1981, A45

Sandra Lovelace v Canada, Views of the Human Rights Committee, CCPR/C/13/D/24/1977, available at <http://www.unhcr.ch/tbs/doc.nsf/FramePage/TypeJurisprudence?OpenDocument>

Yilmaz-Dougan, CERD/C/36/D/1/1984, Communication No.1/1984