

Conceptualising Discrimination Grounds – the ruling in Ring & Skouboe Werge in perspective

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Outline

- Facts of Case C-335/11 (and precedents): intersections
- The Court's reading of disability
- Cases on defining disability and the proposal of organising EU equality law by nodes
 - Explaining the concept
 - Differences it will make to these (and other) cases

ECJ C-335/11 Ring & Skouboe Werge

- 2 women employees (secretaries) suffering from pain (back problem/ whiplash injury), long absences
- Dismissed as if not disabled
- Demand working part time as reasonable accommodation
- Is this disability?



C-335/11 why not disability?

- Ring: chronic illness, much pain (osteoarthritis)
- Skouboe: long illness, initially no prediction whether curable
- Both cases:
 - Part time work (+ height adjustable desk for Ring) would allow continuing employment
 - No special aids needed



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Earlier case law

- Chacon Navas (2006)
 - Female employee in catering
 - illness of 8 months
 - dismissed, paid compensation
 - Claims reinstatement
 - reference: can she rely on disability discrimination?
- Coleman (2008)
 - Female employee (legal secretary)
 - Harassment on grounds of son's disability
 - Claims compensation for discrimination
 - reference: discrimination by association?

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A surprising coincidence?

- All these cases concern women
- They were in the female section of the labour market
- Their problem connected to their traditional female roles
 - Women and chronic illness
 - Women and motherhood
 - Part time work

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Chacón Navas (C-13/05)

- Autonomous concept of “disability” in Dir 2000/78
- Under that directive, disability consists of limitation that hinders participation in professional life, resulting “in particular from physical, mental or psychological impairments” (43)
- Disability differs from sickness (44, 46)
- Duty of reasonable accommodation implies long duration, if not permanence (45)
- Dismissal on grounds of disability constitutes discrimination if not justified because employee in light of duty to reasonably accommodate “is not competent, capable and available to perform the essential functions “ (51)

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Critique Chacón Navas

- Medical model of disability
 - Court views impairment as cause of limitation to participate (only implied)
 - Court does not seem to allow for overlap of chronic illness and disability
- ECJ Coleman case (C-303/06):
 - 46 (the Court) “did not hold that (...) the scope ratione personae of (Directive 2000/78) must be interpreted strictly with regard to those grounds.”

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Relevance Ring case

- UN CRPWD is binding on EU, enjoys primacy
→ interpretation of EU law in conformity
- Notion of disability:
 - Stresses interaction of impairment with barriers
 - Illness (curable or chronic), may lead to disability
- Disability does not presuppose a need for special equipment
- Reasonable accommodation as wide notion, encompassing part time
- Dismissal on grounds of disability may be discrimination (Chacon Navas confirmed)

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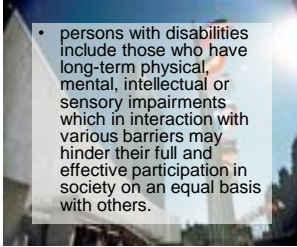
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A new notion of disability?

Social Model of disability

- Radical
 - Disability results from the inadequate accommodation of impairment by society
- Modified
 - Impairment and society interact in generating disability.
- WHO ICF
 - Analyses function in context with environment

UN CRPWD – Article 1



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Case 335/11 (Ring): concept of disability

- 38 the “concept of ‘disability’ must be understood as referring to a limitation which results in particular from (...) impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers”
- 39 impairments must be long-term (follows from CRPWD)
- 41 illness – whether curable or not – may entail a limitation which in interaction with barriers establishes disability

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First reference to Ring

- AG Wahl, Opinion Z v A Governmental body (C-363/12)
 - Does being born without a womb, but with genitalia and chromosomes considered female constitute a disability under Directive 2000/78?
 - If such a woman uses a surrogate mother in Carolina (USA) to produce a child from her ovaries and her partner’s sperm, does the refusal of paid maternity leave constitute sex discrimination or disability discrimination?

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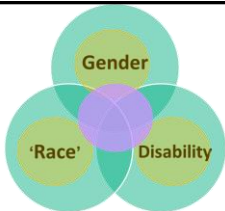
Some dissatisfaction

- All these cases concern women
- Partly in their female roles
- Women and chronic illness
- Women and motherhood

*Gendered notion of disability?
Sex as additional factor?*

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- Refocus based on common rationale
- Heterarchy instead of hierarchy
- Inclusive instead of exclusive

Nodes of Discrimination

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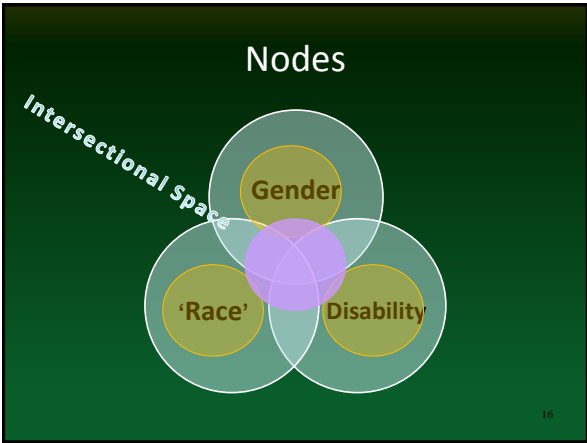
Common rationale for discrimination grounds?

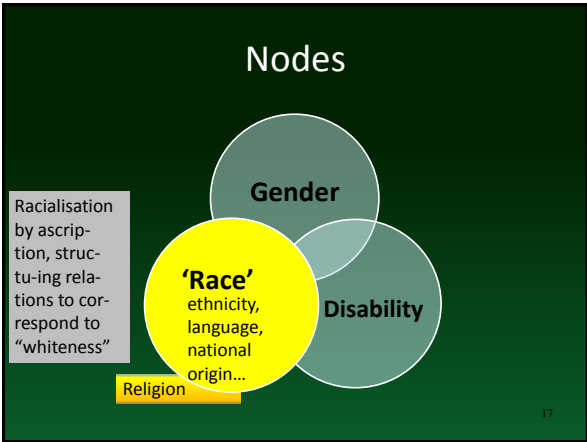
- ...related to durable inequality arising from structural processes of exclusion (Young 2009)
-based on ascribed otherness (Schiek, 2002, 2005)

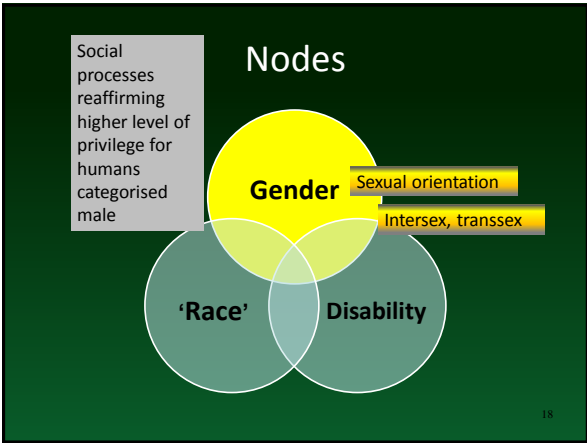
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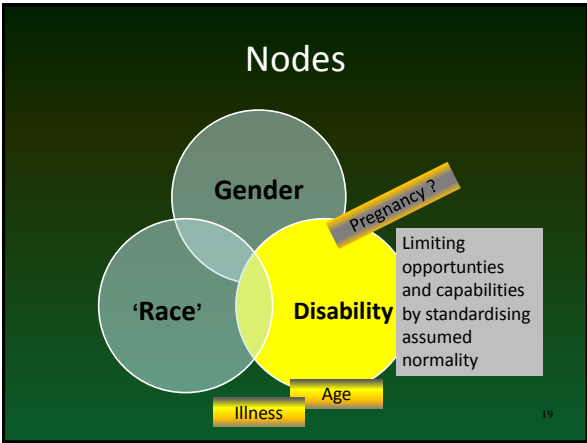
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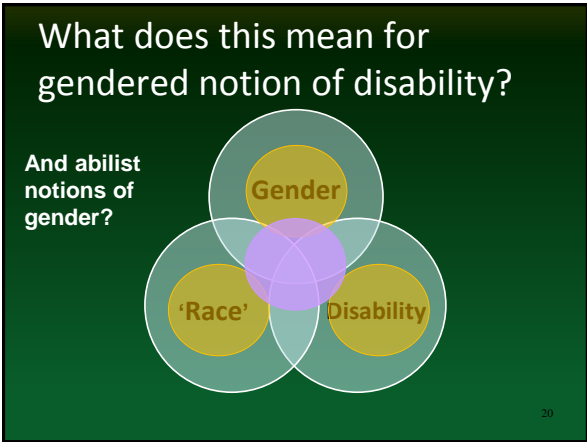
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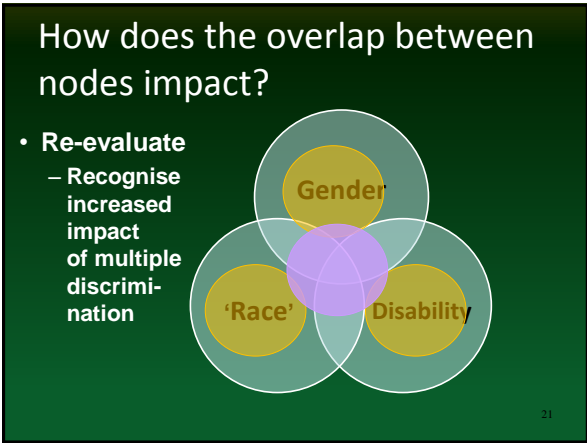












*Thank you for
your attention!*

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