

Intersectionality: the potential of EU law

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Invisibility at the intersection

- All the women are white; all the blacks are men...and some of us are brave.
- 'The paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged blacks.'
(Crenshaw)
- 'Single axis approach'
- Not all women nor all blacks treated unfavourably – only black women

Problems with a single axis approach

- Everyone has an ethnicity, a colour, a gender, a sexual orientation, an age, a range of ability
- Assumes groups are internally homogenous: essentializes.
- Same person can have a combination of privileged and disadvantaged identities: white women; ethnic minority men.
- Ignores role of power relationships: discrimination addresses imbalances of power.

Intersectionality in practice

- Roma women: Vertical, diagonal and layered inequalities
- LGBT people with disabilities
- Muslim LBT women
- Young ethnic minority men
- Disadvantaged ethnic minorities with disabilities or elderly.
- Migrant women and domestic workers

Wrong turn in intersectionality theory?

- Is the aim to create better delineated sub-groups, thereby granting 'greater inclusion to differently defined subjects such as Black women plaintiffs or battered immigrant women'?
- Fascination with 'infinite combinations and implications of overlapping identities.'
- Can't see what difference make a difference
- Problem: proliferation of sub-groups,
- Back to assumption that all members of the sub-group are the same?

‘Structural intersectionality’

- Refocus on the structures of power and exclusion, or ‘structural intersectionality’
- Analysis of power illuminates differences that make a difference
- Discrimination as relational: vertical, layered and diagonal relationships of power
- ‘Maids and madams’ in a patriarchal society

Scope for progress

- Can we interpret existing EU discrimination law to incorporate intersectionality?
- Principle of equal treatment between ‘men and women’
- ‘Women’ does not mean ‘white, heterosexual, able-bodied, prime age, Christian woman’.
- Convention on Elimination of Discrimination against Women (CEDAW): Broad mandate for all women.
- Move from ‘grounds’, ‘groups’, ‘identity’ to relationships patterned by power imbalances

EU structural obstacles

- Different directives
- Different scopes: Hierarchy of protection
- Fixed list (except for Charter)
- Equality body
- Way forward?
- Grounds: Do we need new sub-groups?
- 'Pandora's box' or proliferation of groups?
- Ground plus one? US, UK

Reconfiguring intersectionality in EU law

- Grounds as capacious: all women have a colour, ethnicity, sexual orientation, age, ability or disability, religion or non-religion etc.
- Articles 2 and 3(2) TFEU: 'Equality between men and women'
- Article 157 TFEU: Equal pay between male and female workers
- Recast Directive (2006/54): Principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
- Positive action permitted 'with a view to ensuring full equality in practice between men and women in working life.' (Art 3)
- Gender mainstreaming: MS must 'actively take into account the objective of equality between men and women' (Art 29)
- Charter: 'Equality between men and women must be ensured in all areas.'
Article 23

‘On grounds of sex’ and intersectionality in EU case-law

- Pregnancy as discrimination on grounds of sex (Dekker, Webb).
- Treated less favourably than men but also than non-pregnant women
- Older women: Treated less favourably than older men but also younger women (Marshall, Test Achats)
- Parenting: Fathers treated less favourably than mothers but not less favourably than other women (Roca Alvarez)
- Beyond comparator, groups and grounds to all aspects of identity relevant to relationships of power

Ethnic or racial origin

- Grounds as capacious: all those with an ethnicity also have a gender, age, sexual orientation etc
- Ethnic or racial origin not defined
- Depends on particular power relations: a social construct
- Counter racism without accepting separate racial categories
- Not all ethnic groups are disadvantaged
- Ethnic or racial origin need not be exclusive reason for discrimination
- Wider scope of Racial Equality Directive.

‘On grounds of racial or ethnic origin’ in CJEU case-law

- Consider all characteristics of a person’s identity which are relevant to an imbalance in the power relationship
- Firma Feryn: ‘Immigrants’: relationship of exclusion, prejudice and stigma associated with racial discrimination.
- CHEZ v Nikolova (2015): Directive applies to a collective measure irrespective of whether it only affects persons of a certain ethnic origin, or also subjects others to the less favourable treatment.
- Intersectional discrimination on grounds of ethnic origin, geographical location and socio-economic disadvantage.
- Comparator as all consumers of electricity supplied by CHEZ in an urban area.

Intersectional Indirect Discrimination

- Apparently neutral provision, criterion or practice (PCP) includes unenumerated characteristic
- Policy applying to a geographical location putting people of Roma origin at a particular disadvantage: Chez
- Part-time workers cases: Jenkins, Bilka, Gerster
- OR Comparator group: Brachner: exceptional pension increase, excluded low paid pensioners, predominantly women
- Compared female pensioners with male pensioners: i.e older women with older men rather than younger women.

Positive action and mainstreaming

- Initiative on public bodies to identify inequality and discrimination
- Focus on groups defined by intersectional disadvantage
- Equality bodies and NGOs in member states: Roma women, disabled LGBT people, older/younger ethnic minority men, Muslim gay women.
- Challenge: Representation and involvement

Intersectionality and positive action in EU law

- Member States to maintain may adopt specific measures in order to compensate for disadvantage ‘**linked to** any of the grounds referred to’ (Art 7 Employment Equality Directive)
- May have specific measures to compensate for disadvantages ‘**linked to** racial or ethnic origin’ (Art 5 Racial Equality Directive)
- Gender: MS must ‘actively take into account the objective of equality **between men and women** when formulating and implementing laws, regulations, administrative provisions, policies and activities.’ etc (Recast Directive Art 29)

Remedies and intersectionality in EU law

- EU law: real, effective, dissuasive, proportionate sanctions or compensation.
- Enhanced compensation?
- Remove legislative, administrative and other measures contrary to principle of equal treatment
- Declare void or invalid provisions contrary to principle of equal treatment in contracts, individual or collective, regulations of professional associations and trade unions, etc.
- Visibility of intersectional discrimination requires appropriate remedies