

Uses, abuses and non-uses of intersectionality before the European Court of Justice

A journey from Ring & Skouboe
Werger to Parris, Achbita and
Bougnaoui
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Queen's University
Belfast

School of Law

Professor Dagmar Schiek

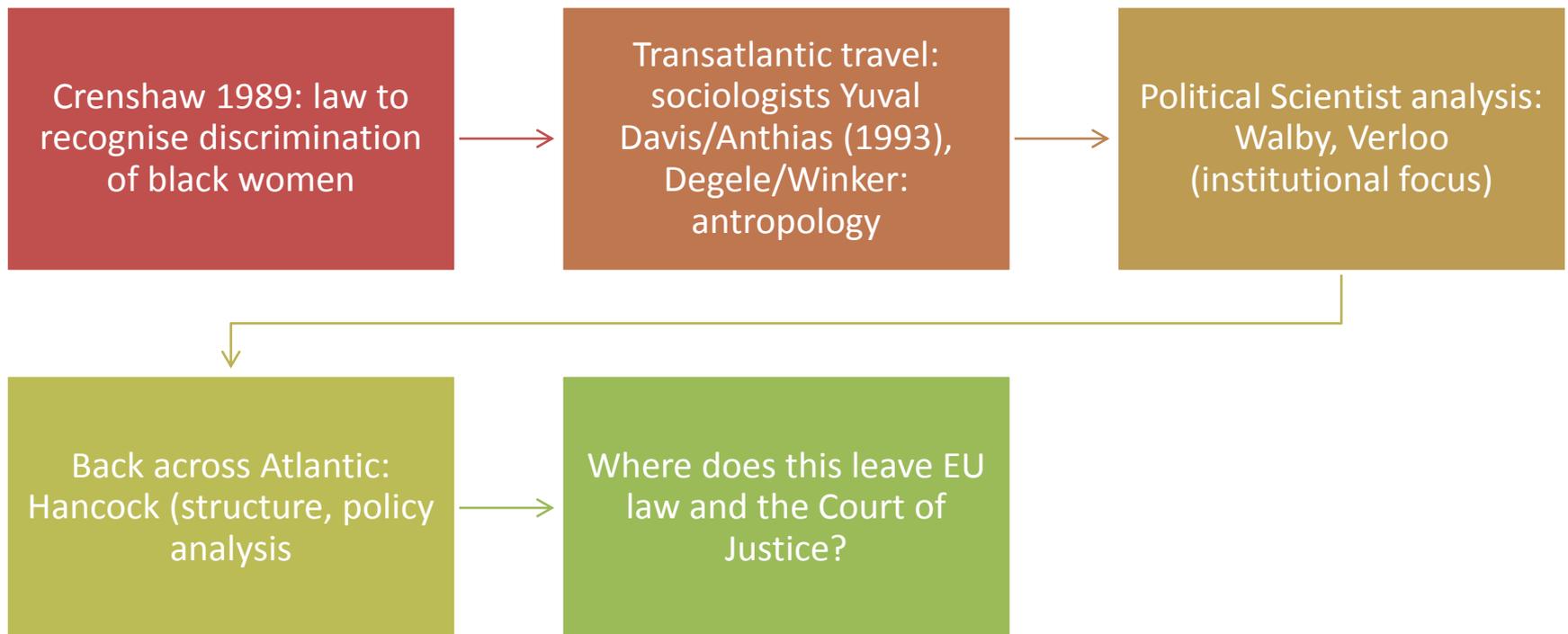
Overview



- Intersectionality as a concept – and its relevance for law
- EU anti-discrimination law and intersectionality
- Relevance of case law
- Capacious grounds? Case law on disability
 - Skoube & Werge, Kaltoft ...
- Recognising true intersectionality?
 - Parris, Achbita, Bougnaoui



There and back again: travels of a concept



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

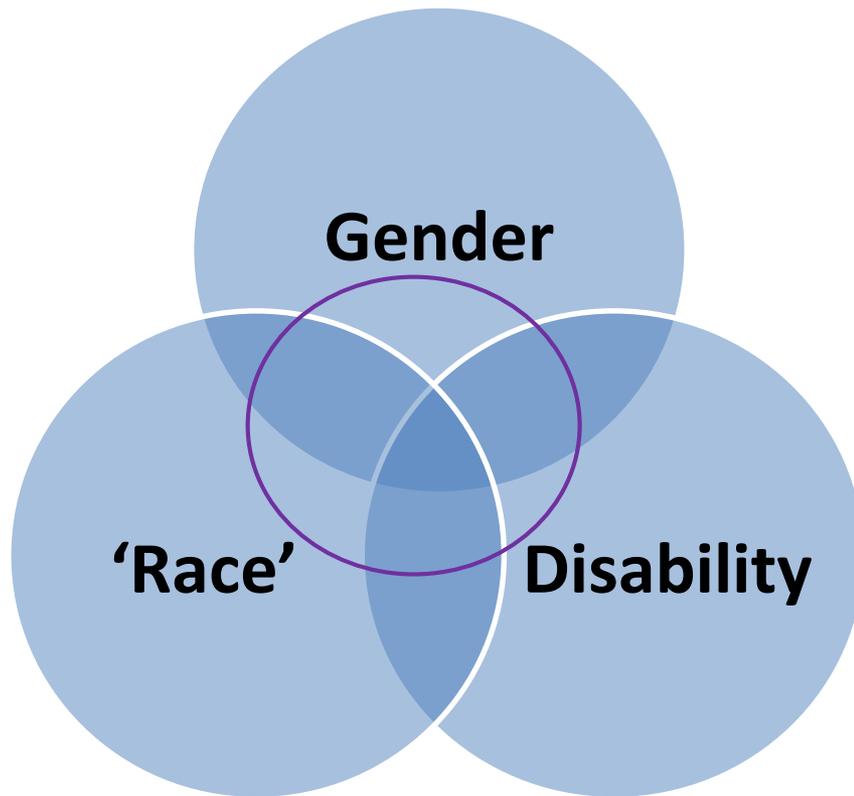


My own central claim

- 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



Some more detail

Social processes reaffirming higher level of privilege for humans categorised male

Gender

Sexual orientation

Pregnancy ?

intersex, transsex

Racialization by ascription, structuring relations to correspond to "whiteness"

'Race'

ethnicity, language, national origin...

Disability

Limiting opportunities and capabilities by standardising assumed normality

Illness

Age

Religion

Law



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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**



Why should we use it?

- Recognising all dimensions of discrimination
- Apply discrimination law to mono-intersectional cases
- Avoid wide exceptions by cumulating claims
- Award higher damages/stricter remedies



Precondition: awareness for power imbalances (asymmetries)

- Advantage
 - Men
 - Whites
 - Majority religion/ethnicity
 - Best years of life
 - Heterosexual
 - Perceived as able(bodied)
- Disadvantage
 - Women
 - Men (and women) disturbing gender expectation
 - “BME”
 - Muslims
 - Too old or young
 - Non majoritarian life style
 - disabled



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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



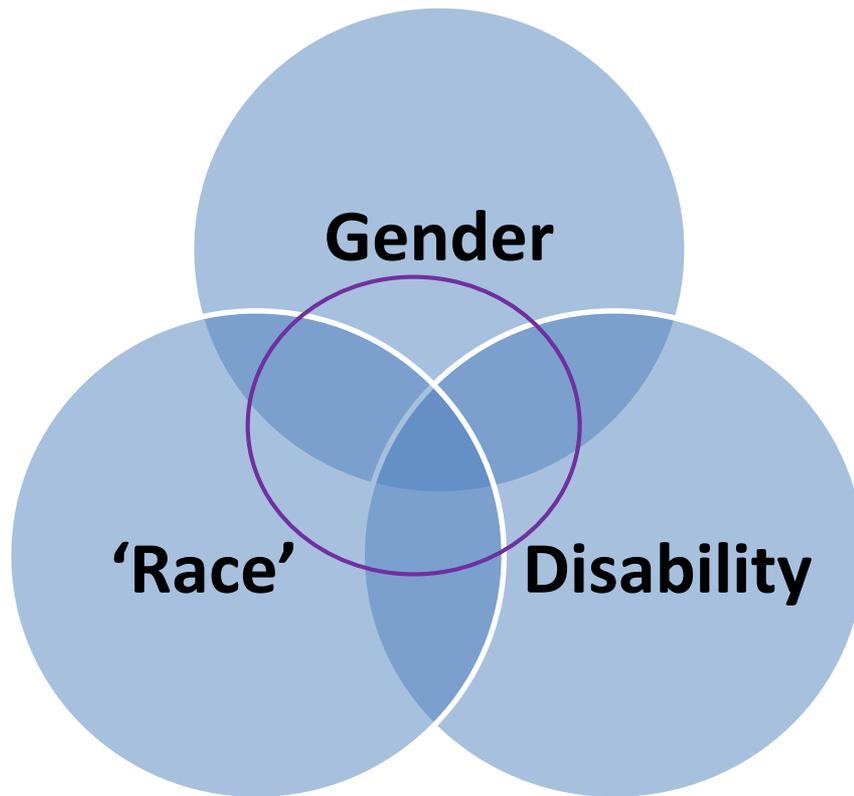
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Intersectionality and Grounds



- Capacious grounds
 - Sandra Fredman, 2016
- Defining grounds as to include those at the intersections
- How does this work in practice?
 - Schiek (2016) on disability



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



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?

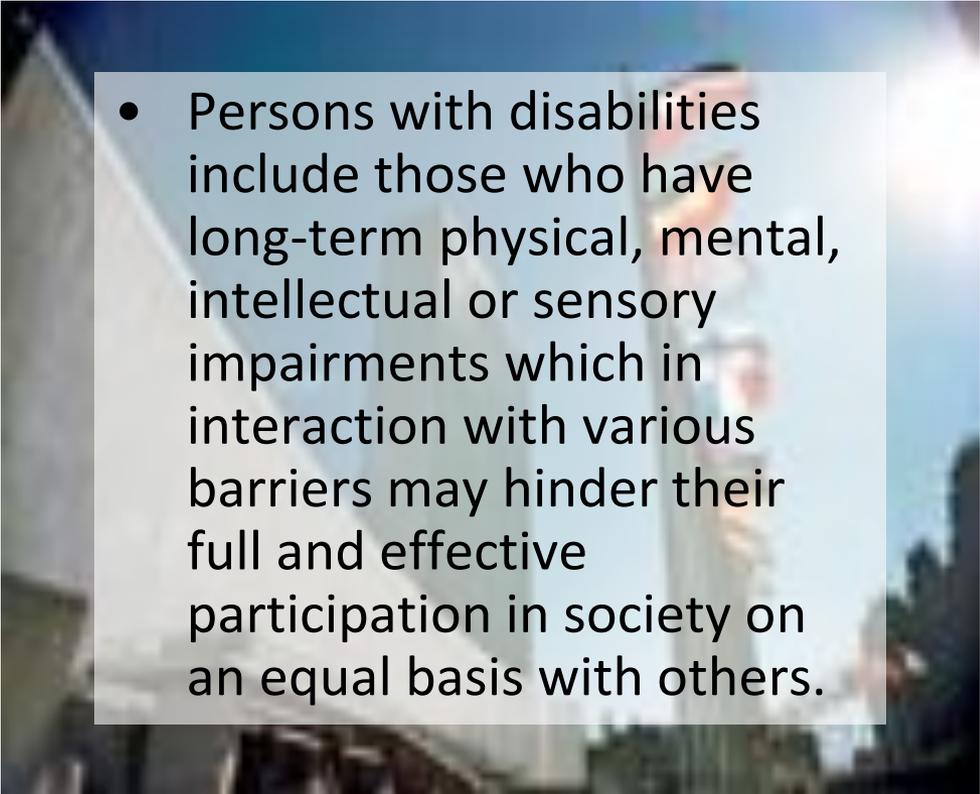


A new notion of disability?

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

- 
- Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

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
- Overall: the impairment remains the source of disability, though interaction with barriers is recognised



Further cases on disability

- Z (C-363/12)
 - Woman born without a womb, but with genitalia and chromosomes considered female, contracted a surrogate mother in the US to have a child from her ovaries and her partner's sperm
 - Does refusal of paid maternity leave constitute discrimination on grounds of disability or sex?
 - Notion of disability even more “social” – no disadvantage from not having children in employed life
 - Arguably neglect of intersection: caught between overwhelming social expectation to bear children and to conform to role in each detail...
- Kaltoft (C-354/13)
 - Obese male child minder dismissed on grounds of obesity
 - Can this constitute disability discrimination?
 - Again, obesity may be disability if impairment actually hinders performance of post
 - Another confirmation of being tied to an impairment (contrasting Z)



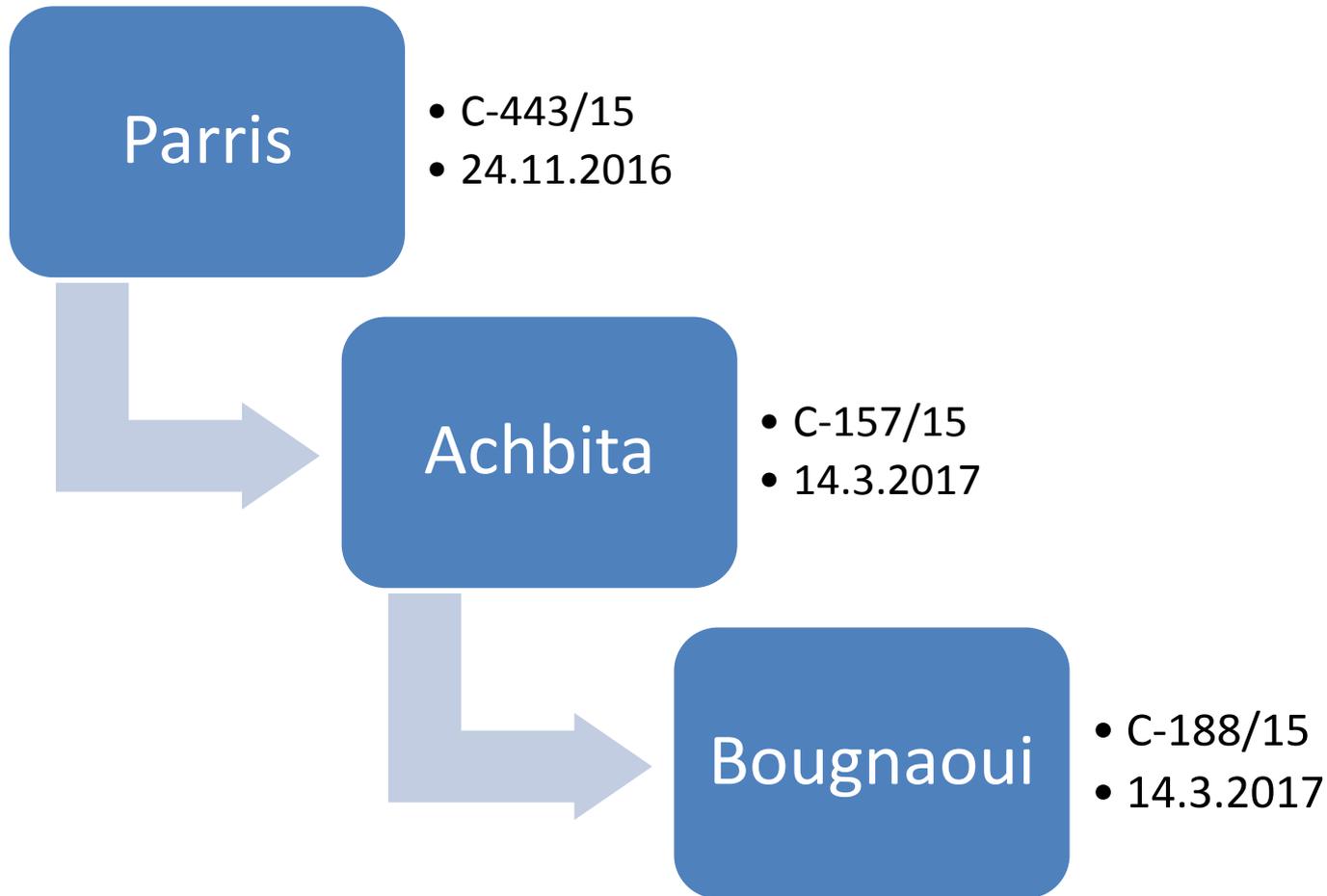
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The Bermuda triangle for intersectionality



Parris – the ECJ's De Graffenreith moment?

- Occupational pension scheme only provides for survivor's benefit if partner married / became civil partner before 60th birthday
- As Ireland only introduced homosexual civil partnership in 2011, there is a whole generation of homosexual lecturers who are unable to pass on survivor pensions



AG Kokott (Parris)

- Discrimination on grounds of homosexuality?
 - Indirect
 - Legitimate aim (avoid abuse)
 - Disproportionate means
 - Age discrimination
 - Direct age discrimination
 - Not justified
- „several factor discrimination“
is in evidence here
requires stricter standards for
justification



Court (Parris)

- No discrimination on grounds of homosexuality
- Age discrimination is justified (Article 6 (2) Directive)
- No consideration of intersectionality!



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



Bouagnaoui 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)



Court (Bougnou)

- 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



Bouagnaoui case – AG Sharpstone

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Why use intersectionality??

- Parris case
 - Seems the only way to recognise the specific harm
- Achbita / Bougnaoui case
 - 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



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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*Thank you for
your attention!*

d.schiek@qub.ac.uk



Queen's University
Belfast

School of Law

Professor Dagmar Schiek