

TACKLING DOUBLE VICTIMIZATION OF MUSLIM WOMEN IN EUROPE: THE INTERSECTIONAL RESPONSE

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Abstract

The headscarf ban is mostly tackled as discrimination based on the sole basis of religion or belief. Such an approach does not take into account the multiple identities of the victims, e.g. as women and believers and therefore the intersection of gender and religion. This paper describes the pitfalls of this current mainstream legal analysis that ignores such interwoven and connected patterns of marginalisation and argues that the contemporary non-discrimination law may otherwise perpetuate inequalities. It examines the extent to which discrimination on the grounds of religion contributes to the marginalization of women and suggests legal and non-legal strategies for an intersectional perspective on the headscarf ban.

Muslims, particularly Muslim women, are facing a rise of discrimination in Western-European countries in the aftermath of 9/11 ⁽¹⁾. National debates relating to the ban of ostentatious religious signs at public schools or the burqa in the public space ⁽²⁾ have contributed to the reinforcement of the stigmatization of Muslim women and also their discriminatory exclusion in everyday life beyond the spheres addressed in legislation on religious clothing. Sociological and anthropological research shows that the exclusion of Muslim women has grown during the last decade: more and more Muslim women are barred from education, vocational training, employment, health, housing, services, or public areas because they wear a headscarf.

Most of the time, Muslim women challenge their exclusion or their detrimental treatment on the basis of religious discrimination. Not only do Muslim women perceive they are discriminated against just on this ground but also the vast majority of courts, tribunals and Equality bodies tackle the headscarf ban as discrimination based on the sole basis of religion or belief. Such an approach does not take into account the multiple identities of the victims, e.g. as women and believers. It does not capture the complexity of discrimination experienced by veiled Muslim women.

Tackling discrimination against Muslim women as merely a religious one reflects neither the reality nor the mechanism of such a complex segregation process. Multiple elements playing a role in the marginalization of this specific group of persons can be observed, like (alleged) foreign nationality, ethnic origin or immigration background, and social status, which may amplify disadvantages in the educational system and the job market (Barskanmaz, 2009 and Fundamental Rights Agency, 2009).

Even though we acknowledge the multiplicity of grounds that can be at work in the exclusion of Muslim women, we will focus on the intersectionality of religion and gender. There are several reasons for such a limitation of the scope of this study. First of all, contrary to the other grounds of discrimination, gender and religion are constant parameters. Not all Muslim women are immigrants or descendants of immigrants as “European native” women also convert to Islam. Moreover, not every Muslim woman lives and studies in underprivileged areas. However, what they all have in common is their gender.

A comparison of the legal situation of Muslim women vis-à-vis discrimination shows, that protection of women at the intersection of religion and gender is by no means harmonised or uniform in the EU Member States. On the contrary, only a few European countries did come up with specific protection for Muslim women faced with exclusion as women.

This paper explains to what extent the current approach requiring “*the persons to slot themselves into rigid compartments or categories*”⁽³⁾ that may not fully correspond to reality is inappropriate, misleading, and even counterproductive in the fight against discrimination. Discrimination is seldom the result of a single dominant relationship, disconnected from other forms of inequalities. In all cases, where the combination of different grounds describes the reality of a person’s identity, such complex reality corresponds to the most vulnerable, marginalised, and disadvantaged group (Fundamental Rights Agency, 2010: 12). In other words, the person who belongs to more than one disadvantaged group because of a common trait is likely to suffer more hardship than the one belonging to a single group.

The paper describes the pitfalls of this current mainstream legal analysis that ignores such interwoven and connected patterns of marginalisation. It thus argues that there is an urgent need to rethink the contemporary non-discrimination law because otherwise, it may be perpetuating inequalities (Crenshaw, 1989, 1991; Bamforth et al. 2008; Enar 2011).

First, we examine how identities and categorizations shape Muslim women’s experience of discrimination in order to then demonstrate the extent to which discrimination on the grounds of religion contributes to the marginalization of women. In the second part of this paper, we suggest a range of legal and non-legal strategies in order to implement an intersectional perspective on the headscarf ban within the framework of non-discrimination law.

PRELIMINARY PART

Growing exclusion of Muslim women

Since the early 1990s, heated debates have emerged in Western European countries about head and body covering of Muslim women in the public sphere, particularly in institutions such as schools, the civil service, and in courts. Different countries have found different ways of regulating the wearing of religious clothes. While the debate began with a focus on the education sector, soon the public service sector was included. In the meantime, commentators observed effects of the debates on the labour market in general. As the EU Fundamental Rights Agency maintains, the selective bans on wearing the Islamic headscarf, as a form of ‘legal discrimination’, had an impact apart from those intended by the laws and increased “the ‘acceptability’ of such discrimination against women” (EU Fundamental Rights Agency, 2011: 75).

In conclusion, the effects of laws banning headscarves or face-veils are not restricted alone to the passing and enactment of the actual law, but beyond that they become symbols in public debates on Muslims in Europe, immigration, and integration, (Soharso and Lettinga, 2008, also Korteweg and Yurdakul, 2011) which according to Mr Sunier, tend to follow the logic of domestication of Islam in Europe (Sunier, 2009). Different twists in the debates in

different national contexts have led to different policies and juridical measures throughout Europe.

1. Debates about the banning of headscarves in schools and work places

Debates in the 1990ies and the early 2000s lead to the prohibition of students to attend public schools with a headscarf in France and for teachers to wear a headscarf in public schools in Germany. However, debates about possibilities of banning the wearing of headscarves have been discussed in all Western European countries, yet with different intensity and subtexts but always reflecting on integration, the role and visibility of religion and especially Islam in public space, national identity and the situation of Muslim women (Amir-Moazami, 2007:158.).

Throughout Europe feminists became leading voices in these debates sustaining the opinion that the headscarf is an unmistakable symbol of the oppression of women and therefore incompatible with women's rights. This position is expressed in a statement of a German women's organization: "*For TERRE DES FEMMES, the headscarf is a symbol of a patriarchal gender hierarchy, i.e. the guardianship of men over women. This is maintained by both men and women.*"⁽⁴⁾ The French philosopher Elisabeth Badinter warns that the tolerance of the headscarf would in fact mean to abolish gender equality. "*En autorisant de facto le foulard islamique, symbole de la soumission féminine, vous donnez un blanc-seing aux pères et aux frères, c'est-à-dire au patriarcat le plus dur de la planète. En dernier ressort, ce n'est plus le respect de l'égalité des sexes et du libre arbitre qui fait loi en France.*" (Badinter et al. 1989)

Similarly, many feminist activists spoke in favor of restricting the religious freedom of Muslim women in order to enable them to develop a free will and independency of male domination. This included the support for exclusive solutions that compel women to withdraw either their headscarves or themselves from society.

This position is far from being uncontested among feminists. In their effects Ms Freedman argues, "*the policy of banning Muslim women from wearing headscarves has in fact been detrimental to the exercise of their rights, acting to further exclude them from European societies in the name of supposedly universal, but arguably Eurocentric conceptions of women's rights*" (Freedman, 2007: 29).

With reference to feminist debates over banning the headscarf in the education sector in Germany and France, Ms Rommelspacher and Ms Wallach Scott both point out the contradiction between justifying a ban with the aim to free Muslim women from the oppression of traditional or patriarchal society and the consequences of the ban that led to the expulsion of the headscarf-wearing women from schools or employment. This way, veiled Muslim women, (i.e. those wearing headscarves), appear as women who need rescuing or, if trying to speak for themselves, as dangerous elements in the project of Islamization. According to Rommelspacher, this builds a foil that enables "Western-style" women to appear as "emancipated" while the demands for gender equality within the European context are put on hold (Rommelspacher 2009 and Wallach Scott, 2007). Recent approaches in gender studies have described this phenomenon as an intersection of different forms of hierarchies, in this case gender, race and religion that instead of supporting them leads to further exclusion of those women who are perceived as victims of male oppression.

2. Confronting the intersections between gender and religion

In a comparison of media debates and legal policies in four national contexts Ms Korteweg and Ms Yurdakul contend that discussions of honour-related violence that stigmatize certain immigrant communities are more likely to lead to general anti-immigrant policies or policies that impede settlement, while debates that frame honour-related violence as a variant of the generally widespread problem of domestic violence and violence against women are more likely to lead to policies that directly target these forms of violence. The outcome is quite different as the authors show: in the first case women are not supported, while immigration is further restricted, which by politicians is presented as a means of fighting violence against women. In the second case victims of violence are directly and indirectly supported in the field of NGOs (Korteweg and Yurdakul, 2011).

Like restricting policies to prohibit domestic and honor related violence, a ban of headscarves in certain sectors of education and the work life on the one and the support of Muslim women in attempts to emancipate from male domination by offering access to participation in society on the other hand offer two different answers to address the marginalization of Muslim women (Holzleithner, 2008). Increasingly, restrictions on religious clothing and headscarf bans are criticized, as Muslim women beyond the education sector see themselves confronted with the decision between work or wearing a headscarf (Roseberry, 2011: 191). They are furthermore described “as indirect discrimination on the grounds of sex and religion, as they affect women more than men and Muslims more than Christians.”⁽⁵⁾ Hence, measures that confront one dimension of discrimination (gender) are not only questioned in their effects on a subgroup, but perceived as responsible for discrimination at the intersection with another dimension (religion).

3. Data on discrimination of Muslim women

Recent quantitative surveys and data generated by NGOs that offer counselling for victims of discrimination, show that effects of the bans have unfolded also in other areas of everyday life such as public transport, searching for housing, in the health system, in the social service sector, or in their neighbourhood. Cases that are discussed publicly often refer to job refusals; Muslim women report cases of being kept from a promotion in a job or being graded differently than other students in school. (Open Society Institute, 2009)

Amongst Muslim women, those wearing the headscarf are the first victims suffering from discrimination. Even if Muslim men also can get into conflict over beards, turbans or jilbabs, there has been a significant rise in complaints about unequal treatment of women who wear a headscarf around Europe⁽⁶⁾. According to a 2009 Open Society Institute (OSI) study led in 11 European cities, 81% of non-Muslims state that they have never experienced religious discrimination, while this is shared by only 35% of the Muslim respondents (OSI, 2009). The European Union Minorities and Discrimination Survey (EU-MIDIS), carried out in 2009 within 14 EU Member States, also shows evidence of a high level of experiences of discrimination among Muslims in general⁽⁷⁾. In countries, such as France, where statistics are broken down by gender, it appears that more women complain about religious discrimination than men⁽⁸⁾. Moreover, research carried out in the Netherlands showed that 15 out of the 40 Muslim women interviewed who wore a headscarf had experienced problems when applying for a job because of their headscarf. Several of the Muslim women interviewed expressly confessed that they did not apply for a position when they suspected that headscarves would not be accepted⁽⁹⁾. According to OSI city-reports, Muslim women also felt they had fewer job opportunities because of their appearance, specifically when they wear a head cover or

other Islamic clothing (especially OSI, 2010b: 114). Similarly, a survey published by the Norwegian Centre Against Ethnic Discrimination showed that 20% of the 300 private corporations that took part in the study would not accept their employees wearing religious head-dress at work ⁽¹⁰⁾. Only a limited number of these corporations referred to the working dress requirements. Therefore, it seems unlikely that the headscarf ban in these cases is merely a way to meet legitimate security requirements.

PART I

The diversified and lowered protection of Muslim women resulting from a non-intersectional approach ⁽¹¹⁾

As a religious sign exclusively worn by women, the headscarf appears as the paradigm symbol of intersectionality. However, the European court of Human Rights and most of the European national courts and the Equality bodies dealing with the headscarf overlook its gender perspective in order to address it merely as a religious one ⁽¹²⁾.

This situation is one of the direct consequences of the structural pitfall of non-discrimination law which leads claimants to disaggregate and choose amongst the elements of their identities those that they consider as the most relevant. The claims are designed in order to fit the existing and distinguished categories as groups discriminated against are “*mutually exclusive, defined according to objective characteristics and operating in opposition to one another*” (Hannett, 2003: 65). They highlight the ground of discrimination which is considered as the most salient or the most relevant. In this respect, one must mention the likely perception of Muslim women of their experience of discrimination which would be primarily based on religion, the strategic litigation advice of their lawyers, or even the lack of support from NGOs.

Moreover, the headscarf ban issue raises a singular difficulty compared to other forms of intersectional discrimination: the headscarf may also be understood in itself as incompatible with gender equality. Such a view is shared in particular by the mainstream women’s movement and some European courts. This also jeopardizes all attempts to deal with the headscarf as a manifestation of multiple discrimination.

Nevertheless, as we will show below, the current focus on the religious aspect of the headscarf is biased and misleading. The disentanglement of its hybrid nature leads to diverse national solutions and even a lowered protection of Muslim women as the prohibition of religious discrimination is less protected than the gender one.

A. The limits of the prohibition of religious discrimination in Europe compared to gender discrimination

The scope or the level of protection may differ depending on the alleged discrimination ground such as gender and religion.

1/ A hierarchical protection between gender and religious discrimination

- **in EU law**

Gender equality has long been considered as a core right within the EU legal order. Since 1957 and the EEC Treaty, the principle that men and women should receive equal pay for equal work has been provided in primary EU legislation. Over time, secondary legislation, constructive ECJ's case-law, and amendments to the Treaties have contributed to reinforce the scope of this principle. Since the seventies, gender equality has been enshrined as a general principle of EC law ⁽¹³⁾ and the Amsterdam and the Lisbon Treaties as well as the Charter of Fundamental Rights also have offered a preeminent place to gender equality. The principle of equality between women and men are part of the values and objectives of the Union (Articles 2 and 3(3) of the Treaty on European Union). The European Union shall also fulfil the task of integrating equality between men and women into all EU policies (also known as "gender mainstreaming", Article 8 of the Treaty on the Functioning of the European Union). Moreover, besides the general prohibition of discrimination on all grounds including sex (Article 21), the EU Charter also includes specific reference to equality between women in all areas (Article 23).

In EU law, religious discrimination is forbidden only within the employment field ⁽¹⁴⁾. Gender discrimination protection is wider as it also encompasses the access and provision of goods and services, including housing ⁽¹⁵⁾. This seems to comfort the view that there would exist a form of hierarchy between the grounds of discrimination at EU level. But as Member States often offer a protection beyond the requirements the EU law, such a distinction is nevertheless not necessarily replicated at a national level (Mc COLGAN et al., 2006: 74). Nor is it the case within the ECHR system.

- **within the European Convention of Human Rights (ECHR)**

The justifications for differences of treatment, which are admitted by the European Court of Human Rights, seem different depending on the grounds of discrimination.

Gender equality is recognised by the European Court of Human Rights (ECtHR) as one of the key principles underlying the Convention and a goal to be achieved by Member States of the Council of Europe ⁽¹⁶⁾. The Court considers that "*only very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention*" ⁽¹⁷⁾. Therefore, the standard of protection seems very high when discrimination leads to exclusion on a gender basis. It is only when the issue of discrimination relates to matters of fiscal and social policy (e.g. pension schemes, retirement age etc.) that the European Court affords the State Parties a wide margin of appreciation where gender discrimination is concerned ⁽¹⁸⁾.

The test applicable to the limits of religious manifestation is quite different, even if "*freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention*" ⁽¹⁹⁾. For example, most of the cases concerning the headscarf ban have been analysed under the protection of article 9 enshrining the respect of freedom and belief, combined with article 14 prohibiting religious discrimination. The ban was judged as justified either on the basis of security reasons ⁽²⁰⁾, or secularism (consistent with the values of a democratic society) ⁽²¹⁾ and/or gender equality ⁽²²⁾. In all events, the States Parties are given a wide margin of appreciation due to the lack of consensus on religion around Europe.

Nevertheless, even when most of the European States have already adopted a specific standard of protection concerning the wearing of religious symbols at universities or the ban

of the crucifix in the classrooms, this emerging consensus did not diverge the Court from its usual test on religion ⁽²³⁾.

2) Its consequences: the diversity of the national legal outcomes relating to the protection of Muslim women

Due to the lack of consensus on religion around Europe, the legal protection of Muslim women is by no means harmonised or uniform between the concerned Member States ⁽²⁴⁾. This concerns not only the public employment field where the neutrality of the State may limit the wearing of religious symbols. Such a diversity of the legal outcomes also affects Muslim women within the private sector.

For example, the Danish Supreme Court (*Højesteret*) held that clothing guidelines of a department store (the well-know Føtex chain) aiming at creating a religious-neutral workplace were not discriminatory on the basis of religion. Even if it admitted that such a dress code mainly affected Muslim women, the differential treatment was found objectively justified and proportionate ⁽²⁵⁾. A Belgian Labour Court (*Cour du Travail*) came to the same conclusion about the dismissal of a female employee working in a bookshop for non-compliance with clear dress guidelines. It explained that any freedom may be limited where religious practices are “*likely to lead to chaos*”. The dismissal was found justified because the dress-code was applicable to every worker and supported a neutral image of the company ⁽²⁶⁾.

By contrast, a German Labour Court ruled as discriminatory on the basis of religion the dismissal of a nurse wearing the headscarf in a Catholic hospital because she was capable of fulfilling her tasks regardless of her headgear ⁽²⁷⁾. The Dutch Equality Body (*Commissie Gelijke Behandeling*) also considered as discriminatory the refusal to serve customers of a restaurant wearing headcoverings ⁽²⁸⁾. Adopting the observations of the French Equality Body (HALDE), the Paris Criminal Court of Appeal (*Cour d’appel, chambre correctionnelle*) convicted a private training center for discrimination because it excluded Muslim women wearing the headscarf ⁽²⁹⁾. More surprisingly, the same situation may lead to diametrically opposed solutions. For example, the dismissal of a receptionist working in a private company because she was wearing a headscarf was considered justified by Belgian courts but discriminatory in France ⁽³⁰⁾.

Whatever the lack of consensus on religion, it is nevertheless puzzling to see how different women and in this case, Muslim women, may be treated from one country to another. Would it mean that there is no consensus on gender equality in Europe? It is doubtful at least in the 27 EU Member States which are bound by the EU Directives on gender equality within the employment field. As an integrated legal order, the EU Law requires a uniform interpretation of these texts. According to Ms Vakulenko in her analysis of the relationship between gender, Islamic dress and Human rights, “*there is (...) a noticeable tendency to overlook or underestimate the gender dimension of the hijab controversy. In particular, the intersection of gender and religion inherent in the ‘Islamic headscarf’ (...) has not been adequately considered or analysed*” (Vakulenko, 2007; see also Fournier and Yurdakul, 2006).

Besides, the headscarf ban has also been considered by some courts as a way to liberate women from their fate. This jeopardizes all attempts to demonstrate that in fact it creates serious inequality with respect to employment, education, and more generally, all opportunities to participate in public life.

B. The discrepancy between an abstracted and sexist interpretation of the headscarf and the reality experienced by Muslim women

The legal perception of the headscarf ban is not only fragmented, it has also been understood as conflicting with gender equality.

• The incompatibility between the headscarf and gender equality within the ECtHR's case-law

In its *Dahlab* judgment (³¹), the European Court of Human Rights held that the headscarf is a “powerful external symbol” and that “it might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which (...) is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others, and above all, equality and non-discrimination (...)”.

In its *Sahin* case (³²), the Court adds that, when examining the question of the Islamic headscarf in the Turkish context, “it must be borne in mind the impact that wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it”. The Court also notes that this religious symbol has taken on a political significance in Turkey over the years. It therefore “does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts. (...) In that context, the headscarf ban constitutes a measure intended to achieve (...) pluralism in the university.”

Among the variety of meanings of such a symbol, the European Court of Human Rights construed the headscarf as a symbol of the inferior position of women in Islam and supported the view that girls and women may be pressured into wearing it. In other words, the headscarf ban would be the outcome of the conflict between “emancipatory modernity and oppressive tradition” (Scott, 2007: 153). It thus gave a wide margin of appreciation to the States in order to free all women from religious requirements and social pressure, especially in a context where Islamic fundamentalism would threaten democracy.

Although controversial, such a perception has a long history in the Western countries. As reiterated by Ms Rottmann and Marx Ferree (2008), it helped to legitimize the colonization of Muslim countries and to protect uneducated and backward immigrants against themselves. Nevertheless many sociological studies show the multifaceted meanings of the headscarf and its polysemic nature (³³). “It reflects the diversity of women’s experience and aspirations around the world” (³⁴). Moreover, the headscarf has nowadays dramatically shifted from economic marginality to cultural difference in Western countries (Weber, 2004). More and more young educated women in Europe wear it in order to reaffirm their “otherness” and/or Muslim identity (³⁵).

• A “Eurocentric” approach compatible with women’s rights in a multicultural Europe?

Carolyn Evans argued that the “Court uses both stereotypes of Muslim women without any recognition of the inherent contradiction between the two and with minimal evidence to demonstrate that either stereotype is accurate with respect either to the applicants or to

Muslim women more generally". On the one hand, the Muslim woman appears as "the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of male dominance". On the other hand, the Muslim woman is also linked to the figure of the aggressor as she is "inherently and unavoidably engaged in ruthlessly propagating her views". (Evans, 2006: 52)

According to the dissenting Judge Tulkens, the "unilateral and negative" view of the majority of the Court is linked to stereotypes and prejudice and appears also "paternalist". In any event, the Court gave no evidence that the two abovementioned applicants ever tried to proselytize to their pupils or their fellow students. Ms Dahlab was even wearing her headscarf at school for five years without raising any comments or complaints until she was told to remove it. Moreover, nobody had ever accused Ms Sahin of holding fundamentalist views. She peacefully wore her headscarf and simply wanted to keep it at University.

The lack of factual assessment of each individual situation means that the Court has not analysed the proportionality of the exclusion measure. The defendant government should have put forward a convincing explanation as to how the general interest could justify that the claimants were individually barred from working and studying. Even if fighting against Islamism may be a legitimate aim, such a ban might not seem proportionate when applied to women who have nothing to do with fundamentalism.

Moreover, nothing suggested that the female applicants challenging the headscarf ban before the European Court of Human Rights were not wearing this religious sign of their own free will. There were no objective elements to consider that they were particularly vulnerable or politically instrumentalized or that they were acting under social pressure. They were all educated, some of them were working, others entering the medical profession as doctors or pharmacists, or they intended to travel. They simply expressed their wish to be able to keep their headscarf at work, at University, or in other public institutions.

Ms Kurtulmus was a Turkish associate professor at the Faculty of Economics of the University of Istanbul. She had worn the Islamic headscarf when she obtained her doctorate and later her professorship ⁽³⁶⁾. Ms Dahlab was a Swiss national converted to Islam and worked as a primary-school teacher ⁽³⁷⁾. Ms Karaduman was Turkish. She had completed her university studies at the Faculty of pharmacology in Ankara and had obtained her Bachelor's degree ⁽³⁸⁾. Ms Sahin was a Turkish national in her fifth year at the Faculty of Medicine. She wore the headscarf during the first four years of her studies. Being prevented from attending lectures veiled, she decided to move to Vienna ⁽³⁹⁾. Ms Bayrak of Turkish origin was living in France and was forced to leave public secondary school because she could not wear the headscarf on the basis of the 2004 French legislation banning all ostentatious religious signs. She followed correspondence courses, passed her A Level and is now a medical student at the University of Caen where she is allowed to keep her headscarf during classes ⁽⁴⁰⁾. Ms El Morsli was Moroccan and intended to join her French husband in France but could not enter the French Consulate in Marrakech with her headscarf for security reasons. As a consequence, she could not get her visa ⁽⁴¹⁾.

We could give other illustrations of such critical situations from national case-law. For example, in France, a woman wearing a *hijab* was denied access to an English course taking place on the premises of a State high school, where school pupils are prohibited to wear any ostentatious religious symbols. This woman, who had paid for her training to improve her knowledge of English in order to get a degree in Islamic Banking, was eventually prevented

from attending the class. The public training centre, which depended directly from the Ministry of Education justified the woman's exclusion on the basis of the maintenance of public order and the normal functioning of public service: it feared that the mere proximity of this woman would have a negative impact on the school pupils prohibited from wearing religious symbols. Before the Court, it also pled that, in any case, the claimant's training was purely hypothetical: she had stopped her studies ten years ago, was pregnant and her professional shift seemed incompatible with her family life. Last but not least, it considered that her husband's revenues were sufficient to support the family⁽⁴²⁾.

The sexist nature of the headscarf may be a reality in certain cases and that some women may be forced to wear it around Europe. In these cases, we argue that any form of cultural and religious relativism which could violate women's fundamental rights should clearly be prohibited. Nevertheless, the ECtHR's jurisprudence deliberately conceals the religiousness or the result of spiritual soul-searching of the headscarf and the countless other meanings this piece of cloth might have. It focuses on the potential threat it may have on others and on Western values such as gender equality. It does not take into account the diversity of women in a multicultural Europe and even less the specific situations of the claimants (Vakulenko, 2007: 192). On the contrary, the meaning of the headscarf should be ascertained only on a case-by-case basis⁽⁴³⁾.

Moreover, the Court's case-law does not explain who the beneficiaries of gender equality would be. First of all, if wearing the headscarf really was contrary to this fundamental principle, consistency would require a total prohibition of the headscarf in all places, whether public or private (Bribosia and Rorive, 2004: 958). Secondly, as Judge Tulkens but also the French Council of State pointed it out, it would be difficult to prohibit a woman, on the basis of gender equality, from following a practice that, in the absence of proof to the contrary, she has freely adopted. *"Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them"*⁽⁴⁴⁾. They are *"not intended to be applicable to the individual person, i.e. to the person's exercise of personal freedom, which may in some cases lead to the adoption of a form of behaviour that could be interpreted as sanctioning an inferior situation, in the public space like anywhere else, provided there is no violation of physical integrity"*⁽⁴⁵⁾.

Despite the fact that the ECtHR is *"to guarantee rights that are not theoretical or illusory, but practical and effective"*, the headscarf is construed in a highly abstract way without any reference to the religious identity of the applicants. Gender equality is also understood as an *"organizing principle of society (which) is completely separated from the gender in the applicants' identity"* (Vakulenko, 2007: 193). It is so disconnected from their identities that it becomes a concept that is used against women. As a consequence, such an abstraction eventually deprives girls of education, jobs, and other fundamental rights, which sounds rather paradoxical (CHAMBLEE, 2004: 1073; BLEIBERG, 2005: 129). The exclusion of women, and in this case Muslim women, from studying, working, or travelling appears in complete contradiction with the purpose of gender equality which is about women's empowerment. Talking about women's rights and equality, the exclusion of Muslim women from higher education and careers may have more detrimental consequences than the repeal of the headscarf ban (REBOUCHE, 2009). One might fear that *"depriving young people of their economic and intellectual independence exposes them to a much greater extent to the pressure of their families and society"*⁽⁴⁶⁾. For example, according to 71 NGOs⁽⁴⁷⁾, Turkish women who wear the headscarf are thus restricted to the status of housewives, agricultural labourers, servants, or other such unskilled roles.

Therefore, the second part of this paper will make some suggestions for Muslim women to become more visible citizens in an inclusive society.

PART II

Ways to restore the multiple identities of Muslim women

In the name of modernization, Muslim women, as women, are alienated from society. The US Supreme Court Justice Louis Brandeis stated in a judgement in 1927 that “*men feared witches and burnt women*”⁽⁴⁸⁾. “*The symbols (...) do not have meaning by themselves. Instead, it is up to the court to attribute meaning to them*”⁽⁴⁹⁾. It becomes a problem when it aims at categorizing veiled Muslim women whether as victims or as proletizing aggressors. They are not “second-class women” and all the instruments dealing with sex equality should protect them as women.

Preventing women and in this case, Muslim women, from wearing a headscarf at work, at universities or in the vocational training centres may come into conflict with gender equality. In a gender perspective, the headscarf ban has an exclusion effect. Therefore, not only would it not protect women but on the contrary, it would infringe on equal rights for all women within the employment sector, vocational training, or education as referred to Article 2 of the additional Protocol no. 1 to the ECHR combined with Article 14 of the ECHR, Article 14 of the 2006/54/EU Directive concerning equal treatment between men and women or Articles 10 and 11 of the UN Convention on the elimination of all forms of discrimination against women (CEDAW).

Therefore the aim of our following developments is to give practical advice to Muslim women in order to successfully plead intersectional discrimination and increase their protection under non-discrimination law.

A. The recognition of the gender perspective of the headscarf and its intersectionality

1) The legal instruments prohibiting multiple discrimination

To our knowledge, there are no legal binding international or European instruments expressly prohibiting multiple discrimination. Nevertheless, nothing would prevent the existing legal texts to cover multiple discrimination. Article 26 of the International Covenant on Civil and Political Rights, Article 14 of the ECHR, and Article 21 of the EU Charter of Fundamental Rights provide for a non-exhaustive list of prohibited grounds of discrimination. Nothing suggests that they cannot be combined.

Moreover, there are several soft measures at the international level urging State Parties to tackle this very specific form of discrimination, such as the UN Fourth World Conference on Women in Beijing (1995) or the Durban II Declaration (2001)⁽⁵⁰⁾.

At the EU Level, the Recitals of the 2000/750/EC Council Decision establishing a Community action programme to combat discrimination⁽⁵¹⁾ also require national action on multiple discrimination. Similarly, the Recitals of Directives 2000/78 and 2000/43 prohibiting

racial and religious discrimination both stress that women are often victims of multiple discrimination. The European Parliament has also called on EU member States to review the implementation of all policies related to the phenomenon of multiple discrimination⁽⁵²⁾. This is consistent with the gender mainstreaming policy as referred to in Article 8 of the Treaty on the Functioning of the European Union⁽⁵³⁾.

The 2010 Genderace Report⁽⁵⁴⁾ also noted that at the national level, the vast majority of European legislation covers multiple discrimination. The Bulgarian and Romanian legislation both give a definition of multiple discrimination, while the Polish one expressly provides that direct and indirect discrimination can be based on more than one ground. According to the German General Equal Treatment Act, “*discrimination based on several of the grounds (...) is only capable of being justified (...) if the justification applies to all the grounds liable for the difference of treatment*” (Article 4). The Romanian Equal Treatment Act (2006) provides that multiple discrimination is an “aggravating circumstance” which has an impact on the level of damages. According to the Austrian Disability Equality Act, tribunals may also take into account multiple discrimination when assessing the award for damages. The Spanish and Bulgarian laws both place a positive duty on public authorities to address the problem of multiple discrimination in devising policies and conducting surveys. Even if there is no express provision in other national legislation in Cyprus, Denmark, France, Iceland, Malta, the Netherlands, Norway, Portugal, Slovakia, Spain, Sweden, nothing would prevent courts to construe their laws as encompassing multiple discrimination⁽⁵⁵⁾.

2) The UN precedents

The International Convention against All Forms of Discrimination Against Women (CEDAW), ratified by all the European countries, enshrines the rights for women to freely choose their profession and work as well as equal rights with men concerning conditions for career and vocational guidance, access to studies and the achievement of diplomas in educational establishments of all categories. Unlike other human rights treaties, the CEDAW is “*concerned with the impact of cultural factors on gender relations*”⁽⁵⁶⁾. It gives formal recognition of the influence of culture and tradition on restricting women's enjoyment of their fundamental rights.

To our knowledge, the CEDAW Committee has not yet had the opportunity to give a communication on this issue except in the case *Kayhan v. Turkey*⁽⁵⁷⁾ concerning the dismissal of a Turkish female schoolteacher based on the wearing of the headscarf. Unfortunately, the CEDAW Committee considered the communication inadmissible for procedural reasons: Ms Kayhan had not challenged gender but only religious discrimination before the national Courts and therefore domestic remedies were not exhausted contrary to the requirement provided in article 4, paragraph 1 of the Optional Protocol.

Nevertheless, the CEDAW Committee has expressed deep concern about the disadvantages concerning the professional and employment opportunities of women and the impact on girls and women of the ban on wearing headscarves in schools and universities. For example, it has continuously and unsuccessfully requested from the Turkish government to monitor and assess the impact of the ban on wearing headscarves and to compile information on the number of women who have been excluded in the areas of education, employment, health and political and public life, but also schools and universities⁽⁵⁸⁾.

On January 25, 2010, the Chairwoman of the Dutch Equal Treatment Commission (ETC) explained to the CEDAW Committee that Muslim women form a specific group suffering from discrimination ⁽⁵⁹⁾. The number of headscarf cases has increased over the last few years. Muslim women are more vulnerable than men as the expression of their religion is visible. Half of the 28 judgements of the ETC on the ground of religion in 2007 concerned headscarves.

She reiterated her former suggestion to the CEDAW Committee vis-à-vis the Dutch government to take steps to reverse the negative attitude towards Muslim women, particularly by making it clear that it is completely forbidden to refuse women wearing headscarves access to education and employment or to ban them from cafés and restaurants or sports schools. She also suggested that the CEDAW Committee recommends that the Dutch government sanction employers who continue to refuse to hire Muslim women wearing headscarves ⁽⁶⁰⁾.

Besides, some national courts or Equality Bodies handle the ban of the headscarf in an intersectional way, i.e. as gender and religious discrimination.

3) The existing precedents of a gender-oriented approach in Europe

- In Norway

In Norway, like in most European countries, Muslim women lodged complaints concerning the headscarf ban as discriminatory on the ground of their religion ⁽⁶¹⁾. Nevertheless, the Norwegian Ombud's jurisdiction was limited to gender until 2006. It thus decided *ex officio* to deal with these claims from a gender perspective. Later on, when the Ombud became competent on other discrimination grounds, she addressed the headscarf ban as gender and religious discrimination, due to her concern for multiple/intersectional aspects in this respect.

Until now, twenty cases were settled by the Ombud and/or the Anti-Discrimination Tribunal regarding the right for Muslim women to wear the headscarf at work or at school.

- before 2006:

The first one of these concerned the dismissal of a room maid for non-compliance with the uniform code of the Radisson SAS Plaza Hotel prohibiting the use of head coverings. According to both the Ombud and the Anti-Discrimination Tribunal ⁽⁶²⁾, this gender-neutral dress code nevertheless disadvantaged Muslim women wearing headscarves and produced gender specific discriminatory effects.

The Norwegian bodies relied on the fact that a general ban on headgear would mostly affect women, because the majority of immigrants in Oslo wearing religious attire are Muslims. They also referred to the existing accommodating uniform regulation within the military services (e.g. for turbans) to conclude that practical solutions were already managed without great difficulties in other sectors. They also shared the view that "*Muslim women's personal integrity was so closely linked to wearing the hijab that a prohibition would mean that they could be barred from work*" (Hellum, 2011: 84). Concerning the proportionality of

such a ban, the Ombud stressed that since the headscarf for these women would be a religious requirement, and freedom of religion is a human right (which at the time was not included in Norwegian Anti-Discrimination legislation), it would be disproportionate to uphold such a ban. In this context, requiring a uniform design that would accommodate the wearing of a headscarf was therefore not considered as unreasonable. The two Norwegian institutions concluded that the employer's policy was indirectly discriminatory on the basis of gender.

Later on, the Norwegian Ombud dealt with another "scarf off" uniform policy in a large furniture store, the company A-Møbler⁽⁶³⁾. According to the employer, such a requirement aimed at securing value neutrality. Even if the Ombud admitted that the promotion of a common profile was a legitimate aim, it needed to be strictly linked to the nature of the work. As the furniture store did not give evidence of such a genuine occupational requirement, it was found that the headgear ban had a disproportionate impact on women. The Ombud again hold that indirect gender discrimination took place⁽⁶⁴⁾. The employer accepted this interpretation and the claimant was entitled to be reinstated in her previous position⁽⁶⁵⁾.

These cases were all presented as cases of gender discrimination under the Gender Equality Act, which at the time was the only comprehensive anti discrimination law in place in Norway.

- after 2006

In more recent decisions relating to another department store and a bakery⁽⁶⁶⁾, the Ombud for Equality and the Anti-Discrimination Tribunal upheld this general line of reasoning. The headscarf ban was thus challenged according to the Gender Equality Act and the new Act against Ethnic and Religious Discrimination. The Ombud concluded that the claimants were subjected to direct discrimination on the grounds of religion and indirect discrimination on the grounds of gender.

In 2008, the Ombud reiterated this assessment about the police uniform regulations Equality, which was eventually confirmed by the Anti-Discrimination Tribunal⁽⁶⁷⁾. The Ombud referred to the existing accommodating uniform with the military, the customs service, and the hospitals in Norway. It also gave special attention to the best practices in Britain and in Sweden where policemen can wear turbans and hijabs as long as they have a suitable colour and shape and satisfied safety requirements. The Norwegian bodies asserted that the Ministry of Justice had not given evidence that value neutrality could justify the ban and that the police should also reflect society. They concluded that such a policy was discriminatory on the grounds of both gender and religion⁽⁶⁸⁾.

This series of decisions by the Norwegian Ombud are interesting because they specifically address the hijab as an issue of gender equality rights. The Ombud also explicitly refrains from considerations about the symbolic meanings of the headscarf, and instead treats the complex issue as an intersecting individual right.

The Norwegian Ombud considers that the headscarf ban is detrimental to Muslim women who cannot enjoy equal freedom of choice concerning employment. She did not deny that the headscarf might in itself repress women and that women may be forced by men to wear it. But whether or not Muslim women wear such a garment of their own free will, the employers shall not prohibit headscarves at the workplace on the sole basis that this may be oppressive. In an interview about the abovementioned A-Møbler case, the Norwegian Ombud of that time, Ms

Kristin Mile, explained that the question whether or not the use of hijab is oppressing to women *“is maybe something the Muslim environment has to discuss, but to forbid the use of the headgear is something completely different (...). That means that we would shut women out of the work life and it would then be twice as oppressing”* ⁽⁶⁹⁾. Many Muslim women would be excluded from working life because unveiling is incompatible with their religion or because male family members will not let them take on paid work if they do not wear the headscarf.

In a very pragmatic view, the Norwegian Ombud construed the gender equality legislation as setting limits on the employers’ ability to require conditions that adversely affect women and, by extension, Muslim women. She advocates for the promotion of substantive equality in all areas and implies equal opportunities for women and men (Craig, 2007, Loenen Year, Siim and Skjeie, 2008, Langvasbråten and Skjeie, 2005).

To our knowledge, the Norwegian Ombudsperson is the sole European institution that systematically addressed the ban of the headscarf as intersectional discrimination.

- In the Netherlands

In its opinion 2004-165, the Dutch Equal Treatment Commission (ETC) followed the same approach. It had to settle a case relating to a veiled temporary worker who was first offered a 3-day job as a cleaner in a psychiatric hospital. Eventually, she was not allowed to work because she did not comply with the requirement applicable to the staff to dress ‘appropriately’. The cleaning company stated that the reason for the refusal was for her own safety, as she might get hurt by one of the patients.

According to the Dutch Commission, this “vague” rule gave no guarantee at all that an employee would not become the victim of aggression by any of the patients. Also other more efficient ways other than wearing discreet clothes could have been established to protect the personnel. The ETC decided that the rule according to which employees working in the psychiatric hospital are dressed as discreetly as possible had a discriminatory effect on Muslim women as the persons who cover their head to comply with religious requirements are mostly women. This amounted to indirect discrimination on the grounds of religion and sex.

Nevertheless, this decision is isolated. As its counterparts in Europe, the ETC usually deals with the headscarf ban as mere religious discrimination. It had nevertheless this possibility concerning the exclusion of a veiled Muslim trainee from a Catholic primary school. But as the Dutch Equality Body decided that according to the specific circumstances of the case, the claimant was not discriminated against on the basis of her religion, it also concluded that there could not be gender discrimination either ⁽⁷⁰⁾.

Beyond the lack of intersectional analysis, gender discrimination is also not acknowledged because it is not alleged by claimants. Muslim women have not developed strategies to force national courts and tribunals to consider intersectional discrimination. The following developments will give some guidance in this respect.

B. The legal tools and strategies to develop an intersectional and gender-based approach

Despite the Norwegian case-law, the fact remains that most European countries totally eclipse the gender perspective of the headscarf. Nevertheless, from a strict legal point of view, nothing would apparently prevent national courts from dealing the headscarf ban as gender discrimination. It is first necessary to overcome legal barriers that are in fact imaginary.

a) Drawing on the consequence of a lack of real tension between the headscarf and gender equality within the case-law of European States: alleging gender discrimination in cases relating to the headscarf ban

The main barrier for an intersectional approach would be a national legislation or case-law supporting the perception of the headscarf as sexist in itself advocated by the European Court of Human rights, the Swiss and Turkish courts or the dominant strands among feminists. The large majority of European courts and national equality bodies however do not acknowledge such an incompatibility.

Even in a secular country such as France, it has been ruled that promoting gender equality can by no means justify the refusal to rent a room in a rural bed-and-breakfast to two veiled women. This behaviour was sentenced under criminal law ⁽⁷¹⁾. Moreover, wearing the headscarf is not seen by French courts as being a provocation. The Anti-Discrimination Commission (HALDE) has repeatedly affirmed, in accordance with administrative case-law, that « *wearing the headscarf is not, in itself, an act of pressure or proselytizing* »⁽⁷²⁾. The highest Administrative Court, the Council of State, has also held that the veil is not incompatible with the principle of secularism, and that the questions raised by wearing the headscarf must be decided case-by-case, in accordance with the circumstances ⁽⁷³⁾.

Similarly, in the famous *Ludin* case⁽⁷⁴⁾, the German Federal Constitutional Court explained that Muslim women have many different motives for wearing a headscarf, such as the manifestation of their faith, the preservation of their identity in the Diaspora, or their unavailability for sex. As a consequence, the headscarf could not be reduced to a symbol of oppression. On the contrary, the Court asserted that the wearing of the headscarf could foster the integration of Muslim women.

No case-law in many other European countries (such as the United Kingdom, the Netherlands, Norway, Sweden, Austria etc) seems to identify a contradiction between the headscarf in itself and gender equality. It thus seems that the Swiss and Turkish constitutional courts are rather isolated in Europe when construing the headscarf as a symbol of women's submission in Islam. Moreover, some European Equality Bodies, including the Dutch and German bodies, have already acknowledged, in reports and general publications, the principle that forbidding the headscarf may be a form of intersectional discrimination based on gender, religion, and even origin ⁽⁷⁵⁾.

As a consequence, it appears that if the gender perspective of the headscarf ban is eclipsed by Courts or Equality Bodies, it is firstly because gender is not alleged as a discrimination ground by the victims themselves. Therefore, the first legal advice to the victims and their counsel would be to challenge the headscarf ban on a double ground of discrimination.

It has to be remembered that the Courts are not competent to raise this question *ex officio*. Even when the Equality Bodies have the power to deal with discrimination cases on their own initiative, only a few of them have the power to make binding decisions ⁽⁷⁶⁾, very few can award damages and hardly any may initiate *ex officio* court proceedings (for an overview, see Ammer et al., 2010: 225).

b) Submitting claims of intersectional discrimination combined with the right to personal autonomy before the European Court of Human Rights

According to judge Martens, “*Human dignity and human freedom imply that a man [or a woman] should be free to shape himself [herself] and his[her] fate in the way that he deems best fits his personality*” ⁽⁷⁷⁾.

As described above, all the applicants challenging a headscarf ban have actually lost their case before the European Court of Human Rights. Their claims were based on Article 9 enshrining freedom of religion and/or Article 9 combined with Article 14 of the ECHR referring to the prohibition of religious and gender discrimination. Therefore, these legal bases do not seem the most appropriate provisions to succeed. There are however alternative provisions that might be invoked such as Article 2 of Protocol no. 1 relating to the right to education or Article 10 relating to the freedom of expression.

But above all, Article 8 concerning the right to respect for private life ⁽⁷⁸⁾ may be a much more efficient legal tool to tackle intersectional discrimination against Muslim women wearing headscarves. The European Court has broadly construed this provision covering a principle of personal autonomy to the effect that anyone should be able to live according to his or her convictions and personal choices, even if it means putting himself/herself at moral or physical risk, provided he/she does not harm anybody else ⁽⁷⁹⁾. Such a right is construed in the sense of the right to make choices about one's own body.

Matters of relevance to personal development include details of a person's identity as a human being. In their joint dissenting opinion to *Odievre v. France case*, Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää asserted : “*We are firmly of the opinion that the right to an identity, which is an essential condition of the right to autonomy* ⁽⁸⁰⁾ *and development* ⁽⁸¹⁾, *is within the inner core of the right to respect for one's private life*”. According to well-established case law, “*Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world*” ⁽⁸²⁾. The Court also ruled that private life covers the physical and psychological integrity of a person ⁽⁸³⁾ and can therefore embrace multiple aspects of the person's physical, social and ethnic identity ⁽⁸⁴⁾.

Such jurisprudence could thus cover the right for Muslim women to wear a headscarf. It would be even more powerful when combined with an intersectional discrimination based on gender and religion.

Moreover, the ECtHR investigates on whether a contested practice is essential to the personality of the applicant. The protection under Article 8 is guaranteed regardless of the location of its manifestation ⁽⁸⁵⁾. “*Thus, invocation of Article 8 could challenge the public/private division implicit in headscarf prohibitions such as those applied in Turkish universities (...)*” (VAKULENKO, 2007: 194).

c) Reassessing the comparator problem

In order to establish discrimination, it must be shown that a person is or has been treated “*less favourably than another is, has been, or would be treated in a comparable situation*” or in the case of indirect discrimination “*when a person has been put at a particular disadvantage compared with other persons*”⁽⁸⁶⁾.

When dealing with headscarf ban, the European Court has already rejected claims based on gender discrimination. The Court argued that men placed in similar circumstances, i.e. those wearing clothing that clearly identified them as members of a different faith, would be equally treated as Muslim applicants wearing a headscarf⁽⁸⁷⁾. Such a comparability test is critical. In different cases, Muslim female applicants are compared with men wearing headgear for religious reasons (such as Sikhs or Jewish men wearing respectively turbans and yarmulkes). However, in cases relating to gender discrimination, to compare like with like, the cause of a difference of treatment must be solely based on sex. Therefore, the comparison should be made with Muslim men. Not only does the test sound biased as the Court changes two characteristics instead of one but also because it refers to an “equal misery” comparison.

Modern non-discrimination law is more about prohibiting differences (of treatment) than prohibiting (structural) disadvantage. It inherently suggests a comparative analysis. Therefore, the fortunes of many cases depend on the choice of the appropriate comparator. From this perspective, the choice of the comparator is strategic as it may lead to the dismissal of cases that should be adjudicated⁽⁸⁸⁾.

The comparator-based approach sometimes makes it difficult to identify appropriate comparators to reveal multiple discrimination⁽⁸⁹⁾. It is not always easy to find an appropriate comparator or to determine which of the characteristics has caused discrimination. For example, when an employer has treated a comparator who is different by two protected characteristics (i.e. religion and gender) more favourably, this may not be enough to shift the burden of proof in respect to both characteristics so that discrimination is proven on the basis of each characteristic if the employer cannot provide a neutral credible explanation. In cases of dual combined discrimination, a tribunal would usually require more than one comparator or some other evidence to reveal the true basis of discrimination (Tamara, 2010: 64).

This difficulty should not however be over-stated when the exclusion of veiled Muslim women is at stake. As shown above, Muslim women are usually discriminated against on the basis of a dress code. What is therefore striking is that employers or administrative bodies never contest that they actually treat Muslim women differently and furthermore even state that should they withdraw their headscarves, they would not exclude them.

In such a situation, the discriminatory practice is not a mere practice but relies on a binding provision that is usually not contested. Therefore, even if there are no actual comparators, courts can undoubtedly rely on one mere ‘hypothetical comparator’, i.e. a fictional person who is the same as the claimant in all respects except that s/he does not have the relevant protected characteristics.

Moreover, in many other European countries, such as in France or in the Netherlands, the comparison-based approach is not as strict as in the United Kingdom of example. For example, when the Dutch Equal Treatment and the French Defender of Rights (ex-HALDE) address discrimination, they first focus on whether a certain rule or policy affects a (group of)

person(s), directly or indirectly. The analysis of the European Court of Human Rights is also flexible in this respect.

Finally, as described above, for certain categories of persons who are discriminated against, such as pregnant women, there is no need to find an appropriate comparator as only women can experience pregnancy ⁽⁹⁰⁾. A similar approach could be followed according the Norwegian case-law interpreting the headscarf as an item that is part of the physical integrity of Muslim women.

d) Developing an argumentation based on indirect gender discrimination:

- Highlighting the irrelevance of the discriminatory intention :

When the gender issue has been alleged, some courts seem nevertheless reluctant to consider that the headscarf ban is discriminatory on such a basis.

As an example, the European Court of Human Rights has consistently held that the ban is not directed at the applicant and is unrelated to her religious affiliation or her sex. It relies on the fact that the challenged measure merely pursues, among other things, the legitimate aim of protecting public order and the rights and freedoms of others and/or ensuring the neutrality of the State. Therefore, the Court focuses its analysis on “*the manifest purpose of the rule*” (e.g. the preservation of both secularism within educational institutions and the principle of the neutrality of the public service) without paying attention to the effects of exclusion that such a ruling has against Muslim women ⁽⁹¹⁾.

Similarly, the German Federal Labour Court also excludes any possibility that regulations about religious clothes may be discriminatory on a gender basis. It finds its reasoning on the basis that such rules are not specifically aimed at the headscarf worn by women, who are thus not unequally treated because of their sex ⁽⁹²⁾.

Such a test is questionable because it eclipses the disparate impact of the headscarf ban on Muslim women. Although in the last years, the ECtHR has recognized and sanctioned indirect discrimination, in particular on a gender basis ⁽⁹³⁾, it totally ignores such forms of discrimination when a religious sign or a dress code is at stake. It thus misapplies the concept of indirect discrimination (see also Baer et al., 2010) which does not necessarily require a discriminatory intent. Indirect discrimination refers to measures which would seem *prima facie* acceptable and neutral but which in fact prove highly detrimental to specific groups, without objective justification. Any court should analyse the detrimental effect of a specific measure on a person or a group of persons, regardless of the fact that they may be specifically targeted or not, and check whether it is justified and proportionate to the aim pursued.

According to the EU law, indirect discrimination is prohibited and occurs where an apparently neutral provision, criterion, or practice would put persons having a particular religion or belief or of one sex at a particular disadvantage compared with other persons unless that provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ⁽⁹⁴⁾. Similarly, the ECtHR case-law prohibits difference in treatment that may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group ⁽⁹⁵⁾.

Both the Court of Justice of the European Union and the European Court of Justice have expressly acknowledged that a discriminatory intention is irrelevant in this respect⁽⁹⁶⁾. Therefore, it may be important to recall such a principle when challenging a headscarf ban or headgear restriction code.

- Establishing *prima facie* discrimination

To our knowledge, the Court of Justice of the European Union has not yet been given the opportunity to rule on the headscarf ban or more generally on religious discrimination against Muslim women, contrary to the European Court of Human Rights.

Despite the challenge by the claimants of the headscarf ban under the combined basis of Articles 14 and 9 of the ECHR, the ECtHR analyses this kind of issue, first and foremost, as a restriction to the freedom to manifest one's religion. Therefore, the European Court mainly reviews whether the ban meets a "*pressing social need*" and whether it is proportionate to the legitimate aims pursued.

Article 14 of the ECHR which prohibits discrimination has no independent existence. Therefore, when there is not a clear inequality of treatment in the enjoyment of the rights enshrined by the Convention, the Court generally considers unnecessary to review the case under this provision too. According to the ECtHR's case-law, there is no real separate issue arising under Article 14 relating to the prohibition of discrimination when a headscarf ban is concerned. It seems that its discriminatory aspect is thus under evaluated or, at least, it is not considered as "*a fundamental aspect of the case*"⁽⁹⁷⁾. Such an approach impacts not only the reasoning of the Court but also the solution to the dispute. The Court does not deal with this kind of case as a form of intersectional discrimination but it is even worse: it does not consider that, in itself, this may raise a discriminatory issue.

Both EU law and the ECtHR's case-law recognised and applied two different methods of determining how an apparently neutral measure can be discriminatory⁽⁹⁸⁾. Drawing on the American "disparate impact" doctrine, the so-called "disproportionate impact" approach is geared to verifying whether a given measure "*has disproportionately prejudicial effects on a particular group*"⁽⁹⁹⁾ or if it affects "*a substantially higher proportion*" (of the group in question)⁽¹⁰⁰⁾ The second approach, namely unfavourable treatment, consists in pinpointing which measure "*by nature, or intrinsically, is liable to disadvantage persons belonging to a category protected against discrimination*" (De Schutter, 2001 : 95).

Regarding the visibility of Muslims around Europe, a study held in 2009 showed that the overwhelming majority (84%) of the respondents stating that they wear traditional or religious clothing in public are women (Fundamental Rights Agency, 2009). The lack of official statistics on this subject, however, should not be an absolute obstacle to the evidence of a potential indirect discrimination in case of a prohibition of all kinds of headgear or all kinds of religious attire. It may be enough to explain to what extent prohibiting the headscarf may by nature, or intrinsically, disadvantage Muslim women, in order, at least, to shift the burden of proof.

Moreover, in the situations described above, the headscarf can be prohibited in itself or on the basis of dress code prohibiting headgears, religious clothing, or religious signs.

In the first hypothesis, multiple discrimination is additional. The correct comparator must not share one or two of the victim's characteristic(s): the comparator may be a non-Muslim man or non-Muslim woman. Even if it may be sufficient to show that discrimination occurs on the basis of religion, it is still relevant for victims to allege gender discrimination. The defendant will have to justify the prohibition twice. Moreover, as explained above, it seems easier to justify religious discrimination than gender discrimination.

In the last three cases, the prohibition is gender neutral. It may also affect men wearing religious signs such as Jewish or Sikh men wearing a yarmulke or a turban respectively, or even in the last situation, Muslim men wearing the beard. The problem in such a situation is that due to the lack of official statistics on religion, which are usually constitutional, it may be difficult to substantiate that women are more particularly targeted than men.

To our knowledge, there are neither official statistics nor even independent large-scale surveys relating to the persons wearing religious signs around all of Europe, or experiences of the discrimination they face. The exact number of the Muslim population within European countries is in doubt as census figures may be questioned and often national legislation prevents the compiling of such information. It is extrapolated from the EU immigration statistics.

The European Court of Human Rights has already admitted “*sufficiently reliable data*” obtained through a general questionnaire which has not been challenged by the defendant State (¹⁰¹). Furthermore, the European Committee of Social Rights also stated that when official statistics are lacking subject to constitutional restrictions, “*it is up to the State authorities to gather data to gauge the extent of the problem and the progress made in remedying the problem and providing for other remedies (...)*” (¹⁰²).

Besides, the “unfavourable treatment” approach described above allows for *prima facie* suppositions which have not been demonstrated or even documented to the effect that the measure in question is inherently liable to be detrimental to a given target group. No reference is made to specific proportions of the population or the fact of a disadvantage actually having been noted. Therefore, it is less concerned with the practical effects of a provision than with its object in the strict sense of the term.

To conclude on indirect discrimination based on gender when a headgear (including headscarf) ban or religious attire is concerned, the Dutch Equal Treatment Commission considered that people who cover their head because of religious reasons are mostly women. While acknowledging that male believers of other religions may also be concerned by such a ban (e.g. Jewish men wearing yarmulke), it is commonly known that the vast majority of persons in the Netherlands who currently cover their heads on religious grounds are women. The same test was applied in Norway where the Ombud and the Anti-Discrimination Tribunal both relied on the fact that a general ban on headgear would mostly affect women, because the majority of immigrants in Oslo wearing religious attire are Muslims.

Even if not all Muslim women wear headscarves and the number of people wearing headgears is not known, Muslim women are generally considered as the biggest group of persons to use headgear for religious reasons.

- e) Advocating for substantive equality

Formal equality or treating likes alike fails to address societal structures that keep on disadvantaging women. Gender-neutral norms often perpetuate discrimination because they are interpreted from a male perspective and do not account for women's life experiences (and in this case Muslim women).

Framing equality law in this way may obscure *“the historical and continuing realities of inequality facing the subordinated group within each group”* (Hannett, 2003: 65). As the Canadian Supreme Court explained, *“every difference in treatment between individuals under the law will not necessarily result in inequality and (...) identical treatment may frequently produce serious inequality”* ⁽¹⁰³⁾. In the judgement *Egan v. Canada* ⁽¹⁰⁴⁾, Judge L'Heureux-Dubé advocated for a group-based dignity and contextual analysis. She requested to overcome the formal test based on comparison and proposed a new test answering the question whether *“a person is treated with equal concern, respect, and consideration”*. Therefore, the focus should be on individuals belonging to groups who have suffered historic disadvantage. As equality aims at improving the lives of the oppressed, the Court should thus consider the particular hardship imposed on them (Gilbert, 2003; see also Bilge and Roy, 2010).

Substantive equality aims at remedying past and present disadvantage by examining the context or “lived-experiences” of those to whom equality in result is due (Schöpp-Schilling, 2003: 15). According to L'Heureux Dubé J., *“we will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction (...). We risk undertaking an analysis that is distanced and desensitized from real people's real experiences.... More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals”* ⁽¹⁰⁵⁾.

Such an approach focuses more on society's response to a specific person and the historical disadvantage experienced by the group the person belongs to than on the mere characteristics of such a person. In this respect, Ms Solanke proposed to replace the logic of immutability underlying grounds with a limiting principle more aligned to social realities, such as stigma ⁽¹⁰⁶⁾.

According to the glossary of Genderace, *“Stigmatisation is the social imposition of a negative relationship to a personal attribute which permits the doubting of the person's worthiness. It is the mechanism by which first, a person's humanity is reduced, which secondly justifies the reduction or removal of civility, opportunities, and life chances. Stigmas can be immutable but not all are: they can relate to physical attributes, character or personality traits borne by the individual or a relative. Stigma, it can be argued, is the raw material of grounds: if the totems were collapsed, categories removed, and grounds ‘put’ back together, one would be left with a messy collection of social stigmas”* (Solanke, 2009 and Solanke, 2008). Stigma thus refers to a special discrepancy between “virtual” and “actual” social identity (GOFFMAN, 1963).

In many European States, Muslims feel socially excluded, stigmatised and discriminated against ⁽¹⁰⁷⁾. Different sociological surveys acknowledge this situation (Killian, 2003; GURBUZ and GURBUZ, 2006: 22). Ms Göle explains that *“the Islamic headscarf is the most visible and controversial adoption of a stigma symbol”* (Göle, 2003). The headscarf is construed as a sign debasing women's identity, a symbol of oppression, an expression of backwardness, or even terrorism and fundamentalism.

Nevertheless in a multicultural society such as Europe, it is of fundamental importance to overcome the ethnocentric notions of women's inherent autonomy, dignity, and integrity. All women do not necessarily have the same conception of empowerment, freedom, and integrity. Therefore, pleading for a substantive equality vis-à-vis Muslim women wearing the headscarf would highlight the evidence of unfair disadvantage. Such an approach would help to address discrimination "*when this is due to structural, systemic, and institutional reasons*" (Uccellari, 2008:44).

Our developments above may be useful for Muslim women who decide to challenge their exclusion before the Courts and/or the Equality Bodies. Nevertheless, this may concern only a few of them. One crucial issue is that Muslim women often do not perceive themselves as victims of gender discrimination and that the NGOs defending women's rights would moreover be reluctant to support their claims from a gender perspective.

C. Developing strategies beyond legal tools

As the 'European Union Minorities and Discrimination Survey' shows, 79% of the Muslim respondents who experienced discrimination within the last 12 months before the interview did not report any incident. The survey comes to the conclusion that if "*this was extended to the entire Muslim population in the 14 Member States where Muslim respondents were surveyed, the level of non-reporting would translate into thousands of cases that do not reach any complaints bodies – including State bodies and NGOs*" (EU Fundamental Rights Agency, 2009: 8).

The survey also asked for the reasons not to report discrimination, finding that 59% of the respondents considered that "*nothing would happen or change*" by reporting their experience of discrimination to an organisation or office where complaints can be made (Ibidem: 8). More than every fourth Muslim of Turkish origin (28%) who had faced discrimination indicated "*concern about negative consequences*" as a reason for not reporting. On the basis of this data, the European Union Agency for Fundamental Rights (FRA) concludes that policy interventions at the Member State level need to explore the specific reasons among different groups for non-reporting and the need for developing severe measures against the "*disillusion among respondents about the effectiveness of reporting discrimination*" (Ibidem: 9). Additional to the mistrust in existing legal measures and anti-discrimination institutions the survey found an acute lack of knowledge on organisations in their country that can offer advice or support to people who have been discriminated against. Between 60 and 94% of Muslim respondents could not name a single such organisation (Ibidem: 11).

The majority of Muslim respondents, the survey assesses, are largely unaware that discrimination against them might be illegal and even more respondents do not know any organisation that might be able to assist them if they are discriminated against. We therefore have to assume that most cases of discrimination are never reported, or make it to court, but remain very important in the lives of Muslim women. This is supported by the documentation of non-governmental organizations that are engaged in counselling victims of discrimination in different national and regional settings ⁽¹⁰⁸⁾ and led to the recommendation by the Open Society Foundation that city administrations should offer advice and guidance addressing specific target groups on anti-discrimination in this field (OSI, 2009: 219 and OSI, 2010a: 153.). An example for such a specific initiative is the Network against Discrimination of

Muslims Berlin that extends existing counselling on ethnic discrimination to Muslims as their target group.

A main demand in the field of counter-discrimination-measurements is informing and empowerment of potential victims of unequal treatment in order to enable them to stand up against incidents of discrimination. Another strategy to counter discrimination that in praxis can be combined with the first one is the establishment of statistics and documentation on cases of exclusion and discrimination on religious grounds and with regard to multiple factors of discrimination that are reported in order to raise the visibility and urgency of such cases. (Baer et al., 2011)

Besides the lack of knowledge on legal rights and resulting from this insecurity on the side of people concerned, law enforcement is hindered by several entry barriers like fear of reactions by police, courts, and lawyers as uncomprehending or “blaming the victim”. All these can be reasons for people concerned not to seek legal protection. Additionally social commitments or hierarchies in work relationships can lead to a restraint to use rights individually. In such cases, as Ms. Baer and her colleagues argue, collective law enforcement could change this structurally, especially in the field of education, where law enforcement is widely unpopular to fight discrimination (Baer et al., 2011: 50-51). However, class actions are not permitted in all European countries in cases of discrimination.

A view at the European legal situation furthermore shows that it does not necessarily mean that Muslim women are protected from being excluded from employment or school attendance with reference to their religious clothing if there is no ban of headscarves in the public sphere or certain fields of it. However, only a few European countries did come up with a specific protection of Muslim women faced with such exclusion. Academic research and transnational legal exchange should for that reason focus on reporting and making visible successful means of protection and support for Muslim women.

Another problem is the organization of anti-discrimination work whether it is by Equality Bodies, or NGOs, the initiatives often concentrate on only one dimension or identity feature. In some cases, they perceive different grounds of discrimination that contradict each other. This leads to the need for governmental and non-governmental initiatives to develop competencies and strategies to address intersectionality and multiple discrimination. A major way to progress towards this aim would be to cooperate beyond the borders of different criteria of discrimination or group identity. These joint efforts would furthermore allow the mobilisation of wider frameworks for action on discrimination, under-reporting, and equality across civil society and the public sector (Ammer et al. 2010: 178).

In the field of unequal treatment of Muslim women, this is especially difficult as past and current debates on religious clothing have contributed to an understanding of gender equality and certain forms of religious practices or visibility as being contradictory. The only way to address this notion so far seems to be to build on strands within the feminist movement that are aware of intersecting hierarchies and cooperate in the struggle against the exclusion of Muslim women. This could and should include measures against the obstacles these women face within general society as well as within their families and communities.

The women’s movement is showing some significant potential considering the interest in the support of Muslim women. As the recommendations by Ms Baer and her colleagues to tackle multidimensional discrimination suggest, equal treatment bodies of European

governments could support and cooperate with NGOs that are focusing on different dimensions of discrimination. This could be done in shared conferences highlighting multiple discrimination and measures against it. There could be special funding for innovative cooperative projects developing joint approaches. In another trend, Muslim women in different national contexts of the EU have found their own representative bodies and lobby organisations. In these initiatives Muslim women speak for themselves and suggest solutions for some of their main problems in everyday life. In Germany for instance the “Aktionsbündnis muslimischer Frauen” was founded in 2009 and became a full and equal member of the German national council of more than 50 nation-wide women's associations and organizations. Other examples can be found in the Dutch context where Muslim women’s representatives have been included in the development of governmental answers to domestic violence beyond the judicial field.

To sum up, a range of measures beyond legal tools needs to be undertaken in order to fight multiple discrimination: raising awareness, and lobbying for support against multiple discrimination in the general public and among minority groups, documenting cases of multiple discrimination for policy debates and legal cases, exchange on successful counter-measures between municipalities, regional and national administrations, and NGOs. So far, initiatives to raise awareness about support against discrimination among potential victims seem to be most important. These should include information on rights on organizations and institutions that offer support, and raising trust and empowerment. Additionally, academic research on effects of discrimination and successful counter-measures, especially with approaches of participative research that include the perspectives of victims and counsellors, should be supported. Another potential in the field of academic research are surveys on Muslims in Europe or specific national contexts. So far some of these surveys included questions on experiences of discrimination and religious practices such as clothing, yet they did not provide data on a connection between the two and for the most part do not break down experiences of discrimination by gender. Future surveys or analysis of existing results should consider this deficit.

This paper aimed at suggesting new methodologies to tackle complex forms of discrimination against Muslim women wearing headscarves. Beyond misconceptions on indirect discrimination, the biased approach of the comparative method, the double standard of protection relating to religion and gender discrimination, we also underlined another key obstacle in the development of an intersectional approach i.e. the ECtHR’s case-law interpreting the headscarf as incompatible with gender equality.

However, as shown by national and European case-law, nothing could suggest that the Muslim claimants were either victims or aggressors or that they did not choose of their free will to wear a headscarf. However, excluding Muslim women from employment and education and depriving them of their economic and intellectual independence does not appear as the most appropriate way to free them from the pressure of their families or culture. Our argument is to come back to a case-by-case assessment of every situation of discrimination in order to find a fair balance between the public interest and the claimant’s individual one.

The extent of the adverse effect of the headscarf ban on Muslim women is only slightly discussed due to the lack of reliable statistical data. Nevertheless, from a conceptual point of

view, it seems puzzling to accept the marginalization of women from economic and social life in the name of gender equality. Moreover, quantitative surveys on discrimination indicate high levels of discrimination and victimization; while, at the same time, showing low levels of rights awareness and knowledge about, or trust in, mechanisms for making complaints. This leads to the conclusion that many discriminatory incidents and criminal victimization experienced by Muslims are never reported to any organisation – either State-run, including the police, nor NGOs. Hence, campaigns to convey knowledge about anti-discrimination rights and about agencies and organisations that offer help and support in such cases are essential.

In order to bring cases of discrimination against Muslim women forward as intersectional discrimination, awareness for this possibility needs to be raised among counsellors, lawyers, and judges as well as among victims themselves. Often at all these points a focus is put on religion as the feature of difference that conceals other dimensions of inequality. It has been suggested that courts, no matter which reasons are put forward in discrimination cases, should test other grounds of discrimination in order to cover multiple discrimination (Baer et al., 2011: 64).

Our paper attempted to develop innovative legal strategies that are able to catch the social reality of such exclusion which is not only based on religion but also on gender. We described the existing case-law in Norway which may constitute an interesting precedent for new methodologies. Amongst different legal advice, we propose to the victims and their lawyers to allege indirect gender discrimination before Courts and Equality Bodies, to submit claims of intersectional discrimination combined with the right to personal autonomy as referred to in Article 8 of the ECHR, to reassess the comparator problem when applied to the headscarf ban and even to request for substantive equality. We also suggested strategies beyond the law in order for NGOs to support Muslim women.

Multiple discrimination is a problem of the whole society and not only of the individuals or groups that are directly affected by it. People, whose tasks it should be to counter discrimination and who could not be persuaded for this task until now, need more knowledge and sensitization. This is relevant for people in politics, schools, trade unions and employers: they need to be informed of the features and effects of intersectionality. Awareness raising policies on counter measures should also be developed (Ammer et al. 2010: 179). This also means that both national Equality Bodies and non-governmental organisations need to address discrimination in an intersectional way. Otherwise, non-discrimination law may fail to address the real question which has less to do with any characteristic inherent in individuals than the disadvantages and stigmatisation suffered by particular individuals in society. Worse, non-discrimination law, as it stands, may perpetuate inequalities and double victimization.

As Judge L'Heureux Dubé of the Canadian Supreme Court rightly said: *“No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable”* ⁽¹⁰⁹⁾. We thus argue that non-discrimination law must *“be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (...), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice”* ⁽¹¹⁰⁾.

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NOTES

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- (¹) See OPEN SOCIETY INSTITUTE 2009; EUMC 2006, EU Fundamental Rights Agency 2009.

- (²) See French Law no. 2004-228 of 15 March 2011 banning ostentatious religious signs at public schools and French Law no. 2010-1192 of 11 October 2010 prohibiting the covering of the face in the public space. See also the legislative initiatives of some Länder in Germany following the *Ludin* case ruled by the Constitutional Court, the municipality bylaws prohibiting the wearing of the burqa in Italy, Spain or Belgium etc.
- (³) Ontario Human Rights Commission, An intersectional approach to discrimination. Addressing. Multiple Grounds in Human Rights Claims, Discussion Paper, October 9, 2001; http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts/pdf.
- (⁴) TERRE DES FEMMES, Positionspapier zum Kopftuch von TERRE DES FEMMES - Menschenrechte für die Frau, 30.10.2006 [Translated by the authors]; <http://frauenrechte.de/online/index.php/themen/tdf-positionen/ag-frauenrechte-und-religion/561-positionspapier-zum-kopftuch-von-terre-des-femmes-menschenrechte-fuer-die-frau-ev.html>.
- (⁵) EU Fundamental Rights Agency, Migrants, minorities and employment Exclusion and discrimination in the 27 Member States of the European Union, Update 2003 – 2008, Luxembourg (2011), at 76.
- (⁶) See for example the statement of the Chairwoman of the Dutch Equal Treatment Commission explained to the CEDAW Committee that Muslim women form a specific group suffering from discrimination; <http://www.cgb.nl/StippWebDLL/Resources/Handlers/DownloadBestand.ashx?ID=263>.
- (⁷) EU Fundamental Rights Agency, Data in Focus Report Muslims, 2009, at 3.
- (⁸) HALDE's Annual Report 2010: 23; http://www.halde.fr/IMG/pdf/RA_Halde_2010.pdf
- (⁹) CGB (Dutch Equal Treatment Commission) advisory opinion 2006/03 of 14 February 2006, Comments on the fourth Dutch report on the implementation of the Convention on the elimination of all forms of discrimination against women
- (¹⁰) Senter mot etnisk diskriminering, *Når noen er likere enn andre: En undersøkelse om bruk av religiøst hodeplagg på arbeidsplassen* (Oslo: Senter mot etnisk diskriminering, 2001) quoted by HØSTMÆLINGEN (N.), "The permissible scope of legal limitation on the freedom of religion or belief in Norway", 19 (2005) *Emory international Law Review*, 989-1032, at 1016; <http://www.law.emory.edu/fileadmin/journals/eilr/19/19.2/Hostmaelingen.pdf>; see also *Landesstelle für Gleichbehandlung, 2007*.
- (¹¹) The terms "multiple discrimination" and "intersectionality" both refer to discrimination based on several grounds. The term of multiple discrimination is almost exclusively used within international and European instruments, while the terminology referring to intersectional discrimination is mostly used by authors. Intersectionality refers more specifically to discrimination on several grounds but none of them can be isolated. When conceptual accuracy is not needed, we will use them indifferently in this paper. On the terminology and the differences between the concepts of multiple and intersectional discrimination, see Makkonen, 2002.
- (¹²) The same problem occurs concerning ethnic and racial discrimination cases, see Carles and Jubany-Baucells, 2010: 178.
- (¹³) ECJ 15 June 1978 *Defrenne III*, Case 149/77.
- (¹⁴) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; The proposal of directive which could remedy to this problem has gone unheeded. (see 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).
- (¹⁵) 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) and 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.
- (¹⁶) For example, ECHR 28 May 1985 *Abdulaziz, Cabales and Balkandali v. United-Kingdom*, nos. 9214/80, 9473/81 and 9474/81 § 78; ECHR 24 June 1993 *Schuler-Zraggen v. Switzerland*, 14518/89§ 67; ECHR 7 October 2010 *Konstantin Markin v. Russia*, 30078/06.
- (¹⁷) For example ECHR 20 June 2006 *Zarb adami v. Malta*, no. 17209/02.
- (¹⁸) ECHR 12 April 2006 *Stec and Others v. UK* [GC], nos. 65731/01 and 65900/01 (pension payments and invalidity benefits).
- (¹⁹) ECHR 25 May 1993 *Kokkinakis v. Greece*, no. 14307/88.
- (²⁰) ECHR 4 March 2008 *El Morsli v. France*, no. 15585/06 ; ECHR 4 December 2008 *Dogru and Kervanci v. France*, nos. 27058/05 and 31645/04.
- (²¹) ECHR 30 June 2010 *Aktas et al*, no. 43563/08.

- (²²) ECHR 15 February 2001 *Dahlab v. Swizerland*, no. 42393/98; ECHR 10 November 2005 (GC) *Sahin v. Turkey*, no. 44774/98.
- (²³) In this respect, see the dissenting opinions of Judge Tulkens in *Sahin* case and of Judge Kalaydjieva in *Lautsi* case.
- (²⁴) For illustration of this variety, see Doe, 2011 and Rorive, 2009.
- (²⁵) Danish Supreme Court 21 July 2005 (Case 22/ 2004), U.2005.1265H ; Comp. with the 2000 judgment concluding to indirect discrimination on the basis of religion. This case was about a veiled girl who was denied traineeship in a department store for non observance of the dress code. The guidelines did not however specify that the employees should be dressed uniformly but that the employees should be dressed in a “businesslike” and “nice” way. The plaintiff was awarded 10.000 DKR in compensation (Eastern High Court 10 August 2000 U.2000.2350Ø).
- (²⁶) Brussels Labour Court of Appeal 15 January 2008 *E.F. v. SA Club*, RG no. 48695.
- (²⁷) Cologne Labour Court 6 March 2008 19 Ca 7222/07 and Cologne Land Labour Court 3 December 2008 3 sa 785/08 quoted by DOE (N.), *op.cit.*
- (²⁸) Dutch Equal Treatment Commission (ETC) 8 September 2004 Opinion 2004-12.
- (²⁹) HALDE Decision no. 2009-339 of 28 September 2009 and Paris Court of Appeal 8 June 2010 *Benkirane*, n° 08/08286 ; For a comment, PRADELLE (S.), « L’interdiction du port du voile dans l’enseignement supérieur peut être le signe d’une discrimination », 2 (2011) *A.J. P.*, p. 79 and seq.
- (³⁰) Antwerp Labour Court of Appeal 14 January 2008 *Centre for Equal Opportunities and Opposition to Racism v. NV G4S Security Services and Samira Achbita*, no. 53282 Comp. Paris Court of Appeal 19 June 2003 *Teleperformance v. Tahri* (Ms Tahri had however always worn the veil, even during the recruitment interview and during the 18 months she worked with the company whereas Ms Achbita declared to her supervisor that she intended to wear a headscarf after years in the company).
- (³¹) ECHR 15 February 2001 *Dahlab v. Swizerland*, no. 42393/98;
- (³²) ECHR 10 November 2005 (GC) *Sahin v. Turkey*, no. 44774/98.
- (³³) See in particular, BRION, 2004; HAUG et al., 2009: 196-197; see also JESSEN et al., 2006.
- (³⁴) For a comprehensive study, refer to WING (A.K.) & SMITH (M.N.), “Critical Race Feminism Lifts the Veil? Muslim Women, France and the Headscarf Ban”, 39 (2006), *UC Davis Law Review*, 743-790. http://lawreview.law.ucdavis.edu/articles/Vol39/Issue3/DavisVol39No3_WING.pdf; See also ENDERWIZ (S.), “The Headscarf Is Not the Headscarf”, 15 September 2009, <http://en.qantara.de/The-Headscarf-Is-Not-the-Headscarf/9589c9688i1p226/index.html>.
- (³⁵) GÖLE (N.), *The Islamist Identity*, 21 October 2003, http://qantara.de/webcom/show_article.php?wc_c=549&wc_id=4&wc_p=1.
- (³⁶) ECHR 24 January 2006 *Kurtulmus v. Turkey*, no. 65500/01.
- (³⁷) ECHR 15 February 2001 *Dahlab v. Swizerland*, no. 42393/98.
- (³⁸) ECommHR 3 May 1993 *Karaduman v. Turkey*, no. 16278/90.
- (³⁹) ECHR 10 November 2005 (GC) *Sahin v. Turkey*, no. 44774/98.
- (⁴⁰) ECHR 30 June 2009 *Bayrak v. France*, no. 14308/08.
- (⁴¹) ECHR 4 March 2008 *El Morsli v. France*, no. 15585/06.
- (⁴²) French Equality Body (HALDE) Decision no. 2009-238 of 8 June 2009 ; Paris Administrative Tribunal (interim order) 27 Avril 2009 and 5 Novembre 2010 (judgement on the merits) *Said c/ GRETA Top Formation* ; The claimant won the case.
- (⁴³) In this respect see the *Ludin* judgment of the German Constitutional Court (Bundesverfassungsgericht, 24 September 2003, 2BvR 1436/02).
- (⁴⁴) See the dissenting opinion of Judge Tulkens under the *Sahin* Case.
- (⁴⁵) Study of possible legal grounds for banning the full veil, Report adopted by the Plenary General Assembly of the Conseil d’Etat, 25 March 2010, 50 p., http://www.conseil-etat.fr/media/document/RAPPORT%20ETUDES/etude_veile_integral_anglais.pdf
- (⁴⁶) The Coalition for the Partial Preliminary *Evaluation Report by 71 Non-Governmental Organizations of Turkey*, Turkey’s Sixth Report on its Compliance with the Convention on the Elimination of All Forms of Discrimination against Women, June 2010, p.31; Women’s Rights Organization against Discrimination (AKDER), *The general condition of women in Turkey and the effects of headscarf ban to gender* HDIM.NGO/180/08 2 October 2008, <http://www.osce.org/odihr/33886>.
- (⁴⁷) *Ibidem*.
- (⁴⁸) *Whitney v. California*, 274 U.S. 357, 376 (1927) relating to the free speech.
- (⁴⁹) KAHN (R.A.), “The headscarf as threat: a comparison of German and U.S. legal discourses”, (2007) *Vanderbilt Journal of Transnational Law*, http://findarticles.com/p/articles/mi_hb3577/is_2_40/.
- (⁵⁰) See the final Declaration of the World Conference against Racism, Racial Discrimination Xenophobia and Related Intolerance, September 2001, http://www.un.org/durbanreview2009/pdf/DDPA_full_text.pdf.

- (⁵¹) OJ L 3030, 2 December 2000, 23-28; See Recitals 4 and 5.
- (⁵²) EP Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm Programme, *Official Journal* C 285 E, 21 October 2010, para 31.
- (⁵³) See also the amendment of the EU Parliament in the proposal of Council Directive on implementing the principle of equal treatment beyond employment (2 April 2009) in order to include a definition of multiple discrimination.
- (⁵⁴) <http://genderace.ulb.ac.be/rapports/GENDERACE%20FINAL%20REPORT%20sent.pdf>
- (⁵⁵) Only Slovakia and Czech Republic would remain without any possibility to invoke multiple discrimination at national level. In the United Kingdom, where it was previously difficult to do so, this notion was expressly included in the 2010 Equality Act (Section 14) but it seems that this provision will eventually not enter into force.
- (⁵⁶) Fifth Recital of the CEDAW adopted by the UN General Assembly on 18 December 1979, and entering into force on 3 September 1981.
- (⁵⁷) CEDAW 27 January 2006 *Rahime Kayhan v Turkey*, Communication No. 8/2005, UN Doc CEDAW/C/34/D/8/2005; http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8_2005.pdf.
- (⁵⁸) Concluding observations of the Committee on the Elimination of Discrimination against Women on Turkey 30 July 2010, <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-TUR-CO-6.pdf>; See also the concluding observations dated 20 January 2005 <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/1d90f5466d4660afc1256fd90049112e?OpenDocument>.
- (⁵⁹) <http://www.cgb.nl/StippWebDLL/Resources/Handlers/DownloadBestand.ashx?ID=263>.
- (⁶⁰) CGB (Dutch Equal Treatment Commission) advisory opinion 2006/03 of 14 February 2006, Comments on the fourth Dutch report on the implementation of the Convention on the elimination of all forms of discrimination against women.
- (⁶¹) On this general issue, refer to Craig, 2007; See also Loenen & Goldschmidt, 2007.
- (⁶²) LDN 8/2001, 6 March 2001 and 29 August 2001.
- (⁶³) A-Møbler former Equality Ombud's case No. 140/2003/470, 9 January 2004.
- (⁶⁴) The only other exception admitted by the Ombud relates to security reasons but it was not applicable to the hotel and the furniture store cases; CRAIG (R.I.), *Systemic discrimination in employment and the promotion of ethnic equality*, Martinus Nijhoff Publishers, Leiden, 2007, at 64.
- (⁶⁵) PETERSSON (C.), “Muslim woman wins headscarf case”, 30 January 2004, <http://pub.nettavisen.no/nettavisen/english/article179797.ece>.
- (⁶⁶) See the Ombud case No. 07/627 (department store) and Ombud case No. 07/1698 (bakery); For example, the bakery's uniform regulation prevented the wearing of the hijab or any other religious objects. The female complainant who wore the hijab was therefore not hired. For more information about it, refer to www.ldo.no/PageFiles/7410/Praksis_ENG.doc.
- (⁶⁷) Ombud case No. 08/1528 and Tribunal Case No. 08/2010.
- (⁶⁸) Despite these decisions, the Ministry of Justice has refused to adjust the uniform regulations so far.
- (⁶⁹) PETERSSON, 2004, <http://pub.nettavisen.no/nettavisen/english/article179797.ece>
- (⁷⁰) The claimant had first accepted to withdraw her headscarf for her training then changed her mind. The training centre had made all the reasonable efforts to find her another school after being placed to this Catholic school. See ETC Opinion 2010- 78; http://www.cgb.nl/oordelen/oordeel/220782/een_onderrwijsinstelling_voor_vmbo_maakt_geen_verboden_onderscheid_op_grond_van_godsdienst_en_geslacht_bij_het_aanbieden_van_een_stageplaats_en_bij_het_hanteren_van_de_regels_b
- (⁷¹) Nancy Court of Appeal 8 October 2008 no. 08/00882 about the owner of a rural bed-and-breakfast who was sentenced because she refused to rent a room to two veiled women.
- (⁷²) Council of State 27 November 1996 *Mr and Ms Jeouit*, no. 172.686.
- (⁷³) Council of State, Opinion, 27 November 1989, n° 346 893, <http://www.conseil-etat.fr/cde/media/document//avis/346893.pdf>
- (⁷⁴) Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sep. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 282, (283-84) (F.R.G.), at 304-305; This case was about a German woman of Afghani origin. Her application for a position of a teacher was turned down because she was wearing a headscarf after completion of her pedagogical studies.
- (⁷⁵) Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages, 2010, p. 34f.;

http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/gemeinsamer_bericht_ads_.pdf?__blob=publicationFile; *Derde evaluatie AWGB, WGB m/v en artikel 7:646 BW. Over de periode 1 september 2004 tot 1 september 2009*, Commissie Gelijke Behandeling (2010). See chapter 5, 5.1. *Discriminatie op meerdere gronden* (p. 54-64).

http://www.cgb.nl/publicaties/publicatie/221955/derde_evaluatie_awgb_wgb_m_v_en_artikel_7646_bw_2004_2009.

- (76) In order to enforce these decisions, they shall however take the case to court.
- (77) Dissenting opinion under the ECtHR judgment of 27 September 1990, *Cossey v. United Kingdom*, appl. no. 10843/84.
- (78) For an overview, see Koffeman (N.R.), *The right to personal autonomy in the case law of the European Court of Human Rights*, Leiden, June 2010, 71 p. ; [http://www.staatscommissiegrondwet.nl/userfiles/files/\(The%20right%20to\)%20personal%20autonomy%20in%20the%20case%20law%20of%20the%20EC%20of%20Human%20Rights.pdf](http://www.staatscommissiegrondwet.nl/userfiles/files/(The%20right%20to)%20personal%20autonomy%20in%20the%20case%20law%20of%20the%20EC%20of%20Human%20Rights.pdf).
- (79) ECHR 17 February 2005 *KA and AD v Belgium*, no. 42758/98.
- (80) ECHR 29 April 2002 *Pretty v. United Kingdom*, no. 2346/02.
- (81) ECHR 6 February 2001 *Bensaid v. United Kingdom*, no. 44599/98.
- (82) *Ibidem*.
- (83) For example, ECHR 26 March 1985 *X and Y v. the Netherlands*, no. 8978/80 , para. 22 and ECHR 25 March 1993 *Costello-Roberts v. United Kingdom*, no. 13134/87, para. 36. ECHR [GC] 29 April 2002 *Pretty v. the United Kingdom*, no. 2346/02, para. 61.
- (84) ECHR 4 September 2004 *Mikulić v. Croatia*, no. 53176/99, para. 53 and ECHR 4 December 2008 *S. and Marper v. United Kingdom*, nos. 30562/04 and 30566/04, para. 66.
- (85) ECHR 27 September 1999 *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96.
- (86) This wording is used by the anti-discrimination EU Directives, such as the 2000/43 and 2000/78 EU Directives.
- (87) Refer to *Kurtulmus* and *Dahlab* EctHR's cases.
- (88) In the 1970ies and 80ies, courts and tribunals held that they could not be protected at all, due to the lack of an appropriate comparator (In the UK, refer to *Turley v Allders Department Stores Ltd* [1980] *I.C.R.* 66). Then, they compared them to sick men (In the UK, refer to *Hayes v. Malleable Working Men's Club and Institute* (1985) *I.R.L.R.*, 367; See also US Supreme Court's judgment, *General Electric Company v. Gilbert*, 429 125 (1976)) before rejecting the need for a comparator in the nineties. They finally realised that it was impossible to find an appropriate comparator as only women could experience pregnancy, which has nothing to do with a pathological condition (ECJ 8 November 1990 *Dekker*, case C-177/88; ECJ 14 July 1994 *Webb*, Case C- U. S. 32/93).
- (89) See for example, *Bhal v Law Society* [2004] *I.R.L.R* 799 where an Asian woman in the United Kingdom claimed that she had been subjected to discriminatory treatment on both racial and gender grounds. The Employment Tribunal that first considered her case ruled that she could compare herself to a white man, so that the combined effect of her race and her sex could be measured. However, both the Employment Appeal Tribunal and the Court of Appeal ruled that this was an incorrect interpretation of the law ; Comp. with *Tilern De Bique* case , EAT [2010] *I.R.L.R.* 471.
- (90) ECJ 8 November 1990 *Dekker*, case C-177/88; ECJ 14 July 1994 *Webb*, Case C-32/93.
- (91) See ECHR 10 November 2005 (GC) *Sahin v. Turkey*, no. 44774/98 ; ECHR 24 January 2006 *Kurtulmus v. Turkey*, no. 65500/01; ECHR 24 January 2006 *Köse and 93 others v. Turkey*, n^o 26625/02; ECHR 30 June 2010 *Aktas et al*, no. 43563/08.
- (92) Bundesarbeitsgericht (Federal Labour Court), 20 August 2009 (Beret Case) 2 AZR 499/08, parag. 24 ; See also Human Rights Watch, *Discrimination in the name of neutrality, Headscarf bans for teachers and civil servants in Germany*, February 2009; http://www.hrw.org/sites/default/files/reports/germany0209_web.pdf.
- (93) ECHR 20 June 2006 *Zarb Adami v. Malta*, no. 17209/02.
- (94) Article 3 of 2000/43 Directive and Article 2 of 2006/56 Directive.
- (95) ECHR 13 November 2007 *D.H. and others v. The Czech Republic*, no. 57325/00.
- (96) For example, ECJ 13 May 1986 *Bilka-Kaufhaus*, Case 170/86 and ECHR 13 November 2007 *D.H. and others v. The Czech Republic*, no. 57325/00.
- (97) ECHR 16 March 2010 (GC) *Orsus and others v. Croatia*, no. 15766/03.
- (98) AST (F.), "Indirect discrimination as a means of protecting pluralism: challenges and limits", in Council of Europe, *Institutional accommodation and the citizen: legal and political interaction in a pluralist society*, Trends in social cohesion, no. 21, Council of Europe Publishing, Strasburg, Dec. 2009, 85-109 ; http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/source/Trends/Trends-21_en.pdf.

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- ⁽⁹⁹⁾ ECHR 4 May 2001 *Jordan v. the United Kingdom*, no. 24746/94; ECHR 6 January 2005 *Hoogendijk v. the Netherlands*, no. 58461/00.
- ⁽¹⁰⁰⁾ Council Directive 97/80 of 15 December on the burden of proof in cases of discrimination based on sex, *Official Journal* L 14 of 20 January 1998; this directive was repealed on 15 August 2009.
- ⁽¹⁰¹⁾ ECHR 13 November 2007 (GC) *D.H. and Others v. the Czech Republic*, no. 57325/00.
- ⁽¹⁰²⁾ ECSR 8 December 2004 *European Roma Rights Centre v. Greece*, Complaint No. 15/2003; ECSR 7 December 2005 *European Roma Rights Centre v. Italy*, Complaint No. 27/2004.
- ⁽¹⁰³⁾ Canadian Supreme Court *Andrews v. British Columbia* (1989) 1 *S.C.R.* 143.
- ⁽¹⁰⁴⁾ Canadian Supreme Court *Egan v. Canada*, (1995) 2 *S.C.R.* 513.
- ⁽¹⁰⁵⁾ *Egan v. Canada*, (1995) 2 *S.C.R.* 513, at 551f..
- ⁽¹⁰⁶⁾ See the Genderace glossary at the following link;
http://dev.ulb.ac.be/tef/glossaire/index.php?option=com_glossary&func=view&Itemid=34&catid=13&term=Stigma.
- ⁽¹⁰⁷⁾ Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, Report on Islam, Islamism and Islamophobia in Europe, Doc. 12266, 25 May 2010, 17 p. <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12266.pdf>.
- ⁽¹⁰⁸⁾ Landesstelle für Gleichbehandlung, 2007.
- ⁽¹⁰⁹⁾ *Egan v. Canada*, (1995) 2 *S.C.R.* 513 at 553.
- ⁽¹¹⁰⁾ (1999) 2 *S.C.R.* 203 (*Corbière* case).