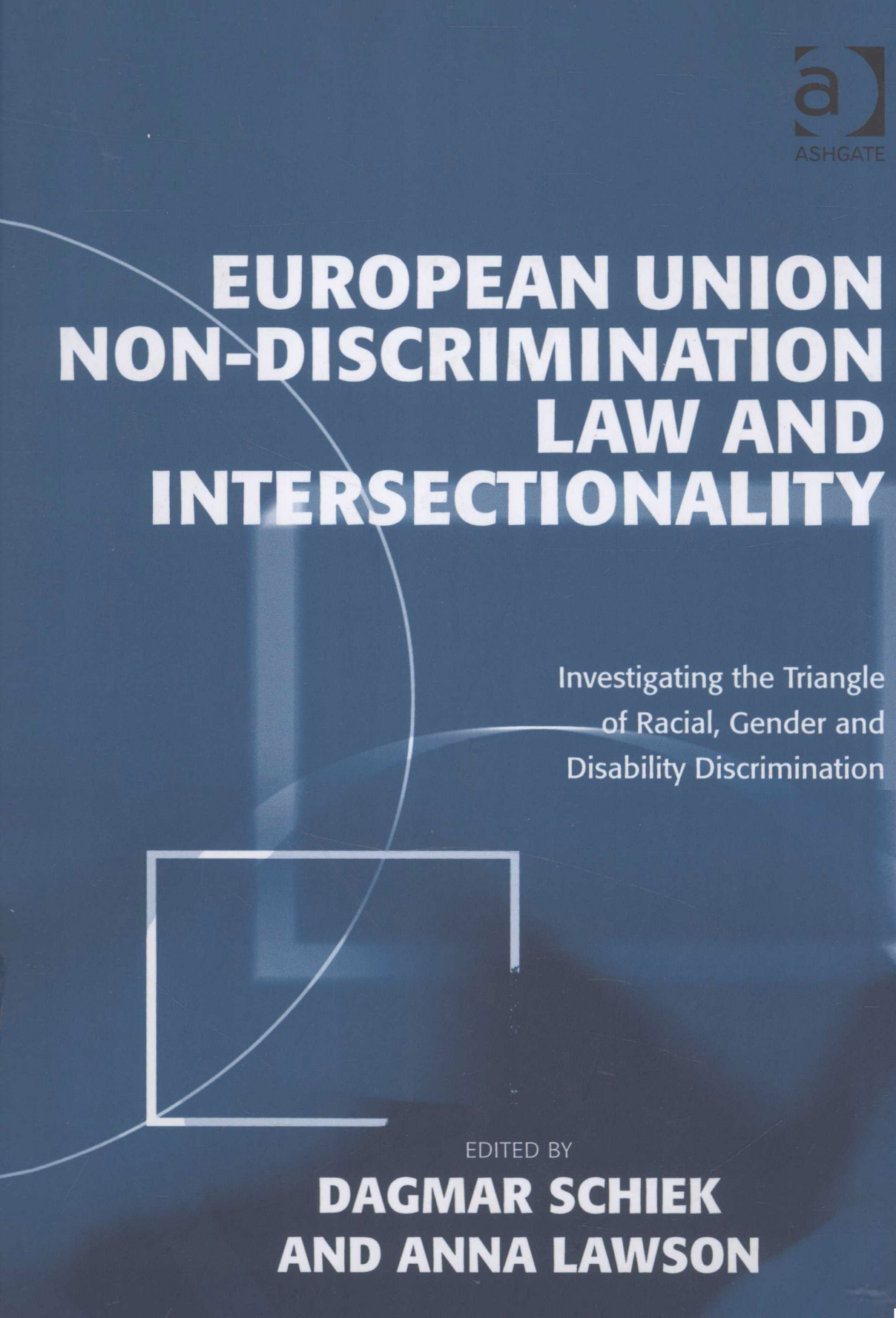
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EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY
Investigating the Triangle of Racial, Gender and Disability Discrimination
EDITED BY
DAGMAR SCHIEK AND ANNA LAWSON

European Union Non-Discrimination Law and Intersectionality

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Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data
European Union non-discrimination law and intersectionality :
investigating the triangle of racial, gender and
disability discrimination.
1. Discrimination--Law and legislation--European Union
countries. 2. Equality before the law--European Union
countries.
I. Schiek, Dagmar. II. Lawson, Anna.
342.2'4087-dc22

Library of Congress Cataloging-in-Publication Data
European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination / by Dagmar Schiek and Anna Lawson.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7546-7980-6 (hbk) -- ISBN 978-0-7546-9947-7 (ebk)
1. Discrimination--Law and legislation--European Union countries. 2. Equality before the law--European Union countries. 3. Discrimination--European Union countries. 4. Discrimination--Law and legislation--Europe. 5. Equality before the law--Europe. 6. Discrimination--Europe. I. Schiek, Dagmar. II. Lawson, Anna.
KJE5142.E839 2011
342.2408'5--dc22

2010038023

ISBN 9780754679806 (hbk)
ISBN 9780754699477 (ebk)

Printed and bound in Great Britain by the
MPG Books Group, UK

EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY

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Preface

This volume emerged from the Second European Conference on Multidimensional Equality Law, held in Leeds on 29 March 2009. That conference was part of a series of European Conferences on Multidimensional Equality Law designed to provide a forum for critical reflection on legislative and jurisprudential developments in EU equality law – a body of law which has been transformed from one focused on gender equality law into a multi-ground affair with a multiplicity of policy aims. The First European Conference on Multidimensional Equality took place in May 2007 and generated the sister-volume of this book (Schiek and Chege 2009).

The European Commission plays a pivotal role in the development and shaping of EU equality law. As well as proposing relevant legislation and policy initiatives, it provides funding for most of the European level non-governmental organizations working in the field and also for a sizeable proportion of the relevant academic work. It has even paid for another 'First European Conference', the First European Conference on Multiple Discrimination held in December 2007 in Denmark, disseminating the results of a Commission study (European Commission 2007a). The European Conferences on Multidimensional Equality Law base themselves mainly on other funding, and therefore provide a valuable space for critical reflection which is entirely independent of the Commission.

The provision of a forum for independent reflection is important and we would like to express our thanks to those who made it possible for us to offer this by supporting the series of European conferences on multidimensional equality law. We are grateful for the participation of speakers at the first conference, the participation of others who joined only at the stage of the second conference and also for the contributions of some authors who provided chapters only after the second conference in order to make this a comprehensive book rather than simply a collection of conference papers.

Further, sincere thanks are due to several institutions and individuals who contributed to this process. These include the main sponsor of the conference, the British Academy. They also include the School of Law at the University of Leeds, which supported this publication through its strategic development funds (which were used to fund a language check of chapters written by non-native speakers of English). Dr Paul Skidmore's contributions to the editing process again went considerably beyond the language check, for which he was commissioned. Jule Mulder also provided invaluable support with the whole editing process in the summer of 2010. We are extremely grateful for their professionalism and their very hard work.

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Introduction

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The Context of the Book

The First European Conference on Multidimensional Equality Law (FECMEL) and the sister-volume of this book (Schiek and Chege 2009) addressed the heightened complexity of EU non-discrimination law, caused by the multiplication of the 'discrimination grounds' and the expansion of the material scope of the field as well as the agenda pursued by it. The overall conclusion of the conference, which is also mirrored in the book, can be summarized in three points. First, it is necessary to refocus equality law in order to avoid it becoming trivialized by ever more multiplications of grounds and purposes. Second, new manifestations of disadvantage at the intersections of ethnicity, language, religion and gender have emerged, with the consequence that the situation of Muslim and Romani women in Europe has become a seismograph revealing the effectiveness of the response of EU equality law to intersectional discrimination. Third, the multidimensionality of purposes requires the development of a substantive and inclusive concept of equality law, which addresses the question 'equality of what?'. Such a concept might be a good starting point for a specific European approach towards non-discrimination law, rooted in welfarist traditions and collective approaches to enforcement of rights.

This book is based on a collection of chapters initially delivered at the Second European Conference on Multidimensional Equality Law (SECMEL) in May 2009. This conference, as a first step towards further developing this research agenda, addressed legal and policy responses to intersectional disadvantage in the EU and explored ways of refocusing equality law. Between 2007 and 2009, the international and European profile of disability discrimination was heightened by the EU's commitment to concluding the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Our quest for a way of refocusing EU equality law incorporates this heightened profile, being structured around a triangle of 'race', gender and disability.

This introduction will contextualize the substantive chapters by first introducing briefly a number of contributions to the debate on intersectionality and its appearance in international and European legal frameworks under the heading 'multiple discrimination'. This will be followed by an overview of the book's structure which will include brief summaries of the different contributions.

Intersectionality and the Notion of Multiple Discrimination

In the past few years, the issue of discrimination on more than one ground has been widely debated in socio-legal theory under the term of intersectionality (Grabham et al. 2009; Meenan 2007). The term was first used in this context by legal researcher Kimberlé Crenshaw in a 1989 article focusing on the experiences of black women. She used the picture of an intersection of streets:

> Discrimination, like traffic through an intersection, may flow into one direction and it may flow into another. If an accident happens at an intersection, it can be caused by cars travelling from any number of directions, and, sometimes, from all of them. Similarly, if a black woman is

> harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination. (Crenshaw 1989: 145)

This image suggests that disadvantage on the intersection between gender and 'race' is likely to be more severe, just as a car accident is likely to cause more damage when vehicles are travelling from all directions. Thus, the term intersectionality was introduced to refer to the specific situation of black women, which can neither be compared to that of black men, nor to that of white women. Crenshaw criticized both feminist and anti-racist politics, the one for neglecting black women's colour, the other for neglecting their gender. Her concern has been understood as a warning of the need to avoid identity politics (Verloo 2006: 212). Even before Crenshaw coined the term intersectionality, similar phenomena had been debated in Europe under different headings (Vieten 2009: 95–7), as well as in the United States (Hancock 2007). Initially, gender, race and class were regarded as the central vectors around which inequalities evolved (Yuval-Davis 2006: 201). Since then, other intersections, such as the intersection between sexualities and ethnicities and between gender and religion, have been explored, particularly in the context of a critical analysis of the notion of 'race'.

Although the intersectionality debate had its origin in legal discourse, it rapidly developed into a notion used more generally within women's studies, an interdisciplinary field integrating sociology, cultural studies, political and economic science and, to a lesser extent, law. Although the notion may originally have been used in order to develop better law and politics, it soon expanded into other dimensions. In the wake of 'post-modern' social theory, it was increasingly used to theorize identities rather than to criticize identity politics. Intersectionality research became dominated by sociological investigations of law, as a practice that was generally ill-suited to achieve change. 'Modern' intersectionality theory has consequently attracted the criticism that it focused on law as a medium of performing identities, instead of exploring law's potential to contribute to overcoming disadvantage. As Conaghan puts it:

> It is largely within the context of such engagements with law – as a performative process of identity formation – that 'modern' Intersectionality theory takes place. (Conaghan 2009: 39)

Twenty years after its official recognition, the concept of intersectionality is increasingly contested, as *inter alia* witnessed by the emergence of a socio-legal edited collection entitled *Intersectionality and Beyond* (Grabham et al. 2009). The concept has been criticized as being too complex to offer guidance in practical matters (Squires 2008: 55) or as being too rooted in the Anglo-Saxon discourse to be of use in Continental contexts (Rey Martinez 2008: IV). From feminist perspectives, especially in the EU context, the critique has focused on the lack of concern for structural inequality (Verloo 2006: 214–16) and on the danger of submerging the aim of achieving gender equality in other aims (Squires 2008: 55). This latter danger, however, does not seem specifically linked to an acknowledgement of intersectional disadvantage as an element of non-discrimination law. Rather, it is said to be inherent in the specific way in which the European Union has embarked upon the agenda of multiplying grounds on which discrimination is prohibited (Holzleithner 2005). The specific strategy of the EU involves pursuing a nominal agenda of equality of grounds with a hidden practice of establishing hierarchies (Verloo 2006).

Although much of this criticism is undoubtedly justified, it is suggested that intersectionality as a concept can be utilized to do justice in cases of disadvantage at the intersections of gender, 'race' and disability. There is, in fact, evidence that cases of multiple discrimination can be adequately dealt with by courts (Gerards 2007: 172–80), although there is certainly scope for further development

of judicial practice, as is discussed in the third part of this book. It is therefore necessary to develop appropriate strategies for bringing intersectionality before the courts (Goldberg 2009: 143–6, and the contributions in the third part of this book) and for raising its profile amongst policy-makers (Kantola and Nousiaien 2009).

The practical relevance of intersectionality is also increasingly acknowledged by UN and EU institutions. These typically use the notion of 'multiple discrimination', which is often considered as an umbrella notion for the different forms of discrimination on more than one ground. Guided by an analysis initially commissioned by the Finish Exterior Ministry (Makkonen 2002: 11–13), it has become usual to distinguish between 'additive' or 'compound' discrimination and intersectional discrimination. The former would signify instances of discrimination on more than one ground, where the role of the different grounds can be distinguished. 'Intersectional' discrimination would refer to discrimination on more than one ground where the influence of those grounds cannot be disentangled. Examples of the latter include the denial of the right to bear children for ethnic minority women or disabled women, and harassment specifically directed against disabled women. Prominent examples for the use of 'multiple discrimination' within policy documents include the Beijing platform for Action for Equality, Development and Peace, issued by the United Nations Fourth World Conference on Women. With this platform, the governments affirm their determination:

> to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability or because they are indigenous people. (UN 1995)

Similarly, reports by international organizations which increasingly refer to the problems underlying intersectionality usually use the term 'multiple discrimination'. This notion is also preferred by the European Union itself.

This book nevertheless commits itself to intersectional discrimination because the term multiple discrimination conjures up a mathematical notion of adding disadvantage which is at odds with complex social reality (Conaghan 2009: 24) and supports a tendency to assume a separateness of strands of discrimination, which in reality intersect (Yuval-Davis 2007: 565). We aim to contribute to develop strategies for addressing the reality of those affected by intersectional disadvantage by providing a space for reflection on developments to date as well as for deeper conceptual analysis, and the critical notion of 'intersectionality' is better suited to this task. Our focus is the disadvantage which occurs at the intersections of gender, 'race' and disability. The situation of those who lie at the more privileged or advantaged intersections (e.g. white, non-disabled men) is therefore not investigated here.

The Structure and Contents of the Book

The book is divided into four parts. Part I assembles four chapters which reflect on the three central nodes of 'race', gender and disability from social, legal and theoretical perspectives. Part II provides various comparative perspectives on problems of intersectionality by detailing developments in a number of different countries. In Part III, three authors develop proposals which should enable courts to better address disadvantage at the intersection between 'race', gender and disability. In the fourth part three chapters evaluate current development in EU law on intersectionality.

In Chapter 1, Dagmar Schiek opens the debate by proposing a new way of organizing the socio-legal field of EU non-discrimination law and policy. She draws attention to the risks associated with the multiplication of discrimination grounds such as a dilution of non-discrimination law and disproportionate attention being given to some grounds due to their novelty. Schiek identifies three pivotal 'nodes' around which all grounds can be conceptually clustered – the nodes of 'race', gender and disability. The nodes are imagined as being linked through overlapping orbits. The concept thus depicts intersections as a rule rather than the exception in equality law. Schiek also explains that the overlap of several nodes indicates greater severity of the intersectional disadvantage and thus mandates a stronger response. It is the structural cohesion provided by these three nodes that provides the underlying organizing principle of this book. The chapter seeks to demonstrate how the node concept permits a focus on key distinctions and an escape from the hierarchies between grounds which have been created by differences in the political strength of the single-issue social movements that pressed for their inclusion in EU non-discrimination law. The chapter also explicates how the node concept offers an adequate response to intersectional disadvantage.

Chapter 2 investigates how disadvantage at the intersection of all three nodes is addressed by legal frameworks of international (UN), European (Council of Europe and EU) and national level. Theresia Degener points to the scarcity of data about the situation of those at the intersections, and provides narrative accounts of the experiences of intersectional disadvantage by disabled women before highlighting potential difficulties in formulating adequate legal responses. She stresses that disability discrimination was recognized much later than race and sex discrimination and thus still seems underdeveloped. The resulting conceptual inconsistencies (such as the fact that reasonable accommodation is generally confined to disability) and their implications for the three different levels of equality law are then explored. In none of these bodies of legislation have the tensions yet been satisfactorily resolved. UN law seems to be furthest progressed – its bodies have issued a number of recommendations on intersectional discrimination against women, and the recent Convention on the Rights of Persons with Disabilities includes a specific article on disabled women. By contrast, both the Council of Europe and the European Union still focus primarily on single-axis strategies. In conclusion, Degener demands that intersectionality should be included within anti-discrimination law and not be merely left to new governance mechanisms such as positive duties, as the agency of those affected by intersectional disadvantage is of paramount importance.

While Degener argues from a legal action perspective in order to enhance rights for disabled women, Anna Lawson, in Chapter 3, approaches the phenomenon of intersectionality from the perspective of disability studies. She explores the under-researched and under-regulated intersection of disability and 'race'. In the tradition of critical disability studies, she distinguishes between 'impairment' as a physical, psychological and mental individual characteristic potentially restricting functionality, and 'disability' as a form of exclusion rooted in socio-economic factors that operate on people labelled as having 'impairments'. Lawson explores the way in which poverty (to which disproportionate numbers of people from minority ethnic groups are exposed in many countries) increases the likelihood of impairment and the way in which racism sometimes operates to make it more likely that people from such backgrounds will be labelled as having an 'impairment' than would people from the majority ethnic group. The chapter then identifies key forms of disadvantage experienced by people from ethnic minorities who have or are simply labelled as having an impairment. This is followed by a critical analysis of concepts in EU law which are aimed principally at disability and considers their potential to tackle disadvantage at the disability–race intersection. Lawson goes on to criticize the absence of positive duties from

EU non-discrimination law, and demands that such duties should be introduced and used to tackle disadvantage at the intersection between ethnicity and disability.

While Chapters 2 and 3 highlight the neglected corner of the triangle framed by race and gender and disability, Ulrike Vieten in Chapter 4 responds to the challenge to analyse race and gender as fuzzy concepts. Startled by a tendency of officialdom in Continental Europe to prefer the term 'ethnicity' over the term 'race', she traces the genealogy of the two categories from a critical feminist perspective. Vieten criticizes the reluctance to admit the ongoing effects of institutionalized Whiteness in the social fabric of Continental Europe. She argues that there is a strong division between a predominantly Anglo-American critical debate on race and racism on the one hand, and a Continental European one that uses ethnicity, a fundamentally gendered and culturalizing term, on the other. Nonetheless, she exposes the racialization processes underlying the definition of ethnicity, for example when the place of birth or a belonging to one of the Christian religions become decisive for ethnicity. The recurrence of this culturalization discourse also has a sexist dimension in that it reduces all women to a function of markers of boundaries between ethnic or religious minorities and the dominant culture. Culturalization thus underlines the gender dimensions of racialization discourses. Vieten concludes that the different streams of colonial skin colour racism and contemporary culturalized anti-Muslim racism illustrate various forms of racism that have to be understood against the background of a complex archive of European racisms.

Part II offers comparative perspectives. It is opened by Chapter 5 with a comparison between the situations of disabled women in Turkey, not (yet) a Member State of the EU, and France. Ayse Idil Aybars uses the EU non-discrimination acquis and the respective national welfare state arrangements as comparative parameters. Welfare state arrangements are seen to include gender equality regimes as well as regimes for inclusion of vulnerable groups, such as disabled people. France is an atypical representative of the conservative continental welfare model, combining active inclusion policies with high levels of female employment, while Turkey is a representative of the Southern welfare model, relying on familial support networks with corresponding low levels of female employment. As regards equality regimes, both states are similar in their republican tradition. Equality is seen as a general principle, unconnected to groups. While gender equality features more highly in recent years, other equalities are not specifically supported. Only in France has recent impact of EU directives led to the emergence of multidimensional approaches (which is experienced as alien to republican values). Aybars concludes that the different welfare traditions are decisive for higher levels of inclusion of disabled women in France, while intersectional disadvantage is not adequately dealt with in either of the two countries.

Susanne Burri in Chapter 6 offers an analysis of opinions by the Dutch Equal Treatment Commission (ETC) on cases involving discrimination on more than one ground. Her concern, given the recent critique of the concept by Conaghan, is whether an intersectional approach is useful in practice. The practical section offers a wide array of examples of intersectional and multiple discrimination, including intersections between ethnicity and disability, ethnicity and religion, and religion and gender. In her analytical evaluation, Burri takes a pragmatic approach, arguing that 'efforts demanded by intersectional analysis should ... be proportional to the added value ... first'. She concludes that the main added value of using intersectional analysis in practice is to depict accurately the experiences of victims of discrimination, even if their claims are rejected.

In Chapter 7, on reactions in France and Germany to women wearing headscarves in schools, Stephanie Fehr uses different national experiences as illustrations of the stereotypes with which Muslim women wearing headscarves are confronted ('intersectional prejudice'). The stereotypes of the French Stasi Commission are analysed in detail, as are attitudes among German judiciary and policy-makers. Like Burri, Fehr considers headscarf-related discrimination to be situated at the

intersection of race/ethnicity, gender and religion. Additional dimensions, consistent with the central 'nodes' framework of this book, can be derived from accounts which capture the 'racialization' of Islam (Schiek, in this volume; Vieten, in this volume). Fehr provides some evidence of such racialization. She further exposes the paternalistic attitudes underlying the headscarf debate and characterizes them as being 'against the interests of women'.

Stergios Kofinis, in Chapter 8, discusses the position of Muslim minority women in Greece, providing another national illustration of the 'race' node: the construction of citizenship in the Greek constitution which results in an intricate web of religious, ethnic and cultural allegiances. The historical account of Greek politics towards the Minority of Thrace reveals an early example of multiculturalism in the most negative sense. Kofinis highlights the tension between individual and group rights, which he considers as insurmountable. The particular status of the Muslim minority in Greece seems not only to smother different cultural traditions within the group, but also to consign women within this minority to a status deprived of the protection of rights, in particular as regards family law and inheritance. Against this negative backdrop, the author also traces some incremental developments towards acknowledging 'Muslim minority women as a social group standing at the intersection of discrimination'.

In Chapter 9, Kevät Nousiainen analyses yet another constellation of disadvantage at the intersection of being female and belonging to a minority ethnic group. She also addresses intersections between non-discrimination rights and social and cultural rights. Her chapter examines the implications for mothers of a lack of provision of children's daycare in minority languages. The underlying problem, which has been reviewed under the CEDAW and under Finnish discrimination legislation, is elaborated against a unique national background. Finland, having joined the Council of Europe only in the late 1980s and the EU only in 1995, had developed a regime for its diverse population based on more 'eastern' traditions. As a consequence, minority protection, including protection of linguistic minorities, has a much longer tradition than anti-discrimination rights. This results in a tendency to preserve the identities of groups, and this can conflict with the women's rights to engage in extra-familial work in the absence of childcare in minority languages. This national problem highlights the position of women as bearers of culture, which was identified as one of the roots of intersectional disadvantage in Chapter 4.

In Chapter 10, Gay Moon evaluates the recent UK Equality Act 2010 as it responds to intersectional discrimination, contextualizing the new provision on this issue with the British legal and political debate from 1965. She shows that the gradual acceptance of multiple and intersectional discrimination as a problem has developed by reference to debates in the United States and Canada, while EU models were given less attention. The new statutory definition of multiple discrimination is restricted to direct discrimination and to combinations of only two grounds. This approach is evaluated as disappointing in comparison with legislation in Canada and in EU countries such as Romania. However Moon acknowledges that the new legislation is an important first step in the right direction.

Part III turns to practical applications of intersectional analysis, in particular in court procedures. Suzanne Goldberg opens this part with Chapter 11, discussing the contrast between wide acceptance of intersectionality in US academia and judicial discourse and the limited extent of successful intersectional litigation strategies. While recognizing the limitations of any political strategy based solely on litigation, she warns against underestimating the potential of judicial rulings, thus echoing a concern expressed by Degener in Part I. Goldberg identifies four factors that have prevented the US courts from ruling in favour of claimants bringing 'complex claims': cognitive preferences for simplicity, as reflected in the comparative framework for discrimination claims; social salience of familiar categories; single-strand identity-based advocacy and judicial

institutional legitimacy, which tends to make courts wary of using complex sociological or even anthropological analysis. In conclusion Goldberg advises those bringing intersectional claims to make them easier and attemp to respond to these inhibiting factors.

Lynn Roseberry, in Chapter 12, also devises litigation strategies for intersectional claims. Her focus is on Muslim women who are excluded on grounds of their religious attire, such as headscarves. Using theories developed in relation to sexual orientation discrimination, she proposes to read these women's anti-discrimination claims as assertions of ethnic minority and gender identities in the face of assimilationalist demands. Investigating the discourses of one English and one Danish case in detail, she exposes assimilationalist paradigms. She considers that these paradigms also underlie the hierarchies of equalities: immutable traits eliciting stronger protection against discrimination than traits an individual can overcome, thus suggesting the stronger protection of identity than of behaviour. Based on socio-psychological research, Roseberry concludes by challenging the distinctions between identity and behaviour. She suggests that courts should take into account identity asserting behaviour as part of protecting identity.

In the last of the chapters in Part III, Chapter 13, Iyiola Solanke explores legal responses to the discrimination (in employment and other spheres of life) experienced by 'corpulent women of colour'. This innovative discussion is set against the alarming backdrop of statistical trends about weight gain – trends which demonstrate that obesity is increasing and that discrimination associated with 'fatphobia' is therefore also likely to become more common. Solanke demonstrates how that discrimination has a greater impact on women than on men and presents evidence suggesting that it has a greater impact on black women than on white women. She considers cases in which such discrimination has been challenged as a form of disability discrimination and questions the appropriateness of regarding excess weight as a disability. Solanke draws attention to the link between social factors and excess weight and to the harmful stigmatization experienced particularly by large black women. In line with her previous work on stigma and intersectionality, Solanke proposes an alternative route to the formulation of a legal remedy for corpulent women of colour in EU law and elsewhere – a route based on stigma and context.

Part IV provides conclusions of the foregoing for EU law and policy. Carles, Howard and Kofman initiate this part by presenting results of comparative and socio-legal research on the gender use of race discrimination legislation in Chapter 14. Their comparison between Bulgaria, France, Germany, Spain, Sweden and the UK encounters the difficulty presented by the contestation of the central notion of 'race' in most of the states under enquiry. The authors engage in a comparative assessment of the notion, reflecting and expanding upon Vieten's analysis in Part I. Further, they identify a lack of data, in particular on intersectional identities, and differences in coverage of single-axis legislation for different grounds as barriers for women in using anti-racist legislation. Despite all these difficulties, they also find that the establishment of a multi-ground framework in response to EU directives also encourages social actors and courts to acknowledge the reality of multiple discrimination. They warn that the detail and also the velocity of these developments will differ greatly in line with different national traditions. To ensure a speedier and more consistent process throughout the EU, they suggest providing explicit protection against multiple discrimination, and also implementing adequate methodologies for addressing these claims.

In Chapter 15, Kristina Koldinská considers the effectiveness of legal and policy responses to the situation of Romani women in the central and eastern European countries. Although constituting a regional problem, the situation of the Roma, and in particular of Romani women, has attracted intense attention internationally and at EU level, where a specific directive addressing their situation has been debated. Koldinská provides a legal action perspective on and careful analysis of existing legislation. She concludes that existing EU law can be interpreted to include

multiple discrimination in principle, but also notes that there is no practical experience in this direction as yet. Thus, she too proposes the creation of explicit rules on multiple discrimination, though she warns against an overly detailed legislative definition of the concept. She concludes that a combination of law and policy is needed to activate social rights in favour of Romani women. Thus she supports the recently initiated open method of coordination (OMC) on Roma inclusion as the way forward.

In the final chapter, Dagmar Schiek and Jule Mulder provide a critique of EU legal and policy developments with relevance to intersectional discrimination and call for further legislative action. The chapter begins with an overview and analysis of key EU level developments. This is followed by a discussion of ways in which intersectional and other discrimination is tackled by different national legal orders. In a section on comparative socio-legal structures and approaches, attention is then drawn to the pragmatic incremental approach to legal development which characterizes common law systems and to the more systemic approach favoured by civil law countries. The authors explain that, in the field of EU non-discrimination law, the common law approach has been particularly influential and suggest that this helps to explain the current differences in levels of protection afforded to different grounds by the various directives. They call for a systemic legislative EU response to the problem of intersectional disadvantage and argue that attempting to address it in a directive which covers only some of the grounds will only exacerbate the problem. The solution they propose is a new directive dealing with intersectional disadvantage across all the non-discrimination grounds.