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# “Multiple discrimination”

European Academy of Law – 18 September 2012

# Multiple Discrimination

- Notions: multiple discrimination or intersectionality
- Problems with “intersectionality”
- Multiple discrimination and the EU
  - EU legislation
  - ECJ case law
  - Some national developments
- Ways forward
  - Incremental EU policy development
  - The nodes concept and intersectionality

# Multiple Discrimination

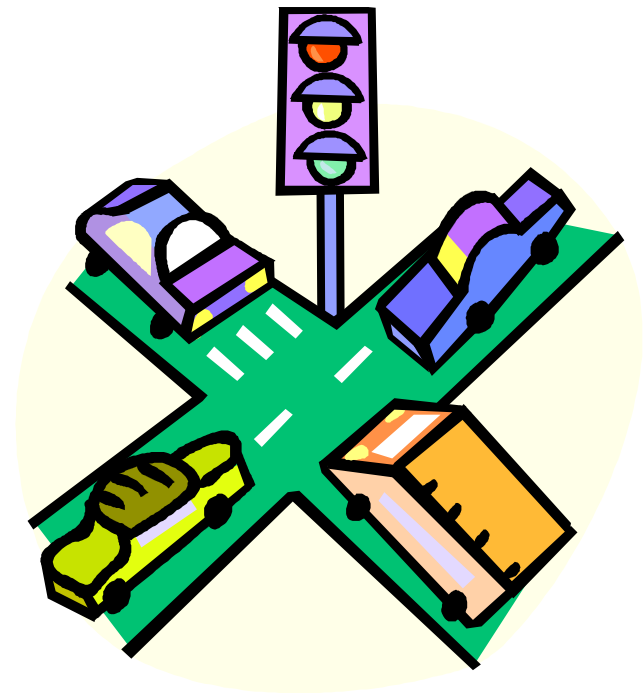
- *Beijing declaration (UN 1995)*
- *(The governments affirm their determination) to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability or because they are indigenous people.’ (United Nations 1995)*

# Intersectionality



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‘Discrimination, like traffic through an intersection, may flow into one direction and it may flow into another. If an accident happens at an intersection, it can be caused by cars travelling from any number of directions, and, sometimes, from all of them. Similarly, if a black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination’ (Crenshaw 1989, 145)



# Critique of intersectionality

- Too complex to offer guidance in practical matters (Squires 2008)
- Answers to specific problems of common law concepts (Rey Martinez 2008)
- Danger of submerging demands of gender equality, in particular in EU discourse (Squires 2008, Verloo 2006, Holzleithner 2005)
- May also strengthen gender equality as most of those affected are women (Schiek 2005) – and is needed to capture the reality of discrimination (Schiek 2010)

# Intersectionality and Law

- Legal discourse of minor relevance to social change (Conaghan 2009)
- Advocacy important to bring neglected issues to mind, including intersectionality (Goldberg 2009)
- Position of intersectional discrimination against women underdeveloped in EU law (Nielsen 2009)
- Carles et al (2011 GENDERACE project )

# Intersectionality – challenges for law(yers)



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Law(yers):  
reduce  
complexity

Many reasons  
for disadvantage

adequate  
concept ?

Intersections of  
dis/advantage  
in anyone

Add  
"grounds" ?

# Multiple discrimination and EU law

- EU legislation
- ECJ case law
- Some national developments



# EU legislation

- 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
  - Obligation to report on issues of multiple discrimination and gender mainstreaming
    - Article 17 and 19 respectively
- “gender” Directives:
  - No reference to multiple discrimination

# Planned legislation

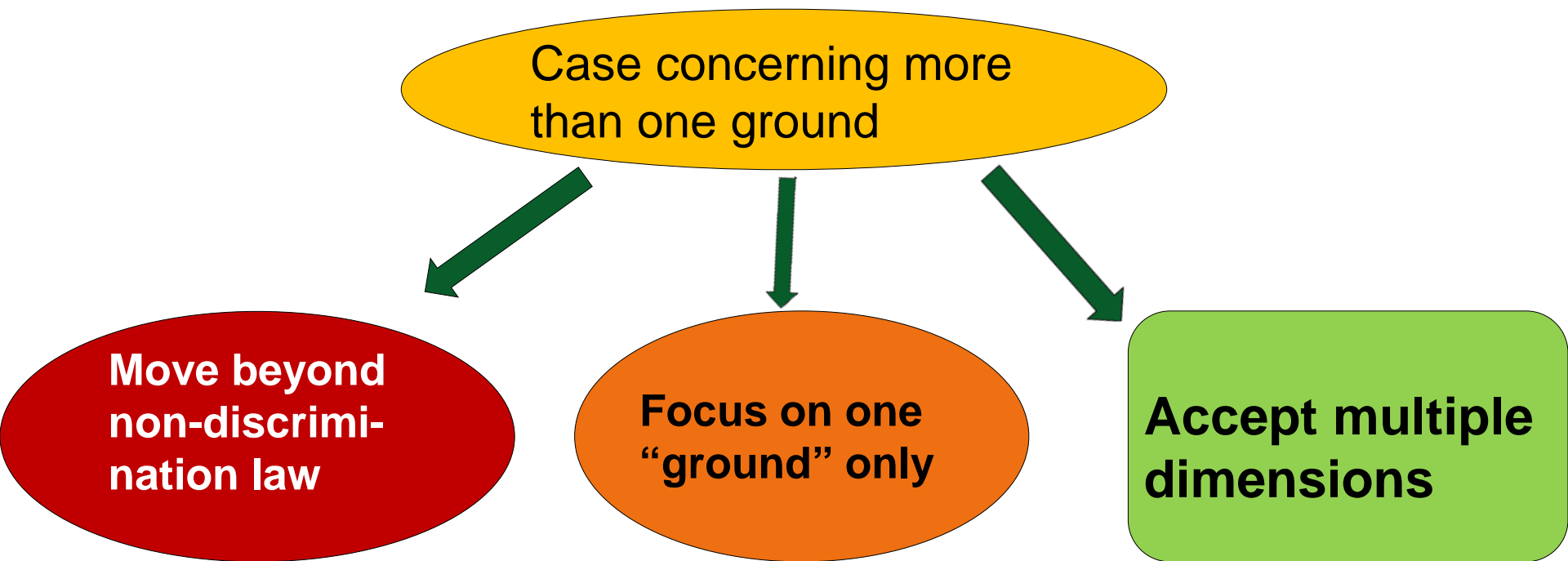
- COM 2008 (426)
  - No mention of multiple discrimination in text
  - Obligations to report
- EP proposal
  - Full definition (very specific)

# Proposed definition

- Article 1 (...)
- 2. Multiple discrimination occurs when discrimination is based:
  - (a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or
  - (b) on any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of
    - (i) sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive),
    - (ii) racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or
    - iii) nationality (in so far as the matter complained of is within the scope of Article 12 of the EC Treaty).

Is new EU legislation  
necessary?  
Can EU law respond  
in other ways?

# Case law of the Court of Justice of the EU (ECJ)



**Move beyond  
non-discrimi-  
nation law**

- Kamberaj (C-571/10)
  - Nationality and indirect race discrimination

**Focus on one  
“ground” only**

- Adoui & Cournaille (115,116/81), Jany et al (C-268/90)
  - Nationality, gender not considered
- Coleman (C-303/06)
  - Disability, gender not considered
- Küçükdeveci (C-555/07), Bulicke (C-246/09)
  - Focus on age, gender / ethnicity not considered
- Kleist (C-356/09)
  - Focus on gender, age not considered

## Accept multiple dimensions

- Meister (C-415/10)
  - Neither the national court nor the ECJ have any problem considering discrimination on grounds of age, gender and ethnicity next to each other
- Lindorfer (C-227/04P)
  - Age and sex discrimination in defining pension rights



# Some examples from national levels

- Recognising multiple/intersectional discrimination

Legislation:

Poland both direct and indirect discrimination can be multiple

UK now direct but only if not more than two grounds

Definitions are contained in Bulgarian and Romanian Act

- Adequately dealing with justifications

Example: German legislation

# Preventing multiple discrimination

- Positive duties
  - Also to be implemented in legislation
  - Positive examples: Spain and Bulgaria
- Developing policy concepts
  - Avoiding identity politics
  - Raising awareness of institutional actors

# Examples

- Bulgaria (“PADA”)
  - Article 11 ... “(2) State authorities, public bodies and local governments shall undertake priority measures (...) to provide equal opportunities for individuals who are victims of multiple discrimination.”
- Spain (Law 3/2007)
  - Article 14.6 (criteria for action of public bodies include) ‘consideration of the particular difficulties in which women included in groups of special vulnerability (at risk of social exclusion) are, such as those belonging to a minority, migrant women, girls, women with disabilities, elderly women, widows and female victims of domestic violence, for which public authorities could also adopt measures of positive action’

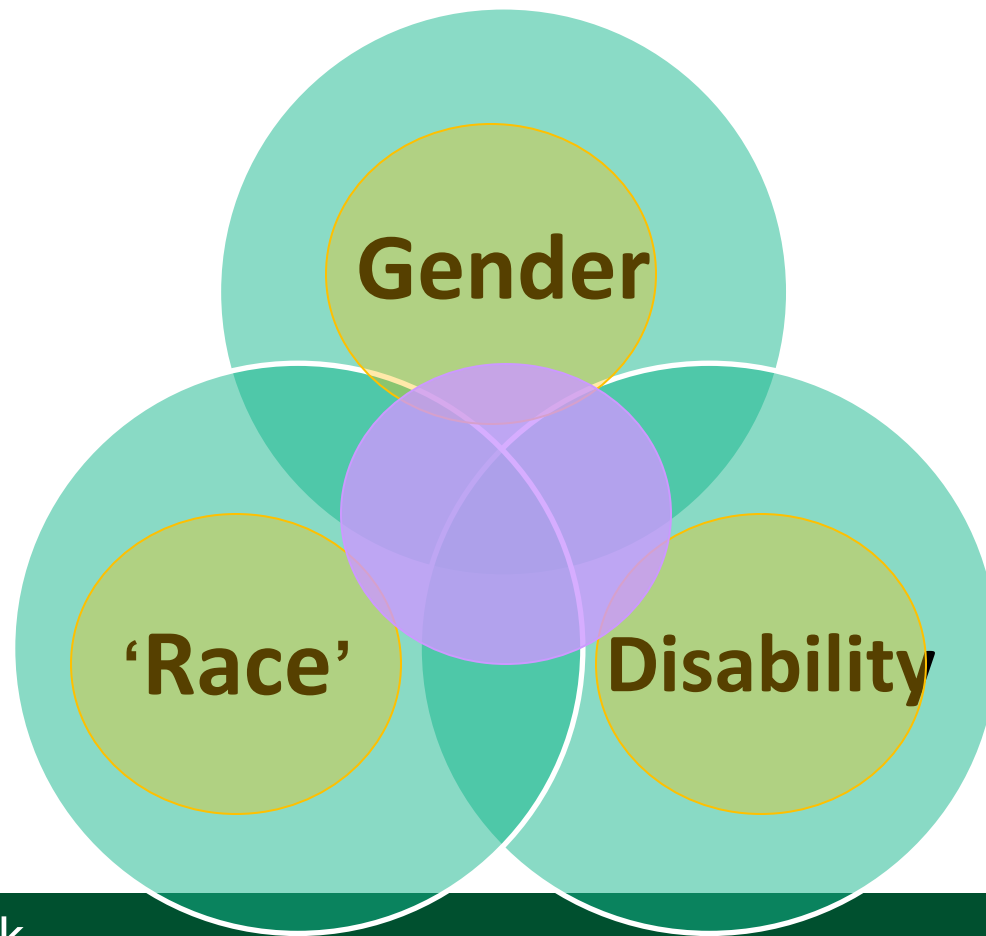
# What is at stake?

- Barriers to dealing adequately with multiple/intersectional discrimination
  - Lack of awareness?
  - Lack of a definition?
  - Comparator approach?
  - Compartmentalisation?
  - Lack of social actors?

# Ways forward for the EU?

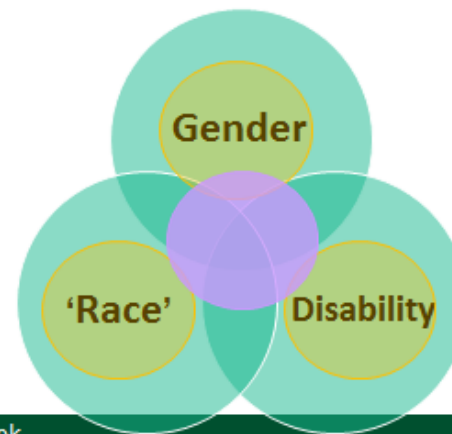
- No premature overregulation
  - Acknowledging the problem in legislation consistently, without delivering a “common law style” definition may prompt judicial creativity
- Positive policies (“OMC” like)
  - No compartmentalisation of intersectional experience into specific “groups”
  - Initiating wider discourse on central nodes for non-discrimination and their intersectionality

# The node concept and intersectionality



- Refocus
  - Avoid re-defining intersectional cases as single ground cases
  - (adequate space for non-discrimination and social policy)

The node concept and intersectionality

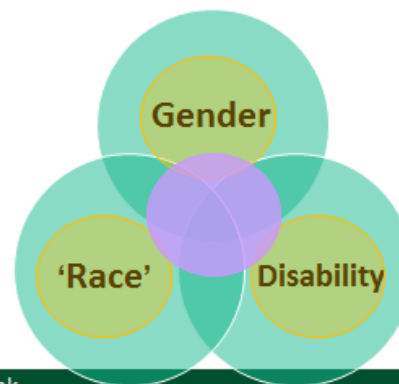


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- Re-evaluate
  - Recognise larger impact of central inequalities
  - Recognise increased damage through multiple discrimination

The node concept and intersectionality



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*Thank you for  
your attention!*