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# On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)

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by Dagmar Schiek, Queen's University Belfast\*

## **Abstract (329 words)**

*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 disproportionately on white women or black men. As regards EU law, the value of intersectionality as a practically relevant concept is being doubted. (Conaghan, 2009) This article discusses the question whether and how intersectionality can and should be used in applying EU non-discrimination law through a critical analysis of three ECJ rulings decided between 24 November 2016 and 14 March 2017. 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 against the background of a purposive interpretation of EU anti-discrimination legislation based on the concept of equality nodes (Schiek, 2011b) in critical perspective. (Schiek, 2016)*

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

## **Introduction**

Does the European Court of Justice (ECJ<sup>1</sup>) recognise and acknowledge intersectional discrimination if and when confronted with it? That question was tested three cases decided between November

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<sup>1</sup> Under the current EU Treaties, the EU's judiciary is constituted as the Court of Justice of the European Union

2016 and March 2017, the trio of Parris, (*David L. Parris v Trinity College Dublin and Others* C-443/15 EU:C:2016:897,) Achbita (*Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* C-157/15 EU:C:2017:203) and Bougnaoui. (*Asma Bougnaoui and ADDH v Micropole SA*, C-188/15, EU:C:2017:204) As a novelty for the ECJ,<sup>2</sup> 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. (Makkonen 2002: 9-14; Schiek 2009: 4-6) It thus constitutes a specific subsection of discrimination on more than one ground.

The factual background 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 60<sup>th</sup> 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 recognition of the combined effect of age and sexual orientation, while the two headscarf cases were decided on the basis of religious discrimination only and continue to be debated as such in academic responses. (e.g. Cloots 2018; Hambler 2018; Howard 2017; Weiler, 2017) This recent academic discourse contrasts with the feminist academic debate starting in the late 1980s, which identified headscarf discrimination as epitomising intersectionality. (Bilge 2010; Chapman 2016; Davis and Zarkow 2017; Halrynjo and Jonker 2016; Holzleithner 2008; Sacksofsky 2009) The trio elicits consternation: why would an AG (though not the Court) recognise the intersectional discrimination of two relatively privileged white men, while AGs Juliane Kokott and Eleonor Sharpston and the Court's Grand Chamber completely ignored the contribution intersected racial/ethnic and sex discrimination experienced by ethnic minority Muslim women?

Addressing this question offers an opportunity to revisit several facets of the intricate intersectionality debate. It demands a reflection of how intersectionality can be recognised as a category of anti-discrimination law (II), invites a recollection of how EU anti-discrimination law specifically relates to this debate (III) and 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.

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(CJEU), consisting of the Court of Justice (ECJ, an abbreviation which distinguishes from the ICJ) and the General Court (GC), and potentially additional courts (Article 19 TEU, Articles 252-257 TFEU).

<sup>2</sup> Schiek (2009:7) provides an overview of earlier case law, where intersectionality could have been applied, though the claimants' disadvantage could be acknowledged without doing so.

## Intersectionality, intersectional discrimination and litigation

### *Intersectionality as a socio-legal concept*

Intersectionality, dubbed a mezzo level theory (Cho et al. 2013) has travelled across disciplines and continents,<sup>3</sup> serving to analyse policy development (Hancock 2005) and add analytical precision to sociological studies. (Walby and Verloo 2012; Winker and Degele 2011) Its very complexity (Schiek 2016) has been criticised as too challenging, (Chow 2016) particularly for legal studies (Conaghan 2009) and for litigation. (Fredman 2016a: 80-85) As a consequence, some authors propose to replace it by concepts such as capacious grounds ((Fredman 2016a: 69-79) and horizontal inequalities (Steward 2014) in anti-discrimination law and policy.

In contrast to these voices, Kimberlé Crenshaw, (1989) 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 race and sex. Crenshaw used the *DeGraffenreid* case (*DeGraffenreid v General Motors* 413 F Supp 142 (ED Mo 1976) 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,<sup>4</sup> 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.<sup>5</sup> Interestingly, Scandinavian jurisdictions, French and German courts have been less hesitant to acknowledge intersectional discrimination, (Jonker 2015; Schiek 2009: 12-16) although cases are few and far between, because advocates hesitate to use an as yet unknown concept. This should give cause to pause and reflect what, if anything, can be achieved by using intersectionality in a rights context.

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<sup>3</sup> 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: 119-122; Weber 2015: 25-26).

<sup>4</sup> 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). The latter is credited with recognising a “sex plus” approach (Areheart 2006: 220; Scarborough 1989: 1467; McColgan 2014: 98), while the former explicitly recognised stereotyping specifically against Asian women (for more Schiek 2005: 455-457; Fredman 2016a: 67).

<sup>5</sup> *Ministry of Defence v Tilern De Bique* [2010] IRLR 471 constitutes an important exception: a female Caribbean soldier won an indirect discrimination claim on grounds of gender and race as intersected category: the refusal of allowing her to transfer to a post not requiring shift-work alongside the rejection of her sister’s application for leave to enter the UK as a child carer created a situation considerably more detrimental for a black woman of non UK origin than for a black man or a white women (Moon 2011: 167)

### *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 the law responds to oppression<sup>6</sup> as experienced in reality. 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, (Schiek 2002) who viewed equality was not as a universal right, but rather as a virtue. The concept of formal equality, central as it is for European constitutional thought, mirrors these limitations in that it makes rights to equal treatment conditional upon comparability of the claimants with those more favourably treated. While offering 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.

In identifying the purpose of substantive anti-discrimination law, views are divided on whether anti-discrimination laws should have a primarily re-distributive purpose (Fredman 2011) or focus on enabling individuation (i.e. moulding one's life beyond traditional stereotypes) and respecting difference in favour of those suffering disadvantage. (Schiek 2016) 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, which are based on the class conflict 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 openly welfarist law and policy. (Quinn and Flynn 2012) Instead, anti-discrimination law has been linked to the politics of difference, (Young 2009) or identity-focused cultural politics that differ fundamentally from class-based politics. (Fraser 2007) As expanded in more detail elsewhere, (Schiek 2005, 2011b, 2016) these approaches by US American authors are also useful for theorising European anti-discrimination law as addressing exclusion based on cultural de-recognition. This again raises the question whether anti-discrimination law protects groups or 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. Identifying the ill addressed by anti-discrimination law as being subjected to disadvantage on the basis of ascribed otherness 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. (Fredman 2011: 82-

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<sup>6</sup> On the notion of oppression as central for discrimination law see (McColgan 2014: 45, 56-98)

112; Schiek 2016: 25-27) These roots result in anti-discrimination law's asymmetry: 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 their true purpose, and may even have to be restricted, for example in favour of positive action.

### *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) 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 involving several grounds. There is also the danger of diluting its drive and purpose, and even detracting from equalities that matter through "over-stretch". (McColgan 2014: 89-97)

Recognition of intersectional discrimination can contribute to these risks, (Petrova, 2016; Squires, 2008) but also help mitigating them. Risks emerge from the multiplication of categories by intersecting grounds: 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.

As this article discusses discrimination on grounds of religion, one of the traits with enhanced potential for creating identity-based groups, a specific strand of critique of intersectionality deserves specific attention, namely the critique deriving from an inclination for protecting groups prone to triggering conflict with priority. For example, Frances Stewart (2014) suggests that addressing "horizontal inequalities" is superior to using intersectionality. Addressing horizontal inequalities in her definition focuses on redistribution between members of groups which are 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. (Stewart 2011) The primary aim of avoiding conflict in, for example, multi-ethnic societies, is shared by approaches coined consociationalism.<sup>7</sup> Eilish Rooney (2009) submits 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 disadvantage for women is disregarded due to the priority for addressing what Stewart would term horizontal inequalities between these ethno-religious groups. 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-

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<sup>7</sup> I have to express my gratitude to Biljana Kotevska for alerting me to this connection (on consociationalism generally see Lijphart 1977; on anti-discrimination law and consociationalism – with contrasting positions - Hodžić and Mraović 2015; McCrudden and O'Leary, 2013).

group inequalities based on gender (including choices related to sexual orientation and marriage) or disability. (Schiek 2005)

### *Refocusing discrimination grounds around nodes*

However, 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 reducing their number as proposed by McColgan. (2014: 92-96) Focusing grounds around nodes (Schiek 2011b: 23-27) also avoids producing clashes with existing legislation and human rights guarantees, (Lee 2017) while highlighting varied and potentially conflicting rationales behind individual discrimination grounds. (Schiek 2005:443-452) 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 emerge around the key rationales for the ascription of 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.<sup>8</sup> Gender discrimination is based on reaffirming higher privilege for persons, 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.<sup>9</sup>

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<sup>8</sup> This is also characterised as stigmatising and stereotyping (Fredman 2016a; Solanke 2017).

<sup>9</sup> Petrova (2016:8) offers a succinct summary of this concern.



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 2001.<sup>10</sup> 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 mannerism of the opposite sex can be similar to ascribing a predefined community membership on the basis of external traits.

## 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 pay law, (Masselot 2007) today's EU anti-discrimination law aims at combating discrimination on grounds of personal characteristics as an autonomous aim. (Schiek et al 2007: 2-3) 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,<sup>11</sup> resulting in Directives 2000/43/EC and 2000/78/EC. Together with the sex equality directives 2004/113 and 2006/54<sup>12</sup>, and constitutionally infused by Articles 21-25 of the Charter of Fundamental Rights of the European Union (CFREU), they constitute the body of EU anti-discrimination legislation. Its fundamental character is informed by both Article 21 CFREU and the TFEU's economic freedoms, as recently confirmed by the Court's Grand Chamber in a ruling reaffirming the direct horizontal effect of the anti-discrimination rights contained in Article 21 CFREU (*Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* C-414/16, EU:C:2018:257, para 77).

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<sup>10</sup> Since then, the WHO classifications of disease and health state explicitly that sexual orientation alone is not an anomaly in itself, suggesting, however, that it can lead to anomalies (World Health Organisation, International Statistical Classification of Diseases and Related Health Problems – ICD 2010 – Chapter V, Mental and Behavioural Disorders, category F66 (<http://apps.who.int/classifications/icd10/browse/2016/en#/F60-F69>))

<sup>11</sup> See on the development of EU anti-discrimination legislation (Benedi La Huerta 2016: section 2; La Barbera 2017)

<sup>12</sup> Renumbered and expanded from the original directives 75/117/EEC and 76/206/EEC



Although EU anti-discrimination law does not yet define intersectional or multiple discrimination,<sup>13</sup> 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 (Schiek et al 2007) demands starting with the wording of the relevant directives (including their recitals). It is thus encouraging that recital 14 of Directive 2000/43 and recital 3 of Directive 2000/78 mention that women frequently suffer from multiple discrimination. While the sex discrimination directives do not mention it, European Parliament resolutions on women with disabilities and violence against women use the term multiple discrimination.<sup>14</sup> 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. (Degener 2011: 33-34) 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. (Fredman 2016a:27; McColgan 2014:101; Schiek 2009: 3-4)

Recognition of intersectional discrimination under EU law (Schiek 2005: 450-465) 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 in its recitals. 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-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, (e.g. Fredman 2016b with further references) though only partly in case law. Accordingly, intersectionality under EU law should encompass this asymmetry as well.

While it would be possible to interpret the corpus of EU anti-discrimination legislation as encompassing multiple,<sup>15</sup> including intersectional discrimination, 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.

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<sup>13</sup> This is the aim of the European Commission’s 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, which has been integrated into the still pending proposal by now, see (Schiek and Mulder 2011).

<sup>14</sup> Resolution 2013/2065/INI and Resolution 2013/2004/INK

<sup>15</sup> This is also supported by the EU Commission in its 2014 report on Directive 2000/78 (COM (2014) 2 final, p 9).

## Intersectionality before the Court of Justice of the European Union

### *Parris – the DeGraffenreid moment?*

The Parris constitutes the Court's fifth ruling on sexual orientation in employment under Directive 2000/78/EC<sup>16</sup> and one of numerous age discrimination cases. (Mohr 2017; Numhauser-Henning and Rönmar 2015; Schiek 2011a) While the Court occasionally rejected age discrimination claims, it has so far endorsed sexual orientation discrimination claims under Directive 2000/78. (Möschel 2017)<sup>17</sup> As mentioned the case concerns the exclusion of survivor pensions for partners of employees who married after their 60<sup>th</sup> 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 case was complex, because there was clearly no direct discrimination on grounds of homosexuality, as the policy affected all couples becoming married after the policy holder's 60<sup>th</sup> birthday and any direct age discrimination was subject to the generous exceptions for age discrimination provided for in Article 6 Directive 2000/78. Thus, from an intersectionality perspective, the question was whether EU anti-discrimination law would cover the situation of older homosexuals excluded from survivor pensions at all.<sup>18</sup>

AG Kokott raised to the Irish Labour Court's<sup>19</sup> 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 find that the claimant is discriminated on grounds of age and sexual orientation. (EU:C:2016:493, paragraph 148) 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 recognised.

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

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<sup>16</sup> 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-WestTrains 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.

<sup>17</sup> The Court was more ambiguous in relation to asylum and national policy around blood donations by homosexual men (*X and Others* C-199-201/12 EU:C:2013:720, and *Léger* C-528/13 EU:C:2015:288), though a recent opinion of AG Wathelet indicates potential for change in relation to derivative free movement rights for EU citizens' non-EU same sex spouses (*Coman et al*, C-673/16 EU:C:2018:2).

<sup>18</sup> 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 article, see (Möschel 2017: 1844-45; Schiek 2017: 410-411).

<sup>19</sup> Based on statistics of 2012, Solanke (2017: 457 with fn 86) stresses that Irish Courts hear the highest proportion of cases where multiple discrimination is at stake: 25 %.

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: without any further reasoning, it refused to recognise the combined ground of age and sexual orientation.

The critique of this ruling is nuanced, since 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 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 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 (EU:C:2016:493, paragraph 124-131), the option for the policy holder's spouse to draw a survivor's pension clearly adds to the value of the pension package. This is, because it can be regarded as an extra benefit for the policy holder herself: without it, she would have to make other arrangements to secure their partner if 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, see Schiek 2011b) 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.”<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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 unrelated to discrimination. (Ellis and Watson 2012: 169-70; Schiek 2007, 435-441) 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 60<sup>th</sup> 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.

### *Achbita and Bougnaoui – derecognising dimensions of the headscarf enigma?*

In the Western world, the so-called Islamic headscarf – exclusively worn by women - has become a contentious piece of cloth, resulting in frequent litigation by women dismissed or refused employment because wearing it. The two cases decided by the ECJ’s Grand Chamber on the same day resulted from references by the Belgian Court de Cassation (Achbita) and the French Court de Cassation (Bougnaoui) respectively, in both cases with the support of human rights organisations.<sup>23</sup> Both

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<sup>20</sup> An English translation by the Federal Anti-Discrimination Agency is available from [http://www.antidiskriminierungsstelle.de/EN/TheAct/theAct\\_node.html](http://www.antidiskriminierungsstelle.de/EN/TheAct/theAct_node.html)

<sup>21</sup> This is misread by Solanke (2017: 455), who assumes an aggravation of the burden of proof instead.

<sup>22</sup> This wide-spread approach to indirect discrimination is as also advocated by Möschel, who supports a general balancing test in cases of indirect discrimination in his annotation of Parris (2017: 1843-44)

<sup>23</sup> The Association de défense des droits de l’homme (ADDH) supported Asma Bougnaoui, and the Centrum

claimants were dismissed because they decided to wear a headscarf to work, relying on their interpretation of Islam, a religion to which they claimed allegiance. Samira Achbita worked as a receptionist for a temporary agency and started wearing a headscarf after returning from parental leave. Her employer claimed a clash with their unwritten rule that no “visible signs” of “political, philosophical or religious beliefs” should be worn in the work place, to protect a “position of neutrality”.<sup>24</sup> When Achbita refused to work without the headscarf, she was dismissed. Asma Bougnaoui was employed as a design engineer, visiting clients on their premises as part of her duties. When one of the clients expressed dismay on her wearing a “veil”, 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”. (Sharpston 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.

Both cases were categorised as based on religious discrimination only by AG Kokott (Achbita) and AG Sharpstone (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. (Schiek 2005:445; McColgan 2014:67-8) This ambiguity weakens any protection against discrimination on grounds of religion, since it invites balancing of competing freedoms in cases relating to religious discrimination, in stark contrast to other bans on discrimination. This weakness was 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,<sup>25</sup> while the Court stated succinctly that the notion of religion must be read widely to include both the forum internum and the forum externum, although needing five full paragraphs to arrive at this conclusion. (para 26-30) 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, constitutes discrimination on grounds of sex. Further, the Court and its AGs balanced 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” (paragraph 37), 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 balanced different religions & beliefs. Similarly, AG Kokott submitted that an employee “may be expected to moderate his exercise of his religion in the workplace” (paragraph 116), 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, (Howard, 2017,

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voor gelijkheid van kansen en voor racismebestrijding supported Samira Achbita.

<sup>24</sup> 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

<sup>25</sup> AG Sharpstone’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 ones religion.

pp. 359-360) while it may or may not be justified, further underlines this inherent weakness, as does the Court's reference to the employers' freedom to conduct a business in defence of discrimination. The skilful critique of the practical limitations of the ban of religious discrimination in academic writing (Cloots, 2018; Hambler, 2018; Howard, 2017; Weiler, 2017) further demonstrates that relying on religion only has fundamental detriments for the rights of the claimants. Even though in the Bougnaoui case both AG Sharpston and the Court declare as unlawful the dismissal on the grounds that a customer wishes to be spared the view of a veil which does not in the slightest impact on her performance, 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", (paragraph 130) suggesting that any religious garment obfuscating eye contact would always impact on performance in customer-facing roles. The Achbita judgment goes even further in easing justification of a head-scarf ban: all the employer needs 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)

It is surprising that the Court and its AGs have not considered other grounds informing the dismissal of a Muslim women, namely gender and ethnicity, even though AG Kokott explicitly characterises these grounds as stronger than religion,<sup>26</sup> which would suggest that these grounds should be given some weight. Halrynjo and Jonker (2016) suggest that the Courts should follow the claimants, who overwhelmingly rely on religion. However, such findings are refuted in the same study, which shows that Muslim women are aware of the fact that they are discriminated against as Muslim women. Nor is it 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 (McCrudden 2018: 3-4) - increasingly infused by affective orientations such as religious beliefs, sexual orientation or cultural claims, it seems unavoidable for affective narratives to attain importance. 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. (Yilmaz 2015:38) Creating an affective community relies on women as boundary markers, as has been argued by those criticising forms of multiculturalism close to communitarianism. (Lacey 2004: 49; McColgan 2014: 193-198; Schiek 2005: 451-452) The question is whether outlawing the gender performance (Holzleithner 2008) of minority women is a strategy unrelated to as sex discrimination. The point has been made that gender performance of different cultures should not be rated differently to avoid being accused of orientalism. (Bilge 2010) 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).

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<sup>26</sup> 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 Sharpstone contradicts this view (paragraph 112 of her opinion).

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. (paragraph 75 of her 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)<sup>27</sup>. 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, this discrimination would remain unaddressed. 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. (Chapman 2916; Bilge 2010) The singling out of minority women demonstrating their affiliation to a religion not shared by the majority in EU Member States under threat 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 held 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)”<sup>28</sup>. In the age of Orientalism (Said 2003) and the culturalism, (Razak 2004) 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. (Vieten 2011) 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 (Kofinis 2009) and continuing in racialisation of Jews in Nazi Germany to ethno-religious categorisations in Northern Ireland and Muslim exclusion in Bosnia-Herzegovina. (Farkas 2017: 52-56) In the process of racialisation, actual or perceived membership of faith groups becomes a proxy for ethnicity (McColgan 2014:67-8) and otherness. Accordingly, 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

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<sup>27</sup> Such a ban would fall foul of EU anti-discrimination law’s bans as well: it is at least religious, (Weiler, 2017) if not ethnic discrimination (see below).

<sup>28</sup> *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



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 of intersectional discrimination on grounds of religion, gender and racial and ethnic origin. Sadly, this context has been wholly ignored in the cases before the ECJ.

## 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 though directly prompted by the Irish Labour Court’s reference question, the ECJ was unable to recognise intersectional discrimination of older homosexuals in access to occupational survivor pensions in Parris. However, the opinion of AG Kokott, in spite of its shortcomings, has not only demonstrated that it would have been possible to recognise intersectional discrimination in this case, but also shown how this would have had palpable advantages for claimants. The exceptions from and justifications for discrimination must be applied cumulatively, thus raising the bar for defending different treatment in intersectional cases.

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 does not merely demonstrate a regrettable lack of doctrinal clarity and ideational accuracy. The claimants also were unable to profit from the stricter standards for defending differential treatment on grounds of sex and racial or ethnic origin. Further, future claimants will forgo the potential to claim intersectional discrimination beyond employment under EU law, for example in cases of excluding women wearing headscarves from sport facilities.<sup>29</sup> It is to 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 or 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

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<sup>29</sup> See LG Bremen, ruling of 21 June 2013 – 4 S 89/12 (NJW-RR 2014, 206, beck-online)

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.

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