On uses, mis-uses and non-uses of inter-sectionality before the Court of Justice (EU)

Schiek, D. (2018). On uses, mis-uses and non-uses of inter-sectionality before the Court of Justice (EU). *International Journal of Discrimination and the Law*, *18*(2). Advance online publication. https://doi.org/10.1177/1358229118799232

Published in:
International Journal of Discrimination and the Law

Document Version:
Other version

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DAGMAR SCHIEK

On uses, mis-uses and non-uses of intersectionality before the European Court of Justice (ECJ)

The ECJ rulings Parris (C-433/15), Achbita (C-157/15) and Bougnaoui (C-188/15) as a Bermuda Triangle?

Volume 7 (2018) Issue 3

These on-line papers are part of the programme provided under the Jean Monnet ad Personam Chair held by Dagmar Schiek, which was part-funded by the EU Commission from September 2011 to August 2014 (University of Leeds)

A shorter and slightly revised version of this paper has been accepted for publication in the International Journal of Discrimination and the Law (2018).

Abstract

Intersectionality, frequently used by political scientists (Walby & Verloo, 2012) *sociologists (Winker & Degele, 2011) and anthropologists (Hancock, 2015) as a highly abstract concept, originated as a critique of US courts' ignorance of discrimination against black women specifically (Crenshaw, 1989). That ignorance emerged in cases such as DeGraffenreid, in which the claimants challenged a collective redundancy scheme resulting in dismissing most black women on grounds of indirect discrimination. The court refused to recognise black women as a category of relevance and did not find any discrimination because the scheme did not impact disproportionally on white women or black men. This paper discusses three ECJ rulings decided between 24 November 2016 and 14 March 2017, which similarly failed to acknowledge intersectional discrimination, thus inviting national courts to deny recognition and adequate remedies to claimants. The first case concerning the pension claims of two white homosexual men (Parris, C-443/15) can be qualified as the Court's "DeGraffenreid moment" because it refused to recognise discrimination in a case where the intersection of being over 63 and homosexual was the basis of excluding the men from a survivor's pension. The Court refused to recognise combined discrimination and found that neither age nor sexual orientation in isolation were the reason of that exclusion. The two more recent cases (Achbita, C- 157/15, Bougnaoui C-188/15) seem to constitute instances of surprising ignorance of racializing Muslim women through penalising them for wearing a headscarf: The Court, following its AGs, refused to protect women against dismissal on grounds of that garment on the basis of extensive justifications for religious discrimination, thus ignoring a pervasive exclusion on the intersection of gender and ascribed race. The article criticises all three rulings with a twofold argument. First, it is submitted that anti-discrimination law should and can recognise intersectional discrimination without losing its focus by a reconceptualization around the nodes gender, race and disability. Second, it is argued that EU anti-discrimination law can be interpreted to encompass this concept by using a purposive interpretation.*

***Key words**: Intersectional discrimination – exclusion of Muslims as race discrimination – functional interpretation*

On uses, mis-uses and non-uses of intersectionality before the European Court of Justice (ECJ)

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I. Introduction

Does the European Court of Justice (ECJ[1]) recognise and acknowledge intersectional discrimination if and when confronted with it? That question was tested in three cases decided on 24 November 2016 and 14 March 2017 respectively, the trio of Parris,[2] Achbita[3] and Bougnaoui.[4] As a novelty for the ECJ,[5] the trio required acknowledging intersectionality, should the underlying discrimination be fully recognised.

Briefly, intersectional discrimination can be characterised as discrimination on more than one ground where either the specific contribution of any one of these grounds is indiscernible, or the full extent of discrimination is only recognisable by acknowledging the combination of two or more grounds. It thus constitutes a specific subsection of discrimination on more than one ground.[6]

The factual backgrounds of those cases, all three emerging as references from national courts, are fascinating illustration of how the concept of intersectional discrimination can be used erratically, and thus may augment inequalities that discrimination law should address. The Irish Parris case concerned the refusal of a university superannuation scheme to provide a survivor pension to an employee's same sex partner. This was based on a general rule preventing access to a survivor pension for couples legalising their relationship after the policy holder's 60th birthday. In Ireland registered partnerships for same sex couples only became available in 2011, resulting in excluding homosexuals born before 1951 from access to a survivor pension. The Belgian (Achbita) and French (Bougnaoui) cases concerned the dismissal of women whose names indicate Arabic descent because they wore a headscarf motivated by their Muslim creed. In Parris, AG Juliane Kokott supported the national court's suggestion that recognising the specific discrimination required acknowledging the combined effect of age and sexual orientation, while the two headscarf cases were decided on the basis of religious discrimination only

[*] This paper profited from feedback on a number of occasions by Nicole Busby, Biljana Kotevska, Clare Rice and Ulrike Vieten. The usual disclaimer applies.

[1] Under the current EU Treaties, the EU's judiciary is constituted as the Court of Justice of the European Union (CJEU), consisting of the Court of Justice (abbreviated to ECJ for an adequate differentiation from the International Court of Justice [ICJ]) and the General Court (GC), and potentially additional courts (Article 19 TEU, Articles 252-257, though this option has not yet been used (cf Regulation (EU, Euratom) 2015/2422 of the European Parliament and the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, recital 4).

[2] Judgment of 24 November 2016 *David L. Parris v Trinity College Dublin and Others* C-443/15 EU:C:2016:897.

[3] Judgment of 14 March 2017 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* C-157/15 EU:C:2017:203.

[4] *Asma Bougnaoui and ADDH v Micropole SA*, C-188/15, EU:C:2017:204.

[5] For an overview of earlier case law, where intersectionality could have been applied, although the claimants' disadvantage could also be recognised without such application, see (Schiek, 2009)

[6] (Makkonen, 2002, pp. 9-14; Schiek, 2009, pp. 2-4)

and continue to be debated as such in academic responses.[7] This recent academic discourse contrasts with the feminist academic debate starting in the late 1989s, which identified headscarf discrimination as epitomising intersectionality.[8] The trio of cases leaves the observer puzzled: how could a situation could emerge in which the AG (though not the Court) recognised the intersectional discrimination of two relatively privileged white men, while AG Juliane Kokott and Eleonor Sharpston, along with the Court's Grand Chamber, completely ignored the contribution of intersected racial/ethnic and sex discrimination if experienced by ethnic minority women of Muslim creed?

Addressing this question offers an opportunity to revisit several facets of the intricate intersectionality debate. First, it demands a reflection of how intersectionality can be recognised as a category of anti-discrimination law (II). Second it invites a recollection of how EU anti-discrimination law specifically relates to this debate. (III) Third, it requires a detailed critique of the three rulings (IV). We will conclude that recognising intersectional discrimination as a category of EU anti-discrimination law improves the quality of this body of law and enables the EU's judiciary to confront new forms of intersectional discrimination on grounds of so-called race and sex suffered by Muslim women.

II. Intersectionality, intersectional discrimination and litigation

1. Intersectionality as a socio-legal concept

Intersectionality, dubbed a mezzo level theory by Crenshaw and co-authors,[9] has travelled across disciplines and continents,[10] serving to analyse policy development[11] and to add analytical precision to sociological studies.[12] This very complexity[13] has been criticised as too challenging,[14] particularly for legal studies[15] and even more so for litigation.[16] As a consequence, some authors propose replacing intersectionality by concepts such as capacious grounds[17] and horizontal inequalities.[18]

In contrast to these voices, Kimberlé Crenshaw,[19] who coined the term intersectionality as epitomising the specific discrimination experienced by black women, conceived of intersectionality as a socio-legal critique of sex discrimination law as well as race discrimination law. Just as US tort law made it difficult to award adequate damages to victims of accidents at an intersection involving several cars, anti-discrimination law made it difficult to recognise the discrimination emanating from the intersection of

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[7] See for example (Hambler, 2018; Howard, 2017; Cloots, 2018; Weiler, 2017)

[8] (Bilge, 2010; Chapman, 2016; Davis & Zarkow, 2017; Halrynjo & Jonker, 2016; Holzleithner, 2008; Sacksofsky, 2009)

[9] (Cho, et al., 2013)

[10] Next to the travels of Kimberlé Crenshaw's idea of "intersections" (on which see (Lutz, et al., 2011), there is also the phenomenon of co-original identification of intersecting inequalities. In particular, there are predecessors of intersectionality in Europe as well (Vieten, 2009, pp. 119-122; Weber, 2015, pp. 25-26).

[11] (Hancock, 2015)

[12] (Walby & Verloo, 2012; Winker & Degele, 2011)

[13] (Schiek, 2016)

[14] (Chow, 2016)

[15] (Conaghan, 2009)

[16] (Fredman, 2016a, pp. 80-85)

[17] (Fredman, 2016a, pp. 69-79), in effect demanding that intersectional cases are treated as sex discrimination cases.

[18] (Stewart, 2014)

[19] (Crenshaw, 1989)

race and sex. Crenshaw used the DeGraffenreid[20] case as an illustration for judicial responses to discriminatory employment practices affecting black women specifically. A group of black women challenged a redundancy scheme, which made all black women workers redundant, while impacting to a much lesser degree on white men, white women and black men. The refusal to recognise black women as a protected class became a symbol for the blind spot which intersectional cases occupied in this case law.

While US and UK case law has since occasionally recognised intersectional discrimination,[21] most of the successful cases evolved around harassment or direct employment discrimination. In some of these cases, courts only recognised discrimination on grounds of sex with a specific variation ("sex plus"), an approach which arguably de-recognises the unique disadvantage triggered by intersectional discrimination. Also, indirect discrimination cases such as *DeGraffenreid* still constitute a challenge for practical uses of intersectionality theory in the US and UK litigation context.[22] Interestingly, Scandinavian jurisdictions as well as French and German courts have been less hesitant to acknowledge intersectional discrimination.[23] However, cases are few and far between, because advocate hesitate to use an as yet unknown concept. This should give cause to pause and reflect what, if anything, can be achieved by using this concept in a rights context.

2. Intersectionality and purposes of anti-discrimination law

This reflection requires consideration of the purpose of anti-discrimination law, though space dictates that it remains cursory here. Those who promote addressing intersectional inequalities through discrimination law demand that discrimination law should react to the realities of oppression[24] experienced. This chimes with a substantive notion of discrimination law, under which discrimination law takes on a mission of social engineering in order to address a specific injustice. The contrasting formal notion of discrimination law harks back to arithmetic equality, as devised by Aristotle.[25] In his philosophy, equality was not a right, but rather a virtue, to be earned, and definitely not open to all. The concept of arithmetic equality, central as it is for European constitutional thought, mirrors these limitations: equal treatment is conditional on the comparability of those claiming equal treatment with those who enjoy privilege. While it offers a clear and familiar doctrinal structure, formal equality is thus inadequate for protecting those who are excluded on the basis of characteristics such as ascribed sex, race or disability.

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[20] DeGraffenreid *v* General Motors 413 F Supp 142 (ED Mo 1976). Payne *v* Trevanol 673 F 2d 798 (5th Cir 1982) and Moore *v* Hughes 708 F 2d 475 (9th Cir 1983) are often cited as similar cases. US case law varies in the degree to which discrimination at the intersection of gender and race/ethnicity is recognised, see already (Schiek, 2005, pp. 455-457), most recently (Fredman, 2016a, p. 67)

[21] Cases frequently cited include Lam v University of Hawaii 40 F3d 1551, 1562 (9th Cir. 1994) and Jefferies *v* Harris County Community Action Association, 615 F.2d 1025, 1032 (5th Cir. 1980). Most authors credit the latter case as a with recognising a "sex plus" approach (Areheart, 2006, p. 220; Scarborough, 1989, p. 1467; McColgan, 2014), while the Lam *v* University of Hawaii Court explicitly recognised that there is stereotyping specifically against Asian women.

[22] There is an important exception in UK case law, where a female Caribbean soldier successfully relied on indirect discrimination on grounds of gender and race as intersected category: the refusal of allowing the soldier to transfer to a post not requiring shift-work alongside the refusal to allow her sister into the UK for child care purposes created a situation considerably more detrimental for a black woman of non UK origin than for a black man or a white women (Ministry of Defence v Tilern De Bique [2010] IRLR 471, see on this (Moon, 2011, p. 167)

[23] (Jonker, 2015; Schiek, 2009, pp. 12-16)

[24] On the notion of oppression as central for discrimination law see (McColgan, 2014, pp. 45, 56-98)

[25] (Schiek, 2002)

Identifying the purpose of substantive anti-discrimination law is not straightforward, though. Views are divided whether anti-discrimination laws should have a primarily re-distributive purpose[26] or whether distribution is a side-effect from enabling individuation (i.e. moulding one's life beyond traditional stereotypes) and respecting difference in favour of those suffering disadvantage.[27] This is related to the question whether anti-discrimination laws are constructed to address ills that differ from those addressed by "traditional" Western social law and policy. These are based on the class conflict emanating with European capitalism and aim at erasing inequalities along with different classes altogether. While in the US discourse anti-discrimination law is frequently equated with social policy in general, this has convincingly been traced back to an aversion towards law and policy openly welfarist.[28] Instead, anti-discrimination law has been linked to the politics of difference,[29] or identity-focused cultural politics that differ fundamentally from class-based politics. As expanded in more detail elsewhere,[30] these approaches by US American theorists can be used to theories European anti-discrimination law as well: it addresses exclusion based on cultural de-recognition. This again raises the question whether anti-discrimination law protects groups, and is thus close to minority protection, multiculturalism and communitarianism, or whether individuals (in relation to their ascribed group membership). Combating discrimination on grounds of racial or ethnic origin, or on grounds of religion and belief, for example, may serve to protect ethnic or religious groups at the same time. If such group protection is recognised as overarching purpose of anti-discrimination law, this would clash with banning discrimination on grounds of sex or sexual orientation, for example. Sex discrimination is based on ascribing gender roles, and overcoming it requires individuation, i.e. the opportunity for women to not align with traditional gender role expectations. Protecting ethnic and religious groups may, however, imply protecting traditions which include gender role restrictions.

Creating a coherent body of multi-ground anti-discrimination law, which is a precondition for addressing intersectional discrimination, entails identifying one or more rationales that can inform the combat of discrimination on all these grounds. If the ill addressed by anti-discrimination law is summarised as being subjected to disadvantage on the basis of ascribed otherness, this constitutes such a unifying rationale. At the same time this rationale is aligned with the asymmetric conception of anti-discrimination law. After all, the grounds on which discrimination is banned, derive from social movements demanding recognition, such as the feminist, the anti-racist and the disability movement.[31] These roots result in the asymmetric purpose of anti-discrimination law: it is meant to combat disadvantage of women, those labelled black and ethnic minorities, and those labelled disabled, or those referred to as homosexuals or older people. Anti-discrimination laws may formally protect against discrimination in favour of those usually profiting from discrimination, e.g. men, those ascribed ethnic majority identity or religious affiliation, or heterosexuals. However, this protection is a mere corollary to anti-discrimination law's true purpose, and may even have to be restricted, for example in favour of positive action.

[26] (Fredman, 2011)

[27] (Schiek, 2016)

[28] (Quinn & Flynn, 2012)

[29] (Fraser, 2003; 2007; Young, 2009)

[30] (Schiek, 2011b; 2016)

[31] (Fredman, 2011, p. chapter 2; Schiek, 2016)

3. Risks of multiplying discrimination grounds and accepting intersectionality

The multiplication of discrimination grounds to include sex, race/ethnicity, disability, sexual orientation, age and religion and belief (as happened in the context of EU legislation), which forms the basis of the intersectionality debate, has contradictory consequences for the field of anti-discrimination law. It promotes the field of anti-discrimination law, as there are ever more problems to which anti-discrimination law provides an answer, including cases where discrimination can be pursued on more than one ground. There is also the danger of diluting its drive and purpose, and even detracting from equalities that matter through overreach.[32] Recognition of intersectional discrimination can contribute to these risks.[33]

As a consequence, the failure of traditional approaches to anti-discrimination law to recognise intersectional discrimination has led to demands of removing the anti-discrimination grounds from anti-discrimination law.[34] This approach has the advantage of avoiding essentialism,[35] which can be aggravated by establishing ever more narrow categories or groups competing for protection in an anti-discrimination Olympique.[36] The disadvantage of the approach is to ignore the very characteristics which have become the basis of oppression, and thus continue the de-recognition which anti-discrimination law seeks to combat.

Another strand of critique is worthwhile addressing in particular in a paper also discussing religion, and thus one of the traits with enhanced potential for creating identity-based groups. As a side effect of multiplying categories, intersectional analysis tends to focus on protecting individuals rather than collectives. Instead of dealing with larger entities such as the Catholics in Northern Ireland, the secular persons in Europe, women in France, the investigation focuses on, for example, a Catholic woman in Northern Ireland with a disability who also identifies as a lesbian. Intersectionality may thus lead to fragmentation of the basis for political action, and actually inhibit structural analysis. A specific strand of critique attracted by this deserves specific attention, namely the critique demanding more focus on protecting groups proudly and resolutely defending their identity and preservation as closed entities.

For example, Frances Stewart[37] suggests that addressing "horizontal inequalities" is superior to using intersectionality. She distinguishes horizontal inequalities from vertical inequalities, characterising the latter as individual, and the former as group-related. Addressing horizontal inequalities thus entails redistribution between groups, more specifically groups likely to be "provocative", i.e. provoke conflict. Thus, those aspects of identity not related to conflict should, if not be disregarded entirely, not be at the forefront of horizontal inequalities. Beyond that, Stewart defends a view on equality politics addressing resource allocation as a central element, at the expense of recognition or other elements of justice. That redistribution can address intersectional disadvantage, if that is compatible with prioritising those inequalities which are most likely to provoke conflict.[38]

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[32] (McColgan, 2014)

[33] (Petrova, 2016; Squires, 2008)

[34] (Liebscher, et al., 2012), for a succinct critique see (Lee, 2017)

[35] (Hancock, 2015)

[36] (Martinez, 1993)

[37] (Stewart, 2014)

[38] (Stewart, 2011)

The primary aim of avoiding conflict in, for example, multi-ethnic societies, is shared by approaches coined consociationalism.[39] Eilish Rooney has submitted the view that organising a political entity around two dominant ethno-religious complexes (such as protestant/unionist and catholic/nationalist as in Northern Ireland) reduces the scope for an intersectional analysis, because for example gender inequalities (i.e. disadvantage for women) is disregarded due to the priority for addressing what Stewart would term horizontal inequalities between these ethno-religious groups.[40]

These observations chime with the assessment that identity-based multiculturalism (communitarianism) would counteract recognition of intersectional inequalities, because it supports homogeneity of cultural groups, which again mitigates against analysing in-group inequalities based on gender (including choices related to sexual orientation and marriage) or disability.[41]

The purpose of anti-discrimination law as developed above differs from protecting groups as such, but instead protects individuals on the basis of ascribed group membership. This allows integrating intersectionality analysis. However, the concern that diffusion into too many sub-categories would dilute anti-discrimination law has to be taken seriously. This requires refocusing anti-discrimination law, and there is a way of achieving this while at the same time enhancing protection against intersectional discrimination.

4. Refocusing discrimination grounds around nodes

There is a more convincing way of recognising intersectionality and at the same time enhancing the viability of anti-discrimination law, through regaining precision and focus. This can be achieved by reorganising the discrimination grounds around the three nodes race (1), gender (2) and disability (3). The three nodes focus discrimination grounds, without necessarily diminishing their number.[42]. Focusing grounds around nodes also avoids producing clashes with existing legislation and human rights guarantees,[43] while highlighting varied and potentially conflicting rationales behind individual discrimination grounds.[44] At the same time the nodes concept implies that overlap is common, which allows the recognition of intersectional discrimination as a matter of course. This enables anti-discrimination law to acknowledge experiences of discrimination as they happen, instead of reducing them to one predominant discrimination ground as a compartmentalised reality.

Insert graph here

The three nodes[45] emerge around the key rationales for ascribing difference, a heteronomous process which is the basis of the ill addressed by anti-discrimination law. Racist discrimination is based on the ascription of otherness on grounds of external traits associated with common ancestry, culture, religion and community. [46] Gender discrimination is based on reaffirming higher privilege for persons,

[39] I have to express my gratitude to Biljana Kotevska for alerting me to this connection. On consociationalism see generally (Lijphart, 1977) and (McGarry & O'Leary, 2006); on conflicts between anti-discrimination law and consociationalism see – for two contrasting positions - (Hodžić & Mraović, 2015) and (McCrudden & O'Leary, 2013).

[40] (Rooney, 2009)

[41] (Schiek, 2005).

[42] By contrast, McColgan proposes to reduce the number of discrimination grounds, and particularly to refrain from viewing discrimination on grounds of age and religion as separate categories (McColgan, 2014, pp. 66-69)

[43] This is the danger identified by (Lee, 2017)

[44] On this see already (Schiek, 2005, pp. 443-452)

[45] For a more extensive explication of this see (Schiek, 2011b, pp. 23-27)

[46] This has also been characterised as stigmatising, and stereotyping (Fredman, 2016a; Solanke, 2017)

activities and lifestyles categorised as male. Disability discrimination is based on limiting opportunities and capabilities by standardising bodily, sensory, psychological and emotional normalcy (abilist discrimination). As illustrated by the graph, these nodes have a centre as well as an orbit. The orbit encompasses discrimination grounds related to the same rationale. Thus, as gender discrimination is based on reaffirming higher privilege for male life styles, it also presupposes the complementary female gender role, alongside the organisation of society around a bi-gendered family. Accordingly, any discrimination based on heteronormativity qualifies as gender discrimination. This includes professional disadvantages suffered by men for using educational leave allowances as well as discrimination on grounds of homosexuality. The concept also allows fitting religion, which usually constitutes a freedom in human rights law, into an adequate space within discrimination law: the ascription of otherness on grounds of adhering to a minority religion is one of the oldest recognised forms of race discrimination, as evidenced by the definition of race in the UN Convention for the Elimination of all forms of Racial Discrimination (CERD).

These examples also illustrate that the nodes concept recognises the asymmetric nature of anti-discrimination law, while not reverting to protecting groups instead of individuals. The notion of othering presupposes targeting those suffering from disadvantage rather than those profiting from discrimination. Combining asymmetry with intersectionality is not only necessary to do justice to the purpose of EU anti-discrimination law, it is also an important precondition to prevent intersectionality to result in infinite multiplication of identity categories, and potentially benefiting those least affected by discrimination in social reality.[47]

Finally, the overlap between those nodes demonstrates that intersectionality is the rule rather than the exception. For example, enforcing heteronormativity can also be achieved by imposing psychological normalcy, which was the reason for the WHO categorising homosexuality and transsexuality as an anomaly until as recent as 2010.[48] Also, ascribing otherness on grounds of external traits can capture the stigma going along with some impairments, raising them towards disabilities. Finally, the stigmatisation of homosexuals taking on the manierism of the opposite sex can be similar to ascribing a predefined community membership on the basis of external traits.

III. Intersectionality and EU anti-discrimination law

Within the EU legal order, bans on discrimination were first conceived in the realm of the Common Market (now: Internal Market, cf Article 14 TFEU): prohibiting unequal treatment on grounds of nationality (more precisely on grounds of nationality of a Member State or national origin of goods and services in the EU) was a precondition of its functioning. While discrimination on grounds of nationality is more directly linked to the Internal Market (and thus only extends to those having the nationality of a Member State), it too constitutes an instance of protecting citizens against discrimination. In outlawing EU citizens' discrimination on grounds of their nationality even if moving between Member States for motives other than economic, today's article 18 TFEU and subsequent secondary legislation (Directive 2004/38/EC) establish individual rights not limited to economic actors, just as anti-discrimination law. Nevertheless, Internal Market law and Citizenship law are merely instrumental in protecting against discrimination. While that same critique could have been raised against the EEC's early equal

[47] See for a succinct summary of this concern (Petrova, 2016, p. 8)

[48] From this point in time, the classifications of disability and health state explicitly that sexual orientation alone is not an anomaly, suggesting, however, that it can lead to anomalies [reference]

pay law,[49] today's EU anti-discrimination law aims at combating discrimination on grounds of personal characteristics as an autonomous aim.[50] Though the residual legislative competence of today's Article 308 TFEU was sufficient to create EU sex equality legislation, discrimination on grounds of racial and ethnic origin, disability, religion and belief, sexual orientation and age was only addressed after the Starting Line group succeeded in inserting today's Article 19 TFEU into the Treaties, and followed this up by channelling the preconceived directive through the EU legislative process in record time,[51] resulting in Directives 2000/43/EC and 2000/78/EC. Together with the sex equality directives 2004/113 and 2006/54[52], they constitute the body of EU anti-discrimination legislation. From 2009, Articles 21-25 of the Charter of Fundamental Rights of the European Union (CFREU) provide a constitutional foundation for this body of legislation. This very short history is far from irrelevant, as illustrated by the recent Grand Chamber ruling in Vera Egenberger:[53] the Court drew a direct link between Article 21 CFREU and the TFEU's economic freedoms in order to support horizontal effect of the anti-discrimination rights contained in Article 21 CFREU. Thus, there is a continuum between economic freedoms and anti-discrimination law, on which in particular the specific character of EU anti-discrimination law rests.

As a consequence, EU anti-discrimination legislation mainly targets relations between market participants, which – while attracting criticism - [54] is a precondition for anti-discrimination law to remain relevant for social reality in market-based societies.[55] This is also the reason for the closed-list approach prevailing in EU anti-discrimination legislation: its intended horizontal effect is not limited to exceptionally powerful market actors who can be equated to state actors, but instead extends to the smallest grocer and even an individual or occasional trader, for example when selling a family home. Subjecting these individual actors to a general obligation of justifying any unequal treatment, irrespective of the reasons on which it is based, would not only seem unfeasible, but also constitute a clash with their individual freedom to choose their preferred business practice. Banning discrimination on the basis of an open list, however, does just that: it subjects the addresses to a general obligation of treating others equally. The closed list approach thus emerges as irreconcilably linked to and indeed necessitated by its market-focus.[56]

Nevertheless, some authors demand that EU anti-discrimination legislation copies the open-list approach from the European Convention of Human Rights, the EU's own Charter of Fundamental Rights (CFREU) and national constitutions within and beyond the EU, inter alia because this would also allow for the Court to add intersectional discrimination as a new category.[57]

These demands are problematic. First, they posit that recognising intersectionality under EU law requires legislative changes in the relevant directives. The most recent attempt to add to the EU anti-

[49] (Masselot, 2007)

[50] (Schiek, et al., 2007, pp. 2-3)

[51] See on the development of EU anti-discrimination legislation (Benedi La Huerta, 2016), section 2, (La Barbera, 2017)

[52] renumbered and expanded from the original directives 75/117/EEC and 76/206/EEC

[53] *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* C-414/16, EU:C:2018:257

[54] (Somek, 2011), echoing earlier critiques of EU sex equality law without referencing them (see, for example, (Masselot, 2007) with further references

[55] (Schiek, 2016, p. 27)

[56] See with similar arguments (McColgan, 2014, pp. 63-69), see also (Schiek, 2000, pp. 344-357 in particular; Schiek, 2005, pp. 429-434)

[57] See (Conaghan, 2009, pp. 21-48; Fredman, 2016a, pp. 66-67)

discrimination directives stems from 2008, illustrating that there would be a very long wait until such legislative change might materialise.[58] Second, open-list approaches go along with a wider range of justifications, which would also be required by protecting business freedom if extending anti-discrimination law to market participants (now Article 16 CFREU).[59] Thus, changing EU anti-discrimination legislation to adopt an open-list approach for the sake of integrating intersectionality would sacrifice current strengths of the field.

This article argues that it is not necessary to wait for EU legislation on the matter, because current EU law can be interpreted as encompassing intersectionality.

In interpreting EU legislation (as well as Treaty law), the systematic tradition of exegesis prevailing in most EU Member States should be taken as a starting point.[60] This exegesis starts with the wording of the relevant directives (including their recitals). It is thus encouraging that Directives 2000/78 and 2000/43 mention in their recitals that women would frequently suffer from multiple discrimination.[61] While directives on sex discrimination do not contain a similar reference, European Parliament resolutions on women with disabilities and violence against women use the term multiple discrimination.[62] The resolution on women with disabilities mirrors the reference to multiple discrimination in Article 6 of the 2006 the UN Convention on the Rights of People with Disabilities. This convention has been viewed as one of the chief instances of recognising intersectionality in UN law.[63] Likewise the Beijing platform for Action for Equality, Development and Peace, issued by the United Nations Fourth World Conference on Women, refers to multiple barriers faced by women and girls. Accordingly, the term "multiple discrimination" should be used as an overarching notion to encompass discrimination on more than one ground. [64] Within that overarching category, it remains useful to distinguish between compound discrimination, i.e. cases in which discrete instances of discrimination on several grounds add up, and intersectional discrimination, i.e. cases in which discrimination on several grounds is inseparably linked into a new form of discrimination.[65]

Recognition of intersectional discrimination under EU law[66] derives from a functional interpretation of the entirety of EU anti-discrimination law, which after all bans discrimination on a variety of grounds, while also recognising multiple discrimination. The general principles of EU law include the use of effet utile as a guide in exegesis. This would suggest that discrimination the recognition of which depends on acknowledging intersected grounds must be encompassed by the protection of EU anti-

[58] See European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [SEC (2008) 2180 = COM/2008/0426 final = CON]. EURLEX lists the last debate in the Council on 24 November 2017, as the Commission has not withdrawn that particular proposal yet. On specific concerns relating to a narrow definition of multiple discrimination proposed as an amendment by the European Parliament see (Schiek & Mulder, 2011). This amendment has been integrated into the still pending EU Commission proposal by now.

[59] See the warning by (McColgan, 2014, p. 63), this is also raised by (Moon, 2011, p. 168).

[60] See on methods of comparative EU anti-discrimination law (Schiek, et al., 2007)

[61] Recital 14 for Directive 2000/43 and Recital 3 for Directive 2000/78

[62] Resolution 2013/2065/INI and Resolution 2013/2004/INK, see on this (La Barbera, 2017, p. 142)

[63] (Degener, 2011, pp. 33-34)

[64] See (Fredman, 2016a, p. 27; McColgan, 2014, p. 101; Schiek, 2009, pp. 3-4), by contrast, Solanke views multiple and intersectional discrimination as distinct categories (2017 , pp. 446-447).

[65] Timo Makkonen (2002) is usually credited with having made this distinction first.

[66] See (Schiek, 2005, pp. 450-465).

discrimination law. A functional interpretation also supports recognition of the substantive concept of equality as a basis for EU anti-discrimination law, which again demands asymmetry of its categories – as is widely recognised in literature, [67] though only partly in case law. Accordingly, intersectionality under EU law should encompass this asymmetry as well.

Overall, it would be possible to interpret the corpus of EU anti-discrimination legislation as encompassing multiple discrimination,[68] including intersectional discrimination. However, the trilemma of Parris, Achbita and Bougnaoui illustrates once again that the ECJ is not fully convinced of this approach yet, as the next section demonstrates.

IV. Intersectionality before the Court of Justice of the European Union

1. Parris – the DeGraffenreid moment?[69]

a) Problem and facts of case

The Parris constitutes the Court's fifth ruling on sexual orientation in employment under Directive 2000/78/EC[70] and one of numerous age discrimination cases. [71] While age discrimination claims have received mixed results, the Court has in the past responded positively to sexualities discrimination in the context of employment and social security as addressed by Directive 2000/78. [72] As mentioned the case concerns the exclusion of survivor pensions for partners of employees who married after their 60th birthday under an occupational pension scheme, which in combination with the late recognition of homosexual registered partnerships and marriage in Ireland, excluded homosexuals born before 1952 from acquiring a survivor pension for their partner. The Irish Court which made the reference argued that in order to recognise discrimination here, the interaction of age discrimination and sexual orientation discrimination would need to be addressed.[73]

b) Arguments by AG and Court

The case was certainly complex. There was clearly no direct discrimination on grounds of homosexuality, because heterosexual couples were also affected if they married after the policy holder's 60th birthday. Any direct age discrimination could most likely profit from the generous exceptions for age discrimination provided for in Article 6 Directive 2000/78. Thus, from an intersectionality perspective,

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[67] See for example (Fredman, 2016b), with further references

[68] This is also supported by the EU Commission in its 2014 report on Directive 2000/78 (COM (2014) 2 final, p 9.

[69] For a first assessment of this ruling see (Schiek, 2017)

[70] After Maruko C-267/06 EU:C:2008:179, Römer C-147/08 EU:C:2011:286, Accept C-81/12 EU:C:2013:275 and Hay C-267/12 EU:C:2013:823. These rulings recognised the discrimination experienced, in contrast to those issued before 2000 (Grant v. South-West Trains C-249/96 EU:C:1998:63, P. v. S. and Cornwall County Council C-13/94 EU:C:1996:170, P, D. and Kingdom of Sweden v. Council of Europe C-122 & 125/99 EU:C:2001:304,

[71] See (Schiek, 2011a), more recently (Numhauser-Henning & Rönnmar, 2015; Mohr, 2017)

[72] (Möschel, 2017). Case law beyond employment has been more ambiguous in relation to asylum and national policy around blood donations by men who had sexual intercourse with men (*X and Others* C-199-201/12 EU:C:2013:720, and Léger C-528/13 EU:C:2015:288). However, the recent Coman ruling on derivative free movement rights of non-EU same sex spouses of EU citizens is more positive (Relu Adrian Coman et al Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, C-673/16 EU:C:2018:385).

[73] Based on statistics of 2012, Solanke stresses that Irish Courts hear the highest proportion of cases where multiple discrimination is at stake: 25 % (Solanke, 2017 , pp. 457, with fn 86)

the question was whether EU anti-discrimination law would cover the situation of older homosexuals excluded from survivor pensions at all.[74]

AG Kokott raised to the Irish Labour Court's challenge to consider recognition of "combined discrimination", although, in contrast to the Court, she found that the scheme constituted indirect discrimination on grounds of sexual orientation and direct discrimination on grounds of age. Thus, Kokott did not necessarily need intersectional (or combined) discrimination to conclude that the claimant is discriminated on grounds of age and sexual orientation.[75] However, she still found that the combined discrimination would have an impact on the findings, as it should impact on "reconciliation of conflicting interests for the purposes of the proportionality test" by according "greater weight" to "the interests of the disadvantaged employees" (ibid, paragraph 157). This was the route she used to get around the wide exceptions for discrimination on grounds of age provided by Article 6 (2) Directive 2000/78, and to apply a strict proportionality test for the indirect combined discrimination she found to be present in the case.

The Court did not follow its AG. It rejected the claim of indirect discrimination on grounds of homosexuality, because heterosexual couples were also affected, without any further reasoning beyond the statement that Member States are autonomous in their policy towards equal marriage. It found that the age requirement constituted direct age discrimination, but that this discrimination could be justified under Article 6 Directive 2000/78. More specifically, the Court found that the access to a survivor pension qualifies as a retirement benefit under the second paragraph of this provision, which allows the fixing of ages of entitlement to retirement or invalidity benefit, provided that this does not result in sex discrimination. The Court then approached the DeGraffenreid question and asked, whether, if there is no discrimination on either of the individual grounds, there could be discrimination on grounds of their combination. Without any further reasoning, it refused to recognise the combined ground of age and homosexuality.

c) Critique

The critique of this ruling must address some of the doctrinal challenges of intersectionality before courts, and thus is nuanced. The case is correctly categorised as a combination of indirect discrimination on grounds of homosexuality and direct age discrimination, while the refusal to allow a combination of these forms of discrimination is not convincing.

While there is clearly no direct discrimination on grounds of homosexuality alone, it is also dubious whether indirect discrimination on this ground could be established: Ireland has a young population and also undergone a considerable liberalisation in relation to homosexuality quite recently. This means that there are most probably a larger number of younger homosexuals who would marry their partner or enter into a registered partnership than older ones. Among the older homosexuals there is most likely a considerable number who entered into a marriage of convenience with a partner of the opposite sex, and are thus able to convey a survivor pension, or who would never have registered a partnership anyway, irrespective of legislative change. Accordingly, there is some doubt that homosexual members of the occupational pension fund are disadvantaged more frequently than their heterosexual counterparts. However, the proportion of homosexuals born before 1951 who are

[74] The case also revisited the question whether Directive 2000/78/EC exempts different treatment on grounds of civil status, even if a civil status is not available to homosexuals, because its Recital 22 clarifies that family law remains the prerogative of Member States. On this aspect, which is beyond this paper, see on this (Möschel, 2017, pp. 1844-1845; Schiek, 2017, pp. 410-411)

[75] AG Kokott's opinion (EU:C:2016:493, paragraph 148)

disadvantaged by the rule is most likely considerably higher than that among heterosexuals. Neither AG Kokott nor the Court engage in any of these arguments.

On age discrimination alone, it is hard not to agree with the Court, which found that the age restriction on access to a survivor pension is covered by the explicit exception for maximum age limits for accessing retirement benefits in Article 6 paragraph 2 (2) Directive 2000/78. Contrary to AG Kokott's view,[76] the option for the policy holder's spouse to draw a survivor's pension clearly adds to the value of the pension package, because it can be regarded as an extra benefit for the policy holder herself. After all, she would have to make other arrangements to secure their partner after her death if and in so far as they depended on their income. A survivor pension entitlement thus constitutes a retirement benefit.

However, Article 6 (2) Directive 2000/78/EC contains its own indication that multiple discrimination must be recognised: it prohibits any exclusion through an age barrier which constitutes sex discrimination. Whether or not one considers discrimination on grounds of homosexuality as discrimination on grounds of sex (as discrimination by association (McColgan, 2007, p. 78) or by refusing to conform with gender role expectations (Richards, 1999, pp. 193-196)), this specification invites recognition of combined discrimination in this case. And this case certainly constitutes combined discrimination as addressed by intersectionality theory: neither age discrimination (because of the statutory justifications)[77] nor sexual orientation discrimination can be established in isolation. However, the combination of the age restriction and the slow and gradual acceptance of homosexual partnerships in Ireland taken together ensure that homosexual men and women born before 1952 cannot gain a survivor pension under a pension scheme such as that at stake here.

In this regard the argument of AG Kokott on justification under Article 6 paragraph 1 Directive 2000/78/EC is intriguing. The Directive does not clarify anything on justification of intersectional discrimination. However, an idea embraced by Section 4 of the German General Equal Treatment Act (AGG) seems to represent a general principle applicable to intersectionality discrimination. The provision reads "Where unequal treatment occurs on several of the grounds referred to under Section 1, this unequal treatment may only be justified under Sections 8 to 10 and 20 when the justification extends to all those grounds for which the equal treatment occurred."[78] The referenced sections include special justification for direct discrimination relating to occupational requirements, age and religion and belief. Accordingly, the provision requires that justifications are cumulated in cases of multiple discrimination.[79] The lenient standards for one of the two forms of discrimination cannot be applied if they are not allowed for both. This principle rules out reliance on justification according to Article 6 (2) Directive 2000/78, because this rule does not cover sexual orientation discrimination. It could be argued that indirect discrimination on grounds of the claimant's homosexuality would open up more options for justification.[80] On a correct conceptualisation of indirect discrimination, there is no additional justification in these cases. Instead, if finding disparate impact of a neutrally worded provision, the assumption that this constitutes discrimination can be rebutted by arguing that the differentiation is no causally linked to the discrimination ground because it is pursued for the sake of a different aim

[76] EU:C:2016:493, paragraph 124-131

[77] On their general suitability because of the specifics of age as a discrimination ground see (Schiek, 2011a).

[78] See for the English translation provided by the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes) *http://www.antidiskriminierungsstelle.de/EN/TheAct/theAct_node.html* (with a link for free download)

[79] This is misread by (Solanke, 2017 , p. 455), who maintains that the burden of proof is aggravated by this provision.

[80] This wide-spread approach to indirect discrimination is as also advocated by (Möschel, 2017), who supports a general balancing test in cases of indirect discrimination in his annotation of Parris (p. 1843-44)

unrelated to discrimination.[81] In both cases, the argument mainly relies on proportionality. In this case, there is a combination between direct age discrimination and indirect homosexuality discrimination, which for practical purposes leaves the option to use the objective justification of avoiding abuse. In this regard Kokott's argument is convincing: excluding any marriage or civil partnership entered into after the policy holder's 60th birthday is more intrusive than necessary to achieve the stated aim. Instead, a refusal for survivor pension entitlement in cases when a marriage is entered into by someone already terminally ill could be introduced, for example. It has to be noted that this requires accepting intersectional discrimination in this case.

While the initial consternation by the three rulings under review stemmed from the recognition of some rudimentary form of combined discrimination in a case brought by white men, this puzzlement should not lead to the conclusion that intersectionality should never cover cases where no discrimination on grounds of racial and ethnic origin is present. However, if in those cases where there is an intersection of racial / ethnic origin with other grounds intersectionality is not used, this derecognition of intersectionality's original claim is disturbing. It is this question which we approach next.

2. Achbita and Bougnaoui – derecognising dimensions of the headscarf enigma?

a) Problem and facts of case

In the Western world, the so-called Islamic headscarf – exclusively worn by women - has become a contentious piece of cloth, and cases concerning women dismissed or refused employment because wearing were fought in courts. The two cases decided by the ECJ's Grand Chamber on the same day resulted from references by the Belgian Court de Cassation[82] and the French Court de Cassation[83] respectively. Both claimants were supported by human rights organisations.[84] In both cases a woman was dismissed because she decided to wear a headscarf to work, relying on her interpretation of Islam, a religion to which she claimed allegiance. Samira Achbita worked as a receptionist for a temporary agency specialising in reception services. She started wearing a headscarf after returning from parental leave. Her employer stated that this clashed with an unwritten rule for employees not to wear "visible signs of their political, philosophical or religious beliefs" in the work place, in line with its "position of neutrality". [85] When Samira Achbita refused to work without the headscarf, she was dismissed. Asma Bougnaoui was employed as a design engineer, following a period as intern with the same company. As part of her duties she worked for a number of clients on their sites. When one of the clients requested that she should cease to wear a "veil" at their premises, her manager asked her to comply, and upon her refusal she was dismissed. The employer relied on neutrality, and specifically stating: "We regret this situation as your professional competence and your potential had led us to hope for a long-term collaboration".[86]

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[81] See (Schiek, 2007, pp. 435-442), similar (Ellis & Watson, 2012, pp. 169-170)

[82] *Achbita*, above fn. 3.

[83] *Bougnaoui*, above fn. 4.

[84] The Association de Défense des Droits de l'Hommes (ADDH) supported Asma Bougnaoui, and the Centrum voor gelijkheid van kansen en voor racismebestrijding supported Samira Achbita.

[85] Paragraphs 11-13 of the judgement. The employer later formalised the policy in collaboration with the works council, but the reference questions were posed while the policy was still unwritten.

[86] AG Sharpston, opinion of 13 July 2016 (*Bougnaoui*), EU:C:2016:553, paragraphs 22-23.

In both cases it was thus quite clear that the women were dismissed on grounds of wearing a headscarf, and nothing else.

b) Arguments by AG and Courts

Both cases were categorised as based on religious discrimination only by AG Kokott (Achbita) and AG Sharpston (Bougnaoui) as well as by the Court. In both cases the Court referred to jurisprudence of the European Court for Human Rights (ECtHR) on Article 9 of the European Convention for Human Rights (ECHR), which protects religious freedom. This underlines the ambiguous position of discrimination on grounds of religion, which can appear as an auxiliary to the substantive right of religious freedom.[87] This ambiguity weakens any protection against discrimination on grounds of religion. Further, the proximity of the ban on religious discrimination and freedom of religion invites balancing of competing freedoms in cases relating to religious discrimination, which is a further contrast to other bans on discrimination.

The resulting weaknesses of a ban of religious discrimination are also apparent in these two rulings. For example, both AGs debates explicitly whether discrimination on grounds of manifesting one's religion can be viewed as discrimination on grounds of religion,[88] while the Court states rather succinctly that the notion of religion must be read widely to include both the forum internum and the forum externum.[89] However, the Court's ruling in Achbita needs five full paragraphs to achieve the same result.[90] By comparison, it is quite unusual for pleadings before the ECJ to consider whether discrimination on grounds of pregnancy, which may be viewed as activation of capacities only women have, is actually discrimination on grounds of sex. Perhaps more seriously, the Court and its AGs balances religious equality with competing freedoms. Thus, the Achbita Court states that "in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate"[91], i.e. as a legitimate aim to rebut the assumption that a policy disparately impacting on Muslims constitutes indirect discrimination on grounds of religion. The desire to remain neutral, i.e. to not express any religion, certainly falls in the category of "religion and belief" as a belief that life in the public sphere should be secular. Accordingly, the Court balances different religions & beliefs. Similarly, AG Kokott submits that an employee "may be expected to moderate his exercise of his religion in the workplace"[92], which again suggests the negotiability of religion and belief, in contrast to choices such as sexual orientation.

The critique of the Court's rulings in these cases that it does not require the same strictness in justifying indirect discrimination or in applying the genuine objective requirement test,[93] while it may or may not be justified, confirms the inherent weakness of any protection against discrimination on grounds of religion. This weakness is also confirmed by the fact that the Court in both cases allows employers

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87 (Schiek, 2005, p. 445), see also (McColgan, 2014, pp. 67-68), who derives a weaker protection against discrimination on grounds of religion from this ambiguity.

88 AG Sharpston's opinion in Bougnaoui, paragraphs 85-89, AG Kokott, opinion of 31 May 2016 (*Achbita*), EU:C:2016:382 paragraph 114, stating that omitting to wear a headscarf only affects the *forum externum*, and is thus less intrusive than a requirement to change one's religion.

89 Paragraph 30, similarly also AG Kokott's opinion in *Achbita* (paragraph 35).

90 Paragraphs 26-30

91 Paragraph 37

92 Paragraph 116

93 (Howard, 2017, pp. 359-360)

to rely on their freedom to conduct a business in restricting the wearing of headscarves on the part of employees.[94]

c) Critique

The doctrinal critique of using discrimination on grounds of religion is not, however, the focus of this annotation. This critique has already been developed skilfully by others.[95] The discussion above has demonstrated that relying on religion alone has fundamental detriments for the rights of the claimants. Even though the Court and its AG in the Bougnaoui declare as unlawful the dismissal of a Muslim woman because a customer requires to be spared the view of a headscarf, although this garment does not in the slightest impact on her performance. However, they also open ways to justify such a dismissal. The employer would only need to state that wearing a headscarf impacts on performance. AG Sharpston explains that "Western society regards visual or eye contact as being of fundamental importance in any relationship involving face to face communication",[96] suggesting that any religious garment obfuscating eye contact would always impact on performance in customer-facing roles. Further, the Achbita ruling eases justification of a head scarf ban for employers. All they need to show is that they "had, prior to (the relevant) dismissal, established a general and undifferentiated policy of prohibiting visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with customers". (paragraph 41)

The question is why the Court and its AGs have not considered the other discrimination grounds informing the dismissal of a Muslim women, namely gender and ethnicity, although AG Kokott specifies that these grounds are stronger than religion,[97] which would suggest that they are weightier. Halrynjo and Jonker suggests that the Courts should follow the claimants, who overwhelmingly rely on religion.[98] However, their data shows that Muslim women are aware of the fact that they are discriminated against as Muslim women, which refutes their conclusion. It is also not a coincidence that most discrimination related to religious apparel disadvantages women. In an age where identities become ever more important and are – contrary to expectations that secularism will continue to characterise modern societies[99] - increasingly infused by affective orientations such as religious beliefs, sexual orientation or cultural claims, it seems unavoidable that affective narratives become more important. The categorisation of immigrants as Muslims, who are experienced as threatening the autochthon culture, is inevitably linked to an escalation of gender and sexuality politics.[100] Creating an affective community relies on women as boundary markers, as has been argued by those criticising forms of multiculturalism close to communitarianism.[101] The question is whether outlawing the gender performance[102] of minority women is an adequate reaction, which does not qualify as sex discrimination. The point has been made that gender performance of different cultures should not be rated differently,

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[94] This is criticised, with further references, by (Cloots, 2018, pp. 614-616)

[95] (Cloots, 2018; Hambler, 2018; Howard, 2017; Weiler, 2017)

[96] Paragraph 130 of her opinion.

[97] AG Kokott stresses that in contrast to sex, skin colour and ethnic origin, the practice of religion can be altered, which makes an expectation to moderate it reasonable (paragraph 116 of her opinion). AG Sharpston contradicts this view (paragraph 112 of her opinion).

[98] (Halrynjo & Jonker, 2016)

[99] (McCrudden, 2018, pp. 3-4)

[100] (Yilmaz, 2015, p. 38)

[101] (Lacey, 2004, p. 49; McColgan, 2014, pp. 193-198; Schiek, 2005, pp. 451-452)

[102] (Holzleithner, 2008)

lest the allegation of orientalism can be made.[103] It can be asked with which justification a requirement to wear high heels is viewed as sex discrimination, while the demand to show one's hair is not. In short, gender performance requirements are equally limiting, whether they derive from Western culture and lead to heightened risk of accidents and developing bunions (through wearing shoes with narrow fronts and high heels), or from Islam and lead to heightened risk of temporary overheating or impaired hearing (through wearing a veil).

AG Sharpston mentions the relevance of gender categories for the dismissal of a woman wearing a headscarf in a different context. She deliberates whether wearing a headscarf is a feminist statement or instead a symbol of oppression of women, only to recommend that the Court refrains from taking a position on this matter.[104] It is quite surprising to see such short and ill deliberated reasoning in this generally carefully worded opinion. The more obvious question to be asked in relation to gender equality is whether the alleged neutrality requirement affects anyone else in practice than a woman wearing a headscarf. In both cases the employer has not suggested that they also dismissed a man (for example for wearing a yarmulke)[105]. Surely if there was such a male comparator suffering from the same policy, this would have been mentioned? Accordingly, we can conclude that the policy overwhelmingly or exclusively affects women. Policies requiring women to adhere to Western standards of femininity before they are allowed to become part of the workforce must be rejected as gender discrimination.

However, if the Courts were not to accept intersectional discrimination, such discrimination would not be recognised. After all, demands to conform to Western standards of femininity mainly impact on minority women, though some majority women may convert to Islam and be equally affected.

So far, we have only established intersectionality between religion and gender. It is submitted that the head scarf ban will, bar in very particular circumstances, also constitute discrimination on racial or ethnic origin (under Directive 2000/43/EC). From social science perspectives, the head scarf debate is analysed in categories of the racialisation of Muslim women.[106] As indicated above, the singling out of minority women demonstrating their affiliation to a religion not shared by the majority in EU Member States for the penalty of being dismissed must be viewed in the context of the foreignness of the perceived religion.

As the Court of Justice correctly stated in its CHEZ ruling, the definition of racial and ethnic origin, which is not provided in the Directive, must align to the ECHR, and by the way also to CERD. On this basis the Court stated that "the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community (see, to this effect, in relation to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, judgments of the European Court of Human Rights)".[107] Accordingly, religion can certainly play a role in the process of

[103] (Bilge, 2010)

[104] Paragraph 75 of her opinion

[105] This should not indicate that such ban would not be captured by EU law – for subsuming it under religious discrimination see (Weiler, 2017); if following the argument developed here it would also be discrimination on grounds of ascribed race/ethnicity.

[106] (Chapman, 2016; Bilge, 2010)

[107] *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* C-83/14 EU:C:2015:480, paragraph 46. See also ECJ Jyske Finans A/S v Ligebehandlingsnævnet C-668/15 EU:C:2017:278 : paragraph 17.

ascribing ethnic minority status. In the age of Orientalism[108] and the culturalism,[109] markers of identity such as religion, clothing and language contribute to racialisation at least as intensively, if not more so than remnants of biological racism.[110] In addition, racialisation of religious minorities has a long history on Europe, harking back, for example, to the population exchange between Turkey and Greece among others on the basis of affiliation to Islam and the Greek Orthodox Church[111] and continuing in racialisation of Jews in Nazi Germany to ethno-religious categorisations in Northern Ireland and Muslim exclusion in Bosnia-Herzegovina.[112] In the process of racialisation, actual or perceived membership of faith groups becomes a proxy for ethnicity[113] and otherness. In this regard, disadvantage on grounds of perceived religious affiliation is to be categorised as discrimination on grounds of racial and ethnic origin. The othering of women donning a head scarf seems to be a prominent example of this process. Paragraph 130 of AG Sharpston's opinion seems to indicate that even an AG before the ECJ is not beyond falling for this process. Much less can it be considered to not affect the average population.

Accordingly, the better arguments support the view that exclusion of women wearing an "Islamic headscarf" from employment opportunities is and remains a prominent example of intersectional discrimination. Sadly, this context has been wholly ignored in the cases before the ECJ.

IV. Conclusion

The critique of these three rulings exposes that the wheels of justice grind slowly, in particular when it comes to recognising complexity in EU anti-discrimination law.

Even if prompted by a well-thought through reference question of the Irish Labour Court, the Court has not been able to recognise intersectional discrimination of older homosexuals in access to occupational survivor pensions. However, the opinion of AG Kokott, in spite of its shortcomings, has demonstrated that it would be possible to recognise intersectional discrimination in EU law. Furthermore, it has demonstrated that such recognition has palpable advantages for claimants, because exceptions from and justifications of discrimination must be applied cumulatively, thus raising the bar for defending different treatment in intersectional cases. As this was only a 5 judges chamber decision, there is hope that the Court develops its case law if confronted with more intelligent reference questions in other constellations.

In its recent Grand Chamber rulings on the head scarf enigma the Court and its AGs have refrained from capturing the specific dynamics of racializing Muslim women and excluding them on the basis of gender and ethnicity. In all fairness it must be said that the EU's highest judges followed the dominant approach before national constitutional courts as well as the ECtHR. The derecognition of intersectional discrimination in these cases is not merely a matter of doctrinal clarity and ideational accuracy. Unfortunately for the claimants, they also miss out on stricter standards for defending differential treatment, as well as the potential to address intersectional discrimination beyond employment under EU law, for example in cases of excluding women wearing headscarves from sport facilities.[114] It is to

[108] (Said, 2003)

[109] (Razack, 2004)

[110] (Vieten, 2011)

[111] (Kofinis, 2009)

[112] (Farkas, 2017, pp. 52-56)

[113] (McColgan, 2014, pp. 67-68)

[114] See LG Bremen, ruling of 21 June 2013 – 4 S 89/12 (NJW-RR 2014, 206, beck-online)

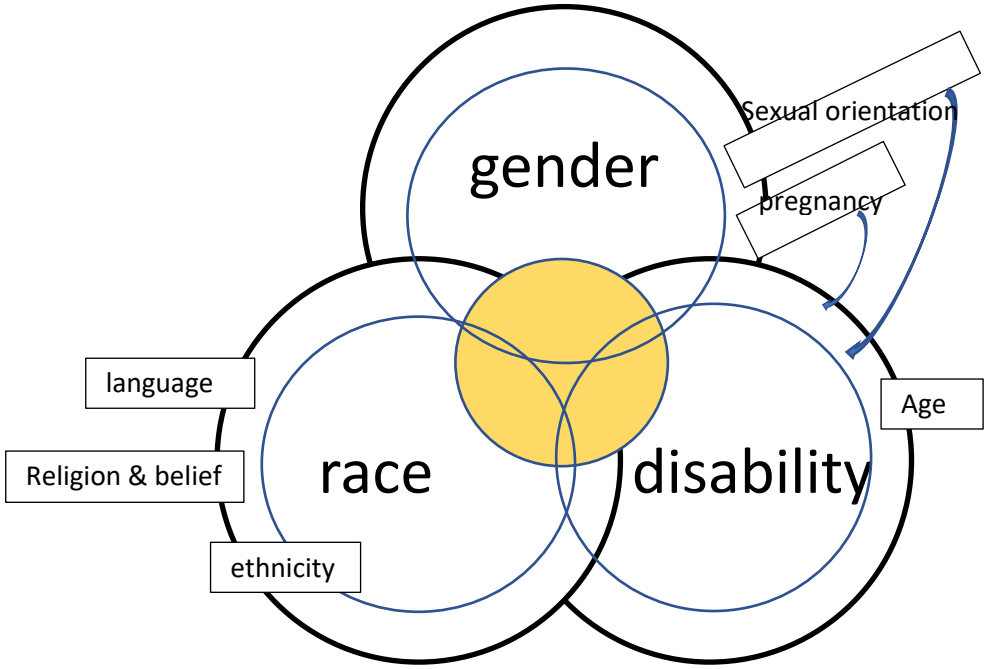
be hoped that these rulings provoke an academic debate which contributes to more adequate development of case law at EU and national levels.

The reframing of anti-discrimination law through refocusing discrimination grounds around the nodes gender, race and disability could contribute to that development. Despite all the critique developed above, the reluctance of the European judiciary to acknowledge intersectional discrimination were understandable if it was based on the reluctance to overcomplicate EU anti-discrimination jurisprudence to a degree that would dilute the effectiveness of its prohibitions. Refocusing anti-discrimination law around these nodes should have guided the Court and its AGs in the cases of Achbita and Bougnaoui to recognise the situation of Muslim women not only as situated at the intersection of race and gender, but also as a situation of heightened relevance for EU anti-discrimination law. The ban of "Islamic" headscarves only affects women, and thus constitutes either direct of covered discrimination on grounds of sex. It also affects those suffering the disadvantages of sex discrimination, in this case women (other groups suffering the disadvantages include men providing childcare, for example). This means the discrimination experienced is at the core of the gender node. Placing those who are othered on grounds of their adherence to a minority religion at a disadvantage also constitutes discrimination associated with the race node. There are good reasons to qualify the othering of Muslims in Western Europe as racialisation, which gives those cases a doubly-elevated relevance.

In the Parris case, the reliance on the nodes concept would have allowed the Court to recognise the gendered dimension of discrimination on grounds of homosexuality. As a consequence, the Court should have found that the justification under Article 6 paragraph 2 Directive 2000/78/EC does not apply due to the inextricable link between discrimination related to the orbit of the gender node and age discrimination in these cases.

Thus, the way in which intersectional discrimination is introduced into the legal discourse can contribute to guiding judicial reasoning more clearly, and avoid it missing the relevance of insidious forms of racialised gender and gendered race discrimination, as the Court and its AG's did in the cases decided on 14 March 2017.

Graph: reorganising anti-discrimination law around nodes



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