

**THINLY VEILED DISCRIMINATION:  
MUSLIM WOMEN, INTERSECTIONALITY AND THE HYBRID SOLUTION  
OF REASONABLE ACCOMMODATION AND PROACTIVE MEASURES**

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*This article examines the discrimination experienced by Muslim women wearing headscarves in Europe, identifying this as a form of intersectional discrimination. Despite the recognition of intersectional discrimination being hindered by obstacles inherent in the current framework of European anti-discrimination law, a number of academics have suggested that the Court of Justice of the European Union is nonetheless capable of responding to this form of discrimination. However, this article demonstrates that it remains unlikely that the Court will respond to intersectional discrimination within the remit of the current law, as exemplified by its failure to do so in the recent cases of *Achbita v G4S Solutions* and *Bougnaoui v Micropole SA*. As it appears that Muslim women's right to wear the headscarf is not adequately protected under the current law, a novel hybrid solution is suggested, based on the introduction of an employer duty of reasonable accommodation of religion in conjunction with proactive measures aimed at combating intersectional discrimination. Such an approach would provide an immediate stopgap to prevent the position of Muslim women in Europe declining further, as well as initiating long-term efforts to tackle the problem of intersectional discrimination.*

**Keywords:** CJEU, intersectional discrimination, Islamophobia, religious symbols, religious discrimination

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## I. INTRODUCTION

It is undeniable that discrimination against Muslim women in Europe is rife. In the aftermath of 9/11, further Islamist terrorist attacks in France, Belgium, Germany and the UK, and the European refugee crisis, Islamophobia and anti-Muslim rhetoric have escalated alarmingly.<sup>1</sup> As Muslim women are immediately identifiable as such when wearing the hijab, niqab or burqa (referred to here collectively as 'the headscarf' for ease of reference), they have borne the brunt of this, encountering a greater likelihood of being discriminated against when wearing the garment.<sup>2</sup>

However, the discrimination experienced by Muslim women wearing the headscarf cannot be regarded as solely based on their religion: as the garment

<sup>1</sup> Jim Wolfreys, *Republic of Islamophobia: The Rise of Respectable Racism in France* (Hurst Publishers 2018) 22.

<sup>2</sup> European Union Agency for Fundamental Rights, *EU-MIDIS Data in Focus Report 5: Multiple Discrimination* (2010) 4.

is worn exclusively by women and predominantly by those with ethnic minority or immigrant status, their discrimination must be recognised as additionally situated on the grounds of gender and ethnic origin. Thus, they face intersectional discrimination, which not only means that their unique 'synergistic' experience of discrimination is different to that which would be experienced under any of the three grounds alone; it is also marked as particularly harmful: '[i]t gets worse when you're not just a Muslim; you're a woman, you're visibly Muslim, possibly you're an immigrant'.<sup>3</sup> Despite these factors compounding Muslim women's experience of discrimination, they are often disregarded in the discussion of their right to wear the headscarf. As the headscarf is widely perceived to be emblematic of the oppression of women under Islam, it is deemed incongruent with the protection of women's rights, and its intersectionality is obscured.<sup>4</sup>

Notwithstanding the evident ignorance and stereotype informing this opposition to the headscarf, these views have played a role in the increasing ubiquity of headscarf bans across the continent, which have so far been introduced in Germany, France, Belgium and Austria.<sup>5</sup> Whilst previously confined to public spaces including courts and schools, such bans have recently been legitimised in the private workforce, with the Court of Justice of the European Union (CJEU) holding in *Achbita* and *Bougnaoui* that employer policies prohibiting the wearing of religious symbols do not constitute religious discrimination.<sup>6</sup> Absent from the judgement was any

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<sup>3</sup> Kimerlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139, 139; Jason D'Souza and Ash Kelly, 'Vancouver Woman Says Hijab Invites Racial Abuse, Harassment' (*CBC.CA*, 28 May 2017) <<http://www.cbc.ca/news/canada/british-columbia/vancouver-woman-says-hijab-invites-racial-abuse-harassment-1.4134789>> accessed 17 March 2018.

<sup>4</sup> Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 16.

<sup>5</sup> Matthew Weaver, 'Burqa Bans, Headscarves and Veils: A Timeline of Legislation in the West' (*The Guardian*, 14 March 2017) <<https://www.theguardian.com/world/2017/mar/14/headscarves-and-muslim-veil-ban-debate-timeline>> accessed 28 November 2017.

<sup>6</sup> Case C-157/15 *Achbita v G4S Secure Solutions NV* EU:C:2017:203; Case C-188/15 *Bougnaoui v Micropole SA* EU:C:2017:204.

consideration of how such bans disproportionately affect Muslim *women* and are thus intersectionally discriminatory.

It is, however, questionable as to whether the CJEU has the ability to respond to such intersectional discrimination within the current legal framework. This article examines the obstacles inherent in European anti-discrimination law that prevent intersectional discrimination from being addressed. The paper further considers arguments raised by Sandra Fredman, Dagmar Schiek and Karon Monaghan, all of whom suggest that despite these obstacles the CJEU remains able to recognise intersectional claims.<sup>7</sup> These arguments are questioned in light of recent case law: the Court's failure to recognise the intersectional discrimination at play not only in *Achbita* and *Bougnaoui*, but also in its first case regarding discrimination explicitly on the basis of a combination of two grounds, *Parris v Trinity College Dublin*, suggests that recognition of intersectionality under the current framework is ultimately unlikely.<sup>8</sup> Whilst *Achbita* and *Bougnaoui* have previously been examined from an intersectional perspective, this article seeks to fill a gap by demonstrating how specific obstacles present in European anti-discrimination law operated to prevent the intersectional discrimination apparent in these cases from being addressed by the Court.<sup>9</sup>

In light of the fact that it is unlikely that the CJEU will address intersectional discrimination within the current framework, it is submitted that a change in

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<sup>7</sup> Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (European Network of Legal Experts in Gender Equality and Non-Discrimination 2016); Dagmar Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law' (2005) 12(4) *Maastricht Journal of European and Comparative Law* 427; Karon Monaghan, 'Multiple and Intersectional Discrimination in EU Law' (2011) 13 *European Anti-Discrimination Law Review* 20, 25.

<sup>8</sup> Case C-443/15 *Parris v Trinity College Dublin* EU:C:2016:897.

<sup>9</sup> Eugenia Pastor, 'Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational Courts, Two Different Approaches' (2016) 5(2) *Oxford Journal of Law and Religion* 255, 255; Mathias Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris' (2017) 54(6) *Common Market Law Review* 1835, 1848; Dagmar Schiek, 'On Uses, Abuses and Non-uses of Intersectionality before the European Court of Justice' (2018) 7(3) *International Journal of Discrimination and the Law* 82, 95.

the law is required in order to better protect Muslim women's right to wear the headscarf and to better combat intersectional discrimination. A novel hybrid solution is suggested, based on the combination of a reasonable accommodation model alongside the implementation of proactive measures. Such an approach would allow for the immediate enhancement of protection against discrimination for Muslim women at work via accommodation of the headscarf – which would be better able to respond to the intersectionality of such discrimination through a highly individualised response – whilst long-term efforts against systematic disadvantage are initiated by proactive measures, ensuring that the need to dismantle the societal roots of such discrimination is not disregarded.

Section II first introduces the concept of intersectionality before providing further analysis of Muslim women's experience of this type of discrimination. It then examines the Eurocentric perceptions of the headscarf that operate to obscure the intersectional nature of Muslim women's experience of discrimination as the basis for a subsequent argument that reform of religious discrimination law alone will not be enough to combat the socially ingrained nature of Muslim women's disadvantage. Section III examines the framework of European anti-discrimination law in order to demonstrate that it is ill-equipped to recognise and respond to intersectional discrimination. Assertions that the CJEU still has the capacity to address this issue are then considered. Analysis of its failure to do so in *Parris*, *Achbita* and *Bougnaoui* demonstrates that it is unlikely that the Court will in practice respond to intersectional discrimination within the remit of the current law and that it is thus unable to address the marginalisation of Muslim women.

Section IV presents legislative changes to combat intersectional discrimination that have been suggested previously in the literature, before making the case for the hybrid solution as a preferable response to this problem. It first addresses the advantages and disadvantages of the implementation of reasonable accommodation from an intersectional perspective, concluding that whilst such a model would be beneficial in affording greater protection for the individual, it does not work to combat the socially ingrained roots of such discrimination. Proactive measures are presented as a means of overcoming this inherent weakness. The hybrid solution, based on a combination of these two approaches, is thus suggested

as the ideal means of combating the issue of intersectional discrimination against Muslim women. In order to demonstrate this, *Achbita* and *Bougnaoui* are re-examined to show how the obstacles inherent in the current law would have been overcome had the hybrid solution been in place.

## II. INTERSECTIONALITY AND MUSLIM WOMEN

The concept of intersectional discrimination encapsulates the unique form of disadvantage experienced by those who exhibit more than one protected characteristic. Muslim women who wear the headscarf are an archetypal example of persons facing intersectional discrimination: not only do they encounter disadvantage based on the manifestation of their religion, but the marginalisation they incur in comparison to Muslim men when wearing the headscarf marks them as further discriminated against on the grounds of gender, which is also compounded by the fact that the majority of Muslim women wearing the headscarf are of ethnic minority origin.<sup>10</sup> However, the gender discrimination at play in the discrimination accrued due to wearing the headscarf is often obscured. As the Eurocentric perception of the headscarf denounces the garment as incongruent with the principles of gender equality, the disadvantage Muslim women experience *as women* is generally disregarded. This section addresses these factors in turn to develop an understanding of the present position of Muslim women in Europe from an intersectional perspective.

### *I. Intersectionality*

The term 'intersectionality' was coined by Kimberlé Crenshaw in order to identify the cumulative disadvantage experienced by individuals who encounter discrimination on the basis of multiple grounds.<sup>11</sup> Using the analogy of traffic at an intersection to conceptualise intersectionality, Crenshaw noted that '[i]f an accident happens in an intersection, it can be caused by cars travelling from any number of directions and, sometimes, from all of them'.<sup>12</sup> Similarly, if an ethnic minority woman experiences

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<sup>10</sup> European Union Agency for Fundamental Rights, *EU-MIDIS II: Muslims – Selected Findings* (2017) 7.

<sup>11</sup> Crenshaw (n 3) 140.

<sup>12</sup> Crenshaw (n 3) 139.

discrimination, her suffering could result from sex discrimination, race discrimination or other forms of discrimination – but most often, it arises due to their confluence. Thus, it is not possible to pinpoint the harm as arising from a single ground of discrimination; rather, their concurrence results in a different experience from that which would have been encountered under any of the grounds alone. The result is thus qualitatively different or 'synergistic'.<sup>13</sup> This form of discrimination is widely considered to be particularly severe, 'just as an accident caused by cars from all directions leads to more damage'.<sup>14</sup>

Crenshaw observed that such an experience is not generally catered for by the law as each ground of discrimination is typically defined from the perspective of the most privileged of that group, whose circumstances are not influenced by a further compounding protected characteristic.<sup>15</sup> Conaghan notes that the result of this 'top-down' model is that, for example, in gender discrimination cases, the experience of white women is often 'the measure of subordination overall', obscuring the fact that ethnic minority women's disadvantage is also routed through their ethnic minority status.<sup>16</sup> The standard single-axis approach of anti-discrimination law is therefore unable to adequately capture and respond to this form of disadvantage.<sup>17</sup>

A further disadvantage of the law's 'tendency to compartmentalise' individuals into discrete categories is that this approach fails to encapsulate the lived experience of the person discriminated against.<sup>18</sup> Because 'human beings do not exist as compartmentalised entities', the effort to achieve equality based on the single-axis approach can necessarily only partially succeed in providing what is needed for equality to be experienced by the

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<sup>13</sup> Fredman (n 7) 7; Crenshaw (n 3) 139.

<sup>14</sup> Susanne Burri and Dagmar Schiek, *Multiple Discrimination in EU Law Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Network of Legal Experts in the Field of Gender Equality 2009) 4.

<sup>15</sup> Crenshaw (n 3) 152.

<sup>16</sup> Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Emily Grabham et al. (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 21, 25.

<sup>17</sup> Crenshaw (n 3) 140.

<sup>18</sup> Conaghan (n 16) 27.

individual.<sup>19</sup> Crenshaw therefore recommended that the focus of the law should instead be on the lived experience of those who are intersectionally discriminated against, in order to accurately capture the disadvantage faced and the protection thus needed.<sup>20</sup> Such an intersectional approach based on individualised and lived experience is advantageous in that it is conducive to the achievement of substantive equality.<sup>21</sup> Whilst formal equality dictates that 'likes be treated alike', such a uniform approach does nothing to acknowledge the institutionalised marginalisation of certain groups and thus tends to reproduce the sexual, racial and class inequality at the root of society by treating everyone the same.<sup>22</sup> The recognition of intersectional discrimination therefore works to eliminate disadvantage beyond that which can be deciphered by assuming all persons with a particular characteristic have the same experience.

Beyond the aim of representing and providing an adequate remedy for the individual's lived experience of discrimination, intersectionality aims to promote the idea that disadvantage does not flow from identity categories or grounds of discrimination itself, but rather the 'historically constituted structures ... of racism, colonialism, patriarchy, [and] sexism' that perpetuate it.<sup>23</sup> Cooper suggests that the intersectional approach to opposing social inequality therefore demands an effort be undertaken to dismantle these structures, as any attempt to eradicate inequality without tackling its root cause will necessarily be temporary and short-lived.<sup>24</sup> By recognising and

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<sup>19</sup> Schiek (n 7) 441.

<sup>20</sup> Crenshaw (n 3) 152.

<sup>21</sup> Fredman (n 7) 36.

<sup>22</sup> Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59(3) *Cambridge Law Journal* 562, 562; Iris Marion Young, 'Structural Injustice and the Politics of Difference' in Emily Grabham et al. (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 274.

<sup>23</sup> Rita Dhamoon, 'Considerations on Mainstreaming Intersectionality' (2011) 64(1) *Political Research Quarterly* 230, 234.

<sup>24</sup> Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press 2004) 191; Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in Ineke Boerefijn et al. (eds), *Temporary Special Measures: Accelerating the de facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia 2003) 125.

responding to the lived experience of the most marginalised in order to achieve substantive equality for all, and in working to eradicate the structural causes of inequality, intersectionality has the potential to reverse 'not just the epiphenomenon of discrimination but its underlying political economy'.<sup>25</sup> Such an approach would be of profound value for Muslim women wearing the headscarf, a prime example of persons suffering from intersectional discrimination.

## 2. *The Headscarf as the 'Paradigm Symbol' of Intersectionality*

Muslim women are discriminated against on the grounds of their religion, their sex, and their ethnicity. As the headscarf operates as a religious symbol worn exclusively by women and predominantly by those with ethnic minority status, it thus appears as 'the paradigm symbol of intersectionality'.<sup>26</sup> The effect of the intersectional discrimination experienced by headscarf wearers is deeply concerning. As the Open Society Institute reports, many Muslim women perceive their only options as being 'to accept their exclusion from mainstream employment or to remove their headscarf'.<sup>27</sup> Where removing their headscarf is not an option they wish to pursue, many Muslim women adopt professionally detrimental 'coping strategies', such as avoidance of customer contact, seeking alternative employment within the bounds of their own religious or ethnic community, or ultimately resigning from the workplace altogether.<sup>28</sup> Research by the European Union (EU) Agency for Fundamental Rights substantiates this claim, revealing that Muslim women who usually wear a headscarf outside their home are in employment to a lesser extent than women who do not (29% and 40%, respectively).<sup>29</sup> The intersectionality of the discrimination faced by headscarf wearers, and the

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<sup>25</sup> Gerard Quinn, 'Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law' (2016) 15 *Equal Rights Review* 63, 72.

<sup>26</sup> European Union Agency for Fundamental Rights (n 10) 7; Frédérique Ast and Riem Spielhaus, 'Tackling Double Victimization of Muslim Women in Europe: An Intersectional Response' (2012) 16 *Mediterranean Journal of Human Rights* 357, 362.

<sup>27</sup> Open Society Institute, *Muslims in Europe: A Report on 11 EU Cities* (2010) 127.

<sup>28</sup> European Network Against Racism, *Forgotten Women: The Impact of Islamophobia on Muslim Women* (2016) 20.

<sup>29</sup> European Union Agency for Fundamental Rights (n 10) 30.

gravity of its consequences, is undeniable. Recognition of the intersectional nature of their disadvantage is the only means of formulating an adequate remedy to it, which is impossible when their discrimination is considered as solely based on their religion.

### 3. *Perceptions of the Headscarf – Obscuring Intersectionality?*

Although it has been established that Muslim women face intersectional discrimination on the grounds of religion, ethnic origin and gender, this latter element is often obscured in considerations of their right to wear the headscarf, as the Eurocentric lens through which the headscarf is viewed regards it as irreconcilable with the protection of women's rights.<sup>30</sup> As the headscarf is commonly viewed as an instrument of the oppression of women under Islam, the promotion of gender equality is frequently utilised as an argument in favour of the restriction of the headscarf in Europe.<sup>31</sup> However, this interpretation of gender equality is arguably just as paternalistic and oppressive to women as that which it aims to combat. On the assumption that the West must liberate them from their oppressive religion, Muslim women are presumed to be incapable of self-determination and are denied their 'freedom as autonomous persons in their own right'.<sup>32</sup>

This 'gender equality' argument was employed by the ECtHR in *Dablab v Switzerland* and *Şahin v Turkey*.<sup>33</sup> In the former case, the Court rejected the claim of a Muslim primary school teacher that her school's ban on headscarves violated her freedom of religion under Article 9 and amounted to sex discrimination under Article 14 of the European Convention on Human Rights (ECHR), noting that the headscarf 'appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to

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<sup>30</sup> Anna Korteweg and Gökçe Yurdakul, *The Headscarf Debates: Conflicts of National Belonging* (Stanford University Press 2014) 12.

<sup>31</sup> Peter O'Brien, *The Muslim Question in Europe: Political Controversies and Public Philosophies* (Temple University Press 2016) 141.

<sup>32</sup> Susan Rottmann and Myra Feree, 'Citizenship and Intersectionality: German Feminist Debates About Headscarf and Antidiscrimination Laws' (2008) 15(4) *Social Politics* 481, 485; Irene Zampi and Neil Chakraborti, *Islamophobia, Victimisation and the Veil* (Palgrave Pivot 2014) 10; Jill Marshall, 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion' (2008) 14 *Res Publica* 177, 189.

<sup>33</sup> ECHR 2001-V; ECHR 2005-XI.

square with the principle of gender equality'.<sup>34</sup> In the latter case, the Court held that the applicant's exclusion from university due to her desire to wear the headscarf was not a violation of Article 9, as upholding the principle of secularism was necessary to protect the democratic system in Turkey, which also held gender equality to be a fundamental principle.<sup>35</sup> In these cases the ECtHR's Eurocentric interpretation of 'gender equality' as being incongruent with the right to wear the headscarf ultimately obscured the intersectional discrimination at play. The Muslim women's status as female was rendered 'so disconnected from their identities' that the concept of gender equality was used *against* the women, with the result that they were excluded from the workplace and from higher education.<sup>36</sup>

Notably missing from the European debate surrounding Muslim women's right to wear the headscarf is any consideration of their views on the matter. The assertion that the headscarf is an oppressive symbol mandated by the Koran fails to acknowledge that the garment is not only voluntarily worn by Muslim women, but is defended by them on the basis that it represents an exercise of agency and an expression of 'bold and brave individualism'.<sup>37</sup> The Eurocentric lens through which the headscarf is viewed obfuscates the lived experience of Muslim women, disregarding the value of the garment for its wearers and dismissing the intersectional nature of the discrimination experienced as a result of its restriction.

### III. INTERSECTIONALITY AT THE CJEU?

Despite the evident need for the law to acknowledge and respond to intersectional discrimination, the current European anti-discrimination framework presents numerous obstacles precluding the recognition of such claims. Notwithstanding these obstacles, Fredman, Schiek and Monaghan maintain that the CJEU is still capable of responding to intersectional discrimination within the remit of the present law. However, the Court's

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<sup>34</sup> Ibid 13.

<sup>35</sup> *Şabin* (n 33) para 116.

<sup>36</sup> Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16(2) *Social and Legal Studies* 183, 189; Ast and Spielhaus (n 26) 367.

<sup>37</sup> Nancy Hirschmann, 'Western Feminism, Eastern Veiling and the Question of Free Agency' (2002) 5(3) *Constellations* 345; O'Brien (n 31) 141.

failure to do so in three recent cases – *Parris*, in which the Court failed to recognise this form of discrimination in its first explicitly intersectional claim, and *Achbita* and *Bougnaoui*, in which it failed to recognise the intersectional nature of the headscarf – suggests that this is unlikely. This section addresses these points in turn, focusing on five distinct obstacles presented by the current legal framework: the segmentation of directives, the single-axis approach, the need for the identification of a comparator, the CJEU’s impact-oriented approach, and the analysis of justification and proportionality.

### *I. Obstacles Posed by the Current Framework*

The segmentation of workplace anti-discrimination law into three different sets of directives – one concerning race and ethnic origin, one concerning religion or belief, disability, age, or sexual orientation, and one concerning gender discrimination – presents an obstacle, as claims brought to the CJEU which span different directives may have to be brought under more than one of them.<sup>38</sup> This is particularly problematic for Muslim women, as the gender aspects of headscarf bans in the workplace will not be dealt with in depth where their claim is brought on the ground of religion or belief under Directive 2000/78/EC (hereafter, the Directive).

The single grounds-based approach of EU anti-discrimination law manifestly fails to capture the 'complexity' and synergistic nature of intersectional discrimination.<sup>39</sup> Even if a claim under two grounds is brought, the victim's experience is not reflected – as previously established, the harm of intersectional discrimination is due to the confluence of discrimination

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<sup>38</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2000/54/EC 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; Fredman (n 7) 62.

<sup>39</sup> Maria Onufrio, 'Intersectional Discrimination in the EU Legal Systems: Toward a Common Solution?' (2013) 14(2) *International Journal of Discrimination and the Law* 126, 130.

grounds, not their addition. Thus, where a Muslim woman encounters the law regarding her headscarf, bringing a claim under religious discrimination or gender discrimination, consideration under each ground precludes contemplation of the necessarily *gendered* aspect of her religious claim and the *religious* aspect of her gender claim. Therefore, her lived experience is disregarded; the analysis under either ground is necessarily more simplistic than the actual factors at play and the intersectional experience is erased from the examination.

Analysis of both direct and indirect discrimination requires the identification of a comparator or a comparator group that does not possess the specific characteristic on which the discrimination is alleged to be grounded. This process creates a significant obstacle to the recognition of intersectional discrimination, as demonstrated by the fact that a Muslim woman claiming a headscarf ban constituted discrimination based on the intersection of her religion and gender would be defeated on the basis that neither Muslim men nor non-Muslim women experience such discrimination. Both analyses work to conceal 'the true nature of her disadvantage and the discrimination suffered', as they do not encapsulate the synergistic nature of discrimination resulting from the combination of grounds.<sup>40</sup>

As Cloots demonstrates, the CJEU often demarcates direct from indirect discrimination by focusing on the impact a measure has on distinct groups of employees.<sup>41</sup> In order for a rule to amount to direct discrimination, it must have the effect that all of the people who are disadvantaged by the rule belong to the protected group and all of the people who are not disadvantaged by the rule do not belong to the protected group.<sup>42</sup> Due to the single-axis approach, this has the potential to preclude cases of intersectional discrimination from being recognised as direct discrimination. As it may be the case that not *all* Muslim people and not *all* women would be affected by a headscarf ban in a particular workplace, the rule will not be found to be directly discriminatory,

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<sup>40</sup> Karon Monaghan, 'Multiple and Intersectional Discrimination in EU Law' (2011) 13 *European Anti-Discrimination Law Review* 20, 25.

<sup>41</sup> Elke Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? Achbita and Bougnaoui' (2018) 55 *Common Market Law Review* 589, 602.

<sup>42</sup> *Ibid* 603.

as it does not disadvantage only and all of the members of a recognised protected group. Although *all* Muslim women might be affected, thus suggesting a case of direct discrimination, this will not be addressed as Muslim women are not currently recognised as a protected group in their own right.

The ability of the CJEU to undergo a satisfactory analysis of justification and proportionality in regard to indirect discrimination claims is also hampered by the single-axis approach. In its analysis of indirect discrimination, the Court's inability to consider how gender and, secondarily, ethnicity feed into the religious discrimination produced by a seemingly neutral rule blinds it to the particularly disproportionate impact such religious 'neutrality' policies have on Muslim women. The particular 'effects of exclusion' for Muslim women as a result of neutrality policies, for example, are undermined when only the religious aspect of such rules are considered; failure to consider the impact of gender and ethnicity thus results in an incomplete analysis.<sup>43</sup>

## 2. *Potential for Recognition?*

Despite these obstacles, the current anti-discrimination framework does recognise the existence of intersectional discrimination. The preambles to both Directive 2000/43/EC and Directive 2000/78/EC stipulate that

[i]n implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim [...] to promote equality between men and women, especially since women are often the victims of multiple discrimination.<sup>44</sup>

On this basis, Fredman, Schiek and Monaghan argue that the obstacles posed by the current framework do not preclude the CJEU from being able to recognise intersectional discrimination. Fredman and Schiek propose that the Court has solutions to the current obstacle of the single-axis approach. Schiek argues that as EU employment equality law encompasses all grounds of discrimination, it should be read as prohibiting discrimination not only on single grounds, but also on combined grounds.<sup>45</sup> Fredman suggests that the

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<sup>43</sup> Ast and Spielhaus (n 26) 19.

<sup>44</sup> Directive 2000/43/EC (n 38) preamble recital 14; Directive 2000/78/EC (n 38) preamble recital 3.

<sup>45</sup> Schiek (n 7) 465.

Court could take a 'capacious' view of the existing grounds of discrimination, such that all aspects of an individual's identity are considered regardless of the ground under which the claim is brought.<sup>46</sup> This would reveal the other factors of disadvantage that may be compounding the victim's experience of discrimination, rather than the perspective of only the most privileged of that group. Monaghan further purports that the comparator issue is not 'conceptually insurmountable', in that in an intersectional claim the Court could require that the comparator be a person who does not have any of the characteristics at issue, thus allowing the synergistic nature of the discrimination to be illuminated.<sup>47</sup>

Despite its arguable capacity to do so, it appears unlikely that the CJEU will in practice respond to intersectional discrimination within the current anti-discrimination framework. This is apparent from the recent decision in *Parris v Trinity College Dublin*, in which the Court faced its first explicitly intersectional claim, yet failed to recognise this as a distinct form of discrimination.<sup>48</sup> In this case, Mr Parris' civil partner was prohibited from accessing his survivor's pension, which was only payable if the individual concerned had married or entered into a civil partnership before the age of sixty; the men had been unable to do so legally in Ireland until Mr Parris was sixty-four years old.<sup>49</sup> The Court was referred the question as to whether, in the absence of a finding of discrimination on the separate grounds of age or sexual orientation, the rule was discriminatory based on the 'combined effect' of age and sexual orientation.<sup>50</sup> Finding no discrimination based on either ground in isolation, the Court dismissed the suggestion that there may have been discrimination based on the two grounds combined, stating that 'no new category of discrimination' could exist where none was found on the grounds taken separately.<sup>51</sup>

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<sup>46</sup> Fredman (n 7) 69.

<sup>47</sup> Monaghan (n 7) 26.

<sup>48</sup> Case C-443/15 *Parris v Trinity College Dublin* EU:C:2016:897, Opinion of AG Kokott, para 149.

<sup>49</sup> *Parris* (n 8) paras 17–26.

<sup>50</sup> *Ibid* para 29.

<sup>51</sup> *Ibid* paras 80–81.

The Court thus missed the reality of the discrimination at play. The pension scheme at hand did not discriminate against homosexual persons nor persons over sixty; only homosexual people born before 1951 were disadvantaged by the rule.<sup>52</sup> The discrimination was thus inherently intersectional. In its single-axis analysis, the Court failed to acknowledge and respond to a rule that clearly disadvantaged Mr Parris due to the confluence of his sexual orientation and his age and was unwilling to respond to the unique harm suffered due to this.

As has already been recognised, there is little difference between this case and the one used by Crenshaw to conceptualise intersectionality and the weakness of single-axis discrimination analyses, namely *DeGraffenreid v General Motors*.<sup>53</sup> In this case, the plaintiffs alleged that they had been discriminated against due to General Motors' past failure to hire black women. The Court held that as black men and white women had both been hired, there had been no discrimination, and refused to consider 'the creation of new classes of protected minorities'.<sup>54</sup> The similarity of the decision here and that of the CJEU in *Parris* is striking and considering the prominence of Crenshaw's use of this example in the creation of intersectionality theory – the facts of the case have been used in European Commission reports to explain intersectional discrimination, and Crenshaw's article containing her discussion of *DeGraffenreid* was even mentioned in Advocate General (AG) Kokott's Opinion on this case – the Court not only failed to acknowledge the

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<sup>52</sup> Alina Tryfonidou, 'Another Failed Opportunity for the Effective Protection of LGB Rights Under EU Law: *Dr David L Parris v Trinity College Dublin and Others*' (EU Law Analysis, 1 December 2016) <<http://eulawanalysis.blogspot.co.uk/2016/12/another-failed-opportunity-for.html>> accessed 9 April 2018.

<sup>53</sup> Möschel (n 9) 1848; Schiek (n 9) 95; Shreya Atrey, 'Illuminating the CJEU's Blind Spot of Intersectional Discrimination in *Parris v Trinity College Dublin*' (2018) 47(2) *Industrial Law Journal* 278, 282; Raphaële Xenidis, 'Multiple Discrimination in EU Anti-Discrimination Law: Towards Redressing Complex Inequality?' in Uladzislau Belavusau and Kristen Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing 2018) 71; *DeGraffenreid v General Motors* [1976] 413 F Supp 142 (US Federal Court of Appeals).

<sup>54</sup> *DeGraffenreid* (n 53) 145.

existence of intersectional discrimination in this claim, but disregarded the work that has been done to raise awareness of its existence.<sup>55</sup>

The improbability of the Court addressing intersectional discrimination within its current framework thus appears to be undeniable, despite the aforementioned assertions that it has the capacity to do so. This was further exemplified in the specific context of Muslim women in the cases of *Achbita* and *Bougnaoui*.

### 3. *Obstacles Exemplified in Achbita and Bougnaoui*

Both cases concerned Muslim women who were dismissed by their employers due to their wish to wear the headscarf in the workplace; the judgements were handed down four months after *Parris*. While the fact that intersectional discrimination was at play in these cases has been acknowledged, no analysis of how the obstacles in the current framework of European anti-discrimination law prevented this from being addressed by the Court has yet appeared in the literature.<sup>56</sup> This section presents an analysis of this sort, demonstrating that the aforementioned impediments in the current framework prevented the intersectional discrimination faced by the women from being recognised and that the CJEU will therefore remain unlikely to respond to intersectional discrimination within the remit of the current law. As Ms Achbita's and Ms Bougnaoui's ethnic origin is indeterminable from the judgements, the section focuses on the intersectional discrimination on the basis of religion and gender, notwithstanding the prior observation that Muslim women most often encounter intersectional discrimination on all three grounds.

In *Achbita*, the employee was dismissed when she began wearing the headscarf to work in contravention of the company's policy banning the wearing of religious, political or philosophical symbols or engagement in any observance of such beliefs.<sup>57</sup> The question referred to the Court was whether the prohibition of wearing a headscarf in the workplace resulting from the employer's policy constituted direct discrimination under Article 2(2)(a) of

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<sup>55</sup> Fredman (n 7) 28; Kokott (n 48) para 150.

<sup>56</sup> Pastor (n 9) 255; Möschel (n 9) 1348; Schiek (n 9) 95.

<sup>57</sup> Achbita (n 6) para 15.

the Directive.<sup>58</sup> In *Bougnaoui*, the employee was dismissed when she continued to wear her headscarf in the workplace following a disciplinary interview in which she was warned that whilst she was in 'contact internally or externally with the company's customers, [she] would not be able to wear the veil in all circumstances'.<sup>59</sup> The question referred was whether the difference in treatment did not amount to discrimination on the basis that the wish of a customer to no longer have services rendered by an employee wearing a headscarf was a genuine and determining occupational requirement under Article 4(1) of the Directive.<sup>60</sup>

#### A. Failure to Recognise Intersectionality

Although the questions referred in *Achbita* and *Bougnaoui* were not explicitly related to intersectional discrimination as in *Parris*, arguably the Court should have recognised the intersectional discrimination inherent in policies prohibiting the headscarf and operated beyond a single-axis analysis, especially given that neither question referred to the Court was explicitly worded as regarding religious discrimination – both questions simply referred to the headscarf as the factor at play.

The segmentation of the anti-discrimination directives is obviously an issue here: as the questions referred were regarding Directive 2000/78/EC, detailed consideration of gender discrimination was precluded. Arguably the Court could still have acknowledged the gender discrimination inherent in the cases: in light of the references to gender equality in the preamble to the Directive (see section III.2), the European Commission's 2007 Report on Multiple Discrimination suggested that the Directive is intended to work together with existing provisions on gender discrimination in the workplace.<sup>61</sup> Pastor further noted before the judgements were handed down that given the open list of non-discrimination grounds contained in Article 21 of the EU Charter of Fundamental Rights, the Court did have the

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<sup>58</sup> Ibid para 21.

<sup>59</sup> *Bougnaoui* (n 6) para 14.

<sup>60</sup> Ibid para 19.

<sup>61</sup> Directorate-General for Employment, *Social Affairs and Equal Opportunities, Tackling Multiple Discrimination: Practices, Policies and Laws* (European Commission 2007) 18.

opportunity to analyse the gender aspect of the discrimination claims.<sup>62</sup> Its failure to do so is thus disappointing.

This failure is particularly disappointing considering the attention given to gender equality in AG Sharpston's Opinion on *Bougnaoui*. Rather than considering whether the request that Ms Bougnaoui remove her veil had an effect on gender equality, AG Sharpston only raises the issue that some perceive the headscarf to be a 'feminist statement' whilst others consider it to be a 'symbol of oppression of women', ultimately recommending that the Court refrain from taking a position on this matter.<sup>63</sup> It is surprising that AG Sharpston recognises the issue of gender equality that arises in relation to the headscarf, but fails to actually examine whether gender discrimination was at play in Ms Bougnaoui's dismissal, demonstrating how perceptions of the headscarf can operate to obscure the gender discrimination suffered by its wearers.

## B. Comparator

Article 2(2)(a) of the Directive establishes that direct discrimination on the grounds of religion or belief shall be taken to occur where 'one person is treated less favourably than another is, has been or would be treated in a comparable situation'. On this ground, the CJEU ruled in *Achbita* that G4S's neutrality policy 'refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction'.<sup>64</sup> The Court therefore held that the policy must 'be regarded as treating all workers of the undertaking in the same way by requiring them [...] to dress neutrally'.<sup>65</sup> As the rule was not applied differently to Mrs Achbita than to any other worker, the Court concluded that it 'does not introduce a difference of treatment that is directly based on religion or belief', thus not constituting direct discrimination for the purposes of the Directive.<sup>66</sup>

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<sup>62</sup> Pastor (n 9) 266.

<sup>63</sup> Case C-188/15 *Bougnaoui v Micropole SA* EU:C:2017:204, Opinion of AG Sharpston, para 75; Schiek (n 9) 95.

<sup>64</sup> *Achbita* (n 6) para 30.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* para 32.

In focusing on the comparison between employees who manifest their political, philosophical or religious belief, the Court missed the opportunity to use the appropriate comparator from an intersectional perspective, namely someone who lacked both of Ms Achbita's protected characteristics: being female *and* religious. If the Court had done so, perhaps it would have concluded that Ms Achbita had been treated less favourably.

### C. Impact-Oriented Approach

The Court's impact-oriented distinction between direct and indirect discrimination is clear in its conclusion that Ms Achbita was not directly discriminated against because the rule did not only disadvantage religious people, but those with political and philosophical beliefs as well. However, the Court has occasionally departed from this approach and found direct discrimination to exist where the parties disadvantaged by a rule extend beyond the relevant protected group. In *CHEZ*, a company had placed electricity meters at varying heights off the ground, disadvantaging those who lived in districts populated mostly, but not exclusively, by Roma people, and providing those living in other districts less populated by Roma people with an advantage.<sup>67</sup> Even though the company's practice did not exclusively disadvantage Roma people, the CJEU considered that it was based on ethnic stereotypes or prejudices and therefore held that it amounted to direct discrimination.<sup>68</sup> Clouts notes that it is surprising that the Court did not similarly take stereotypes and prejudices against Muslim people into account when considering whether the neutrality policy in *Achbita* amounted to direct discrimination.<sup>69</sup> Given the wide-ranging perceptions held in Europe about the Islamic headscarf specifically, such an examination into potential prejudices informing G4S's neutrality policy could have perhaps yielded a conclusion that recognised the intersectional nature of the discrimination at hand and potentially revealed the policy to be directly discriminatory.

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<sup>67</sup> Case C-83/14 *CHEZ Razpredelenie Bulgaria v Komisia za zashtita ot diskriminatsia* EU:C:2015:480.

<sup>68</sup> *CHEZ* (n 67) paras 82 and 91.

<sup>69</sup> Clouts (n 41) 611.

#### D. Justification and Proportionality

Despite the question referred in *Achbita* focusing on direct discrimination, the Court went on to consider whether the neutral rule banning religious, philosophical or religious symbols constituted indirect discrimination under Article 2(2)(b) of the Directive. The Court found that 'it is not inconceivable' that the referring court might conclude that the neutral rule in this case was indirectly discriminatory, but ultimately held that the disadvantage resulting from the rule was justified by the company's aim to project an image of neutrality to its customers.<sup>70</sup> The Court held that such an aim 'must be considered legitimate', referring to the employers' freedom to conduct a business under Article 16 of the EU Charter of Fundamental Rights as the basis for this conclusion.<sup>71</sup> The Court did not engage with this further in *Bougnaoui*, merely referring to *Achbita* as the basis for the conclusion that if a difference in treatment was found to be based on a neutral rule, it would be justified by the legitimate aim of 'a policy of neutrality vis-à-vis its customers'.<sup>72</sup>

As Śledzińska-Simon recognises, reconciling the employer's freedom to conduct a business with the fundamental right not to be discriminated against requires 'striking a fair balance' between the competing interests.<sup>73</sup> However, she notes that the freedom to conduct a business should be narrowly construed, 'especially taking into account the structural nature of discrimination'.<sup>74</sup> Although the importance of projecting an image of religious neutrality is arguably more significant for employers in secular states such as Belgium, the national court of which referred the case, the Court's lack of consideration for the structural inequality arising from this principle is profoundly disappointing from an intersectional perspective. Neutrality in general perpetuates a Eurocentric worldview: 'ethno-national-religious

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<sup>70</sup> *Achbita* (n 6) para 37.

<sup>71</sup> *Ibid* para 38.

<sup>72</sup> *Bougnaoui* (n 6) para 33.

<sup>73</sup> Anna Śledzińska-Simon, 'Is There a Place for the Islamic Veil in the Workplace? Managerial Prerogatives and the Duty of Reasonable Accommodation in the EU Anti-Discrimination Governance' (2016) 17 *ERA Forum* 203, 207.

<sup>74</sup> *Ibid*.

neutrality is simply the majority standard'.<sup>75</sup> The Court's limited analysis of the legitimacy of this aim precludes the recognition of the structural discrimination that 'neutrality' perpetuates. If it had considered this, perhaps a fairer balance would have been struck between the employer's freedom to conduct a business and the employee's interests, and Ms Achbita's right to wear the headscarf would have been protected.

The Court's proportionality analysis is also concerning from an intersectional perspective. As summarised by AG Kokott, the proportionality analysis requires that measures adopted to achieve the legitimate aim must be appropriate, must not go beyond what is necessary and must not cause disadvantage disproportionate to the aims pursued.<sup>76</sup> In determining that the restriction in question was appropriate for the purpose of ensuring the neutrality policy was properly applied, and that it would be limited to what is strictly necessary where it covered only those employees who interact with customers, the Court concluded that the ultimate dismissal of Ms Achbita would only be 'strictly necessary' where the company considered whether it would have been possible to offer her a post not involving any visual contact with customers instead of a dismissal. The Court's endorsement of the 'ghettoisation' of Muslim women in the workplace is alarming, especially 'given just how many roles can be public-facing', and may have the effect of further discouraging Muslim women's participation in the workforce.<sup>77</sup> If the Court had accounted for the intersectional discrimination faced by Muslim women – and the aforementioned duty to promote equality between men and women because of this, as stipulated in Article 3 of the Preamble to the Directive – arguably it would have recognised that the result of this ruling would be to exclude a large section of the female workforce from certain positions, in total contradiction with the duty to promote gender equality.

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<sup>75</sup> Veit Bader et al., 'Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction' (2013) 13(2) *International Journal of Discrimination and the Law* 54, 57.

<sup>76</sup> Case C-157/15 *Achbita v G4S Secure Solutions NV* EU:C:2017:203, Opinion of AG Kokott, para 97.

<sup>77</sup> Sarah Fraser Butlin, 'The CJEU Confused Over Religion' (2017) 76 *Cambridge Law Journal* 246, 248; Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8(3) *European Labour Law Journal* 232, 252.

Therefore, if the Court had acknowledged Ms Achbita's discrimination as intersectional, it could have recognised the restriction of Muslim women to back-office positions as an unacceptable solution.

Finally, the Court's failure to address the final step in the proportionality test, namely verifying whether the neutrality policy imposes a disproportionate burden in comparison to the aims pursued, is regrettable; it might otherwise have recognised that such exclusion from the workplace was unacceptable and thus disproportionate. If the Court had acknowledged the intersectional discrimination at play, it may have engaged in a stricter proportionality test, allowing it to arrive at this conclusion. In *Parris*, AG Kokott noted in her Opinion that a difference of treatment resulting from the combination of two or more grounds of discrimination 'may also mean that, in the context of the reconciliation of conflicting interests for the purposes of the proportionality test, the interests of the disadvantaged employees carry greater weight'.<sup>78</sup> Although the Court did not follow AG Kokott's Opinion on this ground in that case, Möschel points to her comment as suggesting that intersectionality may influence the way in which the Court conducts its proportionality analysis, in that 'the defendant will have to bring more stringent justifications for the differential treatment'.<sup>79</sup> The Court's failure to engage with the intersectional disadvantage suffered by Ms Achbita unfortunately ruled out such a possibility in this case.

#### IV. THE HYBRID SOLUTION

As the above analysis demonstrates, it remains unlikely that the CJEU will respond to intersectional claims within the remit of the current law. The present need for reform is undeniable, given that the structural inequality faced by Muslim women continues to be perpetuated by Eurocentric perceptions of the headscarf and their potential for marginalisation in the workplace is now exacerbated by the legitimisation of headscarf bans in private workplaces in *Achbita* and *Bougnaoui*.

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<sup>78</sup> Kokott (n 48) para 157.

<sup>79</sup> Möschel (n 9) 1849.

Fredman has previously made suggestions for reform in order to address intersectional discrimination.<sup>80</sup> She proposes that new protected grounds of discrimination could be introduced, such as being a woman of colour or a disabled gay person, so that those facing intersectional discrimination would not have to make a claim based on one protected characteristic.<sup>81</sup> Such an approach would be very difficult to implement, as it would necessitate creating a list of all the possible combinations of protected characteristics to ensure that all intersectional experiences are protected. Fredman also suggests the possibility of combining grounds within the existing list of protected characteristics so as to recognise discrimination arising from more than one ground, without regarding these as new subgroups.<sup>82</sup> This approach is arguably unsuited to combating intersectional discrimination, which is synergistic and qualitatively different to the addition of different grounds of discrimination (see section II.1). This section therefore addresses a gap in the literature that remains regarding an operable solution to address intersectional discrimination in European anti-discrimination law.

In order to address the inadequacies of the current law, and the resultant inequality for Muslim women, it is evident that any reform must focus on the individual experience of discrimination and the dismantling of the societal structures that work to sustain it. It is submitted that a solution can be found within the combined approach of reasonable accommodation of religion and the implementation of proactive measures. The former approach allows for an immediate, operable enhancement of the protection of religious expression in the workplace, whilst the latter works to address the structural causes of marginalisation, in order to provide a long-term solution ensuring that individuals are not institutionally disadvantaged. Whilst reasonable accommodation has been recommended by various scholars as a means of enhancing protection for religious rights in the workplace, its benefits have not yet been acknowledged from an intersectional perspective.<sup>83</sup> Proactive

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<sup>80</sup> Fredman (n 7) 66.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 68.

<sup>83</sup> Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience and the Rights of Others' (2014) 3(1) *Oxford Journal of Law and Religion* 2; Matthew Gibson, 'The God "Dilution"? Religion, Discrimination and the Case for Reasonable Accommodation' (2013) 72(3) *Cambridge Law Journal* 578; Katayoun Alidadi,

measures have been recommended as a means of dismantling the structural inequalities that perpetuate intersectional discrimination, but recommendation of their use in conjunction with reasonable accommodation is novel. In order to make the case for such a hybrid approach, this section examines each solution separately to identify their strengths and weaknesses, before suggesting that the implementation of both measures together would be preferable.

### 1. Reasonable Accommodation of Religion

The reasonable accommodation of religion model is based on the premise that religious persons are prevented from accessing and operating freely in certain workplaces due to their protected characteristic as they may have clothing or working time requirements that are not catered for due to rules enforced by their employer.<sup>84</sup> In order to achieve equality of access for that person and for them not to be unduly discriminated against by such rules or conditions, it is necessary for the employer to consider whether they can make an individual adjustment to workplace conditions in order to accommodate that person.<sup>85</sup> Such accommodation is limited to what is 'reasonable' in order to avoid disproportionate burden being suffered by the employer.<sup>86</sup> This model is currently in place in Canada and the United States, yet the concept of reasonable accommodation in the EU is limited to that required for disabilities.<sup>87</sup> Just as the highly differential forms of disability require a highly individualised response, reasonable accommodation has been recognised as a means of providing adequate protection for the various forms

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'Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment?' (2012) 37(6) *European Law Review* 693.

<sup>84</sup> Emmanuelle Bribosia et al., 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' (2010) 17(2) *Maastricht Journal of European and Comparative Law* 137, 138.

<sup>85</sup> Andrew Hambler, *Religious Expression in the Workplace and the Contested Rule of Law* (Routledge 2015) 236.

<sup>86</sup> Lisa Waddington and Aart Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (2002) 18(4) *International Journal of Comparative Labour Law and Industrial Relations* 403, 410.

<sup>87</sup> Directive 2000/78/EC (n 38) art 5.

of religious manifestation in society.<sup>88</sup> Indeed, 'the freedom of religion and non-discrimination can be seen as "empty" or "nugatory" without a corresponding duty of reasonable accommodation'.<sup>89</sup>

Many scholars have recommended that a reasonable accommodation of religion model be introduced in Europe.<sup>90</sup> The Parliamentary Assembly of the Council of Europe recently recommended that member states take legislative or other measures to ensure that employees may lodge requests for reasonable accommodation of their religion or belief, and to establish dispute resolution mechanisms to respond to employers' refusal to accommodate, although these recommendations were not ultimately included in the resulting Resolution.<sup>91</sup> The reasonable accommodation approach itself is therefore at the frontline of academic scholarship and policy discussion on religious discrimination, and the benefits for Muslim women have been recognised.<sup>92</sup> However, much of the work advocating for reasonable accommodation of religion is focused on the benefits this would have regarding clashes between religious and sexual orientation rights.<sup>93</sup> A call for reasonable accommodation based on its ability to better respond to intersectional discrimination has not yet been made. This section demonstrates the advantages of the reasonable accommodation model from an intersectional perspective and shows how the implementation of this model could correct the issues with the current law that prevent intersectional discrimination against Muslim women from being recognised.

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<sup>88</sup> Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 221.

<sup>89</sup> Alidadi (n 83) 695.

<sup>90</sup> Leigh and Hambler (n 83) 2; Gibson (n 83) 578; Alidadi (n 83) 693.

<sup>91</sup> Council of Europe, *The Protection of Freedom of Religion or Belief in the Workplace* (Committee on Legal Affairs and Human Rights 2019) 2; Parliamentary Assembly of the Council of Europe, Resolution 2318 on the protection of freedom of religion or belief in the workplace (Text adopted by the Assembly on 29 January 2020 at the 5<sup>th</sup> sitting).

<sup>92</sup> Alidadi (n 83) 699.

<sup>93</sup> Carl Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29(4) *Oxford Journal of Legal Studies* 729.

### A. Advantages

It has previously been suggested that the individualised response generated by reasonable accommodation is not suited to tackling religious discrimination, which is instead best dealt with by focusing on the disadvantage suffered by the religious group.<sup>94</sup> However, from an intersectional perspective, an individualised response focusing on the individual's lived experience is paramount (see section II.1). As reasonable accommodation operates around adjustment of workplace rules on a highly individualised basis, it is aptly suited to recognising and accommodating the unique experience of those who are intersectionally discriminated against.<sup>95</sup> Such an individual approach requires contextual analysis of all of the factors of a given case, enabling the employer to acknowledge and respond to the cumulative disadvantage generated by the existence of more than one characteristic, which would have been rendered invisible by attempts to fit the experience under one discriminatory ground.<sup>96</sup> As a result, gender discrimination against Muslim women, repeatedly rendered invisible under the law's current framework, would be illuminated. Furthermore, as the reasonable accommodation process is intended to encourage dialogue between employee and employer, this model has the potential to restore Muslim women's voices in articulating what their headscarf means to them, which has been disregarded in contemporary debates on the headscarf (see section II.3).<sup>97</sup> As the 'power of intersectionality lies in its potential to give voice to the individual', the ability for Muslim women to express their individual needs through this model is instrumental in achieving this aim.<sup>98</sup>

As discussed in section II.1, intersectionality strives for substantive rather than formal equality in order to respond to the differing needs of the

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<sup>94</sup> Emmanuelle Bribosia and Isabelle Rorive, *Reasonable Accommodation Beyond Disability in Europe?* (European Network of Legal Experts in the Non-Discrimination Field 2014) 38.

<sup>95</sup> Gibson (n 83) 579.

<sup>96</sup> Stychin (n 93) 749.

<sup>97</sup> Jennifer Jackson-Preece, 'Positive Measures and the EU Equality Directives: Closing the Protection Gap Between "New" and "Old" Minorities Through the Reasonable Accommodation of Religion?' (2010) 9(1) *European Yearbook of Minority Issues* 519, 535.

<sup>98</sup> Conaghan (n 16) 26.

institutionally disadvantaged. Reasonable accommodation is also advantageous from this perspective: in requiring adaptation of workplace rules, the model emphasises to employers the need to adapt to the variable needs of people from diverse backgrounds.<sup>99</sup> This model could help to achieve substantive equality for Muslim women, in that their professional opportunities would no longer be thwarted by policies of religious neutrality.

The recognition of intersectional discrimination via reasonable accommodation would not be subject to the aforementioned constraints evident in the current European anti-discrimination law framework. The obstacle posed by the need for a comparator, difficult in cases of intersectional discrimination due to the existence of multiple discrimination grounds generating distinctive cumulative disadvantage, would no longer prevent cases being brought forward, given that reasonable accommodation 'focuses solely on any omission to provide [the] accommodation in the first place'.<sup>100</sup> The focus on the omission to provide reasonable accommodation would be particularly beneficial where the disadvantage stems from a seemingly neutral rule, because this model does not require that the rule be objectively justified by a legitimate aim, as the analysis of indirect discrimination currently does. Whilst at first this may appear problematic in that the rule creating a difference of treatment goes uncontested, it is suggested that this is actually an advantage: as secularism is a principle of fundamental importance in many European states, it is arguable that avoidance of the loaded question as to whether religious expression should take precedence over neutrality is to be welcomed. Such an approach would be beneficial in allowing the Court to protect Muslim women from intersectional discrimination in the workplace without fear of the reaction of member states to a perceived threat to the principle of neutrality. Berthou notes that where large French companies have discreetly allowed prayer rooms and accommodation of religious dietary requirements, they are reluctant to publicise such efforts due to fear of being seen as making a

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<sup>99</sup> Gay Moon and Robin Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' (2006) 6 *European Human Rights Law Review* 610, 647.

<sup>100</sup> Gibson (n 83) 592.

political statement.<sup>101</sup> Avoiding the discussion of religious freedom over secularism through the reasonable accommodation model may thus be further advantageous in that employers in secular states are more likely to welcome accommodating practices. The lack of analysis in the reasonable accommodation model as to whether the neutrality policy necessitating the accommodation was a 'legitimate aim' is additionally beneficial, as it avoids the possibility that neutrality policies be granted blanket justification – as occurred in *Achbita* and *Bougnaoui* – by focusing on the question of whether accommodation would have placed a disproportionate burden on the employer. As the duty of reasonable accommodation requires that the existence of such a disproportionate burden be tangibly proven by the employer, it is arguable that this model would be more effective in protecting Muslim women's rights to wear the headscarf.<sup>102</sup> As Jackson-Preece points out, uniform exceptions are not 'likely to be particularly onerous in financial or other terms'.<sup>103</sup>

## B. Disadvantages

Reasonable accommodation is not, however, a 'panacea' for Europe's religious discrimination problem, and it is certainly not faultless from an intersectional perspective.<sup>104</sup> As identified in section II.1, the objective of intersectionality is not just to appreciate and respond to lived experiences of multiple difference, but simultaneously to 'locate these specific differences within social patterns of hierarchy and division'.<sup>105</sup> Whilst the highly individualised approach of the reasonable accommodation model is beneficial in providing an immediate avenue for protection for Muslim women facing intersectional discrimination, its operation as a 'reactive'

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<sup>101</sup> Katell Berthou, 'The Issue of the Voile in the Workplace in France: Unveiling Discrimination' (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 281, 314.

<sup>102</sup> Vickers (n 88) 223.

<sup>103</sup> Jackson-Preece (n 97) 538–539.

<sup>104</sup> Gibson (n 83) 611.

<sup>105</sup> Momin Rahman, 'Theorising Intersectionality: Identities, Equality and Ontology' in Emily Grabham et al. (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 353.

measure to individual complaints would mean that the underlying cause of their discrimination goes unchallenged.<sup>106</sup>

If reasonable accommodation alone were implemented in Europe, the Eurocentric perspectives that operate to exclude Muslim women would continue to prevail. This is because the language of 'accommodation' is assimilationist in itself: the model implies that social norms are to be determined by the cultural majority within which '[d]ifference becomes the special exception', further marginalising minority groups.<sup>107</sup> This implicit acceptance of the dominant societal narrative precludes any consideration of its inherent majority bias and, as Day and Brodsky highlight, allows rules and practices that favour the privileged in society to be maintained, as long as concessions are made to those who are disadvantaged by them.<sup>108</sup> The inability of the reasonable accommodation model to combat structural inequality is the main criticism of the Canadian model. Whilst it has been recognised as 'an effective short-term strategy yielding certain tangible short-term benefits', its ability to progress the objective of substantive equality in the long term has been questioned.<sup>109</sup> As stated in section II.1, the recognition of intersectionality aims to achieve substantive equality by responding to institutionalised marginalisation. Efforts to dismantle the structures that cause it are imperative if true equality is to be achieved.

It is thus necessary to recognise that whilst reasonable accommodation may be effective as a response to intersectional discrimination in the workplace and would be successful as a stopgap in preventing the increasing marginalisation of Muslim women in Europe, it is not enough to change their position in the long-term. Whilst the response to intersectional discrimination requires acknowledgement of a given individual's lived experience, a sole focus on individuals precludes the possibility of collaborative change for the whole of society.<sup>110</sup> It is therefore necessary that,

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<sup>106</sup> Vickers (n 88) 221.

<sup>107</sup> Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit?' (1996) 75 *Canadian Bar Review* 433, 435; Vrinda Narain, 'The Place of the Niqab in the Courtroom' (2015) 9 *Vienna Journal on International Constitutional Law* 41, 49.

<sup>108</sup> Day and Brodsky (n 107) 435.

<sup>109</sup> Narain (n 107) 50.

<sup>110</sup> Conaghan (n 16) 27.

alongside reasonable accommodation, corresponding action be taken to challenge the root cause of Muslim women's discrimination.

## 2. *Proactive Measures*

The term 'proactive measures' denotes many forms of organised action aiming at institutional change.<sup>111</sup> In such a scheme, initiative lies with policy makers to mount political pressure with the aim of achieving structural change and to implement educational measures to promote understanding about issues such as intersectional discrimination and the need for substantive equality. New legislative and policy measures would need to be evaluated from an intersectional perspective in order to ensure they are not 'biased to one axis of inequality' and to adjust them accordingly where necessary.<sup>112</sup> As regards education, proactive measures would require initiatives and campaigns to raise awareness of the existence and nature of intersectional discrimination amongst employers, public authorities and the judiciary.<sup>113</sup> This work would allow 'institutional and structural causes of inequality [to] be diagnosed and addressed collectively and institutionally', better enabling efforts to combat the roots of this inequality.<sup>114</sup>

As '[p]ositive duties need to be championed by those at the top of the institutional hierarchy', the ability of such measures to render substantive change for individuals could take a significant amount of time.<sup>115</sup> This is demonstrated in the failure of previous policy-based attempts to address intersectionality. Despite calls for its recognition first being made in 2006 in Europe's Roadmap for Equality Between Women and Men, this effort received criticism in its conclusion from the European Parliament's Committee on Women's Rights and Gender Equality, which highlighted that the problem of intersectional discrimination still needed to be

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<sup>111</sup> Sandra Fredman, *Making Equality Effective: The Role of Proactive Measures* (European Network of Legal Experts in the Field of Gender Equality 2010) 3.

<sup>112</sup> Mieke Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13(3) *European Journal of Women's Studies* 211, 223.

<sup>113</sup> Directorate-General for Employment, Social Affairs and Equal Opportunities (n 61) 54.

<sup>114</sup> Fredman (n 7) 80.

<sup>115</sup> Fredman (n 7) 82.

addressed.<sup>116</sup> It is unclear what follow-up there has been: the subsequent Strategy for Equality Between Women and Men 2010-2015 fails to mention intersectional discrimination at all.<sup>117</sup> The prolonged time period for such a top-down approach to substantially change individuals' lives is of particular concern given the increasing marginalisation of Muslim women, combined with the discouraging results of *Achbita* and *Bougnaoui*. It is clear that change which has the potential to rectify Muslim women's situation in the present needs to be implemented, in addition to such long-term structural change.

### 3. *The Hybrid Solution*

Given that the introduction of either solution by itself is problematic, it is submitted that a hybrid approach based on a legal duty of reasonable accommodation of religion, supplemented by the implementation of proactive measures to combat the root causes of intersectional discrimination, is preferable.

#### A. Implementation of the Hybrid Solution

Reasonable accommodation of religion could be implemented by expanding Article 5 of Directive 2000/78/EC, which currently provides for the duty to reasonably accommodate disabled persons, to provide for the duty to reasonably accommodate religious persons as well. Aside from the need to add uniform and workplace dress policy adjustments to the list of appropriate measures of accommodation, the current law outlining what amounts to a disproportionate burden for the employer and what the duty of accommodation entails would apply.<sup>118</sup> This change in the law would therefore be straightforward for member states and employers to adjust to,

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<sup>116</sup> Commission, 'A Roadmap for Equality for Equality Between Women and Men 2006-2010' COM (2006) 92 final, ch I, art 4; Committee on Women's Rights and Gender Equality, *An Assessment of the Results of the 2006-2010 Roadmap for Equality Between Women and Men, and Forward Looking Recommendations* (2009) Explanatory Note.

<sup>117</sup> Commission, 'Strategy for Equality Between Women and Men 2010-2015' COM (2010) 491 final.

<sup>118</sup> Directive 2000/78/EC (n 38) preamble recital 20 and 21.

already being familiar with the process regarding the duty to reasonably accommodate disabled persons.

This change in the law would provide for a duty to accommodate a wide variety of religions and religious manifestations but would be particularly useful for Muslim women. This change would provide an alternative means of remedy to workplace regulations restricting the headscarf and would acknowledge and respond to intersectional discrimination through an individualised approach responding to context and lived experience. As noted in section II.2, Muslim women are increasingly excluding themselves from the workplace due to their experience of intersectional discrimination when wearing the headscarf. As their presence in the workforce is ever more threatened in the aftermath of *Achbita* and *Bougnaoui*, such an alternative means of protection is paramount.

Proactive measures in instituting policy change and education have the potential to address structural inequality by aiming to bring the issue of intersectional discrimination to the fore. I suggest that such proactive measures should follow Fredman's 'four ingredients' of a proactive model – responsibility, participation, monitoring and enforcement.<sup>119</sup> This model was conceived specifically in relation to gender equality; in the context of intersectional discrimination, I suggest that education must be added as another key ingredient. Given the widespread misconceptions about the headscarf, education is particularly important in the effort to combat the intersectional discrimination of Muslim women. More precisely, I suggest that responsibility should be given to the relevant equality body in each member state, such as the Equality and Human Rights Commission in the United Kingdom. Given that Member States are required to have such an equality body, and that they already have the role of investigating and responding to complaints of discrimination, they are best suited to imposing the scheme of proactive measures suggested below.<sup>120</sup> Each equality body would assess new policy and legislative measures through an intersectional lens and recommend potential changes if necessary. They would monitor the situation of intersectional discrimination in the relevant member state, via consultation with trade unions, employers and potential victims to identify

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<sup>119</sup> Fredman (n 111) 5.

<sup>120</sup> Directive 2000/43/EC (n 38) Article 13(1).

existing problems and suggest solutions at company level. Such investigations are already sometimes undertaken by equality bodies, such as the UK Equality and Human Rights Commission's investigation into gender equality at the BBC.<sup>121</sup>

The most important role for these bodies in the context of proactive measures against the intersectional discrimination of Muslim women would, in my view, be in the context of education. Educational campaigns centred on intersectional discrimination and perceptions of the headscarf could be set up by these equality bodies to be filtered through participating trade unions and NGOs to employers, aiming to educate managers, colleagues and customers on how they can avoid intersectional discrimination and how they can contribute to the integration of the person facing it. It is suggested that the hybrid solution would necessitate the education of the judiciary about Eurocentric perceptions of the headscarf. The headscarf is not a measure used for the oppression of Muslim women, and this assumption cannot be relied upon to rationalise its restriction.

Finally, equality bodies could also be given enforcement powers. Fredman suggests a 'pyramid of enforcement', whereby complaints could be made to the equality body in response to non-compliance of employers.<sup>122</sup> The equality body would then initiate a process of discussion and negotiation with the relevant employer.<sup>123</sup> Should this discussion be unsuccessful, the employer would then be subject to a compliance order issued by the equality body. Were this further step to fail, Fredman recommends that fines or other judicially enforced sanctions could be utilised.<sup>124</sup> I recommend that trade unions could be involved in this system of enforcement, by demanding a commitment to combating intersectional discrimination via collective bargaining or other industrial action.

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<sup>121</sup> Equality and Human Rights Commission, 'Investigation: Does the BBC Pay Women and Men Equally for Equal Work?' (2019) <<https://www.equalityhumanrights.com/en/inquiries-and-investigations/investigation-does-bbc-pay-women-and-men-equally-equal-work>> accessed 12 May 2020.

<sup>122</sup> Fredman (n 111) 7.

<sup>123</sup> Ibid.

<sup>124</sup> Fredman (n 111) 7.

Such proactive measures would combat institutionalised disadvantage in the long term. The measures proposed should therefore be implemented alongside reasonable accommodation. This novel approach provides a means of achieving both aims of the intersectionality project, namely responding to the synergistic lived experience of discrimination and dismantling the structures that cause it.

#### B. The Hybrid Solution in the Context of *Achbita* and *Bougnaoui*

The potential utility of the hybrid solution in protecting Muslim women's right to wear the headscarf and combating their experience of intersectional discrimination can be demonstrated by reference to *Achbita* and *Bougnaoui*. Had a duty of reasonable accommodation been applied in *Achbita*, it would have first necessitated a dialogue between Ms Achbita and G4S, in which she would request an individualised adjustment to the workplace neutrality policy and discuss its potential implementation with her employer. If her desire to wear her headscarf had not then been accommodated, Ms Achbita would have been able to claim that her dismissal amounted to discrimination due to her employer's failure to reasonably accommodate her religious belief. In order to maintain that they did not discriminate against her, it would have been necessary for G4S to prove that allowing her to wear her headscarf would have imposed a disproportionate burden on the company. Upon examination of the facts of the case, it is likely that it would be found that allowing Ms Achbita to wear her headscarf would not have imposed such a disproportionate burden, given that no customer had complained about it and there was therefore no evidence that allowing her to wear it would negatively impact the business. In the absence of such evidence, G4S would have had to make an individual exception to their neutrality policy for Ms Achbita, perhaps on the condition that her headscarf be in muted or company colours as a concession to the neutrality policy.<sup>125</sup>

In the case of *Bougnaoui*, it may have been found that allowing Ms Bougnaoui to wear her headscarf when interacting with the particular customer who had complained about it would indeed have caused Micropole a disproportionate burden, as it might have affected that customer's relationship with the company or negatively impacted the business. However, Ms Bougnaoui's

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<sup>125</sup> Kokott (n 76) para 105; Sharpston (n 63) para 123.

dismissal might still have been found to be a failure to make a reasonable accommodation. In the context of disability, Directive 2000/78/EC notes that a reasonable accommodation might include an adjustment to the 'distribution of tasks' within the workplace.<sup>126</sup> Whilst the financial cost of such an effort and the financial resources of the organisation must be taken into account, the duty of reasonable accommodation of religion might in this instance have necessitated an investigation into whether Ms Bougnaoui could continue working at Micropole with different customers who had not complained or within the company in a non-customer facing role.<sup>127</sup> Given that Ms Bougnaoui spent 95% of her working time in such a non-customer-facing role, it is unlikely that this minor reorganisation would be considered a disproportionate burden.<sup>128</sup> Consequently, it appears that had the reasonable accommodation aspect of the hybrid solution been in place, both Ms Achbita and Ms Bougnaoui would have been able to continue working for their respective employers whilst wearing their headscarves.

Additionally, had the proactive measures suggested in the hybrid solution been in place, further issues would have been mitigated at both the level of Ms Achbita and Ms Bougnaoui's workplaces and at the CJEU. At the workplace level, given that the proactive measures suggested include education about intersectional discrimination and perceptions of the headscarf, companies such as G4S might have been aware of the detrimental impact a neutrality policy would have had for Muslim women and avoided the policy in the first place. Indeed, for Ms Bougnaoui, it is hoped that Micropole would not have indulged its customer's perception of the headscarf to the extent of dismissing Ms Bougnaoui. Even if the facts of the cases had remained the same, given the judicial education proposed in the hybrid solution, the CJEU might potentially have been more aware of the intersectional aspect of these cases, and thus the higher disproportional impact these women were facing, when striking a balance between their interests and their employers' freedom to conduct a business. The outcome of the cases might therefore have been different. Even if they were not, and for instance Ms Achbita was still found to not have been discriminated

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<sup>126</sup> Directive 2000/78/EC (n 38) preamble recital 20.

<sup>127</sup> Ibid preamble recital 21.

<sup>128</sup> Sharpston (n 63) para 131.

against, the enforcement mechanism suggested in the hybrid solution would mean that she had another means of redress, namely the process of discussion and negotiation mediated by the relevant national equality body.

## V. CONCLUSION

This article has examined the issue of intersectional discrimination as faced by Muslim women, who encounter synergistic disadvantage in the face of increasing restriction of their right to wear the headscarf. It has been demonstrated that the CJEU is unlikely to respond to intersectional discrimination within the current framework of European anti-discrimination law, as exemplified by its judgments in the cases of *Parris*, *Achbita* and *Bougnaoui*. In the latter two cases, the Court's legitimisation of employers' ability to ban headscarves in the private workplace looks set to further the marginalisation of Muslim women in employment. In order to remedy this, it has been argued that legal reform is paramount. The proposed reform is a novel hybrid solution involving the implementation of a reasonable accommodation model in conjunction with proactive measures. Such an approach would provide a means of recognising and responding to the intersectional discrimination of Muslim women, substantially improving the protection of their right to wear the headscarf in the workplace, whilst working to tackle the societal roots of their marginalisation.