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# Master Working Paper

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Intersectionality Theories and Headscarf Cases

Before the ECtHR and the CJEU

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## 1. Introduction

The wearing of the Islamic headscarf has been a controversial topic in Europe for some time now, both from a socio-political as well as from a legal point of view<sup>1</sup>. Indeed, not only has it become “a powerful cultural signifier of otherness in debates over [...] Muslim integration across the West”<sup>2</sup>, but it has also come to be perceived as a sign of backwardness from the progressive values of the West and/or as a symbol of a certain Islam conceived as a long-standing security threat, especially in the aftermath of 9/11 and the “war on terror” that followed<sup>3</sup>.

Confronted to these tensions, European states have been dealing with the wearing of the Islamic headscarf in various ways, sometimes prohibiting it in different situations such as public education or the judicial system<sup>4</sup>. These bans are often based on so-called “neutrality policies” prohibiting the wearing of conspicuous symbols of religious, political or philosophical convictions in general. However, the rationale invoked in explanatory reports or parliamentary debates frequently relates to the Islamic headscarf and the challenges brought against those bans before national courts are mostly concerned with the wearing of the headscarf<sup>5</sup>. These techniques have now been taken up by private employers, as exemplified in a recent case brought before the Court of Justice of the European Union (hereafter, “CJUE” or “Luxembourg Court”).

As a result of this trend, Muslim women face more and more obstacles in their access to education and employment, and some of them end up being excluded from school, dismissed from their work or even not hired at all because they refuse to remove their

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<sup>1</sup> Armin Steinbach, ‘Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights’ [2015] 4 CJICL 29, 30

<sup>2</sup> Sirma Bilge, ‘Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women’ [2010] 31 Journal of Intercultural Studies 9, 9

<sup>3</sup> Anoosh Soltani, ‘Confronting Prejudice Against Muslim Women in the West’ [2016] United Nations University Publications < <https://unu.edu/publications/articles/confronting-prejudice-against-muslim-women-in-the-west.html> > accessed 16 August 2018

<sup>4</sup> Sarah Haverkort-Speekenbrink, *European Non-Discrimination Law: A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012) 4

<sup>5</sup> See, for example, Haleh Chahrokh, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany* (Human Rights Watch, 2009) 25

headscarf. Statistics are lacking in that regard, but considering the current climate of growing Islamophobia, the issue is likely to continue developing.

So far, headscarf bans have been overwhelmingly dealt with under the notions of freedom of religion and religious discrimination, but the gender dimension of the phenomenon has been somewhat disregarded. Indeed, headscarf bans do not affect all Muslims but only Muslim women, as they are the only one wearing the headscarf. Moreover, these bans usually rest on stereotypical perceptions of headscarf-wearing women, which are associated neither with Muslim men nor with non-Muslim women. This is a typical example of what scholars call “intersectional discrimination”<sup>6</sup>. This notion emerged almost 30 years ago in the US but its relevance is still very much debated and its integration into the European legal framework is still in its infancy.

In this essay, I will try to determine the potential impact of intersectional theories on the determination of headscarf cases within this framework<sup>7</sup>. For that purpose, I will first have a look at the notion of intersectionality, its origin, its meaning and its related concepts, as well as present the main arguments of the intersectionality debate and the major obstacles faced by intersectionality theories within the current predominating framework (section 2). Then, I will briefly analyse the two main legal frameworks applicable to headscarf cases in Europe: the European Convention of Human Rights (hereafter, “ECHR” or the “European Convention”) and the European Union (hereafter, “EU”) equality law framework (section 3 and 4). In these sections, I will examine the extent to which these two frameworks acknowledge the possibility of an intersectional approach. I will also try to identify the main obstacles to the integration of such an intersectional approach within these frameworks. Finally, I will analyse the way in which the Court of Justice of the European Union and the European Court of Human Rights (hereafter, “ECtHR” or “Strasbourg Court”) have dealt with headscarf cases in the past and the possible impact

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<sup>6</sup> Sigtona Halrynjo and Merel Jonker, ‘Naming and Framing of Intersectionality in Hijab Cases – Does It Matter? An Analysis of Discrimination Cases in Scandinavia and the Netherlands’ [2016] 23 Gender, Work and Organization 278, 281

<sup>7</sup> The term “headscarf cases” used throughout this essay refers to these instances where a public or private entity prohibited the wearing of the Islamic headscarf, either through a general “policy of neutrality” or only in the case of the applicant.

of an intersectional approach on the existing jurisprudence and on the protection of headscarf-wearing women in the future (section 5).

With this essay, I argue that intersectionality theories challenge both European legal frameworks regarding antidiscrimination law as well as the ECtHR's analysis of religious freedom. Beyond the naming and framing of intersectional discrimination in headscarf cases, I consider that the application of an intersectional approach is capable of impacting the treatment of these cases at the European level and prompting it towards a better protection of Muslim women's right to equality and religious freedom. Even more so, I argue that instances of intersectional discrimination encourage us to re-conceptualize our understanding of discrimination in today's society

## 2. Intersectionality

### a) A Relatively New Notion

It is only relatively recently that academics, mostly from the legal and sociological fields, have been interested in identifying and understanding the phenomenon of multiple discrimination, in general, and intersectionality, in particular<sup>8</sup>. This movement was largely pioneered in the US, in the late 80s and early 90s, especially by the African American scholar Kimberlé Crenshaw.

In a 1989 article focusing on the experience of black women, Crenshaw criticises the "single-axis framework" characterizing the dominant conception of discrimination<sup>9</sup>. This framework is believed to originate in the fact that political liberation movements such as feminism and anti-racist movements have traditionally been focussed on a single characteristic<sup>10</sup>. They have later been adopted by law in the form of the "traditional"

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<sup>8</sup> *Tackling Multiple Discrimination: Practices, policies and laws* (European Commission, 2007) 15

<sup>9</sup> Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] 1 U. Chi. Legal F. 139, 140

<sup>10</sup> Ben Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' [2016] 16 Equal Rights Review 73, 74

protected grounds of discrimination and may explain the centrality of comparison in equality law<sup>11</sup>. According to Crenshaw, the problem is that, as a consequence, discrimination law tends to focus on the most privileged members of the protected groups and marginalizes the experience of those who are at the intersection of these groups<sup>12</sup>. Regarding black women in particular, she argues that “the paradigm of sex discrimination tends to be based on the experiences of white women; [while] the model of race discrimination tends to be based on the experiences of the most privileged blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against black women”<sup>13</sup>.

While the topic of intersectionality and multiple discrimination initially remained predominantly academic, it is now slowly being taken into account within various human rights fora, both nationally and internationally<sup>14</sup>. The international community recognised the notion of multiple discrimination for the first time at the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa in 2001<sup>15</sup>. At the national level, it has mainly received attention from the Anglo-Saxon jurisdictions (the US, Canada, Ireland and the UK)<sup>16</sup>. Despite this growing recognition, the meaning of the notions of intersectionality and multiple discrimination remains somewhat obscure.

## **b) A Notion With No Internationally Agreed Definition**

There is no internationally agreed definition of the phenomenon of intersectionality or multiple discrimination. Indeed, much like equality, these notions have arguably very little substantive content on their own<sup>17</sup>. In this essay, I will consider that the term “multiple

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<sup>11</sup> *ibid*

<sup>12</sup> Crenshaw (n 9) 140

<sup>13</sup> *ibid* 151

<sup>14</sup> Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Institute For Human Rights, Åbo Akademi University 2002) 1-2

<sup>15</sup> *Tackling Multiple Discrimination* (n 8) 15

<sup>16</sup> *ibid* 17

<sup>17</sup> Smith (n 10) 76

discrimination” refers to any situation in which a person suffers from discrimination on more than one ground. This “umbrella term” is indeed the most commonly used term in the human rights discourse to refer to such situations<sup>18</sup>.

Scholars tend to agree that there are three ways in which discrimination can take place on more than one ground. First, discrimination can occur on one ground at a time so as to create an accumulation of distinct discrimination experiences<sup>19</sup>. For example, “a disabled woman may be discriminated against on the basis of her gender in access to highly skilled work, and on the basis of her disability in a situation in which a public office building is not accessible to persons with wheelchairs”<sup>20</sup>. Following the 2007 European Commission report on multiple discrimination, I will describe this kind of situation as “additive discrimination”<sup>21</sup>. Secondly, a person may suffer from discrimination on the basis of two or more grounds at the same time, with the consequence that the quantitative nature of the experience of discrimination is being increased<sup>22</sup>. In other words, one ground of discrimination gets compounded to one or more other ground<sup>23</sup>. This type of discrimination is therefore referred to as “compound discrimination”. An example of this may be the situation of immigrant women on the labour market, as certain jobs are considered unsuitable for women and others are reserved in particular for immigrants<sup>24</sup>. Finally, a qualitative transformation in the nature of discrimination may take place in the presence of two or more grounds of discrimination<sup>25</sup>. Indeed, those grounds may operate and interact in such a way that they are, in fact, inseparable<sup>26</sup>. This situation is called “intersectional discrimination”. It is the phenomenon to which Crenshaw referred to when she argued that black women face a specific type of discrimination not experienced by black men or by white women.

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<sup>18</sup> *Tackling Multiple Discrimination* (n 8) 9

<sup>19</sup> *ibid*

<sup>20</sup> *ibid*

<sup>21</sup> *Tackling Multiple Discrimination* (n 8) 16

<sup>22</sup> Nicholas Bamforth, Maleiha Malik and Colm O’Cinneide, *Discrimination Law: Theory and Context* (1<sup>st</sup> edn, Sweet & Maxwell 2008) 528

<sup>23</sup> *Tackling Multiple Discrimination* (n 8) 16

<sup>24</sup> Makkonen (n 14) 11

<sup>25</sup> Bamforth, Malik and O’Cinneide (n 23) 518

<sup>26</sup> *Tackling Multiple Discrimination* (n 8) 17

Headscarf bans are typically considered as an example of intersectional discrimination, since they specifically target Muslim women<sup>27</sup>. As such, Muslim women are thus confronted to a form of discrimination that is experienced neither by Muslim men nor by non-Muslim women. This essay will therefore mainly focus on intersectional discrimination, even though most of its findings also apply to other instances of multiple discrimination. Intersectionality is still, however, a very debated idea.

### c) A Hotly Debated Notion

Proponents of an intersectional approach of discrimination put forward three main arguments in support of their position. The first argument relates to the invisibility of certain types of intersectional discrimination<sup>28</sup>. While additive and compound discrimination cases can be dealt with within the single-axis framework, as they can be articulated around a single ground of discrimination<sup>29</sup>, certain forms of discrimination are only experienced by persons who are “at the intersection” of two or more grounds<sup>30</sup>. For example, involuntary sterilisations are only performed on women with disabilities or women from certain ethnic groups, such as Roma women. Analysed through a single ground, the discriminatory nature of these situations will remain invisible<sup>31</sup>. This is mainly due to the essentialism tendencies characterizing the single-axis framework. Indeed, grounds of discrimination tend to be conceptualized as homogeneous social groups defined “according to normative standards that reflect the social norm and social identity of those who have greater power”, such as “men”, “whites” or “heterosexuals”<sup>32</sup>.

Another consequence of this finding and a second concern regarding the single-axis framework is that it misrepresents the lived experiences of individuals suffering from

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<sup>27</sup> Halrynjo and Jonker (n 6) 281

<sup>28</sup> Merel Jonker, ‘Comparators in multiple discrimination cases: a real problem or just a theory?’ in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt *Equality and human rights: nothing but trouble?* (Universiteit Utrecht 2015) 212

<sup>29</sup> Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law* (Publications Office of the European Union, 2016) 28

<sup>30</sup> Susanne Burri and Dagmar Schiek, *Multiple Discrimination in EU law: Opportunities for legal responses to intersectional gender discrimination?* (European Commission Directorate for Employment, Social Affairs and Equal Opportunities, 2009) 20

<sup>31</sup> Fredman, *Intersectional discrimination* (n 30) 28

<sup>32</sup> Bamforth, Malik and O’Cinneide (n 23) 81-82

intersectional (or multiple) discrimination<sup>33</sup>. Gerard Quinn identifies four ways in which that is the case<sup>34</sup>. First of all, a “uni-sectional” approach ignores the fact that we all have multiple identities<sup>35</sup> and that these identities may change overtime. Secondly, it is not able to tackle the underlying causes of discrimination, especially multiple discrimination<sup>36</sup>. Thirdly, the traditional equality analysis does not get at the “socio-economic determinants or effects” of discrimination<sup>37</sup> or, in other words, at the “power dynamics”<sup>38</sup> inherent in discriminatory phenomena. And fourthly, this analysis allows adjudicators to (mostly unconsciously) rely on prevailing social assumptions and biases about protected characteristics rather than questioning them<sup>39</sup>. It is argued, however, that an intersectional approach is capable of remedying these pitfalls and bringing about substantive equality<sup>40</sup>.

Nevertheless, the concept of intersectionality is not uncontested and it has been questioned whether such a complex notion could be of use for legal discourse or offer guidance in practice<sup>41</sup>. One of the main critiques of intersectionality theories relates to the “Pandora’s box” argument<sup>42</sup> or the “etcetera” problem<sup>43</sup>. Indeed, judges and lawmakers<sup>44</sup>, as well as certain scholars, fear that an intersectional approach to discrimination would lead to the proliferation of sub-categories of protected grounds<sup>45</sup>. However, these concerns should be put into perspective as not all of the possible sub-categories of grounds experience discrimination<sup>46</sup>. But beyond these practical considerations, the main risk for intersectionality theories would be to end up focussing on the creation of “new essentialist and exclusionary categories of presumed victims”<sup>47</sup>. While it would appear that certain manifestations of intersectionality might have taken this wrong turn<sup>48</sup>, most

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<sup>33</sup> *Tackling Multiple Discrimination* (n 8) 5

<sup>34</sup> Gerard Quinn, ‘Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law’ [2016] 16 *Equal Rights Review* 63, 69-70

<sup>35</sup> See also, Fredman, *Intersectional discrimination* (n 30) 30

<sup>36</sup> Quinn (n 35) 69

<sup>37</sup> *ibid* 70

<sup>38</sup> Fredman, *Intersectional discrimination* (n 30) 30; Smith (n 10) 75

<sup>39</sup> Quinn (n 35) 70

<sup>40</sup> Smith (n 10) 81

<sup>41</sup> Burri and Schiek (n 31) 5

<sup>42</sup> Smith (n 10) 83

<sup>43</sup> Fredman, *Intersectional discrimination* (n 30) 31

<sup>44</sup> Sandra Fredman, ‘Double trouble: multiple discrimination and EU law’ [2005] 2 *EADLR* 13, 14

<sup>45</sup> Smith (n 10) 83

<sup>46</sup> Fredman, ‘Double trouble’ (n 45) 18

<sup>47</sup> Makkonen (n 14) 34

<sup>48</sup> Fredman, *Intersectional discrimination* (n 30) 31

scholars argue that intersectional approaches to discrimination law should lead to an “open-textured legal approach capable of engaging with the underlying structures of inequality when dealing with discrimination claims”<sup>49</sup>. Ivana Radacic, for example, defends an approach based on disadvantage<sup>50</sup> while Timo Makkonen suggests a “process-oriented” method<sup>51</sup>. Others argue in favour of a framework based on substantive equality. Sandra Fredman, for instance, develops an analysis of intersecting relations of power based on four complementary functions of equality: (i) the need to redress disadvantage (the redistributive dimension); (ii) the need to address stigma, prejudice, stereotyping and violence (the recognition dimension); (iii) the need to facilitate participation and voice (the participative dimension); and (iv) the need to accommodate difference through structural change (the transformative dimension)<sup>52</sup>. Beyond these conceptual considerations, a contextual analysis is already being applied in Canadian courts, tribunals and commissions, for example<sup>53</sup>. However, the path to what some call “structural intersectionality”<sup>54</sup> is not without hurdles.

#### d) A Path Full of Obstacles

There are several obstacles to the application of an intersectional approach to discrimination cases that are relevant across most legal frameworks.

A first hurdle is the frequent compartmentalisation of these legal frameworks<sup>55</sup>. Indeed, the legal provisions and mechanisms of equality law may be different depending on the protected ground at issue<sup>56</sup>. Therefore, the choice of ground may have different legal implications<sup>57</sup>. As a result, claimants will often tend to focus on only one aspect of their identity in order to maximize their chances of success<sup>58</sup>. Indeed, if they were to bring an

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<sup>49</sup> Smith (n 10) 84

<sup>50</sup> Ivana Radacic, ‘Gender Equality Jurisprudence of the European Court of Human Rights’ [2008] 19(4) EJIL 841, 852-856

<sup>51</sup> Makkonen (n 14) 5

<sup>52</sup> Fredman, *Intersectional discrimination* (n 30) 37

<sup>53</sup> *Tackling Multiple Discrimination* (n 8) 28

<sup>54</sup> Fredman, *Intersectional discrimination* (n 30) 31

<sup>55</sup> Burri and Schiek (n 31) 18

<sup>56</sup> Makkonen (n 14) 49

<sup>57</sup> *ibid*

<sup>58</sup> *Tackling Multiple Discrimination* (n 8) 21

intersectional discrimination claim, they would only benefit from the common minimum level of protection afforded by the various legal grounds<sup>59</sup>. The problem is that such a “trimming process” risks misrepresenting the multi-layered nature of the discrimination experienced by the applicant<sup>60</sup>.

Another important critique of the single-axis framework of equality law and one of the major obstacles to an intersectional approach of discrimination is the “comparator approach”<sup>61</sup>. Equality law usually requires evidence that a similarly situated person is treated more favourably than the claimant in order to reach a finding of discrimination. This approach has, however, proved to be problematic even in single-ground discrimination cases<sup>62</sup>. Indeed, a comparator (even a hypothetical one) may not always be easily identifiable<sup>63</sup>. And this difficulty will be even more prominent in intersectional discrimination cases. The choice of comparator is not always self-evident either. If we take headscarf cases as an example, should the comparison be based on the experience of Muslim men, non-Muslim women or non-Muslim men? Or are they all relevant comparators? As a result of these practical difficulties and following their conceptual criticism of the focus on comparison characterizing the single-axis framework of discrimination, intersectional approaches thus suggest replacing the comparator approach with some sort of contextual analysis based on disadvantage, for example, as detailed above.

Finally, a third obstacle to intersectional approaches of discrimination relates to the lack of awareness of, and important lack of available data about, the phenomenon of intersectional discrimination<sup>64</sup>. Indeed, national statistics are usually not disaggregated along intersectional lines<sup>65</sup> and qualitative work in that regard is also missing<sup>66</sup>. This

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<sup>59</sup> Victoria Chege, ‘The European Union anti-discrimination directives and European Union equality law: the case of multi-dimensional discrimination’ [2012] 13 ERA Forum 275, 280

<sup>60</sup> *Tackling Multiple Discrimination* (n 8) 21

<sup>61</sup> Burri and Schiek (n 31) 18

<sup>62</sup> Chege (n 60) 277

<sup>63</sup> Jonker (n 29) 212

<sup>64</sup> Burri and Schiek (n 31) 18

<sup>65</sup> Fredman, *Intersectional discrimination* (n 30) 28

<sup>66</sup> Bamforth, Malik and O’Cinneide (n 23) 523

results in an insufficient knowledge about which groups are vulnerable to intersectional discrimination, the extent of the phenomenon and the sectors in which it manifests itself<sup>67</sup>.

These issues have all been raised, in particular, regarding the EU equality law framework; therefore I will come back to them later on. But first, I will give a brief explanation of the ECHR framework applicable to headscarf cases and examine if this framework leaves room for some form of intersectional approach.

### 3. The European Convention of Human Rights

#### a) The Framework Applicable to Headscarf Cases

So far, headscarf cases have been dealt with by the ECtHR exclusively from the perspective of the applicant's right to religious freedom, which is protected by Article 9 of the Convention<sup>68</sup>. This right, which includes the right to manifest one's religion<sup>69</sup>, is a qualified right, meaning that it can be subject to limitations. These limitations must be prescribed by law and pursue the legitimate aims of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others<sup>70</sup>. Finally, they must be "necessary in a democratic society", which entails a proportionality test according to which there needs to be "a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference"<sup>71</sup>. This proportionality test will generally involve a "balancing of interests" between the interest of the individual concerned and the pressing social need invoked by the national government to justify the limitation<sup>72</sup>.

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<sup>67</sup> *Tackling Multiple Discrimination* (n 8) 5

<sup>68</sup> Haverkort-Speekenbrink (n 4) 177

<sup>69</sup> European Court of Human Rights Research Division, 'Overview of the Court's case-law on freedom of religion' (2013) 8

<sup>70</sup> Article 9 (2) ECHR

<sup>71</sup> *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 117

<sup>72</sup> Haverkort-Speekenbrink (n 4) 180

Confronted with a headscarf ban, one could also invoke Article 14 of the Convention, which prohibits different treatment of individual in analogous situations, including on the grounds of sex and religion, except where there is a reasonable and objective justification<sup>73</sup>. This exception involves a proportionality test similar to the one applied in the context of Article 9<sup>74</sup>. It should, however, be noted that Article 14 cannot be invoked independently but only “in conjunction with” other Convention rights (in headscarf cases, this would most probably be the right to religious freedom protected by Article 9)<sup>75</sup>. In both cases, the strictness of the ECtHR’s assessment will depend on the level of discretion left to the Member States<sup>76</sup> and whether the relevant ground of discrimination is considered as “suspect” by the Court<sup>77</sup>. Regarding sex discrimination in particular, the Court held that “very weighty reasons would have to be advanced before the difference of treatment on the ground of sex could be regarded as compatible with the Convention”<sup>78</sup>.

There are several reasons explaining the ECtHR’s focus on Article 9 in headscarf cases. The first one is that applicants often tend to formulate their complaint solely under this article<sup>79</sup>. Another reason relates to the fact that the ECtHR often declines to examine a complaint under Article 14, when a violation has already been found under another article. Finally, in *Dahlab v Switzerland*, the Court stated, in relation to whether a headscarf issue constituted sex discrimination, that:

*“the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith. The Court accordingly concludes that there was no discrimination on the ground of sex in the instant case”*<sup>80</sup>.

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<sup>73</sup> Radacic (n 51) 843

<sup>74</sup> Haverkort-Speekenbrink (n 4) 187

<sup>75</sup> Radacic (n 51) 843

<sup>76</sup> Haverkort-Speekenbrink (n 4) 180

<sup>77</sup> Radacic (n 51) 843

<sup>78</sup> *Abdulaziz, Cabales and Balkandali v. UK* (1985) Series A, No. 94, para. 78

<sup>79</sup> Haverkort-Speekenbrink (n 4) 178

<sup>80</sup> *Dahlab v Switzerland* ECHR 2001-V, 429

Nevertheless, this conclusion might be challenged in future cases, following the Court's recent acceptance of the notion of indirect discrimination<sup>81</sup>, which I will explain in the following section. But for now, I turn to the question whether the ECtHR currently recognizes some form of intersectional approach to discrimination.

## b) The ECHR and Intersectionality

While never expressly relying on an intersectional approach, the ECtHR sometimes takes into account the experiences of those suffering from intersectional discrimination, both directly, under Article 14 of the Convention, and indirectly, through findings of violations under the Convention's substantive provisions<sup>82</sup>.

In the case *B. S. v Spain*, the Court acknowledged for the first time, under Article 14 of the Convention, the specific vulnerability of an applicant on account of her intersectional identity<sup>83</sup>. The case concerned a female Nigerian sex worker who was physically and verbally mistreated by the Spanish police<sup>84</sup>. She alleged that she had been discriminated against on account of her sex, race and profession considering that, unlike other sex workers of European origin, she was subject to repeated police checks and victim of racist and sexist insults<sup>85</sup>. In finding a violation of Article 14 taken in conjunction with Article 3, the Court noted that "the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute"<sup>86</sup>. Though the ECtHR's reasoning is short, it appears significant that the Article 14 claim was even considered at all and that, in doing so, the Court gave so much weight to the applicant's intersectional identity<sup>87</sup> – even more so considering that the two third-party interveners in this case specifically asked the ECtHR to recognize

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<sup>81</sup> Haverkort-Speekenbrink (n 4) 185

<sup>82</sup> Smith (n 10) 94-96

<sup>83</sup> Lourdes Peroni, 'Racial Discrimination in Strasbourg (Part II): Intersectionality and Context' [2012] Strasbourg Observes < <https://strasbourgobservers.com/2012/10/17/racial-discrimination-in-strasbourg-part-ii-intersectionality-and-context/>> accessed 31 July 2018

<sup>84</sup> *B.S. v Spain* App no 47159/08 (ECHR, 24 July 2012), paras 6-28

<sup>85</sup> *ibid* para 29

<sup>86</sup> *ibid* para 71

<sup>87</sup> Smith (n 10) 95

intersectional discrimination<sup>88</sup>. In a more recent case concerning a 50-year-old woman who could not have sexual relations after a failed operation, the Court also found a violation of Article 14 on account of the reduction of the compensation awarded domestically on the basis of age and gender stereotypes<sup>89</sup>. What is particularly interesting in this case is that the Court did not rely on a comparator approach, pointing instead to the fact that “the applicant’s age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds”<sup>90</sup>. This was, however, heavily discussed in the separate opinions to the judgement.

The ECtHR has also found violations of the substantive provisions of the Convention in cases involving intersectional discrimination. For example, in two cases against Slovakia regarding the forced sterilisation of Roma women, the Court held that there had been a breach of Article 8, without finding it necessary to examine the Article 14 claims<sup>91</sup>. This tendency to avoid dealing with Article 14 claims, especially when there is clear evidence of systemic discrimination, shows, however, that the Court is still hesitant to address the structural inequalities that create and legitimise intersectional discrimination<sup>92</sup>.

Nevertheless certain features of the ECtHR’s framework reveal the potential of the Court to address claims of intersectional discrimination, especially the open-ended nature of Article 14<sup>93</sup>. Therefore it is not excluded that certain developments might take place in the future.

### **c) Concluding Observations**

While the ECHR framework does not face a “compartmentalisation problem” since all grounds of discrimination are addressed under a single provision, it is nevertheless confronted with a different issue, i.e. a tendency to avoid dealing with the discriminatory

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<sup>88</sup> *B.S. v Spain* App no 47159/08 (ECHR, 24 July 2012), paras 65-66

<sup>89</sup> *Carvalho Pinto de Sousa Morais v Portugal* App no 17484/15 (ECtHR, 25 July 2017)

<sup>90</sup> *ibid* para 53

<sup>91</sup> See *V.C. v Slovakia* App no 18968/07 (ECtHR, 8 November 2011) and *N.B. v Slovakia* App no 29518/10 (ECtHR, 12 June 2012)

<sup>92</sup> Smith (n 10) 97

<sup>93</sup> *ibid* 96

aspects of national practices altogether. Though it would appear that this does not prevent the ECtHR from occasionally adopting an intersectional approach, it still shows a reluctance of the Court to engage with intersectional discrimination. Furthermore, even though the ECtHR might have recently shown a willingness to rely on factors other than a similarly situated comparator to establish discrimination, it still seems to favour an approach based on comparison rather than on disadvantage or domination, for example. Therefore, the road to recognition of intersectional discrimination appears to be still rather long.

In the next section, I will examine the current EU equality law framework, as well as its anticipated developments, in order to determine the extent to which it acknowledges intersectional approaches to discrimination.

## 4. The Law of the European Union

### a) The EU Equality Law Framework

The existing EU anti-discrimination and equal treatment legislation rests on four Directives addressing different grounds of discrimination and different contexts of discrimination. Council Directive 2000/43/EC of 29 June 2000 (the “Racial Equality Directive”) implements the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>94</sup>. Its scope is the broadest as it applies to the fields of employment and occupation, access to goods and services, social protection and advantages, as well as education<sup>95</sup>. Council Directive 2000/78/EC of 27 November 2000 (the “Framework Directive”) establishes a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, in matters of employment and occupation<sup>96</sup>. Finally, the principle of equal treatment of men and women is protected by

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<sup>94</sup> Art 1 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Racial Equality Directive”) [2000] OJ L180/22

<sup>95</sup> Art 3 of Racial Equality Directive

<sup>96</sup> Art 1 and 3 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (“Framework Directive”) [2000] OJ L303/16

Directive 2006/54/EC of 5 July 2006 (recast)<sup>97</sup>, as regards employment and occupation, and by Council Directive 2004/113/EC of 13 December 2004<sup>98</sup>, as regards access to goods and services (the “Gender Equality Directives”).

EU law also makes a distinction between direct and indirect discrimination. On the one hand, direct discrimination is considered to occur when a person is treated less favourably than another is, has been or would be treated in a comparable situation on one of the grounds protected by EU law<sup>99</sup>. It therefore entails a comparability test and requires that a comparator, either real or hypothetical, be identified<sup>100</sup>. Whereas indirect discrimination, on the other hand, occurs when an apparently neutral provision, criterion or practice puts a particular group of persons at a particular disadvantage compared with other persons<sup>101</sup>. It therefore requires proof of a “disparate impact”, which can be established through statistical or any other means<sup>102</sup>. Another difference between the two notions relates to justifications. Indeed, indirect discrimination can be objectively justified by a legitimate aim, if the means of achieving that aim are appropriate and necessary, while only the exceptions expressly provided in the various Equality Directives may justify direct discrimination<sup>103</sup>.

## **b) EU Equality Law and Intersectionality**

EU equality law contains no express provision regarding multiple discrimination<sup>104</sup>. However, there are indications suggesting that equal treatment should be considered as a cohesive principle applicable across the different protected grounds<sup>105</sup>.

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<sup>97</sup> Art 1 and 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23

<sup>98</sup> Art 3 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37

<sup>99</sup> Art 2 (2) (a) of the Equality Directives

<sup>100</sup> Jonker (n 29) 212

<sup>101</sup> Art 2 (2) (b) of the Equality Directives

<sup>102</sup> Recital 15 of the Racial Equality Directive and the Framework Directive

<sup>103</sup> Haverkort-Speekenbrink (n 4) 94

<sup>104</sup> Chege (n 60) 277

<sup>105</sup> Bamforth, Malik and O’Cinneide (n 23) 545

In particular, Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU)<sup>106</sup> provides for the mainstreaming of gender and all the other protected grounds in the activities and policies of the EU. In relation to equality law, the principle of gender mainstreaming lead to the inclusion, in the recitals of the Racial Equality and Framework Directives, of a reference to the promotion of equality between men and women, “especially since women are often the victims of multiple discrimination”<sup>107</sup>. It also requires the EU Commission to include, in its report to the Parliament and the Council, an assessment of the impact on women and men of the measures taken by the Member States following implementation of these two Directives<sup>108</sup>. Intersectionality is also contemplated, for example, in Article 6 (2) of the Framework Directive in relation to age and gender. Finally, a number of soft law instruments published by various organs of the EU point towards a growing recognition of the necessity of adopting an intersectional approach to discrimination<sup>109</sup>.

The case-law of the CJEU, however, remains rather scarce. Indeed, only two cases have been identified as cautious attempts of the Court to acknowledge intersectional experiences: the *Lindorfer* case<sup>110</sup> and the *Galina Meister* case<sup>111</sup>. I will provide further analysis of the latter in the next section of this essay.

Nevertheless, it appears that EU law would not be averse to taking into account intersectional experiences in the future. But how can these experiences be addressed within EU law? In a report to the EU Commission, Sandra Fredman identified three possible avenues in that regard: the creation of new sub-grounds of discrimination, the combination of existing grounds or the expansive interpretation of those grounds in order to encompass intersectional experiences<sup>112</sup>. While she considered the third approach to

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<sup>106</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47

<sup>107</sup> Recital 14 of the Racial Equality Directive and Recital 3 of the Framework Directive

<sup>108</sup> Art 17 (2) of the Racial Equality Directive and Article 19 (2) of the Framework Directive

<sup>109</sup> See, for example, European Parliament Resolution 2003/2109(INI) on the situation of women from minority groups in the European Union [2004] OJ C 102E/497; Commission (EC), ‘Equality and non-discrimination in an enlarged European Union’ (Green Paper) COM (2004) 379 final, 28 May 2004; Commission (EC), ‘A Roadmap for equality between women and men’ (Communication) COM (2006) 92 final, 1 March 2006; European Parliament Resolution 2005/2164(INI) on the situation of Roma women in the European Union [2006] OJ C 298E/283

<sup>110</sup> Case C-227/04 P *Maria-Luise Lindorfer v Council of the European Union* [2007] ECR I-06767; See Burri and Schiek (n 31) 7

<sup>111</sup> Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] OJ C 165-4

<sup>112</sup> Fredman, *Intersectional discrimination* (n 30) 66

be the most promising, the second has been favoured by the European Parliament in its amendments to a Commission proposal for the adoption of a new Framework Directive in fields other than employment and occupation<sup>113</sup>. The relevant amendments are as follows (in bold):

*“Article 1*

*1. This Directive lays down a framework for combating discrimination, **including multiple discrimination**, on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.*

***2. Multiple discrimination occurs when discrimination is based:***

***(a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or***

***(b) on any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of***

***(i) sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive),***

***(ii) racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or***

***iii) nationality (in so far as the matter complained of is within the scope of Article 12 of the EC Treaty).***

***3. In this Directive, multiple discrimination and multiple grounds shall be construed accordingly.”***

This proposition is not without criticism, especially given the segregated nature of the EU equality law framework. According to scholars, it would be preferable to insert parallel provisions into all equality directives instead of only this planned one in order to avoid further confusion with regards to the scope of protection afforded<sup>114</sup>. Indeed, following the current proposition, not only would the EU conception of multiple discrimination exclude

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<sup>113</sup> European Parliament Resolution 2010/C 137E/22 of 2 April 2009 on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [2009] OJ C137E/68

<sup>114</sup> Burri and Schiek (n 31) 23

the intersection between gender and racial discrimination but it would also only apply to instances of discrimination outside of the employment field<sup>115</sup>. Considering that this is the field where most multiple discrimination claims arise so far<sup>116</sup>, this critique should not be easily dismissed.

### **c) Obstacles to an Intersectional Approach in EU Equality Law**

The compartmentalisation of legal frameworks is one of the most prominent difficulties raised by EU equality law. Indeed, the inconsistencies detailed above regarding the material scope of the Equality Directives and the way justification defences and exceptions are framed mean that intersectional discrimination claims can only be brought within the scope of the common level of protection<sup>117</sup>. Some progress could be made, however, following the Commission's proposal for a new Framework Directive. Indeed, the proposed Directive seeks to level up the scope of legal protection on grounds of religion, disability, age and sexual orientation to that already existing for racial or ethnic origin<sup>118</sup>. Paradoxically, this would mean that, while intersections between gender and other characteristics are the most recognized instances of intersectional discrimination, this ground would become the least protected by EU equality law<sup>119</sup>.

Secondly, like most single-axis frameworks, EU equality law relies on a "comparator approach" of discrimination, in particular when it comes to cases of direct discrimination. However, the Equality Directives also allow for the use of hypothetical comparators<sup>120</sup>. These can be helpful in cases where no real comparator(s) are available, but it remains unclear who these hypothetical comparators should be in cases of intersectional discrimination<sup>121</sup>. There are also indications that a comparator-free approach could be

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<sup>115</sup> *ibid* 11

<sup>116</sup> Bamforth, Malik and O'Conneide (n 23) 523

<sup>117</sup> *Chege* (n 60) 280

<sup>118</sup> See Art 3 (1) of the Commission (EC), 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426 final, 2 July 2008

<sup>119</sup> Mark Bell, 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' [2009] 3 *Equal Rights Review* 7, 9

<sup>120</sup> See Art 2 (2) (a) of the Equality Directives and Article 2 (2) (a) in COM (2008) 426 final

<sup>121</sup> *Chege* (n 60) 288

developed in EU law. Indeed, no comparators have been relied on in cases involving the less favourable treatment of women on grounds of pregnancy<sup>122</sup>. Moreover, no comparison is needed in cases of harassment as it is required to show that the purpose or effect of the unwanted conduct was to violate human dignity and to create an intimidating, hostile, degrading, humiliating or offensive environment<sup>123</sup>. The CJEU even rendered a ruling, in the *Galina Meister* case, which led some authors to conclude that some room had been left for the application of a contextual approach instead of a comparator approach, at least in recruitment cases<sup>124</sup>. In this case, the Luxembourg Court stated that a job applicant who “claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected, [is not entitled] to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process”<sup>125</sup>. However, the Court immediately went on to state that “a defendant’s refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination”<sup>126</sup>. Nevertheless, additional guidance would be needed for a contextual approach to be feasible<sup>127</sup>.

Moreover, a form of comparison is also inherent in the “disparate impact” test characterizing indirect discrimination claims. Indeed, the analysis focuses on the amount of those, in the relevant pool of comparison, who can comply with the provision, criterion or practice at issue in the instant case<sup>128</sup>. The definition of the relevant pool is therefore critical, but once again, it is not self-evident in cases of intersectional discrimination<sup>129</sup>.

Finally, the lack of data and in-depth studies regarding intersectional experiences also constitutes a problem within the European Union, with certain Members States even forbidding the collection of statistics on certain grounds such as race<sup>130</sup>. This may notably

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<sup>122</sup> See, for example, Case C-177/88 *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941

<sup>123</sup> See Art 2 (3) of the Racial Equality and Framework Directives and in COM (2008) 426 final ; Art 2 (c) of the Gender Equality Directives

<sup>124</sup> Jonker (n 29) 213-219

<sup>125</sup> Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] OJ C 165-4, para 46

<sup>126</sup> *ibid* para 47

<sup>127</sup> Jonker (n 29) 219

<sup>128</sup> Bamforth, Malik and O’Cinneide (n 23) 539

<sup>129</sup> *ibid*

<sup>130</sup> Chege (n 60) 279

pose a problem in cases of intersectional claims of indirect discrimination, where the numbers are not sufficient to establish the disparate effect of a policy<sup>131</sup>. Recital 37 of Directive 2006/54/EC encourages the development, analysis and diffusion of comparable statistics disaggregated by sex<sup>132</sup>, but this recommendation should also be followed for all other protected grounds and in a manner allowing the experience of people at the intersection to be taken into account as well.

#### **d) Concluding Observations**

Thus while EU equality law provides for a much more express recognition of intersectional discrimination than the ECHR framework, especially given the proposed new Framework Directive, its approach to discrimination is definitely not without flaws. The two most important ones relate to the compartmentalisation of legal protection and the reliance on comparators, not only in direct discrimination cases but also, to a certain extent, in cases of indirect discrimination. Nevertheless, there appears to be indications of progress towards a more uniform scope of protection as well as questioning of the comparator approach, at least when it comes to direct discrimination.

### **5. The Special Issue of the Islamic Headscarf**

In this final section, I will attempt to determine how an intersectional approach to headscarf cases brought before the ECtHR and the CJEU could have an impact on the level of protection afforded by these two Courts. But first, I would like to say a few words of the relation between intersectional theories and headscarf cases in general.

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<sup>131</sup> *ibid*

<sup>132</sup> Recital 37 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23

## a) Intersectionality and Headscarf Cases

As said earlier, headscarf cases are a typical example of intersectional discrimination as this type of discrimination only affects Muslim women<sup>133</sup>. However, it is not always clear what is the role played by gender in these cases. While some consider the wearing of the Islamic headscarf to be inherently in conflict with gender equality, others point at the “synergetic disadvantage” affecting Muslim women wearing the headscarf in various contexts<sup>134</sup>. In my opinion, the second approach should be preferred. Indeed, a number of social science studies show that the headscarf can have a variety of meaning, from an expression of personal piety and/or cultural identity to a symbolic challenge to the sexual exploitation of women’s bodies, and that it should not automatically be considered as a symbol of the subordination of women<sup>135</sup>.

On a different note, contrary to other forms of intersectional discrimination, bans on the wearing of Islamic headscarves are very visible issues in today’s society and they are usually hotly debated. An intersectional approach, therefore does not appear necessary to bring these issues to the fore. However, as explained above, headscarf cases are usually dealt with exclusively under the notions of religious freedom and/or discrimination based on religion. Consequently, the remaining question is: would an intersectional approach highlighting the gender dimension of such cases have an impact, in practice, on the level of protection granted to Muslim women wearing the headscarf within the ECHR and EU equality law frameworks? Before turning to the specificities of each examined framework, I would like to give a brief analysis of the relevance of intersectional theories to headscarf cases in general. I will do so by addressing a critique formulated by Sigtona Halrynjo and Merel Jonker in a 2016 article called “Naming and Framing of Intersectionality in Hijab Cases – Does It Matter? An Analysis of Discrimination Cases in Scandinavia and the

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<sup>133</sup> Halrynjo and Jonker (n 6) 281

<sup>134</sup> *ibid* 282

<sup>135</sup> Pierre Bosset, ‘Mainstreaming religious diversity in a secular and egalitarian State: the road not taken in *Leyla Sahin v. Turkey*’ in Eva Brems (ed) *Diversity and European Human Rights – Rewriting the Judgements of the ECHR* (Cambridge University Press 2013) 204

See, for example, Sirma Bilge, ‘Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women’ [2010] 31 *Journal of Intercultural Studies* 9; Madeleine Chapman, ‘Feminist dilemmas and the agency of veiled Muslim women: Analysing identities and social representations’ [ 2016] 23 *European Journal of Women’s Studies* 237

Netherlands”<sup>136</sup>. This article examines 14 headscarf discrimination cases in the workplace, brought before the Norwegian, Swedish, Danish and Dutch equality bodies. Based on this analysis, the authors argue that the “naming and framing” of headscarf cases as intersectional discrimination cases is not crucial for the protection of Muslim women against discrimination.

First, they point to the fact that the complainants themselves tend to focus on religion as the central ground of discrimination, while the gender dimension is usually taken for granted. Therefore, they conclude that an intersectional approach is not necessary to recognize the experiences of Muslim women<sup>137</sup>. To this, I would argue, however, that properly acknowledging the experiences of victims of intersectional discrimination should not be limited to the perceptions of these victims as to their own individual experience. On the contrary, one of the main elements of intersectionality theories relates to taking into account the wider structural context of discrimination within which the instant case occurred<sup>138</sup>. At no point is it required that the victim be cognizant of this wider context.

Secondly, and most importantly, Sigtona Halrynjo and Merel Jonker argue that the key factor influencing the outcome of headscarf cases relates to the interpretation of the justification rule by the adjudicating body rather than to the possibility of relying on intersecting grounds of discrimination when bringing the case in question<sup>139</sup>. I consider, however, that this argument is only valid if we understand intersectional approaches as limited to the redefinition of protected grounds and focused on identities. In this case, it is true that the “naming and framing” of cases of intersectional discrimination without questioning the existing equality framework is unlikely to bring about a higher level of protection. However, as explained earlier, most intersectional theories have moved beyond this limitation, suggesting instead to replace the current comparison-based approach of discrimination by some form of contextual or structural approach taking into account historical and sociological patterns of oppression and domination<sup>140</sup>. Understood

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<sup>136</sup> Sigtona Halrynjo and Merel Jonker, ‘Naming and Framing of Intersectionality in Hijab Cases – Does It Matter? An Analysis of Discrimination Cases in Scandinavia and the Netherlands’ [2016] 23 Gender, Work and Organization 278

<sup>137</sup> Halrynjo and Jonker (n 6) 284-289

<sup>138</sup> Makkonen (n 14) 5

<sup>139</sup> Halrynjo and Jonker (n 6) 291-292

<sup>140</sup> Smith (n 10) 79

as such, intersectional theories can definitely have an impact on the justification analysis, as is detailed below regarding the analysis performed by the ECtHR and the CJEU.

Finally, it should be noted that, as is acknowledged by Sigtona Halrynjo and Merel Jonker themselves, their analysis is only based on 14 case studies from four different equality bodies<sup>141</sup>. Therefore, their findings cannot be extended to the treatment of headscarf cases in all countries, much less to the methods followed at the European level by the ECtHR and the CJEU.

Following these clarifications, I will now examine the approach taken by these two Courts when it comes to cases relating to the wearing of the Islamic headscarf.

## **b) Headscarf Cases Within the ECHR Framework**

In a number of cases relating to bans on the wearing of Islamic headscarves, the ECtHR has readily accepted that these bans constituted interferences with the applicant's right to freedom of religion<sup>142</sup>. The main questions left before the Strasbourg Court are therefore whether such interferences pursue a legitimate aim and whether they are necessary and proportionate to the achievement of that aim. It should be noted that the reasoning held hereafter in that regard would also be applicable under Article 14 of the ECHR should the Court recognize the discriminatory nature of headscarf bans in the future.

Public security has been recognized by the ECtHR as a legitimate aim to restrict the wearing of religious symbols such as the Islamic headscarf<sup>143</sup>. However, the interference thus created is not considered proportionate in cases of blanket bans applicable to the public space, i.e. outside of selective security zones, in the absence of evidence of a general threat to public security<sup>144</sup>. These cases are fairly undisputed and it appears that an intersectional approach would probably not have any impact on their outcome.

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<sup>141</sup> Halrynjo and Jonker (n 6) 293

<sup>142</sup> See, for example, *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 178; *El Morsli v France* App no 15585/06 (ECtHR, 4 March 2008); *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015), para 47

<sup>143</sup> Steinbach (n 1) 34-35; See, for example, *El Morsli v France* App no 15585/06 (ECtHR, 4 March 2008)

<sup>144</sup> *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 139

Therefore, they will not be discussed any further.

### *Gender Equality*

More problematic is the Court's reliance on gender equality as a legitimate justification for restrictions on the wearing of the Islamic headscarf. Thus, in *Dahlab v Switzerland*, the ECtHR stated that the wearing of a headscarf was "hard to square with the principle of gender equality"<sup>145</sup>. This principle was also cited in *Leyla Sahin v Turkey*<sup>146</sup> in connection with the principle of secularism, to which I will come back in a moment. In this case, a Turkish medical student was refused admission to lectures and exams following a University circular prohibiting the wearing of the Islamic headscarf. In deciding that this ban was not contrary to the applicant's freedom of religion or right to education, the Strasbourg Grand Chamber relied, among other things, on the principle of equality between men and women<sup>147</sup>. However, as highlighted above and as detailed by Judge Tulkens in her dissenting opinion, "wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women"<sup>148</sup>. In fact, assuming that religion and equality are mutually exclusive concepts often relies on essentialised views of the beliefs of religious individuals<sup>149</sup>. According to Judge Tulkens, it is not the Court's role to determine "in a general and abstract way" the meaning of the headscarf<sup>150</sup>.

This approach of the ECtHR reflects one of the pitfalls of the single-axis framework identified earlier, i.e. that it allows adjudicators to rely on stereotypical assumptions and biases about protected grounds of discrimination rather than questioning them. In my opinion, an intersectional approach could offer a more modern insight into gender equality and help overcoming this kind of mislead reasoning<sup>151</sup>. Indeed, it could prompt the Court

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<sup>145</sup> *Dahlab v Switzerland* ECHR 2001-V, 429

<sup>146</sup> *Leyla Sahin v Turkey* ECHR 2005-XI, 115, paras 115-116

<sup>147</sup> *Ibid* paras 115-116

<sup>148</sup> Dissenting Opinion of Judge Tulkens in *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 11

<sup>149</sup> Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' [2017] 8 ELLJ 232, 237

<sup>150</sup> Dissenting Opinion of Judge Tulkens in *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 12

<sup>151</sup> Bosset (n 137) 205

to look into the broader context of discrimination specifically affecting Muslim women who wear the headscarf, notably the fact that they are often denied their agency, i.e. their capacity to act and think independently<sup>152</sup>. Taking this finding into consideration, I believe the ECtHR would consider the practice of wearing the headscarf to have been freely adopted, in the absence of proof to the contrary<sup>153</sup>.

But, even if it was established, in the case at hand, that the applicant did not choose freely to wear the headscarf, the justification test does not end here. It necessitates proof that the measure disputed before the Court is proportionate, including the fact that it is appropriate to reach the legitimate aim invoked<sup>154</sup>. Considering that women who are actually forced to wear the Islamic headscarf may risk “exclusion from the social life of the community, withdrawal of familial support, intimidation, threats, and even violence” if they were to take it off, it is safe to assume that a lot of them would prefer giving up their education or access to employment rather than being exposed to such risks. It is therefore questionable whether headscarf bans are indeed appropriate means of protecting gender equality in this context. On the contrary, education and employment are precisely the type of environments capable of empowering women and fostering gender equality, while “bans and exclusions echo that very fundamentalism these measures are intended to combat”<sup>155</sup>. I argue that adopting an intersectional approach taking this context into account would thus lead the ECtHR to conclude that a headscarf ban cannot be proportionate to achieve the goal of gender equality. Finally, such an approach could also underline the discriminatory nature of headscarf bans, such as the one provided in *Leyla Sahin v Turkey*, regarding access to education<sup>156</sup>, an issue that was, according to Judge Tulkens, not properly examined by the ECtHR in this case<sup>157</sup>. I believe that, in doing so, it would also prompt the Court to take into account the structural issues in educational equality faced by Muslim women in today’s society<sup>158</sup>.

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<sup>152</sup> Soltani (n 3)

<sup>153</sup> Dissenting Opinion of Judge Tulkens in *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 12

<sup>154</sup> *ibid* para 2

<sup>155</sup> *ibid* para 19

<sup>156</sup> Bamforth, Malik and O’Cinneide (n 23) 538

<sup>157</sup> Dissenting Opinion of Judge Tulkens in *Leyla Sahin v Turkey* ECHR 2005-XI, 115, paras 14-20

<sup>158</sup> See, for example, Jaclynn McDonnell, ‘Islam and Educational Equality for Muslim Women’ [2017] Law School Student Scholarship <[http://scholarship.shu.edu/student\\_scholarship/906](http://scholarship.shu.edu/student_scholarship/906)> accessed 15 August 2018

## Negative Religious Freedom

The ECtHR has also invoked the negative right of others not to be affected by the proselytising impact of headscarves to justify banning them in certain environments. This was notably the case in *Dahlab v Switzerland* where a teacher was prohibited from wearing her headscarf in the performance of her teaching duties at a State school<sup>159</sup>. This case law has been the subject of criticism as it rests on a certain stereotype characterising headscarf-wearing women as indoctrinated and attempting to proselytise others<sup>160</sup>. In the instant case, the empirical evidence was, however, clearly insufficient to corroborate this assertion<sup>161</sup>. While it is obviously necessary to prevent radical Islamism when it is encountered, it is also essential to distinguish between women wearing the headscarf and fundamentalists seeking to impose their religious views on others<sup>162</sup>. By contrast, in *S.A.S. v France*, the ECtHR showed much more reluctance in attributing to the wearing of a full-face veil, a meaning not supported by evidence<sup>163</sup>. I consider that an intersectional approach to headscarf cases would encourage the Court to continue in this direction by highlighting the kind of structural prejudice faced by Muslim women wearing the headscarf and thus contributing to a more nuanced analysis of the situation.

## Secularism

Finally, a fourth and frequently invoked aim justifying bans on the wearing of religious symbols, like the headscarf, relates to the principle of secularism, which can be understood as separating the State from religion so as to ultimately protect religious freedom, among others<sup>164</sup>. This principle was considered as compatible with the values of the European Convention for the first time in the *Leyla Sahin* case<sup>165</sup>. It was then relied on in *Dogru v France* and *Aktas v France* regarding a ban on headscarves worn by pupils

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<sup>159</sup> *Dahlab v Switzerland* ECHR 2001-V, 429

<sup>160</sup> Steinbach (n 1) 37

<sup>161</sup> *ibid*

<sup>162</sup> Dissenting Opinion of Judge Tulkens in *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 10

<sup>163</sup> *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 120

<sup>164</sup> Bosset (n 137) 198

<sup>165</sup> *Leyla Sahin v Turkey* ECHR 2005-XI, 115, paras 112-116

in French public schools<sup>166</sup>, as well as in *Ebrahimian v France* regarding the decision not to renew the applicant's contract as a social assistant in the psychiatric unit of a public hospital on account of her refusal to remove her headscarf<sup>167</sup>. The problem is that, while secularism may be implemented in a number of different ways, the ECtHR seems to have favoured a general and abstract examination of its conformity with the "values" of the Convention, instead of defining the criteria it has to meet in order to constitute a valid interference with religious freedom<sup>168</sup>. The Strasbourg Court indeed only refers to a rather vague obligation to maintain pluralism and tolerance between the various religions<sup>169</sup>. It does not make any difference between the performers and recipients of the public service in question, for example teachers and students<sup>170</sup>, nor does it distinguish between services directed at mature adults or at young children<sup>171</sup>.

In my opinion, one of the criteria that the ECtHR should also take into account in that regard is the intersectional impact that bans on the wearing of religious symbols might have on headscarf-wearing women, notably excluding them from access to employment in public services. In general, I consider that the intersectional context should be part of the proportionality assessment of headscarf cases, in particular regarding the balancing test to be applied between the interest of the individual and the pressing social need in a democratic society<sup>172</sup>.

Finally, I argue that the ECtHR should acknowledge the discriminatory nature of headscarf bans as well as adopt an intersectional approach to such discriminations in order to address their structural causes. That being said, I will now turn to the first two headscarf cases brought before the CJEU under the EU Equality Directives.

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<sup>166</sup> *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008), paras 62-72; *Aktas and Others v France (dec.)* App no 43563/08 (ECtHR, 30 June 2009)

<sup>167</sup> *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015), para 53

<sup>168</sup> Bosset (n 137) 198-199; Steinbach (n 1) 39

<sup>169</sup> Steinbach (n 1) 39

<sup>170</sup> Dissenting Opinion of Judge Tulkens in *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 7

<sup>171</sup> Bosset (n 137) 198-199

<sup>172</sup> Haverkort-Speekenbrink (n 4) 180

### c) Headscarf Cases in EU Equality Law

On 14 March 2017, the CJEU released its judgments in the cases of *Achbita*, *Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* (hereafter referred to as *Achbita*)<sup>173</sup> and *Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole Univers* (hereafter referred to as *Bougnaoui*)<sup>174</sup>. These rulings were strongly anticipated, as they constituted the Court's first decisions on the matter of bans imposed by private employers on the wearing of religious signs. In the *Achbita* case, Mrs Achbita used to work as a receptionist for G4S Secure Solutions NV but was dismissed because she insisted on wearing her headscarf, contrary to the company's "policy of neutrality" prohibiting the visible wearing of political, philosophical or religious signs during working hours<sup>175</sup>. As for the *Bougnaoui* case, it related to the alleged discriminatory character of the dismissal by Micropole Univers SA of one of its Muslim employees because she refused to remove her headscarf while being in contact with the company's customers, following a complaint from one of them<sup>176</sup>. Both applicants considered that they had been discriminated against on the basis of their religion and filed a complaint before the national courts, which then requested a preliminary ruling from the CJEU on the matter. The judgements of the Court in these cases were subject to important criticism relying on various arguments. In this essay, I will focus on those which might be influenced by the adoption of an intersectional approach to discrimination.

#### *Direct or Indirect Discrimination*

In *Achbita*, the Court decided that an internal rule prohibiting the wearing of visible signs of political, philosophical or religious beliefs did not constitute direct discrimination since it covered any manifestation of belief without distinction and there was no evidence that it

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<sup>173</sup> Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* [2017] OJ C 151–3

<sup>174</sup> Case C-188/15, *Bougnaoui and ADDH v. Micropole* [2017] OJ C 151–4

<sup>175</sup> Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* [2017] OJ C 151–3, paras 10-16

<sup>176</sup> Case C-188/15, *Bougnaoui and ADDH v. Micropole* [2017] OJ C 151–4, paras 13-18

had been applied differently to the applicant<sup>177</sup>. However, it was left to the national court to decide whether this apparently neutral provision particularly disadvantaged persons adhering to a specific religion or belief thereby constituting indirect discrimination<sup>178</sup>. In *Bougnaoui*, the CJEU held that it was for the national court to determine if the dismissal of the applicant corresponded to direct discrimination of Ms Bougnaoui or if it was based on an internal rule similar to that of the company in *Achbita*, in which case it could constitute indirect discrimination<sup>179</sup>.

This reluctance of the Court to decide on the existence of indirect discrimination illustrates the difficulties of the single-axis framework's comparator approach in establishing a disparate impact in intersectional discrimination cases. The first difficulty, in these cases, relates to the fact that not all Muslim are affected by the contested measure. Indeed, only women wear the headscarf and not all of them do<sup>180</sup>. Secondly, it is not very clear which comparator should be relied on in order to determine the proportion of people who are affected: adherents of other religions or people who do not follow a religion (considering that among these there might also be diversity in the practice of wearing conspicuous symbols)<sup>181</sup>? Finally, considering that banning religious symbols might have a more pronounced effect on members of a certain sex<sup>182</sup>, should the comparators be men, women or both? According to me, an intersectional approach replacing the comparator test by a contextual or structural assessment would allow the CJEU to acknowledge that bans on the wearing of religious symbols are obstacles often faced by Muslim women in today's society and which usually rely on a variety of prejudices regarding religion and gender. This Court would, therefore, be able to decide that such bans may *a priori* have a discriminatory nature, which would then have to be confirmed following a justification-like test.

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<sup>177</sup> Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* [2017] OJ C 151-3, paras 30-32

<sup>178</sup> *Ibid* para 34

<sup>179</sup> Case C-188/15, *Bougnaoui and ADDH v. Micropole* [2017] OJ C 151-4, paras 32-34

<sup>180</sup> Haverkort-Speekenbrink (n 4) 96

<sup>181</sup> *Ibid* 97

<sup>182</sup> Eleanor Spaventa, 'What is the point of minimum harmonization of fundamental rights? Some further reflections on the Achbita case' [2017] EU Law Analysis <<http://eulawanalysis.blogspot.nl/2017/03/what-is-point-of-minimum-harmonization.html>> accessed 5 December 2017

## Justification

In *Achbita*, the CJEU provided some guidance in that regard, in case the referring court was to find that the neutral policy disputed before it amounted to indirect discrimination.

First it stated that “an employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate”<sup>183</sup>. Interestingly, the Court referred to the decision of the ECtHR in *Eweida v UK* to support this finding<sup>184</sup>. However, if the Strasbourg Court did indeed find, in that judgement, that an employer’s desire to display a certain corporate image was a legitimate aim, it immediately went on to decide that this aim could not outweigh a person’s freedom to manifest their religion if there was no evidence of a real encroachment to the employer’s interests<sup>185</sup>. Importantly for our purposes, the ECtHR also considered the socio-economic harm faced by the applicant, a Christian wearing a cross on a chain around her neck, taking into account the possibility of changing jobs and the seriousness of losing one’s job<sup>186</sup>. In my opinion, an intersectional approach would highlight the specific structural difficulties usually faced by Muslim women in that regard and would, therefore, reinforce the importance of these two factors in the proportionality assessment undertaken by the Court<sup>187</sup>.

This analysis of the Strasbourg Court was nevertheless not part of the CJEU’s reasoning since it did not define the content of the freedom to conduct business nor did it explain the necessity of a policy of neutrality in protecting such freedom. Absent any kind of balancing test such as this one, the Court appears to consider the legitimacy of the purpose of neutrality to be self-evident<sup>188</sup>. This conclusion is reminiscent of the ECtHR’s case law

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<sup>183</sup> Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* [2017] OJ C 151–3, para 38

<sup>184</sup> *ibid* para 39

<sup>185</sup> *Eweida and Others v United Kingdom* ECHR 2013-I, 215, para 94

<sup>186</sup> Saïla Ouald-Chaib and Valeska David, ‘European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it.’ [2017] Strasbourg Observers <<https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/>> accessed 2 December 2017, referring *Eweida and Others v United Kingdom* ECHR 2013-I, 215, paras 83 and 109

<sup>187</sup> *ibid*

<sup>188</sup> Robin Bankel, ‘A Critical Commentary on the ECJ’s Judgment in *G4S v Achbita*’ [2017] *ejiltalk* <<https://www.ejiltalk.org/a-critical-commentary-on-the-ecjs-judgment-in-g4s-v-achbita/>> accessed 2 December 2017

regarding secularism in that, as detailed earlier, the Court has always been reluctant to define this notion as well as the criteria for its compliance with the principles of the ECHR<sup>189</sup>. But while the idea of secularism might be justified considering the nature of the State and its duty of neutrality<sup>190</sup>, such a duty cannot really be extended to private parties<sup>191</sup>, especially knowing that this might be “an easy cover-up for prejudice”<sup>192</sup>. The same critique applies to the recommendation that national courts take into account the possibility for the employer to offer a post not involving any visual contact with customers to those employees refusing to abide by a neutrality policy<sup>193</sup>. Indeed, “towards whom is a company neutral when it decides to hide its visibly religious employees for the sake of their corporate image”<sup>194</sup>? What kind of message is sent to Muslim women, for example, when a headscarf-wearing employee is dismissed or relegated to a back-office job on account of such policies?

These findings regarding neutrality appear all the more surprising knowing that, in *Bougnaoui*, the CJEU decided that:

The willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of [Article 4 (1) of the Framework Directive]<sup>195</sup>.

This is so because such a requirement must be “objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out”<sup>196</sup>. This decision has been generally perceived as a positive step on the part of the Court<sup>197</sup>. However, it is also seen as contradictory with its findings in *Achbita*, where neutrality

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<sup>189</sup> Steinbach (n 1) 41

<sup>190</sup> See, for example, *Leyla Sahin v Turkey* ECHR 2005-XI, 115, para 107

<sup>191</sup> Spaventa (n 184)

<sup>192</sup> Erica Howard, ‘Islamic headscarves and the CJEU: Achbita and Bougnaoui’ [2017] 24(3) MJ 348, 356

<sup>193</sup> Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* [2017] OJ C 151–3, para 43

<sup>194</sup> Ouald-Chaib and David (n 187)

<sup>195</sup> Case C-188/15, *Bougnaoui and ADDH v. Micropole* [2017] OJ C 151–4, para 41

<sup>196</sup> *ibid* para 40 and Directive 2000/78/EC (n 40) art 4(1)

<sup>197</sup> Howard (n 194) 362-364

policies were considered legitimate although, in reality, such policies ultimately aim at taking customer preferences into account<sup>198</sup>.

In my opinion, an intersectional approach to discrimination would, first, highlight that we all have multiple identities and that neutrality should not be defined by reference to the normative standards of the majority or those in position of higher power. Indeed, in an increasingly diverse society, wanting to hide diversity in the workplace in order to appeal to as many customers as possible is not really a realistic path to take<sup>199</sup>. Secondly, I believe that national jurisdictions should account for the intersectional impact that neutrality policies may have on Muslim women's access to work, when assessing their proportionality. Hopefully, this could help tip the scale in favour of the applicant when balancing her interests with those of her employer.

## 6. Conclusion

By way of conclusion, we can say that adopting an intersectional approach can indeed improve the way headscarf cases are being dealt with at the European level and enhance the protection of Muslim women who wear the Islamic headscarf. However, this requires to go beyond the mere "naming and framing" of headscarf cases as intersectional discrimination, and actually challenge the current framework to take into account the structural and socio-economic determinants of the phenomenon.

At the level of the ECtHR, a first step would be to acknowledge the discriminatory nature of headscarf bans and to address them not only under the right to religious freedom but also as a specific form of discrimination against Muslim women under Article 14 of the European Convention. In doing so, the Court should not only refer to its newfound recognition of indirect discrimination but also question its comparison-based approach to discrimination and replace it with an approach based on disadvantage or prejudice, for

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<sup>198</sup> Vickers (n 151) 250-251

<sup>199</sup> Ouald-Chaib and David (n 187)

example. Then regarding justification, the following comments are relevant whether the case is being examined under Article 9 or Article 14 of the ECHR.

First, an intersectional approach would require not to consider as legitimate the aims of gender equality, the protection of the negative religious freedom of others and secularism, absent any evidence that these are indeed being endangered by the wearing of the Islamic headscarf in the case at hand. Indeed, considering the headscarf to be inherently incompatible with these principles relates to a specific form of prejudice experienced by headscarf-wearing women: the fact that they are often perceived to be indoctrinated, incapable of deciding on their own and attempting to proselytise others. Acknowledging the intersectional nature of the discrimination faced by Muslim women should help the Strasbourg Court in that regard.

Secondly, an intersectional approach would require the ECtHR to take into account the socio-economic impact of headscarf bans on Muslim women when assessing the proportionality of the measure at stake. This should prevent the Court from finding these bans appropriate to foster gender equality. This might also play a decisive role in the balancing test between the interest of the applicant and the pressing social need invoked in the case at hand.

When it comes to the CJEU, our findings are a little different. Indeed, the EU equality law framework appears much more welcoming to the idea of intersectionality theories than the ECtHR. However, the effective adoption of an intersectional approach would require a major obstacle to be lifted: the compartmentalisation of the EU equality law framework. The proposition of the EU Commission for a new Framework Directive, as amended by the European Parliament, constitutes a first step in that regard but a lot of work remains to be done.

Regarding the first and so far only headscarf cases brought before the CJEU, it was argued that an intersectional approach, if it was to be adopted, would have three potential impacts on the current case-law. First, it would clarify that internal policies prohibiting the wearing of visible signs of political, philosophical or religious beliefs constitute, at first

glance, instances of indirect discrimination. Secondly, it would support challenges against the relevance of neutrality as a legitimate goal for employers in the private field. Finally, it would prompt the CJEU to take into account the socio-economic impact of neutrality policies on Muslim women's access to employment when assessing the proportionality of the disputed measure.

However, most of these potential impacts on the ECtHR and CJEU case law cannot take place if they are not supported by evidence. Therefore, I would like to reiterate the importance of developing statistical data as well as qualitative studies regarding the headscarf issue, in order to effectively map its determinants.

Finally, I would like to conclude by saying that intersectionality theories have the potential of profoundly reshaping our understanding of discrimination<sup>200</sup>. If they succeed in providing a viable replacement of the single-axis comparison-based framework – which is, arguably, still a work in progress<sup>201</sup> –, they should lead not only to better judicial outcomes for victims of intersectional discrimination but also a better use of positive action<sup>202</sup> and enhanced, more effective policies aimed at combating the phenomenon<sup>203</sup>.

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<sup>200</sup> Makkonen (n 14) 36

<sup>201</sup> Quinn (n 35) 63

<sup>202</sup> Bamforth, Malik and O'Conneide (n 23) 548

<sup>203</sup> Makkonen (n 14) 36

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