

INTERSECTIONAL DISCRIMINATION

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OVERVIEW

Introduction

Intersectionality: Origin and development

Theoretical framework

**Legislation: The European framework (EU and CoE); National
legislation**

**Case-law: European Court of Justice (ECJ); European Court of
Human Rights (ECHR); National case law**

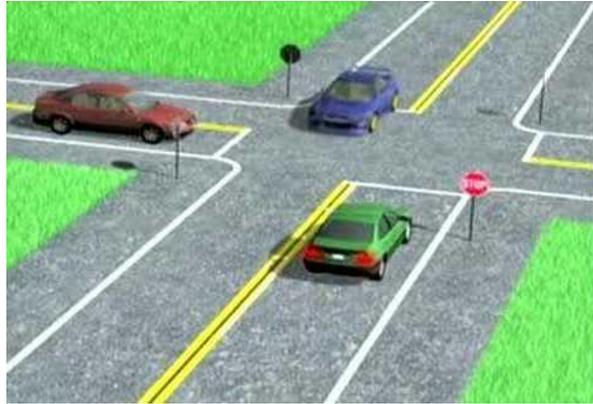
WHO IS MISSING AND WHY? (MATSUDA)



Kim Crenshaw coins the term «intersectionality»

«Invisibility of Black women»





TRAFFIC INTERSECTION ANALOGY

“Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction and may flow in another. If an accident happens in an intersection, it can be caused by car 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)

“The location of women of color at the intersection of race and gender makes their experiences *structurally* and *qualitatively* different than that of white women, but these experiences “tend not to be represented within discourses of either feminism or anti-racism, discourses that are shaped to respond to one or the other, leaving women of color marginalized within both”

Kimberlé Crenshaw (1989)

DEGRAFFENREID V GENERAL MOTORS (1976)

In DeGraffenreid, five Black women brought suit against General Motors, alleging that the employer's seniority system ("last hired-first fired") perpetuated the effects of past discrimination against Black women. Evidence adduced at trial revealed that General Motors simply **did not hire Black women prior to 1964** and that **all of the Black women hired after 1970 lost their jobs in a seniority-based**.

Court: “However, [Black women] should not be allowed to combine statutory remedies to create a new '**super-remedy**' which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, **but not a combination of both**”

WHEN?

- United States, 1989: Workshop «**Critical Race Theory**», with Derrick Bell, Richard Delgado, **Kimberlé Crenshaw, Mari Matsuda, Angela Harris**
- RACE CRITs, QUEER CRITs, LAT-CRITs, CRITICAL RACE FEMINISTS
- **Third Wave of Feminism**



A LOOK BACKWARDS

- Isabella Baumfree (pseudonym: Sojourner Truth): Icon of African-American women's rights advocacy and abolitionism. Speech, *Ain't I a Woman?*, Ohio Women's Rights Convention in Akron (Ohio) in 1851.
- Combahee River Collective, founded in Boston in 1974, regarded as a stronghold of black women's rights: *The Combahee River Collective Statement*, issued in 1977.
- Gloria C. Hull, Patricia Bell Scott and Barbara Smith's book (1981): "*All the Women Are White, All the Blacks Are Men, But Some of Us are Brave: Black Women's Studies*".
- Hooks 1982: "*Ain't I a Woman. Black Women and Feminism*".

Black women experience oppression differently from both 'white middle-class women' and 'black men', because sex, race and class are inextricably bound together.



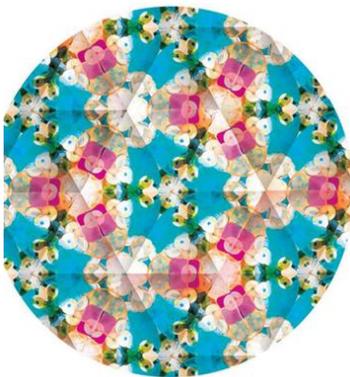
IYIOLA SOLANKE



“**Tin** (*stagno*)
and **copper**
(*rame*) interact to
make **bronze**



DEAUX AND PERKINS (2001): KALEIDOSCOPE



TRIPARTITION (CRENSHAW)		
Structural Intersect.	Political Intersect.	Representational Intersect.
<p>Occurs when social structures that create and organize different social groups interact to produce effects that may (or not) be intended.</p> <p>Example: Domestic violence shelters that do not address the <u>intersectional</u> needs of poor women, migrants, or trans women</p> <p>Positive actions Substantive Equality</p>	<p>Occurs when the political movements advocating for different groups (e.g., feminists and anti-racists) interact to exclude or marginalize the interests of some subset of the groups, or reinforces another form of injustice.</p> <p>Coalitions across movements</p> <p>Example: Setting up the domestic violence agenda by “othering” the experiences of women of color</p>	<p>Occurs when images or cliché ignore or distort the complexity of the group</p> <p>(Invisibility/hypervisibility)</p> <p>Example: «Gypsy kidnappers»</p> <p>Case of «Angela» (Italy)</p>

MCCALL, 2005		
Anti-categorical complexity	Intra-categorical complexity	Inter-categorical Complexity
<p>It is based on a methodology that deconstructs analytical categories (e.g. poststructuralist, postcolonial)</p> <p>Methods: biography, narration</p> <p>Law: Post-categorical? (Race v. Racism)</p>	<p>It tends to focus on particular social groups at neglected points of intersection—“people whose identity crosses the boundaries of traditionally constructed groups” (Dill 2002, 5)—in order to reveal the complexity of lived experience within such groups.</p> <p>It focuses on one dimension within each category</p> <p>Within gender (female) and race (Black)</p>	<p>It requires that scholars provisionally adopt existing analytical categories to document relationships of inequality among social groups and changing configurations of inequality along multiple and conflicting dimensions.</p> <p>Simultaneously: within “gender” (male/female/...); race (Black/White/...), etc.</p> <p>Quantitative</p>

INTERSECTIONALITY

Finding the «blind spots» (Nina Lykke)

Dagmar Schiek's «Nodes»

Broadening the scope of the anti-discrimination law



The Legislation



LEGAL TERMS

Intersectionality

Multiple discrimination = umbrella term

Multiple discrimination = someone experiences discrimination on different grounds on separate occasions

Compound discrimination = discrimination on more grounds which add to each other in the same occasion. The role of the different grounds can still be distinguished (see *Perera v Civil Service Commission* (no 2))

Intersectional discrimination = on more than one ground, where the influence of various grounds cannot be disentangled

(Makkonen 2002)



WHY SHOULD WE GO FOR «INTERSECTIONAL PROTECTION»?

Protection “for the whole person” (Gay Moon): to tackle cases which would be not protected by taking into consideration one ground at the time

A matter of substantive equality (positive actions)

Obtain higher damages



UNITED NATIONS



UNITED NATIONS

1995 Beijing: Fourth World Conference on Women

Beijing Declaration: “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)

2001, Durban: World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance (Falcón 2012) **preparatory meetings** prior to the Conference spread debate on intersectionality and multiple discrimination (gender dimension of racism)



UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

(ENTERED INTO FORCE IN 2008)

Article 5 “Equality and non-discrimination”

5.2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

Article 6 “Women with disabilities”

1. States Parties recognize that women and girls with disabilities are subject to **multiple discrimination**, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

UNITED NATIONS

Recommendation n. 32 “The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination”

[...] The ‘grounds’ of discrimination are extended in practice **by the notion of ‘intersectionality’** whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention [Note of the author: race, colour, descent, or national or ethnic origin]. [...]

(Committee on the Elimination of Racial Discrimination)

COUNCIL OF EUROPE



THE COUNCIL OF EUROPE

- European Convention on Human Rights (ECHR)
(non-exhaustive list of grounds)
- Istanbul Convention (entry into force 01/08/2014)
- Recommendation of the Committee of Ministers to member States on Measures to combat discrimination on the grounds of sexual orientation and gender identity (Recommendation CM/Rec(2010)5)

THE ISTANBUL CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

Its Explanatory report emphasizes that “migrant and refugee women may also be excluded from support services because of their residence status. It is important to point out that women tend to experience **multiple forms of discrimination** as may be the case of women with disabilities and/or women of ethnic minorities, Roma, or women with HIV/Aids, to name but a few. This is not different when they become victims of gender-based violence” (par. 53, p. 10).

Recommendation of the Committee of Ministers to member States on Measures to combat discrimination on the grounds of sexual orientation and gender identity

It encourages the states “to take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against **discrimination on multiple grounds**, including on grounds of sexual orientation or gender identity; national human rights structures should have a broad mandate to enable them to tackle such issues” (Art.46).

EUROPEAN UNION



THE EUROPEAN UNION

EU CHARTER OF FUNDAMENTAL RIGHTS

Art. 21

Any discrimination based on any ground **such as** sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited

(Non-exhaustive list)

ART. 19 TFEU (EX ART.13 TEC)

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, **may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**

(Numerus clausus)

FOCUS ON THE EU SECONDARY LEGISLATION

EUROPEAN UNION LEGISLATION

EU Secondary Law

Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of **racial or ethnic origin**

Recital 14: “In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, **especially since women are often the victims of multiple discrimination**”

(Double Discrimination)



EUROPEAN UNION LEGISLATION

Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation “women are often the victims of multiple discrimination”

Recital 3: In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, **especially since women are often the victims of multiple discrimination.**

(Double discrimination)



EU LEGISLATION

Art. 17(2) of Directive 2000/43 and Art. 19(2) of Directive 2000/78:

(...) In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, **provide an assessment of the impact of the measures taken on women and men**. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive”.

This obligation to report has been interpreted as concerning both **gender mainstreaming** and issues of **multiple discrimination** (Schiek 2012)



EUROPEAN UNION LEGISLATION

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Directives 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

NO reference to multiple discrimination, nor to mainstream other discrimination grounds in the reports assessing the implementation of these Directives.



SOFT LAW

European Parliament Resolution on the situation of women from minority groups in the European Union (2003/2109(INI)): Multiple discrimination concerning

1. *Disabled women*
2. *Migrant women*
3. *Roma women*

Green Paper “Equality and non-discrimination in an enlarged European Union” (2004)

European Parliament Resolution on the situation of Roma women in the European Union (2005/2164(INI))



FOCUS ON THE EU LEGISLATION

DIFFERENT SCOPES AND HIERARCHY OF ANTIDISCRIMINATION PROTECTION

Directive 2000/43/EC	Directive 2000/78/EC	Directive 2004/113/EC	Directive 2006/54/EC
Racial and Ethnic Origin	Religion or Belief, Age, Disability, Sexual Orientation	Gender	
Employment and occupation Supply of goods and services, including housing Education and social protection, including social security, healthcare and social advantages	Employment and occupation	Supply of goods and services, including housing NO: education, media advertising	Employment and occupation.

GAPS IN THE LEGISLATION AND CHALLENGES

- No definition of multiple discrimination
- 'Only' multiple discrimination occurring to women are taken into account by the Directives 2000/43 and 2000/78
- Hard law: Explicit mention of multiple discrimination appears just in the Recitals of the Directives 2000/43/EC and 2000/78
- Different scopes of the anti-discrimination Directives and hierarchy of antidiscrimination protection
- Numerus clausus of anti-discrimination grounds in secondary legislation
- Equality bodies just under Directives 2000/43/EC and 2006/54/EC. Many Member States adopted Equality bodies with single-ground agendas (see at: <http://www.equineteurope.org/>).
- Two different EU Agencies (FRA and EIGE): cooperation?
- No regulation is provided about: COMPARATOR; JUSTIFICATION; BURDEN OF PROOF; REMEDIES

NON DISCRIMINATION CLAUSES IN DIRECTIVES CONCERNING THIRD COUNTRY NATIONALS

E.G., Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

Article 11

Equal treatment

1. Long-term residents shall enjoy equal treatment with nationals as regards:

- (a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration;
- (b) education and vocational training, including study grants in accordance with national law;
- (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures;
- (d) social security, social assistance and social protection as defined by national law;
- (e) tax benefits;
- (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing;
- (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
- (h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security.

PROPOSAL FOR A 'HORIZONTAL DIRECTIVE'

The Proposal was presented by the European Commission on 2 July 2008 for trying to eliminate the hierarchy of discriminatory grounds and to abolish the discrepancies between the objective scopes of the Directive 2000/78/EC and the Directive 2000/43/EC.

The final text of the Proposal was adopted by the European Parliament on 2 April 2009



DEFINITION OF MULTIPLE DISCRIMINATION IN THE PROPOSAL FOR A 'HORIZONTAL DIRECTIVE'

2. Multiple discrimination occurs when discrimination is based:

- (a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation [*among each other*], 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).**



OBLIGATION TO REPORT (PROPOSAL OF A 'HORIZONTAL DIRECTIVE')

Art. 16 (2)

The Commission's report shall (...) also contain information about multiple discrimination, covering **not only discrimination on grounds of religion or belief, sexual orientation, age and disability, but also discrimination on grounds of sex, race and ethnic origin.** In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

MAIN CRITICISMS TO THE TEXT OF THE PROPOSAL

- 1) **The specific combination between gender and racial/ethnic origin has not been addressed**
- 2) The gaps of protection concerning gender discrimination (education, media, advertising) were not filled
- 3) Objective scope: definition of multiple discrimination provided by the Proposal: only outside employment?
- 4) Legal gaps (comparator, justification, remedies, etc.) remain unsolved

NO REGULATION IS PROVIDED FOR:

1. **SUITABLE COMPARATOR**
2. **JUSTIFICATION**
3. **REMEDIES**

COMPARATOR

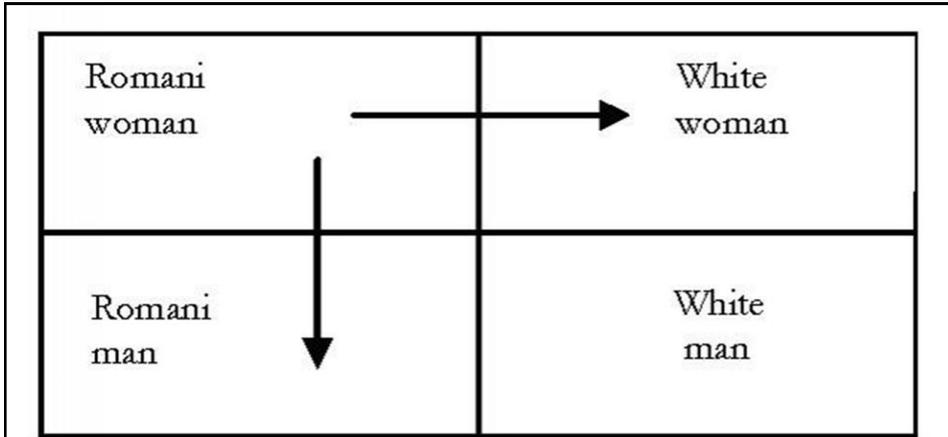
- Direct Discrimination: also **hypothetical comparator**
- Indirect Discrimination: **comparator**
- Harassment: **no comparator**

Intersectional Discrimination:

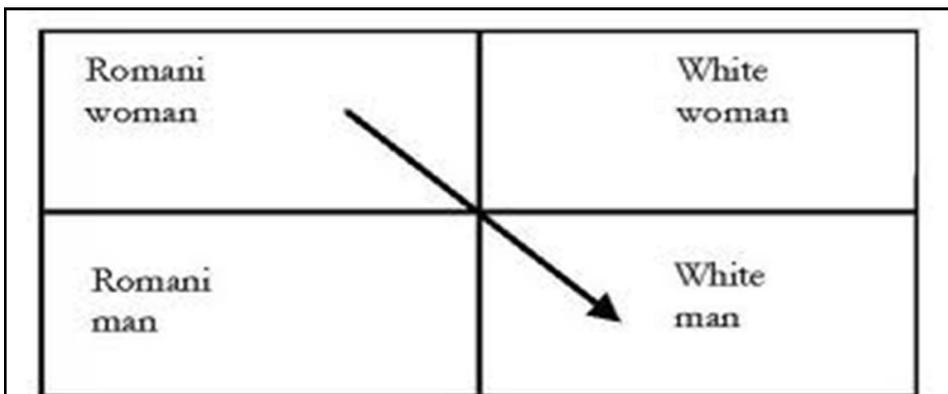
Single comparator vs. multiple comparator approach

Comparator - free approach? (like in the case of harassment)

Hypothetical comparator?



MOON, G., 2009



MOON, G., 2009

JUSTIFICATION

Direct discrimination:

Restrictive provision (numerus clausus): Only justifications provided by the antidiscrimination Directives are admitted (e.g. the ground 'nationality' is not covered)

Indirect discrimination: justifications which meet the general conditions described in the Directives are admitted

Common Justifications

- a) Genuine and determining occupational requirements, the objective is legitimate and the requirement is proportionate/necessary
- b) Positive action

Specific justifications (Directive 2000/78/EC)

- a) Disability and age in the armed forces
- b) Religion and beliefs: specific, previously existing, genuine occupational requirements
- c) Age: legitimate objectives associated with employment and social security policies
- d) Religion: provisions specific to Northern Ireland (police officers and teachers)



JUSTIFICATION

Intersectional discrimination: Should the case be rejected only on the basis of a justification applicable to all grounds referred in the claim? Or is sufficient to refer just to some of them?

In the amendments to the Proposal for a "horizontal" Directive, the opinion of the Committee for Women Rights seems in line with the first solution. However the final text adopted by the European Parliament did not include this remark.



REMEDIES

How should the remedies be calculated in the cases of intersectional discrimination?

Different approaches:

On the one hand, the lack of higher remedies in the case of intersectional discrimination can discourage the claimants to ground the case on several categories or on the intersection of them. On the other hand, the higher remedies should not result in just 'adding' different remedies or double counting. They should, though, mirror the major harm suffered by the victim of discrimination.

NATIONAL LEGISLATION

NATIONAL LEGISLATION

Austria, Bulgaria, Germany, Greece, Italy, Poland, Romania, Spain, United Kingdom make a reference to multiple discrimination.

They mostly do not distinguish between multiple and intersectional discrimination

AUSTRIA

Neither the Austrian Federal Equal Treatment Act (FET) nor the Equal Treatment Act (ETA) (both 2004) provided specific rules on multiple discrimination.

2008 amendment of the two acts: multiple discrimination shall be taken into account **when assessing the amount of damages** (FET, para 19a; ETA, paras 12/13; 26/13; 51/10)

Explanatory Memorandum: cases of multiple discrimination have to be assessed “from an overall perspective and the claims cannot be separated or cumulated by grounds”.

The Austrian Disability Equality Act provides that multiple discrimination might be taken into account by authorities, when assessing the award of damages.

BULGARIA

Protection against Discrimination Act (PADA):

Supplementary provisions to the PADA: multiple discrimination shall mean discrimination on the grounds of more than one of the characteristics under Article 4(1).

(Positive measures)

Article 11(2) of Pada: "State authorities, public bodies and local governments shall undertake priority measures due to the provisions of Article 7(1), subparagraphs 12 and 13 (currently pp. 13 and 14), to provide equal opportunities for individuals who are **victims of multiple discrimination**", i.e.:

- educational and training measures ensuring balanced inclusion of women and men
- specific measures for the benefit of disadvantaged individuals or groups of people

(Tisheva, G. 2009. Bulgaria, in Burri et al., 2009)

CROATIA

Multiple discrimination belongs to the «severe» forms of discrimination and shall be considered when immaterial damages are evaluated (art. 6 of Anti-discrimination Act)

GERMANY

The German Equal Treatment Act (AGG 14.08.2006). Section 4 of this Act provides:

“Discrimination is based on several of the grounds...[it] is only capable of being justified...if the justification applies to all the grounds liable for the difference of treatment.”

This clause means that, with any combined grounds, justification needs to be established at the highest standard (Moon 2009, *op. cit.*)

Section 27(5): intersectorial cooperation of the German Equality Body



GREECE

The Greek anti-discrimination legislation (Laws 3304/2005 and 3896/2010) did not refer to multiple discrimination

Law 3996/2011 on the reform of the Labor Inspection Body limits it to employment law:

Article 2 par. 1 (h) : “[The Labour Inspectorate Body] supervises the implementation of the principle of equal treatment irrespective of racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation, taking into consideration instances of multiple discrimination in accordance with article 19 of Law 3304/2005”

Equal Treatment Law 4443/2016 replaces the Law 3304/2005 and acknowledges multiple discrimination (art. 2(2))



ITALY

Italian law explicitly provides rules on multiple discrimination in the simplified form of double discrimination (gender and any of the other grounds of discrimination of Legislative Decree 215/2003, implementing Directive 2000/43/EC, and Legislative Decree 216/2003, implementing Directive 2000/78/EC).

Furthermore, art. 1 Leg. Decree suggests to take into consideration “[...] different forms of racism based on culture and religion” (does it open up possibilities to tackle more cases of multiple discrimination? Does it integrate a post-categorical approach?)

Art. 3 Italian Constitution

1. All citizens have equal social dignity and are equal before the law. Without distinction of sex, race, language, religion, political opinion, **personal or social conditions**.

Legislative Decree 150/2011 harmonized the rules of procedure applicable for discrimination claims (apart from cases covered by art. 38 Code of Equal Opportunities). It is thus possible to bring a case of discrimination on grounds of e.g. religion and ethnic origin with a single procedure, BUT if gender is involved, two separate proceedings will have to be pursued.

POLAND

Article 18(4) of the Labour code defines ‘indirect discrimination’ as follows: ‘Indirect discrimination occurs whenever an apparently neutral provision, criterion or practice results in differences in terms of employment to the detriment of all or a substantial number of employees belonging to a group differentiated **with regard to one or more reasons** mentioned in § 1, and if they cannot be objectively justified by other reasons

ROMANIA

In Romania, the law on Equality between Men and Women (Act 340/2006, Article 4h) explicitly defines multiple discrimination as an act of discrimination based on two or more grounds of discrimination.

The Romanian Equal Treatment Act (2006), which covers the grounds of age, disability, race and ethnic origin, religion and belief, and sexual orientation, provides that discrimination on two or more grounds shall be treated as an “**aggravating circumstance**” (art.2.6).

SPAIN

May 2011: New equality bill has been debated and approved (Proyecto de Ley Integral para la Igualdad de Trato y No Discriminación)

- 1) definition and regulation of multiple
- 2) discrimination and positive actions for this specific type of discrimination

Article 7. *Multiple Discrimination*

Multiple discrimination occurs when more grounds of discrimination covered by the antidiscrimination law combine and interact (Tr: concurren o interactúan), generating a specific form of discrimination.

- Justification shall refer to each ground of discrimination
- Positive action

UNITED KINGDOM

Equality Act 2010

Chapter 1: Eight discrimination grounds (age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation)

Chapter 2: Combined discrimination: dual characteristics;

Section 14: 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

Limits: Only direct discrimination and only on two grounds (double discrimination)



Case Law



COUNCIL OF EUROPE



B.S. v SPAIN

Judgement B.S. v Spain

The ECtHR recognizes the particular vulnerability of the applicant due to her race, gender, and employment status

Third-Party interveners

The AIRE Centre invited the Court to recognize the phenomenon of **intersectional discrimination**, which required a multiple grounds approach that **did not examine each factor separately**

FORCED STERILISATION OF ROMA WOMEN

Some cases of forced sterilisation of Roma women in the Czech Republic, Slovakia, and Hungary reached the European Court of Human Rights (ECtHR) and most of them either ended with a friendly settlement between the parties or were declared inadmissible by the ECtHR (European Roma Rights Center, 2016, Curran, 2016). However, the ECtHR recognised that Romani women's rights had been indeed violated in cases against Slovakia.

[V.C. v. Slovakia (*Application no. 18968/07*); N.B. v. Slovakia (*Application no. 29518/10*), 12.06.2012; I.G. and others v. Slovakia (*application no. 15966/04*)]

FORCED STERILISATION OF ROMA WOMEN

In the case I.G. and others v. Slovakia, the applicants explicitly underlined that they had “suffered a **double burden of discrimination**, as their sex and race had played a decisive role in the violation of their human rights in issue.” (section 161). Such discrimination infringes upon the rights that these individuals are granted through Article 3 (Prohibition of torture), Article 8 (Right to respect for private and family life), and Article 12 (Right to marry) of the Convention. In all cases, the ECtHR held that forced sterilization violated Article 3 and Article 8 of the ECHR, **but did not examine the cases under art. 14 ECHR.**

FORCED STERILISATION OF ROMA WOMEN

Dissenting opinion of Judge Mijovic in the V.C. v. Slovakia judgement

The sterilisation of Roma women should be analysed in context and viewed against the background of “the general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), **the effects of which continued to be felt up to the time of the facts giving rise to the present case**” (V.C. v. Slovakia, 45); of the negative attitude of the Slovak public opinion against the Roma communities; and of the number of pending cases before the ECtHR (see also Curran, *ibid*).

EUROPEAN UNION COURT OF JUSTICE



ACHBITA - G4S SECURE SOLUTIONS (C-157/15) AND - BOUGNAOUI E ADDH -
MICROPOLE SA (C-188/15)

2017

ACHBITA - G4S SECURE SOLUTIONS (C-157/15) AND -
BOUGNAOUI E ADDH - MICROPOLE SA (C-188/15)

- Ms. Achbita was dismissed when she insisted on wearing her headscarf at work. The Belgian court referred the following question to the EU CJ:
- *“Should Article 2(2)(a) [of the Framework Directive] be interpreted as meaning that the prohibition on wearing, as a **female Muslim**, a headscarf at the workplace does not constitute **direct discrimination** where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs in the workplace?”*
- Ms Bougnaoui had been informed by her employer that her headscarf had disappointed the customers. The French court referred the following question:
- *“Must Article 4(1) [of the Framework Directive] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by **an employee, a design engineer, wearing an Islamic headscarf**, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?”*

**ACHBITA - G4S SECURE SOLUTIONS (C-157/15) AND -
BOUGNAOUI E ADDH - MICROPOLE SA (C-188/15)**

Pending the CJEU's decision, the European Network Against Racism (ENAR) organised the workshop for lawyers and litigators in 2016 in Brussels, within the project "Forgotten Women". This workshop created a space for participants to discuss various approaches for litigation and mobilisation to tackle intersectional discrimination against Muslim women



**ADVOCATE GENERAL KOKOTT- CASE
ACHBITA**

G4S Secure Solutions NV ('G4S') is an undertaking that provides, inter alia, not only security and guarding services but also reception services to various customers from the public and private sectors. On 12 February 2003, Ms Samira Achbita joined G4S as a receptionist under an employment contract of indefinite duration.

G4S employees are not permitted to wear any religious, political or philosophical symbols while on duty. Initially, that prohibition applied **only as an unwritten company rule**. With the approval of the G4S works council, the following written formulation was incorporated into the G4S employee code of conduct with effect from 13 June 2006:

'employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them'.



ADVOCATE GENERAL KOKOTT- CASE ACHBITA

The criterion of the genuine and determining occupational requirement

The occupational requirement

Some undertakings may consciously set themselves the goal of recruiting a colourful and diversified workforce and turn the very diversity that it showcases into its brand image. However, an undertaking — such as G4S in this case — may just as legitimately decide on a policy of strict religious and ideological neutrality and, in order to achieve that image, demand of its employees, as an occupational requirement, that they present themselves in a correspondingly neutral way in the workplace



ADVOCATE GENERAL KOKOTT- CASE ACHBITA

The criteria of legitimate objective and proportionate requirement

In such a case, a policy of neutrality is absolutely crucial, not only because of the variety of customers served by G4S, but also because of the special nature of the work which G4S employees do in providing those services, which is characterised by constant face-to-face contact with external individuals and has a defining impact not only on the image of G4S itself but also and primarily on the public image of its customers.



ADVOCATE GENERAL KOKOTT- CASE
ACHBITA

Proportionality test ('the requirement [must be] proportionate')

A rule containing occupational requirements must not be contradictory and must be applied and enforced consistently by the employer in relation to all of its employees. Such a rule is, after all, appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In the present case, however, there is nothing to indicate that the contested company rule operated by G4S might in some way not have been consistent or systematically enforced



ADVOCATE GENERAL KOKOTT- CASE
ACHBITA

Whether the ban is necessary for achieving the objective pursued

An alternative solution might be for an employer such as G4S to move employees such as Ms Achbita to back-office positions in which they would have no significant face-to-face contact with external individuals, or, to avoid any risk of conflict, to deploy them only with customers which have no objection to the employment of receptionists who wear visible and conspicuous signs of religious belief such as the Islamic headscarf.

a ban such as that operated by G4S constitutes a measure that is necessary for the purposes of implementing a company policy of religious and ideological neutrality



JUDGEMENT

Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, **does not constitute direct discrimination based on religion or belief within the meaning of that directive.**

By contrast, such an internal rule of a private undertaking **may constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.**

ADVOCATE GENERAL SHARPSTON- CASE BOUGNAOUI

The issues that arise in this Opinion **do not relate to the Islamic faith or to members of the female sex alone.** The wearing of religious apparel is not limited to one specific religion or to one specific gender. In some cases, there are what may be termed absolute rules, although these will not necessarily apply to all adherents of the faith in question or in all circumstances. In other cases, there may be one or more styles of apparel available to adherents, who may choose to wear them either permanently (at least when in public) or at times and/or places they consider appropriate. Thus, by way of example only, nuns in the Roman Catholic and Anglican faiths were traditionally required to wear a form of habit incorporating a headdress or veil. In some orders, that distinctive apparel may now be replaced by a small discreet cross pinned to ordinary civilian apparel. Similarly, the use of the kippah by male adherents to the Jewish faith is well known. While there is considerable debate as to whether there is an obligation to cover the head at all times (rather than only when at prayer), many orthodox members of the faith will do so in practice. Male adherents to the Sikh faith are, in general, required to wear a dastar (or turban) at all times and may not remove it in public.

CASE BOUGNAOUI

A Muslim woman working as a design engineer in Paris began wearing a headscarf, and some customers to whom she was sent on assignment complained: apparently it upset their employees. Her employer, Micropole, asked her to stop wearing it and she refused, and was dismissed.



ADVOCATE GENERAL SHARPSTON- CASE BOUGNAOUI

- *Proselytising and behaviour at work*
- *Gender equality*

The dismissal was not in fact implemented on the ground of her religion (that is to say, the fact that she was a member of the Islamic faith) **but on her manifestation of that religion** (that is to say, the fact that she wore a headscarf). Does the prohibition laid down by Directive 2000/78 extend not only to the religion or belief of an employee but also to manifestations of that religion or belief? In my view, it does.



ADVOCATE GENERAL SHARPSTON- CASE BOUGNAOUI

Direct discrimination

There is nothing in the order for reference or elsewhere in the information made available to the Court to suggest that, because she wore the Islamic headscarf, she was in any way unable to perform her duties as a design engineer – indeed, the dismissal letter expressly refers to her professional competence. Whatever the precise terms of the prohibition applying to her, **the requirement not to wear a headscarf when in contact with customers of her employer could not in my view be a ‘genuine and determining occupational requirement’.**



ADVOCATE GENERAL SHARPSTON- CASE BOUGNAOUI

Indirect discrimination

Two protected rights – the right to hold and manifest one’s religion and the freedom to carry on a business – are potentially in conflict with one another. An accommodation must be found so that the two can coexist in a harmonious and balanced way. It is with that in mind that I turn to the question of proportionality. [...]

Thus, it seems to me that where an undertaking has a policy requiring its employees to wear a uniform, it is not unreasonable to require that employees should do as much as possible to meet it. An employer can therefore stipulate that those employees who wear an Islamic headscarf should adopt the colour of that uniform when selecting their headscarf (or, indeed, propose a uniform version of that headscarf).



ADVOCATE GENERAL SHARPSTON- CASE BOUGNAOUI

Indirect discrimination

The bigger the business, the more likely it will be to have resources allowing it to be flexible in terms of allocating its employees to the tasks required of them. Thus, an employer in a large undertaking can be expected to take greater steps to make a reasonable accommodation with his workforce than an employer in a small- or medium-sized one.

I have already indicated that there may be instances where the particular type of observance that the employee regards as essential to the practice of his/her religion means that he cannot do a particular job.

ADVOCATE GENERAL SHARPSTON- CASE BOUGNAOUI

Indirect discrimination

More often, I suggest, the employer and employee will need to explore the options together in order to arrive at a solution that **accommodates both the employee's right to manifest his religious belief and the employer's right to conduct his business**. Whilst the employee does not, in my view, have an absolute right to insist that he be allowed to do a particular job within the organisation on his own terms, nor should he readily be told that he should look for alternative employment. A solution that lies somewhere between those two positions is likely to be proportionate. Depending on precisely what is at issue, it may or may not involve some restriction on the employee's unfettered ability to manifest his religion; but it will not undermine an aspect of religious observance that that employee regards as essential

ADVOCATE GENERAL SHARPSTON- CASE BOUGNAOUI

Conclusion

- A rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is *a fortiori* the case when the rule in question applies to the wearing of the Islamic headscarf alone.
- Where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer's business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim.

JUDGEMENT

Consequently, the answer to the question put by the referring court is that Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf **cannot be considered a genuine and determining occupational requirement within the meaning of that provision.**

PARRIS CASE

JUDGEMENT 2016

OPINION OF ADVOCATE GENERAL KOKOTT - CASE PARRIS (CASE C-443/15)

“Accordingly, in a situation such as that at issue here, employees such as Dr Parris would, in accordance with Article 2(2)(b) of Directive 2000/78, have to be regarded as being **at a particular disadvantage by reason of a combination of their sexual orientation and their age** because the terms of the pension scheme have the effect of systematically depriving their surviving partners in particular of a survivor’s pension. It is true that, for all employees, the surviving partner’s eligibility for a survivor’s pension is subject to the (apparently neutral) condition that the couple must have entered **into a marriage or civil partnership before the employee’s 60th birthday**. In truth, however, **this systematically excludes homosexual employees born before 1951 in particular** — unlike all other categories of employee — from a survivor’s pension of this kind because those employees would never have been able to satisfy the aforementioned condition even if they had wanted to”

PARRIS: AG KOKOTT'S OPINION

“By this question, the Court is essentially being asked to clarify how discrimination against individuals which **is attributable to a combination of two or more grounds for a difference of treatment is to be dealt with in the context of the EU-law prohibitions on discrimination**. While there is no doubt that the Court has in the past already been presented with cases* in which several such factors have featured in the background, no case has yet — to my knowledge — required the Court to give a ruling on this issue”

*Kleist (C-356/09, EU:C:2010:703, combination of age and sex), Odar (C-152/11, EU:C:2012:772, combination of age and disability), Z (C-363/12, EU:C:2014:159, combination of sex and possible disability), Milkova (C-406/15, combination of disability and civil servant status), pending

Case C-415/10 Galina Meister v Speech Design Carrier (Judgement 2012)

Galina Meister v Speech Design Carrier Systems GmbH “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 (Farkas 2012)

The [Court of Justice of the European Union](#) concludes in a case referred by the German Federal Labour Court, that EU non-discrimination legislation does not entitle a worker who has a plausible claim that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant.

The Court concludes however, that a refusal by the employer to disclose any such information may be one of the elements to take into consideration when establishing the presumption overturning the burden of proof.

The complainant, Ms Galina Meister, held that she had been discriminated against on the grounds of her **age, sex and/or origin in the recruitment process** where a private company made two successive, identical job advertisements for which Ms Meister applied, unsuccessfully, without being called for an interview. She held that without the employer disclosing information on the recruitment process and its outcome, she was not able to establish any facts from which it could have been presumed that there had been discrimination

NATIONAL CASE-LAW

NATIONAL CASE LAW IN EUROPE

AUSTRIA

Supreme Court in 2010 (8 Ob A63/09m)

Gender and ethnic origin

No decision should be made here “whether compensation for multiple discrimination had to be assessed by a general view or by cumulating amounts for each discriminatory act” (Schindlauer 2012)

Equal Treatment Commission, GBK II/79/09.

Religion combined with ethnic harassment: grounds were addressed separately, since they are covered by separate legal provision.

Acknowledgement of the combined effect of multiple discrimination



DENMARK

“Føtex” (U 2005, 1265H)

A woman was dismissed from her job at a department store because she started wearing a hijab.

The claim was lodged exclusively on the basis of religious discrimination, but the Supreme Court considered ethnic and gender discrimination as well.

However, discrimination was justified (dress code) in this case.



FRANCE

Paris Court of Appeal (2001/32582)

Black woman: A Black woman employed by the Parisian public transport authority (RATP) claims discrimination based on gender and race (Fr: à raison de son sexe et de sa race) in the work place (advancement and training).

Comparator: a group including men and a woman.

The employer does not manage to justify objectively the unequal treatment



GERMANY

Constitutional Court's Judgement of 27 January 2015
on ban of teacher's headscarves in public schools
ban of teacher's headscarves in public schools

Religion/ belief and gender



GERMANY

Labour Court Wiesbaden, judgment 5 Ca 46/08 of 18 December 2008

German woman of Turkish origin: grounds of gender and ethnic origin.

She was moved to a less attractive job after maternity leave: her successor in the old job is a 'German male' (comparator)

Only discrimination based on gender has been acknowledged by the Court

Germany - BAG, 22.01.2009 (8 AZR 906/07)

Remedy should be proportionate (no double counting)

ITALY

- Sara, an Italian national of Egyptian origin, applied for a job as a leaflet distributor at a footwear fair by sending her curriculum vitae and photograph to the agency in charge of hiring personnel for the event. She then received an e-mail affirming that the agency would like to hire her because she is "very pretty", but asked whether she would "take the *chador* off." Sara declined the offer, explaining that she wears her veil for religious reasons, but offered to wear one that would match the uniform of the event instead. The agency replied that prospective customers "would never be that flexible" and did not enter into a contract with her. Sara lodged a claim at the Tribunal of Lodi, in the Milano area, affirming that she was "discriminated against on the basis of religion and gender." The judge recognized that the *hijab* has religious nature but resolved that the agency's conduct could not be considered indirect discrimination on either religion or gender because their selection criteria of "long and voluminous hair", minimum height, size, and availability to wear mini-skirt uniforms are justified by target market preferences that focus on image rather than professionalism. (Bello, forthcoming)

ITALY

- The judge considered the allegations of religion-based and gender-based discrimination separately and dismissed both of them. The first allegation was dismissed because the fashion market justifies the agency's request for a "pleasant and attractive woman", from which "a certain 'kind' of person with certain physical characteristics" is inferred. According to the judge, Sara was denied the job because having her hair covered would deprive her of "an element of charm and seduction", rather than because of her being Muslim *per se*. Put differently, the obstacle being not "the veil" but the fact that hair (an assumed element of seduction) was covered. The judge explained that the same would have happened to a woman wearing a headscarf "for cultural, ethnic, style or health reasons (like in the case of baldness or hair loss caused by chemotherapy)." At the same time, no gender-based indirect discrimination had occurred because in the fashion market "a head of hair can represent elements of male seduction and could be legitimately required from men as well". (Bello, forthcoming)

NORWAY

Oslo Equality Tribunal B vs. Thon Hotel Opera (1/2008)

Two girls with Asian background were refused a room in a hotel in Oslo city center (suspect they were prostitutes and drug addicts, since one of them had a home address in the city and had no luggage)

Acknowledgment of multiple discrimination (gender and origin)

The policy of the hotel was judged discriminatory

SWEDEN

- *Alleged multiple discrimination (age and gender) in relation to hiring (Labour Court Case 2010 No. 91 (judgment 2010-12-15))*

If the same discriminatory act concerns more grounds, it is still regarded as a **single discrimination** case. The number of grounds does not affect the amount of damages



UNITED KINGDOM

Bahl v. the Law Society (Bahl v Law Society [2003] I.R.L.R. 640 and [2004]I.R.L.R. 799)

- **Employment Tribunal** recognized that the claimant (Bahl), an Asian woman, had been discriminated as a "Black woman".
- **Employment Appeal Tribunal:** tribunal failed to distinguish 'between the elements of alleged race and sex discrimination'. It overturns the decision of the Employment Tribunal
- Evidence in relation to each ground is needed.

Court of Appeal rejected Bahl's appeal.

(McColgan 2010; Solanke 2010)



UNITED KINGDOM

United Kingdom, Employment Tribunal, Case Nr. 2200423/2010 (ET), *Miriam O'Reilly v. British Broadcasting Corporation*, judgment 11 January 2011.

A presenter at the British Broadcasting Corporation (BBC) was replaced with a younger female presenter, while an older male presenter was retained.

Two discrimination grounds (gender and age) were considered separately and not in combination. Age discrimination only was found by the Tribunal, but not sex discrimination.



UNITED KINGDOM

United Kingdom, Employment Appeal Tribunal, *Ministry of Defence v. DeBique* [2010] IRLR 471 (EAT), 12 October 2009.

More than one discrimination ground was taken into account.

Complain of indirect gender discrimination indirect race discrimination

Employment Appeal Tribunal:

«the nature of discrimination is such that it cannot always be sensibly compartmentalized into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage.»



SUGGESTIONS TO PROMOTE THE DEFENCE ON INTERSECTIONAL DISCRIMINATION

- 1) Harassment (no comparator)
- 2) Strategic litigation
- 3) Mediation



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Thank you for your attention

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