

Multiple & Intersectional Discrimination

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'Zero-sum' anti-discrimination law

Protected Characteristic (PC)

- Race
- Gender
- Disability
- Gender Reassignment

- Sexual Orientation
- Religion
- Civil Partnership
- Age

Statute

- RRA 1965; 1968; 1976
- SDA 1975
- DDA 1995
- Regulations 1999

- SO Regulations 2003
- R/B Regulations 2003
- Civil Partnership Act 2004
- Age Regulations 2006

Patchwork
in EU
equality
law

Grounds of Discrimination

		Grounds of Discrimination					
		Age	Disability	Religion or Belief	Sexual Orientation	Sex	Race, Ethnic Origin
Fields covered by EU legislation	Education	NO	NO	NO	NO	NO	YES
	Social Protection	NO	NO	NO	NO	PARTLY COVERED	YES
	Social Advantages	NO	NO	NO	NO	PARTLY COVERED	YES
	Access to Goods and Services available to the Public, including Housing	NO	NO	NO	NO	YES	YES
	Employment and Vocational Training	YES	YES	YES	YES	YES	YES

Source: Bąkowski and Copeland 2012, p4

WHICH STATUTE?



MUTUALLY EXCLUSIVE

RACE

SEX

AGE

Traditional silos getting in the way?

What if cases can't be mapped?

Multiple grounds

- Race and Disability
- Race and Sex

Which ground/ statute?

- RRA or DDA?
- RRA or SDA?

Mismatch I: Multiple discrimination (MD)

- **Cumulative:** different grounds/ PCs at different times
 - ***Al Jumard v Clywed Leisure Ltd:***
 - race discrimination (treated differently to white colleagues);
 - disability discrimination (failure to make reasonable adjustments)
- **Additive:** different grounds/PCs at same time
 - ***Nwoke v. Government Legal Service:***
 - race (all white applicants ranked higher after interview even if degree class lower);
 - sex (women who were graded higher than men were unlikely to be offered a job, and if appointed were paid less)
- **Solution:** supporting evidence for all PCs

Cumulative MD eg *Al Jumard*

Jan:
race

Feb:
religion

March:
disability



Additive MD eg *Nwoke*



Protection from multiple discrimination in Europe

No specific legal protection

- Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, (Turkey)

Legal protection

- EU – Race Directive, Equal Employment Directive
- Bulgaria – s. 6, Protection Against Discrimination Act
- Croatia - Art 6(1) Anti-discrimination Act
- Macedonia – Art 12, Anti-discrimination Law
- Germany - s.4 AGG
- Greece - Law 3996/ 2011,
- Spain – Art 20, Law 3/2007
- Romania – Art 2(6), Anti-discrimination Law
- UK – s.14, Equality Act 2010

Legislation

Romania – Art 2(6) ADL

- ‘Any distinction, exclusion, restriction or preference based on *two or more* of the criteria foreseen in para. 1 shall constitute an aggravating circumstance ...unless one or more of its components is not subject to criminal law’.

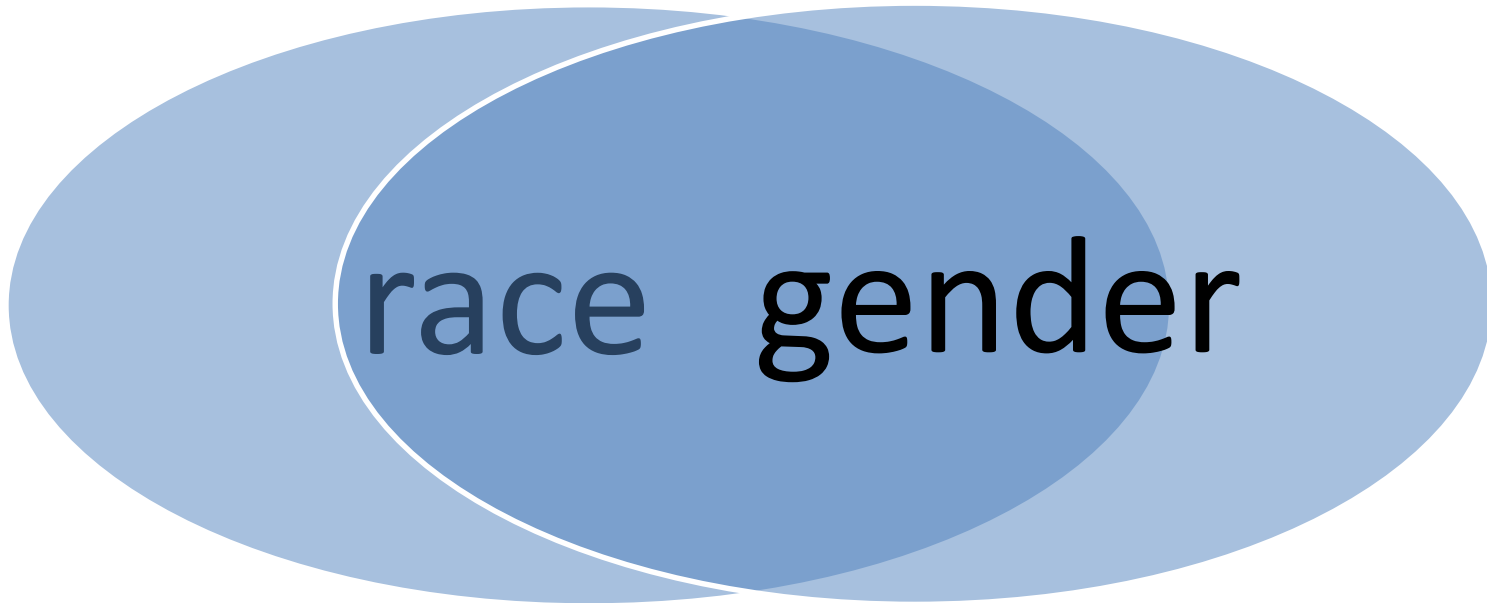
UK – s.14, Equality Act

- A person (A) discriminates against another (B) if, because of a *combination of two* relevant protected characteristics, A treats B less favorably than A treats or would treat a person who does not share either of those characteristics.
- B need not show that A’s treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).

Mismatch II: intersectional discrimination

- **Intersectionality:** a philosophy of inequality
 - discrimination involves more than one protected characteristic and it is the unique combination of characteristics that results in discrimination, in such a way that they are completely inseparable.
 - *Synergy:* ‘co-determined and interdependent effects’ produced by two or more elements that operate together:
 - oxygen + hydrogen = water not ‘oxyhydrogen’;
 - tin + copper = bronze, not ‘tinper’
 - Intersectional discrimination creates a new legal subject.
 - In the absence of synergy, the idea of intersectional discrimination loses its social and political context.

Intersectional discrimination



Example 1 – getting in: finding a job

- 1970: one black woman employed as a janitor
- Emma DeGraffenreid: hired in June 1973; fired in Jan 1974.
- Brenda Hines: hired in June 1973, made redundant in Jan 1974.
- Alberta Chapman: hired in 1973, made redundant in Jan 1974.
- Brenda Hollis: hired in Dec 1970. Hollis made redundant by December 1971;
- Patricia Bell hired in Dec 1970; fired in May 1972, re-hired in May 1973 and fired again in Jan 1974.
- 1970 = 6 black female workers; 1971 = 11; 1972 = 0; 1973 = 137 (max 155 out of 8,500)
- Jan 1974: only the black female janitor.
- 22% of St Louis = black women

Example 2 - Getting on: climbing the corporate ladder

- 1967: Dafro Jeffries worked as a Secretary to the Director of Programs at Harris County Community Action Association (HCCAA).
- 1970: promoted to Personnel Interviewer.
- 1970 and 1974: unsuccessful applications for promotions to various positions within the agency.
- 1974: unsuccessful application for Field Representative - black male colleague hired.
- Jeffries complains and is dismissed

Ms Sojourner Truth

Ain't I a
woman?!



Crenshaw: the 'blind spot' in ADL

- 'Not only courts but feminists and civil rights thinkers have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks...
- Black women are regarded either as too much like women or Blacks and the compounded nature of their experience is absorbed into the collective experiences of either group,
- ...in which case Black women's Blackness or femaleness sometimes has placed their needs and perspectives at the margin of the feminist and Black liberationist agendas.'

'disrupting dominant discourses' of discrimination

- ...Intersectionality represents a structural and dynamic arrangement; power marks these relationships among and between categories of experiences that vary in their complexity.
- To map intersectionality from instance to instance both confirms the relevance of categories and provides the impetus for disrupting dominant discourses that regard these categories as fixed and mutually exclusive.
- Intersectionality then was an attempt to create a prism that revealed the confluence of structure and identity and to highlight vectors in which discrimination was rendered invisible by the prevailing frameworks that were deployed to identify and intervene against it...

Intersectional discrimination

- *Ontario Human Rights Commission and Rachael Baylis-Flannery vs. Walter DeWilde (2003) [145]*
- While the findings of discrimination made in this case are of sufficient gravity that Ms Baylis-Flannery could succeed on either enumerated ground of race or sex, or on both grounds, one set following the other, the law must acknowledge that she is not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman.
- The danger in adopting a single ground approach to the analysis of this case is that it could be characterized as a sexual harassment matter that involved a Black complainant, thus negating the importance of the racial discrimination that she suffered as a Black woman. In terms of the impact on her psyche, the whole is more than the sum of the parts: the impact of these highly discriminatory acts on her personhood is serious.

Baylis-Flannery cont. [146]

- The Tribunal finds that the serious forms of discrimination Ms Baylis-Flannery endured, with respect to her race and her sex, were intersectional in nature. The Respondent, in his role as her employer, sexually solicited her, sexually harassed her, racially harassed her, engaged in discriminatory treatment toward her within her employment, and poisoned her workplace with pornography that mirrored both her race and gender.
- He did so because she is an attractive, young Black woman, and all the evidence heard about his views about Blacks and Africans, his comments about dating, his visits to strip clubs in Detroit, about his fixation with Malina, about the Black female escort he found attractive on the internet, and about his hiring practices indicate that he has a stereotypical view of attractive, young, Black women over whom he can assert economic power and control.

Remedies

Multiple Discrimination

- Sweden: compensation increases with each ground of discrimination if discrimination occurs at different times.
- Bulgaria: different procedure – cases heard by a five-person panel instead of the usual three.

Intersectional Discrimination

- Czech Republic: official apology for sterilisation of Roma women
- Canada: damages for each ground plus lost wages and 'mental anguish' (*Bayliss Flannery*)
 - Public apology by the employer?