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Intersectional discrimination and EU law: Time to revisit Parris

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Abstract

In this article it is argued that the CJEU judgment in *Parris* needs to be revisited to recognise that intersectional discrimination is covered by the EU anti-discrimination Directives. There are several reasons for this. First, a prohibition of intersectional discrimination is now laid down in an EU anti-discrimination Directive (Directive, 2023/970/EC); second, this would fit in with developments in the EU Commission, Council and Parliament; third *Parris* turns on its own facts; fourth a purposive or capacious interpretation of these Directives already allows for such discrimination to be included in the Directives; fifth, the shift in CJEU case law towards a intra-group comparison for discrimination can make comparisons in intersectional discrimination cases easier. It is argued that without acknowledging that intersectional discrimination is covered by the EU anti-discrimination Directives, victims of such discrimination, like Mr Parris and others, like headscarf wearing women, might be left without a remedy when they suffer discrimination on a combination of grounds.

Keywords

Intersectional discrimination, multiple discrimination, EU anti-discrimination directives, *parris* case, purposive interpretation, headscarves

Introduction

Multiple or intersectional discrimination, where discrimination takes place on more than one protected ground, has returned to the European Union (EU) agenda in recent years. In

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2000, the EU adopted two Directives against discrimination: Directive 2000/43/EC, prohibiting racial and ethnic origin discrimination in the areas of employment and occupation, social protection, social advantages, education, and access to and supply of goods and services which are available to the public; and, Directive 2000/78/EC, prohibiting discrimination on the grounds of disability, religion or belief, age and sexual orientation in employment and occupation. Both these Directives mention in their preambles that women are often the victims of multiple discrimination (Directive, 2000/43/EC, Recital 14; Directive, 2000/78/EC, Recital 3) Commission Communications mentioned multiple discrimination in 2008 (COM (2008a) 420, 3.2) and in 2014 (COM (2014) 2, 4.4). A 2017 EU Council decision on COM (2008b) 426, also mentions that discrimination includes multiple discrimination and direct and indirect discrimination on one or more/multiple grounds (Council 2017, 12 and Article 2(a) and (b)). All these documents mention 'multiple' rather than 'intersectional' discrimination, although the Council decision mentions that 'discrimination on the basis of religion or belief, disability, age or sexual orientation may be compounded by or intersect with discrimination on grounds of sex or gender identity, racial or ethnic origin, and nationality' (EU Council, 2017, 12ab). The latter shows an awareness of intersectional discrimination, where two or more grounds are clearly linked and intersect with each other as will become clear below. Since then, the term 'intersectional discrimination' has become more prominent at EU level. For example, in the EU Gender Equality Strategy 2020-2025, the European Commission states that 'the strategy will be implemented using intersectionality … – the combination of gender with other personal characteristics or identities, and how these intersections contribute to unique experiences of discrimination – as a cross-cutting principle'; and, that 'the intersectionality of gender with other grounds of discrimination will be addressed across EU policies' (COM (2020) 152). And, in a 2021 Motion, the European Parliament expresses that women face intersecting inequalities and discrimination (European Parliament Motion, 2021). Most importantly, intersectional discrimination has now been explicitly included as a form of discrimination in Directive 2023/970/EC, the Pay Transparency Directive. This suggests the development of more attention to the issue of intersectional discrimination at EU level since about 2017.

However, in its 2016 judgment in *Parris v Trinity College Dublin*, the Court of Justice of the EU (CJEU) did not follow the Opinion of its Advocate General and seems to have rejected an intersectional claim, a claim on a combination of discrimination grounds if no discrimination on either ground can be found (Case C-443/15, para. 80). As will become clear, the CJEU, in *Parris,* was criticised for this and it was argued that the case stands on its own facts. In light of the renewed attention given to intersectional discrimination in all EU institutions and the explicit mention of this in the 2023 Directive, it will be argued that it is time to revisit the judgment in *Parris* and to recognise that EU anti-discrimination law covers intersectional discrimination.

This article starts with a discussion of the terms 'multiple discrimination' and 'intersectional discrimination,' and this is followed by an analysis of the *Parris* case, including the Opinion of Advocate General Kokott in this case. The criticism raised against *Parris* and the reasons it was argued why this case stands on its own facts as well as developments in the case law of the CJEU will then be examined in order to argue that the

case needs to be revisited and that EU law now needs to accept that EU anti-discrimination Directives (Directives, 2000/43/EC, 2000/78/EC, 2004/113/EC, 2006/54/EC) prohibit intersectional discrimination.

Multiple and intersectional discrimination

Directive 2023/970/EC defines intersectional discrimination in Article 3(2)(e) as 'discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directives 2000/43/EC and 2000/78/EC'. The Preamble of this Directive explains, in Recital 25, that gender-based pay discrimination can take different forms and 'may involve an intersection of various axes of discrimination or inequality'. This recital gives some examples: disabled women, women of a different racial or ethnic origin, and younger and older women. This is why, according to the Preamble, the Directive should clarify that it should be possible 'to take due account of any situation of disadvantage arising from intersectional discrimination'.

As mentioned, the EU Gender Equality Strategy 2020-2025 refers to intersectionality as the combination of gender with other personal characteristics or identities, and how these intersections contribute to unique experiences of discrimination' (COM (2020) 152 footnote 10). This follows the definition of the European Institute for Gender Equality (Intersectionality). The European Parliament describes intersectional discrimination as referring to 'a situation in which several grounds of discrimination operate and interact with each other,…, in a way that is inseparable and produces specific types of discrimination' (European Parliament Motion 2021, A). And the Center for Intersectional Justice defines intersectional discrimination as taking place 'when an individual or a group of individuals are discriminated against based on grounds that are intertwined in such a way that they produce a unique and new type of discrimination' (Center for Intersectional Justice, 2020, 20).

All this suggests that 'intersectional discrimination' is a specific and unique form of discrimination where two or more grounds interact or intersect and are inextricably linked; where a person is discriminated against because of this intersection, because they have two or more characteristics and are discriminated against because of this combination of grounds. An example would be an employer who does not employ young women because they are likely to interrupt their employment to have children and then, are away from work for a considerable amount of time and claim maternity pay and rights. Is this age discrimination? It is not a problem that affects all young people and the employer can show that they employ both younger and older people. The same can be argued in relation to gender discrimination: the problem does not affect all women and the employer employs both men and women. A young woman who is turned down for a job with this employer, suffers discrimination because she is both young and female; her gender and age intersect to form a separate, unique ground of discrimination.

The term 'intersectionality' was first coined by American professor Kimberlee Crenshaw to describe the specific discrimination which Black women in the US experience, which is different from that faced by Black men or White women (Crenshaw, 1989). They are discriminated against because they are both Black and female. And this is

still the case: for example, Makinde, in her 2023 blog about the lack of Black women in corporate leadership in Canada, writes: 'while white women may speak of breaking through the "glass ceiling" for many Black women, it's more like a "concrete ceiling". Black women experience unique and formidable barriers in the workforce' (Makinde, 2023). The 'glass ceiling' is a term used to describe the barriers women (and other minorities) face in being promoted to higher jobs in employment.

The above all suggests that gender is a ground that often intersects with many other characteristics. However, it must be noted that intersectional discrimination can take place because of a combination of other grounds as well. *Parris*, for example, concerned a combination of age and sexual orientation. Moreover, intersectional discrimination can also be based on more than two grounds of discrimination. Xenidis (2018: 41) mentions as an example of workplace discrimination of an EU citizen, 'a Muslim woman wearing an Islamic headscarf' who is not allowed to do so at work and continues that 'such a case might involve harmful stereotypes based on religion, but also on race and gender'. Therefore, there is an intersection of three grounds (see further Howard (2024: 139-161) and the literature referred to there).

The term 'multiple discrimination' is often used in a more general way for cases where a person is discriminated against on more than one ground of discrimination. The European Institute for Gender Equality (Multiple discrimination) explains that 'the term "multiple discrimination" is used as an overarching, neutral notion for all instances of discrimination on several discriminatory grounds.' (This can manifest itself in two ways: 'first there is "additive discrimination" where discrimination takes place on the basis of several grounds operating separately. Second, there is "intersectional discrimination", where two or more grounds interact in such a way that they are inextricable' (European Institute for Gender Equality, Multiple Discrimination).

Additive discrimination, also referred to as compound discrimination, can thus be described as the situation where a person is discriminated against on more than one ground at the same time and one ground adds to the other ground and so compounds the discrimination. Having one protected characteristic lays a person open to discrimination, but having two or more increases the likelihood of discrimination occurring. Makkonen gives the example of a very segregated labour market where some jobs are considered suitable only for men and some jobs are reserved particularly for immigrants. The prospect of an immigrant woman finding a suitable job would then be markedly reduced because of additive or compound discrimination (Makkonen, 2002: 11). In this case, the grounds of discrimination can be seen separately, and a claim can be made on each ground separately. This is often not the case when there is intersectional discrimination. In the example of the employer not employing a young woman, there would be no claim on the separate grounds of gender and age and the young woman would only be successful in a discrimination claim if she could claim discrimination on the combined grounds.

The European Parliament Motion (2021: B) mentions that 'intersectional discrimination differs from multiple discrimination, which occurs when each type of discrimination can be proved and treated independently'. However, 'in the case of intersectional discrimination, the grounds of discrimination are intertwined, which creates a unique type of discrimination'. The Center for Intersectional Justice (2020: 20) adds to its definition of

intersectional discrimination that 'in such cases, one would not make several claims of separate cases of discrimination, but rather one case of intersectional discrimination'. Both seem to suggest that a finding of discrimination on each of the separate grounds would not be possible in cases of intersectional discrimination. It is suggested that this is not always the case, and that the CJEU judgment in EB supports this.

In EB a former police officer complained about a sanction which was imposed on him in the 1970s and which led to a reduction in his pension, claiming that this reduction amounted to sexual orientation discrimination. The sanction was imposed in 1974 for an attempted offence of same-sex indecency on two minors (para. 20). The CJEU took account of the fact that, at that time, the sanction for similar offences involving heterosexual or lesbian acts would have been significantly less and thus the law treated male and female homosexual and heterosexual acts differently. This differentiation would no longer be possible after the entry into force of Directive 2000/78/EC and the acts committed by EB could then not have justified the disciplinary sanction (para. 60). The CJEU concluded that the national court needed to consider the reduction in pension entitlement in order to calculate the amount EB would have received in the absence of any discrimination on the ground of sexual orientation (para. 70). Although only sexual orientation discrimination was claimed, this case concerns intersectional discrimination on the grounds of sexual orientation and gender: EB would not have been disciplined so severely if he had been female or heterosexual, he was sanctioned more severely precisely because he was a male homosexual. Therefore, a finding of discrimination on one of the grounds is sometimes possible in intersectional cases.

One more point needs to be mentioned. The term 'multiple discrimination' is sometimes used for both additive/compound and for intersectional discrimination, and it is thus not always clear what people mean when they use the term. This is compounded by the fact that it is not always easy to distinguish clearly between additive/compound and intersectional discrimination. For example, research done in Germany by Weichselbaumer (2020: 600-627) showed that women with a Turkish name on their job application were less likely to get an interview than women with an identical cv and a German name, and if the woman with the Turkish name also wore a headscarf, this was even less likely. Weichselbaumer (2020: 624) describes this as 'multiple discrimination'. But is this is additive/compound or intersectional discrimination? It can be argued that this is additive/compound discrimination: the Turkish woman is discriminated against because of her ethnic origin, and this is compounded by discrimination on the grounds of religion or belief when she also wears a headscarf. However, it can also be argued that this is intersectional discrimination because it is the combination of these grounds that gives rise to the discrimination experienced. It must be noted that gender discrimination could also play a role as mentioned above and by Howard (2024: 114-161). Whether this is seen as additive/compound or as intersectional discrimination, in both cases it appears possible to make a claim on each of the grounds separately. But because it is quite often not possible to do so in cases of intersectional discrimination, it is argued here that it should be made clear that a claim on a combination of grounds is possible under EU law. If that was the case, the difficulty of having to distinguish between additive and intersectional discrimination would disappear.

Parris v Trinity College Dublin

Parris concerned age and sexual orientation discrimination. Mr Parris had been in a stable relationship with his same-sex partner for over 30 years. They entered a civil partnership in the UK in 2009 when Mr Parris was 63, but this was only recognised in Ireland in 2011 when the Civil Partnership Act 2010 came into force. Since 1972, Mr Parris had worked for Trinity College Dublin and was part of their pension scheme. This scheme provided for a survivor's pension for a surviving spouse or partner on the death of the scheme member, but only if the member had married or entered a civil partnership before they reached the age of 60. Parris asked his employer, before he retired, to pay out the survivor's pension to his partner in case he died before his partner. This was rejected both in first instance and on appeal because Mr Parris was over 60 when he entered his civil partnership. He claimed direct and indirect discrimination on the grounds of age and sexual orientation. The Irish Equality Tribunal dismissed his claim and Parris appealed to the labour Court in Ireland, which asked the CJEU for a preliminary ruling on three questions: (1) was this sexual orientation discrimination against Directive 2000/78/EC? (2) if the answer to that question was negative, was this age discrimination against the Directive? (3) if the answer to that question was also negative, did this constitute discrimination against the Directive if this discrimination arose from the combined effects of the age and sexual orientation of the member of the scheme? (case C-443/15 *Parris*, paras 15-29).

Advocate Kokott started her Opinion with an interesting observation, acknowledging that particular attention needed to be given to the fact that the discrimination here was based on a combination of two factors, age and sexual orientation. She, therefore, appeared to clearly see this case as a case of intersectional discrimination. She continued that 'the Court's judgment will reflect *real life* only if it duly analyses the combination of those two factors, rather than considering each of the factors of age and sexual orientation in isolation [italics added] (para 4).

Advocate General Kokott stated that, in her opinion, there was indirect sexual orientation discrimination which was not justified; there was also direct age discrimination, which could not be justified (paras 110 and 146). The third question asked the CJEU, according to her Opinion, to clarify how discrimination attributable to a combination of two or more grounds was to be dealt with in the context of the EU-law prohibitions on discrimination (para. 149). In a footnote here, she added that this is sometimes referred to as 'multiple discrimination' but that that term might be misleading because it suggested the presence of discrimination on two different and independent grounds of discrimination. In the Advocate General's view, this case concerned the combination of two or more factors neither of which, in and of itself, gave rise to discrimination against the persons concerned (footnote 74). This appears contradictory to her findings that there is both sexual orientation discrimination and age discrimination.

Kokott mentioned that, although there are no express provisions in EU law for this situation, this did not mean that it could not deal with it (para 152). She continued that the combination of different grounds must be taken into account under EU law, and that not doing so would be contrary to the prohibition on discrimination in Directive 2000/78/EC.

The fundamental rule of the Directive that there must be no discrimination on the grounds mentioned 'must also apply to cases involving possible discrimination based on a combination of more than one of those grounds' (para. 153). The Advocate General concluded that there was indirect discrimination on the combined grounds of sexual orientation and age (para. 159). Therefore, in her opinion, a claim on a combination of discrimination grounds was possible in EU law and Directive 2000/78/EC meant to cover this form of discrimination as well. Kokott also suggested that in such a case, the proportionality review, the justification test for indirect discrimination, should be stricter (para. 157).

The CJEU did not follow the Advocate General, nor did it mention the terms 'multiple' or 'intersectional discrimination'. It held that, firstly, there was no direct or indirect sexual orientation discrimination because heterosexual couples were also affected (Case C-443/15 *Parris*, paras 50 and 60-61). Secondly, there was no direct age discrimination because the discrimination was justified under Article 6 (2) of Directive 2000/78/EC (Case C-443/15 *Parris*, paras 75 and 78). Although the CJEU stated that 'discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78' (para. 80), it then concluded that there can be no 'discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation' (paras 80 and 82). It appears, therefore, that the CJEU has rejected an intersectional claim where no discrimination on any of the combined grounds exists. As Tryfonidou (2016) points out, one of the notable features of the judgment in *Parris* 'is the Court's express rejection of the possibility that multiple discrimination can be prohibited by Directive 2000/78'. Kapotas (2023: 33) confirms this where he writes that, in *Parris*, 'the CJEU has explicitly rejected the possibility of a distinct, self-standing intersectional claim under the Equality Directives'.

Criticism of Parris

The CJEU's apparent exclusion of intersectional discrimination from the protection provided by the EU anti-discrimination Directives in *Parris* appears to go against the Opinion expressed by Advocate General Kokott in that case and against what the European Commission, referred to in Kokott's Opinion, stated, that 'the Directives [2000/43/EC and 2000/78/EC] do not contain any specific provisions on multiple discrimination' but 'that the Directives already allow a combination of two or more grounds of discrimination to be tackled in the same situation' (COM (2014) 2, point 4.4). Not being able to make a claim that discrimination has taken place on a combination of grounds is problematic because, as was already mentioned, in many cases of intersectional discrimination, a claim on either of the grounds separately will not be successful, as the example of the young woman who is not given a job because the employer thinks she is likely to interrupt her employment to have a baby/babies, shows. Therefore, although she is clearly a victim of discrimination, she will not be able to get a remedy for this. However, another issue is that a judgment 'will reflect real life only' if it duly analyses the combination of two or more factors, as Kokott wrote in her Opinion in Parris. People can

belong to different groups and these groups are not mutually exclusive. Every person has multiple traits/identities and can be discriminated against because of any of these or of a combination of these. Moreover, these traits can not only change over time, but people also emphasise different ones at different times. This is summed up well by Dube (2023), who criticises the CJEU for not using an intersectional approach in *LF v SCRL*, and, by doing so it 'does not acknowledge the entirety and complexity of the disadvantage that victims of intersectional discrimination face'. In contrast to this, 'an intersectional approach caters to the multidimensionality of people's experiences and identities' (Center for Intersectional Justice, 2020, 2).

Möschel (2017, 1848) expresses that the CJEU understands the facts in *Parris* as additive discrimination, where each ground can be neatly distinguished, and not as intersectional discrimination, where it is not clear on which of the grounds the discrimination occurs. By seeing the case as additive discrimination, the CJEU missed the idea of intersectionality where 'we are not adding two separate things but we are establishing a different, compounded type of discrimination faced by Mr Parris, situated at the crossroads of age and sexual orientation'. If the CJEU had recognised intersectionality in this case, 'it would have meant that, in certain cases, intersectional discrimination is not the sum of single grounds of discrimination but can constitute its own form of discrimination'.

It is submitted that the CJEU applied what is often referred to as a 'single axis' or 'single ground' approach, which means that, even where discrimination on a combination of grounds is claimed, the court looks at each grounds separately. As the Center for Intersectional Justice (2020: 20) states, 'International and European legal and policy frameworks have traditionally relied on addressing discrimination through a single-axis angle'. And Tryfonidou (2016) points out that this is problematic because 'a multiple discrimination assessment contradicts the classic single ground model of discrimination law analysis'. This analysis 'requires the identification of a single hypothetical comparator who must only have a single characteristic … that is different from the person that is treated worse'. This suggests that one of the problems intersectional discrimination poses for courts is that, in EU law, for both direct and indirect discrimination a comparison needs to be made: for direct discrimination, there must be less favourable treatment than another person *in a comparable situation*, while for indirect discrimination there must be a particular disadvantage *compared to other persons* [italics added] (Directives 2000/43/EC and 2000/78/EC, Articles 2(2)(a) and 2(2)(b); Directive 20006/54/EC, Articles 2(1)(a) and 2(1)(b)). This comparison becomes more complicated where more grounds of discrimination are involved. However, Monaghan (2011: 26) writes that this is 'not conceptually insurmountable' and that a comparison could be made comparing across grounds: a Black woman could be compared to 'a White man, a Black man or a White woman - in other words, someone other than a black woman'. This could, however, become more difficult when there are more than two discrimination grounds involved, although the fact that the anti-discrimination Directives allow for a hypothetical comparator, as the words 'would be' in the above cited articles indicate, could ease this problem somewhat (On comparators in EU Law see Kapotas (2023, 21-35)). The

development in CJEU case law from an 'inter-group' comparison to an 'intra-group' comparison, might also contribute a solution here, as will be examined below.

EU law and intersectional discrimination claims

It is argued here that the EU anti-discrimination Directives already allow for intersectional claims and that *Parris* should not be seen as excluding such claims, because that case not only turns on its own facts but is also out of line with developments since the judgment was handed down in 2016. It is also worth noting that the EU anti-discrimination Directives do not contain explicit provisions for multiple or intersectional discrimination claims, but neither do they prohibit such claims. As Atrey (2018, 25) argues in relation to Directive 2000/78/EC, 'there is no indication in the text of the Directive that "multiple discrimination" or discrimination "on any of the grounds" is to be interpreted as excluding combined forms of discrimination that cannot be proved individually in relation to each ground'.

Parris turns on its own facts

It is submitted that *Parris* turns on its own facts (Howard, 2024: 151) and must not be seen as generally excluding intersectional claims in cases where discrimination takes place on a combination of two or more interacting grounds of discrimination. *Parris* concerned an area of law which, according to Recital 22 of Directive 2000/78/EC, falls under the competence of the Member States. This Recital states: 'this Directive is without prejudice to national laws on marital status and the benefits dependent thereon'. In the case, Trinity College, the defendant authorities, the United Kingdom Government and the EU Commission had all raised the objection that finding discrimination on the ground of sexual orientation could be contrary to Recital 22 because it could mean giving de facto retroactive effect to the institution of civil partnership before the legislation introducing this came into effect (Case C-443/15 *Parris*, Opinion AG Kokott, para. 100). The CJEU accepted this and, with a reference to Recital 22, stated that Member States were free to provide or not provide for marriage or another form of legal relationship for persons of the same sex, and, if they did so, to decide when this would have effect. EU law did not require Ireland to provide for marriage or another legal relationship for same-sex partners before 2010 nor to provide this with retrospective effect. Therefore, the CJEU concluded that there was no sexual orientation discrimination (Case C-443/15 *Parris*, paras 57-61).

The CJEU came to that conclusion despite the fact that Advocate General Kokott, in her Opinion in this case, wrote that this objection was unfounded. Her suggested interpretation did not in any way compel Ireland to change the status of an employee retroactively, nor did it mean that Parris and his partner had to be regarded as having been married or in a civil partnership during periods in the past. Parris and his partner were claiming prospective benefits corresponding to their present marital status. The competence in matters of marital status and the benefits depended thereon was with the Member States, but, as Kokott argued, this competence had to be exercised in compliance

with EU law, in particular the principle of equal treatment and non-discrimination (Case C-443/15 *Parris*, Opinion AG Kokott, paras 100-109; Möschel, 2017, 1845).

In the same vein, Atrey notes two problems with the way the CJEU applied Recital 22 in *Parris*. First, the CJEU 'misconstrues the claim as asking for retrospective benefits to be claimed by the recognition of same-sex civil partnership', but, as Kokott stated, 'Parris and his partner were only *prospectively* [italics in original] claiming benefits based on their now legally recognised civil partnership'; and, they were 'simply defending themselves against a term contained in the occupational pension scheme at issue—the 60-year age limit—which was laid down in the past but discriminates against them today' (Atrey, 2018, 291). The CJEU did, therefore, not follow its own judgments in *Maruko* and *Römer*, where the CJEU had recognised a claim for sexual orientation discrimination 'by extending benefits to same-sex couples which originated *before* the same-sex partnerships where legally recognised' [italics in original] (Atrey, 2018, 291, referring to Case 267/06 *Maruko*, paras 19, 20 and 79 and Case C-147/08 *Römer*, paras 22 and 66). Second, the CJEU 'misapplied the exception in that it completely let it override the prohibition of discrimination in Articles 1 and 2 of Directive 2000/78/EC. This is a U-turn from the Grand Chamber decision in *Maruko'*, where it had held that the exercise of the competence of the Member States in this area 'must comply with Community law and, in particular, the principle of non-discrimination'. (Atrey, 2018, 291, referring to Case C-267/06, *Maruko*, para. 59). The CJEU itself referred to this principle with a reference to *Maruko* in *Parris*, but then did not apply this (C-443/15 *Parris*, para. 58). Instead, the CJEU appears to have used Recital 22 of Directive 2000/78/EC to deny sexual orientation discrimination (Atrey, 2018, 281). Because of the application of Recital 22 in this way by the CJEU, it can be said that *Parris* turns on its own facts.

Intersectional discrimination is already covered by the anti-discrimination directives

Some authors have argued that the EU anti-discrimination Directives can be interpreted expansively to include multiple and intersectional discrimination (Fredman, 2016; Atrey, 2018, 286-287 and 294-295; Schiek, 2018: 89-90; Dube, 2023). Fredman, for example, writes that 'it is possible to construe existing grounds sufficiently capaciously to address the confluence of power relationships which compounds disadvantage'. In support of this argument, she mentions, first, *Brachner,* where the CJEU focussed on the disparate impact on women pensioners as against male pensioners in order to answer the question of whether the disadvantage affected a greater number of women than men (Fredman, 2016: 72); second, Fredman refers to international human rights law, in particular to the application of the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of People with Disabilities (CRPD). According to Fredman, CEDAW 'recognises the ways in which different aspects of different women's identity interact to produce disadvantage' (Fredman, 2016: 35). The CRPD also recognises the intersection of disability with other grounds of discrimination (Fredman, 2016: 36). The same argument can be found in Dube, who calls this a 'comprehensive approach' and points out that the 2021 Motion of the European Parliament has recognised

the potential of this approach with references to the CEDAW and the CRPD and to 'the flexibilities under Article 21 of the Charter' (Dube, 2023). The latter is a reference to Article 21 of the Charter of Fundamental Rights of the European Union, which contains a prohibition of discrimination on an extensive number of grounds, including all grounds covered by the EU anti-discrimination Directives.

Atrey argues that the plain language of Directive 2000/78/EC does not support the limitation imposed by the CJEU in *Parris*. Article 2 of the Directive gives no indication of limiting the remit of anti-discrimination to only discrete and mutually exclusive forms of discrimination based on a single ground alone' (Atrey, 2018) 285). And Schiek (2018: 90) bases her argument that current EU anti-discrimination law can be interpreted as encompassing intersectionality on a functional interpretation of this body of law, grounded in the principle of *effet utile*, which is a general principle of EU law. This principle means that EU legislation must always be interpreted with a view to effectively achieving the intent of the legislation. This is also referred to as a 'purposive interpretation'. Advocate Kokott's Opinion in *Parris* also supports accepting that EU anti-discrimination law already covers intersectional discrimination, as, without such recognition, the judgment would not 'reflect real life'. In other words, it would not provide effective protection against discrimination, which is the objective of this area of law. Möschel (2017: 1848) expresses surprise at the *Parris* judgment because the CJEU has, in the past years, 'generally taken a relatively broad stance towards anti-discrimination law and effective protection against discrimination by recognizing other forms of discrimination, such as discrimination by association, that are also not explicitly mentioned in the text of the anti-discrimination directives'. (Discrimination by association is discrimination because a person is associated with a person with a protected characteristic, although they do not have the protected characteristic themselves. Möschel refers to Case C-303/06, Coleman; and, Case C-83/14, CHEZ). It is submitted that, like Schiek, both Möschel and the Opinion of Advocate Kokott in *Parris* suggest a purposive interpretation of the anti-discrimination Directives: the purpose or aim of these Directives is to provide effective, 'real life' protection against discrimination and, thus, they should be interpreted as including protection against intersectional discrimination. However, it would be clearer if EU law and the CJEU case law made explicit that this is included.

It must be noted that an issue that could prove a complication to an intersectional discrimination claim under EU law, is that the anti-discrimination Directives do provide different levels of protection. According to Article 3(1) of Directive 2000/43/EC, racial and ethnic origin discrimination is prohibited in employment related areas; in social protection, including social security and healthcare; in social advantages; in education; and, in access to and supply of goods and services which are available to the public, including housing. Article 14 of Directive 2006/54/EC shows that gender discrimination is prohibited in the areas of employment and occupation, while Article 3 of Directive 2004/113/EC prohibits gender discrimination in the access to and the supply of goods and services. However, discrimination on the grounds of religion or belief, disability, age and sexual orientation is, according to Article 3 (1) of Directive 2000/78/EC, only prohibited in the areas of employment and occupation. There is a proposal (COM (2008b) 426) to extend the protection against the grounds of discrimination covered by Directive 2000/78/

EC to all areas covered by Directive 2000/43/EC, but this proposal has not been adopted to date. Therefore, a claim on discrimination on intersecting grounds which includes one of the grounds covered by Directive 2000/78/EC can only be made when it concerns discrimination in employment and occupation, although the CJEU has given a wide interpretation to this and has extended this to occupational pensions (Dewhurst, 2023: 335-352).

Developments since Parris. Another argument for revisiting *Parris* is that opinions within the EU and developments in the law and case law have moved on. It was mentioned in the introduction that the EU Council, the EU Commission and the EU Parliament have all recognised intersectional discrimination and that intersectional discrimination has been explicitly included as a form of discrimination in Directive 2023/970/EC. It can be argued that these developments suggest that the purpose of EU anti-discrimination law is to include effective protection against all forms of discrimination, including intersectional discrimination and, therefore, all anti-discrimination Directives should be interpreted purposively to do so. This is further supported by the argument that, because Directive 2023/970/EC explicitly includes intersectional discrimination, the other EU anti-discrimination Directives should also be interpreted as including protection against intersectional discrimination because the CJEU has itself expressed that a uniform application of EU law and the principle of equality is desirable (Case C-13/05 *Chacon Navas*, para. 40).

There are also some indications of a shift towards the recognition of the possible intersection of discrimination grounds in the CJEU case law, although the terms 'intersection' or 'intersectional discrimination' were never used in any of the judgments. In the already mentioned case of *Brachner*, decided in 2011 before *Parris*, the CJEU appeared to take more than one ground of discrimination into account. This case concerned indirect discrimination in the way an increase in old age pensions in Austria was calculated. The CJEU compared female pensioners with male pensioners and thus it seemed to recognise the intersection of gender and age (Case C-123/10 *Brachner*, paras 59 and 60). *Odar,* decided in 2012, also before *Parris*, concerned the calculation of compensation for employees over the age of 54 who were made redundant on operational grounds, which disadvantaged disabled employees who were entitled to an early disability pension. The CJEU considered that this 'disregarded the risks faced by severely disabled people, who generally face greater difficulties in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age'; and, that their financial requirements may increase with age (Case C-152/11 *Odar*, para. 69). The CJEU repeated this, with a reference to *Odar*, in *Bedi*, decided in 2018, which concerned the loss of a form of assistance on becoming entitled to early retirement due to disability (Case C-312/17 *Bedi*, para. 75). Therefore, in both cases the CJEU clearly recognised the intersection between age and disability.

And, as was mentioned above, in *EB*, the CJEU showed awareness of the intersection of sexual orientation and gender by comparing the sanction for similar offences involving heterosexual or lesbian acts and stating that the law at the time thus treated male and female homosexual and heterosexual acts differently (Case C-258/17, *EB*, para. 60). As

Xenidis, referring to *EB*, expresses, 'the CJEU clearly recognises the intersection of discrimination on grounds of gender and sexual orientation'. She concludes that, although implicitly, the CJEU integrated intersectionality within the comparison test to find direct sexual orientation discrimination (Xenidis, 2022, 34). After also mentioning *Odar* and *Bedi,* Xenidis comes to the conclusion that 'this shows how awareness of the way in which intersecting vectors of disadvantage shape discrimination can trigger a purposive interpretation (geared towards tackling specific vulnerabilities) as opposed to a formalistic interpretation (geared towards ensuring symmetrical treatment) of EU equality law' (Xenidis, 2022, 34). Therefore, these cases show that the CJEU clearly recognises the possibility of discrimination taking place on more than one intersecting grounds.

There is another development that can support the argument that the case law of the CJEU has moved on since *Parris* was decided. This is the fact that the CJEU is moving away from an inter-group comparison towards an intra-group comparison for discrimination. An intra-group comparison allows a comparison to be made between people within the group of people who share a protected characteristic. In *Cresco,* the CJEU did an intra-group comparison, it compared people with a certain religion with people of another religion and found discrimination on the ground of religion or belief where national legislation treated people belonging to certain religions differently from those belonging to other religions (Case C-193/17 *Cresco*). In *VL,* the CJEU explicitly mentioned that the protection granted by Directive 2000/78/EC would be diminished if a situation where discrimination occurs within a group of persons, who all have disabilities, would not be covered (Case C-16/19 *VL*, paras 29, 31 and 35). In other words, the CJEU allowed comparisons to be made between persons with different disabilities. In *Wabe and Müller,* the CJEU stated that the prohibition of religion or belief discrimination in Directive 2000/78/EC was not limited to differences in treatment between persons having a particular religion or belief and those who do not and referred to *VL* (Joint cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 49).

In her Opinion in *LF*, Advocate General Medina (paras 38-39) explained that traditionally, Directive 2000/78/EC had been interpreted as prohibiting discrimination between in- and out-groups: comparing individuals with a protected characteristic (in-group) with those without it (out-group), but that recent CJEU judgments seemed to have shifted from this inter-group focus to an intra-group focus, referring to *VL* and pointing out that the CJEU relied on an intra-group comparison in *Wabe and Müller*. She continued that intra-group comparison required an assessment as to the existence of discrimination within a group composed of individuals that shared the same protected characteristic; and, that this meant increased sensitivity to less visible disadvantages and more protection to the less privileged individuals within a particular group (Opinion AG Medina in Case C-344/20 *LF*, para. 39). In other words, allowing for intra-group comparison recognises that less privileged individuals within a protected group are extra vulnerable to discrimination on top of the discrimination that the whole group is subject to. As Dube (2023) expresses, an intra-group comparison could extend 'equality protection to less privileged individuals within the same protected characteristic, visualising relative disadvantage within the same discrimination ground'.

It is suggested that this move to an intra-group comparison could make dealing with cases of intersectional discrimination easier because it would help to overcome the single-ground approach. Applying an intra-group comparison to the scenario in *Parris*, it can be argued that the group of homosexual people is vulnerable to discrimination because of their sexual orientation; and that, within that group, older homosexual people are extra vulnerable because of their age and because of the big shift in attitudes towards homosexuality and same-sex relationships in their lifetime. As Atrey (2018, 290) points out, because Mr Parris and his partner are an older, same-sex couple, they suffer from the 'continuing effect of their historical marginalisation from social institutions such as marriage and civil partnership as well as from employment and related benefits'. Analysing the *Parris* case in this way would then lead to a finding of intersectional discrimination. This same reasoning can be applied to the four cases mentioned above. Using an intra-group comparison could assist in establishing intersectional discrimination.

All the above suggests that the judgment in *Parris* should be revisited. However, there is an area in which the CJEU does not appear to want to consider intersectional discrimination. This is in its cases concerning bans on the wearing of Islamic headscarves in employment, which will be examined next.

Headscarf cases and intersectional discrimination in EU law

To date, the CJEU has handed down judgment in six cases concerning the wearing of Islamic headscarves at work (Case C-157/15 *Achbita*; Case C-188/15 *Bougnaoui*; Joint cases C-804/18 *Wabe* and C-341/19 *Müller*; Case C-344/20, *LF*; Case C-148/22 *OP*). In all cases, a Muslim woman was prohibited from wearing a headscarf, which she wore for religious reasons, at work, and, when she refused to take the headscarf off she was dismissed or, in the case of LF, did not get an internship. The CJEU has considered all six cases under the provisions against religion or belief discrimination under Directive 2000/78/EC and has not really engaged with the argument that such bans could amount to gender discrimination, although this was raised in some of the preliminary references. The possibility of racial or ethnic origin or intersectional discrimination in these cases was never raised by the referring court or considered by the CJEU, although these bans are often seen as prime examples of intersectional discrimination on the intersecting grounds of religion or belief, gender and racial or ethnic origin (Loenen, 2009: 313-328; Fehr, 2011: 111-124; Relano-Pastor, 2016: 277; Möschel, 2017: 1848-1849; Vickers, 2017: 251; Schiek, 2018: 82-103; Center for Intersectional Justice, 2020: 20; Frantziou, 2021: 674-684; Xenidis, 2022: 21-37; Dube, 2023). This is because such bans mainly affect Muslim women who are often from a migrant or ethnic minority background. As Möschel (2017, 1848-1849) writes 'in European academic literature, the headscarf – but also the full body veil – worn by some Muslim women has almost become the paradigmatic example of intersectionality analysis' as these women can be argued to face discrimination on the grounds of sex, religion and race in intersectional ways.

Advocate General Medina, in *LF*, pointed out that internal neutrality rules might lead to Muslim women experiencing deep disadvantage to becoming employees which might result 'in discrimination going beyond religion and extending also to gender'. She

highlights that 'double discrimination is a real possibility' (Opinion AG Medina in Case C-344/20 *LF*, para. 66). Former Advocate General Sharpston, in her Shadow Opinion on Wabe and Müller (2021, para. 267)*,* refers to 'triple discrimination'. because the rules at issue in these cases might not only have a disparate impact on the employee because she is a religiously observant Muslim, but also because 'she is female (the Koranic requirement to dress modestly is addressed to women) and because she comes from a different ethnic community from the majority of the employers' workforce (one that is more likely to be Muslim by religion)'. *Wabe and Müller* were allocated to Advocate General Sharpston in 2019, but after she left office in September 2020, they were reallocated to her successor, Advocate General Rantos. However, because the former Advocate General and her team had already done much of the work for the opinion, she wrote a Shadow Opinion to contribute to the debate in this area. Medina refers to this Shadow Opinion, but she only refers to double discrimination. However, the CJEU and the other Advocates General did not engage with race or intersectional discrimination.

Advocate General Kokott, in her Opinion in *Achbita* (paras 49 and 121), mentioned both gender and racial or ethnic origin discrimination but concluded that the company rule in question was capable of affecting men as much as women and did not appear to put employees of a particular colour or ethnic background at a particular disadvantage. In her Opinion in *Bougnaoui,* Advocate General Sharpston (para. 30) stated that the issues here 'do not relate to the Islamic faith or to members of the female sex alone. The wearing of religious apparel is not limited to one specific religion or to one specific gender' (Opinion AG Sharpston in Case C-188/15 *Bougnaou*i, para. 30). The employee in *Wabe* claimed that the prohibition on wearing the headscarf was not only direct religion or belief discrimination, because the rule directly targeted the wearing of the Islamic headscarf, but also gender discrimination, because the neutrality rule exclusively affected women, and ethnic origin discrimination, as the rule had a greater impact on women with migration backgrounds (Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 30). The referring court only asked whether Wabe's neutrality policy constituted direct religion or belief discrimination or indirect religion or belief and/or gender discrimination against workers who wore certain items of clothing for religious reasons, but did not mention race or intersectional discrimination.

In *Wabe and Müller*, both the CJEU and Advocate General Rantos did not consider gender discrimination because, first, gender discrimination was not covered by Directive 2000/78/EC; and, second, the order for reference did not contain sufficient facts to consider whether discrimination on the grounds of gender existed (Opinion AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 59; Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 58). However, the CJEU started from the premiss that the rule constituted indirect religious discrimination because, according to the findings of the referring court in *Wabe,* the rule at issue 'concerns, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith' (Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 59). However, it is submitted that a rule that affects almost exclusively female workers amounts to indirect gender discrimination as it puts persons of one gender at a particular disadvantage compared with a person of the opposite gender (Case C-170/84 *Bilka*, para. 31).

LF claimed discrimination, either direct or indirect, on the basis of religious belief and gender/sex (Case C-344/20 *LF*, para. 22). However, the referring tribunal was very short in rejecting discrimination on the ground of gender by simply stating that 'the applicant does not establish facts from which it may be inferred that there has been direct discrimination based on gender' (Case C-344/20 *LF*, para. 24). The Tribunal referred a number of questions to the CJEU, none of which referred to either gender or race discrimination. And, although Advocate Medina mentioned the possibility of double discrimination on the grounds of religion and gender, the CJEU did not engage with gender or race discrimination.

In *OP*, the employee challenged the decision of her employer to prohibit all municipal workers from any form of proselytising and from wearing any visible sign that might reveal their ideological or philosophical affiliation or political or religious beliefs, as discrimination on the grounds of both religion and belief and gender (Case C-148/22 *OP*, paras 12-16). The referring tribunal asked, among other questions, whether Directive 2000/78/EC permits a ban on the wearing of all signs which might reveal religious beliefs, 'even if that neutral prohibition appears mostly to affect women and may thus constitute disguised discrimination on grounds of gender' (Case C-148/22 *OP*, para. 20). The CJEU followed the Opinion of Advocate General Collins (paras 35-39). and declared the question regarding gender discrimination inadmissible because the referring court did not indicate the reason why this was important, nor did it set out the factual and legislative context or mention Directive 2006/54/EC (Case C-148/22 *OP*, paras 42-50). However, in *Achbita*, the CJEU had referred to settled case law that the fact that the referring court's question refers to certain provisions of EU law does not prevent it from giving the national court all the guidance on interpretation which may be helpful 'whether or not that court has referred to those points in its question' (Case C-157/15 *Achbita*, para. 34). The CJEU could, therefore, have engaged with this question, but did not appear to wish to do so, nor did it engage with issues of race or intersectional discrimination. As Vickers (2023) writes, a further disappointing aspect of *OP* is 'the refusal of the court to engage with the critical question of intersectional discrimination', which 'could have been considered as part of the assessment of proportionality by considering the particular impact of the neutrality requirement upon women' (Directive 2000/43/EC, 2000, Directive 2000/78/EC, 2000, Directive 2004/113/EC, 2004, Directive 2006/54/EC, 2006, Directive 2023/970/EC, 2023).

It is clear that the CJEU, in the six headscarf cases decided to date, did not really engage with the question of gender discrimination and never considered racial or ethnic origin discrimination or intersectional discrimination. The CJEU allowed employers to ban employees (and interns) from wearing religious symbols at work, as long as the rules complied with three conditions: first, they should prohibit all visible signs of religious, philosophical and political belief and not just some signs. Second, the neutrality rule must be genuinely pursued in a consistent and systematic manner and must, thus, apply to all employees equally and the employer should not make a distinction between different religions or beliefs. Third, and this applies only to private employers, the neutrality rule must be limited to customer facing employees. Public authorities can prohibit the wearing of religious symbols for all employees whether they come into contact with customers or

service users or not, as was clear from *OP* (Case C-148/22 *OP*, paras 32-33). In none of these cases did the CJEU pay any attention to the possible restrictions on the employment opportunities and the wider social integration of Muslim women who wish to wear headscarves at work for religious reasons. This does not reflect the reality or, in Advocate General Kokott's words in her Opinion in *Parris*, 'real life' for many Muslim women who want to wear a headscarf for religious reasons. If the CJEU had used an intra-group comparison, it could not only have reflected real life for the women involved, but it could also have acknowledged the intersectional discrimination present in these cases. An intra-group comparison could take account of the fact that Muslim people are vulnerable to discrimination and that Muslim women are more vulnerable than Muslim men because clothing prescriptions for Muslim women are stricter than for Muslim men and make Muslim women more visibly different. And, the fact that Muslims are mostly from an ethnic minority background, also makes them even more vulnerable, as they can also be discriminated against because of their racial and ethnic origin. Applying such a comparison could lead to acknowledging the presence of intersectional discrimination.

Advocate General Medina in her Opinion in *LF* (para 50) pointed out that the CJEU, in *Wabe and Müller,* although it cited *VL* repeatedly, deviated from that judgment in not using an intra-group comparison. It is regrettable that the CJEU did not engage with intersectional discrimination in its headscarf judgments, as many commentators have pointed out (e.g. Frantziou, 2021, 651; Xenidis, 2022; Dube, 2023; Vickers, 2023). Kapotas (2023, 34) writes that the CJEU, in the headscarf cases, 'appears to have made a conscious choice to stick with *Parris*', while Xenidis (2022: 34) expresses her surprise at 'the avoidance strategies deployed by the Court [CJEU]' because it has 'implicitly grappled with the problem of intersectional discrimination in past decisions', as was analysed above. It is submitted that this is another reason to revisit *Parris*: the CJEU could then take account of the intersectional discrimination to which Muslim women are subject when their employers ban the wearing of religious symbols in the workplace and this would reflect the 'real life' situation of these women. With Xenidis (2018: 42) we can conclude that 'ignoring the intersections of religion, gender and race and how they shape particular situations could thus result in the invisibility of the specific prejudice experienced by Muslim women'.

Conclusion

It has been argued that the CJEU should revisit its judgment in *Parris*, which, as was analysed, expressly rejected the possibility of a claim for intersectional discrimination, for a number of reasons. First, because a prohibition of intersectional discrimination is now laid down in an EU anti-discrimination Directive: Directive 2023/970/EC. Because the CJEU general aims for a uniform interpretation in EU anti-discrimination law, this should lead to an interpretation of the EU anti-discrimination Directives to include protection against intersectional discrimination. This would fit in with other developments in EU law towards acknowledgement of intersectional discrimination. Second, and related to the first point, it can be argued that a capacious or purposive interpretation of the anti-discrimination Directives means that intersectional discrimination is already covered,

especially because this, in line with the developments at EU level in this area, fits in with the aim of these Directives: to combat discrimination.

A third reason supporting the revisiting of the judgment in *Parris*, is the shift within the CJEU's case law towards an intra-group comparison which could make the comparison in intersectional discrimination cases easier and, thus, make it easier to apply an intersectional lens. A fourth reason for revisiting *Parris* is that there are developments in the case law which indicate that the CJEU has become more aware of the possibilities of intersectional discrimination taking place. However, the CJEU has not shown this awareness in its judgments in the headscarf cases it has handed down to date. However, as these cases are seen by many as a prime example of intersectional discrimination, revisiting *Parris* and making such a claim possible might provide more protection for Muslim women who want to wear their Islamic headscarf at work and might reflect the reality of what is happening when they are prohibited from doing so. This is the fifth reason for the argument that the judgment in *Parris* needs to be revisited.

It is argued that, for all these reasons, *Parris* needs to be revisited and overruled urgently to ensure that victims of intersectional discrimination, like Mr Parris, headscarf wearing women, the young women in our first example and others are not left without a remedy when they suffer what is clearly 'real life' discrimination on a combination of grounds.

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