

# Anti-discrimination law & Policy – contradictory roots as a challenge for addressing intersectionality (EUropean perspectives)

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# ARGUMENT IN A NUTSHELL

- Intersectionality remains a useful element of anti-discrimination law
- EU anti-discrimination law can be interpreted as protecting against intersectional discrimination as it stands
- Yet EU Courts routinely fail to acknowledge intersectionality
- Refusing to recognise “headscarf-discrimination” as sex, race and religion discrimination is only one aspect of this
- COVID 19 crisis will create many more instances of disadvantage at the intersection of sex and ascribed race in the EU

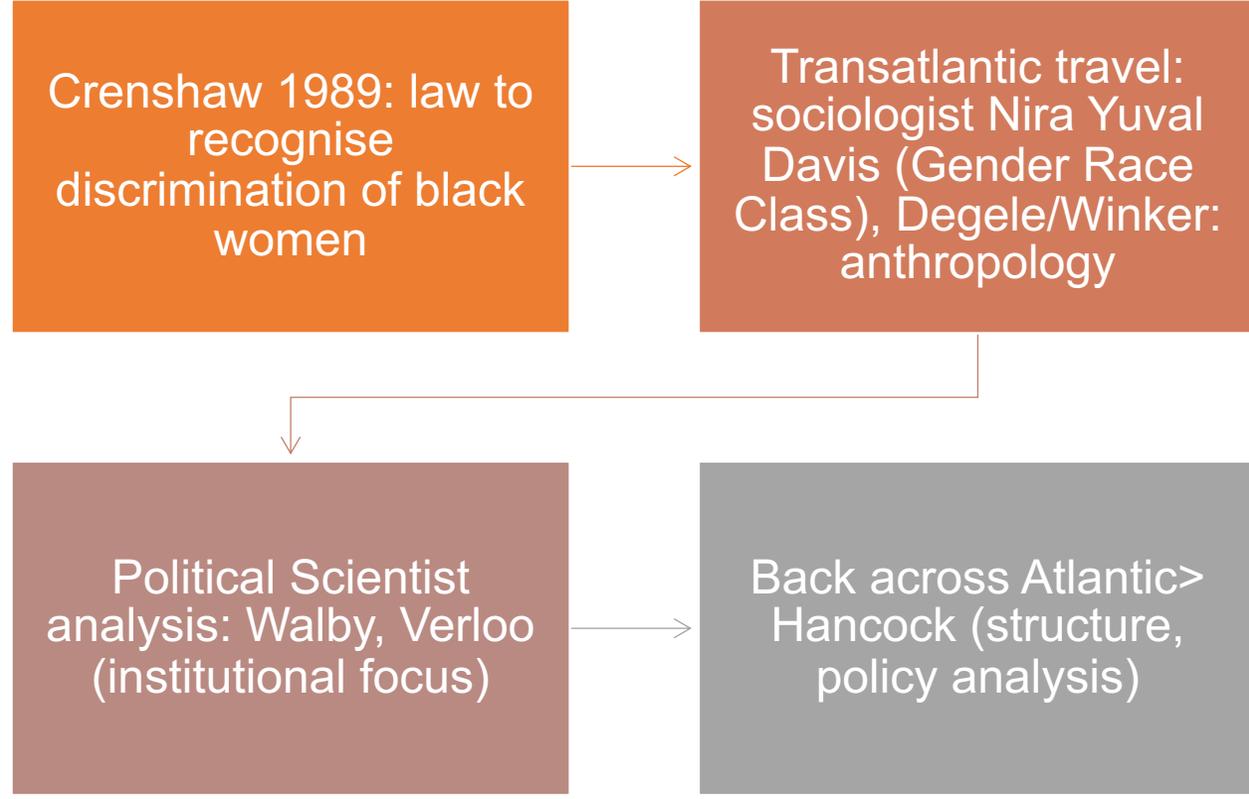
Avoiding loss of focus and overreach of anti-discrimination law

Recognising intersectionality in law

# INTERSECTIONALITY a fun guide



# THERE AND BACK AGAIN: TRAVELS OF A CONCEPT



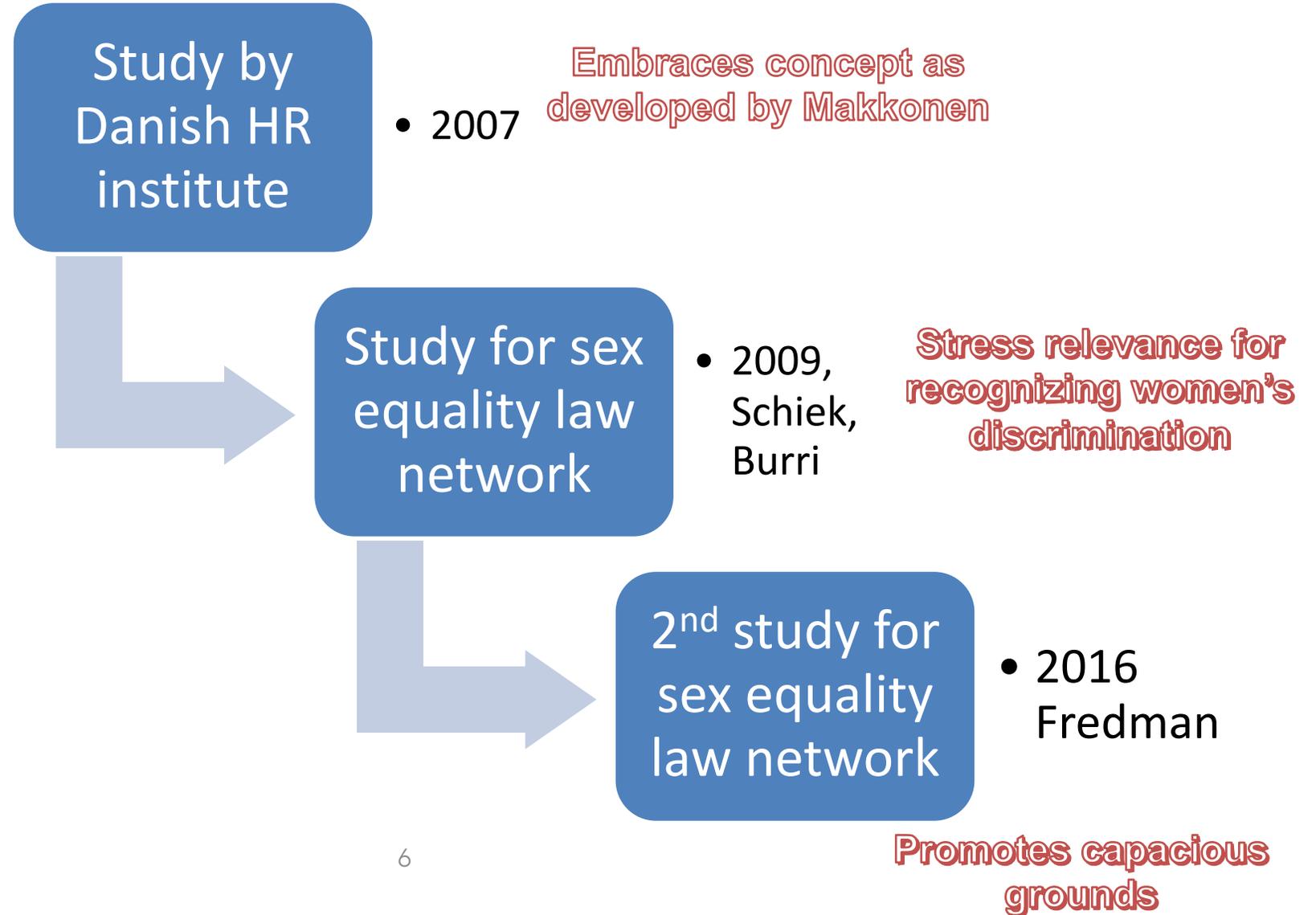
# Intersectionality & Non-Discrimination law pragmatic

- An analytical tool to explain shortcomings of the law (Crenshaw)
- 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 (avoiding overreach/loss of focus)

# CRENSHAW'S ANALYSIS OF DE GRAFFENREID (413 F SUPP 142 (ED) MO 1976)

- A collective redundancy exercise affected men and women almost equally, as well as being “race balanced”
- Court held that the law did not allow the creation of new protected groups, such as Black Women
- Alas, all Black Women were dismissed. These brought a claim based on indirect discrimination on grounds of sex and race
- Intersectionality demonstrates how the law dismisses Black Women's experience

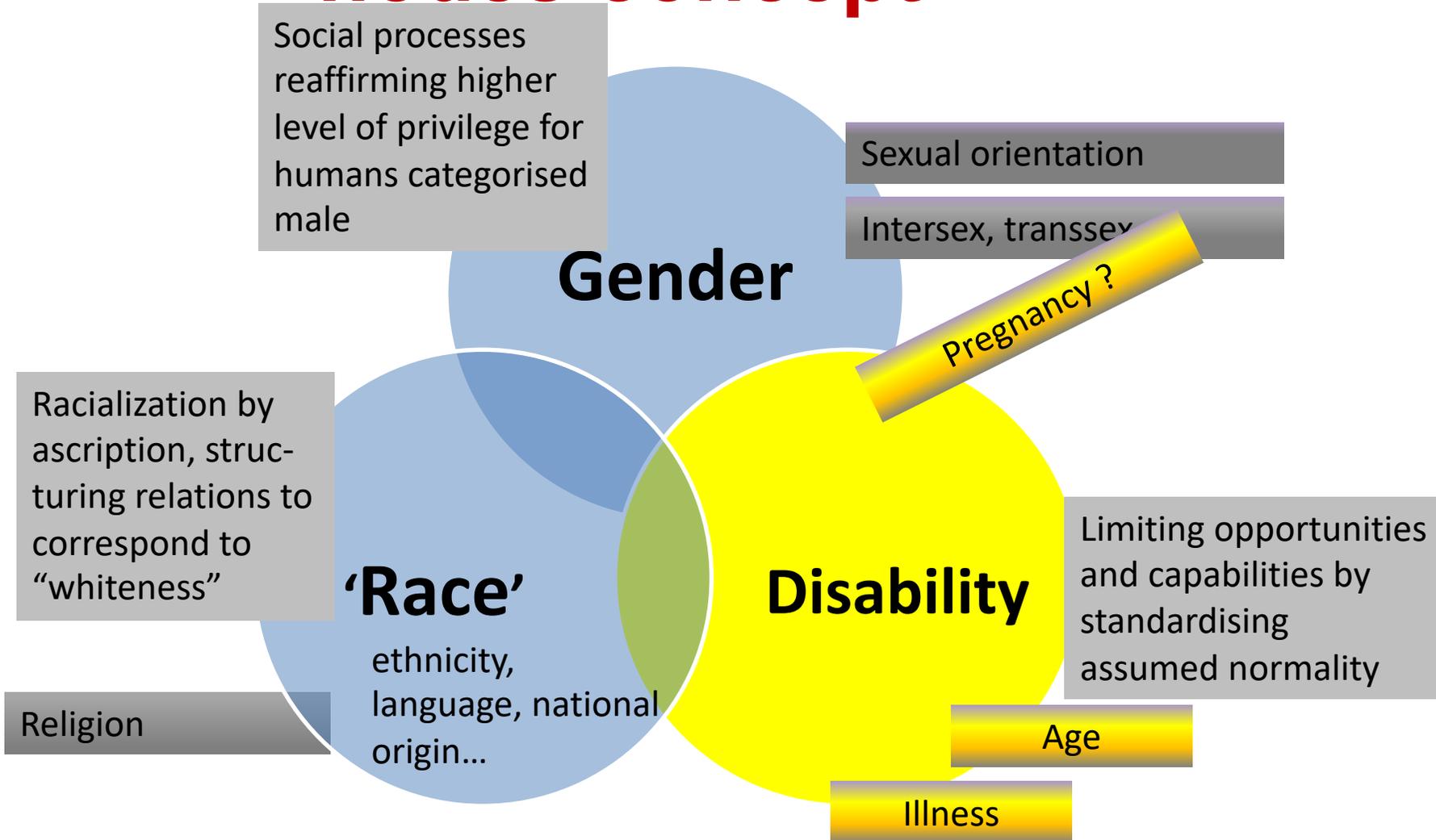
# Reflection in EU COM legal discourse



- Addressing ill in legal terms
- That ill is characterised by subjecting individuals to disadvantage on the basis of ascribed otherness
  - Individual, not group protected
  - Disadvantage based (asymmetry)
  - Ascription as external event

**Overarching aim of anti-discrimination law  
(Schiek)**

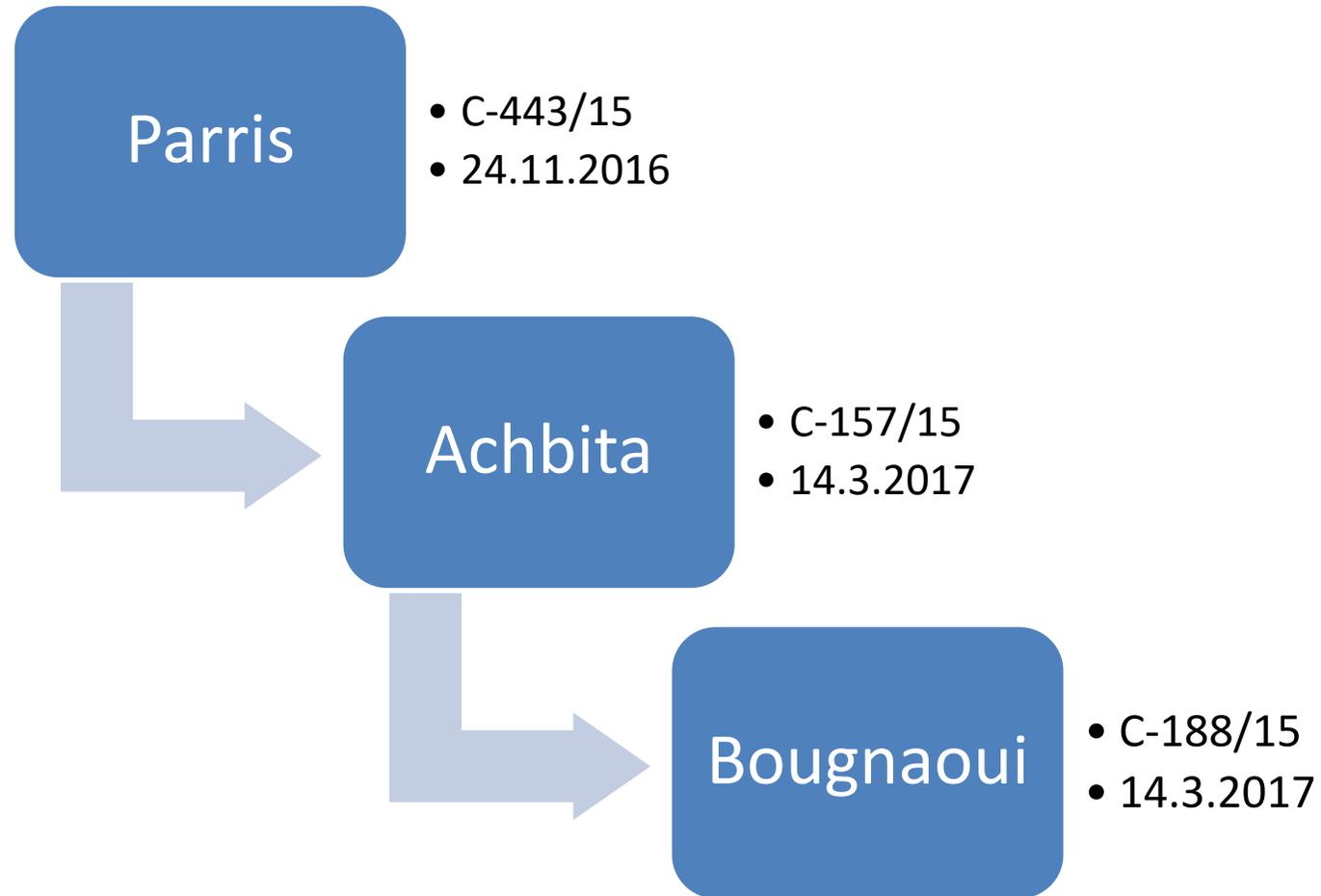
# Avoiding overreach/loss of focus: nodes concept



# 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**

# The ECJ and intersectionality - recent



# 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
- ***Will EU anti-discrimination law cover the situation of older homosexuals who are excluded from the survivor pension?***

# AG Kokott (Parris)

- No direct discrimination on grounds of homosexuality
- Indirect
  - Legitimate aim (avoid abuse)
  - Disproportionate means
- Age discrimination
  - Direct age discrimination
  - Not justified
- „several factor discrimination“
  - in evidence here
  - requires stricter standards for justification

# Court (Parris)

- No discrimination on grounds of homosexuality
  - Direct
  - indirect
- Age discrimination is justified (Article 6 (2) Directive 2000/78)
- No consideration of intersectionality!

# NEW VIEWS ON THE NOTORIOUS HEADSCARF?

- Samira Achbita & CGKR v G4S Secure Solutions NV C-157/15 EU:C:2017:203
- Asma Bougnaoui and ADDH v Micropole SA, C-188/15, EU:C:2017:204
- Woman returning from parental leave wearing headscarf, dismissed upon refusing to take it off, “neutral” workplace policy cited
- Software engineer worked with headscarf undisputed, but was asked to take it off for one specific client, who asked for it. Dismissed on refusal

# 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)

# Bouagnaoui case – AG Sharpstone

- 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

# 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
  - Acknowledging intersectionality might lead to higher damages

# New upcoming cases

C-804/18 referred by Hamburg Labour Court (WABE)

C-341/19 referred by German Federal Labour Court (MH Mueller Handels AG)

C-344/20 referred Brussels Labour Court (francophone)

# Concluding questions

- Will the Court ever recognise the reality of intersectional discrimination?
- Is it worthwhile bothering?