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Intersectional Discrimination – gender aspects of religious discrimination

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Overview

- Intersectionality and EU law
 - A very short introduction
- Religion, racial/ethnic origin and sex/gender
 - A different perspective on the headscarf cases
- Other aspects of gender and religion
 - Ashers Bakery

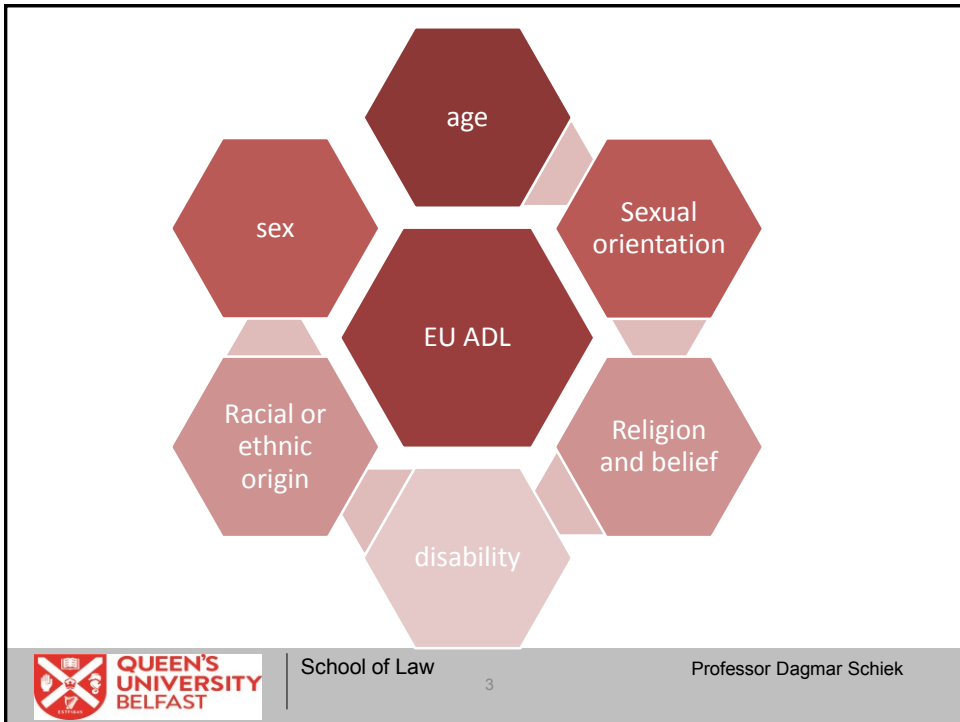


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Issues for intersectionality

There is no "essential woman"

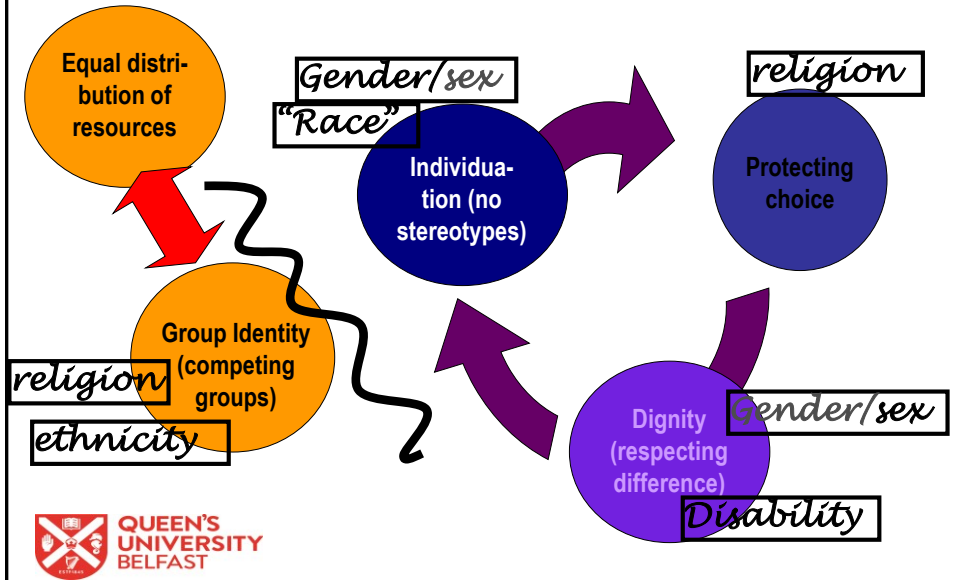
There is no uniform "protected group"

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Conflicts between Grounds ?



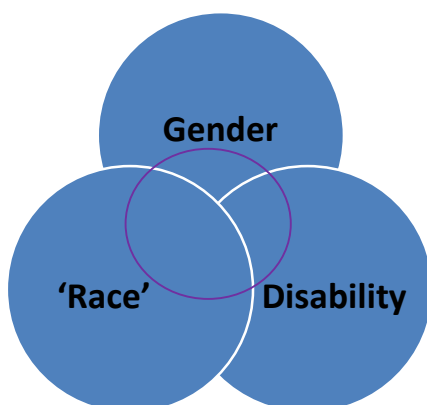
Intersectionality and law

- An analytical tool to explain shortcomings of the law
- A conceptual frame to expand protection of anti-discrimination law to those ignored "truly intersectional cases"
- A conceptual frame to reframe "grounds" central to anti-discrimination law

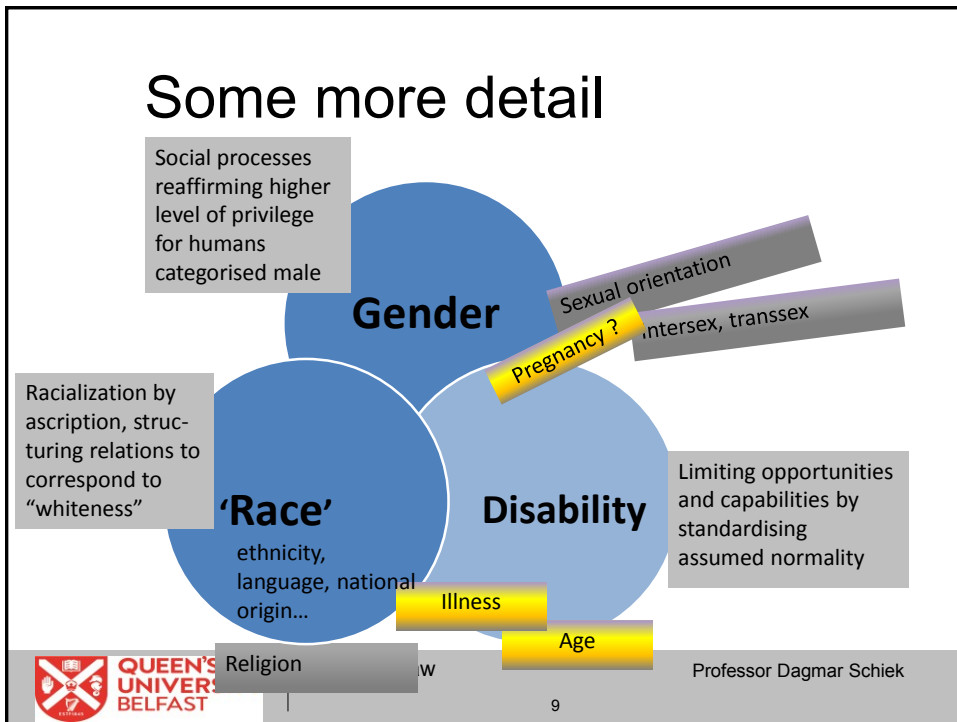
My own central claim

- Ascribing otherness, or othering, constitutes the specific mark of creating social disadvantage through market based discrimination.
- It is distinct from social inequalities associated with the class divide and poverty.
- This normative base demands re-framing grounds and recognising intersectionality

Nodes – the basic concept



- Refocus EU anti-discrimination law
- Highlight context around the 3 concepts
- Realise that overlap (intersectionality) is the norm rather than exception



Positive EU law supports intersectionality

- Directives 2000/43 and 2000/78
 - “women are often the victims of multiple discrimination”
 - Recital 14 Dir 2000/43, Recital 8 Dir 2000/78/EC
 - Commission to report on multiple discrimination and gender mainstreaming
 - Article 17 and 19 respectively
- “gender” Directives:
 - No reference to multiple discrimination
- **While there is no positive definition of intersectional or multiple discrimination, EU law can be interpreted as corresponding to intersectional inequalities**

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CJEU Case law...

- ... is not everything
 - Policy development, based on empirical studies
 - Positive action measures
 - Awareness building.
- ... but has an important role
 - Specifying open norms (unavoidable in EU)
 - Development of law beyond legislation

Does the CJEU recognise intersectionality?



ECLI:EU:C:2016:897 – C-433/15 – Parris – November 2016

80 (...) while discrimination may indeed be based on several of the grounds (of) Article 1 of Directive 2000/78, there is (...) no new category of discrimination resulting from the combination of more than one of those grounds (...) that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.

81 Consequently, where a national rule creates neither discrimination on the ground of sexual orientation nor discrimination on the ground of age, that rule cannot produce discrimination on the basis of the combination of those two factors.

Galina Meister (EU:C:2012:217, C-415/10)

- Ms Meister considered that she suffered less favourable treatment than another person in a comparable situation, on the grounds of her sex, age and ethnic origin. She therefore brought an action against Speech Design before the Arbeitsgericht (Labour Court)
- Multiple discrimination not viewed as a problem
- Case turned on burden of proof

Avoiding the issue

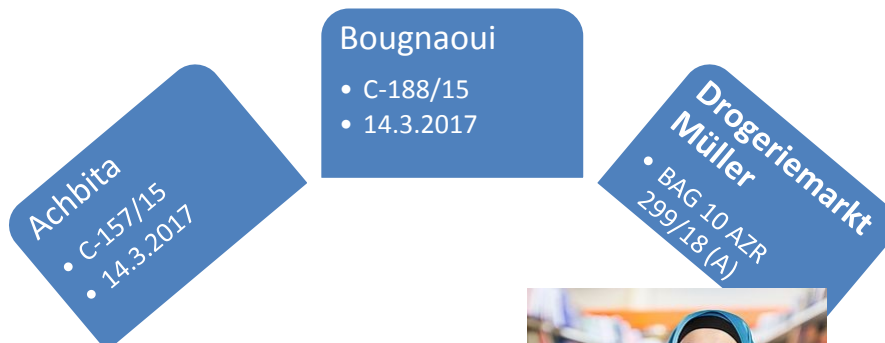
- Race focus (neglecting gender)
 - FERYN (C-54/07)
- Age focus (neglecting ethnicity)
 - Küçükdeveci (C-555/07) (also indirect gender discrimination ?)
- Age focus (neglecting gender)
 - Petersen (C-341/08), Bulicke (C-246/09)
- Sexual orientation (neglecting gender)
 - Maruko (C-267/06), Roemer (C-147/08) (indirect discrimination?)
- Disability focus (neglecting gender discrimination)
 - Coleman (C-303/06) – also indirect discrimination

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What headscarf cases?



Achbita

- Woman started wearing headscarf
- Unwritten rule of political and ideological neutrality at work is formalised (collaboration of works council)
- Muslim Woman is dismissed

Achbita case – AG Kokott

- Stresses throughout that the claimant is a Muslim woman
- However, the ban on religious, political and philosophical signifiers is NOT direct discrimination on grounds of religion and belief
 - General policy, several „grounds“
- The indirect discrimination is justified (business interest, neutral clothing)

Court (Achbita)

- Indeed this is at best indirect discrimination, as there is disparate impact
- At justification level, the Court steers this towards religious freedom (para 39), and submits that dismissal is justified if
 - before Achbita’s dismissal, there is a general rule
 - And this is motivated by maintaining a neutral appearance



38 An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.

39 An interpretation to the effect that the pursuit of that aim allows, within certain limits, a restriction to be imposed on the freedom of religion is moreover, borne out by the case-law of the European Court of Human Rights in relation to Article 9 of the ECHR (judgment of the ECtHR of 15 January 2013, *Eweida and Others v. United Kingdom*, CE:ECHR:2013:0115JUD004842010, paragraph 94).

40 As regards, in the second place, the appropriateness of an internal rule such as that at issue in the main proceedings, it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner (see, to that effect, judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55, and of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 53).



Bougnaoui case

- IT engineer was required not to wear headscarf when working with specific customers, who had expressed a dislike.
- When she did not comply, she was dismissed, with reference to business interest.



AG Sharpstone - Bougnaoui

- Individual demand to not wear headscarf when contacting customer is direct discrimination on grounds of religion
- In principle, this could be justified by reference to genuine business requirement
- In this specific case, the employer has not been convincing though
- Interesting slant: In „Western culture“ eye contact is central – and this could be used as justification (paragraph 130 of opinion)



Sharpston para 130

- Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication between representatives of a business and its customers. It follows in my view that a rule that imposed a prohibition on wearing religious apparel that covers the eyes and face entirely whilst performing a job that involved such contact with customers would be proportionate. The balancing of interests would favour the employer. Conversely, where the employee in question is asked to work in a role which involves no visual or eye contact with customers, for example in a call centre, the justification for the same rule would disappear. The balance will favour the employee. And where the employee seeks to wear only some form of headgear that leaves the face and eyes entirely clear, I can see no justification for prohibiting the wearing of that headgear.

Court (Bougnaoui)

- Rules in parallel to Achbita
 - If general rule including, but not limited to religion, the ban is justifiable (as indirect discrimination).
 - If not (as it is direct discrimination), it might still be a genuine and objective requirement to comply with customer demands (34)
 - Though read narrowly
 - Decision on categorisation and justification left to national court

34 By contrast, if the dismissal of Ms Bougnaoui was not based on the existence of an internal rule (...), it is necessary to consider (...) whether the willingness of an employer to take account of a customer's wish no longer to have services provided by a worker who, like Ms Bougnaoui, has been assigned to that customer by the employer and who wears an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78.

35 (...) Member States may provide [a good defence], provided that the objective is legitimate and the requirement is proportionate.

40 It follows from the (...) above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot (...) cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer

Drogeriemarkt Müller

- Employer operationalised the Achbita ruling, prohibiting the wearing of any large item signifying religion or belief or political opinion in a general rule
- Dismisses salesperson wearing the „Islamic headscarf“
- Reference questions focus on scope for work place agreement, religious freedom (ECHR) and relationship between national and EU fundamental rights protection
- NOT on intersectionality.

Why use intersectionality??

- Achbita / Bougnaoui cases, DM Müller
 - Gender & ethnic dimension of cases springs in the face – the law to recognise this?
 - Justification of gender and ethnic discrimination more demanding than for religious discrimination
 - Acknowledging intersectionality might lead to higher damages
 - But why gender and religion????

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The Ashers Bakery case

- <https://www.supremecourt.uk/cases/uksc-2017-0020.html> [link to judgment]
- A Christian bakery refuses to produce a cake for a gay wedding which also promotes equal marriage
- Another take on religion and gender
 - The religious claimant is funded by a US organisation
 - Refusal to serve, relying on religious freedom, and rejection of alternative gender arrangements

Other examples

- Refusal to act in gay marriage cases as official representative
- Refusal to provide abortion
-

Cautious conclusion

- Intersectionality matters for EU anti-discrimination law
- Defining grounds adequately is a challenge for which intersectionality theory can be used
- Accepting intersectionality beyond this necessary if some claims not to be de-recognised
- Intersectional dimension of head scarf cases if recognised may prevent inherently racist justification of exclusion (“Western culture”)



Main references

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