The Discrimination in Workplaces

A Critical Discourse Analysis of the European Court of Justice Judgment about the Islamic Veil Prohibition

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Abstract

The issue of the Islamic headscarf has been in the centre of the political debate whether it fits into the Western culture or not. Several member-states in the European Union have issued laws and regulations that impose restrictions on wearing the Islamic headscarf in the public sphere. Even some EU courts have ruled such restrictions imposed by member-states. Recently, this issue has been discussed in the context of the occupational life. In a dispute before the European Court of Justice, the ban was considered as legitimate. In this research, I analyse the judgment from a socio-legal perspective and analyse the intersectional identity of Mrs. Achbita who is a party in the dispute, considering that she belongs to the social category of veiled working Muslim women.

Keywords: Socio-legal, Intersectionality, Gender, Multiple Discrimination, Intersectional Discrimination, Neutrality, Objectivity, Justification
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1. The Introduction

Recently, the European Court of Justice has ruled that prohibiting employees from wearing any signals of their beliefs, regardless if they were philosophical, religious or political signs, doesn’t form a direct discrimination against the employees and neither an indirect one in certain circumstances. This is if the prohibition is derived from internal rules in the organization (Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017). In this case, the court has given a landmark judgment in the hijab or the Islamic headscarf cases in the occupational life. A landmark judgment would provide a precedent which should be followed in similar cases and affects substantially the interpretations of the law when faced by similar cases. The tradition of such judgments is not new at the EU courts and neither strange within the framework of a doctrinal understanding of the law. Previous judgments that are somewhat similar or related to religious signs have been ruled by the European Court of Human Rights almost in the same way and to some extent in a similar reasoning (Dogru v France, 2009; Sahin v Turkey; S.A.S v France, 2014; Human Rights Watch, 2009). But the remarkable thing in this case is the given power to private organizations to issue internal rules and claiming that they are for legitimate aims. Comparatively, all the mentioned cases judged by the European Court of Human Rights the state was a party of the case and the prohibition was legitimized from the state against private bodies. This, according to the European Court of Justice, doesn’t form a direct religious discrimination and the indirect discrimination can be justified because it’s based on legitimate aim (Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017). So, this is not a new understanding approached at the EU courts neither a strange one. The multidimensionality or the multiple inequalities have been ignored in the name of the neutrality and the objectivity of the law or more concretely, because of the dogmatic position that the court takes when separating between the social and the legal. The multidimensionality is defined in the term “intersectionality”. To introduce the term briefly in this introduction, the intersectionality was first addressed and conceptualized by Crenshaw in 1989 in describing the experiences of the black women suffering from multidimensional inequalities (Crenshaw, 1989, 1991). Crenshaw addressed the issue of intersectionality to refer to the multiple dimensions that intersect in the women’s identity and form the lived experience of black women (Crenshaw, 1989, 1991). Although, the growing demands to recognize the intersectionality in the national antidiscrimination laws and the pressure from EU to member-states to
incorporate the term in the national legislation, still the liberal trajectory is dominant in dealing with the issue and in the understanding of the problem or solving it through law texts and from a dogmatic position. Here, it can be beneficial to develop upon the liberal understanding of the human rights and introduce it so it would be easier to the reader to get the notion that is discussed here as the issue is connected to the discrimination and intersectionality as highlighted areas in the scope of human rights. The liberal understanding of human rights concerns law texts and considers human rights as agreed upon outgoing from the political values that are adopted by the society. This includes a limitation to the existence of human rights to the written law as the human rights exist as far as they are regulated in a law and can be found in a law text (Dambour, 2010).

In this essay, I will consider the case that was judged by the European Court of Justice creating a precedent, or a landmark decision, to follow in judging cases about Hijab in occupational life and assessing the discrimination (Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017). Further, I will conduct a critical discourse analysis to explore the discourses of the neutrality, the objectivity and the justification; to which extent they exist and to provide a critical view on these discourses from a socio-legal perspective. Finally, I will analyse the intersectional identity of Mrs. Achbita as a party in the case and her position from an intersectional perspective.

In the light of the previous introduction, two questions can be developed and asked,

1- How do the discourses of neutrality and objectivity exist in the judgment and how they can be discussed from a socio-legal perspective?

2- How can the intersectional identity in the case be discussed and subsequently which position does this identity is placed into?

To answer the research questions, I will review the relevant literature in this field to give the reader a clear understanding to the analysis. I will conduct a critical discourse analysis on the court’s judgment in the research case and discuss the reasoning from a socio-legal perspective to illustrate the European legal tradition in ruling such cases. In that context, I will introduce the liberal understanding of the law in a summarized way. Furthermore, I will introduce the intersectionality generally and relate to what it is relevant to the research case and the research questions.
2. The Aim

The aim of the research is not to assess the judgment neither to underestimate it. The aim in this text is rather to provide a critical view on the issue from a socio-legal standpoint. More specifically, to describe the discourses of the European Court of Justice in judging cases related to discrimination against Muslim women and the Islamic headscarf and at the same time contest these discourses from a socio-legal perspective. This is because the prohibition of the Islamic headscarf in the occupational environment is new and the research case has been ruled in 2017. So, there isn’t much research on this issue although much literature on the prohibition of the Islamic headscarf in other contexts can be found based on cases ruled by other courts. To reach the aim of the research, I benefit from several cases that were judged at EU courts. Here, I mention EU courts and I don’t specify a certain court in the EU. This is because the discourses and the understandings by the courts are what matters and not which court judges which case in which way. Finally, to make the text cases clear I will include links to the cases at the respective EU court’ website. Furthermore, in the second section, I will conduct an intersectional analysis to illustrate the intersectionality and the intersectional identity who has been given a disadvantageous position.

3. Limitations

The research is of course limited to its mentioned case and is not applicable on other cases. This is because mapping out many courts and many cases requires extensive resources and much more time and space to conduct the research. Furthermore, it requires an access to another database than this that I have access to through the Internet. So, this is a small-scale analysis conducted on one cases and the results can’t be generalized over all cases but the results can form a signifier to the discourses and trajectories followed in that respect by the European Court of Justice.

4. Literature Review

In this section I will review relevant literature to this research in addition to the legal issues that have been considered previously. As I am studying a law case in the contemporary legal practice within the European Union which is characterized by the liberal concept of law and the doctrinal understanding, therefore, I will briefly introduce the difference between the socio-legal perspective and the doctrinal understanding. This is to facilitate for the reader and to put the research topic in a context. Subsequently, I will address the differences
between the intersectional discrimination and the multiple discrimination. This differentiation has important consequences in handling the discrimination at the EU courts. Thereafter, I will introduce the legislation within the EU and the legal contexts where the discrimination in the occupational life can be considered on the operative level i.e the legal texts that the courts have based their judgments upon or more simply the legal practice in such cases.

4.1 The Socio-legal and the Doctrinal Understanding of Law

The legal scholarship is no more limited to the law texts. Recently, the legal scholarship in the traditional or doctrinal understanding of law is being challenged and contested from different perspectives not at least from political and social ones. At the same time, the legal scholarship is expanding and getting wider to include new areas that were not regarded as legal or belonging to the legal scholarship in the doctrinal understanding.

In the legal practice from a doctrinal view, the law is manifested through doctrine, decisions and law texts. It is a formal tool in the hand of policy makers to bring the change on different social levels and it’s represented by the actions of the practitioners of law (Bankar, Reza, 2009). The challenges that the doctrinal understanding is facing have expanded the area of disciplinary in the context of law. The law is now regarded in different meanings depending on different context where it can be found. The social aspect is more recognized and no clear boundaries can be found now between the legal and the social from this perspective (Gunnarsson, et.al., 2007). Therefore, questioning the law boundaries can be useful in the very change that the disciplinary is facing. Asking the question of where the boundaries are drawn between the legal and the non-legal is very relevant to this context. According to Gunnarsson et.al., the increasing recognition of legal pluralism is one of the reasons of the changing nature of the legal scholarship (Gunnarsson, et.al, 2007). The legal pluralism refers to the multiple legal system in a geographical space within the borders of the state (Davis, 2010). Gunnarsson et.al mean to think about the law not as unified and separated entity where the state forms the formal source of it but rather considering the fact that the law is no more limited to the state as the only authoritative source. Other sources are now regarded as belonging to the legal arena or as laws by themselves. There are parallel laws on all levels, the district law and the European Law for example. This has resulted in the states losing some of their sovereign power (Tamanaha, 2007). Another explanation to the shift to the socio-legal perspective, according to Gunnarsson et.al., is the pluralistic
environment in scholarships connected to the legal field and the change in the nature of the knowledge (Gunnarsson et.al., 2007). This includes that issues that were taken for granted are now being questioned. The law is the object of the legal scholarship but this can no more be presupposed neither the limitation of the legal disciplinary to the law as the object. Therefore, the boundaries of the legal scholarship need to be reflected upon (Gunnarsson et. al., 2007).

This paradigmatic shift, at least in the scholarship, to the socio-legal research can bring up the question of what belongs to the legal scholarship and which issues are of legal relevance to be taken into the context of legal scholarship. The dogmatic view of law considers that only the law in the doctrinal understanding is of legal relevance and should be taken into this context. Hence, many issues can be excluded in this view (Persson, 2007). On the contrary, in the socio-legal approach much more issues can be taken into the legal context such as the gender equality because political and social aspects can be included from this perspective (Gunnarsson et. al., 2007).

4.2 The Intersectionality and the Multiple Discrimination

In this section, I will introduce the term “Intersectionality” and differentiate it from the multiple discrimination. I will not describe the complexity of the intersectionality as an analytical tool here, as it will be described and discussed later in the research.

The intersectionality is relatively a new term introduced into the academic arena. The concept was first conceptualized by Kimberlé Williams Crenshaw referring to the experiences of women of colour when multiple dimensions intersect in these women’s identities to form their experiences (Crenshaw, 1989, 1991). The introduction to the concept is relevant here to put the reader in a context. The intersectionality is not a concept that is simply accumulative for different inequalities; but rather it is an interconnected context with all its dimensions where power relations in the society play a main role in creating disadvantages (Ashiagabor, 2009). The multiple discrimination, as more doctrinal term, is much more wider and much more descriptive. It describes the issues related to two or more grounds of discrimination within the law text but not dependent on each other. To the contrast of the multiple discrimination, the intersectionality refers to the case when two or more discrimination grounds occur simultaneously (Gerards, 2007). In other words, the discrimination in the case of the multiple discrimination can occur and be based on either
of the grounds while in the intersectional discrimination the discriminatory factors can’t be separated from each other. This in the case of multiple discrimination can be problematic due to the competitive factor between the grounds of discrimination. This is because it opens up for the risk to overlook the other ground as one ground of discrimination can be recognized (Knudsen, 2006). In fact, the separation between the multiple discriminatory actions and the intersectional ones is not as easy as it can seem. This is because the issue in the reality can be much more complicated and it’s not easy to determine the ground of discrimination. An obvious example about this, an explicit intended discrimination based on religion can include a discriminatory ground based on gender or ethnicity. In that meaning, the different dimensions that intersect don’t act individually and independently from each other but an interrelation masters the overlapping between the several dimensions. This includes that all intersected dimensions act in a way that creates a systemic injustice among women who have intersectional identities. Furthermore, the intersectional identities are not taken into consideration when mapping out the social inequalities because the doctrine and the doctrinal understanding in addition to policies are such that address only one form of marginalization while the intersectional identity is overlooked (Crenshaw, 1991). This can be problematic to women who have intersectional identity because the discrimination in their case is characterized by one ground of discrimination rather than interrelations between several social dimensions (Knudsen, 2006). In such a system, one social category can work as signifier and is more valued over other social dimensions; for example, considering ethnicity as a significant discrimination ground and dismissing the gendered aspect while the fact is that all aspects interplay in their mutual processes to form the intersectional discrimination in a certain situation.

4.3 EU Anti-Discrimination Laws and Intersectionality in Occupational Life

The intersectionality as a concept related to the feminism and the legal scholarship has been a trend in the academic scholarship since it has been introduced. Despite this trend, EU laws, and consequently EU courts, have failed in addressing the issue. An orientation toward the recognition of the multidimensional discrimination in the EU legal bodies and the EU as an organization can be found. Yet, this trajectory is still characterized by the liberal discourses in addressing the problem of multidimensionality in the discrimination, I prefer to write multidimensionality here to comply with the EU line as the intersectionality as a concept still isn’t touched upon.
Particularly, the equality as a principle that governs the EU as organizational body can be found in several contexts. Article 2 of the Treaty on European Union (TEU) states “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” (TEU, Article 2). This principle of equality is emphasized too by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, 1950). In this convention, Article 9 states “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” And article 14 states “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Including the protocol 12 where the governmental discrimination becomes prohibited too. Moreover, the introduction of the general article 13(1) in the Treaty Establishing the European Community (EC, 2002/C 325/01) on combating discrimination in a comprehensive approach based on several discrimination grounds opens up for EU to act as an transnational organizational body to adopt further strategies or acts to enhance the equality. This article states “1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” (EC, 2002/C 325/01).

Narrowing the issue down to the concern of the research, the anti-discrimination laws in the EU couldn’t incorporate the intersectionality as a concept in all its complexity. Although, the shift toward the recognition of the multidimensional discrimination and the orientation toward the intersectionality -for instance, a research was given by the European Commission
about gender equality has discussed the issue (Fredman, 2016). Yet, the issue of intersectionality is unaddressed by EU courts. Several law cases where the intersectional perspective is so obvious have been judged by EU courts not considering the concept (Dogru v France, 2004; Sahin v Turkey, 2005; Dahlab v Switzerland, 2001). Relating to the occupational life, in two recent cases judged by the European Court of Justice, the court has provided a landmark decision based on the Council Directive 2000/78/EC about establishing a general framework for equal treatment in employment and occupation (Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017; Bougnaoui and ADDH v Micropole SA., 2017). Although the directive recognized the multidimensional discrimination and emphasized that women to a great deal, are victims of such a discrimination (2000/78/EC, point 3) the intersectional aspect or the multidimensionality is not touched upon in the judgments. Rather, the concepts of direct discrimination and the indirect discrimination were discussed in a more neutral version (Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017; Daouidi v Bootes Plus SL and Others, 2016; Bougnaoui and ADDH v Micropole SA., 2017). In the law cases mentioned above, whether before the European Court of Justice or the European Court of Human Rights, the discrimination was handled in the context of multiple discrimination and not the intersectional one. For example, the case of Bougnaoui and ADDH v Micropole SA the discrimination ground that was considered is the religion. Thus, the fact that the Islamic headscarf is just for Muslim women and not for Muslims or women was ignored. Consequently, the discrimination grounds competed in the legal assessment and resulted in prioritizing the religion and dismissing the gendered aspect. The same context has been considered in the case Achbita where the Islamic headscarf was the discrimination ground that was assessed by the court. Other examples, Dogru v France, Sahin v Turkey and Dahlab v Switzerland. Thus, the discrimination is handled in these cases as one-issue case not taking into consideration the multidimensional aspect (Gerards, 2007).

4.4 Debates about the Islamic Headscarf in the Public Sphere within the EU

The issue of Muslim women is not new to the political debate and the legal practice in the EU. Neither is the debate about the ban of the Islamic headscarf. Several cases have been taken to different courts. Of course, the Muslim women in this context are always a party in the cases because the Islamic headscarf is only for Muslim women and not for Muslims in general or for Muslim men nor for non-Muslim women. In 2004, a judgment from the
European Court of Human Rights has ruled the ban of the Islamic headscarf at schools in France (Dogru v France, 2004). The prohibition was ruled too in a similar case about the Islamic headscarf in Turkey (Sahin v Turkey, 2005) and in Switzerland for the teachers (Dahlab v Switzerland, 2001). The politicization of the issue on a high level in the EU has contributed to legal steps and restricting regulations through several member states like France and Netherlands (Gresch & Sauer, 2012). Of course, as any other issue discussed politically, the prohibition has been both applauded and denounced by feminists. A remarkable argument by feminists who applauded the ban of the Islamic headscarves is, according to them, to enhance Muslim women’s position in the power structures and combating the patriarchy as the Islamic headscarf symbolizes the oppression and male domination (Freedman, 2007; O’Neil et.al., 2015). Their argument is that the Islamic headscarf represents a power imbalance between Muslim men and Muslim women. Thus, such a ban can be justified by referring to gender equality (O’Neil et.al., 2015). While the other argument by feminists who take the side against the legal restriction is about the otherness of the Muslim women (Rottmann & Ferree, 2008; O’Neil et.al., 2015). Moreover, there are other arguments by feminists who take the side against the legal restriction and the justification of the prohibition and see the veil as a symbol of resisting and agency and moreover an answer to the victimization of Muslim women as suppressed and subordinated in the Western cultures and the enhancement of this victimization by media (O’Neil et.al., 2015). Although, the European Union the legal scholarship is shifting to recognize the intersectionality and despite the legal texts encourages member states to implement relevant intersectional perspectives in the law text on a national level, a legitimization to the restriction of wearing the Islamic headscarf in the public sphere was justified by the EU legal bodies in several occasions. In addition to the judgments in the mentioned cases and other cases, there are controversial laws about this prohibition in in the EU (Rottmann & Marx Ferree, 2008; O’Neil et.al., 2015). In other words, regardless which argument we consider, EU courts has failed in addressing and touching the concept of “Intersectionality” and hence the experiences of veiled Muslim women and their position in Western cultures (Kayaoglu, 2014).
5. Methodology and Theoretical Framework

The study aims to provide a intersectional perspectives on judgments ruled by EU courts and to explore the discourses when handling cases about discrimination in the occupational life. Specifically, the case of the Islamic headscarf where the European Court of Justice has provided a landmark judgment in it. Furthermore, the dogmatic position that the court take in the mentioned case and other similar cases establishes a rich material to discuss from a socio-legal perspective and not only the intersectional one even though the intersectionality is included in the socio-legal approach.

Hence, to reach the aim of the research and to be able to answer the research questions, I will consider the intersectionality as a theoretical framework to answer the research questions and to reach the aim of the research. This is because the intersectional analysis will provide more precise results about the imbalance in the power relations and social inequalities as a focus area. In the methodology, I will use the critical discourse analysis to provide the critical view on the court’s neutral discourses and the claim of the objectivity that can be found in the EU liberal legal practice and in its dogmatic position. The critical discourse analysis is because I am dealing with a case law where mostly, the language is fundamental and we need to get the meaning beyond the written sentence or the spoken word. That is to get in deeper in the judgment and understand the discourses. Moreover, in the critical discourse analysis the naturalization of the language is taken into consideration which enriches the analysis as not to take everything for granted but rather to question such issues that we can consider as natural due to the dominant discourses. That is to consider some issues that are taken for granted without any questioning like women are mothers or most of Muslim women are veiled.

I will begin to explain briefly the intersectional analysis and the critical discourse analysis.

5.1 The Intersectional Analysis

The intersectionality as a concept is regarded as a signifier to women studies especially after the 2000s. It’s almost one of the most important contributions that feminists could enrich women studies with (McCall, 2005). The term has been placed in the centre of the very question about gender equality and the transnational unified language that is for all women around the world. Yet, the methodological approach is still a subject of discussion among scholars. While some scholars cheer the term, there are others who are sceptical to it.
However, the methodological approach is the relevant question after establishing the concept or the question of how we can conduct the intersectional analysis or how to study the intersectionality. Still, there is no clear way to conduct the intersectional analysis and scholars have written much about that. One fundamental issue that should be taken into consideration when conducting an intersectional analysis is managing the complexity of the concept. This complexity comes from the multidimensionality in the intersectional identity which makes different societal, political and other dimensions intersect and consequently need to be explored when conducting the intersectional analysis.

To manage the complexity of the intersectional perspective in this research I will benefit from McCall’s research about the methodology in the intersectional analysis (McCall, 2005). McCall discusses three approaches to manage the complexity. I will describe briefly the three approaches their and clear my choice.

The first methodological approach to intersectional analysis is the Anticategorical complexity. As the name indicates, this approach recognizes no categories and moreover, considers all the categorization in social life is just to simplify the matter of intersectionality. The approach is premises that no category can be considered as a “master category” rather a homogenous order applied on an unstable social reality that is always in change (McCall, 2005). Therefore, the deconstruction is the tool of this approach to deconstruct the inequalities that result from normative assumptions in the social categories of race, sexuality, gender and class (McCall, 2005). McCall gives an example on what can be regarded in the gender as a social category. In this understanding the gender is not only the binary of men/women but much more can be included depending on the definition of men/women (McCall, 2005). In the same way, the second approach is the Intracategorical one which is also sceptical to categorization but keeps the social categories due to the social reality that imposes such categorization. The Intracategorical approach focuses on the social group at a particular point of intersection. Therefore, the invisible categories can be the matter of study in the framework of this approach. In handling the complexity, this approach deals with one social multiple dimension that goes over the intersected categories. Consequently, it doesn’t deal with many social dimensions that belong to certain categories. In other words, it deals with one dimension of multiple categories of the social group in the point of intersection and not with the multiple dimensions of each social category by itself. In that meaning, the Intracategorical approach recognizes the diversity within the one social group.
The Intercategorical approach is the third approach presented by McCall. This approach concerns the inequalities in the relationships among the pre-constituted social groups. The focus in this approach is on the relationships and the inequalities embedded in them emphasizing the change in the constituted social groups and their relationships. To the contrast of the Intracategorical approach which analyses the multiple dimension of intersectionality in the single group, this approach – the Intercategorical approach - takes into consideration multiple groups within an analytical social group and not dealing with the multiple dimension of intersectionality within a single group constituted in a certain point of intersection. Thus, the Intercategorical approach is systematically comparative. An example as McCall gave it, when studying the intersection in gender and class, this approach recognizes six groups which are the male/female combined with the upper class, the working class and the lower class (McCall, 2005).

The concern in this research is more oriented toward the Intracategorical approach although it doesn’t satisfy the criteria of just one approach. This was also emphasized by McCall “Second, some research crosses the boundaries of the continuum, belonging partly to one approach and partly to another” (McCall, 2005). This is because the research topic is about the veiled working Muslim women in Europe in a particular point of intersection. Here, I would argue that this social group is a multigroup constituted of already existing groups which are women, Muslim and working groups. Furthermore, this approach to the intersectional analysis is mostly used in studying cases (McCall, 2005) which is very relevant to this research. This is because the research is about a case law in the contemporary legal practice in Europe. In this context, applying the Intracategorical approach would be beneficial in visualizing the difference and the variety in the already existing social groups where we can draw some generalizations upon. Therefore, an Intercategorical tradition would be relevant in the same context meaning that recognizing the social groups and admitting the existence of them due to the fact that the social reality recognizes them and has these generalizations about them.

5.2 The Critical Discourse Analysis

The Critical Discourse Analysis is an approach that is relatively new in the discourse studies. As the name indicates and as a relatively new school within the discourse studies, the approach concerns the study of the semiotics, discourses and language. This is to visualize and reveal the social inequalities, power relations and dominance through the
discourses (van Dijk, 1993). In the same article, van Dijk defined dominance as “the exercise of the social power by elites, institutions or groups, that results in social inequality, including political, cultural, class, ethnic, racial and gender inequality” (van Dijk, 1993). In other words, the Critical Discourse Analysis is not interested in studying the language as it is but rather understanding how these power relations, social inequalities and dominance are represented and the interplay between these aspects is manifested through the language (van Dijk, 1993; Blommaert & Bulcaen, 2000). There are several directions in the Critical Discourse Analysis and drawing upon a historical development is irrelevant to this section but the most interesting here is the concept and the approach. Therefore, I will not reflect upon the different trajectories or developments in the Critical Discourse Analysis. In that context, the research here considers this approach due to its usefulness in understanding the imbalanced and institutionalized power relations and social inequalities in the topic of the research. Hence, the neutrality discourses and the objectivity in the court’s judgment are relevant areas to be taken into consideration within the Critical Discourse Analysis. This is to enhance the socio-legal aspect in the research in order to be able to reflect upon the judgment from a socio-legal perspective and due to the fact that the court communicates through written language in the judgments which makes the issue very relevant to the research to reflect upon the court’s reasoning and arguments based on the law texts and own interpretations by the court. Furthermore, the intersectional perspective or the intersectional identity represented in the case will gain a fundamental focus in analysing this issue. Therefore, I chose this methodology to analyse the case within the theoretical framework of the Intersectionality as presented in the feminist literature.

6. The Analysis

To be clear here, the analysis is focusing of the category of the working Muslim women in the EU and more specifically, in the case of the research which is about the Islamic headscarf in the occupational life, the case of Mrs. Achbita (Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017). I will begin the analysis drawing upon the socio-legal aspect of the judgment and explore it from a socio-legal perspective in contesting the liberal, neutral and the objective discourses in it which are embedded in the liberal understanding of the law. Here, I mean the neutrality and the objectivity in the judgment. Then, I will move to reflect upon the intersectional perspective
in the judgment whether it has been considered or not and analysing the intersectional identity in the light of the neutral and objective discourses of the court.

6.1 The Socio-legal Aspect

In this section, I will explore the discourses of the court and reflect upon them from a socio-legal perspective. The reflection can here be misunderstood to not getting into the core of these discourses. To be clear, the aim here is to explore the liberal understanding and the dogmatic position of the court represented in the judgment outgoing from a socio-legal approach. Therefore, I will consider three areas in the analysis. I will consider the justification of the restriction imposed on the manifestation of belief. Then, I will discuss the neutrality discourses in the judgment and its relation to the liberal discourses and in the same section I will discuss the claim of objectivity and its effects in the research case.

6.1.1 A Justified Disadvantage

The judgment in the case of Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017 concerns the interpretation of the European Court of Justice of the Article 2(2)(a) of the Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation (The Council Directive) concerning the issue of the ban of the G4S employees to wear any visible signs that manifest the employee’s political, philosophical or religious beliefs (Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, 2017). In the legal context, the court considered the recital 1 in the mentioned directive in interpreting the meaning of the religion and the manifestation of the religion. The 1st recital in the directive states that

“In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

In assessing this recital, the court refers to Article 9 in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This Article in ECHR
(Article 9) has already been disputed before the European Court of Human Rights and assessed by the same court as the prohibition of the Islamic headscarf doesn’t form a breach to this Article in ECHR (Dogru v France, 2004; Sahin v Turkey, 2005). Moreover, the ban in the cases before the European Court of Human Rights was derived from internal rules too. Due to the liberal understanding of the law and the dogmatic position of the court, the court has interpreted the will of the legislature to adopt the meaning mentioned in Article 9 of the religion and the manifestation of the belief mentioning that in points 26, 27,28 in the judgment where point 28 states

“… the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of ‘religion’ in Article 1 of that directive should be interpreted as covering both the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public.”

Thus, the dogmatic position in law considers the expectation that the court is supposed to follow the will of the legislature. The will of the legislature is almost a signifier of a such position. Gunnarsson et.al. put it in describing the dogmatic position

“"The intention of ‘the legislator’ is supposed to be followed and the legal profession is expected to be loyal to the ‘will of the legislator’". (Gunnarsson et.al., 2016, p.6)

This interpretation relying on the will of the legislature or assuming the intention to mean or not to mean something by the legislature can be problematic according to Johnson (2015) as he studied that within the context of Historical Presentism meaning that the assessing of the historical aspect in policies from the present can be problematic and lead to assume “a high degree of intentionality to the decision-makers” (Johnson, 2015). Examining the meaning of manifestation of belief by assuming the same meaning by the legislature in Article 9 in ECHR is problematic that is the prohibition of the Islamic headscarf ruled by the European Court of Human Rights was considered as justified due to societal needs to maintain the democratic society (Dogru v France, 2004). This restriction imposed on the freedom to manifest the beliefs in Article 9 is referred to by the current court, The European Court of Justice, in precedents and settled law-case to explain why the aim to ban the visible religious signs by G4S is a legitimate aim. Moreover, in the opinions provided by advocate general, the opinions have referred to the trajectory followed by other national and EU
courts considering a justified restriction on the freedom of religion and the freedom to manifest the beliefs. The court has in point 37 explicitly mentioned that

“A broad interpretation of the concept of ‘religion’ certainly does not mean that a person’s behaviours or actions are automatically protected by law simply because they spring from some kind of religious conviction.”

The principle of the justification of inequalities is present in the liberal understanding of law. That is the disadvantageous position that one may acquire can be legitimized if this legitimization can result in maintaining the social order other basic liberties. This was the case in (Dogru v France) when referring to the democratic needs in the secular society and the same issue has been considered in Mrs. Achbita’s case when referring to a legitimate aim that is the need to show a neutral attitude by the company in its relations to the customers in order to do business. This was mentioned in point 37 and 38 in the judgment where the court mentions in point 38

“An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.”

Thus, the justification considered that the disadvantageous position of Mrs. Achbita is justified as her freedom to manifest her religion conflicts with other basic freedom which is the freedom to conduct business. This justification has been presented by Rawl also when exploring the principles of justice in the Liberal State. In the context of the liberal society, Rawl discussed that the basic liberties aren’t a subject to infringement or justification. While liberties derived from ‘the distribution of wealth and income and the design of the organizations that make uses of differences in authority and responsibility” are subjects of justification and restrictions in their applications.

“These liberties have a central range of application within which they can be limited and compromised only when they conflict with other basic liberties.” (Rawl, 2003, p.54)
6.1.2 The Claimed Objectivity and The Neutral Discourses

In examining the discrimination whether it can be found in the case or not and whether dismissing Mrs. Achbita forms a ground for discrimination or not, the court considered the concepts of direct discrimination and indirect discrimination as introduced in Council Directive. Article 2 paragraph 2 of the Council Directive 2000/78/EC defines the direct discrimination as

“direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;”

And the indirect discrimination as

“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons...”

In assessing the direct discrimination by the court, the court ruled that no direct discrimination can be found in the case due to the fact that the internal rule of the company don’t treat anyone differently from other workers based on their beliefs. This is because, in a general and comprehensive version, the internal policy in the company prohibits the visible manifestation of any political, religious or philosophical signs. The court has made its assessment referring to the neutrality and the objectivity of the intern policy. That is the intern rule in G4S imposes a general commitment on all employees to not manifest their beliefs in whatever they believe in to ensure the neutral profile of the company in dealings with customers. Actually, the court’s discussion is embedded in the liberal legal discourse considering the law as neutral and objective; meaning that, in a simplified definition, the law is neutral and doesn’t take into consideration issues such as gender, sexual orientation, age and other grounds and impartial as it applies to all regardless other aspects outside the legal arena. In claiming the objectivity, the law shall have the same distance to all regardless their position. Further, the court has mentioned in point 30 in the judgment that

“In the present case, the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any
manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs.”

The objectivity as a ground for not forming a direct discrimination has been regarded in several points in the judgment and in the opinions provided by advocate general delivered on the case. For instance, in the opinions in points 51 and 52, the discussion considered how the internal rule could suit exactly in the middle or in the centre having the same distance to all employees of different beliefs regardless if they are religious or not

“51. *It must be borne in mind, after all, that a company rule such as that operated by G4S is not limited to a ban on the wearing of visible signs of religious beliefs, but, at one and the same time, also explicitly prohibits the wearing of visible signs of political or philosophical beliefs. The company rule is therefore an expression of a general company policy which applies without distinction and is neutral from the point of view of religion and ideology.”*

And in point 52 which states that

“52. *That requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (such as symbols, pins or slogans on his shirt, T-shirt or headwear).”*

Taking this in mind, the court could find that the rule is objective and it doesn’t place Mrs. Achbita directly in a disadvantageous position. This suits perfectly in the concept of law as objective which is considered in the liberal legal discourses. In a more metaphorical version, the “Veil of Ignorance” introduced by Rawl in his book “*A Theory of Justice*” describes that those who are involved in distributing rights and position in the society, assuming that they make rational choices, are behind the veil of ignorance and they won’t be able to see how the power or the rights are distributed and therefore, they will reach an original position where they can take their moral considerations into account as they can’t have self-interest in the issue when they can’t see (Rawl, 2003). Although this original position has been a subject of critique by scholars; it is still considered through the neutral and objective
discourses in the liberal tradition – and in the research case. For instance, the original position has been criticized to be too hypothetical and ignoring the social reality (Sen, 2009). When considering the theoretical concepts of *Veil of Ignorance* and the *Original Position*, the court behind the *Veil of Ignorance* in their claimed *Original Position* couldn’t see that Mrs. Achbita has become a subject for a different treatment and has been put in a position where her freedom has been restricted to the contrast of other employees in the way that the law doesn’t take into consideration the fact that in order to manifest Mrs. Achbita’s belief she has to have a visible manifestation. Regardless which concept we are for, the disadvantageous position of Mrs. Achbita is derived from dismissing the social aspect from the legal context this is because the dogmatic position implies that full separation between the legal and the non-legal. Whether this position is just or can be justified, according to the liberal approach, or unjust from a socio-legal perspective is a question of each approach. While in this research, the socio-legal contests the dogmatic and liberal, and as we have a social reality that we experience far from the ideal conceptions, the issue of not considering the societal aspect still will result in inequalities in the social reality which is the sphere that we live in while in a legal dogmatic context, the justification of the inequality claiming that the rule is objective, the restriction is just. That is, in a legal dogmatic context considered by the court, the disadvantage is acceptable here to the favour of other liberties and in the name of the objectivity and the neutrality which apply to all. Hence, the court couldn’t find any ground for direct discrimination according to the Council Directive 2000/78/EC as the internal rule didn’t treat Mrs. Achbita differently.

On the other hand, when examining the indirect discrimination in the case, the court considered that the intern policy may form an indirect discrimination against a group based on beliefs or religion but the different treatment in this case and the disadvantages caused to this group, according to the court, are objectively justified by legitimate aim which is the will to show the neutral profile of the company in all relations with the customers and the ways achieving this aim are necessary for the company. The court in the opinions claims that the intern policy is objective and neutral and imposing such a restriction on the freedom to manifest beliefs is justified by legitimate aim which is the neutrality in all customer relations and this aim is necessary for the company. In other words, the court explicitly mentions that the aim of such a neutral profile by the company and the prohibition don’t take into consideration whether the employee is a man or woman and doesn’t consider if
the employee belongs or believes in a certain religion, as mentioned in point 49 under the opinions

“After all, a company rule such as that operated by G4S could just as easily affect a male employee of Jewish faith who comes to work wearing a kippah, or a Sikh who wishes to perform his duties in a Dastar (turban), or male or female employees of a Christian faith who wish to wear a clearly visible crucifix or a T-shirt bearing the slogan ‘Jesus is great’ to work.”

Even though, the court, more implicitly and summarized, considered that this prohibition may form a ground for indirect discrimination as introduced in the Council Directive. This is because a woman of Muslim faith will be disadvantaged due to this ban and subsequently Muslim women who wear headscarf, as mentioned in point 57 in the opinions

“However, since such a rule is in practice capable of putting individuals of certain religions or beliefs — in this case, female employees of Muslim faith — at a particular disadvantage by comparison with other employees, it may, if it is not justified in some way, constitute indirect religious discrimination (Article 2(2)(b) of Directive 2000/78).”

Therefore, the court has assessed the legitimate aim and its necessity to the company and concluded that such a ban is genuine and is determining an occupational requirement for a legitimate objective.

This neutral discourse of the court in the judgment and claiming that the internal rule has the same distance to all employees regardless their beliefs or gender suit perfectly in the general discourses of neutrality and the claims of objectivity adopted by EU Courts and embedded in the liberal approach to law. Such discourses can be found in several similar cases, I already referred to above, handled by the European Court of Human Rights. The fact is, according to the reasoning of the court, the judgment could have applied to a male employee of Jewish faith or a Siskh. But such a ban will cause the same disadvantages to a male employee of Jewish faith or a Sikh, although it will be relevant to see how the court could have assessed such a case. Therefore, the advocate general’s reasoning is, to some extent, taking the issue for granted that it won’t form a discriminatory ground regardless the gender or the faith. Moreover, these discourses can seem just on the surface but with a closer examination from a socio-legal perspective, the neutral discourses in this case doesn’t
cause any disadvantages to Muslim men as they still don’t have to show any visible sign of their religion. Here, I am not trying to use the gendered dichotomy of man/woman but rather to draw upon the gendered aspect in the judgment. This prohibition won’t cause the same disadvantages to a woman of the Christian faith who is wearing a cross in Europe as the cross is more culturally accepted and it doesn’t have to be visible but in the case of the veiled Muslim women the religious symbol represented in the headscarf is much more debatable in Western cultures and physically can’t be invisible. From a socio-legal understanding of the law, the court could have discussed the issue of the Islamic veil in a broader concept and incorporated the gendered aspect in the judgment as it’s not the case of a Muslim woman in a workplace but rather Muslim women in occupational life. That is the court could incorporate that considering the social reality. Muslim women are put in a disadvantageous position comparing to women or men of Christian faith or Muslim men when legitimizing such a prohibition. Furthermore, comparing the issue to groups such as Jewish men or Sikhs is to this extent misleading and irrelevant from a socio-legal standpoint. It’s misleading because the court introduced the comparison for groups who will be put in disadvantageous positions while ignoring the fact that such a judgment won’t have the same distance to other groups such as Muslim men, women and men of Christian faith or simply, people who belong to a religion that doesn’t impose visible religious signs onto women. The irrelevancy of such a discussion from a socio-legal perspective comes from the fact that the socio-legal approach doesn’t recognize and is critical to the claimed objectivity within the doctrinal understanding of law in the liberal discourses. Meaning that the claim of the objectivity and the judgment same distance to a Jewish man as to a Muslim woman is problematic in a socio-legal approach because the experiences in the social reality of these groups pf comparison are different even in a legal context. I mean in contemporary society, no Jewish man was dismissed from his employment by a legal judgment because of wearing religious signs!

6.2 The Intersectional Perspective

In this section of the analysis, I will discuss two issues. The first is the multiple discrimination because it is relevant in this context to illustrate how the intersectional perspective is ignored in the judgment within the liberal tradition and the discourses of the court in the judgment. I will discuss how the multiple discrimination is considered and included in the judgment while the intersectional one is ignored. Meaning that the nature of
the multiple discrimination is competitive, as the multiple discriminatory grounds are competing so one ground will be dominant while the other will be invisible (Kundsen, 2006). Therefore, one discriminatory ground was ignored. Hence, the intersectionality couldn’t be visualized as it is about two or more discriminatory grounds occurring simultaneously (Gerard, 2007). Further, I will draw upon the intersectionality as it exists in the lives and experiences of working veiled Muslim women in the EU. Of course, the research will consider Mrs. Achbita and not all working Muslim and veiled women. But some connections can be drawn to similar situations. That is the position of Mrs. Achbita can be acquired by another working Muslim and veiled women in Europe in the same circumstances.

6.2.1 The Intersectionality and the Multiple Discrimination

The considered ground for discrimination in the judgment is the religious discrimination only. The gendered ground for discrimination has totally been ignored and even contested in neutral discourses. That doesn’t mean that the multiple discrimination hasn’t been addressed but rather the difference in the nature between the intersectional discrimination and the multiple one is to some extent a reason for the ignorance of the gender as a discriminatory ground (Fredman, 2016). It can be somewhat simplified to describe the intersectional identity of Mrs. Achbita as a Muslim veiled and working woman because the issue itself has a symbolic value in incarnating the intersectionality. This is because although the ban, in a more general and neutral version, is oriented toward the signs of faith regardless who is manifesting and which belief it is about, the fact is in this case that the ban put veiled working Muslim women in a disadvantageous position and gives the employer the access to a discriminatory tool through internal policies in the name of neutrality, objectivity and the legitimate aim in the liberal societies. Although EU legislature through the Council Directive has recognized the multiple discrimination and recognized women as victims of such a discrimination to a larger extent, yet the court failed to address the issue of intersectionality. In recital 3 in the Council Directive 2000/78/EC, it is stated that

“In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”
The court in assessing the case and examining the discrimination has, through the liberal discourses of neutrality and objectivity, ignored the intersection in Mrs. Achbita’s identity as a Muslim woman and the fact that the Islamic headscarf is for Muslim women and is not for Muslims or women. Therefore, the multiple discrimination couldn’t be discussed neither in the judgment nor in the opinions provided by advocate general. This is because the multiple discrimination is about competing grounds of discrimination to the contrast of the intersectionality which is about two or more grounds of discrimination that occur simultaneously (Knudsen, 2006) and as the intersectionality in that meaning is not recognized by the legislature though it couldn’t be addressed by the court. What is more, the multiple discrimination is not obvious in these discourses due to the fact that the neutral discourses of the court could abolish the gendered aspect from the case because this neutrality doesn’t include any gendered version here as the law shall be neutral and even the intern rule was considered as neutral. Therefore, the gendered aspect couldn’t be visible in the judgment. Even in the opinions, the discussion and the reasoning was oriented toward ignoring the gendered aspect as potential discriminatory ground. For instance, in the opinions provided by advocate general, in point 49, it is stated that

“... There is therefore no discrimination between religions. In particular, all of the information available to the Court indicates that the measure in question is not one directed specifically against employees of Muslim faith, let alone specifically against female employees of that religion. After all, a company rule such as that operated by G4S could just as easily affect a male employee of Jewish faith who comes to work wearing a kippah, or a Sikh who wishes to perform his duties in a Dastar (turban), or male or female employees of a Christian faith who wish to wear a clearly visible crucifix or a T-shirt bearing the slogan ‘Jesus is great’ to work.”

On the contrary, the religious aspect was emphasized and a focus area and a central point of discussion in the judgment as well as in the opinions provided by advocate general. Not even a referring to the recital 3 in the Council Directive 2000/78/EC neither in the judgment nor in the opinions. It can be discussed that the court didn’t even address the multiple discrimination despite the existence of such a concept in the same mentioned directive which has been applied in the current case. I argue here that due to the nature of the multiple discrimination as competing discriminatory grounds (Fredman, 2016) and, as mentioned above, differently from the intersectionality as two or more discriminatory grounds occur simultaneously (Gerard, 2007); the court did in a more implicit way recognize the multiple
discrimination. That is the gendered aspect as a discriminatory ground has been ignored to the favour of the religious aspect which become dominant. For instance, in the opinions by the advocate general, under section B in the assessment in point 33 when assessing the Concept of Discrimination Based on Religion, it was mentioned that

“As is apparent from Article 1 in conjunction with Article 2(1) of Directive 2000/78, that directive combats both direct and indirect discrimination based on religion or belief in employment and occupation. For the purposes of the present case, there is no need to draw a more precise distinction between ‘religion’ and ‘belief’. For the sake of simplicity, I shall therefore refer only to ‘discrimination based on religion’ or ‘religious discrimination’.”

And exactly after this also in the opinions, the case is described as signified by religion. Hence, in my argument, the multiple discrimination was to some extent recognized as there were a reference to it in the reasoning implicitly but due to its nature of competing discriminatory grounds, the gender was ignored to the favour of religion.

After drawing upon the multiple discrimination in this case, it is useful to explore the Intersectionality in Mrs. Achbita’s identity a veiled working Muslim woman. My start point in the intersectional analysis is that the Islamic headscarf is imposed by religious beliefs on Muslim women and not on women or Muslims. More specifically, Muslim women who want to manifest their belief often do it through having a headscarf in the public sphere which is something that Muslim men don’t have to do in order to manifest their belief neither women in general who are of different faiths.

6.2.2 The Intersectionality

The issue of the veiled Muslim woman is in the centre of the very debate about whether such a head cover could fit into the Western tradition and comply with the European values. Even feminists have discussed the issues and some of them celebrated such a ban while other were more critical (See the literature review in the section about these debates). Regardless which current we consider or if we are for the ban or against it, two points shall be born in mind when analysing the issue from an intersectional perspective which are; the Islamic veil is for Muslim women and not for other social categories in that context. Second, the Islamic veil is a way to manifest Muslim women’s beliefs in the public space and not in the private one. Here, it is relevant to mention that not all Muslim women are immigrant
women. Therefore, the issue of ethnicity won’t be reflected upon because it’s not clear in the case if Mrs. Achbita is an immigrant woman or not.

The issue in the case of the research has been considered in the context of the religious discrimination, as mentioned above. This consideration together with the ignorance of the gender as another signifier of the case in examining the discrimination can be somehow problematic. This is because this ignorance can misrepresent the experience of the discrimination and reduce the experiences to the religion of the Muslim woman. Actually, the social category of working and veiled Muslim women is in a position that is oppressive. This oppressive situation in the occupational life is derived from the intersection between gender and religion because of the same reasons mentioned above. As a Muslim veiled woman in the occupational life, such a ban will contribute to the marginalization of veiled Muslim women because it can result in dismissing with no recognized discriminatory ground in a legal context. Furthermore, for Muslim women who still aren’t employed and don’t participate in the labour market, it would form a barrier from getting into the labour market. Comparing this position to Muslim men or non-Muslim women, Muslim males and non-Muslim women won’t be affected neither by the internal rule of G4S nor by the judgment of the European Court of Justice. Even though, the judgment was generalized over everyone and for all kinds of manifesting the beliefs, but in the social reality, among the mentioned social categories, just Muslim women who are affected because the only way to manifest their religious belief is through an obvious symbol which is the Islamic veil. Thus, the oppressive position that they get is derived from being a Muslim and at the same time being a woman. Therefore, discussing the issue in the context of religion is misleading and it reduces the lived experience of discrimination from being discriminated because of being who they are to assessing whether there is a religious discrimination or not and at the same time ignoring that the religious discrimination, whether it exists or not in the case, can only be against a woman. Thus, the ban will impose challenges to veiled Muslim women in the European society, especially with all discussions about the integration and the radical Islam with the associated islamophobia. Hence, considering the social construction of gender and the position that Islam and subsequently Muslims have been placed into in the Western societies, the ban of the veil, with all inherent cultural values and its relation to the debate and the social considerations, would more favourably cause that Muslim women face new challenges in the labour market. The same challenges wouldn’t be faced by Muslim men or non-Muslim women. More generally, these challenges wouldn’t be faced by other social
categories due to several issues. Firstly, Islam as a religion is in the centre of the political debate with the raise of the far-right parties over all Europe associating with the move of the whole political arena to the right. Thus, manifesting the belief in Islam through the veil for women won’t be acceptable as manifesting the belief in other religions such as Sikh men or Jewish men. Secondly, veiled Muslim women, in particular, are perceived as not fitting into the European society and hence the European labour market as a part of the social space. This can be seen through several legal contexts in EU on national levels where the Islamic veil and the veil covering the whole body were and still are banned, such as the ban of Islamic veil in schools in France and the ban of the veil covering the whole body in the streets also in France. Moreover, in that point, the Islamic veil is perceived as a symbol of oppression and subordination to Muslim women and as an opposite to gender equality as addressed in Western cultures (Halrynjo & Jonker, 2016). Thirdly, taking into consideration the mentioned points when discussing the neutral prohibition of the religious symbols, the ban will affect Muslim women and not other social categories like Muslim men who don’t have to wear a seen symbol to manifest their beliefs, nor non-Muslim women who don’t have to wear symbols or who aren’t affected by the debate about the radical Islamism and the islamophobia.

7. The Discussion

Perhaps it seems some kind of a repetition to discuss the analysis because the judgment of the European Court of Justice is just identical to the theorized concepts that were introduced in the research. However, the discussion here is more to achieve a conclusion that can sum up the results from the analysis and answer the research questions and at the same time, reflect upon the ideas presented in the research in the light of the research questions. Therefore, I will consider the same structure here as in the analysis beginning with the socio-legal aspect and moving on to the multiple discrimination and the intersectionality.

7.1 The Socio-legal Aspect

In exploring the court’s discourses in the judgment and in the opinions provided by the advocate general, the analysis shows that the court’s discourses fit neatly in the theorized concept of the dogmatic position as described in the academic literature and. That is the court represented by the judges as legal practitioners have satisfied this point through the reliance on the legislature will and be loyal to the will of the EU legislature. Moreover, the
court went further to assume the will of the legislature. More explicitly, the court in point 28 in the judgment assumes the intention of the EU legislature “...the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78...”. This can be problematic because in a simplified version, it is the following of the will of EU legislature based on assumptions that the will of the EU legislature was oriented toward the same understanding of the court. Here, I’m not questioning the legal experience of the legal practitioners (the judges) in the field so far the legislature didn’t mention the intentions when issuing the law or didn’t even implicitly refer to such an intention.

Moving further to the justification of the inequalities, the court found that the ban of the Islamic headscarf may cause a different treatment to some groups in the society. These inequalities or in the research case, the disadvantageous position that Mrs. Achbita acquired can be justified because the different treatment is found genuine and is determining an occupational requirement for a legitimate objective. This justification has been assessed in the context of the clash between the right to manifest the belief and the right to conduct a business. In discussing the liberal discourses in understanding the law, I have referred to Rawl and the second principle of justice as presented by Rawl in his book *A Theory of Justice* where Rawl presents his theory about justice to maintain order in the liberal society. In that context, I argue that such a justification finds its roots in the core of the legal liberal tradition because the discourses of justification are not only in the disputed cases but even in the legal contexts that consider such an exception. For instance, the exception was there in the EU Directive 2000/78 and in Article 9 recital 2 in the Convention for the Protection of Human Rights and Fundamental Freedoms which states

“2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

In the context of discussing the neutral discourses and the consideration of the objectivity in the law as well as in the judgment, the court made the assessment that the internal rule is neutral and objective which includes that the internal rule doesn’t take into consideration if the employee is a man or a woman and at the same time it establishes a general commitment on all employees. Meaning that it is in the centre and has the same distance to all employees.
I would claim and argue that the neutrality and claiming the objectivity can seem just on the surface but on the other hand, the claim of objectivity still is hypothetical. That is the social reality includes advantages to some people and disadvantages to others. Those dis/advantages are derived from an acquired legal position based on the laws in the legal context. Applying this on the research case, the law could create a situation where the company G4S was privileged and Mrs. Achbita was disadvantaged. Moreover, this disadvantageous position was justified based on legal contexts. In the context of neutral discourses of the court, even though the judgment established that the ban of the religious symbols could have affected a man, I would argue that the ban won’t affect a man who belongs to the same religion and the same social category as Mrs. Achbita (A Working Muslim). This includes that the ban would affect only women in this social category. Considering the social reality again, the ban won’t affect men of other faiths in the same way. I mean until now, no man was dismissed because of the manifestation of the religious symbols of his faith.

7.2 The Intersectional Aspect

The court in handling the case considered one version of discrimination and assessed one ground of discrimination. As I argued above, this is due to the nature of the multiple discrimination as addressed in the judgment. That is the competitive nature of different grounds of discriminations in the multiple discrimination caused that the gendered ground for discrimination became invisible while the religious ground for discrimination became dominant. In considering this in mind, I argue that the judgment and the court were oriented toward the religious discrimination and at the same time ignoring the gendered aspect in the case. As a result, the intersectionality in the case couldn’t be touched upon or addressed because only one ground of discrimination is considered while the intersectionality is about two or more grounds of discrimination that occur simultaneously. I argue that the neutral considerations would prevent such an approach because, simply, the neutrality doesn’t include and regard the gender as an issue to assess or discuss in legal contexts because the law is considered as neutral. I mean here as the law is considered as neutral from a liberal perspective and as the court is discussing the issue from the same perspective, this implies that the gender is not subject of discussion when the internal rule is neutral too. Therefore, a gendered version of the assessment won’t exist when the neutral discourses are dominant. The court didn’t incorporate the gender in the assessment and this was obvious in the judgment that the ban isn’t a gender-oriented ban, in a way the court emphasizing and
enhancing the neutrality in the intern rule. This is true but on the other hand, the effects are more likely to be gender-oriented in the case of the social category the veiled and working Muslim woman. In other words, the experiences of Muslim women in manifesting religion in workplaces under such a ban are totally different from those of Muslim men. They are even different from the experiences of other women who belong to other religions. I mean here that Muslim veiled and working women are put in oppressive situation if they want to manifest their belief. Firstly, it is a fact that they have to wear a headscarf if they want to show their religiousness. So the Islamic headscarf is for them and not for Muslim men or non-Muslim women. On the other hand, the ban would put the veiled Muslim women before two choices which are to work without manifesting the belief or not to work. Some arguments can claim that the judgment is for all religious symbols and moreover political and philosophical ones. This is some kind of simplifying and abbreviation to the issue because in the social reality, the judgment will give the access to a discriminatory tool that can be used as an internal rule in the name of neutrality and the objectivity as it imposes a commitment on all. Taking this into consideration in addition to the situation of Islam in Europe and the increasing islamophobia, it is more likely that this tool is going to be used more and more.

8. Conclusion

The judgment in this case of the Islamic headscarf in workplaces was claimed to be objective and neutral. Although an indicator on a different treatment was obvious and discussed by the court but the court has considered that such a difference in the treatment can be justified. Furthermore, the dogmatic position of the court as there is a strict border between the legal and the social in addition to the neutrality which is considered by the court, caused that the court couldn’t address the intersectionality. On the other hand, the multiple discrimination was a signifier in the assessment as the court compared between two grounds of discrimination which are the religious and the gendered and found that the religious is dominant over the gendered. In such a way, the court could ignore the intersectional identity of Mrs. Achbita in being in an oppressive position. Finally, I argued that the judgment will give others to a discriminatory tool through the internal neutral rules and in the name of the objectivity and neutrality. With the increasing of the islamophobia and the very debate about the radical Islamism, it will be more likely that this discriminatory tool is going to be used more and more and Muslim women who show their religiousness would become a subject to this discrimination.
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