



Multiple Discrimination and Multiple Consciousness

Current Reflections on EU Gender
Equality Law

ERA, 2-3 June 2014

The design of anti-discrimination law

- Stratification
 - Separate statutes/ conventions in PIL
 - limited inter-action (cross transfer of ideas eg. Indirect discrimination)
- Why?
 - Political mobilisation (non-labour)
 - Focused remedies
- Consequences
 - Single-dimension protection

Single Dimension Logic in the UK

Protected Characteristic (PC)

- Race
- Gender
- Disability
- Gender Reassignment

- Sexual Orientation
- Religion & Belief
- Civil Partnership
- Age

Protected by

- RRA 1965; 1968; 1976
- SDA 1975
- DDA 1995
- Gender Reassignment Regulations 1999
- Regulations 2003
- Regulations 2003
- Civil Partnership Act 2004
- Regulations 2006

Design of EU equality law

Grounds of Discrimination

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

Source: Bąkowski and Copeland 2012, p4

WHICH STATUTE?



Traditional silos getting in the way?

What if cases don't fit the 'silos'?

Multiple PC's

- Sex and Age
 - Miriam O Reilly
- Race and Sex
 - Nwoke
 - Bahl
- Race and Religion
 - Azmi
- Religion and Disability
 - Al Jumard

Which statute?

- SDA or Age Regulations?
- RRA or SDA?
- RRA or Religion Regulations?
- Religion Regulations or DDA?

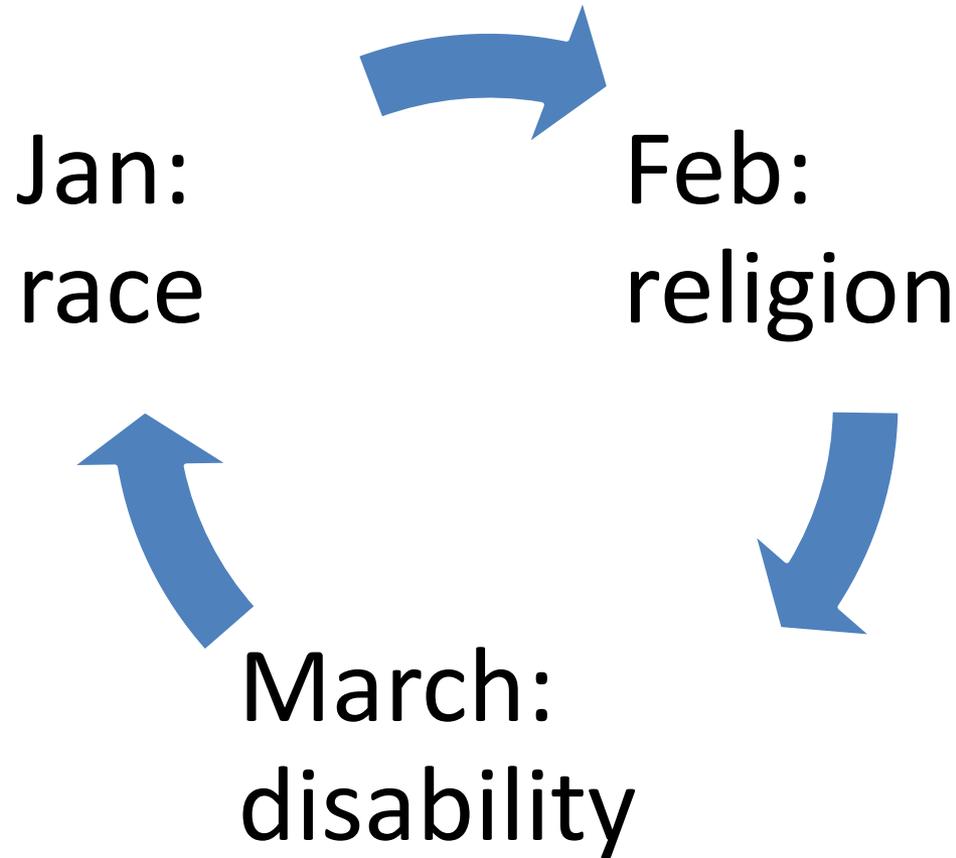
Law and Multiple Discrimination

- EU Race Directive 2000/43 on equal treatment (preamble) ;
EU Equal Treatment Directive 2000/78 (preamble)
 - ‘aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.’
- The International Convention on the Rights of Persons with Disabilities 2006 (‘aggravated’)
- Declaration on the Rights of Indigenous Peoples 2007
- UN Commissioner for Human Rights 2009
- UN Committee on the Economic, Social and Cultural Rights in its 2009 General Comment on non-discrimination

Mismatch I: Multiple discrimination

- **Cumulative:** different characteristics at different times
 - ***Al Jumard v Clywed Leisure Ltd*:** race discrimination (complaints treated differently to white colleagues); disability discrimination (failure to make reasonable adjustments)
- **Additive:** different characteristics at same time
 - ***Nwoke v. Government Legal Service (direct)*:** race discrimination (all white applicants ranked higher after interview even if degree class lower); sex discrimination (women who were graded higher than men were unlikely to be offered a job, and if appointed were paid less)
 - ***Debique v Ministry of Defence (indirect)*:** sex discrimination (24/7 PCP); race discrimination (immigration PCP)
- **Solution:** Must present evidence to demonstrate both PCs

Cumulative Multiple Discrimination



Additive Multiple Discrimination



Mismatch II: multiple consciousness

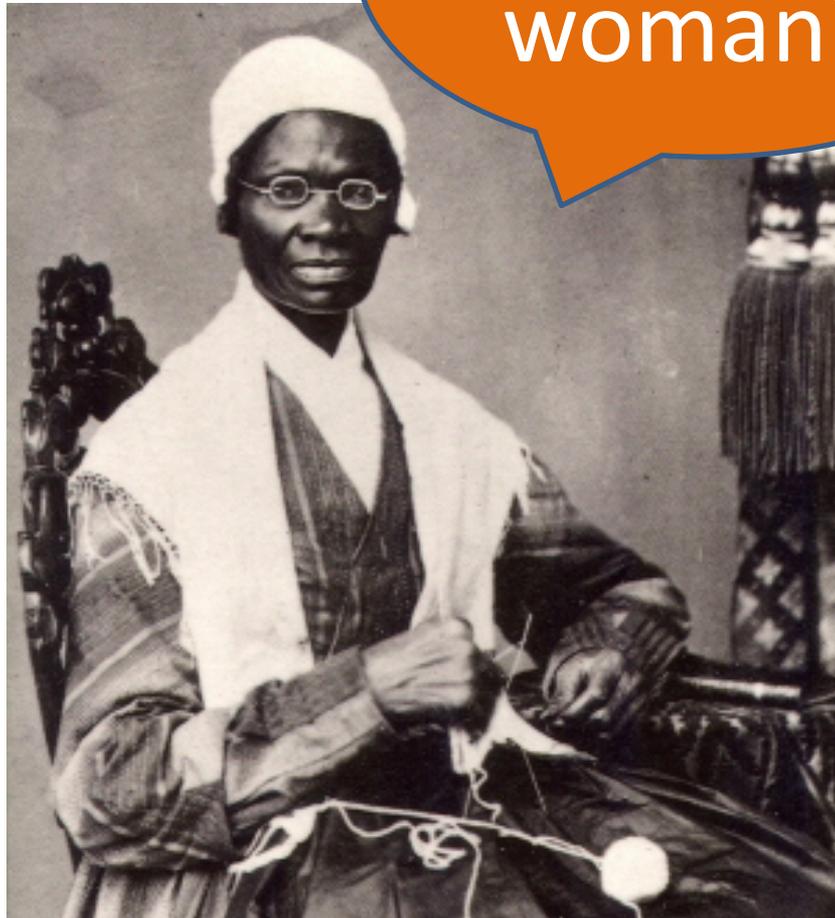
- **“multiple jeopardy” – challenging the single dimension logic:**
 - Does each ground really have ‘a single, direct and independent effect on status, wherein the relative contribution of each is readily apparent’?
- **Intersectionality:**
 - ‘the discrimination involves more than one protected characteristic and it is the unique combination of characteristics that results in discrimination, in such a way that they are completely inseparable. This often occurs *as a result of stereotyped attitudes or prejudice relating to particular combinations of the protected characteristics.*’



marschmellow 1.00 € stuk
negerinnetetjes

Ms Sojourner Truth

Ain't I a
woman?!

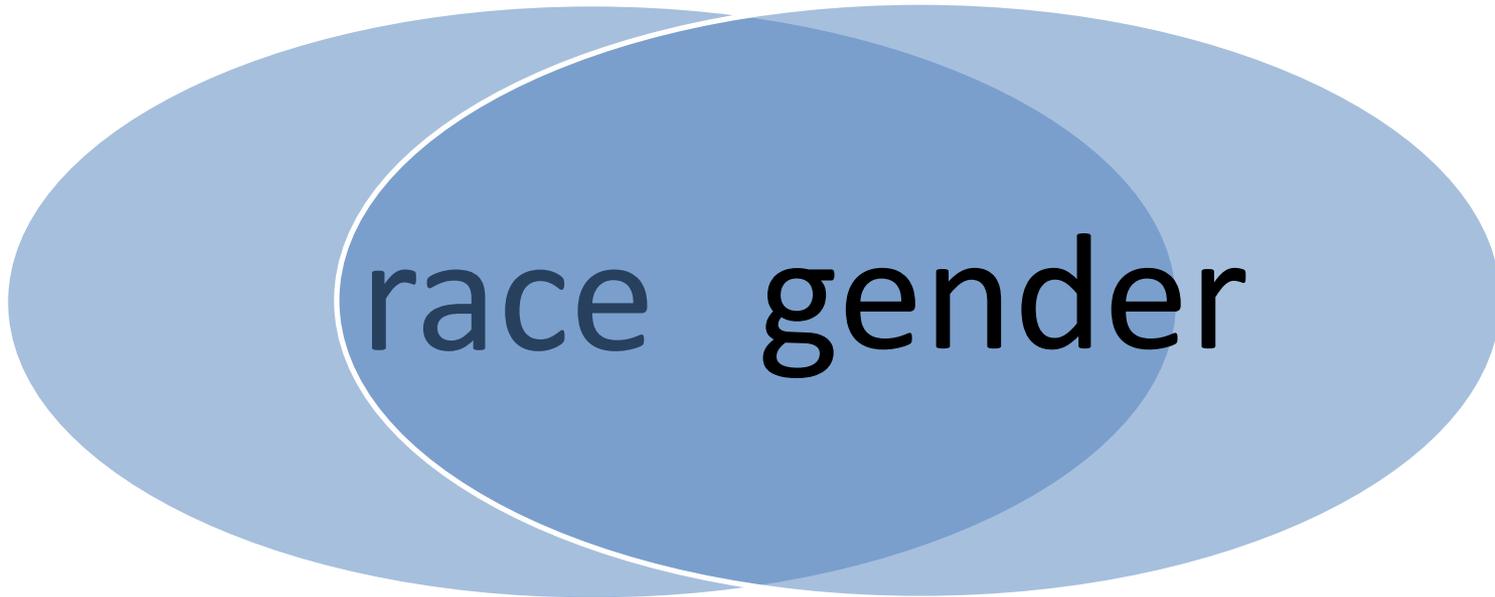


Crenshaw: the 'blind spot'

- '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.'

Intersectional Multiple Discrimination

'condition more terrible than the sum of their
two constituent parts' (Scales-Trent)



Intersectionality in the USA I

- *Emma DeGraffenreid et al v. General Motors (1977)*:
 - ‘The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they 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.’

Intersectionality in the USA II

- *Jefferies v. Harris City Commission (1980)*:
 - ‘...We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women...Black females represent a significant percentage of the active or potentially active labor force. In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy.’

Intersectionality in Canada

- Canada: *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.

Intersectionality in Britain

- *Bahl v. Law Society* [2004] EWCA Civ 1070
- Employment Tribunal
 - Evidence of unconscious race and gender discrimination
 - Use of white male comparator
 - Finding that a white man would not have been treated in this way
- Employment Appeal Tribunal (EAT) and Court of Appeal (CA)
 - Impossible to claim a single combined ground of race and gender discrimination
 - ET failed to identify evidence in relation to each ground of discrimination

Section 14, EqA 2010

- ‘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).’

GOR?

Indirect discrimination?

1. Assumption of choice

- **GEO:** 'If, for example a **black disabled woman** is discriminated against, it is likely that the discrimination she experienced was because of **any one of the three strands**, or because of a combination of any two of these protected characteristics, but less likely to only be because of the particular combination of the three'.
- Victims of intersectional discrimination **lack choice**: they '...don't get to choose which one [attribute] will haunt them and which one they'll be free of.'

2. Absence of synergy

- Intersectionality => a 'multiple consciousness' that creates a new *'integrated, undifferentiated, complete whole'*
- oxygen + hydrogen = water; tin + copper = bronze, not 'tinper'
- Section 14: Multiple discrimination with SDL not multiple consciousness

'Grounds': a fundamental design flaw?

- Single dimension logic cannot accommodate intersectionality
- Immutability as a limiting principle or stigma?
 - 'stain' or 'mark'
 - Socially inscribed negative meanings
 - Various types (physical, behavioural, biographical, visible and invisible, immutable)
 - Insidious, rest upon entrenched assumptions
 - Used to justify withholding of equal treatment and for social control
 - Travel alone or in combination (SDL and MC)

Physical	Biographical	Psychological	Behavioural	Medical	Social/ Political
Age	Caste	Mental health	Illiteracy	HIV/ AIDS	Refugee
Skin colour	Class/ social origin	Dementia	Addiction	Cancer	Asylum seeker
Weight	Sexuality		Paedophile	Menopause	Joblessness
Mobility/ visual impairment	Single woman/ mother		Whistle-blower	Female hair loss	Incarcerati on self/ family member
Sex	Divorcee		Smoker		Nationality / national origin
Albinism					
Pregnancy					

Which stigma? 'Entry criteria'

- Arbitrary
- Punitive rather than negative public response
- Significant hindrance in relation to access to and acquisition of key resources
- Difficult to escape
- Discrete history of oppression and purposeful discrimination
- Absence of political power

Advantages

- Hones in on social stereotypes
- Goes beyond narrow grounds
- Facilitates complexities: stigma can travel alone or in multiples
- Accommodates single dimension logic (SDL) and intersectional discrimination

Summary

- Single dimension logic (SDL) inherent in design of ADL at all levels
- SDL facilitates AMD and CMD but an obstacle for recognition of intersectionality
- Intersectionality = stereotype + **synergy**
- In order to tackle intersectionality, it is necessary to replace threshold concept of immutability with stigma

RELIGION/
BELIEF

WHEN TO
PROTECT
BY LAW?

SMOKER

IMMUTABILITY

Little or no control
Negative public response
Impossible/ very
difficult to change

STIGMA

Blemish or stain
Tarnishes whole identity
Punitive public response
Socially imposed => little
or no control
Socially maintained
Reduces humanity
Justifies withdrawal
of opportunities

VERSUS

WEIGHT

WHISTLE-
BLOWER

RACE