

Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective

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Introduction

“[O]ur struggle for liberation has significance only if it takes place within a feminist movement that has as its fundamental goal the liberation of all people.”²

Intersectionality has been described as “the most important theoretical contribution that women’s studies (...) has made so far”,³ and is, in brief, an approach to identity that recognises that different identity categories can intersect and co-exist in the same individual in a way which creates a qualitatively different experience when compared to any of the individual characteristics involved. Intersectionality shows us how:

*Gender reaches into disability; disability wraps around class; class strains against abuse; abuse snarls into sexual orientation; sexual orientation folds on top of race (...) everything finally piling into a single human body.*⁴

Kimberlé Crenshaw, who originated the term, focused her attention on the position of black women in US society. She noted that black women were failed by anti-racist campaigns that focused on the experiences and needs of black men, and feminist campaigns led by and focused on the experiences of white women. As a result, discrimination law using a “single-axis” model of identity failed black women, as their experiences of oppression were rendered invisible by the dominant narrative within the categories “woman” and “black”.⁵ Much of the

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2 hooks, b., *Ain't I a Woman: Black Women and Feminism*, Pluto Press, 1982, p. 13.

3 See McCall, L., “The complexity of intersectionality”, *Signs: Journal of Women in Culture and Society*, Vol. 30, 2005, p. 1771.

4 Clare, E., *Exile and Pride: Disability, Queerness and Liberation*, South End Press, 1999.

5 See Crenshaw, K., “Demarginalizing the intersection of race and sex: a black feminist critique of anti-discrimination doctrine, feminist theory, and anti-racist policies”, *University of Chicago Legal Forum*, Vol. 4, 1989.

academic discussion continues this focus on the intersection of race and gender, but the potential of intersectionality allows it to go further, showing how *all* identities interact to create complex identities. Writers have highlighted the intersections of disability with race⁶ or the intersectional experiences within the category sexual orientation,⁷ and it is this generality which is intersectionality's greatest strength as a tool for reforming discrimination law.

However, though intersectionality is “fast becoming common parlance among policy-making circles”,⁸ the law, in most cases, still clings resolutely to “single-axis” models of discrimination law and therefore fails to address the lived experiences of those who experience discrimination on multiple grounds.⁹ The “single-axis” approach is the product of several aspects of the historical development of discrimination law. In large part it is due to the origins of the “traditional” protected grounds in political liberation struggles that have been focused on a single characteristic,¹⁰ such as feminism, queer liberation, and anti-racist movements. The limitations of these movements in responding to intra-category diversity and advocating for more than the needs of a relatively privileged minority within a category are well documented.¹¹ The adoption of these liberation struggles by law in the form of discrimination law serves only to exacerbate the tendency of these movements to formulate identity as totemic, homogenous categories that render invisible minority experiences. Another element is arguably the influence of liberalism on equality law,¹² with its approach to the legal subject as an atomistic, abstract individual who can be stripped of “extraneous” identity categories to point to some common core. This lineage is seen in the centrality of comparators and comparison to discrimination law, as well as the adversarial, individualised model of litigation.¹³

6 Ontario Human Rights Commission, *An Intersectional approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, 2001, p. 2.

7 Bilge, S., “Developing Intersectional Solidarities: A Plea for Queer Intersectionality” in Smith, M. and Jafer, F. (eds.), *Beyond the Queer Alphabet*, 2012.

8 Ruwanpura, K., “Multiple identities, multiple discrimination: A critical review”, *Feminist Economics*, Vol. 14, 2008, p. 77.

9 Solanke, I., “Infusing the Silos in the Equality Act 2010 with Synergy”, *Industrial Law Journal*, Vol. 40, 2011, p. 330.

10 *Ibid.*, p. 331.

11 See above, note 5, pp. 139–167.

12 See Hunter, R. (ed.), *Rethinking Equality Projects in Law: Feminist Challenges*, Hart Publishing, 2008; Lacey, N., *Unspeakable subjects: feminist essays in legal and social theory*, Hart Publishing, 1998, Introduction; and Munro, V., *Law and politics at the perimeter: re-evaluating key debates in feminist theory*, Hart Publishing, 2007, Chapter 2.

13 See Fredman, S., *Discrimination Law*, Oxford University Press, 2010, Chapter 1; and Hunter, R., “Introduction: Feminism and Equality”, in Hunter, R. (ed.), *Rethinking Equality Projects in Law: Feminist Challenges*, Hart Publishing, 2008.

Despite the rapid expansion of equality and discrimination law in recent years – equality and non-discrimination provisions are a common feature of national constitutional orders¹⁴ and of international and regional human rights documents¹⁵ – equality remains out of reach for many. In order to address this persistent inequality, we must set substantive equality as our goal. Doing so allows us to approach inequality as a problem of structural power, which creates and perpetuates systems of privilege and disadvantage in society. These systems have a pervasive effect on both private and public life: they affect the distribution of basic goods, such as access to healthcare and housing; they create negative myths and stereotypes which operate to disadvantage certain groups. By developing an understanding of intersectionality, particularly through the recognition of intersectional discrimination, law will be able to better identify and eliminate the power dynamics perpetuating patterns of privilege and disadvantage.

In section one, I outline the development of the concept of intersectionality, from its beginnings in the work of Crenshaw, to more recent critiques of its scope and potential. By constructing intersectionality as a general theory of identity, I show that it has the potential to realign the focus of discrimination law from difference to domination, exposing the structural problems that perpetuate discrimination and allowing political and legal processes to work towards substantive equality.

Section two applies intersectionality to law, explaining how it addresses the problems of “single-axis” models. I address criticisms of intersectionality as applied to law, arguing that far from creating a post-modern splintering of identity to a point of solipsism, recognition of intersectional discrimination is necessary to ensure equality for all, rather than just the relatively privileged minority within a category. I also argue that as well as addressing theoretical flaws with discrimination law, an understanding of intersectionality allows courts to respond to the realities of discrimination.

Section three reviews the response to intersectional discrimination claims by courts in the UK and Canada, as well as the European Court of Human Rights (ECtHR). Experiences from these legal systems expose the difficulties related to the recognition of intersectional discrimination in law, but also provide important guidance for reform. A common thread across all of these jurisdictions is that despite equality activists and organisations calling for recognition of intersectional discrimination, and some recognition of the need to address it at policy level, the law tends to resist movement away from a “single axis” model. In section four, I offer some preliminary thoughts on what substantive equality requires beyond recognition of intersectional discrimination, indicating that a much wider-ranging reform is needed.

14 The Constitution of the Republic of South Africa, Section 9; Canadian Charter of Fundamental Rights, Section 15; Constitution of the Republic of Ireland, Article 40(1); and Constitution of India, Article 15.

15 European Convention on Human Rights, Article 14; European Union Charter of Fundamental Rights, Articles 20, 21 and 23; and American Convention on Human Rights, Article 24.

1. Intersectionality Theory

Intersectionality is, when reduced to its core, a relatively simple concept: it denies that identity can be dissected into “mutually exclusive categories of experience and analysis”,¹⁶ instead asserting that identity is a complex amalgamation of different categories.¹⁷ Therefore, a truly intersectional approach states that, for example, the discrimination that a gay woman experiences is different from that faced by other women and different from that suffered by other gay people. Much of the academic discussion of intersectionality centres on the interaction of race and gender, specifically the experiences of black women, and argues that the oppression and discrimination black women face is distinct from other forms of oppression.¹⁸ However, intersectionality has the potential to go further than merely examining the interaction of any particular dyadic grouping of identity categories to provide a general theory of identity.

For all its apparent simplicity, however, intersectionality can be difficult to define and it has certainly not been accepted without question. Much like equality,¹⁹ it can be seen to have very little substantive content of its own. For Jennifer Nash, intersectionality provides important insights that “identity is complex, subjectivity is messy, and that personhood is inextricably bound up with vectors of power”²⁰ but the paradoxes within the theory have yet to be addressed. Nash makes much of an apparent paradox in Crenshaw’s work, where the experience of black women is central, yet Crenshaw claims that her focus on race and gender “highlights the need to account for multiple grounds of identity when considering how the social world is constructed”.²¹ This paradox seems to be a false one: Crenshaw focuses on the experience of black women because she is a black woman, responding in part to the litigation strategies of black women, but there is nothing in her writing that precludes the expansion of intersectionality. No one writer can address all identities directly in a single piece of work, what is needed is recognition of a plurality of voices in mainstream scholarship.

16 See above, note 5, p. 139.

17 *Ibid.*, pp. 139–167.

18 Ashiagbor, D., “The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-Discrimination Law” in Morris, A. and O’Donnell, T. (eds.), *Feminist Perspectives on Employment Law*, Cavendish Publishing, 1999; Ashiagbor, D., “Multiple Discrimination in a Multicultural Europe: Achieving Labour Market Equality Through New Governance”, *Current Legal Problems*, Vol. 61, 2008, pp. 265–288; see above, note 5, pp. 139–167; Crenshaw, K., “Mapping the margins: Intersectionality, identity politics, and violence against women of color”, *Stanford Law Review*, Vol. 43, 1991, pp. 1241–1299; and Harris, A., “Race and Essentialism in Feminist Legal Theory”, *Stanford Law Review*, Vol. 42, 1990, p. 581.

19 Westen, P., “The Empty Idea of Equality”, *Harvard Law Review*, Vol. 95, 1985, pp. 539–596.

20 Nash, J., “Re-thinking intersectionality”, *Feminist Review*, Vol. 89, 2008, p. 13.

21 See above, note 18, Crenshaw, “Mapping the margins: Intersectionality, identity politics, and violence against women of color”, p. 1245.

For Joanne Conaghan,²² “intersectionality has reached the limits of its potential”.²³ She states that it can do nothing more “to advance the feminist project, whether in law or more broadly”.²⁴ At the core of Conaghan’s rejection of intersectionality is a belief that intersectionality scholarship focuses on identity, at the expense of analysing “the many ways in which inequality is produced and sustained”.²⁵ Conaghan is highly critical of the way intersectionality scholarship sees its “energy (...) directed towards the infinite elaboration of inequality subgroups”²⁶ rather than using equality categories to “explain or elaborate structures, relations, and/or processes of inequality”.²⁷ However, this seems to misstate the issue, intersectionality is a tool which can be used for precisely the examination of the root causes of inequality that Conaghan calls for – the language of identity is just the way that the inquiry into the power structures operating beneath discrimination is articulated.

Conaghan further decries the individualism of intersectional politics and movements, which “acts as an aid in the excavation of inequity experiences at a local level”²⁸ but cannot challenge the structures which create equality. Conaghan cites materialist feminist and second wave feminist recognition to argue that intersectionality creates the focus on identity, stating that “some form of collective organisation was viewed as a necessary condition of any strategy of emancipation emancipation”.²⁹ However, as Lara Karaian notes, there is potential for “an intersectional approach to coalition building”³⁰ wherein a plurality of voices are able to join together to work toward common goals. Therefore, to recognise intersectional experience is not necessarily to promote a paralysing insularism in activism, and indeed it can produce broader, more diverse communities working towards common goals.

22 Conaghan, J., “Intersectionality and the Feminist Project in Law”, in Grabman, E.D., Herman, D., and Krishnadas, J., (eds.) *Intersectionality and beyond: law, power and the politics of location*, Routledge-Cavendish, 2009.

23 *Ibid.*, p. 21.

24 *Ibid.*, p. 21.

25 *Ibid.*, p. 7.

26 *Ibid.*, p. 31.

27 *Ibid.*, p. 31.

28 *Ibid.*, p. 29.

29 *Ibid.*, p. 29.

30 Karaian, L., “The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory, Praxis, Queer Porn, and Canadian Anti-Discrimination Law” in Fineman, M., Jackson, J. E. and Romero, A. P. (eds.), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, Ashgate, 2011, p. 392.

a. Intersectionality as General Theory of Identity

There has been much debate in the scholarship as to whether intersectionality operates as a general theory of identity or if it is merely a way of describing multiple marginalised experiences.³¹ Naomi Zack, for instance, argues that intersectionality refers not just to the way that race and gender interact but “more generally to all women, because differences in sexual orientation, age, and physical able-ness are all sites of oppression”.³² However, this seems an arbitrary limitation. It is true that intersectionality began in feminist discourse but to allow its expansion is not to deny the centrality of women, or to sideline their oppression. Indeed, one of the key advantages of intersectionality as it pertains to law lies in its potential to offer an all-inclusive theory of identity.

To formulate intersectionality as a general theory of identity would be to recognise a hypothetical uber-privileged white, able bodied, heterosexual, cisgender, upper class man as an example of an intersectional identity, but this is not to cede power to the privileged. Privilege will not and should not become the central point of our analysis by recognising this. Intersectionality is a general theory of identity but it is a theory that highlights oppression, and a tool to be used in remedying that oppression.

The fear of recognising typically privileged people as having a complex, intersectional identity seems to derive from a belief that intersectionality will become co-opted by the privileged and used for their advantage, by challenging perceived “special advantages” of minorities such as positive action. This is not entirely unwarranted: Catharine MacKinnon notes that “the sameness standard [of gender equality] has mostly gotten men the benefit of the few things women have historically had”³³ and that all the sex equality cases argued successfully before the US Supreme Court have been brought by men. Nevertheless, a commitment to examining the structural power creating inequality and discrimination minimises the risk of the privileged taking advantage. The work of Davina Cooper on the relationship between social asymmetry and social inequality is illustrative here.³⁴ For Cooper, it is “necessary – but not sufficient” to show unequal treatment based on conduct, beliefs or social location as a guiding principle of social inequality.³⁵ A claim to inequality as manifesting in a claim under discrimination law requires two additional components.

31 For a discussion, see, Kwan, P., “Jeffrey Dahmer and the cosynthesis of categories”, *Hastings Law Journal*, Vol. 48, 1996, pp. 1257–1292; and see above, note 20, pp. 1–15.

32 Zack, N., *Inclusive Feminism: A Third Wave Theory of Women’s Commonality*, Rowman & Littlefield Publishers Ltd., 2005, p. 7.

33 MacKinnon, C., *Feminism Unmodified: Discourse on Life and Law*, Harvard University Press, 1987, p. 35.

34 Cooper, D., *Challenging Diversity: rethinking equality and the value of difference*, Cambridge University Press, 2004.

35 *Ibid.*, p. 195.

Firstly, it requires that the social asymmetry is capable of shaping other social dimensions and becoming pervasive and secondly, that it can significantly impact social dimensions such as the intimate/impersonal or capitalism. This analysis allows the law to focus on the way that inequality “is not symmetrical: it operates to cease or entrench domination by some over others”.³⁶

The benefit of configuring intersectionality as a general theory of identity is that it allows the focus of discrimination law to shift from difference to domination. By exposing that everyone has an identity, it breaks down the dominant paradigm of equality law wherein there is a norm from which “difference” is measured. To use Simone de Beauvoir’s language, it moves equality law on from a paradigm of the “Subject” and the “Other”.³⁷ This approach allows us to formulate “equality questions [as a question of] power and powerlessness”,³⁸ not difference and sameness. In doing this, law’s response can be tailored to the historical and social facts of oppression and domination. While MacKinnon saw domination running along a single axis – gender – what intersectionality as general theory of identity reveals is something closer to Patricia Hill Collins’ “matrix of domination”.³⁹ While black women were Collins’ focus, she recognised:

*[A] more generalised matrix of domination. Other groups may encounter different dimensions of the matrix, such as sexual orientation, religion, and age, but the overarching relationship is one of domination and the types of activism it generates.*⁴⁰

Nash writes that if intersectionality is to be a general theory of identity then scholarship “must (...) broaden its reach to theorise an array of subject experience(s)”.⁴¹ It is precisely this broadening that I examine in the next section. Though mainstream scholarship remains focused on the race/gender interaction, empirical studies show that experiences of intersectional identity extend beyond this, implicating all identity categories.

36 Fredman, S., “Positive Rights and Positive Duties: Addressing Intersectionality” in Schiek, D. and Chege, V. (eds.), *European Union non-discrimination law: comparative perspectives on multidimensional equality law*, Routledge-Cavendish, 2009, p. 74.

37 de Beauvoir, S., *The Second Sex*, translation by Borde. C. and Malovany-Chevallier, S., 2011, Vintage, p. 6.

38 See above, note 33, p. 123.

39 Collins, P. H., *Black Feminist Thought: Knowledge Consciousness and the Politics of Empowerment*, Unwin Hyman, 1990, pp. 221–238.

40 See above, note 39, p. 230.

41 See above, note 20, p. 10.

2. Intersectionality and Discrimination Law

In discussing the application of intersectionality to discrimination law, it is important firstly to clarify the nature of intersectional discrimination. Intersectional discrimination is one form of multiple discrimination,⁴² the other being additive discrimination. Both examples of multiple discrimination are concerned with experiences of discrimination based on more than one ground but only intersectional discrimination is able to offer an adequate analysis of the lived experiences of intersectional identity.

Additive discrimination occurs where a person suffers discrimination on multiple grounds, but each element making up this discrimination can be kept separate. These instances of discrimination can be experienced at distinct times or concurrently, but the key is that the multiplicity of the discrimination only has a quantitative effect – it increases in size but not in nature. For example, in *Perera v Civil Service Commission*,⁴³ the appellant had been turned down for a job due to several characteristics, including nationality, age, and his command of English. Gay Moon notes that “the lack of one factor did not prevent [the applicant] getting the job but it did make it less likely, and the lack of two factors decreased yet further his chances of selection for the job”,⁴⁴ meaning that though the applicant experienced multiple discrimination, it had a cumulative, rather than a synergistic effect. Intersectional discrimination on the other hand “creates a new compound subject”.⁴⁵ In moving beyond the additive model which “remains on one level of analysis, the experiential”,⁴⁶ we reveal discrimination as a “many layered blanket of oppression”.⁴⁷

Additive discrimination poses little difficulty for existing equality law,⁴⁸ as it simply requires that each element be proven independently. It maintains the mutually-exclusive nature of protected grounds that constructs the “singular and discrete examples of disadvantage which may, at most be experienced cumulatively”.⁴⁹ Nevertheless, a particular problem of additive multiple discrimination is that it:

42 Intersectionality scholarship is beset by terminological confusions. Multiple discrimination can be used to mean either additive or intersectional discrimination or as an umbrella term covering both. It is used only in the latter sense in this article, except when quoting other sources.

43 *Perera v Civil Service Commission* [1983] IRLR 166, discussed by the Equality and Diversity Forum, “Memorandum submitted by the Equality and Diversity Forum (E 09)”, June 2009.

44 Moon, G., “Multiple discrimination – problems compounded or solutions found?”, *Justice Journal*, Vol. 3, 2006, p. 89.

45 See above, note 9, p. 340.

46 Yuval-Davies, N., “Intersectionality and Feminist Politics”, *European Journal of Women’s Studies*, Vol. 13, 2006, p. 197.

47 *Ibid.*, p. 196.

48 Monaghan, K., *Monaghan on Equality Law*, Oxford University Press, 2013, Para. 5.12.

49 See above, note 18, Ashiagbor, “The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-Discrimination Law”, p. 1.

[R]eflect[s] hegemonic discourses of identity politics that render invisible experiences of the more marginal members of that specific social category and construct[s] a homogenised ‘right way’ to be its member.⁵⁰

For this reason, additive discrimination only goes so far in addressing the reality of intersectional discrimination.

a. How Intersectionality Addresses Problems of “Single-Axis” Models of Discrimination Law

There are several problems with “single-axis” models of discrimination law which make these models particularly ill-suited to bringing about substantive equality. Intersectionality is able to address these problems, and so ensure discrimination law is able to address substantive inequality. “Single-axis” models are predicated on a model of procedural fairness that approaches the legal subject as something which can be abstracted, stripped of “extraneous” characteristics to reveal a “sameness” that facilitates comparisons. It creates a fiction of uniformity, which states that the problems of a particular, generally dominant, sub-group are the only issues affecting the group as a whole. This is not to deny that common problems do not and cannot exist. Not having the vote affected all women, yet there were problems affecting black women particularly which were ignored by the feminist movement, even after suffrage was gained.⁵¹

Perhaps the greatest of the problems of the single-axis model is the way that it tends to essentialise the experiences of identity groups. Essentialism affects how individual claimants interact with discrimination law, as the law assumes individuals can be characterised by one dominant ground, leaving those with complex identities outside the scope of protection. This entrenches particular expectations of individuals who fall within a particular identity category. As Iyer notes, “it is assumed that everyone in a particular pocket [i.e. protected ground] has no other relevant characteristics, it is not possible to articulate differences between those within a pocket”.⁵² Even where law appears to look beyond this essentialism to recognise that a person has been the victim of discrimination on multiple grounds, this recognition will only be of discrete operations of different discriminations. This simply makes it more difficult for individuals claiming discrimination to get an effective remedy, as they must prove that two or more discrete discriminations have occurred.⁵³ Evidence of discrete discrimination may simply not exist where intersectional discrimination has occurred.

50 See above, note 46, p. 195.

51 See above, note 2; and see above, note 5, pp. 139–167.

52 Iyer, N., “Categorical Denials: Equality Rights and the Shaping of Social Identity”, *Queen’s Law Journal*, Vol. 19, 1993–1994, p. 193.

53 See *Bahl v Law Society*, [2004] EWCA Civ 1070, discussed further in section 3.

Essentialism also affects the way that identity categories are constructed, as it constructs a fiction of a singular experience of what it is to be, for example, a woman, or disabled. This denies the existence of meaningful connections between identity categories. Sarah Hannett, for instance, discusses how equal pay legislation focused on gender ignores intersectional variations *within* gender.⁵⁴ Therefore, laws that only see the claimants' gender cannot adequately address the particular vulnerability of black women to unequal pay where the vulnerability results from a complex interplay of sexism and racism.

Overlying this trend towards essentialism is the way in which difference is defined by its distance from entrenched norms which are set by those with greater power in society. These entrenched norms operate to create the categories of difference themselves, as they are defined by their opposition to the white, male, heterosexual, able-bodied, cisgender, etc., norm, but also the scope of the categories themselves. A key tenet of feminist legal theory is that law's claim to objectivity is simply a screen for male subjectivity, which allows male privilege to become invisible and normalised.⁵⁵ A similar mechanism arguably operates across all identity categories to make privilege invisible. Much as de Beauvoir noted that women were defined by their difference from men – "He is the Subject, he is the Absolute – she is the Other"⁵⁶ – so too are all identities delineated by their opposition from the privileged norm. This creates problematic binaries that attempt to neatly package the complex, multifarious nature of identity.

Essentialism is not entirely without value in political and legal struggles for recognition and equality. Gayatri Chakravorty Spivak coined the term "strategic essentialism" to refer to the way that subordinated groups can put aside intra-categorical variations to stress commonality, in order to create a collective identity that can be used in political movements.⁵⁷ Similarly, Martha Minow has argued that "cognitively we need simplifying categories, and the unifying category of 'woman' helps to organise experience, even at the cost of denying some of it".⁵⁸ Even scholars typically considered radical have given some credence to the value of essentialism in political campaigns. Judith Butler, for instance, has written that it may be necessary to "invoke the category and hence, provisionally (...) institute the identity" – which she terms "learning the double movement" – in order to achieve political objectives.⁵⁹

54 Hannett, S., "Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination", *Oxford Journal of Legal Studies*, Vol. 23, 2003, p. 77.

55 See above, note 12, Hunter; see above, note 33; MacKinnon, C., *Toward A Feminist Theory of the State*, Harvard University Press, 1989; and Smart, C., *Feminism and the Power of Law*, Routledge, 1989.

56 See above, note 37, p. 6.

57 Spivak, G., "Subaltern Studies: Deconstructing Historiography", in Spivak, G. and Guha, R. (eds.), *In Other Worlds: Essays in Cultural Politics*, Oxford University Press, 1988, p.197–221.

58 Minow, M., "Feminist reason; getting it and losing it", *Journal of Legal Education*, Vol. 38, 1988, p. 47.

59 Butler, J., "Contingent Formations: Feminism and the Question of "Postmodernism"" in Butler, J. and Scott, J. W., *Feminists Theorise the Political*, Routledge, 1992, p. 15.

The value of essentialism to law lies primarily in its ability to transform treatment that might otherwise be seen as the mere vicissitudes of life into a wrong that law should remedy. The apparent clarity that monistic identity categories provide in law allows legal analysis to abstract an individual claiming discriminatory treatment from the particular ground and say they are the same as a comparator “but for” that identity, and therefore their differential treatment was irrational and unjustified. However, a willingness to examine the reality of discrimination and how structures of disadvantage are created and operate in society is also able to expose the wrong of discrimination that law should remedy. The essentialism of discrete categories operates merely as clumsy shorthand for this process, and moving to an intersectional approach allows law to respond more effectively to discrimination.

It is important to note that Spivak warned of the dangers of strategic essentialism becoming a cover for actual essentialism. She argued that subordinated groups utilising strategic essentialism must continue to “criticis[e] the category as theoretically unviable”.⁶⁰ Butler too argues that even in invoking problematic categories, we should continue to “open the category as a site of permanent political contest”.⁶¹ There seems a clear difference between members within a category utilising identity categories, however generalised they may be, to serve their own liberation. It is something akin to efforts to reclaim slurs, a way for subordinated groups to take back power from their oppressors. For all that intersectionality serves as a force for “mediating the tension between assertions of multiple identity and the ongoing necessity of group politics”,⁶² we should be wary of an uncritical reliance on strategic essentialism.⁶³

There is a particular fear that embracing intersectionality will open a “Pandora’s Box”⁶⁴ of identity, resulting in an indefinite proliferation of identity categories, the process Butler refers to as “the illimitable process of signification”.⁶⁵ This has consequences for the way that identity is constructed as well as serious practical consequences if intersectionality is to be operationalised in discrimination law. It is arguable that this expansionist trend leads to a point of solipsism, where communities are denied and the bonds of solidarity that sustain identity categories break down. In doing so, it makes it more difficult to show that a practice or law is discriminatory and merits the law’s interference: it is crude, but numbers make a difference. However, as Sandra Fredman notes, this is not inevitable, as intersectional discrimination only occurs when “a group experiences discrimination from several different di-

60 Phillips, A., “What’s wrong with essentialism?”, *Distinktion: Scandinavian journal of social theory*, Vol. 11, 2010, p. 49.

61 Butler, J., *Bodies That Matter: On the Discursive Limits of Sex*, Routledge, 2011, p. 168.

62 See above, note 18, Crenshaw, “Mapping the margins: Intersectionality, identity politics, and violence against women of color”, p. 1296.

63 See above, note 30.

64 Fredman, S., “Double Trouble: Multiple discrimination and EU Law”, *European Anti-Discrimination Law Review*, Vol. 2, 2005, p. 14.

65 Butler, J., *Gender Trouble: Feminism and Subversion of Identity*, Routledge, 1990, p. 143.

rections”, creating something new, therefore not all intersectional identities will necessarily suffer intersectional discrimination.⁶⁶ What an intersectional approach to discrimination law would result in is not the creation of endless new discrete identity categories for every possible permutation of identity, but rather an open-textured legal approach that would examine underlying structures of inequality when assessing discrimination claims.

Conaghan criticises intersectionality for failing to grapple with the underlying inequalities that create patterns of discrimination.⁶⁷ However, this criticism seems mistaken. A legal recognition of intersectionality in discrimination law arguably requires that in assessing discrimination courts *must* examine the structural disadvantages operating in the background. This is because the complexity of intersectional identity and the insidious nature of intersectional discrimination means that clear evidence of discrimination will be, in most cases, unavailable. Courts will then have to engage in an examination of the “nature and situation of the individual or group at issue” as well as the “social and legal history of (...) society’s treatment of that group”, in order to determine the existence of discrimination.⁶⁸ Of course this may require changes to current legal forms and the way discrimination law is litigated in practice, but these difficulties are no reason to discard intersectionality as incompatible with law.

b. The Empirical Case for Addressing Intersectional Discrimination

Evidence of the qualitative difference that intersectional identity makes to experiences of discrimination can be seen in a number of empirical studies. Studies conducted by the Joint Equality and Human Rights Forum (JEHRF)⁶⁹ and the Advisory, Conciliation and Arbitration Service (ACAS)⁷⁰ examined a range of intersectional identities and how these affect experiences in the workplace and other areas of public life. Though both of these studies are rather limited in terms of the number of respondents interviewed, they clearly show that identity categories intersect to create unique stereotypes and myths that underpin discrimination. This perspective is borne out in the work of writers such as Iyiola Solanke, Crenshaw, and Diamond Ashiagbor. The picture that emerges clearly shows how a failure to address intersectional discrimination in law fails a substantial number of people.

The JEHRF, a body which brought together various human rights and equality organisations operating in the UK and Ireland including the Disability Rights Commission⁷¹ and the Irish

66 See above, note 64, p. 18.

67 See above, note 22.

68 Aylward, C. A., “Intersectionality: Crossing the Theoretical and Praxis Divide”, *Journal of Critical Race Theory*, Vol. 1, 2008, p. 39.

69 Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRF, 2003.

70 Hudson, M., *ACAS Research Paper 01/12: The experience of discrimination on multiple grounds*, 2012, available at: http://www.acas.org.uk/media/pdf/0/3/0112_Multidiscrim_Hudson-accessible-version-Apr-2012.pdf.

71 The Disability Rights Commission was replaced by the Equality and Human Rights Commission in October 2007.

Human Rights Commission, in 2003 published their findings on identity and multiple discrimination. Intended to “open a debate on the practical implications for effective equality strategies that flow from the specific experience, situation and identity of particular groups of people holding multiple identities”,⁷² the report looks at particular combinations of identity taken in pairs, including race/gender, disability/sexual orientation, and race/disability. A key finding of the study is that it was no longer sufficient “to develop policies and strategies that promote greater access to and benefit from society’s resources for *homogeneous* groupings of (...) people”.⁷³

The study highlights a particular problem where disabled lesbian, gay and bisexual (LGB) people occupy an interstitial space between the categories of sexual orientation and disability, where they are denied healthcare because of their sexual orientation,⁷⁴ or perceptions about their disability render their sexual orientation invisible. For instance, Michael Brothers notes how “society perceives disabled people to be asexual”,⁷⁵ a stereotype which compounds with the stigma LGB people face to deny disabled LGB people valuable services. One respondent noted that a women’s reproductive clinic “assumed that [she] didn’t have sex” due to her disability and she felt unable to inform the clinic of her sexual orientation as the clinic was “known to be homophobic”.⁷⁶ Brothers highlights how LGB disabled people are failed by both the disability and LGB communities, with “widespread homophobia and prejudice in the disability movement” and “prejudice toward disability” still evident within the LGB community.⁷⁷

This synergy between two identities can be seen in the study’s exploration of the experiences of disabled women in Northern Ireland. Women with disabilities face particular stigmatisation and oppression related to the tension between their disability and their womanhood, as they are “not expected by wider society to become mothers, and when they do they face criticism”,⁷⁸ With most participants feeling they “need[ed] to ask for permission to have children”.⁷⁹ Women with disabilities also face particular discrimination in the workplace, as they are “less likely to be in paid employment than either disabled men or

72 See above, note 69, p. 1.

73 Zappone, K., “Conclusion: The Challenge of Diversity” in Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRE, 2003, p. 132.

74 Brothers, M., “It’s Not Just About Ramps and Braille: Disability and Sexual Orientation” in Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRE, 2003, p. 54.

75 *Ibid.*, p. 62.

76 *Ibid.*, p. 55.

77 *Ibid.*, p. 56.

78 See above, note 73, p. 135.

79 Breslin, N., “Situation, Experience and Identity of Disabled Women in Northern Ireland” in Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRE, 2003, p. 80.

women who are not disabled” and are more likely to be in unskilled work than both men with a disability and able-bodied women.⁸⁰ The research shows that women with disabilities are a particularly vulnerable group within the category of persons with disabilities, with their status as “women, [rendering them] more vulnerable than disabled men to the role of dependent and helpless victim”.⁸¹

Similarly, ACAS’s research on experiences of multiple discrimination reveals the reality of lived experiences of multiple discrimination. ACAS is an independent public body in the UK which works to prevent and resolve employment disputes, by providing guidance on the law and best practice to employees and employers as well as mediation and conciliation services when employment disputes arise. A large part of their mandate is discrimination at work. The study drew participants from ACAS’s databases, focusing on claims based on multiple equality grounds that had progressed to the Employment Tribunal or which had been settled privately or by ACAS. Though the study is very limited in its scope, having only been intended to develop an exploratory report that would act as a foundation piece for deeper research, it clearly shows that multiple discrimination is not so uncommon a phenomenon that policy makers can ignore it. Of the nine claimants interviewed, who were “drawn from lower and higher paid jobs across a range of sectors”,⁸² two had experiences which were most clearly identified as intersectional, while others suggested something closer to an additive form of multiple discrimination.⁸³

One claimant commented that she frequently experienced ageist, racist and sexist comments in the workplace, noting that she felt she “ticked the wrong boxes (...) either [as] a woman or a Muslim...”.⁸⁴ Another of those interviewed felt that he had been denied opportunities at work because he was an older, Asian man. He commented that he “was not sure what could be the reason because there could be [any] combination of the three reasons that I can think of and that is (...) [my] gender, my age and my race”.⁸⁵

Although both of the above studies were intended as preliminary research and as such are limited in their scope, particularly in terms of the number of people interviewed, their conclusions on the need to recognise “diversity within social groups”⁸⁶ cannot easily be dismissed.⁸⁷ The position of black and minority ethnic women has been a particular focus of intersection-

80 *Ibid.*, p. 72.

81 *Ibid.*, p. 73.

82 See above, note 70, p. 27.

83 *Ibid.*, p. 12.

84 *Ibid.*, p. 12.

85 *Ibid.*, p. 13.

86 See above, note 73, p. 132.

87 See above, note 70, p. 27.

al scholarship, with research examining how they face segregation and discrimination in the labour market,⁸⁸ and how black and minority ethnic women with disabilities are rendered invisible.⁸⁹ Solanke cites several in-depth studies of the discrimination that black women face in the United States and Britain showing how gender and race intersect to create oppression that is qualitatively unique due to its creation of “negative myths and stereotypes which (...) covertly influence decision-making”.⁹⁰

The first of these studies was the African American Women’s Voices Project,⁹¹ which examined the experiences of black women across the United States of sexism and racism. Of the 333 participants, 97% stated that they were “aware of negative stereotypes of African-American women”⁹² while 80% stated they had been negatively affected by such stereotypes. A further study cited by Solanke⁹³ is the American Bar Association’s 1994 study⁹⁴ of the position of African American women lawyers. This study found that black women are doubly disadvantaged in the legal marketplace as they “face gender discrimination in minority bar associations and race discrimination in majority bar associations”.⁹⁵

Solanke notes how African-American women are doubly stereotyped as women of colour. They suffer the stereotypes of all black people, the “myth of inferiority, of being lazy, stupid, and unmotivated” and they are also stereotyped specifically as black women.⁹⁶ They are perceived as “non-feminin[e]” and aggressive, which compounds racism to doubly stigmatise black women in the workplace, especially assertive black women.⁹⁷ This positioning of black women is borne out in the work of Crenshaw⁹⁸ and Trina Grilo.⁹⁹ One needs only to

88 See above, note 18, Ashiagbor, “The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-Discrimination Law”, p. 4.

89 See above, note 64, p. 14.

90 Solanke, I., “Putting Race and Gender Together: A New Approach To Intersectionality”, *Modern Law Review*, Vol. 72, 2009, p. 732.

91 Collected in Jones, C. and Shorter-Gooden, K. (eds.), *Shifting: The Double Lives of African American Women: Based on the African-American Women’s Voices Project*, Harper Perennial, 2004.

92 See above, note 90, p. 732.

93 *Ibid.*, pp. 733–734.

94 American Bar Association, Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession, “The Burdens of Both, the Privileges of neither” in *Gender Fairness Task Force Report on Intersectionality*, American Bar Association, 1994.

95 See above note 90, p. 733.

96 *Ibid.*, p. 732.

97 *Ibid.*, p. 732.

98 See above, note 5, pp. 139–167; and see above, note 18, Crenshaw, “Mapping the margins: Intersectionality, identity politics, and violence against women of color”, pp. 1241–1299.

99 Grilo, T., *Berkeley Women’s Journal of Law*, Vol. 10, 1995, p. 16.

look at the treatment of black female athletes such as Serena Williams by certain aspects of the media to see how black women are uniquely stereotyped. They are characterised as intimidating, aggressive, and un-feminine,¹⁰⁰ reflecting the double burden that black women face *qua* black women.

While there is arguably limited evidence of experiences of intersectional discrimination, this is likely caused by a failure to prioritise the gathering of this evidence. Fredman notes that the invisibility of ethnic minority women with a disability is “underlined by the total absence of this group in national statistics”.¹⁰¹ Similarly, a report of the European Commission concludes that a “lack of research, registered complaints and cross-sectional data contribute to the continued invisibility of the phenomenon of Multiple Discrimination”.¹⁰² Related to this is the problem of under-evaluation, highlighted by the ACAS report, wherein participants in the study would initially focus on one aspect of their identity, but would go on to “explicitly or implicitly”¹⁰³ widen their discussion to other aspects of identity. This phenomenon of “suppressed identity” was also identified in the report of the JEHRF.¹⁰⁴ Combined with advice workers sometimes lacking a good understanding of multiple discrimination,¹⁰⁵ it is perhaps not surprising that recorded numbers of multiple discrimination claims are relatively low. This phenomenon of under-reporting shows how the dominance of a “single-axis” model of discrimination can become internalised, which in turn prevents people from being able to articulate their experiences of discrimination and inequality and present them in such a way that allows them to access legal redress.

3. Intersectional Discrimination in Law: Comparative Perspectives

a. UK

UK discrimination law has historically, in instruments such as the Race Relations Act 1976 and the Sex Discrimination Act 1975, taken an approach to discrimination that allows only for a single characteristic to be considered, and treats identity characteristics as discrete, homogenous groups. This trend is continued in the Equality Act 2010 where direct discrimination is defined as unfavourable treatment on the basis of “a protected characteristic” (em-

100 See Eddo-Lodge, R., “Calling the Williams sisters ‘scary’ isn’t just sexist, it’s racist too”, *The Telegraph*, 20 October 2014, available at: <http://www.telegraph.co.uk/women/womens-life/11174583/Calling-Serena-Williams-scary-isnt-just-sexist-its-racist-too.html>; and Jusino, T., “Women’s Sports and Sexism: Isn’t Serena Williams Winning Wimbledon Enough?”, *The Mary Sue*, 13 July 2015, available at: <http://www.themarysue.com/sports-sexism-serena-williams-wimbledon>.

101 See above, note 64, p. 14.

102 European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws*, 2007, p. 5.

103 See above, note 70, p. 11.

104 See above, note 73, p. 135.

105 See above, note 70, p. 17.

phasis added).¹⁰⁶ This commitment to a “single-axis” model raises obvious problems for the capacity of the law to respond to intersectional discrimination.

There was some hope at the time of the then Equality Bill’s passage through Parliament that recognition of intersectional discrimination would make its way into the final Bill. The Government Equalities Office published a discussion paper when the Equality Bill was published in 2009, looking specifically at the “gap in discrimination law in relation to intersectional multiple discrimination”,¹⁰⁷ recognising that for many who experience multiple discrimination “it is difficult, complicated and sometimes impossible to get a legal remedy”.¹⁰⁸ The paper proposed reforms that would bring intersectional discrimination within the scope of the Bill, but these were limited in two problematic ways. Firstly, discrimination claims based on multiple characteristics would be limited to direct discrimination only¹⁰⁹ and secondly, only combinations of two characteristics would be covered.¹¹⁰ Both of these limitations were chosen in order to ensure maximal coverage of the Bill without “unnecessarily complicating” the law.¹¹¹ This motivation does not seem entirely convincing, however. As regards the two characteristics limit, it is not made clear why further characteristics unduly complicate matters. As argued above, recognition of intersectional discrimination requires a holistic, open-textured approach by the reviewing court. This would look beyond the characteristics per se, and examine the power structures which create discrimination. Intersectional discrimination based on more than two characteristics may be harder for a claimant to provide evidence of, but that does not necessarily translate into complexity for a court.

The report cites statistics from the Citizens Advice Bureau showing that approximately 0.92%¹¹² of clients presented a claim based on three or more grounds, a “marginal” group, compared to 8% who presented claims based on only two grounds.¹¹³ However, given the risks of under-identification, it is not unreasonable to speculate that this represents only a small fraction of potential claims. Ultimately, given the report’s earlier recognition of the reality of complex identity and intersectional discrimination, it seems arbitrary to limit claims to two grounds.

The result of this consultation process was Section 14 of the Equality Act, which prohibits direct discrimination based on a combination of two protected characteristics. Howev-

106 Equality Act 2010, Section 13(1).

107 Government Equalities Office, *Equality Bill: Assessing the impact of a multiple discrimination provision*, 2009, Para. 3.5.

108 *Ibid.*, Para. 3.4.

109 *Ibid.*, Para. 4.5.

110 *Ibid.*, Para. 4.9.

111 *Ibid.*, Para. 4.6.

112 *Ibid.*, Para. 4.9, 119 of 13,000 clients.

113 *Ibid.*, Para. 4.9, 1,072 of 13,000 clients.

er, the Coalition Government declined to bring the provision into force, insisting that it was “costly”.¹¹⁴ This has left UK equality legislation at something of an impasse; while there is recognition in policymaking that intersectional discrimination exists and is not addressed adequately by existing law, it has not led to changes to the law.¹¹⁵ There have nevertheless been attempts to bring about recognition of intersectional discrimination judicially, in spite of the legislative barriers.

*Nwoke v Government Legal Service*¹¹⁶ provides a clear example of the courts endorsing additive discrimination. The claimant was a Nigerian-born woman who applied for a job with the Government Legal Service. On examining the rankings used for candidates following interviews, it was discovered that the claimant had the lowest possible ranking, with all white applicants, regardless of gender, ranking higher, even if they had a lower degree class than the claimant. The tribunal found therefore that the only reason for Nwoke’s low ranking was her race and there was therefore unlawful race discrimination. In addition, it was found further that white women were less likely to be hired compared to men, and when they were hired, they were given lower salaries than men. On this evidence, the tribunal found discrimination based on sex.¹¹⁷ Ms Nwoke therefore proved to the tribunal that she had suffered both race and sex discrimination independently of each other, that is, she did not suffer discrimination because she was a black woman but because she was black *and* a woman.

There is some evidence that lower tribunals are willing to consider claims that raise intersectional discrimination. In *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co*¹¹⁸ the claimant was an Indian woman who had worked for a short time for the defendant company. The directors of the company were of Indian origin and a colleague had told the claimant that they did not approve of Asian women working for their company. The claimant was dismissed without reason after five months. Her claim for race and sex discrimination was successful, with the Employment Tribunal using a hypothetical comparator who was male and of an origin other than Indian. Crucially, the Tribunal found that the claimant had been treated unfavourably because she was an Indian woman, not solely because she was a woman or because she was Indian.¹¹⁹

114 Chancellor of the Exchequer, George Osborne MP Budget Statement, March 2011, available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110323/debtext/110323-0001.htm#11032368000001>.

115 See above, note 107.

116 *Nwoke v Government Legal Service* and *Civil Service Commissioners* [1996] IT/43021/94.

117 *Ibid.*, as discussed in Solanke, I., “Putting Race and Gender Together: A New Approach To Intersectionality”, *Modern Law Review*, Vol. 42(3), 2009, p. 728.

118 *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co*. Case 1806128/03, discussed in Bamforth, N., Malik, M. and O’Cinneide, C. (eds.), *Discrimination law: theory and context: text and materials*, Sweet & Maxwell, 2008, p. 526.

119 *Ibid.*, p. 526.

Despite these promising signs from the lower courts, the only case involving an intersectional discrimination claim to reach the higher courts, *Bahl v Law Society*,¹²⁰ was met with firm opposition from the Court of Appeal (CA). Ms Bahl was the first woman of colour to enter the senior management of the law society, holding the post of Deputy Vice President and then Vice President. She resigned however, in the face of allegations of aggressive and bullying behaviour, and brought a claim for discrimination on the grounds of sex and race. While successful at the Employment Tribunal,¹²¹ Ms Bahl lost at both the Employment Appeals Tribunal (EAT)¹²² and the CA. In the CA, Peter Gibson LJ held that:

[I]f the evidence does not satisfy the tribunal that there is discrimination on grounds of race or on grounds of sex considered independently, then it is not open to a tribunal to find either claim satisfied on the basis that there is nonetheless discrimination on grounds of race or sex when both are taken together.”¹²³

Bahl highlights the constraints placed on courts by the inadequacies of legislation which confines discrimination to the single-axis mode. Gibson LJ further observed that “rare is it to find a woman guilty of sex discrimination against another woman”,¹²⁴ highlighting particularly potently the essentialising trend of “single-axis” discrimination law. All women are assumed to be the same (implicitly white) with the same experiences, and intra-categorical variation is ignored.

b. Canada

The core of Canada’s equality law is Section 15 of the Charter of Rights and Freedoms, which provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination”. While intersectionality has not been given explicit legislative recognition in Canada, the structure of Canadian equality law means that it has fared better judicially than in other jurisdictions.

Essential to Canadian equality law’s capacity for acknowledging intersectional discrimination is its unwavering commitment to substantive equality, which was set out in the first case heard by the Supreme Court of Canada (SCC) under Section 15, *Andrews v Law Society of British Columbia*.¹²⁵ Per McIntyre J, substantive equality requires that all are “recognised at

120 See above, note 53.

121 *Ibid.*, Paras. 57–67.

122 *Law Society v Bahl* [2003] UKEAT 1056_01_3107.

123 See above, note 53, Para. 158.

124 *Ibid.*, Para. 137.

125 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

law as human beings equally deserving of concern, respect and consideration”¹²⁶ resulting in an approach to differential treatment which sees that “every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.”¹²⁷ This view of Section 15 as “a guarantee of substantive, and not just formal, equality”¹²⁸ remains central to the Court’s approach.¹²⁹ This examination of whether government action “[has] the effect of perpetuating group disadvantage and prejudice or impose[s] disadvantage on the basis of stereotyping”¹³⁰ is key to the recognition of intersectionality.

The early case of *Canada v Mossop*,¹³¹ however, shows the SCC’s failure to take advantage of this and appreciate the reality of intersectional experience, “betray[ing] a profound misunderstanding of the problem it sought to redress”.¹³² In this case, the applicant’s employment contract stated that he was allowed one day of bereavement leave for the death of a family member. On the death of his (male) partner’s father, the applicant’s request to take bereavement leave was denied because his same-sex partner did not fall under the definition of “family” for the purposes of the contract.¹³³ Under the legislation at the time, the Canadian Human Rights Act, sexual orientation was not a protected characteristic but family status was,¹³⁴ forcing the applicant to claim discrimination on the basis of his family status. However, the SCC refused to allow this claim. The Court operated on an understanding that the applicant’s identity manifested only in his sexual orientation, and not also as a “social identity (...) that manifested in his same-sex relationship”.¹³⁵ There was a failure to think about the category “family status” in a way which would have broadened the category beyond perspective of the dominant heteronormative expectation of “family” and recognise the applicant’s family.¹³⁶

126 *Ibid.*, p. 171.

127 *Ibid.*, per McIntyre J, p. 163.

128 *R v Kapp* [2008] 2 SCR 483, per McLachlin C.J and Abella J, Para. 20.

129 See Faraday, F., Denike, M. and Stephenson, M. K. (eds.), *Making equality rights real: securing substantive equality under the Charter*, Irwin Law, 2006.

130 See above, note 128, Para. 25.

131 *Canada (Attorney-General) v Mossop* [1995] 2 SCR 513.

132 Eaton, M., “Patently Confused: Complex Inequality and *Canada v. Mossop*”, *Review of Constitutional Studies*, Vol. 1, 1994, p. 228.

133 See above, note 131, pp. 567–569.

134 Canadian Human Rights Act 1977, Section 3.

135 Bamforth, N., Malik, M. and O’Cinneide, C. (eds.), *Discrimination law: theory and context: text and materials*, Sweet & Maxwell, 2008, p. 536.

136 For a similar failure see the judgment of the Court of Justice of the European Union in *Grant v South West Trains* (C-249/96) [1998] 1 CMLR 993.

This highlights how a “single-axis” approach elides intra-categorical difference,¹³⁷ presenting only the experiences of the dominant norm as the totemic experiences of the whole group, giving “preference to dominant forms of social identity”.¹³⁸

L’Heureux-Dube J, in *Mossop*, gave the first in a line of judgments which have called for a recognition of complex identity, arguing that “categories of discrimination can overlap and that individuals may suffer historical exclusion on the basis of both race and gender; age and physical handicap or some other combination”.¹³⁹ In her dissenting opinion in *Egan v Canada*,¹⁴⁰ L’Heureux-Dubé J again pointed out the importance of recognising intersectional experience. For L’Heureux-Dubé J, discrimination law requires that courts focus “on the issue of whether [individuals] are victims of discrimination, rather than becoming distracted by ancillary issues such as ‘grounds’”.¹⁴¹

This call for a recognition of intersectional experience was finally echoed in a majority opinion in *Law v Canada*,¹⁴² where Iacobucci J, writing for the unanimous Court, held that “[a] discrimination claim positing an intersection of grounds can be understood as analogous to, or as a synthesis of, the grounds listed in s.15(1)”.¹⁴³ Carol Aylward notes that this recognition by the court of intersectional grounds as analogous grounds provides a “better analytical structure for multiple discrimination claims”.¹⁴⁴

The open-ended list of protected grounds is a particular feature of the SCC’s Section 15 jurisprudence which facilitates the recognition of intersectional identity. In *Corbière v Canada*,¹⁴⁵ the SCC were able to create an analogous ground of “aboriginality-residence” which was a synthesis of two characteristics: being Aboriginal as well as being a band member of an indigenous community (band) who lived off-reserve, when finding that a law which prevented band members who lived off-reserve from voting in band elections violated Section 15(1) of the Charter. L’Heureux-Dubé J again expressly raised the issue of intersectionality when discussing the particular vulnerability of “[a]boriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race”¹⁴⁶ by laws penalising off-band members.

137 See above, note 3, pp. 1771–1800.

138 See above, note 135, p. 536.

139 *Ibid.*, p. 546.

140 *Egan v Canada* [1995] 2 SCR 513.

141 *Ibid.*, p. 563.

142 *Law v Canada* [1999] 1 SCR 497.

143 *Ibid.*, p. 503.

144 See above, note 68, p. 14.

145 *Corbière v Canada* [1999] 2 SCR 203.

146 *Ibid.*, p. 259.

The prevailing approach of the SCC to section 15 has seen the Court pay attention not only to the “nature and situation of the individual or group at issue”¹⁴⁷ but also to the “social and legal history of Canadian society’s treatment of that group”,¹⁴⁸ allowing a focus on substantive equality. Nevertheless, despite the promise of Canadian jurisprudence, there is still a “long way to go to fulfill this vision of [substantive] equality (...) and to make section 15 meaningful to all who are disempowered”,¹⁴⁹ particularly for victims of intersectional discrimination.

c. The European Convention on Human Rights

Article 14 of the European Convention on Human Rights provides that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, (...) or other status.” The ECtHR has never expressly used the term “intersectionality” in its Article 14 jurisprudence but has nevertheless given early indications that it is willing to use Article 14 in a way which takes into account the experiences of those suffering intersectional discrimination both directly, by expressly addressing discrimination experienced on multiple intersecting grounds, and indirectly, through finding violations of the Convention’s substantive provisions in cases where an intersectional identity is at the heart of the case. Though this jurisprudence on intersectional discrimination is limited, the wider jurisprudence on Article 14 reveals an approach that is attuned to the reality of structural disadvantage, and as such could be a foundation for a more thorough response to intersectional discrimination.

In *B.S. v Spain*,¹⁵⁰ the applicant was a woman of Nigerian origin, lawfully resident in Spain, who worked as a sex worker in Mallorca. She was harassed, racially insulted and assaulted by the police in two separate incidents.¹⁵¹ After both incidents, B.S. made a formal complaint alleging racial discrimination. However, both claims were withdrawn due to a lack of evidence.¹⁵² There was evidence of various failures by the authorities to investigate B.S.’s allegations. Following her first complaint, the police officers who were placed on trial were not those B.S. had identified,¹⁵³ and following the second complaint, the case was discontinued by the judge for lack of evidence before B.S. had been given an opportunity to identify the

147 See above, note 68, p. 39.

148 *Ibid.*, p. 39.

149 The Hon. Claire L’Heureux-Dubé in Faraday, F., Denike, M., and Stephenson, M. K. (eds.), *Making equality rights real: securing substantive equality under the Charter*, Irwin Law, 2006, p. 5.

150 *B.S. v Spain*, App. No. 47159/08, 24 July 2012.

151 *Ibid.*, Paras. 7–28.

152 *Ibid.*, Paras. 12, 26.

153 *Ibid.*, Para. 11.

police officers involved.¹⁵⁴ The Court found a breach of both the procedural requirements of Article 3,¹⁵⁵ the prohibition of torture and inhuman and degrading treatment, and Article 14, taken with Article 3.¹⁵⁶

In finding a violation of Article 14, the Court seemed to give considerable weight to the applicant's intersectional identity as a black woman working as a prostitute. The Court noted that a duty to investigate "a possible link between racist attitudes and an act of violence"¹⁵⁷ forms part of the procedural obligation of Article 3 as well as Article 14. Therefore, the domestic courts' failure to address both the racialised language used by the police and their apparent targeting of ethnic minority women for questioning violated Article 14.¹⁵⁸ In finding this violation, the Court noted "that the decisions made by the domestic courts failed to take account of the applicant's *particular vulnerability* inherent in her position as an African woman working as a prostitute" (emphasis added).¹⁵⁹ Despite not being framed in the language of intersectionality, this is a clear recognition of the applicant's intersectional identity. Though the precise nature of this vulnerability is not expanded upon by the Court, given that the Court does not have to consider an Article 14 claim if it is prepared to find a violation of another substantive right,¹⁶⁰ it seems significant that the Court both considered the Article 14 claim at all and in doing so emphasised the applicant's intersectional identity.

In *N.B. v Slovakia*,¹⁶¹ the Court considered a problem of intersectional discrimination, though without addressing the Article 14 claim made by the applicant. The case concerned the sterilisation of an underage Roma woman without her informed consent. The applicant was in labour when it was discovered that future pregnancies carried a high risk of mortality, and she was made to sign consent forms to the sterilisation while under the influence of medication. Despite noting that the "practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups (...) particularly (...) members of the Roma community",¹⁶² the Court concluded that it was not necessary to examine the Article 14 issue separately, having concluded that Slovakia was in breach of Article 8.¹⁶³ This case seems clearly to involve intersectional discrimination, as the applicant

154 *Ibid.*, Para. 23.

155 *Ibid.*, Para. 46.

156 *Ibid.*, Para. 63.

157 *Ibid.*, Para. 59.

158 *Ibid.*, Para. 61.

159 *Ibid.*, Para. 62.

160 *Ibid.*, Para. 59.

161 *N.B. v Slovakia*. App. No. 29518/10, 12 June 2012.

162 *Ibid.*, Para. 121.

163 *Ibid.*, Paras. 92–99.

received particular treatment because she was a woman of Roma origin. In other words, her intersectional identity resulted in treatment that was qualitatively distinct to treatment she would have had if she were a woman of non-Roma origin or a man of Roma origin.

In a similar case, *V.C. v Slovakia*,¹⁶⁴ which also involved the forced sterilisation of a Roma woman, the Court again found a violation of Article 8 but did not “find it necessary” to consider the Article 14 claim.¹⁶⁵ However, Judge Mijovic dissented from the conclusion, arguing that the applicant had been “‘marked out’ (...) as a patient who had to be sterilised just because of her origin”.¹⁶⁶ Yoshida argues that the Court’s focus on the individual harm done fails to acknowledge the systemic “gender violence” against Roma women in Slovakia,¹⁶⁷ and therefore merely obfuscates rather than helps.¹⁶⁸ This seems correct. Though we can celebrate the victory of the individual applicants in *N.B.* and *V.C.*, which we can see as an *ad hoc* vindication of the applicants’ individual rights not to face discriminatory ill-treatment by failing to address the structural inequalities that create and legitimise intersectional discrimination, these victories are hollow. By restricting its analysis to only violations of substantive rights, the Court cannot remedy the systemic inequality which create the conditions for these violations.

Looking beyond these rare direct and indirect recognitions of intersectional experience, the framework the Court has developed in interpreting Article 14 reveals the potential for the Court to adopt an approach that is capable of addressing claims of intersectional discrimination and offer a “successful analysis of multidimensional situations”.¹⁶⁹ Firstly, the open ended nature of the text of Article 14 allows for an expansive approach to the grounds of discrimination, beyond the orthodox “core” of sex, race, and so on. This creates space for the recognition of intersectional identities as “other status” as in Canada¹⁷⁰ as well as allowing the discrimination analysis to look beyond the traditional grounds of protection to engage with the reality of inequality, regardless of its connection to a particular characteristic. In addition, the Court has taken an approach to the formation of identity categories that combines “the traditional focus on natural or immutable differences [with] an awareness of the

164 *V.C. v Slovakia*, App. No. 18968/07, 8 November 2011.

165 *Ibid.*, Para 178.

166 *Ibid.*, Dissenting Opinion of Judge Mijovic, Para. 4.

167 The structural problem is confirmed by Judge Mijovic’s comment at Para. 4 in her dissent in *V.C. v Slovakia*, App. No. 18968/07, 8 November 2011, that there were many more claims pending concerning sterilisation of Roma women.

168 Yoshida, K., “Towards Intersectionality in the European Court of Human Rights: The Case of *B.S. v Spain*”, *Feminist Legal Studies*, Vol. 21, 2003, p. 202.

169 Arnardóttir, M. O., “Multidimensional equality from within: Themes from the European Convention on Human Rights” in Schiek, D. and Chege, V. (eds.), *European Union non-discrimination law: comparative perspectives on multidimensional equality law*, Routledge-Cavendish, 2009, p. 66.

170 See above, note 142, per Iacobucci J, p. 503.

complexity of the social construction of identities”.¹⁷¹ For example in *Goodwin v UK*,¹⁷² the Court took an expansive approach to the category of gender in order to protect trans people’s rights to marry under Article 12 of the Convention. In addition, Oddný Mjöll Arnardóttir notes that this awareness of “histories of social disadvantage and marginalisation”¹⁷³ is reflected in otherwise unexplainable variations in the strictness of review applied by the Court. This leads the Court to apply a more lenient standard of review when examining alleged discrimination against a generally privileged group, and a stricter standard when examining claims by disadvantaged groups. For example, within the category of “sex”, usually seen as a “suspect” category meriting strict review,¹⁷⁴ the claims of men¹⁷⁵ may be reviewed with more lenient scrutiny than those brought by women.¹⁷⁶ This capacity to understand the axes of privilege and disadvantage that exist within identity categories shows that the Court could develop its Article 14 jurisprudence to address intersectional discrimination in a consistent and rigorous way.

Despite this promise, a number of features of the Court’s approach to Article 14 raise problems. Most notably, the tendency to avoid addressing Article 14 claims, as in *V.C., N.B.*, and a host of other decisions,¹⁷⁷ when the Court has found a violation of a substantive right, suggests that any progress to embracing substantive equality is hesitant, at best. This is particularly true when there is clear evidence before the Court of systemic discrimination.¹⁷⁸ Particularly troubling is the inconsistency in the Court’s approach to the circumstances under which it will refrain from addressing an Article 14 claim. The oft-repeated refrain of the Court is that where they have found a violation of the substantive article in a claim, they will not consider Article 14 unless a “clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case”.¹⁷⁹ However, the jurisprudence does not show the Court is following this approach. In *Dudgeon v UK*,¹⁸⁰ for example, a case concerned with clear and overt discrimination on the basis of sexual orientation, the Court held that they could not say that “clear inequality of treatment [was] a fundamental aspect

171 See above, note 169, p. 61.

172 *Christine Goodwin v UK*, App. No. 28957/95, 11 July 2002.

173 See above, note 169, p. 62.

174 *Ibid.*, p. 56.

175 *Rasmussen v Denmark*, App. No. 8777/79, 28 November 1984.

176 By way of example see *Schuler-Zgraggen v Switzerland*, App. No. 14518/89, 24 June 1993.

177 See *Dudgeon v United Kingdom*, App. No. 7525/76, 22 October 1981, Para. 69.

178 *N.B. v Slovakia*, App. No. 29518/10, 12 June 2012, Para. 121; and *V.C. v Slovakia*, App. No. 18968/07, 8 November 2011, Dissenting Opinion of Judge Mijovic, Para. 4.

179 *Chassagnou and Others v France*, App. Nos. 25088/94, 28331/95, and 28443/95, 29 April 1999, Para 89; *Dudgeon v United Kingdom*, App. No. 7525/76, 22 October 1981, Para 67; and *Oršuš and others v Croatia*, App. No. 15766/03, 16 March 2010, Para. 144.

180 See above, note 177.

of the case”.¹⁸¹ Given that *Dudgeon* involved a challenge to legislation which criminalised male same-sex acts,¹⁸² it is difficult to see how inequality of treatment was not at the very heart of the facts in this case. Further, the variability of intensity of review depending on the protected ground at issue¹⁸³ means that the Court is sidetracked by processes of categorisation which are determinative of its approach rather than engaging fully with the realities of the (alleged) discrimination before them.

4. Substantive Equality beyond Intersectional Discrimination

Recognising intersectional discrimination allows the law to begin to respond to the full depth of discrimination as it is experienced. Nevertheless, with substantive equality as our goal, we must look beyond intersectional discrimination to other areas of potential reform. A full exploration of these reforms is outside the scope of this article, but some preliminary suggestions will be made. Pervading through all of these other suggested reforms must be an awareness of the complexities of intersectional identity if they hope to address the structural inequalities that affect the vulnerable individuals existing at the intersections of patterns of disadvantage.

Perhaps most radically, feminist legal scholar Nicola Lacey has called for the recognition of group rights and collective remedies as a means to remedy the failings of an individualistic law.¹⁸⁴ These rights and remedies would address what Lacey calls “cultural” rights and would operate to “protect and express respect”¹⁸⁵ for practices stemming from group membership, such as dress codes. A more important way that group rights and remedies operate for Lacey is as a means to remedy past and current oppressions suffered by those belonging to a particular group, including inequalities in socio-economic status and in the distribution of basic goods.¹⁸⁶ Lacey recognises that such rights would be a challenge to current legal remedies and would require new forms of remedial action that break the link between loss and remedy which is inherent to the individual legal form.¹⁸⁷ These new remedies might include such things as quotas, affirmative action, and educational reform, operating alongside orthodox damages and injunctions.¹⁸⁸

181 *Ibid.*, Para. 69.

182 *Ibid.*, Para. 14.

183 See above, note 169.

184 Lacey, N., “From Individual to Group? A Feminist Analysis of the Limits of Anti-Discrimination Legislation” in Lacey, N., *Unspeakable subjects: feminist essays in legal and social theory*, Hart Publishing, 1998.

185 *Ibid.*, p. 35.

186 *Ibid.*, p. 36.

187 *Ibid.*, p. 39.

188 *Ibid.*, pp. 40–43.

Related to this recognition of group rights is an increased use of positive action and positive duties to bring about transformative equality. Both are concerned with a shift of perspective from individualised claims to a more systems-oriented, top-down approach to addressing patterns of disadvantage. Arguably, an understanding of intersectional identity is closely related to positive action. Both intersectionality and positive action in the equality context can be seen as being informed by an understanding of the ways in which disadvantage is “create[d] or perpetuate[d]”,¹⁸⁹ the latter because it works to address in a systemic fashion inequality and the former because, as has been argued above, examining the difference within traditional categorisations reveals the truth of the “matrix of domination”.¹⁹⁰ As well as the importance of positive action to equality in general, in Fredman’s analysis, it is also key to a thorough legal recognition of intersectionality as it allows the legal analysis to move away from preoccupations with comparison to look at the substance of the “detrimental consequences attached to membership of particular groups”.¹⁹¹ In turn, intersectionality allows us to see the complexity within these groups, and target positive action at those who suffer intersectional discrimination and are therefore “the least advantaged in each of the (...) groups”.¹⁹²

In addition, Fredman argues that the adoption of a more expansive approach to positive action and positive duties to ensure equality opens up “many more possibilities to deal with intersectionality than a complaints-led model”.¹⁹³ The complaints-led model is problematic for discrimination claims in general for a number of reasons which are compounded in the case of intersectional discrimination. Firstly, it puts an immense strain on the individual claimant, both in terms of resources, with expensive protracted litigation being unaffordable for most, and emotionally.¹⁹⁴ The particular vulnerability of victims of intersectional discrimination increases this strain. Individual claims can also only remedy the effects of discrimination for the claimant, rather than addressing the systemic problems that create inequality. By requiring a discriminating “actor”, even if the alleged discrimination is indirect, individual claims can also only go so far in addressing inequality. Many inequalities are the result of subtle and pernicious structural problems that cannot be traced back to any one source, rather than the result of the actions of particular individuals. It is perhaps comforting to caricature the perpetrators of discrimination but in doing so we deny our own, often unconscious, complicity in the creation of disadvantage and inequality.

We must also be willing to look beyond law to recognise the importance of other forms of action, whether they are political, collective, or otherwise. Many within the field of feminist legal theory favour these forms of action, even going so far as to doubt the value of law. Carol

189 See above, note 36, p. 73.

190 See above, note 39, pp. 221–238.

191 See above, note 36, p. 81.

192 See above, note 36, p. 85.

193 *Ibid.*, p. 81.

194 See above, note 185, pp. 22, 34.

Smart, for instance, has argued that “by accepting law’s terms in order to challenge law, feminism always concedes too much”.¹⁹⁵ Smart does not believe that we can simply abolish law and rights immediately – indeed she acknowledges that rights can only be truly abandoned once they become so entrenched that they can be taken for granted, lest oppressed groups return to the “plight” of a lack of legal protection – but rather argues that there should be a gradual turning away from law.¹⁹⁶

This approach seems to fall apart under the weight of its own “internal inconsistency”.¹⁹⁷ While Smart ascribes law with great power to create, express and perpetuate patriarchal oppression, she fails to address why law cannot then be reformulated to turn this power to progressive goals. Similarly, Martha Fineman has argued that activism must focus on domains outside of law, as the ingrained patriarchal techniques of law resist progressive reform.¹⁹⁸ Any reform achieved in other social spheres will then be reflected in law.¹⁹⁹ However this approach ascribes to law a level of passivity that entirely contradicts the power attributed to it in maintaining patriarchy. It seems actively dangerous to ignore law’s power as, per MacKinnon, “one consequence of this turning away, however realistic its reasons, is that male power continues to own law unopposed”.²⁰⁰ The “effective paralysis”²⁰¹ that this deconstruction of law creates means that while “relying on (...) rights analysis is a high-risk strategy, (...) it would be riskier still to abandon it to those unconcerned with (...) the goal of (...) equality”.²⁰² Nevertheless, these perspectives, though hyperbolic, highlight the value of using non-legal methods alongside law to work towards substantive equality.

Conclusion

Recognising and addressing intersectional discrimination is necessary to achieving meaningful substantive equality for all. The prevalence of the single-axis model of discrimination law:

*[R]eflect[s] hegemonic discourses of identity politics that render invisible experiences of the more marginal members of that specific social category and construct a homogenised ‘right way’ to be its member.*²⁰³

195 See above, note 55, Smart, *Feminism and the Power of Law*, p. 6.

196 *Ibid.*, pp. 138–159.

197 See above, note 12, Munro, p. 68.

198 Fineman, M., “Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship”, *Florida Law Review*, Vol. 42, 1990, pp. 25–45.

199 *Ibid.*, p. 33.

200 MacKinnon, C., *Women’s Lives, Men’s Laws*, Harvard University Press, 2007, p. 107.

201 See above, note 12, Munro, p. 69.

202 *Ibid.*, p. 84.

203 See above, note 46, p. 195.

Intersectionality exposes the difference within categories, bringing to light the individuals at the intersections who are ignored by the current orthodoxy. In addition, as a general theory of identity, intersectionality operates to break down the dichotomies of discrimination law – the “Subject” and the “Other”²⁰⁴ and shift law’s focus from difference to domination, exposing the “matrix of domination”.²⁰⁵

This recognition of intersectionality requires considerable analysis and research into how privilege and oppression intersect to form unique experiences. Preliminary research, as discussed above, shows the qualitative difference of intersectional discrimination, but the studies are limited in scope. Currently “[m]any national statistics do not include data de-segregated by sex or race still less by other sources of multiple discrimination”²⁰⁶ and while “the synergist nature of multiple discrimination also makes it difficult to monitor”,²⁰⁷ it is crucial that experiences of intersectional discrimination are documented and analysed in order for law to properly address them. The focus on the intersection of race and gender is welcome, but voices examining the experiences of other intersections need to be brought into the mainstream. Trans people of colour face extraordinary risks of discrimination,²⁰⁸ yet are all too often ignored by mainstream discourses on race, gender, and sexuality. Only by giving voice to a plurality of experiences can we work toward substantive equality for all.

Discrimination law in response to the challenges of intersectionality needs to undergo a radical restructuring of how it approaches discrimination questions. Lessons from Canadian Charter jurisprudence show that an open-textured, holistic approach which is able to examine and address historical, social, and political disadvantage is necessary in order to recognise the realities of intersectional discrimination and bring about substantive equality. From the jurisprudence of the ECtHR we also see the value of non-exhaustive lists of protected grounds. However, beyond these individual elements, what is required is willingness by policy-makers, legislators and courts to engage with structural axes of oppression.

There can be no illusions that intersectionality is the panacea for discrimination law’s failings. Achieving true equality is a difficult goal, indeed it may be an “unattainable ideal”,²⁰⁹ and addressing intersectional discrimination is but one facet of the reform needed to work towards to this goal. There are many more factors that play into the reform necessary to strive for substantive equality. Recognition of the value of positive action to remedy structur-

204 See above, note 37, p. 6.

205 See above, note 39, pp. 221–238.

206 See above, note 64, p. 14.

207 *Ibid.*, p. 14.

208 Transgender Europe’s “Trans Murder Monitoring Project” reports that 1,701 trans people have been murdered globally between 2008 and 2014, available at: http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/idahot-2015.htm.

209 See above, note 125, per McIntyre J, p. 165.

al oppression is important, as is recognition of the importance of socio-economic rights.²¹⁰ There must also be a willingness to look beyond law and create change through other means, political and social.

Despite these difficulties, intersectionality cannot be discarded. Charlotte Bunch, addressing the World Conference Against Racism, noted that “if the human rights of any are left unprotected – if we are willing to sacrifice the rights of any group, the human rights of all are undermined”.²¹¹ A failure to address intersectional discrimination through discrimination law does just this: it leaves the most vulnerable within minority groups struggling for protection. Only by recognising intersectional discrimination can we make progress on the road to achieving meaningful substantive equality.

210 Fredman, S., “Providing Equality: Substantive Equality and the Positive Duty to Provide”, *South African Journal of Human Rights*, Vol. 21, 2005, pp. 163–190.

211 Centre for Women’s Global Leadership, *A Women’s Human Rights Approach to the World Conference Against Racism*, 2011, p. 111, quoted in Yuval-Davies, N., “Intersectionality and Feminist Politics”, *European Journal of Women’s Studies*, Vol. 13, 2006, pp. 203–204.