
EQUAL RIGHTS REVIEW

Special Focus:
Intersectionality

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EQUAL RIGHTS TRUST



Contents

5 *Editorial*

Intersectionality

Articles

13 *Jade Glenister*

Good Intentions: Can the “Protective Custody” of Women Amount to Torture?

38 *Se-shauna Wheatle*

The Constitutionality of the “Homosexual Advance Defence” in the Commonwealth Caribbean

Special

63 *Gerard Quinn*

Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law

73 *Ben Smith*

Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective

103 *Ivona Truscan and
Joanna Bourke-Martignoni*

International Human Rights Law and Intersectional Discrimination

132 *Siobhan Curran*

Intersectionality and Human Rights Law: An Examination of the Coercive Sterilisation of Romani Women

160 *Shreya Atrey*

Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15

186 *Johanne Bouchard
and Patrice Meyer-Bisch*

Intersectionality and Interdependence of Human Rights: Same or Different?

Interview

207

Intersectionality in Promoting Equality

Testimony

223

Layers of Marginalisation: Life for Rohingya Women

Case Notes

231 *Sam Barnes*

Physical Fitness and Gender Discrimination: Entrenching Stereotypes

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Intersectionality

The main impression this inelegant heptasyllabic word has made on me over the years is the almost automatic way in which any analysis focusing on it tends to indulge in spatial metaphor. No wonder, as the notion of intersectionality is itself a spatial metaphor struggling to upgrade itself (or reduce itself, depending on one's perspective) to a technical legal and/or social science term. This issue of the *Equal Rights Review* is an ample case in point, as well as, hopefully, a snapshot capturing the current state of understanding among the experts.

Different people mean different things when they talk about intersectionality. That which intersects can relate to identities, prohibited grounds of discrimination, human rights, human rights violations, disadvantages, inequalities, systems of oppression, and so on; and intersectionality itself is referred to variously as a theory, a framework (another spatial metaphor), a method, a practice... The reader will find all of these usages, and more, in this issue alone.

In a narrower sense, as a term – or shall I say, an aspiring term within anti-discrimination law – “intersectional discrimination” is often used as synonymous with “multiple discrimination”. A more useful choice however is the use of “intersectional discrimination” to describe one of the types of multiple discrimination, the other one being additive (cumulative) discrimination. We speak of additive discrimination when, for example, a Muslim woman has been treated less favourably by an organisation which treats less favourably all women regardless of their religion as well as all Muslims regardless of their sex. We speak of intersectional discrimination when, in a similar example, a Muslim woman has been treated less favourably by an organisation which can show that it does not discriminate against women (it has many non-Muslim women in high posts) and that it does not discriminate against Muslims (it has many Muslim men in high posts), so that it is only the conjunction of gender and Muslim religion that switches on the less favourable treatment. The causality here emerges from the intersection of the protected characteristics. In this example, only two characteristics intersect; but in principle, intersectional discrimination may occur from the crossing of three or more characteristics.

Kimberlé Crenshaw whom we have interviewed for this volume has been rightly credited as having introduced the term “intersectionality” in social science, in a seminal article back in 1989, but the concept behind it existed long before that. Much earlier trends in social science have gradually built an understanding that single identities (women, Roma, Dalits, disabled, etc.) are not a persistently useful abstraction, as they reduce real people to just one of the facets of their multi-faceted identities. While these identities have been in most cases a necessary phase in catalysing political movements for equal rights, they have, over

time, turned from rebels against established social hierarchies into silos storing up group stereotypes. In the literature of the last few decades, critical social science demonstrated that race, gender, class, disability, etc. are not just personal identity characteristics but social hierarchies that shape a person's power status and capabilities. In a concomitant evolution, anti-discrimination law began to grapple with the same realisation of the limiting nature of its cardinal concept of protected characteristics (aka prohibited grounds) expressed in terms of single identities. The metaphor of intersectionality became a central tenet of the modern understanding of identity in social science, as well as in legal philosophy interpreting anti-discrimination law.¹

If intersectionality helps us to understand the complexities of inequality in society, can it help us to find suitable strategies to fight discrimination, and more generally, reduce inequality in society by targeting interventions to benefit the most vulnerable?

Some analysts quoted by Ben Smith and others in this issue have expressed scepticism based on the presumed complexity of intersectional disadvantage and the potential infinite regress of ever more specific sub-divisions within the "protectorates" of women, ethnic minority women, ethnic minority women of some further description, etc. – reaching to the atomic unit of the individual and thus rendering any social group categorisations of equality law meaningless. I do not share this concern, even if we extend the sub-divisions to not just the individual but – why not – further. For, far from being an opaque monolith of personhood, the individual can be regarded as a complex cluster of internalised societal hierarchies forming their "identity". But why should this abstract possibility of further division threaten the recognition of disadvantaged social groups in need of protection from discrimination? Just as the mathematical infinity of space division conceptualised in Achilles and the Tortoise, the Arrow, and the other famous paradoxes of Zeno of Elea does not negate the reality of macro-physical objects, the notion of indefinitely divisible protected groups does not negate the presence in society of specific, rather distinct groups suffering from concentrated doses of disadvantage and discrimination.

If the law wants to take note of them, it can.

Which brings me to the myth of complexity – the uncritical assertion that intersectionality is too complex to be tackled by the law, and that it would so inconvenience the courts if they set out to provide a tailored remedy that litigating intersectional discrimination, particularly on more than two grounds, would be impractical. I think Crenshaw's response is compelling:

What the law has done does not necessarily tell us what the law can do. One could have said a hundred years ago that law cannot fundamentally transform a white

1 The Equal Rights Trust emerged in the mid-2000s out of the need to break the single identity boxes in discrimination law and, overcoming the fragmentation of both the law and the many single identity movements for equal rights, to develop a new framework of thinking about and advocating equality.

supremacist society because it hadn't done it up to that point. Yet, we know now that one of the most significant conceptual revolutions to happen in the twentieth century was a shift within law between an institution which more or less insulated and reproduced white supremacy to one that at least occasionally interrogated the terms of white supremacy. We can therefore never completely conclude what the law cannot do. (...) We can talk about what the law has not yet been robust enough to do. It is clearly the case that complexity is challenging for law, however, I would point out that what is at the core of the issue is how the law interacts with power, not so much complexity. A white male identity is a complex identity but the law has worked out how to reproduce those power relationships. (...) [I]t is more important to talk about how the law insulates power and privilege rather than how it causes difficulty when dealing with complexity.

This trust in the transformational potential of the law to challenge oppression and its underlying stereotypes is shared by Gerard Quinn:

In symbolic terms, the law's endorsement of exclusion or relative exclusion valorises an exclusionary worldview and weaves its assumptions into the background fabric of what is considered 'normal'. But just as the law can embed exclusionary ideas (...) it can also be used to unpick the legacy of the past.

To argue for the usefulness of the concept of intersectionality, Quinn describes the limitations of traditional non-discrimination analysis: 1) its reductionism (I am a white male) is demonstrably counter-factual as every person has multiple characteristics; 2) its non-engagement with the background or ambient “political economy” of hatred or bias; 3) its inability to get at the socio-economic determinants or effects of exclusion nor reach broader socio-economic strategies that, in the long term, can remove disadvantage; 4) its circular nature. But conscious of evolving trends in legal theory and practice, Quinn calls his own depictions a caricature of traditional non-discrimination analysis. Indeed. “Traditional non-discrimination law” is the stuff of legal history, or rather, of its abstractions frozen in time for analytical post mortem. Equality law has in the meantime come a long way.

Resorting to a non-traditional equality analysis, in 2008, in an attempt to summarise the achievement and the aspirations of legal thinking, 128 experts and advocates from all over the world² agreed the Declaration of Principles on Equality, which reflects a new conceptual framework. This unified human rights framework on equality is harbouring a genuine conception of intersectionality. Emphasising the integral role of equality in the enjoyment of all human rights, it recognises both the uniqueness of each different type of inequality and the overarching aspects of different inequalities. The unified framework highlights the intersections between: a) types of discrimination based on different prohibited grounds, such as

2 See their names here: <http://www.equalrightstrust.org/ertdocumentbank/declaration%20signatories%20no%20page%20numbers.pdf>.

race, gender, religion, nationality, disability, sexual orientation and gender identity, among others; b) types of discrimination in different areas of civil, political, social, cultural and economic life, including employment, education, and provision of goods and services, among others; c) types of discrimination in respect to the enjoyment and exercise of different human rights; and d) status-based discrimination and socio-economic inequalities.

The unified human rights framework on equality is the foundation on which the Equal Rights Trust is building its theories of change and planning its interventions. It is not accidental that the very first issue of the *Equal Rights Review* published a strong article on multiple discrimination, explaining, in particular, intersectional discrimination and arguing for the possibility that law should move on to reflect reality.³

But the question remains: can we say that intersectionality is that force which can transform equality law? Is it enough to create a framework harbouring intersectionality? If “traditional non-discrimination law” was a neutral arbiter between the powerful and the powerless, can intersectional approaches move it toward an asymmetrical conception? Ben Smith seems to think so: “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.” It appears that most authors writing on the role intersectionality could or should play in equality law tend to endow this concept with big transformative power.

I think that the shift toward taking the side of the powerless is underway indeed in equality law, but not because of developing a framework incorporating the concept of intersectionality. In itself, this is not enough. The real driver is the evolution of the social and political **aims of equality law**, trending toward an asymmetric approach in favour of the powerless and the most disadvantaged. In itself, intersectionality doesn’t point at a purpose. As a conceptual tool, it can cut both ways. It does not necessarily assume the higher value of substantive equality over formal equality. It can be interpreted either as a tool for treating the powerful and the oppressed symmetrically, thus perpetuating the pre-existing hierarchies, or as a tool cutting in the opposite direction. Nothing in the concept of intersectionality as such would necessarily induce a judge to decide in favour of a poor, disabled, homosexual, female member of a stigmatised ethnic minority and against a rich, healthy, heterosexual, male member of the dominant ethnic group. Intersectionality is a welcome concept only when interpreted in the light of a certain purpose.

It is the transformative purpose of the law – to promote substantive equality – that drives progressive jurisprudence. In the words of Claire L’Heureux-Dubé J, courts should focus “on the issue of whether [individuals] are victims of discrimination, rather than becoming distracted by ancillary issues such as ‘grounds’”.⁴ It is purposive interpretation, seen here in the

3 Uccellari, P., “Multiple Discrimination: How law can Reflect Reality”, *Equal Rights Review*, Vol. 1.

4 *Egan v. Canada* [1995] 2 S.C.R. 513, p. 563.

characteristic radical chic style of Mme L’Heureux-Dubé,⁵ which can jump over the old identity borders of “traditional non-discrimination law”, resist the reification and fetishisation of any limiting legal categories, and keep in focus the lived experience of wounded dignity caused by discrimination. It is not because Canadian law recognised intersectional discrimination at the time (which it did not) that Mme L’Heureux-Dubé was able to vindicate the rights of victims of intersectional discrimination in several landmark cases, but because she was driven by what she saw as the genuine purpose of the equality provision in the Canadian constitution. From this perspective, intersectionality is just one instrument in the toolbox, and not a panacea.

Ben Smith in this issue is much closer to such an instrumental view of intersectionality when he writes:

*[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.*
(Emphasis mine)

An important development is discussed in this issue by Ivona Truscan and Joanna Bourke-Martignoni and relates to how intersectional approaches to the interpretation of international human rights are influencing the future shape of national anti-discrimination laws and policies. As the authors show, recommendations by treaty bodies to states have recently focused on ensuring that cases of intersectional discrimination are justiciable at the national level. The adoption of consolidated equality legislation as opposed to separate ground-based pieces of legislation makes it easier to consider multiple discrimination complaints. And where the legislation is too restrictive, and closer to the “traditional” single-axis type, policy guidance – including by equality bodies, and advocacy by equality movements can drive change.

Intersectionality may not be the driver of change, but it is significant because it is a vehicle. Metaphor, in its original Greek meaning, is that which carries over,⁶ and it is up to us to make a good use of this vehicle, or at least to watch out who the driver is.

Dimitrina Petrova

5 Justice in the Supreme Court of Canada (1987–2002) and Trustee of the Equal Rights Trust since 2008.

6 From μεταφέρω (*metapherō*) – “to carry over”, “to transfer”.

“Nizrin was detained by the Governor of Karak having run away from home after she was sexually assaulted by her uncle. (...) At the time of being interviewed, Nizrin had sent more than 10 letters asking to be released and received only two replies asking who would be able to act as her guarantor. Her reply was that she wished to act as her own guarantor. She had been detained for three years.”

Jade Glenister



Good Intentions: Can the “Protective Custody” of Women Amount to Torture?

Jade Glenister¹

Introduction

*Whoever enters that place is lost. And whoever leaves it is born again.*²

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as:

*[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, **or for any reason based on discrimination of any kind**, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (emphasis added)*

One of the long neglected aspects of this definition has been the infliction of severe pain and suffering “for any reason based on discrimination of any kind.”³ However, recent years have seen an emerging discussion of discrimination in the context of torture. Much of the limited discussion in this context has considered gender-based violence against women.⁴

1 Jade Glenister is Legal and Programmes Assistant at the Equal Rights Trust. She would like to thank Joanna Whiteman and Fawzi Barghouthi for their comments and guidance in developing this article and Courtney Furner for her edits. The views in this article are the author’s own and cannot be taken to represent the views of the Trust.

2 SBS, *Dateline: Jordan – Jailing the Innocent*, 1 October 2008. A transcript is available at: <http://www.sbs.com.au/news/dateline/story/jordan-jailing-innocent>.

3 For convenience, this will be referred to as the discriminatory purpose element of the definition throughout this article, although, as will be discussed, this may not be a purpose in the true sense of the word. Copelon, R, “Gender Violence as Torture: The Contribution of CAT General Comment No. 2”, *New York City Law Review*, Vol. 11, 2008, p. 250.

4 See, for example, Copelon, R., “Recognizing the Egregious in the Everyday: Domestic Violence as Torture”, *Columbia Journal of Human Rights Law Review*, Vol. 25, 1994; *Ibid.*; and Cochrane Alexander, B., “Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims”, *American University International Law Review*, Vol. 15, 2000.

However, this discussion has largely related to the Article 1 requirement for some degree of state involvement in violence against women carried out by non-state actors,⁵ rather than the discriminatory purpose element of the definition.

Similarly, while attention has focused on a state's failure to protect women from violence,⁶ little attention has been paid to the situation in which the state does take steps to protect women, successfully preventing violence from occurring, but through means which potentially amount to discrimination or torture or other ill-treatment. This is the situation that faces women at risk of violence in Jordan. These women, at risk from family members due to domestic violence or honour crimes, may be placed in "protective custody" on the determination of a governor. They are often held for several years in prison without their consent and with no real ability to challenge their detention or seek alternative shelter. It is a practice that occurs in response to patriarchal attitudes towards women in Jordan, which see them targeted for violence, and which is highly discriminatory. However, at least on some occasions, protective custody is implemented with "good intentions"; those ordering the detention of the women genuinely believe that it is in the best interest of the women.

The practice of protective custody therefore provides an ideal case study for exploring the recently emerging discussions of whether actions carried out by state authorities with "good intentions", which are nonetheless discriminatory, can amount to torture.⁷ This article has two purposes: to highlight the draconian measures that are sometimes used by states to protect women from violence, such as protective custody; and in doing so, to discuss the potential reach of the little used discriminatory purpose element of the definition of torture, which is of particular significance in considering whether practices such as protective custody can be considered torture.

1. Protective Custody in Jordan

Just under half of all women imprisoned in Jordan in 2014 were administrative detainees whose cases had never been subject to any judicial process. Several of these women were held in what is known as protective custody; detained for their own protection due to the

5 McGregor, L., "Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings", *Human Rights Quarterly*, Vol. 36, 2014, p. 211.

6 See, for example, *Opuz v Turkey*, Application No. 33401/02, 9 June 2009; see above, note 4, Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture"; see above, note 3; and see Cochrane, above note 4.

7 Jordan acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 13 November 1991. Although Jordan has not made a declaration under Article 22 of the Convention to allow for individual complaints to be made, it must still implement criminal laws, which, at a minimum, meet the elements required under Article 1 of the CAT. See, CAT, Article 4; and Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, Para 8.

threat of violence against them from family members.⁸ Prior to 2005, the number of women held in protective custody according to government figures were staggering:

*Recent statistics indicate that the cumulative yearly total numbers of women placed in protective custody between 1997 and 2004 ranged between 400 and 800. In 1997 there were 402 such women; by 2001 the total had risen to 899, while in 2002 there were 885. In 2003 the number declined to 540, and in 2004 it declined further, to 524. We may note at this point that these figures may be inflated as a result of the method of record-keeping (...) no more than between 50 and 70 women are being held in protective custody at any given time.*⁹

In 2007, steps were taken to reduce the number of women held in prisons, including the opening of women's shelters.¹⁰ However, it is clear that the practice of holding women in protective custody in prisons has continued.¹¹ It is difficult to determine how many women are currently being held in protective custody or have been held in more recent years.¹² A 2010 report estimated that around 25 women were held in protective custody at any one time.¹³ Other reports detail various figures: in 2007 this was reported as only five women;¹⁴ in 2008, 12 women were reported as being held in Jweideh;¹⁵ at the beginning of 2010,

8 National Centre for Human Rights, *The Status of Female Inmates at Reform and Rehabilitation Centers in Jordan*, September 2014, p. 40; and Azzeh, L., "Nearly half of women prisoners are administrative detainees – study", *Jordan Times*, 5 March 2015. This figure was estimated to be as high as 69% in another report, see 7iber, "Imprisoning the Victim: Detaining Women Under the Pretext of Protecting Them From 'Honour' Crimes", 21 January 2015, available at: <http://www.7iber.com/2015/01/women-administrative-detention/> (in Arabic).

9 Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Combined third and fourth reports of States Parties: Jordan*, UN Doc. CEDAW/C/JOR/3-4, 10 March 2006, Para 22.

10 CEDAW Committee, *Fifth periodic report of States parties: Jordan*, UN Doc. CEDAW/C/JOR/5, 24 September 2010, Para 37; UN agencies in Jordan, *Violence Against Women in Jordan: Assessing the Situation*, 2010, pp. 26–28; and Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: Addendum, Mission to Jordan*, UN Doc. A/HRC/20/16/Add.1, 14 May 2012, Para 28.

11 See National Centre for Human Rights above note 8, p. 40; see Azzeh above note 8; see 7iber, above note 8; *Ibid*, Human Rights Council, Para 28; and Mizan Law Group for Human Rights, *Alternative Report for Consideration Regarding the Hashemite Kingdom of Jordan's Amalgamated Second, Third and Fourth Periodic Reports to the United Nations Committee Against Torture (CAT)*, 12 April 2010, Para 7.7.

12 Statistics are apparently not kept on the reasons for women's administrative detention by the Department of Correction and Rehabilitation Centers, see 7iber, above note 8.

13 Huesseni, R., "Jordan" in Kelly, S. and Breslin, J. (eds.) *Women's Rights in the Middle East and North Africa: Progress Amid Resistance*, Freedom House; 2010, p. 6.

14 Human Rights Watch, *Guests of the Governor: Administrative Detention Undermines the Rule of Law in Jordan*, 2009, p. 12.

15 See above, note 2.

13 women were reported to be in protective custody;¹⁶ 25 women were reported to be in protective custody in November 2011;¹⁷ and at least seven women were being held as at February 2015.¹⁸ A 2008 documentary clearly indicated reluctance on the part of some officials to disclose the number of women held in protective custody.¹⁹ The majority of women held in protective custody appear to be held in Jweideh Correctional and Rehabilitation Centre, the main prison for women in Jordan.²⁰ They are housed with other inmates in the prison under largely the same rules.²¹

The decision to place a woman in protective custody is made by a local governor on the basis of the Crime Prevention Law of 1954.²² Article 3 of this Law outlines the circumstances in which a person may be subject to administrative detention:

1. *Any person who is found in a public or private place in circumstances that convince the District Governor that he is about to commit, or help in committing crime.*
2. *Any person who is used to banditry, theft or the possession of stolen money, is used to protect or harbor thieves, or helps hiding or disposing of stolen money.*
3. *Any person whose release without a bail might be dangerous to people.*²³

The law is clear in that it applies to those suspected of committing or intending to commit a crime. Yet it is used to justify the detention of women who are themselves the intended victims of crimes, particularly honour crimes.²⁴ Protective custody is used in response to threats or perceived threats against women from their families as a result of being perceived to be immoral due to adultery, consensual sex outside marriage (zina), being seen in the company of a man

16 See above, note 10, Mizan Law Group for Human Rights, Para 7.7.

17 See Human Rights Council above note 10, Para 27.

18 7iber, "Seven Oppressed Women: Witness Accounts on Administrative Detention Under The Pretext of Protection from 'Honor' Crimes", 25 January 2015, available at: <http://www.7iber.com/2015/01/women-detention-testimonials/> (in Arabic).

19 See above, note 2.

20 See National Centre for Human Rights, above note 8, p. 40; see Azzeh above note 8. A new Women's Detention Centre at Um Al-Lulu has recently been opened, Baker, J. and Søndergaard, E., *Conditions for Women in Detention in Jordan: Needs, vulnerabilities and good practices*, DIGNITY, December 2015, p. 14.

21 *Ibid.*, Baker and Søndergaard, p. 29.

22 7iber, "The Honour Decision-Maker: Interview with Regional Governor Hijzai Assaf" 11 February 2015, available at: <http://www.7iber.com/2015/02/administrative-detention-governor/> (in Arabic); see Human Rights Council above note 10, Para 27; Warwick, C., *Law in the Service of Legitimacy: Gender and Politics in Jordan*, Ashgate, 2009, p. 92; and see above, note 14, p. 10.

23 See translation of the law from the National Centre for Human Rights, above note 8, pp. 12–13.

24 See 7iber above note 22; see Human Rights Council, above note 10, Para 27; see Warwick above note 22, p. 92; and Human Rights Watch above note 14, p. 10.

they are not related to, divorcing, marrying without permission and even simply for being absent from or leaving home.²⁵ The Government states that protective custody is for the protection of the women involved as they face threats from their families.²⁶ While some of the governors detaining women may be motivated by a desire to punish them for perceived wrongdoing,²⁷ it is apparent that many genuinely see this as the only option open to them to protect these women.²⁸

The length of time that women may be detained for can extend to many years, with the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noting cases of detention of up to 14 years.²⁹ The case of Maysun Shobaki, who at the time of the rapporteur's report had been detained for 10 years, is illustrative of the situation that women may find themselves in. Maysun was detained in 1996 for three and a half years following a conviction for unlawful sex, having been raped by her brother and nephew. The doctor who examined her following the rape called the police as she was unmarried and had become pregnant. At the end of her sentence, she remained in prison for her own protection, detained by the Governor under the Crime Prevention Law, to be released only if she marries or finds a sponsor. Her inability to leave has led her to contemplate committing suicide.³⁰

Similar stories to Maysun's have been reported elsewhere, although the length of time that women are being detained for has shortened significantly since 2007.³¹ Human Rights Watch reported on several cases of protective custody in 2009, including that of Nizrin. Nizrin was detained by the Governor of Karak having run away from home after she was sexually assaulted by her uncle. She was then raped by a stranger while hiding in an abandoned building. Her uncle reported her missing and she was found by the police. At the time at which she was interviewed, Nizrin had sent more than 10 letters asking to be released and received only two replies asking who would be able to act as her guarantor. Her reply was that she wished to act as her own guarantor. She had been detained for three years.³²

25 Penal Reform International, *Who are women prisoners? Survey results from Jordan and Tunisia*, 2014, pp. 7, 14; see National Centre for Human Rights, above note 8, p. 41; see above, note 14, pp. 10–16; and see Warwick, above note 22, pp. 90–91.

26 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Addendum, Mission to Jordan*, UN Doc. A/HRC/4/33/Add.3, 5 January 2007, Appendix, Para 41.

27 See above, note 2.

28 Equal Rights Trust interview with Jordanian lawyer, 8 August 2015.

29 See above, note 26, Para 39. Other cases of detention of more than 10 years and up to 15 years have been reported, see above, note 2; see above, note 14, p. 11; and Amman Centre for Human Rights Studies, NGOs Coalition Report *Universal Periodical Review of Human Rights in Jordan NGOs Coalition for the UPR – Joint UPR Submission – Jordan, October 2013*, October 2013, Para 4.

30 See above, note 26, Para 40.

31 See above, note 28; and see Tiber, above note 18.

32 See above, note 14, p. 16.

Nadia-Bahia turned herself into the authorities on finding out she was pregnant, worried that her brothers might kill her. The police handed her over to the Governor, who placed her in protective custody. She gave birth to a baby boy who she saw once a month for three years, before he was placed in foster care against her wishes. She has not seen him since.³³ Azza was detained as a minor accused of zina. She was never charged but at the time of being interviewed had been held for 11 years, the last four of which were in protective custody. She described the way she felt about her detention as follows:

*I beg the minister of interior, the minister of justice, the queen and the king to let me out of this place. I've lived here all of my life. Why are we treated this way? I've written so many letters to the Ministry of Interior. So I have a risk from my family? So what? What right do they have to keep people in prison until they die?*³⁴

The feelings of despair and devastation at being detained against her will are not unique to Azza. Rita, detained for 14 years, described her feelings of hopelessness:

*When I entered that place, I was terrified, I was afraid. I never thought I would set foot in that place or meet the people there (...) I got into that place and I felt like a bird locked up in a cage, suffocating and unable to fly around. It's the same with a human being when locked up in a room within four walls. You can't breathe the air. You can't see anything (...) Whoever enters that place is lost. And whoever leaves it is born again. Whoever enters that place feels on the first day that she's going to a funeral (...) There was no freedom. You're locked up 24 hours a day. You have breakfast, lunch and dinner. They'd open the door for you to get it and then they'd lock you up (...) I'm telling you, I thought I'd be there forever.*³⁵

Sophia, detained for 15 years, described similar feelings:

*I used to pray to God for help (...) I used to convince myself that I was moving, but my feelings were numb, as if I didn't exist (...) I felt dead, not alive. But I tried to convince myself that it was wrong to commit suicide and die (...) When you're locked up within four walls for long and you ask yourself why (...) There's no answer.*³⁶

33 See above, note 18, 7iber.

34 See above, note 14, Human Rights Watch, p. 14.

35 See above, note 2.

36 *Ibid.*

One woman reported going on a hunger strike every year due to her inability to secure her release.³⁷ Although women have the right to contest the decision to place them in custody, there are no known cases of women choosing to do so; this is attributed to the weak position of women compared to the pressure and risks they would face in bringing attention to their case.³⁸ Women will be released from custody only if the governor determines that they can be safely released to a guarantor, usually a male family member, sometimes on the written pledge that if he harms her he will forfeit a monetary penalty (reported to be between JD 5,000 and JD 30,000 (approximately US(\$ 7,050 to 42,3000)).³⁹ In some cases, women may be released if they marry the person with whom they were accused of having sex.⁴⁰ In one case, a woman married a man who raped her.⁴¹ Despite guaranteeing that they will not harm the women released to them, there have been numerous cases reported of women who have been killed after being released to male family members. In 2010, a man was convicted of murdering his sister by stabbing her 33 times and beating her with a rock a week after he had signed a guarantee not to hurt her in order to have her released from protective custody.⁴²

The conditions in Jweideh have been described as sparse, relatively clean and with minimal natural light and some ventilation problems. The prison has reportedly been overcrowded at times.⁴³ Some women, particularly those who are considered to have broken social codes, have reported facing stigma and disdain from prison staff.⁴⁴ Although a recent report noted some instances of women being beaten or slapped (including while strip searched),⁴⁵ it is not clear if this has been the case for women in protective custody, and there are no other known reports of any physical violence towards women detained in protective custody or during the process of detaining them.⁴⁶

37 See above, note 20, Baker and Søndergaard, p. 29.

38 See 7iber, above note 8.

39 See Warwick, above note 22, p. 91; Human Rights Watch, *UPR Submission: Jordan*, March 2013, p. 4 (pages unnumbered); see above, note 10, Human Rights Council, Para 28; see above, note 25, Penal Reform International, p. 8; and above, note 14, p. 13.

40 *Ibid.*, Warwick, p. 91.

41 See above, note 20, Baker and Søndergaard, p. 30.

42 Hussein, R., *Man receives 10 years for killing sister*, The Jordan Times, 13 July 2010, available at: <http://www.jordantimes.com/news/local/man-receives-10-years-killing-sister>. For additional examples see Warwick, above note 22, p. 91.

43 See Baker and Søndergaard, above note 20, p. 40.

44 *Ibid.*, p. 31.

45 *Ibid.*, pp. 44–45.

46 None of the individual cases reviewed documented any complaints of physical or mental abuse. One woman noted that, “it wasn’t such a bad centre but it was still a prison”, see above, note 2.

What is clear is that many of the women who are kept in protective custody have faced significant physical or mental abuse, including honour crimes, prior to their detention, for which they require specialist medical care. However, the physical health care provided to these women is not always adequate and mental health care appears to be woefully lacking.⁴⁷ Women are allowed very limited contact with family members, including children. Women with children born outside of marriage are now reportedly allowed no contact at all with these children. These restrictions cause pain and anxiety and often reinforce feelings of isolation. Women in protective custody who have been ostracised by their families have almost no contact with the outside world.⁴⁸

As can be seen from the above, the key features of protective custody are detention in prison: not in accordance with national law; following the determination of a non-judicial state authority that a woman is at risk of harm; which may be prolonged and is likely to be indefinite; and which may lead to severe feelings of despair and hopelessness because of the inability to be released, the lack of control over the risk of being released to the possibility of harm and due to the fact of being detained itself.⁴⁹ Also key is that it is discriminatory, being largely applied to women as a result of the risk of violence directed towards them because they are women.

2. Can Protective Custody Amount to Torture?

The definition of torture is commonly broken down into four elements: severe pain and suffering; intentionally inflicted; for a purpose; and by or with the consent or acquiescence of a public official.⁵⁰ In the context of protective custody, the last of these elements, the involvement of a state official is not in dispute; the women are detained on the authority of the governor. Nor is this a question of a lawful sanction; while it is argued by some that the Crime Prevention Law permits protective custody, it clearly does not.⁵¹ Finally, while there may be some women who consent to protective custody, there are many who do not and it is their experiences that are the subject of this article. While not considered in

47 See Baker and Søndergaard, above note 20, p. 48–51.

48 *Ibid.*, pp. 32, 61.

49 Such features, of course, mean that protective custody is likely to violate a range of human rights, including the rights to freedom of movement and liberty. However, the purpose of this article, as noted above, is to consider only whether protective custody may amount to torture.

50 See above, for example, note 4, Copelon, “Recognizing the Egregious in the Everyday: Domestic Violence as Torture”, p. 308.

51 See the discussion in section one above. Even if the law was amended to allow for protective custody, this would not result in the finding that protective custody is a lawful sanction. Lawfulness in this context includes not just in accordance with national law, but in accordance with international human rights law. Such a discriminatory sanction could never be lawful under international human rights law. Commission on Human Rights, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 B*, UN Doc. E/CN.4/1997/7, 10 January 1997, Paras 7–8.

this article, it is also extremely difficult to see how women without any alternative option open to them such as a shelter or refuge, could be seen as giving free consent. The failure to provide alternatives to protect women from gender-based violence, or indeed to tackle the causes of such discriminatory violence, can hardly lead to an argument that the women consent to detention.⁵²

a. Severe Pain and Suffering

Before considering the pain and suffering caused by protective custody, it is helpful at this point to briefly consider the distinction between torture and other ill-treatment. Unlike the comprehensive definition of torture, the CAT provides only limited reference to acts that are often collectively referred to as “other ill-treatment”. Article 16 states that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.

As with torture, such acts are only prohibited if they “are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.⁵³ Different approaches have been suggested to distinguish between torture and other ill-treatment. One approach is that torture requires a higher or aggravated degree of pain and suffering than other ill-treatment (that is, something beyond severe pain and suffering).⁵⁴ A similar approach also distinguishes between torture and other ill-treatment on the basis of relative pain and suffering, but starts from the premise that only torture requires severe pain and suffering, and other ill-treatment requires pain and suffering that is less than severe. This approach has been termed the severe-minus approach.⁵⁵ The first approach, requiring something more than severe pain and suffering, goes beyond what is required in Article 1 of the CAT, which is severe pain and suffering, and appears now to

52 States are required to take measures to protect women from gender-based violence, including through the provision of refuges. An overview of the obligations of states in relation to discrimination against women and gender-based violence can be found in Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Doc. A/HRC/23/49, 14 May 2013, Paras 70–71; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence Against Women*, Eleventh Session, 1992, Para 7.

53 CAT, Article 16.

54 No definition is provided in any of the other general human rights treaties. See, for example, International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 1966, Article 7; European Convention on Human Rights, Article 3; and American Convention on Human Rights, Article 5(2).

55 See, for example, Committee Against Torture, *Keremedchiev v. Bulgaria*, Comm. No. 257/2004, UN Doc. CAT/C/41/D/257/2004, 21 November 2008, Para 9.3; and Rodley, N. with Pollard, M., *The Treatment of Prisoners Under International Law*, 3rd ed., Oxford University Press, 2009, pp. 98–99, 114.

have fallen out of favour.⁵⁶ A different approach altogether distinguishes torture from other ill-treatment on the basis of the purposes set out in Article 1 of the CAT.⁵⁷ In practice, as will be seen below, it is often difficult to understand the basis on which distinctions between torture and other ill-treatment are made,⁵⁸ and in some cases, a combination of both relative severity and purpose appears to be used.⁵⁹

On either of the approaches relevant to the CAT definition (severe-minus or purpose), in order for protective custody to be considered torture, it must involve the infliction of severe pain and suffering. If the severe-minus approach is adopted, something less than severe pain and suffering may suffice for protective custody to be classified as other ill-treatment. If a purely purposive distinction is adopted, then for protective custody to be either torture or other ill-treatment, it must cause severe pain and suffering. The relevance of this latter distinction to the purpose element of the Article 1 definition will be considered in the following section. For now, with the above discussion of relative severity in mind, this section turns to consider the severity of pain and suffering caused by protective custody.

The individual circumstances of the case in question are key to determining whether protective custody may amount to torture. This includes considering the particular characteristics, and the

56 Article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stated that torture was an “aggravated and deliberate” form of other ill-treatment. However, this wording was deleted during the drafting of Article 1 of the CAT. Nowak, M., “What Practices Constitute Torture?: UN and US Standards” *Human Rights Quarterly*, Vol. 28, 2006, pp. 820–821; see Rodley with Pollard, above note 55, p 99; and Rodley, N., “The Definition(s) of Torture in International Law”, *Current Legal Problems*, Vol. 55, 2002, p. 476.

57 See Rodley with Pollard, above note 55, pp. 98–99. Nowak also takes this approach, but adds also the element of powerlessness of the victim, “the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the purpose of the conduct and the powerlessness of the victim”, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, UN Doc. E/CN.4/2006/6, 23 December 2005, Para 39; Nowak, M. and McArthur, E., *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, p. 77; and Nowak, M. and McArthur, E., “The distinction between torture and cruel, inhuman or degrading treatment”, *Torture*, Vol. 16, 2006. To the extent that this can be considered as adding an additional requirement of powerlessness in order for the definition of torture to be met, this proposition has been strongly contested, see above, for example, note 3, p. 242. Leaving to one side the difficulties inherent with the use of the term powerlessness, in accordance with the meaning Nowak appears to ascribe to this term as meaning in the control of or detained, this element is not problematic in the context of protective custody, where the women are, by definition, detained.

58 For example, the Human Rights Committee, in relation to Article 7 of the ICCPR, will find a violation of the article without making a distinction between whether the circumstances amounted to torture or to other ill-treatment. Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, Para 4.

59 See, for example, *Salman v Turkey*, App. No. 21986/93, 27 June 2000, Para 114. See above, note 7, Committee Against Torture, Para 10.

vulnerability of, the woman involved.⁶⁰ It is clear from the definition in Article 1 that mental suffering alone may be sufficient to meet the threshold of severe pain and suffering required for an act to be considered torture.⁶¹ The conditions of detention are also relevant; conditions which are particularly egregious have of themselves been considered severe enough to amount to cruel, inhuman and degrading treatment and sometimes even to torture.⁶² Although now evidently shorter than it once was, protective custody can be prolonged, stretching from many months to years in some cases. In all cases, detention is arbitrary and in many cases, it is also indefinite. Although legally the women detained may challenge their detention, it is clear that this is not a viable option in practice due to the vulnerability of these women and the risks that they would face in doing so. Women therefore wait on the discretion, often not exercised, of the governor to be released.⁶³

The suffering caused by detention in and of itself has been recognised as both inhuman and degrading treatment, and considered within the ambit of torture. In *Vinter v United Kingdom*,⁶⁴ the applicants alleged that the sentence of life imprisonment with whole life tariffs (with only the possibility of release on compassionate grounds if the applicant was to die within three months of release) violated Article 3 of the European Convention on Human Rights (ECHR) because of the sense of hopelessness it imposed. The European Court of Human Rights (ECtHR) held that “grossly disproportionate” sentences would violate Article 3 of the ECHR.⁶⁵

In a 2013 complaint, the Human Rights Committee (HRC) found that periods of detention of 14 months and of two years violated Article 7 of the International Covenant on Civil and Political Rights (ICCPR):

*The Committee considers that the combination of the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.*⁶⁶

60 Committee Against Torture, *Dzemajl v Yugoslavia*, Comm. No. 161/2000, UN Doc. CAT/C/29/D/161/2000, 21 November 2002, Para 9.2; and Human Rights Committee, *Vuolanne v Finland*, Comm. No. 265/1987, 1989, Para 9.2.

61 See, for example, Human Rights Committee, *Estrella v Uruguay*, Comm. No. 74/1980, UN Doc. CCPR/C/18/D/74/1980, 1983, cited in note 55, Rodley with Pollard, pp. 97–98.

62 This latter finding was in relation to “infernal conditions”, Human Rights Commission, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1994/37 Addendum: Visit by the Special Rapporteur to the Russian Federation*, UN Doc. E/CN.4/1995/34/Add.1, 16 November 1995, Para 71.

63 See discussion in section one above.

64 *Vinter and Others v the United Kingdom*, App. Nos. 66069/09, 130/10 and 3896/10, 9 July 2013, Para 78.

65 *Ibid.*, Para 102.

66 Human Rights Committee, *F.K.A.G. et al v Australia*, Communication No. 2094/2011, 20 August 2013, Para 9.8.

It is not clear whether the HRC or the ECtHR considered that indefinite detention could amount to torture, as each referred to a violation of the prohibition against torture and other ill-treatment taken as a whole. However, the Special Rapporteur on torture has stated that uncertainty over the length of detention may lead to mental suffering severe enough to constitute torture. Recognising the sense of hopelessness that detention can cause, he noted:

With respect to indefinite detention of detainees the mandate finds that the greater the uncertainty regarding the length of time, the greater the risk of serious mental pain and suffering to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.⁶⁷

As discussed above, women in protective custody reported feelings of despair and hopelessness in response to their ongoing arbitrary and indefinite detention such that they considered committing suicide or went on hunger strikes. This mental suffering may be further compounded by the other circumstances that women may face in protective custody, the cumulative effect of which must be considered together.⁶⁸ Women in protective custody are often in a situation of particular vulnerability due to the experiences that lead to them being detained, which can involve serious physical and mental abuse. Some women have survived being stabbed, burnt or shot, or have seen their sisters killed. In addition to this, some are forced to give up their new-born babies.⁶⁹ These vulnerabilities are then exacerbated by a lack of both physical and mental health care in detention, and in some cases, by the stigma that they face from staff. It is clear that women may therefore have, or be at risk of developing, mental health problems while in detention, and reports of self-harm support this conclusion.⁷⁰ Denial of health care itself, including mental health care, has been considered a violation of Article 3 of the ECHR and Article 7 of the ICCPR.⁷¹ Reports that isolation is used in response to cases of self-harm, and that staff react with disdain to such incidents, have been made in relation to Jweideh, although it is not clear if these reports relate to women in protective custody.⁷²

67 OCHCR, “Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay”, 3 October 2013, available at, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&#sthash.fpmPLPXh.K0ZINBd3.dpuf>. See also OHCHR, “IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health reiterate need to end the indefinite detention of individuals at Guantanamo Naval Base in light of current human rights crisis”, 1 May 2013, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13278&LangID=E#sthash.RL8zOgfs.dpuf>.

68 See Rodley with Pollard, above note 55, pp. 92–94.

69 See Baker and Søndergaard, above note 20, p. 50.

70 *Ibid.*, p. 32.

71 See Rodley with Pollard, note 55, pp. 408–410.

72 See Baker and Søndergaard, above note 20, pp. 46, 51.

The circumstances that women face may also include feelings of fear or powerlessness due to the risk of being released to family members who may harm them (or who have the ability to control whether they are released or not), the pain of being denied the ability to see their children, and in some cases, being effectively shut off from the outside world. Women may also face discriminatory attitudes from prison staff and are at least at risk of some physical violence. The level of mental suffering that women in protective custody experience can drive them to what can only be described as utter desperation, such as in the case of the woman who married her own rapist to secure her release, or where women self-harm.⁷³

The previous Special Rapporteur on torture, speaking about protective custody in Jordan, concluded that “depriving innocent women and girls of their liberty for as long as 14 years can only be qualified as inhuman treatment, and is highly discriminatory.”⁷⁴ It is not clear what the circumstances of the cases being considered by the Rapporteur were or why they were not considered torture. However, the current Special Rapporteur, speaking about women who have experienced rape, honour crimes or other abuse, has noted that placing women in custody to “protect” them “can amount to torture or ill-treatment per se”.⁷⁵ Based on the circumstances described above, some extreme cases of protective custody may lead to mental suffering severe enough to reach the necessary threshold for torture, particularly where detention is prolonged and without hope of release, women experienced violence and abuse prior to entering custody, and when women are experiencing mental health problems and are effectively shut off from the outside world. The next part of this section will therefore consider whether the remaining elements in the definition of torture, intent and purpose, can be found in cases of protective custody.

b. Intent and Purpose

The second and third elements of the definition of torture are the requirements that the pain and suffering be intentionally inflicted on the person, and that this must be for one of the listed purposes.⁷⁶ While these are commonly considered as two separate elements,⁷⁷ they will initially be addressed together here as the line between them often appears blurred when the discriminatory purpose element of the definition is being considered. Both the intent and purpose elements have been subject to considered discussion

73 *Ibid.*, pp. 30, 54.

74 See above, note 26, Para 39.

75 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/31/57, 5 January 2016, Para 24.

76 CAT, Article 1.

77 See above, for example, note 4, Copelon, “Recognizing the Eggregious in the Everyday: Domestic Violence as Torture”, p. 308.

elsewhere.⁷⁸ However, what does not appear to have been explored is how the relationship between intent and a discriminatory purpose interact, if at all, and the significance of the differently phrased discrimination element. The significance of this lack of discussion becomes evident when considering those cases of protective custody in which a woman is detained with “good intentions” (to protect her) but which arise from discrimination. When no other purpose (punishment, intimidation or similar) applies, the sole way in which a woman’s detention may meet the definition of torture is to meet the discriminatory purpose requirement, “for any reason based on discrimination of any kind”.

Discussions of discriminatory purpose often appear to lack detailed reasoning – links between the act, perpetrator and discriminatory purpose often appear to be assumed rather than carefully examined. Similarly, comments made by the Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment and the Committee Against Torture, are often brief and do not appear to shed clear light on the issue. In his annual report to the HRC, then Special Rapporteur on torture, Manfred Nowak, stated that:

*In regard to violence against women, the purpose element is always fulfilled, if the acts can be shown to be gender-specific, since discrimination is one of the elements mentioned in the CAT definition. Moreover, if it can be shown that an act had a specific purpose, the intent can be implied.*⁷⁹ (footnote omitted)

Acts that are gender-specific are noted to be:

*I.e. violence that is gender-specific in its form or purpose in that it is aimed at “correcting” behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women.*⁸⁰

Referring to this statement, the current Special Rapporteur, Juan Mendez, has noted that:

*The mandate has stated, with regard to a gender-sensitive definition of torture, that the purpose element is always fulfilled when it comes to gender-specific violence against women, in that such violence is inherently discriminatory and one of the possible purposes enumerated in the Convention is discrimination.*⁸¹

78 See, for example, Hathaway, O., Nowlan, A. and Spiegel, J., “Tortured Reasoning: The Intent to Torture Under International and Domestic Law” *Virginia Journal of International Law*, Vol. 52; see Nowak and McArthur, above note 57, *The United Nations Convention Against Torture: A Commentary*; and Burgers, J. H. and Danelius, H., *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment*, Martinus Nijhoff Publishers, 1988.

79 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, UN Doc. A/HRC/7/3, 15 January 2008, Para 30.

80 *Ibid.*, Para 30, fn 5.

81 United Nations General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, UN Doc. A/HRC/22/53, 1 February 2013, Para 37.

It is not clear what the reference to a “specific purpose” is in relation to Nowak’s first statement, and how this relates to the requirement for intent, presumably this is something more than the discrimination shown which fulfils the purpose element. In relation to intent, Nowak later stated:

[T]he requirement of intent in article 1 of the Convention against Torture can be effectively implied where a person has been discriminated against.⁸²

Specifically referring to the concept of “good intentions”, Mendez, in a 2013 report, noted that:

The mandate has stated previously that intent, required in article 1 of the Convention, can be effectively implied where a person has been discriminated against on the basis of disability. This is particularly relevant in the context of medical treatment, where serious violations and discrimination against persons with disabilities may be defended as “well intended” on the part of health-care professionals. Purely negligent conduct lacks the intent required under article 1, but may constitute ill-treatment if it leads to severe pain and suffering.⁸³ (footnote omitted)

These various statements appear to indicate that either, or both of, intent and purpose can be assumed where there is discrimination. In relation to the situation of “good intentions”, Mendez went on to note that:

Although it may be challenging to satisfy the required purpose of discrimination in some cases, as most likely it will be claimed that the treatment is intended to benefit the “patient”, this may be met in a number of ways. Specifically, the description of abuses outlined below demonstrates that the explicit or implicit aim of inflicting punishment, or the objective of intimidation, often exist alongside ostensibly therapeutic aims.⁸⁴ (footnotes omitted)

No indication is provided of what is required to satisfy the required purpose of discrimination; rather, reference is made to the other purposes listed in Article 1. Lorna McGregor, in her article examining the application of the definition of torture to human trafficking, also notes the difficulties in establishing the discriminatory purpose of trafficking in order to meet the definition:

The difficulty with discrimination under the Convention definition, however, is that it requires a specific purpose of discrimination, as opposed to international

82 United Nations General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/63/175, 28 July 2008, Para 49.

83 See above, note 81, Paras 19–20.

84 *Ibid.*, Para 22.

*human rights law more generally which can find discrimination on grounds of discriminatory effect.*⁸⁵

In his most recent report, which did not reference the issue of “good intentions”, Mendez stated that “[t]he purpose and intent elements of the definition of torture (...) are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex.”⁸⁶ It is not made clear what acts may be considered gender-specific, but general reference is made to Nowak’s report explaining gender-specific acts (noted above).

These various statements give rise to several questions. What is required in order to demonstrate a discriminatory purpose? What is the relationship between discrimination and establishing intent, if any, and how is this established? Is there a requirement that the perpetrator of torture intend to discriminate? These questions are particularly significant in light of the evolution of the international human rights law prohibition of discrimination, which does not require proof of a discriminatory intention on the part of the perpetrator, but allows for a finding of discrimination on the basis of discriminatory effect.⁸⁷ This part will turn to examining whether the language of the CAT or its drafting history shed any light on these questions. The significance of the prohibition of discrimination to the interpretation of the CAT will then be explored in section three.

At this point, it is helpful to return to the language of Article 1 itself as a starting point. Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention) sets out the basic rule of treaty interpretation, namely that:

*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*⁸⁸

In order to confirm the meaning arrived at from the application of the basic rule, or where the application of this basic rule leaves the meaning obscure or ambiguous, “[r]ecourse may be

85 See above, note 5, p. 219.

86 See above, note 75, Para 8.

87 *Declaration of Principles on Equality*, the Equal Rights Trust, London, 2008, Principle 5. See, for example, the definitions of discrimination contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), G.A. Res. 2106 (XX), 1965; Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, 1979; and Article 2 of the Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006. See also the discussion in section three of this article.

88 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 1969; and Hall, K.C., “The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad”, *European Journal of International Law*, Vol. 18, 2008, p. 923.

had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”⁸⁹

The drafting history of the CAT sheds very little light on the discriminatory purpose aspect of the definition, other than that it was included by Sweden in a revised version of its proposed draft of Article 1, which formed the basis for the discussions of the Working Group responsible for the CAT.⁹⁰ The UK objected to its inclusion, requesting that the following statement be included in the drafting history:

*The United Kingdom shares the concern to eliminate all forms of torture, including any motivated by discrimination. The United Kingdom is doubtful of the need to isolate this particular motivation and in practical terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence.*⁹¹

This objection was not apparently discussed further and the inclusion of the discriminatory purpose clearly subsequently found favour. The fact that other delegates did not apparently share the concern of the UK may indicate that they did not consider that there would be any need to demonstrate a discriminatory motive, or that they did not think that establishing this would be problematic. However, given the absence of any recorded discussion, it is impossible to draw a conclusion one way or the other. There was otherwise no discussion of the wording of the discriminatory purpose or its inclusion in the definition and so there is no indication of any reasons why discrimination was set apart from the other purposes.⁹² This leaves the ordinary meaning of the words to stand for themselves.

What is clear on reading Article 1 for its ordinary meaning, is that the wording of the discriminatory purpose section – “for any reasons based on discrimination of any kind” – is set apart from, and differs from, the wording in relation to the other purposes – “for such purpose as”. The phrase is clearly set apart by the use of the words “or for”⁹³ and is distinct in that it refers

89 *Ibid.*, p. 923.

90 Compare the wording in the 1979 revised draft, “Draft convention against torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sweden”, UN Doc. E/CN.4/WG.1/WP.1, 1979, with that in the 1978 original draft, “Draft convention against torture and other cruel, inhuman or degrading treatment or punishment, submitted to the Commission on Human Rights by Sweden,” UN Doc. E/CN.4/1285, 1978. For an overview of the drafting history, see above, note 57, Nowak and McArthur, *The United Nations Convention Against Torture: A Commentary*, pp. 29–50.

91 United Nations, *Report of the Commission of Human Rights on its Thirty-Fifth Session*, UN Doc. E/CN.4/1347, 1979, p. 39.

92 See above, note 57, Nowak and McArthur, *The United Nations Convention Against Torture: A Commentary*, pp. 29–50.

93 Miller, G.H., *Defining Torture*, Floersheimer Center for Constitutional Democracy, Benjamin N. Cardozo School of Law, 2005, p. 16.

to *reasons based on* discrimination rather than purposes – the discriminatory purpose is not truly a purpose at all; what the definition does not say is “for such purposes as discrimination”. Arguably, the latter may require knowing or intentional discrimination. When read in the context of the entire definition, “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any reason based on discrimination of any kind”, the infliction of the act is linked to the reason, which reason must be based on discrimination, but not itself, discrimination.

The question then becomes, what does it mean for a reason to be *based on* discrimination? There are two alternatives: to read this as requiring some knowing or intentional discrimination, or to read this as requiring that discrimination is taking place, albeit unknown to the perpetrator. In the context of protective custody (assuming that there is no alternate purpose), the reason for the act (of detention) is to protect the woman from violence. The person placing the woman in detention may or may not know that the practice of protective custody is discriminatory, both in that it affects significantly more women than men and that it is based on traditional views of women which require them to accord with their family’s wishes. The perpetrator may, in fact, be aware of both of these things, but not consider them to be discrimination.

The first view – to require knowing or intentional discrimination – would eliminate from the definition’s reach all those situations of “good intentions” which are based unknowingly on discriminatory notions, such as the practice of sterilising women with disabilities for “their own good”. This view would be supported by those who consider that torture requires an element of *mens rea* because it requires the pain and suffering to be inflicted *for a purpose*; that is, the definition of torture taken as a whole requires specific intent (this should be distinguished from the element of intent in the definition itself, which is discussed below).⁹⁴ It could be argued that the discriminatory purpose, coming as it does immediately following the list of purposes, may also similarly require an element of *mens rea*. However, many of those who argue for a *mens rea* element do not appear to have considered whether the different wording of the discriminatory “purpose” renders it not a purpose at all in light of the use of the words “any reason based on”.⁹⁵ In light of the different wording, the argument can be made that no element of *mens rea* is required. In the case of protective custody, if a requirement of *mens rea* is contained in the definition of torture (as it relates to discrimination), whether protective custody could possibly amount to torture at all would require a finding of knowing or intentional discrimination on the part of the perpetrator. Such a requirement would fail to highlight the discriminatory *effect* of protective custody on women.

If an element of *mens rea* is required, this would seemingly place an almost insurmountable hurdle in the way of those trying to argue that a perpetrator discriminated, by requiring

94 See Hathaway, Nowlan and Spiegel, above note 78, p. 795.

95 Hathaway et al, for example, do not give any consideration to the different wording, simply placing discrimination in with the list of other purposes. *Ibid.*

proof of knowing or intentional discrimination. However, as Hathaway notes, the Committee Against Torture has inferred the requisite mens rea from the facts of the case, without requiring direct evidence of the perpetrator's state of mind.⁹⁶ The Committee has itself noted that:

*[E]lements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances.*⁹⁷

Nonetheless, this is arguably more difficult in relation to discrimination, which may be much less evident than, for example, an attempt to force a confession through violence. In cases of protective custody, how can any distinction be drawn between those governors who place women in detention knowing that this is discriminatory and those who do not? The factual scenario could arguably be almost identical (unless some express discriminatory statement is made to this effect). Problematically, even in a case where the torture was blatantly discriminatory in motive, the discriminatory aspect was completely overlooked by the Committee Against Torture.⁹⁸ This casts some doubt on whether knowing or intentional discrimination will always be identified when it must be inferred from the facts. If mens rea is required, can the comments of the Special Rapporteurs be taken such that in any case of discriminatory effect, it will be assumed that there is the requisite knowing discrimination? Mendez's hesitation over the challenges in establishing the required discriminatory purpose would suggest perhaps not,⁹⁹ although his more recent comments may suggest discriminatory effect is sufficient.¹⁰⁰

Similar considerations come in to play when considering the intent element of the definition of torture. As noted above, it is argued that the definition of torture taken as a whole requires specific intent due to the use of the words, *for a purpose*. In addition to this, some have argued that the element of intent itself imports a requirement that the perpetrator must intend to both cause pain and suffering and intend to do so for a purpose. Nowak states that, following from the wording of the section, "[i]ntent must intend that the conduct inflict severe pain and suffering and intend that the purpose be achieved by such conduct."¹⁰¹ Thus if severe

96 *Ibid.*, p. 823.

97 See above, note 7, Committee Against Torture, Para 9.

98 In *Dragan Dimitrijevic v Serbia and Montenegro*, Comm. No. 207/2002, UN Doc. CAT/C/33/D/207/2002, 29 November 2004, despite accepting the evidence of the complainant that the police officers referred to his "gypsy mother", knowing that the complainant was of Roma origin and the complainant's allegation of discriminatory motive on the part of the police, the Committee made no mention whatsoever of discrimination in its finding of torture.

99 See above, note 81, Para 22.

100 See above, note 75, Para 8.

101 See Nowak, above note 56, p. 830. See also Nowak and McArthur, above note 57, *The United Nations Convention Against Torture: A Commentary*, p. 74; and Hathaway, Nowlan and Spiegel above note 78, pp. 799–800.

pain and suffering was caused as part of necessary medical treatment, the doctor would lack the required intent because the severe pain and suffering was unintended and a side effect.¹⁰² This may have been what Nowak meant by “if it can be shown that an act had a *specific purpose*, the intent can be implied (emphasis added)”.¹⁰³

The distinction between general and specific intent in regard to causing pain and suffering has been a much debated and contentious aspect of the definition, as was highlighted by the criticism over the US “torture memos”.¹⁰⁴ General intent would require that the act that caused pain and suffering was done deliberately in the sense that it was not accidental or the result of disease (that is, the act was volitional). On the other hand, specific intent would require the perpetrator to intend to cause the pain and suffering (i.e. his or her objective must be to cause severe pain and suffering and to do so for one of the purposes specified).¹⁰⁵ In the case of protective custody, taking this latter view would require that the woman was detained as a result of a deliberate act and that the purpose was to cause her pain and suffering through that detention. This approach again rules out instances of “good intentions” from falling within the definition of torture.

The requirement of a specific intention to cause pain and suffering has been rejected by many on the basis that it can be used to excuse acts that are clearly within the traditional conception of torture. The torture memos provide one example, excluding interrogation from the definition where pain and suffering was not the “precise objective”, but a “side-effect”. Returning again to the language of the definition, a requirement that the perpetrator specifically intend to cause pain and suffering also appears to be superfluous, given that the definition goes on to require that the act be carried out “for a purpose” or “for any reason based on discrimination”.¹⁰⁶ The drafting history in this regard does shed some light on the situation and would appear to support a reading that does not require specific intent to cause pain and suffering. Proposals by the US that the pain and suffering be “deliberately and maliciously inflicted” and by the UK that it be “systematically” inflicted both failed.¹⁰⁷ The failure of its proposal led the US to clarify its understanding upon ratification that “in

102 See Nowak and McArthur above note 57, *The United Nations Convention Against Torture: A Commentary*, p. 74, fn 179; and Burgers and Danelius, above note 78, p. 119.

103 See above, note 79, Para 30.

104 See Hathaway, Nowlan and Spiegel, above note 78, pp. 792–794.

105 *Ibid.*, pp. 792–794; Rodley, N. and Pollard, M., “Criminalisation of torture: state obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”, *European Human Rights Law Review*, 2006, pp. 124–125; and above, note 4, Copelon, “Recognizing the Eggregious in the Everyday: Domestic Violence as Torture”, p. 325.

106 *Ibid.*, Rodley and Pollard, pp. 124–125.

107 See Hathaway, Nowlan and Spiegel, above note 78, pp. 803–804; and see above, note 4, Copelon, “Recognizing the Eggregious in the Everyday: Domestic Violence as Torture”, p. 325.

order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering”.¹⁰⁸

What then of the comments of the Special Rapporteurs that intent can be implied “where a person has been discriminated against”?¹⁰⁹ The better view, in light of the reasons given above, is simply that the intent requirement is one of general intent, and there is therefore no need to show intent when it is evident that the act was simply not accidental or negligent. Alternatively, if specific intent to cause pain and suffering is required, does discrimination against the person suffice to show that specific intent? Is the assumption made that the perpetrator will always intend to cause pain and suffering in instances of discrimination? Perhaps the Rapporteurs here may be, as noted above, making a reference to intent being assumed in the broader sense, in line with those who argue for an element of *mens rea* when the definition is read as a whole.

What is evident from the above is that there is not a clear answer to any of the questions posed. In relation to the element of intent, the position most supported by the language and drafting history of Article 1 is that there is no need to show an intent to cause pain and suffering, however, this is not undisputed. In relation to the purpose element, while there is clearly a distinction between “for such purpose as” and “for any reason based on discrimination”, this does not help to draw any concrete conclusions about what a reason *based on* discrimination amounts to and whether the discriminatory aspect of the definition also requires an element of *mens rea*. At its narrowest, it could be argued that Article 1 requires an intent to discriminate, whereas at its widest, it could incorporate acts that inflict severe pain and suffering and that are shown on the whole to impact a particular group more than others (without the need to show any particular intent on the part of a specific perpetrator towards a specific person). In the middle – and arguably supported by the wording of the Article – is the idea that the perpetrator must have a reason for carrying out the act and this reason must in some way be related to discrimination. There are then two variations of this middle ground: a requirement of knowing discrimination (some awareness on the part of the perpetrator of their own prejudices); or no requirement of knowing discrimination, simply an objective link between the reason and the discrimination (that is, the perpetrator’s reason is related to discrimination). The next section will argue that any need to demonstrate intent or awareness of discrimination on the part of the perpetrator is apparently at odds with both the intention of the CAT itself and the prohibition of discrimination in international human rights law.

108 United Nations, “United Nations Treaty Collection: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en (online database); see Nowak, above note 56, p. 830; and Bagchi, A., “Intention, Torture, and the Concept of State Crime”, *Penn State Law Review*, Vol. 114, 2009, p. 15.

109 See above, note 82, Para 49; and above, note 81, Para 20.

3. An Argument for a Broad Reading of Article 1

As noted above, the basic rule of treaty interpretation is that a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. What has been absent from the above discussion so far is a consideration of the context, and the object and purpose, of the CAT. This section will demonstrate that, when Article 1 is considered in light of both its context and its object and purpose, an argument can be made that any reading of the Article which requires an intent to discriminate or some conscious or knowing discrimination on the part of the perpetrator should be rejected, thus bringing situations of “good intentions” which are based on discriminatory notions within the scope of Article 1.

At the outset, it must be remembered that the object and purpose of human rights treaties sets them apart from other international treaties. By their very nature, they are treaties designed to protect the rights of individuals from infringement by the state.¹¹⁰ Human rights treaties should therefore be read to make effective the protections that they offer to those rights.¹¹¹ It is clear from the Preamble of the CAT, and the entirety of its provisions, that its object and purpose is to prevent torture and other cruel, inhuman and degrading treatment.¹¹² It requires states to prohibit torture and also to implement a number of steps that aim to prevent torture from occurring.¹¹³ It must be remembered that torture involves acts with some form of state involvement (i.e. it is concerned with the culpability of the state) and not the acts of private individuals (except to the extent that these invoke the state’s due diligence obligations).¹¹⁴ If a requirement of intentional or knowing discrimination was read into Article 1, protective custody could only amount to torture in those instances where governors were aware that the practice was discriminatory (assuming none of the other purposes was met). Therefore, all other circumstances being equal, the attitude of the governor would be the determining factor in whether the practice may amount to torture. This inconsistency of results would appear to completely defeat the object and purpose of the CAT; the state is at fault in both cases as the use of protective custody arises from discriminatory attitudes against women (which the state fails to address)¹¹⁵ and the impact on the women involved

110 See, for example, Inter-American Court of Human Rights, *Advisory Opinion OC-2/82: The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, 24 September 1982, Para 29; and *Wemhoff v Germany*, App. No. 2122/64, 27 June 1968, Para 8.

111 See, for example, *Soering v the United Kingdom*, App. No. 14038/88, 7 July 1989, Para 87.

112 The Preamble includes the words, “[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”.

113 See above, note 7, Committee Against Torture, Para 2.

114 See Bagchi, above note 8, p. 6.

115 It is recognised that in such circumstances the state may be considered to have acquiesced in the treatment of the woman that resulted in her needing protection. However, this would make the initial act against the woman torture (if all other elements were met), and not the subsequent detention. See above, for example, note 75, Paras 10–12.

is identical regardless of the governors' motives. Therefore, a requirement of intentional or knowing discrimination becomes increasingly questionable.¹¹⁶

Perhaps even more significant is considering the CAT in light of “[a]ny relevant rules of international law applicable in the relations between the parties”; the last of three factors specified by the Vienna Convention to be taken into account together with context, when interpreting a treaty.¹¹⁷ This reference to the rules of international law includes both treaties and customary international law.¹¹⁸ The International Court of Justice has held that the interpretation of a treaty must take into account developments in the law since its adoption and moreover; that a treaty must be interpreted in light of the legal framework in place at the time of interpretation.¹¹⁹ This opens the way for, and in fact requires, the CAT to be interpreted in light of the understanding of the prohibition of discrimination in current international human rights law.¹²⁰

International human rights law does not require intent in order to find that there has been discrimination. It is clear from the definitions contained in the treaties relating to discrimination that they encompass both intended and unintended discrimination. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), for example, employs the wording:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.

The use of the phrasing “purpose or effect” shows that unintended discrimination is included. Similar wording, “effect or purpose” is used in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 2 of the Convention on the Rights of Persons with Disabilities. In addition, the HRC has adopted a definition of discrimination encompassing both purpose and effect in relation to the IC-

116 *Ibid.*

117 Vienna Convention on the Law of Treaties, Article 31(3)(c).

118 Fitzmaurice, M., “Interpretation of Human Rights Treaties” in Shelton, D. (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, p. 749.

119 International Court of Justice, *Legal Consequences for States of the continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276*, 21 June 1971, Para 53; *ibid.*, p. 750.

120 The recent comments of the current Special Rapporteur on torture support this approach, “[t]he protection framework must be interpreted against the background of the human rights norms that have developed to combat discrimination.” See above, note 75, Para 9.

CPR.¹²¹ To require a discriminatory intent or knowledge on the part of the perpetrator in order for torture to be found would therefore in effect read down the scope of discrimination for the purposes of the CAT. To do so would appear to fail to take into account the current, relevant legal framework.

Moreover, although discrimination law has continued to evolve in the three decades since the CAT was adopted, these definitions of discrimination were already in place at the time of its adoption in both the CERD¹²² and the CEDAW.¹²³ Therefore, there is limited scope for dispute over a reading in line with the evolution of discrimination law as the concept of discriminatory effect was already known to international law.

Finally, and significantly, to exclude situations where no discriminatory intent or awareness can be shown on the part of the perpetrator would run contrary to the requirement on states to prohibit discrimination, apparent in both treaties and international customary law.¹²⁴ The ICCPR requires both that states apply the rights contained therein without distinction of any kind¹²⁵ and that national laws “shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground”.¹²⁶ To require discriminatory intent to be shown in order to find that torture has occurred would apply a distinction in the application of the right through the omission of unintended discrimination. Similarly, it would build situations of unintended discrimination into national laws prohibiting torture. It would allow the state to turn a blind eye to discrimination or condone discrimination, so long as the individual perpetrators themselves had “good intentions”. But such “good intentions” are themselves often the result of discrimination.

121 Human Rights Committee, *General Comment 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1, 1994, Para 7.

122 CERD, Article 1(1).

123 CEDAW, Article 1.

124 The scope of the prohibition in international customary law is subject to debate, but arguably race, religion and gender are recognised as prohibited, with the prohibition on racial discrimination having reached the status of a pre-emptory norm. See, De Schutter, O., *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, 2010, pp. 64–68 and the materials referred to therein; Pellett, A., “Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion against the Excess of Fragmentation” *Finnish Yearbook of International Law*, Vol. 17, 2006, p. 85; Cassel, D., “Equal Labor Rights for Undocumented Migrant Workers”, in Bayefsky, A. (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, Martinus Nijhoff Publishers, 2006, pp. 511–512; and Bianchi, A., “Human Rights and the Magic of Jus Cogens”, *The European Journal of International Law*, Vol. 19, 2008, p. 506.

125 ICCPR, Article 2(1).

126 *Ibid.*, Article 26.

Conclusion

What is most evident from the discussion above is that there is a need for clarity in relation to discriminatory torture. This area has been long neglected to date, and its development can at best be described as patchy and lagging behind many other areas of international human rights law. Cases of discriminatory “good intentions” such as protective custody further evidence that this aspect of the torture definition must now be addressed. Protective custody may, in extreme cases, result in pain and suffering severe enough to be considered torture. However, if the definition of torture requires intentional or knowing discrimination, such practices, when implemented with “good intentions”, will not be considered torture. This seems a particularly odd result when protective custody is very often implemented in response to gender-based violence, which itself can be considered torture.¹²⁷ In order to ensure that the discriminatory aspect of such practices and their severity is highlighted and subsequently combated, a reading of Article 1 which does not require the perpetrator to intend to discriminate or have any awareness of their own discriminatory attitudes should be preferred. While this discussion has focussed on the CAT definition, it is also evident, and has been touched upon, that the lack of clarity around torture extends to other treaty bodies and mandates and regional courts. Given the absolute nature of the prohibition of torture, clarity is required across jurisdictions, in particular to ensure that discriminatory torture cannot ever be allowed in the guise of “good intentions”, which arise as a result of discriminatory attitudes in a particular country.

127 See above, note 81, Para 37.

The Constitutionality of the “Homosexual Advance Defence” in the Commonwealth Caribbean

Se-shauna Wheatle¹

Introduction

Defences to homicide have often been characterised as “concessions to human frailty”.² The challenge for legislators and judges has been to determine the breadth of the permissible concessions and the categories of human frailty that ought to be accommodated by the law. A series of appellate decisions in the Commonwealth Caribbean in cases concerning the killing of gay men have ignited debate about the nature and application of defences to homicide. The main defences accepted by the courts in these decisions were justifiable homicide (a complete defence to murder which results in acquittal on the ground that the homicide was done in service of the state) and provocation (a partial defence to murder which results in a conviction of manslaughter on the ground that the defendant was provoked to lose his or her self-control). In each case, the basis of the defence was founded on a “homosexual advance defence”, that is, an allegation that the defendant killed the victim in response to an unwanted same-sex sexual advance. The success of such homosexual advance defences sits uneasily with the requirements of Commonwealth Caribbean constitutions, which mandate that the constitutions are “supreme law” and that all other laws must be modified, invalidated or abolished if they fall short of constitutional standards.³ At the centre of the debate over defences to homicides of gay men, particularly in the context of constitutional rights, is the question whether the human frailty accommodated by the law can, or ought, to include fear and stereotypes of same-sex sexuality.

This article presents a critical analysis of the homosexual advance defence in the Commonwealth Caribbean. It is argued, through a thematic presentation of the case law and comparative analysis, that the application of the defences of provocation and justifiable homicide in gay homicide cases is inconsistent with constitutional rights in Commonwealth

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2 *R v Kirkham* (1837) 8 C. & P. 115, p. 119; and Horder, J., *Provocation and Responsibility*, Oxford University Press, 1992.

3 See, for example, Constitution of Barbados, Section 1; Constitution of Jamaica, Section 2; Constitution of Trinidad and Tobago, Section 2; and Constitution of St Vincent and the Grenadines, Section 101.

Caribbean states. It is argued that continued reliance on a homosexual advance defence is inconsistent with the rights to life and equality in Commonwealth Caribbean constitutions. Section one of the article examines the gendered, heteronormative development of provocation and justifiable homicide. Section two analyses the right to equality in Commonwealth Caribbean constitutions and discusses the extent to which the homosexual advance defence under both provocation and justifiable homicide contravenes that right. In section three, it is argued that the application of justifiable homicide as a homosexual advance defence contravenes the right to life in Commonwealth Caribbean constitutions, as it excludes considerations of the reasonableness and proportionality of the use of lethal force in response to a non-lethal attack. Though different textual issues arise under the analysis of each right, at the core of the violation of both the right to life and the right to equality is the fact that the homosexual advance defence incorporates and perpetuates prejudices against gay men and provides insufficient respect for, and protection of, the lives of gay men. Thus, section four briefly suggests remedial steps for resolving the tension between the homosexual advance defence and Caribbean constitutional rights guarantees.

1. Heteronormative Development of Justifiable Homicide and Provocation

The historical development of justifiable homicide and provocation and their application in gay homicide cases is a manifestation of heteronormative conceptions of masculinity.⁴ The defence of provocation rests on the limbs that “the defendant was provoked into losing his self-control” and second, that the provocation was such that it was capable of causing the “reasonable man” to do as the defendant did.⁵ As it was originally constructed to address brawls and struggles between men, the defence has been criticised on the basis that it legitimises violence, and in particular, violence by men.⁶ Jeremy Horder has persuasively argued that the historical development of the defence of provocation licensed rage in men and the violent manifestation of that rage as a matter of defence of honour.⁷ Defence of honour had, and still has, implications in the realm of sexuality and relationships as is evident in the availability of the defence where there was a threat to traditional conceptions of masculinity through sexual infidelity or a homosexual advance.⁸ For instance, in the formulation of the

4 Heteronormativity is used to refer to the belief in prescribed roles for men and women and in the norm of heterosexuality. In this sense, it applies both to normative prescriptions for gender and sexuality. See discussion in Jackson, S., “Gender, sexuality and heterosexuality: the complexity (and limits) of heteronormativity” *Feminist Theory*, Vol. 7, 2006, p. 107.

5 *Holmes v DPP* [1946] 2 All ER 124, p. 128; and *Philbert v The State* (unreported, Eastern Caribbean CA, Dominica), 30 April 2012, Para 21.

6 Pei-Lin Chen, C., “Provocation’s Privileged Desire: the Provocation Doctrine, ‘Homosexual Panic’, and the Non-Violent Unwanted Sexual Advance Defense”, *Cornell Journal of Law and Public Policy*, Vol. 10, 2000–2001, p. 220; and Gray, A., “Provocation and the Homosexual Defence in Australia and the United States: Law out of Step with Community Values”, *The Crit*, Vol. 3, 2010, p. 55.

7 See above, note 2, Horder, pp. 23–42.

8 See above, note 6, Pei-Lin Chen.

modern doctrine of provocation, adultery by one's wife with another man was included in the categories of conduct for which the provocation defence was available.⁹ Thus, in *R v Mawgridge*,¹⁰ Holt CJ explained:

*[W]hen a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property (...). If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter.*¹¹

This category of provocation has been endorsed in legislation, such as Section 120(c) of the Criminal Code of Belize which includes as one of the circumstances that may amount to provocation "an act of adultery committed with or by the wife or husband of the accused person".¹² The adultery basis of provocation has also received judicial endorsement in the Caribbean, with courts finding that the killing of one's wife in response to learning of her adultery could ground a provocation defence.¹³ This basis of provocation was applied in the Trinidadian Court of Appeal decision in *Cox v The State*.¹⁴ The Court of Appeal reduced Cox's conviction from murder to manslaughter, upon evidence that he killed his girlfriend after he discovered that she was having a sexual relationship with another woman.¹⁵ The *Cox* case does demonstrate awareness of the need to display disapproval of such violence, the judges noting the "alarming upsurge of violence generally and in domestic violence in particular in this society".¹⁶ Yet, the Court's disapproval only affected the sentence and not the conviction. The approach in *Cox* therefore remains wedded to traditional legitimisation of violence, an approach which is being dispensed with in other common law jurisdictions.¹⁷ Thus, even before England and Wales replaced the provocation defence with the defence of loss of self-control in the Coroners and Justice Act 2009, there was evidence of judicial discomfort with the traditional application of provocation

9 *R v Mawgridge* (1707) 84 ER 1107, p. 1115; Forell, C., "Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia", *American University Journal of Gender, Social Policy and the Law*, Vol. 14, p. 31; and above, note 2, Horder, pp. 24, 39.

10 *Ibid.*, *R v Mawgridge*.

11 *Ibid.*, p. 1115.

12 See also, Penal Code 1924 (Bahamas), Section 300(3); and Criminal Code 1987 (Grenada), Section 240(c).

13 See, for example, *Zetina v R* (unreported, CA, Belize), 19 June 2009.

14 *Cox v The State* (unreported, CA, Trinidad and Tobago), 13 March 2008.

15 *Ibid.*, Para 15.

16 *Ibid.*, Para 21.

17 Victorian Law Reform Commission, *Defences to Homicide: Final Report*, 2004.

in cases of sexual jealousy.¹⁸ Moreover, the new loss of self-control defence is explicitly unavailable where the violent act was in response to sexual infidelity.¹⁹

Like the use of provocation to excuse violence caused by sexual jealousy, the use of the homosexual advance defence as part of provocation is not a new phenomenon. It was raised in *R v McCarthy*²⁰ in 1954, where ultimately the defence of provocation was unsuccessful because the Court held that the accused was intoxicated and therefore could not be considered a “reasonable man” at the time of the act.²¹ However, Lord Chief Justice Goddard, who delivered the judgment of the Court, expressed support for the argument that violence on the part of the defendant would have been an excusable response to an advance by the deceased man. In the words of the Lord Chief Justice, “this provocation would, no doubt, have excused (...) a blow, perhaps more than one”.²²

The specific requirements of the defence of provocation have long been criticised for manifesting a gender bias.²³ The requirement that the defendant must have experienced a “loss of self-control” is said to privilege men, particularly men in a position of relative power in relation to their victim. The defence applies in a “gendered reality” in which men customarily kill out of anger while women who rely on the defence kill in response to fear.²⁴ Thus, even where both men and women successfully rely on provocation, the application of the defence has created the spectre of treating killings in response to sexual jealousy as commensurate with homicide in response to fear of a violent aggressor.²⁵ The “loss of self-control requirement” has also been shown to privilege heteronormativity on the basis of the persistent notion in the current law of provocation that “a heterosexual man’s honour is insulted by a homosexual advance and he must retaliate accordingly to counter its effect.”²⁶ Accordingly, provocation

18 See, for example, *R v Entwistle* [2010] EWCA Crim 2828, in which the Court of Appeal of England and Wales recognised that “sexual jealousy” was not an excuse for murder and did not constitute sufficient provocation. By contrast, despite the Trinidad and Tobago Court of Appeal’s criticism of the upsurge in violence, the Court nonetheless indicated at paragraph 15 that the sexual jealousy of the defendant on learning of the relationship between his wife and another woman would be “critical to any defence to a charge for murder” (and not merely relevant to sentencing).

19 Coroners and Justice Act 2009, Section 59(6).

20 *R v McCarthy* [1954] 2 All ER 262.

21 *Ibid.*, p. 265.

22 *Ibid.*, p. 263.

23 See above, note 9, Forell, p. 27.

24 *Ibid.*, pp. 33–34.

25 Bradfield, R., “The Treatment of Women Who Kill Their Male Partners Within the Australian Criminal Justice System”, Doctoral Thesis, University of Tasmania, 2002, available at: <http://eprints.utas.edu.au/1045/>, pp. 144–146.

26 Papanthasiou, P. and Esteal, P., “The ‘Ordinary Person’ in Provocation Law: Is the ‘Objective’ Standard Objective?”, *Current Issues in Criminal Justice*, Vol. 1, 1999, p. 55.

can operate to excuse a “defendant’s” lethal expression of outraged manhood against his gay male victim.²⁷

The ancient common law defence of justifiable homicide was also developed with heteronormative undertones. The defence served to vindicate the following categories of homicide: (i) where an executioner executes a criminal in strict conformity with the sentence of death imposed by a court of law; (ii) where an officer of justice or another person acting in his aid kills a person who resists arrest, or kills an escaping felon; and (iii) where the homicide is committed in prevention of “a forcible and atrocious crime”.²⁸ These three categories of justifiable homicide were seen as being in service of the state, and were therefore condoned and vindicated; the defence was justificatory and not excusatory. Accordingly, in the words of Blackstone, the law perceives “no kind of fault whatsoever” and bestows on the killer “commendation rather than blame”.²⁹ The third category, defence of justifiable homicide in prevention of a “forcible and atrocious crime”, could be invoked by a husband who kills a man who attempts to rape his wife or daughter and by a man to whom a same-sex advance has been made (that is, the ancient crime of sodomy).³⁰ There is a strong historical link between honour and virtue,³¹ and the defence of chastity or heterosexuality amounts to a defence of the honour and impenetrability of the male. Moreover, as justifiable homicide was viewed as an act in service of the state, the defence in general and the third category in particular, demonstrate a decidedly masculine representation of the state itself. The killing protects not only the defendant’s honour but also the masculinity, and therefore, the honour of the state itself.

Compounding the heteronormativity of provocation and justifiable homicide are the concepts of “reasonableness” and the “reasonable man”, often now judicially denoted the “ordinary man”, which feature in the formulation of both defences. The reasonable man test is activated under the objective limb of the provocation defence, which requires a determination of whether the provocation was sufficient to cause a reasonable man to act as the defendant did.³² It is also relevant to the defence of justifiable homicide, which requires that the defend-

27 Power, H. “Provocation and Culture”, *Criminal Law Review*, 2006, p. 877. There is much debate in the United States of America regarding whether provocation ought to be classified as a justificatory or excusatory defence. For a clear account of this debate, see Mison, R., “Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation”, *California Law Review*, Vol. 80, 1992, pp. 144–146. This article takes the position that it is a justificatory defence.

28 Smith, J.C. and Hogan, B., *Criminal Law*, Butterworths, 1965, pp. 230–232; and Fitzwalter Butler, T.R. and Garsia, M., *Archbold Pleading, Evidence and Practice in Criminal Cases*, Sweet & Maxwell, 1966, p. 2550. The defence has since been abolished in England and Wales.

29 *Blackstone’s Commentaries on the Laws of England*, Book 4, Routledge, 2001, Chapter 4, p. 182.

30 *Ibid*; and above, note 28, Smith and Hogan; and *R v Bartley* (1969) 14 WIR 407.

31 See above, note, Horder, pp. 26–27.

32 *Attorney General for Jersey v Holley* [2005] UKPC 23, Paras 6–10.

ant must honestly believe, on reasonable grounds, that he had to kill in order to prevent the commission of a forcible and atrocious crime.³³ The “reasonable” standard has been subject to blistering critique for decades, often on the grounds of feminist theory.³⁴ Fundamentally, the basis of the critique was that the standard of the reasonable man was shaped by the dominant and majority members of society, i.e. privileging men. Increasingly, however, there is more discourse on the interaction between the reasonable person standard and sexual orientation. Thus, the “ordinary man” is not only a man (as the name suggests) but also, heterosexual.³⁵ It has been argued that by maintaining this standard of “ordinariness”, the defences of provocation and justifiable homicide uphold a power structure that privileges male heterosexual power by viewing it as “ordinary”.³⁶ Moreover, the roots of the defences are steeped in an outlook which perceives the “reasonable” or “ordinary” person as male, and privilege the protection of the male body and masculine honour.³⁷ This hypermasculine construct of the law and the state has resonance today in Commonwealth Caribbean states. Caribbean feminist author, Jacqui Alexander, has explained the importance of this construct in the legitimisation of the state, arguing that “the archetypal source of state legitimation is anchored in the heterosexual family, the form of family crucial in the state’s view to the founding of the nation.”³⁸ In this framework, the gay man presents a threat which the state must quash in order to “continue to legitimate its existence.”³⁹

Criticisms of the sexuality bias of the reasonable person test have highlighted that the standard of the reasonable person is so stripped of critical social assessment that “it excludes an understanding of the social reality encountered by homosexuals.”⁴⁰ The social reality of the prejudices faced by lesbian and gay persons in a heterosexual society certainly form a crucial part of understanding the use and application of provocation and justifiable homicide as homosexual advance defences. That social reality for sexual minorities within Caribbean society is most vividly reflected in the continued criminalisation of same-sex expression through colonial era sodomy laws that provide that it is an “abominable crime” to engage in anal intercourse. Section 76 of the Offences Against the Person Act of Jamaica, for instance, provides that:

33 See *R v Bartley*, above note 30, p. 411.

34 Moran, M., *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*, Oxford University Press, 2010, pp. 1–7.

35 See Pei-Lin Chen, above note 6, p. 209.

36 Johnston, P., “More Than Ordinary Men Gone Wrong: Can the Law Know the Gay Subject”, *Melbourne University Law Review*, Vol. 20, 1995–1996, pp. 1158–1160 and 1179.

37 See Horder, above note 2; and Forell, above note 9 p. 31.

38 Alexander, M.J., “Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas”, *Feminist Review*, Vol. 48, 1994, p. 14.

39 *Ibid.*

40 See above, note 26, p. 55.

*Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned (...) for a term not exceeding ten years.*⁴¹

Societal animus towards same sex sexuality is also revealed in reports of violent attacks upon members of the LGBT community by private citizens,⁴² the failure of the police force to protect LGBT victims of crime, and interference with LGBT persons' access to public services.⁴³ This presents a scenario in which the society and the state itself sanction continued discrimination and prejudice towards sexual minorities, particularly gay men. Ultimately, a reasonable person standard that epitomises the reasonable person in a society in which homophobia endures opens the door for prejudices against sexual minorities to influence the operation of defences to homicide.⁴⁴

The implications of the heteronormativity of provocation and justifiable homicide defences, and of the anti-gay animus that is channelled through the application of both defences when homosexual advance defences are put forward, are borne out in three Commonwealth Caribbean appellate decisions. A homosexual advance defence was argued in a case of justifiable homicide in *Bartley v R*⁴⁵ and *Philbert v The State*⁴⁶ and as a defence of provocation in *Marcano v The State*.⁴⁷ The decision of the Jamaican Court of Appeal in *Bartley* in 1969 marked the modern re-emergence of justifiable homicide as a defence in the Commonwealth Caribbean. It was accepted by the Court that the homicide was the result of a fight that occurred when the deceased attacked Bartley after the deceased tried to have sexual relations with Bartley. At Bartley's homicide trial, the judge left the issues of provocation and self-defence to the jury but declined to put the issue of justifiable homicide to the jury. The jury convicted the appellant of manslaughter (having apparently accepted the provocation defence). However, the Court of Appeal acquitted Bartley, holding that the judge should have left the defence of justifiable homicide to jury. The Court of Appeal held that:

41 See also Criminal Code 1981 (Belize), Section 53; Offences Against the Person Act 1873 (Dominica), Section 59; and Offences Against the Person Act 1925 (Trinidad and Tobago), Section 59. The crime technically applies to both heterosexual and gay anal intercourse but has a disparate impact on gay men.

42 See, for example, Human Rights Watch, "Jamaica: Shield Gays from Mob Attacks", 31 January 2008, available at: <https://www.hrw.org/news/2008/01/31/jamaica-shield-gays-mob-attacks>; and HuffPost Queer Voices, "Jamaican Anti-Gay Attack Allegedly Caught on Tape", *Huffington Post*, 2 November 2012, available at: http://www.huffingtonpost.com/2012/11/02/jamaica-anti-gay-attack-video_n_2067114.html.

43 Human Rights Watch, *Hated to Death: Homophobia, Violence, and Jamaica's HIV/Aids Epidemic*, 2004, pp. 18–21, 27–31.

44 See Mison, above note 27, p. 147. As in Mison's article, the term homophobia is used in this article to denote prejudice against and hatred of gay and lesbian persons, rather than fear of such persons.

45 See *R v Bartley*, above note 30.

46 See *Philbert v The State*, above note 5.

47 *Marcano v The State* (unreported, CA, Trinidad and Tobago), 26 July 2002.

[A]n attempt to commit sodomy on the person of another is an attempt to commit a forcible and atrocious crime and, if accompanied by acts of violence which clearly manifest an intention to commit the offence, can justify the killing of the attacker.⁴⁸

In a 2012 judgment, *Philbert v The State*, the Eastern Caribbean Court of Appeal relied on *Bartley* to hold that, on a charge of murder, the defendant is entitled to be acquitted on the defence of justifiable homicide if there is evidence that he killed the deceased in order to repel “a sodomitical attack”.⁴⁹ It was alleged that the deceased St. Louis made several advances toward Philbert while they were sitting on St. Louis’s bed. Philbert claimed that St. Louis was trying to unbutton his (Philbert’s) pants, whereupon Philbert pushed St. Louis off the bed, kicked him repeatedly and stamped on his neck while he was on the floor. St. Louis was discovered dead on the floor of his room two days later.⁵⁰ Philbert was convicted of murder but the Court of Appeal quashed his conviction, finding that the trial judge failed to give adequate directions on justifiable homicide.⁵¹ *Philbert* established two central principles for the use of justifiable homicide as a homosexual advance defence. First, a homosexual advance constitutes an attempt to commit “a forcible and atrocious crime”.⁵² Second, the degree of force used is irrelevant once there is an honest belief based on reasonable grounds that killing is the only way to prevent the sexual act.⁵³

Provocation on the basis of a homosexual advance was put forward as a defence in *Marcano v The State*, a Court of Appeal decision from Trinidad and Tobago.⁵⁴ The deceased, Christopher Lynch, was killed by the appellant Marcano and Marcano’s friend Nairoon. There was evidence that on the night of the homicide, the three men were socialising at Lynch’s home. It was alleged that Lynch made a sexual advance towards Nairoon, which Nairoon rejected. An argument developed and Marcano then held Lynch while Nairoon chopped Lynch to death. Marcano argued that his actions were in defence of his friend Nairoon.⁵⁵ At trial, the jury found Marcano guilty of murder. He appealed against his conviction, on the grounds that the trial judge did not leave the issue of provocation to the jury and gave inadequate directions on self-defence.⁵⁶ On the issue of provocation, the Court of Appeal held that the ordinary “right-thinking” person would have responded as Marcano did to a homosexual advance.⁵⁷

48 See *R v Bartley*, above note 30, p. 411.

49 See *Philbert v The State*, above note 5, Para 40.

50 *Ibid.*, Paras 7 and 14.

51 *Ibid.*, Paras 36–37.

52 *Ibid.*, Paras 23 and 31–32.

53 *Ibid.*, Para 33.

54 See *Marcano v The State*, above note 47.

55 *Ibid.*, pp. 6, 16–17.

56 *Ibid.*, pp. 2–3.

57 *Ibid.*, p. 20.

All three decisions present the ordinary person as a heterosexual offended by, and entitled to react violently to, overtures of same-sex sexuality. Thus, the killing of the gay man was held to be justifiable in *Bartley* and *Philbert*, resulting in acquittal; in *Marcano* the appellant was also freed as the Court of Appeal declined to order a retrial “having regard to all the circumstances” of the case.⁵⁸

The use of the homosexual advance defence, both in cases of provocation and justifiable homicide, pose serious challenges for Caribbean constitutional rights. The following sections of the article analyse the inconsistency of the homosexual advance defence, as borne out in the three cases highlighted above, with the rights to equality and life. In this analysis, the three areas of conflict with constitutional rights are: first, the incorporation of homophobic prejudices in the application of the defences: second, the lack of a sufficient requirement for reasonableness and proportionality in the operation of the homosexual advance defence: and third, the failure to distinguish between a non-violent advance and a violent (and potentially lethal) attack.

2. The “Homosexual Advance Defence” and the Right to Equality

The departures of the homosexual advance defence from constitutional rights are demonstrative when seen through the lens of the right to equality. All Commonwealth Caribbean jurisdictions contain constitutional provisions that guarantee the right to equality and prohibit discrimination. The constitutional provisions take different forms but they all prohibit discriminatory laws and discrimination by institutions of the state. The centrality of equality provisions in identifying favoured and disfavoured groups within society contributes to a complex constitutional picture of the protection of equality for sexual minorities in the Caribbean region.⁵⁹ There are two general sets of Caribbean constitutional equality sections. The first set of provisions guarantees the right to “equality before the law.” Section 4(b) of the Constitution of Trinidad and Tobago takes this form, providing as follows:

It is hereby recognised and declared that in Trinidad & Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
(...)
b. the right of the individual to equality before the law and the protection of the law.

Section 13(3)(g) of the Constitution of Jamaica and Section 149D of the Constitution of the Co-operative Republic of Guyana also include a “right to equality before the law”.

58 *Ibid.*, p. 23. Provocation typically reduces a charge from murder to manslaughter, but in this case, the Trinidadian Court of Appeal discharged the appellant.

59 Wheatle, S., “The Rights to Equality and Non-Discrimination and the Jamaican Charter of Fundamental Rights and Freedoms” *West Indian Law Journal*, 2012.

The second set of provisions uses the terminology of discrimination rather than equality and bars discriminatory laws as well as discriminatory treatment by public officials. For instance, Sections 15 (1) and (2) of the Constitution of Saint Christopher And Nevis provide that “no law shall make any provision that is discriminatory either or itself or in its effect” and that “a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.”⁶⁰ The Constitutions of Dominica and St Lucia take a similar form but are broader in scope in that they prohibit discrimination against “any person or authority”.⁶¹ The Constitutions of Jamaica and Guyana also include provisions barring discrimination on particular grounds.⁶²

In states that provide for “equality before the law”, there is a particularly strong case for arguing that discrimination against sexual minorities is unconstitutional. The equality before the law provisions contain no limitation as to the classes of persons to which the right to equality applies. Consequently, equality before the law is not limited by the grounds of non-discrimination specified in other parts of the constitution. These sections are therefore broad enough to prohibit discrimination on the ground of sexual orientation. The Trinidadian Court of Appeal held in *LJ Williams v Smith*⁶³ that the right to equality before the law in Section 4(b) of the Constitution of Trinidad is not restricted by the bases of discrimination specified in the introductory clause to Section 4.⁶⁴ The corresponding sections in other jurisdictions should be interpreted similarly. For example, the equality before the law provision in the Jamaican Constitution should not be limited by the grounds of discrimination specified in section 13(3)(i) of the Jamaican Constitution.

With respect to provisions in the Constitutions of St Kitts and Nevis, Belize, Bahamas, Dominica and St Lucia, all of which bar discrimination on particular grounds, different considerations apply. Section 13(3) of the Constitution of Dominica is representative of the language of the non-discrimination sections. It provides that:

[T]he expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed.

The reference to specified grounds of discrimination raises the question whether, on ordinary statutory interpretation principles, the Section presents a closed, finite list of grounds.

60 Section 16 of the Constitution of Belize and Section 20 of the Constitution of Bahamas are drafted in similar terms.

61 Constitution of Dominica, Section 13(2); and Constitution of St Lucia, Section 13(2).

62 Constitution of the Co-operative Republic of Guyana, Section 149; Guyana; and Constitution of Jamaica, Section 13(3)(i).

63 *LJ Williams v Smith* (1980) 32 WIR 395.

64 *Ibid.*, pp. 424–427, per Kelsick JA.

There are several arguments that can be made to refute the position that the specified grounds are exhaustive. First, it may be argued that the “closed list” position rests on a general rule of statutory interpretation applicable to ordinary laws but which should be displaced in interpreting a constitution. The Privy Council, as the final appellate court for the vast majority of Commonwealth Caribbean states, has established that courts must treat:

*[A] constitutional instrument (...) as sui generis, calling for principles of interpretation of its own, suitable to its character (...) without necessary acceptance of all the presumptions that are relevant to legislation of private law.*⁶⁵

This means that, in the words of Lord Wilberforce, bills of rights “call for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of (...) fundamental rights and freedoms”.⁶⁶ However, courts have also cautioned against applying the principle of generous interpretation in ways that distort the meaning of the text. Thus, the Privy Council counselled in *Matadeen v Pointu*⁶⁷ that, in applying a “generous interpretation” a court ought to be mindful of the fact that it is engaged in “interpretation”, not “divination”.⁶⁸ Nonetheless, allowing for an open list of protected classes of discrimination provides the generous interpretation that is suitable for constitutional rights’ protection without unduly stretching the meaning of the words used in the discrimination clauses.

The second argument in favour of the open list position is grounded in another celebrated principle of constitutional interpretation: that constitutions must be interpreted as living instruments. It is settled law that a constitution is a living instrument and its provisions must accordingly be “judicially adapted to changes in attitudes and society”.⁶⁹ However, it must be noted that the Privy Council has held that not all provisions are so susceptible to adaptation, and that provisions that are “expressed in general and abstract terms”, “in particular, the fundamental rights’ provisions”, require such adaptation while provisions that are drafted in more specific, concrete terms do not.⁷⁰ While Section 13(3) of the Constitution of Dominica, noted above, is a fundamental rights provision, it is debatable whether its list of prohibited grounds can be properly characterised as “general and abstract”. By way of comparison, the Privy Council has applied the living instrument principle to the term “cruel and unusual

65 *Minister of Home Affairs v Fisher* [1980] AC 319, p. 329.

66 *Ibid.*, p. 328.

67 *Matadeen v Pointu* [1999] 1 AC 98.

68 *Ibid.*, p. 108. See also the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 6 BHR 127, Para 21.

69 *Boyce v R* [2004] UPKC 32, Para 29.

70 *Ibid.*, Paras 28 and 55.

punishment”,⁷¹ which is arguably more abstract than the specified list of grounds in Section 13(3). Further, the living instrument principle is generally applied to the meaning of a term that has not been defined.⁷² This raises the question whether it can be used to update the meaning of discrimination, as that term has been defined. So while the living instrument principle is a powerful tool, it is not clear how much it can contribute to an argument for the extension of the prohibited grounds of discrimination.

A third and potentially potent argument in favour of the open list claim is that judicial interpretation of a similar provision in the Commonwealth African state of Botswana provides support for an interpretation of the non-discrimination sections as providing an open list of grounds. In *Makuto v The State*,⁷³ the Court of Appeal of Botswana held that the prohibited grounds of discrimination in Section 15 of the Constitution of Botswana should be extended to include discrimination on the basis of HIV status.⁷⁴ Section 15 provides that:

[T]he expression “discriminatory” means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed.

The President of the Botswana Court of Appeal argued that the framers of the Constitution had no intention of limiting the categories of groups protected from discrimination to those specified in Section 15, but rather, the groups specified were by way of example of what the framers thought were the most likely areas of discrimination.⁷⁵ Guidance ought to be sought from this constitutional decision of the Botswana Court of Appeal due to the close similarity between Section 15 of the Constitution of Botswana and the Caribbean non-discrimination sections referred to above. The Botswanan Court’s interpretation of the corresponding section ought to be considered highly persuasive to Caribbean judges in those jurisdictions with similar non-discrimination provisions. Overall, in light of the above three considerations, there is a convincing argument to be made that the non-discrimination sections provide an open list of protected categories, so that the door is open for protection of gay and lesbian members of society.

If the open list position is accepted for the group of states with non-discrimination sections, a caveat must be entered with respect to Jamaica and Guyana. Legislative history suggests that the non-discrimination sections in those two states do not include discrimination on the grounds of sexuality. In both jurisdictions, the non-discrimination sections

71 See *Boyce v R*, above note 69, Para 24.

72 See, eg, *Thomas v Baptiste* [2000] 2 AC 1, p. 24; and *Bell v Director of Public Prosecutions* [1985] AC 937, p. 948.

73 *Makuto v The State* [2000] 5 LRC 183.

74 *Ibid.*, pp. 187–189.

75 *Ibid.*, p. 189, citing *Dow v AG* [1992] LRC (Const) 623.

were the result of recent legislative action, 2003 in the case of Guyana, and 2010 in the case of Jamaica. In debates on the grounds of discrimination to be listed as prohibited grounds in the Constitution, the question of discrimination on the grounds of sexuality arose, and in both jurisdictions the terms were constructed to exclude discrimination on the grounds of sexuality. In Jamaica, the non-discrimination section bars discrimination on the ground of “being male or female”.⁷⁶ The unusual phraseology of “male or female” was preferred to the more common terms “sex” or “gender”. The term “gender” was rejected on the basis that it was too flexible and could be understood as any classification “roughly corresponding to the two sexes and sexlessness”.⁷⁷ The term “sex” was, in turn, rejected on the basis of fear that the word sex might be interpreted to include “sexual orientation”.⁷⁸ In Guyana, the original Act to amend the non-discrimination section did include sexual orientation as a prohibited ground, but in the face of opposition from religious groups, the President of Guyana refused to give assent to the Act.⁷⁹ Consequently, a new act which excluded sexual orientation was passed and given presidential assent.⁸⁰

In summary, the constitutional right to equality before the law is clearly applicable to gay and lesbian persons in the “equality before the law” states (Jamaica, Guyana and Trinidad and Tobago). Despite the exclusion of protection for gay persons in the non-discrimination sections in Jamaica and Guyana, equality protection is also conferred in these two states by the equality before the law provision. In the states in which there are only non-discrimination sections, but no “equality before the law” provisions, the argument that gay persons are protected by a constitutional right to non-discrimination is a more difficult one, though it is persuasive. Accordingly, there is a strong argument to be made that, generally, sexual minorities in the Commonwealth Caribbean are entitled to the benefit of the constitutional rights to equality and non-discrimination. Using Henry Shue’s analysis of the duties flowing from basic rights, attendant upon the right to equality are duties on the state and state institutions, including parliament and the courts, to respect, protect and fulfil the right to equality.⁸¹ Therefore, the content of criminal laws and their application by the institutions of the state must be examined to determine if the laws, and their application, are consistent with the equality obligations arising in the various constitutions.

76 Constitution of Jamaica, Section 13(3)(i)(i).

77 Government of Jamaica, *Report of the Joint Select Committee on its Deliberations on the Bill Entitled An Act to Amend the Constitution of Jamaica to Provide for a Charter of Rights and For Connected Matters*, Houses of Parliament, available at: <http://jis.gov.jm/media/charter-of-rights1.pdf>.

78 *Ibid.*

79 Research Directorate, Immigration and Refugee Board, Canada, “Guyana: Treatment of gays and availability of state protection (Update to GUY40837.E of 26 February 2003)”, 29 January 2004.

80 Constitution (Amendment) (No. 2) Act 2003, Section 15.

81 Shue, H., *Basic Rights*, Princeton University Press, 1980, p. 51; and Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2009, p. 69.

Using Shue's framework, the defence of justifiable homicide violates the right to equality. The defence of justifiable homicide to prevent a "forcible and atrocious crime" in its modern embodiment in the Caribbean, is solely used to defend the killing of gay men. The only Caribbean appellate cases in which the defence of justifiable homicide was successful were those in which the deceased was a gay man.⁸² Accordingly, though the defence is ostensibly neutral on the surface, it has a clear discriminatory impact on gay men. This is an instance of indirect discrimination, which has been held to constitute a violation of the equality provisions of Caribbean constitutions.⁸³ For example, the Belize Court of Appeal in *Wade v Roches*⁸⁴ held that the dismissal of the applicant from a Catholic public school because her unmarried pregnancy evinced a departure from Jesus' teachings on sex and marriage was unconstitutional sex discrimination.⁸⁵ This decision amounted to recognition of indirect discrimination as unconstitutional since the basis of the dismissal, though neutral on the face of the policy which was to live according to religious doctrine, operated with a discriminatory impact on women.⁸⁶ The discriminatory impact of the justifiable homicide defence in prevention of a forcible and atrocious crime is manifest in the exclusive use of the defence in cases of homicide against gay men. Further, the judgment in *Philbert* made it clear that it was the nature of the advance being a same-sex advance that rendered it an attempt to commit a forcible and atrocious crime; therefore, it was the sexual orientation of the deceased and the advance that was relevant, not the question whether the advance was made violently.

The law on provocation, as applied in homicide cases involving gay men, also results in unequal treatment, chiefly because the provocation defence is applied in a manner that treats gay victims differently from other victims. The problems lie in the use of a non-violent sexual advance as an acceptable basis for the defence of provocation and the analysis used in the cases which suggest that the success of the defence is due to the fact that the sexual advance was made to a member of the same sex. The indirect discrimination resulting from the discriminatory impact on gay men is well represented in the *Marcano* case. The Chief Justice in *Marcano* repeatedly stated that the defendants would have been repulsed by the deceased's "overtures", that "there could be nothing more reprehensible", and "[t]hat is the sort of thing that sends people crazy, in a frenzy".⁸⁷

82 No cases were able to found in which the defence was successful in other circumstances. See Wheatle, S., *Adjudication in Homicide Cases involving Lesbian, Gay, Bisexual and Transgendered Persons in the Commonwealth Caribbean*, Faculty of Law UWI Rights Advocacy Project, 2013.

83 An argument may also be made that, in many cases, public and judicial authorities are directly discriminating against gay men in their application and enforcement of the law relating to both justifiable homicide and provocation. However, this article is concerned with constitutionality of the laws themselves.

84 *Wade v Roches* (unreported, CA, Belize), 9 March 2005.

85 *Ibid.*, Paras 36–38.

86 See above, note 59, p. 132.

87 See *Marcano v The State*, above note 47, pp. 7–8 and 10.

Unequal treatment in homosexual advance cases is further perpetuated by the judgments' acceptance and legitimisation of prejudice against gay men. Thus, we see gay men being represented as inherent threats to masculinity and society, and as criminals. The Court of Appeal in the *Philbert* case referred to the deceased gay man as "the perpetrator",⁸⁸ hence casting the deceased, who would ordinarily be conceived as "the victim", in the role of "the criminal". In the use of a homosexual advance defence, the judgments reflect a perception of the gay man as dangerous and of same-sex sexuality as inherently abnormal and criminal. Accordingly, an advance by a gay man is perceived as an "attack" within the law of justifiable homicide as applied in the Caribbean. The gay man is cast in the role of perpetrator and attacker and the defendant is cast as "the [potential] victim of a homosexual act."⁸⁹

Further, the analysis in *Marcano* was indicative of stereotypical perceptions of gay men. The deceased was repeatedly described as an "older man" and "a bigger man", while his killers were characterised as "boys who were not wise to the world", although they were actually aged 17 and 20.⁹⁰ These characterisations appear to project a stereotype of gay men as a corrupting influence on youth, and consequently, as a danger to the future of society and the state. Thus, the characterisations of gay men in these cases reflect perceptions of gay men that suggest that they are not to be treated as victims of crime. This again represents the lasting and pervasive impact of the heteronormative construction of the state and the "othering" of non-heterosexual masculine individuals within the criminal law.

The heteronormative implications also result in a perception of the "ordinary man" as one who reacts to overtures from a person of the same sex with repulsion and violence. During the Court of Appeal hearing in *Marcano*, Sharma CJ remarked that "it is well to remember that in this particular case (...) this incident started (...) with the rebuff or the repulsion of the overtures made by Lynch [the deceased] to these two young men."⁹¹ In the course of delivering the Court of Appeal's judgment, Sharma CJ appealed again to the sentiment of repulsion against the "unnatural" practices of gay men and a perpetuation of the notion that the normal response of the ordinary man to invitations to engage in such "unnatural acts" is deadly violence. In the view of the Chief Justice, this was "a case where (...) the acts themselves were so unnatural" that any "right thinking person" could have reacted as the defendant and his friend did.⁹²

An antidote to this heteronormative approach is to reject the conception of the ordinary person as one imbued with prejudices against sexual minorities. The Canadian Supreme Court has perhaps provided the clearest and boldest statement rejecting the homosexual advance

88 See *Philbert v The State*, note 5, Para 33.

89 *Attorney General v Jones* BS 20120 CA 98.

90 See *Marcano v The State*, above note 47, pp. 6–7.

91 *Ibid.*, p. 10.

92 *Ibid.*, pp. 20–21.

defence in general⁹³ and the heterosexist notions of the ordinary person in particular. The Canadian Supreme Court held in *R v Tran* that:

*[T]he ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Canadian Charter of Rights and Freedoms. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance.*⁹⁴

3. The Right to Life

Beyond the challenges presented to the right to equality by both provocation and justifiable homicide, justifiable homicide is more incongruous in a modern constitutional regime as it undermines the fundamental right to life of gay men. There are two general forms of right to life sections in Caribbean constitutions. In the first category are sections which comprise two elements, which may be described as a positive element and negative element. The positive element states that individuals are entitled to the right to life. The negative element states that individuals shall not be deprived of that right except in specified circumstances. For instance, Section 13(3)(a) of the Constitution of Jamaica provides for:

*[T]he right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted.*⁹⁵

Guidance on the interpretation of this first category can be obtained from the interpretation of the similarly drafted right to life in Article 2(1) of the European Convention on Human Rights (ECHR), which provides that:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Indeed, the relevance of such an interpretation is reinforced by the use of Article 2(1) as a model in constitutional drafting in the Caribbean and by Caribbean appellate references to

93 Lunny, A., "Provocation and "Homosexual" Advance: Masculinized Subjects as Threat, Masculinized Subjects under Threat", Vol. 12, *Social & Legal Studies*, 2003.

94 *R v Tran* [2011] 3 LRC 437, Para 34.

95 Section 4(a) of the Constitution of Trinidad and Tobago also includes positive and negative elements, recognising "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law".

decisions of the European Court of Human Rights (ECtHR) in deciding constitutional cases.⁹⁶ In interpreting Article 2(1), the ECtHR has declared that the state has a duty to “secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person.”⁹⁷ There is accordingly, a duty on the institutions of state, including parliaments and the courts, to take steps to safeguard life and “to provide effective deterrence against threats to the right to life.”⁹⁸

In the second set of sections found in other Commonwealth Caribbean constitutions, only the negative element appears. For example, Article 138(1) of the Constitution of the Co-Operative Republic of Guyana provides that “[n]o person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of an offence under the law of Guyana of which he has been convicted.”⁹⁹ However, the omission of the positive element does not exclude positive obligations. In a decision on the constitutionality of the Domestic Violence Act of St Lucia, Barrow J, sitting on the bench of the High Court of St Lucia, stated in *obiter dicta* that the state has a constitutional obligation to protect persons from domestic violence, arising from the rights of individuals to “life, liberty, security of the person, equality before the law and the protection of the law.”¹⁰⁰ Moreover, as celebrated Caribbean jurist Margaret Demerieux has argued with respect to this second category of right to life sections that do not expressly include the positive element:

*[A] right to life must, however formulated, go beyond an obligation on the state not to take life intentionally and to secure to citizens protection against the taking of life by private persons. Consequently, the minimum obligation of the right to life forbids the state from taking life and requires it as well to ensure a legal regime in which murder and seriously life threatening action is illegal.*¹⁰¹

The right to life in Commonwealth Caribbean jurisdictions is not constructed as an absolute right; accordingly in most Caribbean states, the right may be limited by the legally sanctioned

96 Parkinson, C., *Bills of Rights and Decolonization the Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories*, Oxford University Press, 2007, pp. 185-96; and *Reyes v the Queen* [2002] 2 AC 235, Para 42.

97 *Keenan v UK*, App. No. 27229/95, 3 April 2001, Para 89. See also *Osman v UK*, App. No. 87/1997, 28 October 1998.

98 *Oneryildiz v Turkey*, App. No. 48939/99, 30 November 2004, Para 89.

99 The following constitutions are in very similar terms: Constitution of Barbados, Section 12; Constitution of Antigua and Barbuda, Section 4; Constitution of St Christopher and Nevis, Section 4; Constitution of St Lucia, Section 2; Constitution of St Vincent and the Grenadines, Section 2; Constitution of Grenada, Section 2; Constitution of Dominica, Section 2; and Constitution of the Bahamas, Section 16.

100 *Francois v AG of St. Lucia* (unreported, HC, St. Lucia), 24 May 2001.

101 DeMerieux, M., *Fundamental Rights in Commonwealth Caribbean Constitutions*, University of the West Indies, 1992, p. 122.

use of force, which is “reasonably justifiable in the circumstances”.¹⁰² Therefore, the requirement of a reasonable justification for using deadly force is a principle that must be respected by the criminal law of each jurisdiction. The criminal law, including defences to murder, must ensure that deadly force is only justified or excused where such force is reasonably justifiable. This implies reasonableness in the use of deadly force and proportion between the deadly violence and the trigger for such violence.

Assessing the defence of justifiable homicide in prevention of a “forcible and atrocious crime”, it is readily apparent that its application by the courts in homosexual advance cases fails to meet this constitutional standard. The Jamaican Court of Appeal held in *Bartley* that:

*[I]f the intent to commit the forcible and atrocious crime is clearly manifested and there is an honest belief based on reasonable grounds that the commission of the crime can only be prevented by killing the assailant, the degree of force used in repelling the attack is generally irrelevant.*¹⁰³

Though there is reference to an honest belief on reasonable grounds that the crime can only be prevented by killing, the concept of reasonableness is negated by two further considerations. First, the Court unquestioningly accepted that it is justifiable to use deadly force in response to a non-lethal attack (a “sodomitical attack”).¹⁰⁴ Second, the court countered the reference to reasonableness by insisting that “the degree of force used (...) is irrelevant” once there was an honest belief based on reasonable grounds that killing was required to repel the commission of sodomy. This holding set the stage for the judgment in *Philbert*, which would emphasise the irrelevance of any critical assessment of the degree of force used.

In the course of delivering the judgment of the Court of Appeal acquitting the appellant Philbert, the Court expressly marginalised the reasonableness of use of force. Two passages of the judgment are crucial on this issue. In the first, it was stated that:

*The law is that (...) a person faced with a sodomitical attack may even pursue his assailant until he finds himself out of danger, but he must not strike blows except in self-defence. Neither does the relevant law require the degree of force used by the appellant in repelling the attack to be proportionate to the seriousness of the attack and the danger to the person attacked.*¹⁰⁵

102 See, for example, Constitution of Antigua and Barbuda, Section 4(2); and Constitution of Belize, Section 4(2).

103 See *R v Bartley*, above note 30, p. 411.

104 See *Philbert v The State*, above note 5, Para 30.

105 *Ibid.*, Para 32.

It is worth pinpointing that reasonableness and proportionality are excluded as requirements for the defence by the paradoxical idea that the defendant is entitled to “pursue his assailant until he finds himself out of danger” and by the statement that the law does not require the degree of force to be proportionate to the seriousness of the attack or the danger to the defendant.

The subsequent passage reads as follows:

*The law requires that the appellant should have had, at the material time, an honest belief based on reasonable grounds that the deceased's sodomitical attack could only be prevented by pushing the deceased as he did and kicking him whilst he was on the floor trying to get up. If the appellant, when faced with the deceased's buggery attempt on him, had that requisite honest belief, the degree of force that he used would be irrelevant. The appellant in such a case does not have to show that it was necessary for him to use force, even deadly force. Necessity for using deadly force against the perpetrator is presumed by the law in such circumstances. It would be the deceased's attempt to bugger him that justifies the appellant's use of force.*¹⁰⁶

Though the court paid lip service to the idea that the defendant should have “an honest belief based on reasonable grounds” that it was necessary to act as he did, it then proceeded to hold that the necessity of using deadly force is “presumed by the law in such circumstances” and that the use of force is justified by the mere existence of the deceased’s “attempt” to have sexual relations with the defendant. This denial of a role for reasonableness in measuring the use of force led to the acquittal of *Philbert*, who repeatedly inflicted brutal and severe wounds on the deceased, even after the evidence suggests that the deceased had been disabled. The Court also concluded that since the degree of force was irrelevant, the jury should have been directed to “acquit the appellant without reference to the medical evidence as to the nature and extent of the injuries (...) and their opinion as to how these injuries were inflicted.”¹⁰⁷ This case highlights in stark terms the impact of removing the requirement of reasonableness and proportionality from the determination of whether the use of force resulting in death was justifiable. By failing to incorporate a requirement of reasonableness or proportionality, the use of justifiable homicide as a homosexual advance defence condones homicidal violence which cannot be considered “reasonably” or “demonstrably justified” as is required by the constitutional guarantees of the right to life.

The lack of reasonableness and proportionality in the application of the defence of justifiable homicide in the Caribbean is compounded by the failure to distinguish between what is termed a “homosexual advance” and a “homosexual attack”. In fact, the terms are used

106 *Ibid.*, Para 33.

107 *Ibid.*, Para 35.

interchangeably. For instance, in *Philbert*, the Court of Appeal found that the “appellant was repelling a buggery attack on him by the deceased”,¹⁰⁸ while also referring to the deceased’s “buggery advances” and “sexual advances”.¹⁰⁹ This fails to create a distinction between an assault and an advance, and in turn, between a violent act and a non-violent act. The result is to create the impression that any advance by a gay man to a heterosexual man is *ipso facto* an assault and violent. It would also lead to the conclusion that hostility, violence, and homicide are appropriate responses to physical expressions of same-sex sexuality.¹¹⁰

By contrast with the modern Caribbean use of the defence, the ancient common law rules on justifiable homicide on the ground of prevention of a “forcible and atrocious crime” are no longer recognised in the common law states of Australia, Canada, or the UK. These jurisdictions have reformulated the defence and incorporated clearer requirements of reasonableness and proportionality in the use of force. In England and Wales, the ancient common law rules on justifiable homicide in the prevention of a crime were replaced decades ago by Section 3 of the Criminal Law Act 1967.¹¹¹ Under Section 3, the question whether killing in the course of preventing a crime is justified is to be determined by questioning whether the degree of force used was reasonable in the circumstances of the case.¹¹² The Section therefore rejects the notion that the degree of force used would be irrelevant, a notion adopted by the Caribbean cases on justifiable homicide as a response to a homosexual advance. The requirement of proportionality or reasonableness is also a requisite element of the lethal use of force in defence of oneself or another in Australia and Canada. Australian laws on the use of force in prevention of crime have “rules incorporating expressly or by implication some measure of proportion.”¹¹³ In the Australian state of Victoria, for instance, Section 462A of the Crimes Act 1958 (Vic) permits the use of force which is not disproportionate for the purpose of preventing indictable offences. In Tasmania, Section 41 of the Criminal Code Act 1924 (Tas) only permits such force as is reasonably believed to be necessary to prevent crimes involving immediate and serious injury to person or property. With respect to the Commonwealth of Australia, Section 10.4 of the Criminal Code Act 1995 (Cth) permits such use of force in the prevention of crime which is a reasonable response to the circumstances as perceived by the person who uses such force. The concepts of reasona-

108 *Ibid.*, Paras 26 and 28.

109 *Ibid.*, Paras 27 and 28.

110 Attorney-General’s Department (New South Wales), *Review of the “Homosexual Advance Defence”*, August 1996, p. 14, cited in Tomsen, S. and George, A., “The Criminal Justice Response to Gay Killings: Research Findings”, *Current Issues in Criminal Justice*, Vol. 9, 1997–1998.

111 The section reads as follows: “(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.”

112 See above, note 28, Smith and Hogan, , pp. 229–230.

113 Lanham, D., Bartal, B., Evans, R. and Wood, D., *Criminal Laws in Australia*, Federation Press, 2006, p. 85.

bleness and proportionality also permeate the provisions on justifiable use of force in the Criminal Code of Canada.¹¹⁴

The most relevant comparative statement on the constitutional standing of the defence of justifiable homicide is the judgment of the South African Constitutional Court in *Re State v Walters*¹¹⁵ on the constitutionality of Section 49(2) of the Criminal Procedure Act. Section 49(2) declared it to be justifiable homicide where a person reasonably suspected of a scheduled offence was killed in circumstances where he could not be arrested or prevented from fleeing. The Constitutional Court held that in authorising the use of lethal force even when (as is the case for some scheduled offences) there was no threat of any, or serious bodily harm, Section 49(2) was disproportionate.¹¹⁶ The Court therefore declared the Section invalid for violation of the right to life and human dignity under Sections 10 and 11 of the Constitution of South Africa. In light of the persuasive weight Caribbean courts have placed on South African Constitutional Court's judgments,¹¹⁷ the decision of the South African Constitutional Court on the constitutionality of justifiable homicide ought to have persuasive weight in Caribbean courts. The Constitutional Court's reasoning provides explicit constitutional examination of the lack of a requirement of reasonableness and proportionality in one category of justifiable homicide, reasoning which would undoubtedly be instructive in determining the constitutionality of justifiable homicide in prevention of "a forcible and atrocious crime".

Despite the fundamental judicial responsibility of subjecting all laws and institutions to the prescriptions of the constitution, the *Philbert* and *Bartley* judgments demonstrate no awareness on the part of the judges of the constitutional rights framework in which they must execute their functions. The judgments adopt a defence developed in centuries past and apply it in contemporary times without updating the defence to account for the contemporary constitutional context. Further, the potential impact of the two decisions is significant: they emanate from appellate courts in the region and therefore, provide a persuasive source of law for courts in other Commonwealth Caribbean jurisdictions.

114 See, for example, Section 34 and 37 of the Criminal Code: "34 (2) Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. 37. (1) Everyone is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it. (...) (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent."

115 *Re State v Walters* [2003] 1 LRC 493.

116 *Ibid.*, Paras 44–46.

117 See, for example, *Maurice Tomlinson v Television Jamaica Ltd* (unreported, SC, Jamaica), 15 November 2013, Paras 50–54 and 168–190.

4. The Way Forward

The constitutional departures of the homosexual advance defence from both the right to life and the right to equality are unsustainable. Under both provocation and justifiable homicide, invocations of non-violent homosexual advances as bases for a defence to murder must be rejected. This would follow a compelling trend in other Commonwealth jurisdictions in which there is increasing recognition of the modern incongruity of homosexual advance defences. As noted above, Canadian appellate courts have rejected such pleas. Further, reviews of case law and statute in Australian states and territories have led to reform of the relevant laws¹¹⁸ and the Australian Capital Territory and the Northern Territory have enacted legislative provisions excluding non-violent sexual advances from the defence of provocation.¹¹⁹

A clear judicial route for resolving the inconsistency posed by the use of the homosexual advance defence as a basis of provocation would be to reject such a claim as a triggering factor for the purposes of provocation. This would resolve the inequality posed by this application of provocation while leaving the more general complaints and broader issues facing the provocation defence to be resolved by the respective legislatures. Regarding justifiable homicide in the prevention of a forcible and atrocious crime, both the very core of the defence and its application are unconstitutional as it not only violates the right to life by justifying unreasonable degrees of force, but is also blatantly discriminatory in its exclusive application to homosexual advances. This category of justifiable homicide is therefore irredeemable and must be resigned by the courts under their constitutional obligation to enforce the supremacy of the constitution or abolished by Caribbean legislatures.

Conclusion

A persistent human frailty that each society must confront is the tendency to prejudice, which often manifests itself in fear of, and discrimination against, that which we perceive as “the other”. This presents a challenge to legislators and jurists in crafting and applying criminal law and constitutional law. If the criminal law is to reflect the rights and obligations emanating from the Caribbean Constitution, it must resolve issues concerning excusatory and justificatory defences to charges for murder in a manner that respects the life and equal worth of all individuals in the state. This requires state institutions to be cognisant that the human frailty of prejudice, manifested in a fear of same-sex sexuality, is one that must not be excused or justified by the state when it results in the killing of sexual minorities. Yet, the application of justifiable homicide and provocation in gay homicide cases does sanction such violence and signifies state perpetuation of prejudicial attitudes towards gay men.

118 See, for example, Law Reform Commission of Western Australia, *Final Report: Review of the Law of Homicide*, September 2007; and Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64, September 2008.

119 Crimes Act 1900 (ACT), Section 13(3); and Criminal Code Act 1983 (NT), Section 158(5).

This article maintains that the danger of justifiable homicide to the constitutional rights fabric of the state is more acute in the sense that it infringes on the rights to life and equality, while the use of a homosexual advance defence as the basis of provocation undermines the equal protection afforded to gay men and lesbians under the law. The use of a homosexual advance defence reflects a perception of the gay man as dangerous and of same-sex sexuality as inherently abnormal and criminal. Accordingly, a same-sex advance by a gay man is perceived as an “attack” and gay men are cast in the role of perpetrators. Used as a homosexual advance defence, both provocation and justifiable homicide embody unconstitutional state sanction of lethal violence against sexual minorities, which rather than alleviating the impact of the prejudice against sexual minorities in society, perpetuates this prejudice and effectively targets sexual minorities as worthy of not only opprobrium, but also death.

“The concept of intersectionality provides both a critique of non-discrimination law as it is currently framed and practiced and offers a way forward. So far, it is probably more successful in the former than the latter.”

Gerard Quinn



Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law

Gerard Quinn¹

1. Introduction

An avalanche of literature is now emerging on the concept of intersectionality,² some of it quite fancy and fashionable. So fashionable that it is in danger of being reified – a formula in place of an understanding, concealing more than it reveals. I am naturally skeptical. Holmes once said that we should pour “cynical acid” over every new idea to see if something of value remains.³ Something important indeed remains of intersectionality but it requires a deeper look beyond the familiarly narrow legal frame.

To get to the heart of intersectionality and why it offers a way out of a well-known problem, one must connect it with a common intuition or nagging doubt that something important is missing from our traditional conception of non-discrimination. The concept of intersectionality provides both a critique of non-discrimination law as it is currently framed and practiced and offers a way forward. So far, it is probably more successful in the former than the latter.

To see what is missing from the traditional non-discrimination framework and why, it is first necessary to reflect on the mischief the framework aims to resolve (both in terms of the rights of the individual as well as the more systematic goal of holding civic space open in a diverse culture), to examine how identities, groups and grounds form and are used negatively, to look at non-discrimination law as one corrective to this use, to see what is left out of its framing of reality, and to assess what intersectionality intends to put in its place.

This is not intended as an extended doctrinal paper – simply as a thought piece to stimulate reflection. Nor is it a disquisition on the many layers and deep theories of equality. It is simply

1 Professor Gerard Quinn is Professor of Law and Director of the Centre for Disability Law and Policy at National University of Ireland, Galway. This paper is an extended version of a short talk given to the combined advisory boards of the Open Society Foundation (OSF) Human Rights Initiative and the OSF Justice Initiative on 21 March 2013. It represents the author’s views only.

2 A quick search of the term intersectionality on HeinOnline reveals 2,998 items.

3 Holmes, Jr., O.W., “The Path of the Law”, *Harvard Law Review*, Vol. 10, 1897, p. 462.

a collection of thoughts on the significance of intersectionality with respect to the non-discrimination idea and law.

2. The Human Impulse to Close Down Space vs. the Political and Ethical Imperative of an Open Society

In understanding the intersectional critique of non-discrimination law, it is important to bring to the foreground some general considerations that have political implications and are often assumed and left unexamined. All societies are defined as much by whom they exclude as by whom they include. This applies literally at our borders. Internally, our societies tend to arrange themselves in concentric circles of exclusion. This affects the economic sphere, the social sphere and public life.

There are many reasons why discrimination is wrong – whether ethical, political, social and economic – and a fitting object of reform. These reasons seem deeply etched in how societies are imagined and constructed.⁴ No doubt, socio-biologists have something to say about these “natural” tendencies to build elaborate social structures around a seemingly innate preference for kith and kin.⁵ The default, the thing that makes non-discrimination law so vitally necessary, seems to be a deep reflex to parse the political community into those who fully belong and those who do not.

The wellsprings for these impulses of exclusion (manifested as differential treatment or subordination) are many and varied. They include the moral – the ascription of moral inferiority to a particular group and the insistence of “our” moral superiority (justifying “our” privileged position). Of course one can never be quite sure that those who adhere to this view do so out of a sense of their so-called moral superiority or whether they use it as a mask to hide much more naked calculations of advantage. Perhaps a self-righteous combination of the two is always at play. Most legal cultures reject any ascription of moral inferiority, as does all international law.

The wellsprings for exclusion also include the purely economic: the impulse to make the “other” appear so different to “us” as to justify their economic powerlessness and by implication “our” economic dominance. It is often easy to see this at work, but hard to figure out whether it simply serves to rationalise exclusion that has already been generated for other reasons or whether it is, in itself, a driver of exclusion. Its effects, especially its cumulative effects over the generations, are devastating.

The wellsprings for exclusion can also include the persistence of stereotypes and prejudice that “naturally” incline people against the “other”. Stereotypes take many shapes and forms

4 Alexander, L., “What Makes Wrongful Discrimination Wrong: Biases, Preferences, Stereotypes and Proxies”, *University of Pennsylvania Law Review*, Vol. 141, 1992, pp. 149–172.

5 See Wilson, E.O., *The Meaning of Human Existence*, Norton, 2014.

and have different sources. They can represent the lingering afterlife of policy choices taken decades ago in favour of blatant exclusion. They can be doubly hard to erode since no society feels comfortable having a mirror put up to it to reveal its anachronistic belief systems. This is one reason why change can be so hard even in the face of the total and provable irrationality of most stereotypes. Stereotypes are especially hard to erode when they (or a kernel of them) might conceivably have some basis in fact. For example, it is true to say that some persons with disabilities have a reduced working capacity. Of course, this framing helps to mask a much deeper truth: that most people with disabilities have at least an equal capacity for productive work – and perhaps even a higher than average commitment to work.⁶ But, as Karl Schmitt insisted, he who controls the exception can control the rule!⁷ In a way the group (people with disabilities) get defined by the exception, which explains the seeming paradox that when they are protected by non-discrimination law (especially in the employment context) they are said to be protected not so much *because* they are disabled but *despite* it.

Stereotypes can function as a pivot that almost unselfconsciously carves out broad exceptions to treating others respectfully and on an equal basis. Almost every society harbours these deep mental reservations with respect to some group or other. My country, Ireland, is no exception when it comes to extending equal human rights to members of the travellers' group. Indeed, the shameful treatment of unmarried mothers in Ireland in the past meant they were treated not merely as un-belonging but almost as if they were not human.⁸ It was as if their (socially imposed) shame had banished them to purdah and worse.

3. The Aetiology of Identities, Groups and Grounds

We, as a species, are not so radically atomised as to form legitimate categories all of our own. Like it or not, we are often defined by traits we share with others – or are simply assumed to share with others. Often those traits become constitutive of who we are as individuals (Irish and proud). Sometimes it is hard not to be smothered by them. This is not to say that these traits are always objectively stable, immutable or universal. But it is to say that they obviously play a significant part in the whole process of exclusion and differential treatment.

We can, throughout legal history, see certain identities or groups “marked apart” in social or folk narratives and then “kept apart” by deliberate laws and policies. For example, certain laws and policies in the District of Columbia actually banned persons with disabilities

6 See statement by International Labour Organization Director General, Guy Ryder, “Millions of Men and Women with Disabilities Face Exclusion”, 3 December 2015, available at: http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_432312/lang-en/index.htm.

7 Schmitt, C., *Political Theology: Four Chapters on the Concept of Sovereignty*, University of Chicago Press, 2006.

8 See, for example, Department of Children and Youth Affairs, *Report of the Inter-Departmental Group on Mother and Baby Homes in Ireland*, July 2014, available at: <http://www.dcy.gov.ie/documents/publications/20140716InterdepartReportMothBabyHomes.pdf>.

from even being seen in the streets (so-called “ugly laws”)!⁹ An extreme version is the phenomenon of “civil death”, which is the denial of the very personhood of an individual, as his or her personhood rights are given to others (for example, a slave becomes the property of a slaveholder) and the individual “disappears”. The chillingly suggestive phrase “civil death”, first coined by Blackstone, has applied (and to some extent still applies) to many groups in several parts of the world, including women,¹⁰ prisoners,¹¹ and persons with intellectual disabilities.¹² Law, “the witness and external deposit of our moral life”,¹³ has often been used (abused) in the past to cement into place these exclusions. In practical terms this is felt by the individual members of the affected group very adversely. In symbolic terms, the law’s endorsement of exclusion or relative exclusion valorizes an exclusionary worldview and weaves its assumptions into the background fabric of what is considered “normal”. Over time, this can have the perverse effect of diverting people away from addressing any contradiction between what they profess to believe and their actual practice. But just as the law can embed exclusionary ideas (and almost inoculate people against critical self-reflection) it can also be used to unpick the legacy of the past. This performs not just the practical task of removing barriers but also an educative role of conscientising people toward right behavior.

Regardless of whether these differentiating traits exist before or as a result of exclusion, the social construction of these “traits”, “identities” or “grounds” in non-discrimination law is not of course a closed set.¹⁴ New identities may emerge in the future arising, for example, from breakthroughs in biomedicine. It has been remarked that mankind has, up to now, used technology to extend its power over nature but that in the future, technology will actually be used to change the nature of mankind.¹⁵ What, therefore, of the impact of technology on humans who have their cognitive capacities augmented – do these “post-humans” deserve to be called human with the benefit of human rights (or do they attract some other set of rights) as well as the benefit of the protection of non-discrimination law?¹⁶ What or who are they? Here scientific (or other) advances create a new class or change circumstances.

9 Schweik, S., *The Ugly Laws: Disability in Public*, NYU Press, 2010.

10 Blackstone, W., *Commentaries on the Laws of England*, Vol. 1, Clarendon Press, 1765, pp. 442–445.

11 See Chin, G.C., “The New Civil Death: Rethinking Punishment in the Era of Mass Conviction”, *University of Pennsylvania Law Review*, Vol. 160, 2012, pp. 1789–1933.

12 See Quinn, G., “From Civil Death to Civil Life – Perspectives on the right to supported decision-making for persons with intellectual disabilities”, paper delivered at Tbilisi State University, 20 December 2015, available at: http://www.nuigalway.ie/research/centre_disability_law_policy/documents/Tbilisi%20State%20University%20Talk%20GQfinal%20Dec%202015.pdf.

13 See above, note 3, 1897, p. 459.

14 See Gergen, M. and Gergan, K.J., *Social Construction – a Reader*, Sage, 2003.

15 See Harari, Y., *Sapiens: a Brief History of Humankind*, Harvill Secker, 2011.

16 See Nayer, P. K., *Posthumanism*, Polity Press, 2013, Para. 47.

But what about situations where this is nothing new, simply an unwillingness (or inability) to face accumulated disadvantages from the past? Often the disadvantages felt by a group (as yet unnamed or identified, much less self-identified) seep very slowly into public consciousness. Perhaps it is an awareness of the unfair disadvantages that leads us to define the group affected (or the ground to be protected). Indeed, one might speculate that as the disadvantages are ameliorated, the need for the ascription (or self-ascription) of group identity is lessened (if not eliminated). At least one leading commentator believes so.¹⁷

It is clear that sharing the traits of a group or shared identity can trigger negative as well as positive reactions and outcomes. Why use law to challenge and roll back the resulting exclusion and discrimination? There are two sets of overlapping reasons why exclusion and discrimination must be opposed. First, there is the ethical imperative of preserving the life chances of individuals caught in the net. While exclusion may be directed against a group, its effects are most keenly felt by individuals. Secondly, there are also clear systems-based reasons why space for belonging, attaching and participating regardless of difference should be preserved. This has to do with the concept of an open and hence successful society – a good in itself but which also serves the instrumental purpose of honouring the rights of individuals.

In a famous encounter in the 19th century, Lord Acton took issue with John Stuart Mill on the value of homogeneity and the “nation” – and the legitimacy of treating others differently.¹⁸ Lord Acton took the view that tests of belonging and un-belonging had no place in a respectable liberal democracy – one that was capable of adapting to rapid change. It is not hard to see why. Left unchecked, the centrifugal tendencies of such an approach makes for an inward-looking political community and generates social dislocation as well as endemic economic jealousy. Such closure often results in political instability as well as economic inefficiency. Indeed the strains are such that this closure can only be sustained over time by reliance on increasingly authoritarian measures and political institutions. So, from a purely instrumental or political perspective, this tendency toward closure (by abusing and excluding groups and group identities) needs to be checked. Successful societies that can adapt even in the face of massive economic, social and political dislocations need public, social and economic space to be kept open.

Put another way, the preservation of common space for the expression of diversity and respect for pluralism is an instrumental end in itself. Polities that are successful in keeping such space open tend to minimise friction, adapt better to challenges – and respect rights. There is therefore a powerful “systems” rationale for non-discrimination law just as there is an ethical one from the perspective of the individual.

17 This emerged in discussions between the author and Professor Anna Lawson (Professor of Law and Director of the Centre for Disability Studies, University of Leeds).

18 See Kurelic, Z., “What can we learn from Lord Acton’s Criticism of Mill’s concept of nationality”, *Politika misao*, Vol. 43, 2006, pp. 19–27.

4. Groups, Identities, Grounds and Non-Discrimination Law

Non-discrimination law provides a tool chiefly in the hands of individual litigants to challenge differential treatment and exclusion. At the heart of non-discrimination law is an insistence on the inherent self-worth of all human beings – and on their *equal* inherent self-worth. Like any Enlightenment idea, it forces existing social and economic practices to pass muster under an ethic of justification.¹⁹ We principally use the tool of non-discrimination law to dissolve and reverse the concentric circles of exclusion and un-belonging at the behest of individual law suits.

Although ultimately resting on a deep conception of the human being, and the equal worth of all human beings, non-discrimination law can be described as normatively empty in at least one respect. Its primary focus is on relativities, how one person or one group is treated *relative* to another. To do this one must set aside context (for example, health care) as secondary and focus instead on identifying and measuring relative treatment. To do this one must clearly identify the groups or traits to be weighed up in terms of their respective and relative treatment. To do this one must abstract a reckonable trait (like gender, race, age, disability, or genetic predisposition towards illness). This is obviously a uni-sectional approach – and not a multi or inter-sectional approach.²⁰

To qualify as a member of the uni-sectional protectorate one must show that one shares the relevant trait (such as gender or age). So much so that one often gets the impression that the primary reality is the group and the primary object of protection is the group, with the individual only protected to the extent they share important group traits. Again, this is somewhat reversed when considering the ground of disability because one often gets the impression that the person is being protected *despite* sharing some core traits with disabled people (extending employment protection to me because I *can* do the job despite being disabled).

What we tend to let happen is that the non-discrimination analysis becomes an end in itself: how to identify differences of treatment; how to explain those differences away; and if they cannot be explained away, whether the gap is sufficiently wide to warrant condemnation. But, from a systems-based perspective, it is not actually the relativities that are of ultimate concern. The gap between the treatment of one group relative to another *reveals* both injustice toward a particular group and a lack of openness in our systems that allow such impulses breathing space in the first place. When the gap between the relativities is egregious then this triggers all sorts of alarms about the presence and influence of illicit impulses that have to be pushed back. It is not just the gap in treatment that makes discrimination wrong, it is how these gaps reveal impulses that cannot be tolerated in a self-respecting open society.

19 See Michelman, F., “Justification (and Justifiability) of Law in a Contradictory World”, *Nomos*, Vol. 28, 1986, pp. 71–99.

20 For a discussion of the distinction between these approaches, see Fredman, S., “Double Trouble: Multiple discrimination and EU Law”, *European Anti-Discrimination Law Review*, Vol. 2, 2005, pp. 13–20.

5. What Do We Miss in Traditional Non-Discrimination Analysis?

Our uni-sectional approach to non-discrimination analysis – though connected at a deep, albeit remote, sense on a very positive mission of inclusion – tends to screen important things out of the frame. How?

First of all, its very reductionism (I am a white male) is demonstrably counter-factual. Very few people ever define themselves in terms of one core trait they happen to share with others. Those that do we tend to associate with ideological extremists or with persons who (rather naturally) commit to an exaggerated sense of identity as a reaction against extreme prejudice, violence and injustice. Forcing people to wear their badge of David to qualify for the benefit of non-discrimination law seems highly artificial and inattentive to the complexity, and plasticity, of the human condition. Identities change. Emphasis changes. Identities are merged and are nearly always in a process of flux. Indeed, one often gets the sense that the state creates (or at least artificially sustains) the nation as an identity and not the other way around.

Secondly, traditional non-discrimination analysis tends to leave the background or ambient “political economy” of hatred or bias intact. It peels away at the surface but does not get to (because it cannot) the underlying causes of the accumulated disadvantages of discrimination and exclusion.²¹ One can peel away at the surface manifestations of these exclusionary impulses without ever dislodging them. Indeed, there are probably no purely judicial remedies to tackle these causes. Put another way, a successful non-discrimination suit (especially if brought as a high profile test case) can be the occasion for a deeper soul-searching as to the root causes of the structural disadvantage and the kinds of programmatic remedies needed to remove it. Not many legal systems cater for structured settlements or judgments that demand, and then monitor, such programmatic changes. In such cases the politics of discrimination take over.

Clearly a much broader strategy is needed to become more self-aware of the “causes” for these illicit impulses to exclude (which differ from society to society) and to work out a way of revealing and dissolving them and the accumulated disadvantages that they generate. For example, everybody in Ireland knew that unmarried women with children born out of wedlock were effectively institutionalised right up to the 1980s. What happened behind closed doors stayed behind closed doors. Nobody said anything or did anything. This closure of the mind, heart and soul was the root cause of allowing discrimination to happen. That closure itself had causes – principally the way in which civic moral sensibilities were appropriated by institutionalised religion from independence in 1921 until the 1990s – leaving no space for moral revulsion except along carefully canalised lines. The “cure” had to await a re-balancing of relations between Church and State that came about for other reasons from the 1990s onwards.

21 See Barnard, C. and Hepple, B., “Substantive Equality”, *Cambridge Law Journal*, Vol. 59, pp. 562–585.

Thirdly, traditional uni-sectional non-discrimination analysis does not (because it generally cannot) get at the socio-economic determinants or effects of exclusion nor reach broader socio-economic strategies that, in the long term, can liberate many disadvantaged people and groups from a disadvantaged status. The non-discrimination frame tends to be synchronic, examining how group X is treated relative to group Y in the here and now. It struggles to be diachronic, to weigh in to the balance historic treatment and especially systems-based reasons for ascribing a lower status to certain groups. That is not to say there are not many bridges between non-discrimination and, for want of a better phrase, social justice. After all, positive action measures to redress the systemic causes of unequal treatment are welcomed (or at least permitted) within non-discrimination law. The innovation of “reasonable accommodation” obviously stretches in the direction of positive obligations. Yet, despite its origins in the grounds of religion it remains largely confined to the ground of disability at the moment. Some non-discrimination judgments may indeed have long-term systemic effects. A major non-discrimination judgment can be the trigger for deeper social and economic reform. But the point is that there is no necessary or logical reason why this deeper process of reform has to happen just because of an episodic victory in the courts on the basis of non-discrimination law.

And lastly, non-discrimination analysis can be circular. The non-discrimination idea does not determine in any hard way how we identify and frame difference, how we judge difference and the kind of response we deem appropriate to difference. The circular nature of the analysis leaves ample room for a judge, for example, to simply import (mostly un-self-consciously) a lot of prevailing social assumptions about certain characteristics such as disability. It is plain, for example, that the lower chamber of the European Court of Human Rights in *D.H. and Others v Czech Republic* felt that the segregation of children with intellectual disabilities from a mainstream or inclusive school environment was a matter best left to the policy prerogatives of the Contracting Parties, and not a matter to be closely scrutinised under the European Convention on Human Rights.²² So rather than flush out bias, traditional non-discrimination analysis can in fact give it an opportunity to periodically re-legitimate itself. Rather than provide an occasion for deep self-questioning, it can afford a license to allow prejudice to masquerade as deliberative judgment.²³ There is nothing inherently necessary in this and, in this case, it was effectively overturned by the judgment of the Grand Chamber. But on those rare occasions when it happens (and visibly happens) it reflects poorly on the judging process. This is an exaggeration of course. But most judges are not Hercules and many lapse easily into seeing difference and differential (i.e. segregationist) treatment as “normal”.²⁴ The point is that the traditional frame does not in itself force decision-makers to probe their own assumptions. Maybe this is no surprise. The Legal Realists have long told us that the human element in the judging process is unavoidable. One would hope that the disciplining virtues

22 *D.H. and Others v Czech Republic*, Application No. 57325/00, 7 February 2006, Para. 47.

23 See the classic statement of the Legal Realist creed in Frank, J., *Law and the Modern Mind*, Brentano, 1930.

24 For a highly perceptive analysis see: Colker, R., *When is Separate Unequal: A Disability Perspective*, Cambridge University Press, 2009.

of the law would compel judges to narrow down the scope for reflecting popular assumptions but, as *D.H. and Others* shows, they have a tendency to creep back into the analysis.

6. Is the Prescription as Good as the Critique?

The above analysis is a caricature of the uni-sectional approach. But there may be enough truth in it to leave us wondering about how and why traditional non-discrimination analysis has its limits and puzzled as to whether there is a better way forward. At a very general level the very term intersectionality sums up this inchoate feeling that something is not quite right. As a vantage point, it expresses a sentiment and a perspective and a rallying point. That is probably the most important thing about it right now. At a more practical level what does intersectionality offer?

Well, first of all, it is an antidote of sorts to the uni-centric or ground-centric way of framing reality in traditional non-discrimination analysis. I am more than a ground. I am more than several grounds. I am a person who may be inter-subjectively formed and defined but who is also more than that.²⁵ Many people see intersectionality as a way of creating awareness about the accumulated disadvantages experienced by someone who happens to have overlapping (and disadvantaged) identities, for example, gender, race, disability. To a certain extent, this is stating the obvious – if certain grounds have been identified because the people who identify within them have generally been disadvantaged, then it makes sense that those who fall within several of these grounds have been multiply disadvantaged. It does not necessarily follow that discrimination will be found just because one happens to share many overlapping identities. It is probably more relevant to the design of the programmes intended to reverse cumulative disadvantage. A decent attempt at reflecting this kind of intersectionality was made in the UN Convention on the Rights of Persons with Disabilities, which contains specific articles on both women and children with disabilities.²⁶ A matter of regret is the failure to include a specific article dealing with age and disability which was due entirely to the fact that elder rights groups were absent from the negotiations.²⁷ The core message of the intersectionality thesis to me is that I am more than the sum of my parts – and my moral claims (alongside my relativity claims) are the most important thing to me as a human being.

Secondly, intersectionality is an antidote to the creeping hierarchies of the excluded.²⁸ Is discrimination on the ground of race really “worse” than discrimination on the ground of age? Can advances on one ground impede advances on another? For example, for a long time in the 1990s, the

25 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*, 1989, pp. 139–167.

26 Articles 6 and 7.

27 This observation is based on the author’s personal observations as a member of the Rehabilitation International negotiating team during the proceedings of the UN Ad Hoc drafting committee (2002–2006).

28 For discussion of these hierarchies in EU law, see Schiek, D., “A New Framework on Equal Treatment of Persons in EC Law?”, *European Law Journal*, Vol. 8, 2002, pp. 290–314.

European Commission resisted opening up its Equal Opportunities Directorate beyond a focus on gender. The theory was that to do so would risk diluting some of the hard-fought high(er) standards on gender.²⁹ The point is not that this was good or bad – but that a uni-centric focus almost required it. A more intersectional approach would not have warranted carving out a privileged space for one group or identity. Another example comes from litigation. In litigation, for example, we typically push hard for one group (identity) that is the focus of the case. Sometimes this can be done by setting to one side (which can be interpreted as implicitly accepting) the discrimination felt by another group. A more self-consciously intersectional practice of law might require us to hesitate before pressing certain arguments lest it would (unintentionally) consolidate the disadvantage of other groups. It follows that a consciousness of intersectionality can heighten sensitivities in the practice of law. We cannot address all issues of discrimination and all grounds at the same time, but we can fashion arguments that cut down space for the judiciary to make easy assumptions. That can be as simple as saying “we do not mean by our argument to suggest that unequal treatment between X and Y is justifiable”. Or it could mean inviting others to draft an amicus brief to address surrounding issues or groups indirectly affected by the case at hand.

Thirdly, an emphasis on intersectionality leads us to understand justice from a social justice perspective as well as a civil rights perspective. It should generate more thought into “accumulated disadvantage”, which often locks disfavoured groups into endemic cycles of poverty. Through time people begin to believe the stereotypes set about themselves – they conform to the image, and re-start the cycle of exclusion and leave intact closed systems that tolerate this. The slogans about interdependence of civil and political rights on the one hand and economic, social and cultural rights on the other are generally vacuous. There is a deep nexus between the two – and intersectionality helps bring this to life.

There is another reason to factor in social justice. Very often our social entitlement system is rigged to exclude and make people feel unwanted. Given that many “vulnerable” groups are dependent, or more dependent than others, on our welfare system and that the State will often try to achieve indirectly (for example, by rigging entitlements programmes) what it cannot do openly or directly to exclude such groups there is every reason to be attentive to the architecture of our social systems. Intersectionality makes this come alive for us.

So, in sum, intersectionality reveals some of the partiality of the uni-sectional approach of traditional non-discrimination law – a tool that does not (because it cannot) capture the full essence of the more positive vision of an open society that we want to achieve. Intersectionality can and should lead to a more self-conscious practice of the law – one that does not endorse any hierarchy of the excluded and which pays attention to the unintended collateral damage that might be experienced by one group as a by-product of argumentative strategies on behalf of another. Intersectionality also helps to broaden the policy agenda if we are seriously interested about reversing not just the epiphenomenon of discrimination but its underlying political economy. What is less clear is what difference a heightened consciousness of intersectionality makes for courts and how they deal with non-discrimination claims based on it.

29 See Fredman, S., “Equality: A New Generation?”, *Industrial Law Journal*, Vol. 30, 2001, pp. 145–168.

Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective

Ben Smith¹

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”.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.

International Human Rights Law and Intersectional Discrimination

Ivona Truscan and Joanna Bourke-Martignoni¹

Introduction

Through traveling to other people's "worlds" we discover that there are "worlds" in which those who are victims of arrogant perception are really subjects, lively beings, constructors of vision even though in the mainstream construction they are animated only by the arrogant perceiver and are pliable, foldable, file away-able, classifiable.²

International human rights monitoring mechanisms have traditionally relied upon a "single-axis" approach to enforce legal provisions prohibiting discrimination.³ The focus of these bodies has been on discrete, mutually exclusive grounds of discrimination as they are recognised in human rights instruments, such as the Universal Declaration of Human Rights, which prohibits distinctions based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴ The remedies provided by international human rights mechanisms in individual cases, as well as their policy recommendations, have tended to reinforce this singular conception of discrimination, which, in turn, entrenches normative and institutional fragmentation and discursive hierarchies through which experiences of discrimination will be identified and redressed through international human rights law.⁵ This article employs an analysis based on selected approaches to intersectional discrimination as an action-oriented method to examine the state of current practice within international human rights mechanisms.⁶

1 The authors would like to thank the Swiss Network for International Studies which, from 2013 to 2015, supported the larger research project, "The Intersectionality of Human Rights Violations and Multiple Forms of Discrimination", within which this article was developed. More information about the project is available at: <http://www.unifr.ch/iiedh/fr/recherche/ethique-politique-dh/snis>. The views expressed in the article remain those of the authors.

2 Lugones, M., quoted in Kapur, R., "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International Post-Colonial Feminist Legal Politics", *Harvard Human Rights Journal*, Vol. 15, 2002, p. 1.

3 May, V. M., *Pursuing Intersectionality. Unsettling Dominant Imaginaries*, Routledge, 2015, p. 82.

4 Universal Declaration of Human Rights, Article 2.

5 See above, note 3.

6 Crenshaw, K., "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics", *University of Chicago Legal Forum*, Vol. 4, 1989, pp. 139–167; Crenshaw, K., "Mapping the Margins: Intersectionality, Identity Politics, and

The article focuses on the jurisprudence of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) as well as several recent interpretive comments and cases by other human rights treaty monitoring bodies. The discussion begins with an overview of several theories of intersectional discrimination and explores the advantages as well as the drawbacks of intersectionality as an observational and reform-driven methodology for analysing and implementing guarantees of substantive equality through international human rights law. In its following sections, the article applies intersectional methodologies to the practice of the CEDAW Committee, the Committee on the Elimination of Racial Discrimination (CERD Committee), the Committee on the Rights of the Child (CRC Committee), the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of Persons with Disabilities (CRPD Committee).

1. Intersectionality Theory and International Human Rights Law

Intersectionality is what occurs when a woman from a minority group (...) tries to navigate the main crossing in the city (...) The main highway is "racism road". One cross street can be Colonialism, then Patriarchy Street (...) She has to deal not only with one form of oppression but with all forms, those named as road signs, which link together to make a double, triple, multiple, a many layered blanket of oppression.⁷

Intersectionality is both a method of observation and an action-oriented form of practice that aims to uncover and redress the workings of privilege and oppression that often remain hidden from view in the classical single-axis analyses of discrimination and inequality used by most international human rights monitoring mechanisms.⁸

Theories about intersectionality have a long history within critical race feminism and in post-colonial studies.⁹ During the 1990s, a number of scholars working within these different

Violence against Women of Color", *Stanford Law Review*, Vol. 43, 1991, pp. 1241–1299; Hill Collins, P., et al, "Symposium on West and Fenstermaker's 'Doing Difference'", in Fenstermaker, S. and West, C. (eds.), *Doing Gender, Doing Difference*, Routledge, 2002; and Kapur, R., "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International Post-Colonial Feminist Legal Politics", *Harvard Human Rights Journal*, Vol. 15, 2002.

7 Crenshaw, K., according to a report of the 2001 World Conference against Racism as cited in Yuval-Davis, N., "Intersectionality and Feminist Politics", *European Journal of Women's Studies*, Vol. 13, 2006, p. 196.

8 See above, note 3.

9 See, for example, note 6, Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color"; see above, note 6, Kapur; Bulbeck, C., *Re-orienting western feminisms: women's diversity in a postcolonial world*, Cambridge University Press, 1998; Padilla, L. M., "Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue", *Fordham Law Review*, Vol. 66, 1997, p. 843; Lenard Hutchinson, D., "Identity Crisis: 'Intersectionality', 'Multidimensionality', and the Development of an Adequate Theory of Subordination", *Michigan Journal of Race and Law*, Vol. 6, 2001, p. 285; and Grillo, T., "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House", *Berkeley Women's Law Journal*, Vol. 10, 1995, p. 16.

traditions advanced models of intersectionality as a counterweight to the dominant essentialist conception of inequality which put forward fixed, homogenous groups as categories within national and international anti-discrimination law and policies.¹⁰ The intersectional, anti-essentialist critique argues that people cannot be defined by singular, unchanging attributes, but rather that identities are constantly being shaped and remade as a result of multiple characteristics and experiences.¹¹ As Virginia May notes, “[i]ntersectionality highlights how lived identities, structural systems, sites of marginalisation, forms of power and modes of resistance ‘intersect’ in dynamic, shifting, ways.”¹²

In rejecting the notion that individual grounds of discrimination can be easily separated from one another in terms of both their cause and effect, intersectional theories rely on a matrix framework that recognises the intricately entwined functions of both identities and power.¹³ Intersectional approaches differ from cumulative or multiple conceptions of discrimination which add together a number of grounds of discrimination – ethnic origin + gender + social class + disability + age – as discrete, sequential and severable identity factors.¹⁴ Intersectional approaches recognise that the unique forms of discrimination that occur at the intersection between several systems of oppression should be observed using new analytical tools and remedied through specific measures that may go beyond those typically provided in cases of discrimination on the basis of a single ground.¹⁵ An intersectional analysis considers intra-group differences as important as those between groups and asserts that it is possible for individuals and groups to be simultaneously oppressed and privileged.¹⁶

10 See above, note 6, Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics”; see above, note 6, Kapur; and Bulbeck, C., *Re-orienting western feminisms: women’s diversity in a postcolonial world*, Cambridge University Press, 1998.

11 Lenard Hutchinson, D., “Identity Crisis: ‘Intersectionality’, ‘Multidimensionality’, and the Development of an Adequate Theory of Subordination”, *Michigan Journal of Race and Law*, Vol. 6, 2001; and Grillo, T., “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House”, *Berkeley Women’s Law Journal*, Vol. 10, 1995.

12 See above, note 3.

13 Hill Collins, P., “Learning From the Outsider Within: The Sociological Significance of Black Feminist Thought”, *Social Problems*, Vol. 33, 1986; and Satterthwaite, M., “Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers”, *Yale Human Rights and Development Law Journal*, Vol. 8, 2005, p. 1.

14 Andersen, M. L. and Hill Collins, P., *Race, Class and Gender: An Anthology*, Wadsworth Publishing, 2015.

15 Fredman, S., “Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights”, in Boerefijn, I., et al (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(l) UN Convention on the Elimination of All Forms of Discrimination Against Women*, Intersentia, 2003, p. 15.

16 See above, note 3.

There is apparent consensus in academic circles and, increasingly, amongst human rights practitioners, concerning the fundamental limitations of the single-axis approach to discrimination.¹⁷ However, disagreement arises in relation to the extent to which intersectionality-based methods are capable of providing concrete responses to the challenges imposed by taking into account a multiplicity of experiences of inequality and oppression.¹⁸

For some scholars, intersectionality forms:

*[A] project of limitless scope and limited promise (...) It ensures that the focus of intellectual, political and legal energy is directed towards infinite elaboration of inequality subgroups, engendering a slow but steady march towards conceptual fragmentation and, ultimately, dissolution.*¹⁹

In this view, the application of intersectional methods is doomed to achieve the opposite outcome of its stated purpose. These scholars have raised the spectre of the “infinite regress problem” whereby intersectionality leads to the disaggregation of sub-group identity categories to the point that the subjects of analysis are reversed, with the individual remaining the standing unit, while the group disappears.²⁰

These critics assert that when the individual or the subgroup remains the subject of analysis, it becomes impossible to design policies, strategies or legislative instruments that would advance the interests of a larger group.²¹ This line of reasoning further implies that, even within a given system of oppression, certain subgroups have a more privileged position when compared with others.²² Thus, oppressed subgroups may assume positions of dominance with respect to other subgroups. The “relativism problem” describes every individual as a potential oppressor, thereby rendering the normative framework on anti-discrimination and equality meaningless.²³

In a scenario where every subgroup experiences some form of oppression, and makes claims for its own priority in strategies to redress discrimination, it has been asserted that intersec-

17 *Ibid.*

18 Conaghan, J., “Intersectionality and the Feminist Project in Law”, in Cooper, D. (ed.), *Law, Power and the Politics of Subjectivity: Intersectionality and Beyond*, Routledge Cavendish, 2008.

19 *Ibid.*

20 Ehrenreich, N., “Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems”, *University of Missouri-Kansas City Law Review*, Vol. 71, 2002, p. 267.

21 *Ibid.*, pp. 266–267.

22 Roseberry, L., “Multiple Discrimination” in Sargeant, M. (ed.), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective*, Cambridge University Press, 2011, p. 28.

23 See above, note 20, p. 271.

tionality does not deliver on its egalitarian promise.²⁴ These critiques argue that without a mechanism for measuring degrees of inequality, intersectional practice locks individuals and subgroups into a never-ending “battle of oppressions”.²⁵

Another argument invoked to refute the advantages of the practical application of an intersectionality framework centres on the claim that intersectionality is an instrument that should be limited to mapping and identifying those groups that deserve greater attention in policies and laws to redress inequalities. According to Conaghan,

*[T]he primary concern of intersectionality analysis is with how law represents women’s experiences. Indeed, much of the work on intersectionality can be understood as a critique of the “map” of gender inequality offered by law and legal feminism, accompanied by calls for a better representation, a richer topography of women’s lives.*²⁶

This assessment positions intersectional approaches to anti-discrimination as observational aids rather than as practical tools capable of radically changing the formulation and implementation of policies, programmes and laws to address intersectional forms of oppression.²⁷

Lastly, human rights practitioners have also expressed concern regarding the added-value of an intersectionality approach in connection with the issue of remedies.²⁸ Several of these authors view the application of intersectional methods as offering a false promise to complainants due to the fact that they have not, as yet, resulted in specific reparations that meaningfully address the root causes of inequality and power imbalances.²⁹

Such critics have further maintained that an intersectional analysis is difficult to implement given the institutional segregation, absence of capacity and the lack of cross-referencing among the different human rights mechanisms. These practical difficulties, it is argued, may lead to an *ad hoc* application of intersectional analysis, thereby creating the risk of interpretive inconsistency and the multiplication of different approaches to the same problem.³⁰

24 See above, note 3.

25 See above, note 20, p. 269.

26 See above, note 18.

27 Tomlinson, B., “Colonizing Intersectionality: Replicating racial hierarchy in feminist academic arguments”, *Social Identities: Journal for the Study of Race, Nation and Culture*, Vol. 19, 2013, pp. 254–272.

28 Davis, A.N., “Intersectionality and International Law: Recognizing Complex Identities on the Global Stage”, *Harvard Human Rights Journal*, Vol. 28, 2015, pp. 205–242.

29 See above, note 3.

30 Bond, J.E., “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s Human Rights Violations”, *Emory Law Journal*, Vol. 52, 2003, p. 74.

While these criticisms of intersectionality as a method for promoting social change are not entirely unfounded, we argue that the difficulties identified can be overcome and that intersectional approaches can and should be used by international human rights institutions to more effectively implement and monitor guarantees of substantive equality. Taken to their logical conclusion, intersectional methods of analysis demand a thorough and radical rethinking of the manner in which human rights institutions operate. The following sections map the first, tentative steps by international human rights mechanisms towards an engagement with intersectionality as a method. Progress is not necessarily going to be linear as the application of intersectionality in practice is a radical, transformative project. As Virginia May asserts:

*Intersectionality is a form of resistant knowledge developed to unsettle conventional mindsets, challenge oppressive power, think through the full architecture of structural inequalities and asymmetrical life opportunities, and seek a more just world.*³¹

2. Awareness of Intersectionality and Forms of Multiple Discrimination in the Practice of International Human Rights Mechanisms

Article 1(3) of the United Nations Charter states that one of the purposes of the United Nations is:

[T]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

This provision inspired the text in Article 2 of the Universal Declaration of Human Rights, which recognises that “everyone is entitled to all the rights and freedoms set forth (...) without distinction of any kind, such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status.” The subsequent adoption of the 10 core multilateral human rights treaties and the practice developed under each of these treaties has broadened the reach of international anti-discrimination law. Diversification has occurred not only in terms of the definition of the acts or omissions that may constitute discrimination, but also in relation to the grounds upon which discrimination must be prohibited. The oldest of these human rights treaties, namely the Convention on the Elimination of Racial Discrimination, prohibits distinctions based on “race, colour, descent, or national or ethnic origin”.³² The two International Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Eco-

31 See above, note 3, p. xi.

32 Convention on the Elimination of Racial Discrimination, Article 1(1).

conomic, Social and Cultural Rights (ICESCR) enriched the category of prohibited grounds by adding an open-ended list that includes, “sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³³

Treaty provisions on non-discrimination now routinely refer to “other status”, in order to leave the potential categories of prohibited grounds open, thus allowing the mechanisms a certain degree of latitude in their responses to newly identified forms of inequality and oppression. The category of “other status” has been read as including a number of different attributes such as, age,³⁴ disability,³⁵ migrant or refugee status,³⁶ place of residence,³⁷ health situation,³⁸ status of deprivation of liberty,³⁹ sexual orientation,⁴⁰ physical appearance,⁴¹ and poverty.⁴²

While the evolving and constantly growing list of grounds of discrimination prohibited by international human rights law would seemingly provide the basis for a systematic consideration of intersectional forms of discrimination, to date this has not been the case. As a general rule, most of the treaty bodies have approached inequality as a singular or separate phenomenon, paying little attention to the substantive rethinking of international anti-discrim-

33 International Covenant on Civil and Political Rights (ICCPR), Article 2(1); and International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2(2).

34 Committee against Torture (CAT), *General Comment No. 2, Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, Paras 21–22; CAT, *General Comment No. 3, Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, Paras 8, 32; Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 24, Article 12 of the Convention (women and health)*, 1999, Para 24; Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 6, The economic, social and cultural rights of older persons*, 7 October 1996, Para 12; and CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 29.

35 Human Rights Committee (HRC), *General Comment No. 2, Reporting Guidelines*, 28 July 1981, para 13; and CEDAW Committee, *General Recommendation No. 24, Article 12 of the Convention (women and health)*, 1999, Para 25.

36 Committee on the Elimination of Racial Discrimination (CERD Committee), *General Recommendation No. 31, The prevention of racial discrimination in the administration and functioning of the criminal justice system*, UN Doc. CRPD/C/GC/31, 20 August 2004.

37 CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 34.

38 *Ibid.*, Para 33.

39 *Ibid.*, Para 27.

40 CAT, *General Comment No. 3, Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, Paras 8, 32.

41 CERD Committee, *Concluding Observations: The Dominican Republic*, UN Doc. CERD/C/DOM/CO/13-14, 19 April 2013, Para 16.

42 CEDAW Committee, *Concluding Observations: Peru*, UN Doc. CEDAW/C/PER/CO/6, 2 February 2007, Para 36.

ination law that would be necessary in order to effectively capture and redress situations of intersectional inequality.⁴³

In recent years, however, a number of the human rights treaty monitoring bodies, including, the CERD Committee,⁴⁴ the CRC Committee,⁴⁵ the Human Rights Committee (HRC)⁴⁶ and the CESCR⁴⁷ have begun to mention forms of multiple and intersectional discrimination within their work. It appears that awareness of the need to counter the “single-axis thinking” and essentialism that characterise the formulation of the non-discrimination provisions within most of the international human rights instruments is slowly growing.

The changing nature of the treaty bodies’ engagement with forms of intersectional discrimination is also apparent in several illustrative cases decided under the Optional Protocol to Convention on the Elimination of Discrimination against Women (Optional Protocol). Some of these cases are analysed in more detail below. While the text of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explicitly refers to particular groups of women in Article 14, on rural women, and in Article 12(2), on equal access to health care where special mention is made of pregnant and breast-feeding women, until recently, the CEDAW Committee carried out its work without much analysis of the forms of intersectional oppression that groups and individual women may face. The group “women” was viewed by the Committee as being an essentially unitary category with comparisons being made against a male comparator (presumably also devoid of any identifying features other than biological sex).

43 See above, note 30, p. 141.

44 CERD Committee, *General Recommendation No. 25, Gender related dimensions of racial discrimination*, 20 March 2000.

45 See, for example, Committee on the Rights of the Child (CRC Committee), *General Comment No. 11, Indigenous children and their rights under the Convention*, UN Doc. CRC/C/GC/11, 12 February 2009; CRC Committee, *General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/C/GC/2005/6, 1 September 2005; and CRC Committee, *Draft General Comment on the Rights of Adolescents*, 2015.

46 HRC, *General Comment No. 18, Non-Discrimination*, 10 November 1989. While the Committee does not expressly refer to intersectional or multiple forms of discrimination, it insists upon substantive (*de facto*) equality as the standard that it uses to assess state compliance with obligations under Articles 2 and 26 of the ICCPR. The Committee therefore argues that differential treatment is justified in order to redress inequalities and in paragraph 8, it cites the example of the provisions in Article 6(5) of the ICCPR that prohibit the death sentence being carried out on pregnant women.

47 See above, note 37, Para 17, “[s]ome individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.” The CESCR does not go further to suggest which particular measures states must take to consider or remedy “cumulative” or multiple discrimination.

3. The CEDAW Committee and its Evolving Practice in Considering Intersectionality in Individual Communications

This section of the article compares several decisions on individual communications submitted to the CEDAW Committee, *A.S. v Hungary*,⁴⁸ *Kell v Canada*,⁴⁹ *R.P.B. v the Philippines*,⁵⁰ and *E.S. and S.C. v Tanzania*.⁵¹ The authors of each communication are women belonging to particular groups: A.S. is a Roma woman; Cecilia Kell is an Aboriginal woman and a survivor of domestic violence; R.P.B. is a girl with disabilities; and E.S. and S.C. are widows and members of the Sukuma ethnic group.

a. *A.S. v Hungary*

In 2004, in one of its earliest decisions under the Optional Protocol, the CEDAW Committee examined the case of *A. S. v Hungary*. The case concerned the medical sterilisation of a Hungarian Roma woman, A.S. without her full and informed consent.⁵² A.S. argued her case on the basis of the right to health information under Article 10(h), the right to non-discrimination in the health sector in Article 12 and the right to freely decide on the number and spacing of children under Article 16(1)(e) of the CEDAW. In her allegations, A.S. stressed her “extremely vulnerable situation (...) as a woman who would lose her child and as a member of a marginalised group of society – the Roma”.⁵³ She also maintained she would have never consented to the sterilisation given her “strict Catholic religious beliefs that prohibit contraception of any kind”.⁵⁴ The issue of informed consent is central to the Committee’s discussion of the merits of the three articles invoked by the author.⁵⁵

The *A.S. v Hungary* case was ground-breaking in that the decision indirectly raised the issue of the systemic discrimination faced by many Roma women in Hungary and elsewhere in the region.⁵⁶ It also underscored the State’s obligation to eliminate discrimination and provide accessible and understandable reproductive and sexual health information

48 *A.S. v Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2004.

49 *Cecilia Kell v Canada*, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008, 26 April 2012.

50 *R.P.B. v the Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011, 12 March 2014.

51 *E.S. and S.C. v Tanzania*, Communication No. 48/2013, UN Doc. CEDAW/C/60/D/48/2013, 13 April, 2015.

52 See above, note 48. A.S. was sterilised during a caesarean section medical intervention prompted by the death of her foetus.

53 *Ibid.*, Para 9.4.

54 *Ibid.*, Para 2.4.

55 *Ibid.*, Para 11.5.

56 Schultz, D.L., “Translating Intersectionality Theory into Practice: A Tale of Romani-*gadže* Feminist Alliance”, *Signs*, Vol. 38, 2012, pp. 37–43.

for all.⁵⁷ However, the Committee failed to engage with the intersectional forms of oppression that A.S. encountered. At the heart of her complaint was the fact that being subjected to forced sterilisation violated both her religious convictions and her interest in following Roma traditions, especially since “having children is said to be a central element of the value system of Roma families”.⁵⁸ The Committee did not explicitly take into account the fact that the author belonged to the Roma minority, nor did it undertake any analysis of her particular circumstances as a Roma mother and whether these factors fundamentally altered the kind of discrimination that she faced.

The discussion of the merits of the allegation under Article 12 provided the right opportunity for the CEDAW Committee to discuss how A.S.’s belonging to the Roma community resulted in differential treatment in the context of accessing health care services. However, the Committee did not take this opportunity. The Committee recalled its General Recommendation No. 24 on women and health, but only in so far as it related to informed consent, omitting to refer to the part of the Recommendation that stresses circumstances, other than biological differences, which impact on women’s health status:

*[W]hile biological differences between women and men may lead to differences in health status, there are societal factors that are determinative of the health status of women and men and vary among women themselves. For that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups.*⁵⁹

The Committee should have taken into account that the author belonged to a Roma community, her particular vulnerability and her religious beliefs regarding contraception as “societal factors” determinative of her health status and treatment. The Committee apparently assumed that the author suffered the violation in the same way as a non-Roma woman, failing to recognise that, from a gender perspective, the experience of non-minority women does not encompass the experience of all women.⁶⁰

The remedies offered by the CEDAW Committee in *A.S. v Hungary*, while adequate in some respects, do not go as far as they might have in shining a light on the specific, systematic and intersectional forms of discrimination experienced by Roma women in the context of sexual and reproductive health care. The Committee called on the State to take measures that would raise the awareness of relevant personnel in public and private health centres with respect to the provisions of the CEDAW and the Committee’s General Recommendations concerning women’s reproductive health. The treaty body also stressed important amendments that the

57 See above, note 48, Para 11.5.

58 *Ibid.*, Para 2.4.

59 See above, note 35, Para 6.

60 See above, note 48, Para 11.5.

State needed to introduce in order to strengthen respect for the principle of informed consent in all cases of sterilisation, including by monitoring public and private health centres that perform such medical procedures.⁶¹ The Committee's formulation of the recommendations reflects that it is the gender of A.S. that is regarded as the primary axis of oppression when, in fact, it was the intersection of her situation as a member of the Roma community and as a mother that resulted in her forced sterilisation.

The Committee's analysis would have benefited from consideration of the interpretative instruments previously elaborated by the CERD Committee and the CESCR. In 2000, the CERD Committee adopted a General Recommendation addressing the gender aspects of racial discrimination⁶² and a General Recommendation looking specifically at the situation of Roma persons.⁶³ Similar to the CEDAW Committee's observation that societal factors influenced women's health status in particular ways, the CERD Committee stated that:

*There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.*⁶⁴

The CERD Committee further acknowledged that:

*Certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilisation of indigenous women.*⁶⁵

Consideration of the comments of the CESCR in relation to the right to health also could have assisted the CEDAW Committee to develop a more in-depth analysis of A.S.'s experiences. In its General Comment No. 14 on the right to health, the CESCR states that the:

61 *Ibid.*

62 See above, note 44.

63 CERD Committee, *General Recommendation No. 27, Discrimination against Roma*, 2000.

64 See above, note 44, Para 1. In paragraph 5, the Committee also indicates that it will take several methodological steps to systematise its consideration of the gendered aspects of racial discrimination, namely it commits to: (a) examine the form and manifestation of racial discrimination; (b) identify the circumstances in which racial discrimination occurs; (c) enquire on the consequences of racial discrimination; and (d) establish the availability and accessibility of remedies and complaint mechanisms for racial discrimination. Importantly, if the CEDAW Committee had taken these practical steps into account in its decision in *A.S. v Hungary* six years later, it would have opened up the possibility of a discussion of the particular circumstances of the applicant as a Roma woman in the health care system.

65 *Ibid.*, Para 2.

[R]ight to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.⁶⁶

The approach of the CESCR to define the right to health based on its interrelated and essential elements of availability, accessibility, acceptability and quality would have allowed the CEDAW Committee to examine and understand the author's experiences.⁶⁷ The author's description of the facts contained indications of the physical barriers that affected her access to emergency medical services.⁶⁸ This raises questions from the point of view of the obligation to provide accessible health facilities without discrimination.⁶⁹ A.S. also claimed that it took only 17 minutes to register her arrival at the hospital, to perform the caesarean section, to ask for her consent to be sterilised and to perform the sterilisation.⁷⁰ This course of events raises serious doubts about the accessibility of information concerning reproductive and sexual-health care and the element of acceptability, which requires respect for the culture of individuals and minorities as well as sensitivity to gender and life-cycle diversity.⁷¹

In future cases relating to the right to health, the CEDAW Committee may find CESCR's General Comment No. 22, issued in March 2016, supports recognition of intersectional discrimination. The Comment focuses on the right to sexual and reproductive health and acknowledges that for:

[C]ertain individuals and population groups that experience multiple and intersecting forms of discrimination that exacerbate exclusion in both law and practice, (...) the full enjoyment of the right to sexual and reproductive health is further restricted.⁷²

66 CESCR, General Comment No. 14, *The right to the highest attainable standard of health (Article 12 of the ICESCR)*, UN Doc. E/C.12/2000/4, 11 August 2000, Para 4. The analysis of the CESCR would also allow the CEDAW Committee to establish not only that the State failed in its obligation to provide information with regard to sexual and reproductive health, but also emphasise the fact that withholding or misrepresenting health-related information amounts to a violation of the obligation to respect the right to health.

67 *Ibid.*, Para 12.

68 See above, note 48, Para 2.2.

69 See above, note 66, Para 12(b)(ii).

70 See above, note 48, Para 2.3.

71 See above, note 66, Para 12(b)(iv) and (c).

72 CESCR, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the ICSECR)*, UN Doc. E/C.12/GC/22, 4 March 2016, Para 2.

Importantly, the CESCR explicitly recognises that “individuals belonging to particular groups may be disproportionately affected by intersectional discrimination in the context of sexual and reproductive health”.⁷³ Such groups may include women living in poverty as well as women belonging to different ethnic minorities.⁷⁴ The connection established by the CESCR regarding the likelihood that women belonging to ethnic minorities may experience intersectional discrimination may dismantle some of the apparent reluctance of treaty bodies to pay more attention to forms of intersectional discrimination.

In 2015, the CEDAW Committee did go some way towards recognising that different groups of women face different and unique barriers to accessing sexual and reproductive health services, when it issued its findings from an inquiry under Article 8 of the Optional Protocol into the situation of sexual and reproductive rights in the Philippines.⁷⁵ Although the inquiry did not specifically address intersectional discrimination, it did highlight the situation of economically disadvantaged women and adolescent girls in Manila as being of particular concern, and its recommendations to the government emphasised the need to ensure that these groups of women, as well as others, have effective access to sexual and reproductive health services, including information.⁷⁶ The Philippines inquiry demonstrates that the CEDAW Committee is gradually expanding its understanding of the barriers facing specific groups of women in relation to access to sexual and reproductive health services, including information. The next part of this section will consider the case of *Kell v Canada*, a case involving property rights.

b. *Kell v Canada*

In 1990, Cecilia Kell, an Aboriginal woman from the Canadian Northwest Territories, returned to her home community of Rae-Edzo after attending university.⁷⁷ When the local housing authority made lodging available to indigenous people under a special scheme, Kell decided to apply. She was living with her partner, one of the directors of the Housing Authority Board at the time who, hearing of the scheme, attempted to apply in his own name. After his application was rejected because he was not a member of the community, the housing authority advised Kell to list both herself and her partner in her application. This proved successful and a house was granted to them as co-owners and both were named on the Assignment Lease.⁷⁸

73 *Ibid.*, Para 30.

74 *Ibid.*, Para 30.

75 CEDAW Committee, *Summary of the Findings Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc. CEDAW/C/OP.8/PHL/1, 22 April 2015.

76 *Ibid.*, Para 52 (a).

77 See above, note 49.

78 *Ibid.*, Para 2.3.

Over the three years that followed the house purchase, Kell was subjected to domestic violence by her partner and this worsened after she found a job and became financially independent. In 1993, the Northwest Territories Housing Corporation, the public authority administering the properties, removed Kell's name from the Assignment Lease at the request of her partner without her knowledge or consent. In 1995, she was evicted from her home by her partner. Over the next 10 years, she fought to regain her property rights through the Canadian legal system. She filed three consecutive suits and had a different legal aid lawyer assigned for each case. She alleged that all of these lawyers failed to follow her instructions and negotiated without her consent.⁷⁹ Shortly after the first suit, Kell's former partner was diagnosed with cancer and died. By the time she filed the third action, the property had been sold by her partner's estate.⁸⁰

In 2008, contending that she had exhausted all domestic remedies, Kell brought an individual complaint under the Optional Protocol. She claimed, in particular, that Canada had "failed to ensure that its agents refrain from engaging in any act or practice of discrimination against women, when they removed [Kell's] name from the lease without her consent."⁸¹ She further submitted that the State had violated Article 16(1)(h) of the CEDAW as it failed to ensure her equal right to ownership, acquisition, management, administration and enjoyment of her property.⁸² Her further submission noted that:

*[T]he failure to reach a settlement in her lawsuit was a result of discrimination perpetrated against her by lawyers assigned to the case and by officials at the Northwest Territories Legal Services Board. As an aboriginal person, she experienced racism, and as a woman, she experienced sexism. Both of these aspects of discrimination contributed to a pattern of behaviour that was – at best bullying and at worst abusive.*⁸³

The CEDAW Committee concluded that Kell's property rights had been prejudiced by the public authority acting with her partner, and that she had been discriminated against on the basis of her identity as an Aboriginal woman who was a victim of domestic violence.⁸⁴ The Committee reiterated its interpretive guidance on intersectional discrimination in its General Recommendation No. 28, and found that the scope of the general obligations of states contained in Article 2 of the CEDAW had to be interpreted in light of the intersecting forms of discrimination experienced by Ms Kell:

79 *Ibid.*, Para 2.13.

80 *Ibid.*, Para 2.11.

81 *Ibid.*, Para 3.2.

82 *Ibid.*, Para 2.13.

83 *Ibid.*, Para 9.3.

84 This conclusion was not unanimous. Ms. Patricia Schulz submitted a dissenting Individual Opinion whereby she disagreed with the Committee's decision on the admissibility of the complaint, and the finding on intersectional discrimination.

*The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. States parties must legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned (...) Accordingly, the Committee finds that an act of intersectional discrimination has taken place against the author.*⁸⁵

The Committee determined that Canada had violated Articles 2(d) and (e) and 16(1)(h) of the Convention and that “[a]s the author is an aboriginal woman who is in a vulnerable position, the State party is obliged to ensure the effective elimination of intersectional discrimination.”⁸⁶ Aside from recommending that Kell be provided with reparations for the specific harms she suffered, the Committee held that Canada was required under the Convention to ensure effective access to justice for all Aboriginal women, by taking steps to recruit and train more Aboriginal women to provide legal aid to women “from their communities, including on domestic violence and property rights.”⁸⁷ It further recommended that professional legal aid services be provided for Aboriginal women with a focus on domestic violence and property rights.⁸⁸

c. *R.P.B. v the Philippines*

The Committee also took into account the existence of several systems of oppression based on age, gender and disabilities in its 2014 decision in *R.P.B. v the Philippines*.⁸⁹ R.P.B., who is unable to speak and hearing impaired, was 17 years old at the time that her neighbour allegedly raped her. She reported the incident to the police; where her sister interpreted for her using sign language. The affidavit drawn up was in Filipino. As the education system for the hearing impaired in the Philippines is almost entirely in English, R.P.B. could not understand the affidavit, nor was she provided with an interpreter (instead relying on her sister).⁹⁰

85 See above, note 49, Para 10.2. In its findings in an inquiry conducted in 2013 in Canada, the CEDAW Committee confirmed its findings regarding the intersectional forms of discrimination that Aboriginal women may suffer. The Committee added that “the intersectional discrimination faced by Aboriginal women living on reserves is exacerbated by their living in a rural environment, because of their geographical isolation and limited mobility, the lack of safe transportation and their limited access to law enforcement, protection and counselling services”. See, CEDAW Committee, *Report of the inquiry concerning Canada*, UN Doc. CEDAW/C/OP.8/CAN/1, 30 March 2015, Para 204.

86 See above, note 49, Para 10.3.

87 *Ibid.*, Para 11.

88 *Ibid.*, Para 12. Similarly, in *da Silva Pimentel v Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 27 September 2011, the Committee considered that the deceased’s status as a woman of African descent and her social-economic status placed her in a vulnerable sector of society in relation to access to health services.

89 See above, note 50.

90 *Ibid.*, Para 3.9.

In her petition to the Committee, R.P.B. argued that in addition to the use of gendered myths and stereotypes about the behaviour of “ordinary” Filipina women, her particular situation, that of being a girl minor and having a disability, was not taken into account. As such, there was a violation of the State’s obligation to end discrimination in the legal process under Articles 1 and 2(c), (d) and (f) of the CEDAW. She also claimed that the lack of a sign language interpreter, either at the investigative stage or at trial, violated her rights under Article 21(b) of the Convention on the Rights of Persons with Disabilities (CRPD).⁹¹

In its assessment, the Committee noted that R.P.B. had suffered moral and material damages as a result of the:

*[E]xcessive duration of the trial proceedings, by the court’s failure to provide her with the free assistance of sign language interpreters and by the use of the stereotypes and gender-based myths and disregard for her specific situation as a mute and deaf girl in the judgment.*⁹²

As a result, the Committee recommended that the State provide reparation in the form of “monetary compensation commensurate with the gravity of the violations” as well as psychological counselling and therapy for R.P.B. and her affected family members and “barrier-free education with interpreting.”⁹³ More generally, the Committee recommended that free and adequate sign language interpretation be provided at all stages of proceedings, that rape legislation be reviewed and that criminal proceedings be conducted “in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim’s gender, age and disability.”⁹⁴

In the *R.P.B.* case, the Committee considered the obligations of states in relation to women and girls with disabilities for the first time. In the absence of textual recognition of the specific situation of women and girls with disabilities in the CEDAW, the Committee satisfied itself with observing that myths and stereotypes prevent courts from considering the individual circumstances of the victim, which may include disability and age.

Although the Committee made progress in taking account of the complex circumstances that formed the background to R.P.B.’s situation, the decision also demonstrates the limits of its capacity to follow an intersectionality-based analysis through to its natural conclusion. R.P.B. requested that the Committee make a decision on alleged violations of Article 2 (c), (d) and (f) in relation to fair trial guarantees free from discrimination as to sex, age, and disability. Despite the Committee’s display of awareness of, and concern for, R.P.B.’s situation as a girl

91 *Ibid.*

92 *Ibid.*, Para 8.11.

93 *Ibid.*, Para 9.

94 *Ibid.*

with hearing and speech impairments, its views still prioritised the sex and gender aspects of the communication.

In its decision, the Committee refers to its General Recommendation No. 18 on women with disabilities⁹⁵ where it acknowledges that these women “may face double discrimination linked to their special living conditions.”⁹⁶ With this argument, the Committee seems to be closer to an additive understanding of inequalities rather than an intersectionality-based logic. Its conclusion, by focusing only on the sex-and gender-based discrimination that lie within the mandate narrowly defined by the Convention, fails to properly take in the disability aspects of the violation. Furthermore, the Committee disregarded the age dimension of the complaint, and treated the author as an adult woman.

Under Article 2(f) of the CEDAW, the Committee explained that compliance by a state with its obligation to eliminate gender stereotypes needs to be assessed in light of “gender, age and disability sensitivity applied in the judicial handling of the author’s case”.⁹⁷ The Committee’s examination of the degree of sensitivity exercised by domestic authorities comprised assessments of the courts’ use of gender stereotypes based on gender and sex constructing a typology of “ordinary Filipina female rape victim” who would “summon every ounce of her strength and courage to thwart any attempt to besmirch her honour and blemish her purity”; and the courts’ observations that R.P.B’s conduct did not match that of the constructed model, in that she had not tried to escape by making noise or using force.⁹⁸ While in this case, the Committee stated that it was going to take account of the triple-tiered situation of the victim, its conclusions separate sex and gender, on the one hand, and age and disability, on the other. The Committee held that the facts of the case amounted to sex and gender-based discrimination and *disregard* for the author’s disability and age.⁹⁹ Thus, the Committee neither decided on additive discrimination on the basis of sex, gender, age and disability, nor intersectional discrimination. Despite its analysis, it still preferred to operate with a conceptual separation of the applicant’s experiences and focus on sex and gender-based discrimination to the detriment of age and disability.

As with *A.S. v Hungary*, the Committee’s analysis of the merits would be enriched if it extended its purview to relevant practice from the other treaty bodies, particularly the CRC Committee and the CRPD Committee. In 2007, the CRC Committee adopted a General Comment on the rights of children with disabilities where it recognised that:

95 *Ibid.*, Para 8.3.

96 *Ibid.*

97 *Ibid.*, Para 8.8.

98 *Ibid.*, Para 8.9.

99 *Ibid.*

[I]n many cases, forms of multiple discrimination – based on a combination of factors, i.e. indigenous girls with disabilities, children with disabilities living in rural areas and so on – increase the vulnerability of certain groups.¹⁰⁰

If the CEDAW Committee were to integrate this interpretation into its reasoning on future cases involving girls with disabilities, perhaps it would help establish a jurisprudence based on the recognition of multiple discrimination, rather than severing and prioritising personal experiences.

The most comprehensive understanding and application of an intersectionality-based logic appears in the draft General Comment of the CRPD Committee regarding Article 6 of the CRPD which focuses on women with disabilities. In the draft, the CRPD Committee states that taking an intersectional approach constitutes a:

[R]eflection of human rights becoming truly universal and personalised. It acknowledges that human beings experience discrimination differently according to their statuses throughout life-cycle and that discrimination occurs in various forms, directly, indirectly, structurally or systemic, or multiple.¹⁰¹

The CRPD Committee therefore recognises that women and girls with disabilities are often confronted with intersectional discrimination. It defines intersectional discrimination as comprising several layers of discrimination based on various grounds whose interaction produces new forms of discrimination that are unique and cannot be correctly understood by describing them as double or triple discrimination.¹⁰²

This draft General Comment constitutes an important source of interpretation concerning the content of an intersectionality-based analysis of discrimination and the main advantages it presents compared to the single-axis approach. First, the Committee understands intersectional discrimination as a form of discrimination based on the interlinking of multiple grounds. Second, the draft General Comment posits that, unlike the case of additive discrimination, in the case of intersectional discrimination, the grounds of discrimination are inextricably linked and it is impossible to untangle them in order to tell which part of the discrimination is based on a certain ground. Third, it stresses that intersectionality is useful to uncover experiences that may remain invisible in the single axis analysis, and to account for the complexity of human experiences at the intersection of sex, gender, age, sexual orientation, ethnicity, or cultural or religious backgrounds. This acknowledgment recognises that:

100 CRC Committee, *General Comment No. 9, The rights of children with disabilities*, UN Doc. CRC/C/GC/9, 27 February 2007, Para 8.

101 CRPD Committee, *Draft General Comment on Article 6, Women and disabilities*, UN Doc. CRPD/C/14/R.1, 22 May 2015, Para 4.

102 *Ibid.* Para 8.

[P]ersons experience discrimination not as members of a homogenous group but as individuals with different statuses and in different life circumstances. It means to acknowledge that multiple discrimination has unique and specific impact on individuals and merits particular consideration and remedying.¹⁰³

Particularly relevant for future cases such as *R.P.B. v the Philippines*, the CRPD Committee states that:

[G]irls with disabilities face intersectional discrimination on account of their age, gender, sex and disability when subject to sexual assault. It is this intersection of identities which concurrently reflects and produces a perceived and actual situation of risk and exclusion which renders possible such an act.¹⁰⁴

This interpretation touches upon the essence of the argument made in the *R.P.B.* case, and states what the CEDAW Committee did not articulate. In defence of the CEDAW Committee, it can be argued that, unlike the text of the CEDAW, the CRPD explicitly acknowledges that women and girls with disabilities face intersectional discrimination, and calls on states parties to take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.¹⁰⁵

d. *E.S. and S.C. v Tanzania*

In one of its most recent decisions, *E.S. and S.C. v Tanzania*, the CEDAW Committee examined the situation of two widows with minor children who were ordered to vacate their homes following the deaths of their husbands.¹⁰⁶ In each instance, the local courts applied patrilineal customary law provisions that granted male family members the right to administer and dispose of the estate.¹⁰⁷ In 2006, the women appealed to the High Court of Tanzania which concluded that “the impugned paragraphs [were] discriminatory in more ways than one”, but that “it was impossible to effect customary change by judicial pronouncements”.¹⁰⁸ The High Court decided that it would not overturn the provisions because doing so would “be opening the Pandora’s box, with all the seemingly discriminative customs from our 120 tribes plus following the same path”.¹⁰⁹ Several subsequent appeals by the women were dismissed on procedural grounds.¹¹⁰

103 *Ibid.*, Para 17.

104 *Ibid.*, Para 8.

105 Convention on the Rights of Persons with Disabilities, G.A. Res.A/RES/61/106, 2006, Article 6.

106 See above, note 51.

107 *Ibid.*, Paras 2.5–2.6.

108 *Ibid.*, Para 2.8.

109 *Ibid.*

110 *Ibid.*, Paras 2.9–2.10.

Having exhausted domestic remedies, the women turned to the CEDAW Committee. The women's complaint stated that there are three separate systems of intestate inheritance law in Tanzania that are divided along ethnic and religious lines, with codified customary law being the most widely applied system.¹¹¹ The Committee concluded "that inheritance matters are governed by multiple legal systems in the State party and that the authors have been subjected to Sukuma customary law on the basis of their ethnicity."¹¹² Although it does not elaborate further upon the situation of the authors as widows subject to patrilineal customary inheritance law, a footnote refers to the Committee's General Recommendations No. 28 and No. 29 in connection with intersectional discrimination.¹¹³

In its determination, the Committee highlights the fact that widows are forced to "perpetually depend on their male relatives and their children" and that they therefore suffer violations of their right to economic independence under Article 13 of the CEDAW.¹¹⁴ The Committee also found that Tanzania had breached its obligations under Articles 2 (c), 2 (f), 5 (a), 15 (1), 15 (2), 16 (1)(c) and 16 (1)(h) of the Convention, "read in the light of General Recommendations Nos. 21, 28 and 29."¹¹⁵ In addition to its recommendations concerning compensation for the authors of the complaint, the Committee urged Tanzania to ensure that the rights guaranteed in the CEDAW prevail over inconsistent national laws and that it repeal or amend local customary laws, "with a view to providing women and girls with equal administration and inheritance rights upon the dissolution of marriage by death, irrespective of their ethnicity or religion."¹¹⁶

The *E.S. and S.C. v Tanzania* case thus raises the possibility of an intersectional approach but again, the Committee failed to follow up its observations with a detailed analysis of the specific impact of discrimination on the basis of gender, marital status, ethnic group and geographical location.

The cases decided by the CEDAW Committee under its Optional Protocol demonstrate a developing awareness of intersectional discrimination.¹¹⁷ The evolution of the Committee's thinking is apparent in the four cases presented above, however, it is not a linear progression and there is still a large gap between the rhetorical acknowledgement of intersectionality

111 *Ibid.*, Para 2.1.

112 *Ibid.*, Para 7.6.

113 *Ibid.*, footnote 32, p. 11.

114 *Ibid.*, Para 7.8.

115 *Ibid.*, Para 8.

116 *Ibid.*, Para 9 (ii).

117 While not explored in detail in this Article, this awareness can also be seen in the CEDAW Committee's investigations of reproductive and sexual health rights in the Philippines and the disappearances of Aboriginal women in Canada under the inquiry procedure. See, CEDAW Committee, *Report of the inquiry concerning Canada*, UN Doc. CEDAW/C/OP.8/CAN/1, 30 March 2015, Para 204; and above, note 75.

as a framework of analysis and the full application of intersectional methodologies in the determination of remedies. In its 2004 decision in *A.S. v Hungary*, the Committee did not acknowledge the fact that the author was a Roma woman and the remedies that were ordered were of a general nature that did not go to the heart of the specific forms of discrimination within sexual and reproductive health care that she experienced as a result of her situation as a mother from a Roma community. In the later cases of *Kell v Canada*, decided in 2012, and *R.P.B. v the Philippines*, decided in 2014, the Committee referred to the concept of intersectionality and attempts to incorporate elements of an intersectional approach into its recommendations. Finally, in the 2015 decision *E.S. and S.C. v Tanzania*, the intersectionality of the situation of the authors as widows from a specific ethnic group is only alluded to in passing and the remedies recommended addressing the question of gender-based discrimination in customary laws on inheritance and property rights in general, without a detailed analysis of the particular situation of widows from ethnic groups that apply patrilineal customary inheritance laws. Arguably, the Committee took a backward step in *E.S. and S.C. v Tanzania*, although such a conclusion is difficult to base on one case alone, and the future jurisprudence of the Committee will be telling in this regard.

4. Beyond Individual Cases: the CEDAW Committee’s Interpretive Practice on Intersectionality in General Recommendations

In addition to the legislative, budgetary and policy measures recommended in individual cases and inquiries in relation to specific country situations, the CEDAW Committee has, as briefly noted above, also issued more general guidance on the identification, reparation and prevention of intersectional discrimination. This section of the paper traces some of the recent developments that are apparent in the Committee’s interpretive General Recommendations, including its effort to achieve greater institutional coherence on the question of intersectional discrimination against girl children in the context of harmful traditional practices.

a. Intersectionality through Substantive Interpretation in General Recommendations

In 1991, the CEDAW Committee adopted an extremely brief General Recommendation on disabled women in which it refers to the “double discrimination” faced by women with disabilities.¹¹⁸ This General Recommendation was followed, in 2004, by General Recommendation No. 25 on temporary special measures in which the Committee discusses the fact that:

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such

118 CEDAW Committee, *General Recommendation No. 18, Disabled women*, 1991, Preamble.

*multiple forms of discrimination against women and its compounded negative impact on them.*¹¹⁹

While this General Recommendation provided the first explicit acknowledgement of the multiplicity of identities that may exist within the group “women”, it still approached multiple discrimination from an essentially additive perspective. The qualitatively different nature of intersectional forms of oppression is not recognised and, as a result, the category of “women” is maintained as the norm with other groups within the category being positioned as “mere derivatives”.¹²⁰

In 2010, the CEDAW Committee adopted General Recommendation No. 28 on the core obligations of states parties to the CEDAW. A paragraph of the General Recommendation is dedicated to intersectionality, which is described as a “basic concept for understanding the scope of the general obligations for states’ parties contained in Article 2”.¹²¹ In the same paragraph, the Committee notes that the discrimination that women experience because of their gender is “inextricably linked with other factors such as race, ethnicity, religion or belief, health status, age, class, caste and sexual orientation and gender identity” and that discrimination on the basis of gender may consequently “affect women belonging to such groups to a different degree or in different ways to men.”¹²² The CEDAW Committee goes on to note that states must “legally recognize such forms of discrimination and their compounded negative impact on the women concerned and prohibit them” and that policies and programmes to redress intersectional discrimination must also be adopted.¹²³

General Recommendation No. 28 represents a shift in the Committee’s thinking about intersectional discrimination in that the notion of the “inextricable” linkage between different grounds of discrimination is evoked. The paradigm has changed from one in which discrimination is viewed in an additive way, with different grounds being stacked on top of one another and, therefore, relatively easily identified, to an acknowledgement that cases of intersectionality may reveal an entirely new form of discrimination. Unfortunately, (and this is almost certainly a result of the construction of the CEDAW itself which focuses exclusively on discrimination against women) this recognition is immediately linked to a male comparator, thereby diminishing the complexity of the analysis and ultimately rendering it less potentially disruptive to the settled system of international human rights law than it might otherwise have been.

119 CEDAW Committee, *General Recommendation No. 25, Temporary measures*, 2004, Para 12.

120 See above, note 28, pp. 205–242.

121 CEDAW Committee, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010, Para 18.

122 *Ibid.*

123 *Ibid.*

The Committee has continued to take up the language of intersectionality in some of its other recent General Recommendations, including: Recommendation No. 30 in 2013 which discusses women and conflict prevention, conflict and post-conflict situations;¹²⁴ No. 34 in 2016 on the rights of rural women;¹²⁵ and General Recommendation No. 33 in 2015 on women's access to justice.¹²⁶ Importantly, the latter General Recommendation notes that "discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women."¹²⁷ The movement away from the male comparator to recognition of the fact that differences *between* women may be more decisive in some cases of intersectional discrimination than differences between men and women is a crucial step in the evolution of the Committee's thinking on intersectionality.

b. Intersectionality through Institutional Developments: the CEDAW and CRC Committee's Joint General Recommendation/General Comment on Harmful Practices

For the first time in the history of the United Nations human rights treaty body system, in 2014, two monitoring bodies issued a joint interpretive instrument. The CEDAW and CRC

124 CEDAW Committee, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 1 November 2013, Paras 6 and 7, in which the Committee notes that "women are not a homogenous group" and that "[d]iscrimination against women is also compounded by intersecting forms of discrimination, as noted in General Recommendation No. 28. Given that the Convention reflects a life-cycle approach, States Parties are also required to address the rights and distinct needs of conflict-affected girls that arise from gender-based discrimination."

125 CEDAW Committee, *General Recommendation No. 34, Rights of rural women*, UN Doc. CEDAW/C/GC/34, 4 March 2016, Para 14, which states, "[i]n line with GR 28, States parties should recognize that rural women are not a homogenous group and often face intersecting discrimination." In Para 15, the Committee notes, "States parties should eliminate all forms of discrimination against disadvantaged and marginalized groups of rural women. For example, States parties should ensure that disadvantaged and marginalized groups of rural women including indigenous; afro-descendent; ethnic and religious minorities; female heads of household; peasant; pastoralists; fisherfolk; landless; migrant; and conflict-affected rural women are protected from intersecting forms of discrimination and have access to education, employment, water and sanitation, health care, etc. States parties should develop policies and programmes ensuring the equal enjoyment of rights by disabled rural women, including by ensuring accessibility of infrastructures and services. States parties should similarly ensure that older rural women have access to social services, adequate social protection, as well as economic resources and empowerment to live life with dignity, including through access to financial services and social security."

126 CEDAW Committee, *General Recommendation No. 33, Women's access to justice*, UN Doc. CEDAW/C/GC/33, 3 August 2015, Para 8, where the Committee states, "[i]n addition, discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socio-economic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person. These intersecting factors make it more difficult for women from those groups to gain access to justice."

127 *Ibid.*, Para 8.

Committees adopted a Joint General Recommendation/General Comment on harmful practices.¹²⁸ This ground-breaking initiative was attempted following observations by both treaty bodies that harmful practices fall within the purview of each of the CEDAW and the Convention on the Rights of the Child (CRC), and that these practices have also been a subject on which the Committees have repeatedly expressed shared concern.¹²⁹

From the perspective of discrimination based on sex, the approach that the Committees take in the General Comment/Recommendation is to acknowledge harmful practices as human rights violations producing continuous effects from childhood into adulthood, and thus affecting girls and adult women alike.¹³⁰ The Committees further state that sex and gender-based discrimination intersects with other factors that affect women and girls, in particular those who belong to, or are perceived as belonging to, disadvantaged groups, and who are therefore at a higher risk of becoming victims of harmful practices.¹³¹ As such, the two Committees assert that harmful practices are “grounded in discrimination based on sex, gender and age, among other things,”¹³² as they are “deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles.”¹³³

The General Recommendation/Comment defines harmful practices as:

*[P]ersistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.*¹³⁴

128 CEDAW Committee and the CRC Committee, *Joint General Recommendation No. 31/ General Comment No. 18 on harmful practices*, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014.

129 The Convention on the Elimination of All Forms of Discrimination against Women provisions that are relevant for an analysis on harmful practices are: Article 1, Article 2, Article 5, and Article 16. From the point of view of the Convention on the Rights of the Child, the relevant provisions would be: Article 2, Article 3, Article 19(1), and Article 24. The interpretative instruments developed by the respective treaty monitoring bodies have additional value, such as the CEDAW Committee’s *General Recommendation No. 14, Female circumcision*, 1990; *General Recommendation No. 19, Violence against women*, 1992; *General Recommendation No. 21, Equality in marriage and family relations*, 1994; and above, note 35. On the other hand, the CRC Committee elaborated the *General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts.19; 28, para. 2; and 37, inter alia)*, UN Doc. CRC/C/GC/8, 21 August 2006; and *General Comment No. 13, The right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/14, 29 May 2013.

130 See above, note 128, Para 68.

131 *Ibid.*, Para 6.

132 *Ibid.*, Para 7.

133 *Ibid.*, Para 6.

134 *Ibid.*, Para 15.

Intersectional discrimination is also reflected in the recommendations that the Committees make in the General Recommendation/Comment. For instance, with regard to the recommendation to states to adopt or amend legislation with a view to effectively eliminating harmful practices, the Committees note that such legislation should address the root causes of these practices, including “discrimination on the basis of sex, gender, age and other intersecting factors”.¹³⁵ The preventive measures recommended by the treaty bodies also stress the fact that harmful practices cannot be treated in isolation, but require a rights-based approach that recognises the indivisibility and interdependence of rights.¹³⁶

The General Recommendation/Comment presents several particularities. The normative content under the CEDAW and the CRC outlined in the General Recommendation/Comment, instead of being firmly anchored in the text of the Conventions themselves, is derived from the interpretative work of the two treaty bodies on other, related issues. The definition of harmful practices follows the model developed in the practice of the CRC Committee with regard to violence against children¹³⁷ and corporal punishment.¹³⁸ Another element from the practice of the CRC Committee is the focus on upholding the dignity and integrity of the individual. In its General Comments regarding violence against children and corporal punishment, the CRC Committee stresses “the concept of dignity requires that every child is recognised, respected and protected as a rights holder”.¹³⁹ On the other hand, the determination that harmful practices constitute a form of discrimination against women and children is rather specific to the narrative of the CEDAW Committee with the addition of discrimination against children. In its General Recommendation No. 19 on violence against women, the CEDAW Committee defines gender-based violence as a form of discrimination that inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men in accordance with Article 1 of the CEDAW.¹⁴⁰ Furthermore, General Recommendation No. 19 draws attention to the linkage between discrimination against women, violence against women and violations of human rights.¹⁴¹ In the same

135 *Ibid.*, Para 55(e).

136 *Ibid.*, Para 58.

137 CRC Committee, *General Comment No. 13, The right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/13, 18 April 2011, Para 4. This reads “violence is understood to mean all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” as listed in article 19, paragraph 1, of the Convention”.

138 CRC Committee, *General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para 2; and 37, inter alia)*, UN Doc. CRC/C/GC/8, 2 March 2007, Para 11. This reads “[t]he Committee defines ‘corporal’ or ‘physical’ punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light”.

139 See above, note 137, Para 3(c).

140 CEDAW Committee, *General Recommendation No. 19, Violence against women*, 1992, Paras 1, 6.

141 *Ibid.*, Para 7. This reads “gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention”.

vein, the General Recommendation/Comment on harmful practices highlights the connection between discrimination, violence and human rights violations by reminding states parties of their due diligence obligations to prevent acts that impair the recognition, enjoyment or exercise of rights by women and children and to ensure that private actors do not engage in discrimination against women and girls, including gender-based violence.¹⁴²

The General Recommendation/Comment is undeniably valuable in that it paves the way for future collaborations among the treaty bodies, provides a substantive and nuanced analysis of the human rights violations that arise from harmful practices through its integration of perspectives from both the CEDAW and the CRC, and ensures greater consistency in the application of human rights norms in this area. However, it should not be read as an unqualified success. The undertaking of the two treaty bodies shows that the mere fact of institutional cooperation on a given issue is not necessarily enough to achieve substantive integration and convergence. For example, the obligation of due diligence as it is reflected in the General Recommendation/Comment is segregated and states are informed that the CEDAW interpretation of the concept should be applied if the harmful practice concerns violence against women and girls, whereas the CRC forms the referential standard if the case involves violence against children in general.¹⁴³

This type of interpretation may result in further separation and marginalisation, as Nura Taefi points out by examining the discourses on girls' rights, and comparing the approaches taken by women's and children's rights narratives.¹⁴⁴ Taefi demonstrates that, while both the CEDAW and the CRC are applicable to girls, the application of both treaties and the discourses related to women's rights and to children's rights result in failure to address girls' particular needs. Taefi argues that girls remained marginalised in the discourse on adult women's rights on account of age, and in the discourse on children's rights on account of gender. She carries the argument further to imply that under the CEDAW, the underlying subject of rights is the white woman; while under the CRC, the underlying subject is the male child.¹⁴⁵ Not considering the intersection of age and gender results, first, in the misrecognition of girl children as subjects of rights, and, second, in a partial approach to the protection on girls' rights, where the focus has been primarily on issues connected to harmful practices and sexual violence. Thus, Taefi also views an intersectional analysis as a method for uncovering these tensions and gaps, and as a mechanism for redesigning the human rights framework of protection.¹⁴⁶

142 CEDAW Committee and the CRC Committee, *Joint General Recommendation No.31/ General Comment No. 18 on harmful practices*, Para 11.

143 *Ibid.*

144 Taefi, N., "The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalization of the Girl-Child", *International Journal of Children's Rights*, Vol. 17, 2009.

145 *Ibid.*, p. 348.

146 *Ibid.*, p. 346.

Moreover, an argument can be made that the General Recommendation/Comment presents a level of inconsistency in that it relies solely on provisions of the CEDAW and the CRC, without wider reference to the ICCPR or the ICESCR. Many arguments have been made that the thematic human rights treaties, such as the CRC, the Convention on the Rights of Migrant Workers and Members of their Families, or the CRPD, are a form of *lex specialis* in relation to the ICCPR and the ICESCR which contain the general norms of human rights protection.¹⁴⁷

The two specialist committees, the CEDAW Committee and the CRC Committee, invoked their shared concern and practice with regard to harmful practice as a justification for their innovative approach in adopting a joint General Recommendation/Comment. However, both the HRC and the CESCR had also previously issued interpretive guidance in relation to harmful practices. In its Concluding Observations on Indonesia, the HRC recommended that the State make efforts to prevent and eradicate harmful practices.¹⁴⁸ The CESCR has expressed deep concern at the lack of progress made by India in eliminating traditional practices and provisions of personal status laws that are harmful and discriminatory to women and girls.¹⁴⁹ The inclusion of the two generalist treaty bodies in the discussion surrounding the adoption of a joint interpretive instrument would have marked a turning point in institutional thinking about intersectionality. A future path towards improved coordination could involve joint action by all of the treaty bodies in the development of a common interpretation of the non-discrimination guarantees that are contained in each of the core human rights treaties.

Conclusion

Intersectionality scholarship invites us to observe and recognise the complexities and multiple dimensions of different systems of power and oppression and the impact that these may have on individuals and groups.¹⁵⁰ The challenge remains in translating these observations into the development of responses that go beyond highly individualised remedies to meaningfully confront and transform oppressive structures, particularly within the confines of a

147 O’Flaherty, M. and O’Brien, C., “Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper of the High Commissioner’s Proposal for a Unified Standing Treaty Body,” *Human Rights Law Review*, Vol. 7, 2007, pp. 141–172.

148 HRC, *Concluding Observations: Indonesia*, UN Doc. CCPR/C/IDN/CO/1, 21 August 2013, Para 12. See also HRC, *Concluding Observations: Djibouti*, UN Doc. CCPR/C/DJI/CO/1, 19 November 2013, Para 8; HRC, *Concluding Observations: Ethiopia*, UN Doc. CCPR/C/ETH/CO/1, 19 August 2011, Para 10; HRC, *Concluding Observations: Malawi*, UN Doc. CCPR/C/MWI/CO/1/Add.1, 19 August 2014; and HRC, *Concluding Observations: Kenya*, UN Doc. CCPR/C/KEN/CO/3, 31 August 2012, Para 15.

149 CESCR, *Concluding Observations: India*, UN Doc. E/C.12/IND/CO/5, 8 August 2008, Para 25. See also CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4, 16 December 2009, Para 20; CESCR, *Concluding Observations: Nepal*, UN Doc. E/C.12/NPL/CO/3, 12 December 2014, Para 14; and CESCR, *Concluding Observations: The Gambia*, UN Doc. E/C.12/GMB/CO/1, 20 March 2015.

150 See above, note 6, Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics”, pp. 150–152.

system of international human rights law that continues to primarily function using a “single-axis” approach to inequality.

There are indications that international human rights mechanisms are gradually beginning to take steps to more fully respond to forms of intersectional discrimination. An examination of the jurisprudence and recommendations issued by the CEDAW Committee over the course of a decade reveals both the progress that the treaty body has made, as well as its reluctance to forge ahead with the substantive application of an intersectional approach. The Committee’s initial failure to engage with issues of multiple and intersectional discrimination as seen in *A.S. v Hungary*, was counterbalanced four years later with a strong affirmation of intersectionality in its decision in *Kell v Canada*. General Recommendation No. 28 on the states parties’ core obligations under the CEDAW also reflects the Committee’s willingness to assert intersectionality as a basic concept for the interpretation of general obligations to guarantee substantive equality under the Convention. The General Recommendation acknowledges differences between women and calls on states to legally recognise and prohibit intersectional forms of discrimination.

However, the CEDAW Committee’s application of intersectionality as a method of analysis has not followed a linear path. In its recent decisions in *R.P.B. v the Philippines*, and particularly in *E.S. and S.C. v Tanzania*, the Committee arguably took a step back. In the former case, the treaty body demonstrated awareness of the author’s complex situation as a girl with disabilities but decided to prioritise sex and gender discrimination over age and disability. In the latter case, the Committee did not engage in any meaningful discussion of the applicants’ status as widows from a specific ethnic group in the context of a patrilineal customary law system.

A comparison with the interpretive practice of other treaty bodies shows that there is potential for greater clarity and consistency on anti-discrimination law within the international human rights system, and provides insights into the ways in which the current gaps in the CEDAW Committee’s reasoning on intersectionality could be closed. Steps in this direction were taken in General Recommendation/Comment No. 31 on harmful practices elaborated jointly by the CEDAW and CRC Committees, which highlights the intersectional dimensions of harmful practices and draws on the specific expertise of each body to develop a more holistic approach. However, fragmentation remains in the approach taken in the General Recommendation/Comment and in its development.

The evolving interpretive practice by the treaty bodies demonstrates that intersectionality does have a place in international human rights law as an observational tool and as a framework for guiding policy and legislative change. The inconsistency and hesitation shown by the treaty bodies in the application of intersectionality may be explained by the fact that they have yet to develop a comprehensive or uniform methodology for assessing inequality. There are no clear or common definitions of the notions of multiple and intersectional discrimination.

Intersectional practice by the international human rights system is also valuable for its potential to influence the future shape of national anti-discrimination laws and policies. Recom-

mendations by treaty bodies to states have recently focused on ensuring that cases of intersectional discrimination are justiciable at the national level through, *inter alia*, the adoption of consolidated anti-discrimination legislation and an expansion of the mandates of national human rights institutions so that they are able to consider complaints that simultaneously invoke intersecting grounds of discrimination.¹⁵¹

As a theory and as a practical tool for the implementation of human rights, intersectionality provides insights as to how we might promote substantive equality and encourage participation by diverse individuals and groups in the conceptualisation, development, implementation and monitoring of policies, laws, budgets and administrative programmes that have an impact on the enjoyment of human rights. By ensuring that a rich range of experiences is brought before judicial and quasi-judicial authorities, intersectionality offers a framework to comprehensively prevent and remedy inequalities. The scope and nature of the human rights violations that arise at the intersections of different forms of discrimination can, as a result, be more effectively identified and addressed, reinforcing universal, regional and national human rights guarantees.

151 See, for example, note 126, Para 60 (c). This reads “provide the possibility for women to lodge claims involving multiple and intersecting forms of discrimination.”

Intersectionality and Human Rights Law: An Examination of the Coercive Sterilisations of Romani Women

Siobhan Curran¹

Introduction

Romani women have endured centuries of extreme racism and discrimination and continue to experience endemic racism and discrimination throughout their lives.² Romani women have experienced widespread coercive sterilisation, legitimised by eugenic discourses of the need to control the “unhealthy” birth rate of Roma.³ Following systematic state sanctioned sterilisations in the former Czechoslovakia, coercive sterilisation continued in Slovakia and the Czech Republic, and cases have also been reported in other countries such as Hungary. Adequate acknowledgement or redress for these grievous human rights abuses has still not been achieved.

An intersectional analysis of Romani women’s experiences provides a framework to understand and address the operations, interactions and patterns of subordination that resulted in widespread coercive sterilisations of Romani women. It also recognises Romani women’s experiences of unique forms of discrimination across multiple identities. When examining experiences of coercive sterilisation through an intersectional lens, one can see that the harms experienced by Romani women are motivated by multiple layers of discrimination and stem from the convergence and indivisibility of different structures of oppression. The coercive sterilisation of Romani women is an attack on Romani women, underpinned by gendered, racial and class-based stereotypes. Coercive sterilisation has also taken place in the context of generations of endemic

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2 Roma are the largest minority ethnic group in the European Union. The Council of Europe estimates that there are 10–12 million Roma in Europe. The majority of Roma live in central and eastern Europe and there are also sizeable Roma minorities in Western Europe. The term Roma is used as an umbrella term by the Council of Europe to refer to people who identify as “Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned”. For more information, see Council of Europe, “Descriptive Glossary of terms relating to Roma issues”, 18 May 2012, available at: <http://a.cs.coe.int/team20/cahrom/documents/Glossary%20Roma%20EN%20version%2018%20May%202012.pdf>.

3 Czech Public Defender of Rights, *Final Statement of the Public Defender of Rights in the Matter of Sterilisations Performed in Contravention of the Law and Proposed Remedial Measures*, 2005, p. 78.

and systematic discrimination against Roma. It is vital to reveal the breadth of interlocking oppressive power structures so that these can be dismantled. It is with this in mind that this paper examines cases of coercive sterilisations of Romani women that have come before human rights courts to investigate the possibilities for an intersectional approach in the courts. While endemic and entrenched discrimination against Romani women will not be addressed and challenged merely through legal approaches, it is one of many tactics that can be part of wider change.⁴

The first section of this article examines intersectionality with a particular focus on how this is employed by Romani feminists. Section two provides a contextual overview of the experiences of Roma in Europe with a focus on coercive sterilisation as an intersectional issue. This is followed by an examination of the incorporation of intersectionality in human rights law in section three, where it is argued that an intersectional approach in human rights law poses challenges to a system that has struggled to grapple with substantive equality and tended to view people from a uni-dimensional perspective. Section four then analyses judgments in relation to coercive sterilisations of Romani women. In relation to cases of Romani women before the European Court of Human Rights (ECtHR), a failure to examine discrimination can be seen, thus dislocating Romani women's experiences from the structures of oppression that resulted in coercive sterilisations. In a case under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), a single-ground analysis provided an inadequate response to the issue of coercive sterilisation of Romani women, which cannot be disconnected from racism. This section then examines the possibilities for an intersectional approach in the courts.

1. Intersectionality

From its beginnings in Black feminism and critical legal studies, literature on intersectionality now transcends many disciplines and has been employed widely by academics and activists.⁵ For this paper, intersectionality is understood as a transformative tool for

4 It is important to note the courageous resistance by Romani women survivors in their struggle to gain justice and accountability for coercive sterilisations. This activism has ranged from court action, to public demonstrations and advocacy; often in the face of great adversity. Gwendolyn Albert notes that local tabloid publications have attempted to smear women who did come forward and in Slovakia, in cases where sterilisation had taken place on underage girls, they were threatened with proceedings of statutory rape against their partners. See Albert, G., "Forced Sterilization and Romani Women's Resistance in Central Europe", *Different Takes*, 2011, available at: <http://popdevhampshire.edu/sites/default/files/uploads/u4763/DT%2071%20Albert.pdf>, p 3.

5 Across the US, Canada, Australia and Europe it is a theme that has been the focus of much contemporary research, resulting in thematic conferences, journals and books. These include special thematic journals such as *European Journal of Women's Studies'* 2006 special on the theme of Intersectionality; *Signs: Journal of Women in Culture and Society* 2013 edition, which focused on "Intersectionality: Theorizing Power, Empowering Theory"; many conferences including "Theorising Intersectionality" held at Keele University, UK in 2005; "Celebrating Intersectionality? Debates on a Multifaceted Concept in Gender Studies", in Goethe-University, Frankfurt in 2009; and edited collections such as Grabham, E., Cooper, D., Krishnadas, J. and Herman, D. (eds.) *Intersectionality and Beyond: Law, power and the politics of location*, Routledge-Cavendish, 2008.

analysis and advocacy that can reveal and dismantle the workings of power and oppression.⁶ It can be employed to reveal multiple dimensions of our social identities, “how we simultaneously experience our race, gender, class, age, ability and so forth as unique experiences of privilege and/or discrimination.”⁷ It is crucial to note that the transformative potential of intersectional analysis has a clear focus on power and dismantling systems of power and oppression.⁸

Intersectionality emerged in the late 1980s as a term to analyse the complexities of difference and the multiple axes and sites of discrimination, in the context of social movements based on identity politics.⁹ It emerged in the context of feminist articulations of the limits of gender as a universal category that essentialised women, and the fact that articulations of women as a homogenous group rendered particular women’s experiences invisible.¹⁰ US black feminists asserted that their experience of oppression at the site of gender, class and race was qualitatively different to that of middle class white women.¹¹ This prompted a critique of mainstream feminist theory and law which were seen as focusing on dominant conceptions of the middle-class, heterosexual, white woman.¹² The term itself was first coined by Kimberlé Crenshaw where she asserted that the single-axis framework in US discrimination law distorted the multi-dimensional experiences of Black women.¹³

Speaking about race and gender, Crenshaw notes that “when the practices expound identity as ‘woman’ or ‘person of colour’ as an either/or proposition they relegate the identity of

6 See “Intersectionality: A Tool for Realizing Human Rights”, *New Tactics in Human Rights*, 11 February 2015, available at: <https://www.newtactics.org/blog/intersectionality-tool-realizing-human-rights>.

7 *Ibid.*

8 *Ibid.*

9 Although as Angéla Kóczé notes, debates about the intersections of gender and class were prevalent in debates between feminists and socialists in the 18th and early 19th centuries, in Kóczé, A., *Missing Intersectionality: Race/Ethnicity, Gender, and Class in Current Research and Policies on Romani Women in Europe*, Central European University, 2009, p. 18.

10 Leslie McCall notes that many other texts around this time used similar terms to articulate and develop this conceptual framework, McCall, L., “The Complexity of Intersectionality”, *Signs: Journal of Women in Culture and Society*, Vol. 30, 2005, p. 1771.

11 See Hull, G.T., Smith, B. and Bell Scott, P. (eds.) *All the Women Are White, All the Blacks Are Men, But Some of Us are Brave: Black Women’s Studies*, New York Feminist Press, 1982, p. 432; and Combahee River Collective, “A Black Feminist Statement” in Guy-Sheftall, B., (ed.) *Words of Fire: An Anthology of African American Feminist Thought*, New Press, 1995, pp. 232–40.

12 Vakulenko, A., “‘Islamic Headscarves’ and the European Convention On Human Rights: an Intersectional Perspective”, *Social and Legal Studies*, Vol. 16, 2007, p. 185.

13 Crenshaw, K., “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, *University of Chicago Legal Forum*, Vol. 4, 1989, p. 139.

women of colour to a location that resists telling.”¹⁴ This captures the experience of Romani women who have been marginalised within the Roma movement, the women’s movement, the lesbian gay bisexual transgender and questioning movement and indeed within class based movements and others. A focus on privileged group members within categories marginalises those experiencing multiple forms of oppression and distorts conceptions of oppression which “become grounded in the experiences that actually represent only a subset of a much more complex phenomenon”.¹⁵

a. Roma Feminists and Intersectionality

The notion of intersectionality is of crucial importance for the analysis of the experiences of Romani women. The movement to progress Roma rights, as with other minority ethnic groups has been based in identity politics. As Crenshaw notes, the difficulty with identity politics, has not been a failure to transcend difference, as critics have charged, but rather a failure to acknowledge different experiences within groups.¹⁶ Indeed, this is the experience within the Roma movement whereby Roma have been posited as a homogeneous group, thus rendering invisible intersectional identities within Romani communities.¹⁷ Some Romani women activists now employ feminist theories of intersectionality in their statements and point to multiple sites and axes of oppression in the analysis of their social position.¹⁸ Kóczé writes “I have come to see my own subject position as a Romani woman as a site where multiple forms of power and hierarchy are enacted.”¹⁹ She notes that along with other feminist Romani women:

*[H]ave struggled to untangle the complex social, political, and economic issues that structure our lives, and develop a language to understand our experiences with multiple inequalities. Finally, we have encountered a “new way of thinking” (about) emerging issues in intellectual and policy circles: that of intersectionality. Though an intersectional approach is now used almost exclusively by highly educated Romani women, a much wider audience understands its implications in a tangible or practical sense and uses individualised vocabularies to express this.*²⁰

14 Crenshaw, K., “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”, *Stanford Law Review*, Vol. 43, 1991, p. 1242.

15 See above, note 13, p. 140.

16 See above, note 14, p. 1242.

17 Oprea, A., “The Arranged Marriage of Ana Maria Cioaba, Intra-Community Oppression and Romani Feminist Ideals: Transcending the ‘Primitive Culture’ Argument” *European Journal of Women’s Studies*, Vol. 12, 2005, p. 134.

18 See above, note 9, p. 24.

19 *Ibid.*, p. 9.

20 *Ibid.*, p. 9.

She notes that the relevance of gender to understanding anti-Roma racism has been controversial. Indeed, the political and representational intersectionality that Crenshaw theorised comes into play, as this is debated among Romani activists and non-Roma. One of the dilemmas noted by Romani feminists in advocating for an intersectional approach is that they are challenged on the logic of differentiation and fracturing the Roma movement.²¹ Attempting to expose axes of oppression can be seen to further stigmatise Roma by exposing intra-group hierarchies and fuelling non-Roma stereotypes of Roma culture as backward or oppressive.²² Alexandra Oprea notes that this becomes even more difficult at peaks of racial oppression as Romani women may “defend harmful practices when these practices are used to legitimise racist attitudes about Roma.”²³ She notes an example of when “child marriages are used to portray Roma as primitive and to reject pleas for equality as long as Roma ‘abuse the rights of their own people’”.²⁴ Prevailing narratives that ignore patriarchy and structural discrimination in non-Romani communities locate Romani women’s experience of gender discrimination as discrimination in the context of an oppressive community. An intersectional approach is sometimes pitted as a choice between ethnic identity and gender identity. In this context, the very structures and axes of discrimination that intersectionality seeks to uncover and challenge are a barrier to an intersectional approach being taken in the first place. Intersectionality exposes generations of oppression by non-Roma. However, in the context of what Crenshaw refers to as representational intersectionality, it is the intra-group hierarchies that are focused upon in dominant representations of Roma, while discrimination by non-Roma and institutional racism is normalised, legitimised and hegemonised.²⁵ Oprea states that neither the Roma movement, nor the women’s movement have adequately conceptualised the intersectional position of Romani women, resulting in marginalisation and exclusion.²⁶ The next section examines the situation of Roma in Europe in this light.

2. Situation of Roma in Europe

Thomas Hammarberg notes that “Europe has a shameful history of discrimination and severe repression of the Roma. There are still widespread prejudices against them in country after country on our continent.”²⁷ The former Commissioner for Human Rights notes that anti-gypsyism is deeply rooted in Europe, “[p]ublic leaders and opinion bodies – both elected officials and others – have openly defamed Roma and Travellers using racist or stigmatising

21 *Ibid.*, p. 20.

22 *Ibid.*, p. 21.

23 Oprea, A., “Romani Feminism in Reactionary Times”, *Signs: Journal of Women in Culture and Society*, Vol. 38, 2012, p. 15.

24 *Ibid.*, p. 15.

25 See above, note 17, p. 136.

26 Interview with Alexandra Oprea, February 19, 2008, New York, see above, note 9, p. 22.

27 Amnesty International, “Human Rights on the Margins – Roma in Europe”, Briefing paper, available at: http://www.amnesty.org.uk/sites/default/files/roma_in_europe_briefing.pdf, p. 3.

rhetoric.”²⁸ This continues to this day; the European Roma Rights Centre (ERRC) has raised concerns about rising violence in Slovakia, Hungary and the Czech Republic and noted that:

*These countries have seen a strengthening of extremist and openly racist groups, which spread hate speech and organise anti-Roma marches through the very same villages where people are being attacked or killed.*²⁹

In particular there is an accelerating pattern of violence in Hungary which is taking place in the context of far right parties in Government and extremist organisations. This has included “the use of firearms, firebombs, grenades, and Molotov cocktails against Roma, and the humiliation of Romani children and adults.”³⁰

The way in which institutions enshrine dominant discourses around issues such as gender relations, ethnicity and conceptions of social justice can work to consolidate, produce and reproduce inequalities. In this context racism, patriarchy, class oppression, and other discriminatory systems operate through institutions to exacerbate inequalities. This can be seen in the experience of Roma who experience direct and indirect discrimination in housing, education, employment, health, access to goods and services, and decision making. A survey by the European Union Agency for Fundamental Rights (FRA) covering 11 EU countries shows that one in three Roma is unemployed and 90% live below national poverty lines.³¹ In 2011, the rate of unemployment among Roma aged 15 to 64 in Slovakia was 70%.³² The ERRC note that in Slovakia many Roma face forced eviction and live in poor and segregated settlements; with substandard housing, a lack of infrastructure and a prevalence of environmental hazards.³³ In Hungary it is estimated that about 60% of Roma live in secluded rural areas, segregated neighbourhoods, settlements, or ghettos.³⁴ Roma have been subjected to extremist groups engaging in violence, paramilitary activities, including rallies in uniform and “patrolling” their neighbourhoods.³⁵ Roma children in many European countries remain excluded from

28 Council of Europe, *Human Rights of Roma and Travellers in Europe*, 2012, p. 11.

29 European Roma Rights Centre (ERRC), “Attacks against Roma in Hungary, the Czech Republic and the Slovak Republic”, 15 July 2012, available at: <http://www.errc.org/article/attacks-against-roma-in-hungary-the-czech-republic-and-the-slovak-republic/3042>.

30 François-Xavier Bagnoud Center for Health and Human Rights and Harvard School of Public Health and Harvard University, *Accelerating Patterns of Anti-Roma Violence in Hungary*, 2014, p. 9.

31 European Union Agency for Fundamental Rights, *The Situation of Roma in 11 EU Member States: Survey Results at a Glance*, 2012, p. 12.

32 ERRC, *Country Profiles: Czech Republic, France, Italy, Macedonia, Romania, Russian Federation, Serbia, Slovakia, Turkey and Ukraine*, 2013, p. 264.

33 *Ibid.*, p. 275.

34 See above, note 30, p. 14.

35 Commissioner for Human Rights of the Council of Europe, *Report by Nils Muiznieks, following his visit to Hungary from 1 to 4 July 2014*, 16 December 2014, p. 4.

quality education, segregated in Roma-only classes or schools, and placed in schools for children with intellectual disabilities. The ERRC points out that recent numbers in Slovakia show Roma constitute 60% of all students in special education; and up to 80% of children in special classes in mainstream schools are Roma.³⁶ In 2013, the ECtHR found “there was a long history of wrongful placement of Romani children in special schools in Hungary and that the State must change this practice.”³⁷

Throughout Europe, the average life expectancy of Roma is shorter than that of non-Roma and infant mortality rates are higher. Life expectancy for Roma in Hungary is 10 years less than non-Roma.³⁸ Roma face significant barriers in accessing health care, including lack of resources to pay for insurance or treatment and discrimination in health care provision.³⁹ FRA research reports discrimination against Roma by health care personnel to be a particular problem. Twenty-five percent of respondents reported experiencing discrimination in the previous five years.⁴⁰

Roma experience human rights issues in all aspects of their lives. This is particularly exacerbated for Romani women, “[o]n average across the 11 EU Member States surveyed, the situation of Roma women in core areas of social life, such as education, employment and health is worse in comparison to that of Roma men.”⁴¹ Romani women have experienced racist attacks, racial abuse at the hands of health practitioners and a disproportionate removal of their children by social workers when compared to other groups.⁴²

The level of discrimination against Romani women in particular can be seen in the practice of their coercive sterilisation across Europe over the course of the last decades. The above section outlines a litany of human rights issues faced by Roma and, in particular, Romani women. The response to these issues has often been the perpetuation of myths about Roma in public discourse, while historical and contemporary state discrimination is not acknowledged or addressed. The focus is placed on the victim and not the perpetrators. When the situation of Romani women is disconnected from the operation of power and

36 See above, note 32, p. 285.

37 ERRC, “*Horváth and Kiss v Hungary*”, 29 January 2013, available at: <http://www.errc.org/cikk.php?cikk=4200>.

38 See above, note 30, p. 14.

39 See above, note 28, p. 22.

40 European Union Agency for Fundamental Rights, “Speech by Morten Kjærum Director of the European Union Agency for Fundamental Rights at the High-level event on Roma inclusion, Bratislava”, 23 May 2011, available at: <http://fra.europa.eu/en/speech/2013/high-level-event-roma-inclusion>.

41 European Union Agency for Fundamental Rights, *Analysis of FRA Roma survey results by gender*, 2013, p. 2.

42 See Centre for Reproductive Rights, Counselling Centre for Citizenship, Civil and Political Rights, *Body and Soul: Forced Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia*, 2003, p. 16; and above, note 28, p. 16.

subordination, this pattern of human rights abuses and state culpability is obscured. Such impunity paves the way for future abuses. This has been the case with coercive sterilisations, discussed in the next section.

a. Coercive Sterilisation of Romani Women throughout Europe

Coercive sterilisation has disproportionately impacted women from marginalised populations and an intersectional perspective can reveal the interlocking power structures that placed some women more at risk to this violation than others.

While voluntary sterilisation is an important contraceptive option, tubal ligation has also been forcibly performed upon women in marginalised populations worldwide, motivated all too often by frankly eugenic considerations.⁴³

This has been true for Romani women, who have a long history of being forcibly sterilised, including under the Nazi regime, particularly prior to full-scale efforts to kill Jews, “Gypsies” and those deemed “unworthy of life”.⁴⁴ In Czechoslovakia, the Ombudsperson in the Czech Republic found that the practice of sterilisation was “directly encouraged by eugenic state policy until at least 1991.”⁴⁵ From the 1970s until the 1990s, state policy posited sterilisation as a birth control method and this was disproportionately promoted to members of the Romani minority by social workers, including by using financial incentives or threats to remove social benefits.⁴⁶ Coercive sterilisations were part of a policy to assimilate Roma into wider society and to stop the “social risk” that Roma posed by reducing their “unhealthy” birth rate.⁴⁷ The Czech Ombudsman estimates that as many as 90,000 Romani women from the former Czechoslovakia became infertile due to coercive sterilisation between 1970 and 1990.⁴⁸

Coercive sterilisation of Romani women continued after the post-Communist period, including more widely across Europe. Research by the ERRC in Slovakia and the Czech Republic revealed that coercive sterilisation of Romani women continued after the post-Communist period.⁴⁹

43 See above, note 4, p. 1.

44 See above, note 28, p. 98.

45 See above, note 32, p. 27.

46 See above, note 28, pp. 93, 94.

47 See above, note 3, p. 3.

48 Walker, B., (ed.), *State of the World’s Minorities and Indigenous People*, Minority Rights Group International, 2013, p. 183.

49 ERRC, *Ambulance not on the Way: The Disgrace of Health Care for Roma in Europe*, 2006, p. 42.

*In the post-communist era in the Czech Republic and Slovakia, social workers were no longer involved, but a recurrent scenario involved doctors sterilising Roma women either during or shortly after a second caesarean-section delivery.*⁵⁰

Cases in the Czech Republic have been documented from as recently as 2007.⁵¹ Although there are fewer reported cases, coercive sterilisation also occurred in recent years in other countries including Hungary.⁵² Cases documented in Hungary, Slovakia and the Czech Republic include those where no consent was provided or where consent was given in advanced stages of labour. Other cases noted the lack of a full explanation of the procedure, no explanation of alternate family planning methods, the provision of manipulative information and the use of financial incentives and threats to withdraw social protection payments.⁵³

The practice of coercive sterilisation of Romani woman in Slovakia was documented in detail in a 2003 report.⁵⁴ The report documented 110 cases since the fall of communism. The research undertaken uncovered consistent patterns of health providers not gaining informed consent to sterilisation. In many cases women were given misleading or threatening information and women were coerced into giving last-minute authorisations for sterilisations.⁵⁵ The report also outlined “patterns of systematic and glaring racial discrimination”, including segregation in maternity wards.⁵⁶ This includes Romani women being prevented from using the same toilets and dining facilities as non-Romani woman.⁵⁷ The report notes that Romani woman were delayed or denied treatment in hospitals and ambulances from certain hospitals were reported to refuse or delay services for pregnant women in Romani settlements. Romani women identified experiencing physical and verbal abuse and racial hatred at the hands of health care providers.⁵⁸

There has been a marked difference in the responses by states to these violations. The Czech Republic issued an apology for “instances of error” in 2009, whereas Slovakia’s government has

50 See above, note 28, p. 94.

51 ERRRC, “Romani Victims of Coercive Sterilisation Still Denied Justice in the Czech Republic”, 11 October 2010, available at: <http://www.errc.org/article/romani-victims-of-coercive-sterilisation-still-denied-justice-in-the-czech-republic/3757>.

52 See above, note 4, p. 2.

53 See above, note 49, p. 42.

54 See above, note 42, Centre for Reproductive Rights, Counselling Centre for Citizenship, Civil and Political Rights.

55 *Ibid.*, p. 14.

56 *Ibid.*, p.15.

57 *Ibid.*, p.15.

58 *Ibid.*, p.16.

denied existence of these practices and Hungary has not expressed any regret.⁵⁹ While outside the focus of this paper, several Romani women in the Czech Republic have won redress for involuntary sterilisations through domestic courts and extra-judicial settlements.⁶⁰ However, overall the shortcomings in the remedies available for Roma women victims remain.⁶¹

b. Intersectionality and Coercive Sterilisation

The experiences of Romani women who have been coercively sterilised demonstrate a deeply disturbing picture of intersectional discrimination. Class oppression, patriarchy and racism all intersect and operate to subordinate Romani women. Coercive sterilisation cannot be linked to just one discreet aspect of discrimination. This can be seen in the narratives that were employed to legitimise discrimination. Coercive sterilisation of Romani women in Czechoslovakia was built on a racial narrative of a “high and unhealthy” population of Roma. Roma sterilisations were legitimised in that they applied to:

*[C]itizens showing an extensively negative attitude to work and learning, a high crime rate, an inclination to alcoholism, female promiscuity, and last but not least, lagging behind the cultural and social development of other population groups.*⁶²

These narratives remain at large. A 2003 report revealed that a physician working in a hospital where Romani women were sterilised stated that Roma did not know the value of work and had children simply to obtain more social welfare benefits.⁶³ In 1995, the Slovak health minister at the time stated that “[t]he government will do everything to ensure that more white children than Romani children are born.”⁶⁴ The use of women’s bodies to assimilate the Roma community and to attack the wider ethnic group reveals a unique experience of discrimination and subordination. Class-based discrimination also comes into play whereby financial incentives or punitive measures have been used promote sterilisation. Furthermore, the historical experience of state sanctioned sterilisation in the former Czechoslovakia cannot be disconnected from the continued experience of coercive sterilisation by Romani women in Slovakia and the Czech Republic.

The articulation of coercive sterilisation of Romani women as an issue of just gender or ethnic or class discrimination would completely obscure the structures of domination that shaped

59 See above, note 28, p. 95.

60 ERRC, *Parallel Report by the European Roma Rights Centre Concerning the Czech Republic: For Consideration by the Committee on the Elimination of Discrimination Against Women at the 63th Pre-sessional Working Group (27–31 July 2015)*, 2012, p. 6.

61 See above, note 28, p. 96.

62 See above, note 3, p. 28.

63 *I.G. and Others v Slovakia*, Application no. 15966/04, 13 November 2012, Para 32.

64 Hoyle, L., “*V.C. v Slovakia: A Reproductive Rights Victory Misses the Mark*”, *Boston College International and Comparative Law Review* Vol. 36, 2014, p.19.

these human rights abuses. Also, the experience of Romani women cannot be said to be simply be an issue of additive discrimination. The history of discrimination, combined with the full dynamics of subordination that Romani women still experience, creates a unique and intersectional experience. It is with this in mind that the following section discusses the possibilities for an intersectional approach in human rights law.

3. Intersectionality and the Human Rights Framework

Despite the wide body of literature on intersectionality and calls in particular by feminists since the 1990s for intersectionality to be incorporated into the human rights framework, progress has been slow. Significantly, in 2000, the Committee on the Elimination of Racial Discrimination (CERD Committee) adopted a General Recommendation that recognised “that some forms of racial discrimination have a unique and specific impact on women”.⁶⁵ In its later General Recommendation No. 32, the CERD Committee specifically mentions intersectionality as expanding the grounds of discrimination in practice.⁶⁶ While slow to embrace intersectionality, General Recommendation No. 28 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) outlines that “states parties must legally recognise and prohibit [such] intersecting forms of discrimination and their compounded negative impact on the women concerned.”⁶⁷ While this represents a significant shift, overall progress is still slow. As Johanna Bond notes, achieving a theory of human rights is only a partial development; the fragmented structure of human rights bodies across different categories, such as racial discrimination and gender discrimination acts as an impediment to intersectionality in practice.⁶⁸

Articulations of intersectionality are not featured in documents published by the ECtHR. Indeed, in the 2010 Handbook on European Non-Discrimination Law, jointly published by the Court and the FRA, intersectionality does not feature at all.⁶⁹ The European Commission against Racism and Intolerance highlights intersectionality in its General Policy Recommendation No. 14. It notes that intersectionality which “has only recently been recognised, at least in international fora, refers to a situation where several grounds interact with each

65 Committee on the Elimination of Racial Discrimination, *General Recommendation no. 25 on gender related dimensions of racial discrimination*, UN Doc A/55/18, 20 March 2000.

66 Committee on the Elimination of Racial Discrimination, *General Recommendation no. 32 the meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc. CERD/C/GC/32, 2009.

67 Committee on the Elimination of Discrimination against Women, *General Recommendation no. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2, 2010.

68 Bond, J., “Intersecting identities and human rights: The example of Romani women’s reproductive rights”, *The Georgetown journal of gender and the law*, Vol. 5, 2004, p. 909.

69 European Union Agency for Fundamental Rights and European Court of Human Rights, *Handbook on European non-discrimination law*, Council of Europe, 2010.

other at the same time in such a way that they become inseparable.”⁷⁰ However, it does not make a recommendation to states in relation to this. In all intersectionality has not become a significant part of discussion in relation to the European Convention on Human Rights. The following part therefore examines what an intersectional approach may look like in practice in human rights law.

a. Intersectionality and Human Rights Law – Approaches and Challenges

*i. Beyond Formal Equality*⁷¹

The human rights framework has been widely critiqued by feminists for essentially being a male-centred system. Feminists have pointed to the precedence given to civil and political rights, the public/private divide and a focus on formal equality.⁷² While the model of formal equality has been central to some seminal human rights struggles including, for example, women’s suffrage, it does not address intersectionality. Dianne Otto notes that formal equality:

*Does not challenge the underlying social, political and economic institutions that reproduce gender hierarchies. It is also not enough because it does not redress the inequitable access to rights that differently situated women (and men) have.*⁷³

Formal equality adopts a symmetrical approach to equality which is seen as individualised and does not take into account structural and systematic discrimination as it is enshrined in institutions. Inequality when systematically enshrined in institutions may be so normalised that it is not even recognised. As former Justice L’Heureux-Dubé states:

*[D]omination always appears neutral to those who possess it, and the law insidiously transforms the fact of domination into a legal right. Inequality permeates some of our most cherished and long-standing laws and institutions.*⁷⁴

This is particularly relevant for an analysis of policies or practice that may not explicitly target Roma, but have a disproportionate impact on the Roma community.

70 European Commission Against Racism and Intolerance, *General Policy Recommendation No. 14*, CRI (2012) 48, 22 June 2012.

71 Formal equality is based on the Aristotelian understanding that equality means treating likes alike. For a detailed discussion of this see Fredman, S., *Discrimination Law*, Oxford University Press, 2002.

72 See Charlesworth, H., Christine, C. and Wright, S., “Feminist Approaches to International Law”, *The American Journal of International Law*, Vol. 85, 1991, p. 613.

73 Otto, D., “Holding up half the sky but for whose benefit?: A Critical Analysis of the Fourth World Conference on Women”, *Australian Feminist Law Journal*, Vol. 28, 1996, p. 23.

74 L’Heureux-Dubé, C., “Making a Difference: The Pursuit of Equality and a Compassionate Justice”, *South African Journal of Human Rights*, Vol. 13, 1997, p. 338.

In a formalistic approach, dominant groups are seen as the norm and those who do not fit in with the characteristics of dominant groups are then attributed as the other. The need for comparison prompts a critique of essentialism and the problem of positioning groups as undifferentiated and uni-dimensional. Majury notes that “differences among women, as among men, are ignored; other sites of oppression are treated as irrelevant.”⁷⁵ This approach is seen as incapable of addressing the intersectional discrimination of those who are more than one identity removed from the dominant group.⁷⁶

In contrast, substantive equality is cognisant of the need to recognise historic and socially-based differences in order to further equality.⁷⁷ Substantive equality looks beyond whether people are treated in the same way by policies or practices to the impact and effect of such policies or practices. It recognises that equal treatment may mean that dominant and subordinate groups are treated differently.⁷⁸ A substantive understanding of equality acknowledges that discrimination may be so entrenched against certain groups that in addition to the obligation of non-discrimination, this may infer a positive obligation on the government to provide systematic remedies to past injustices.⁷⁹ A substantive model is key to intersectionality; as intersectionality is inherently substantive.⁸⁰

ii. Challenges to Intersectionality in Human Rights Law

Intersectionality has been critiqued as a concept that reifies categories and thus inequality.⁸¹ This has provoked much debate on the use of social categories (such as gender, ethnicity, or sexual orientation), which can be seen as too rigid to capture the complexities of identity.⁸² In response to this critique, Catherine MacKinnon asserts that categories “are the ossified outcomes of the dynamic intersection of multiple hierarchies, not the dynamic that creates them. They are there, but they are not the reason they are there.”⁸³ Chandra Mohanty states that although they are based on social constructions, the processes of racialisation and racism are realities that need to be analysed and engaged with in order to place them on the political

75 Majury, D., “The Charter, Equality Rights, And Women: Equivocation And Celebration”, *Osgoode Hall Law Journal*, Vol. 40, 2002, p. 306.

76 *Ibid.*, p. 306.

77 *Ibid.*, p. 304.

78 *Ibid.*, p. 304.

79 Smith, A., “Bills of Rights as process: the Canadian experience”, *International Journal of Law in Context*, Vol. 4, 2008, p. 351.

80 MacKinnon, C., “Intersectionality as Method: A Note”, *Signs: Journal of Women in Culture and Society*, Vol. 38, 2013, p. 1024.

81 See above, note 10, p. 1776.

82 *Ibid.*, p1776.

83 See above, note 80, p. 1023.

agenda for change.⁸⁴ Proponents of intersectionality note that rather than being focused on an infinite number of categories, intersectionality is seen as primarily concerned with structures of power and exclusion.⁸⁵

*It is not so much an either/or in regard to categorical thinking but much more about the need to always pay consistent attention to the historical and social contexts in which the categories being invoked (analytically and/or experientially) are produced, made meaningful and deployed.*⁸⁶

This is crucial in terms of applying intersectionality to human rights law. In reality, there are ways in which human rights law works against this notion of substantive equality. Feminists have critiqued the theoretical framework of human rights that centres on rigid categories and the fragmented structure of human rights institutions.⁸⁷ A challenge to an intersectional approach is that non-discrimination law is based on discreet categories of discrimination and often individuals are forced to place themselves in one of these discreet and rigid categories. This raises concerns in terms of the reification and over-simplification of social constructions. MacKinnon sums this up when she notes that:

*The conventional framework fails to recognise the dynamics of status and the power hierarchies that create them, reifying sex and race not only along a single axis but also as compartments that ignore the social forces of power that rank and define them relationally within and without. In this respect, conventional discrimination analysis mirrors the power relations that form hierarchies that define inequalities rather than challenging and equalising them.*⁸⁸

Crenshaw identifies the pattern of only being able to claim discrimination on one ground as exclusionary of the most marginalised. For example, a single-axis claim of gender discrimination by a white women is thus because race does not contribute to her disadvantage. Therefore a single-ground approach excludes people who are being marginalised on multiple grounds.⁸⁹ In an analysis on multiple discrimination (described as the experience of discrimination across more than one ground), Gay Moon notes that even though multiple discrimina-

84 Mohanty, C.T., "Under Western Eyes: Feminist Scholarship and Colonial Discourses" *Feminist Review*, Vol. 30, 1988, p. 61.

85 Cho, S., Crenshaw, K. and McCall, L., "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis", *Signs: Journal of Women in Culture and Society*, Vol. 38, 2013, p. 797.

86 Lewis, G., "Celebrating Intersectionality? Debates on a Multi-faceted Concept in Gender Studies: Themes from a Conference", *European Journal of Women's Studies*, Vol. 16, 2009, p. 205.

87 See Bond, J., "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations", *Emory Law Journal*, Vol. 71, 2003, p. 72.

88 See above, note 80, p. 1023.

89 See above, note 13, p. 145.

tion is widely acknowledged, it has not been incorporated into legal remedies, policy development or data collection and “in practice lawyers will tend to take up cases on the strongest grounds available to them and ignore the other aspects. They will craft the case to meet the limitations of the law.”⁹⁰ The further difficulty for human rights law is the crucial point that encompassing experiences of inequality at multiple sites and axes of oppression requires an interactive approach, rather than an additive approach. An additive model wrongly assumes that structures of oppression can be separated, while intersectionality recognises that converging systems of oppression are mutually reinforcing and produce an entirely different experience of discrimination.⁹¹ This poses challenges for a legal system that separates out grounds of discrimination and finds even addressing multiple grounds difficult.

b. Can Human Rights Law Adopt an Intersectional Approach?

MacKinnon notes that international law has fluctuated between missing opportunities to recognise intersectional discrimination and truly encompassing intersectionality. For instance, in the case of *Lovelace v Canada*, an indigenous woman complained that the law considered her no longer a member of her nation because she married a non-member of the community.⁹² This marriage ended and when Ms Lovelace returned to the reservation and tried to purchase a home she could not do so as members of the group are prioritised by the Council.⁹³ The Human Rights Committee ruled that her right to enjoy her culture and use her language had been violated but did not rule on her claim of sex discrimination, reflecting a very narrow judgment that did not consider gender discrimination. However, in the landmark *Kadic v Karadzic*⁹⁴ case, which is internationally recognised, an intersectional approach is visible. This case recognised rape as a tool of genocide, which had previously not been recognised in international law. This was a crucial recognition of the indivisibility of women’s experience of rights violations in terms of gender and ethnicity. MacKinnon notes that women moved from the margin to the centre in conceptions of genocide:

The fact that this genocide was in part conducted through gender crimes did not mean that the acts were not also ethnically and nationally and religiously destructive. It meant that they were (...) A violation that had been seen as just something men do to women all the time, even trivialised as surplus repression, was in this case reconfigured by law as the weapon of genocide its perpetrators

90 Moon, G., “Multiple Discrimination: Justice for the Whole Person”, *Journal of the European Roma Rights Centre*, Vol. 2, 2009, p. 7.

91 See above, note 87, p. 72; and The Association for Women’s Rights in Development, *Intersectionality: A Tool for Gender and Economic Justice*, 31 July 2004, p. 2.

92 *Lovelace v Canada*, Communication No. 24/1977, UN Doc. CCPR/C/OP/1, 30 July 1981, Para 10.

93 ESCR-Net, “Sandra Lovelace v Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977”, available at: <https://www.escr-net.org/caselaw/2010/sandra-lovelace-v-canada-communication-no-241977-canada-300781-un-doc-ccprc13d241977>.

94 *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995).

*knew it to be and deployed it as. When its intersectional reality was surfaced and believed, a vast underworld of violated women who had been unnamed and unspoken moved into the legal centre.*⁹⁵

This is extremely important when one thinks of coercive sterilisation of Romani women as an attack on Romani women and an attack on the wider Roma community aimed at assimilation and stopping the “social risk” of the Roma community.⁹⁶ MacKinnon notes that when an intersection approach is used “it aims at the moving substantive reality ‘where systems of race, gender, and class discrimination converge,’ not one or another or even all static abstract classifications.”⁹⁷ She asserts the need to move on from formal equality and fit the law to reality, rather than trying to fit reality to the law.⁹⁸

Intersectionality is a major challenge to the human rights framework and legal system that has grappled to deal with substantive equality and that has tended to address non-discrimination in terms of single categories. Crucial to intersectionality is an application of substantive equality and the ability to move beyond a single-ground or additive approach. This paper contends that it is of crucial importance to reenvision human rights law from this perspective to bring it closer to the lived experiences of people experiencing human rights violations. This is examined further below through the examination of cases of coercive sterilisations of Romani women.

4. Coercive Sterilisation of Romani Women in the Courts

This section examines judgments in cases of coercive sterilisation that have been taken to the ECtHR by applicants from Slovakia. It also examines a complaint to the CEDAW Committee under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol).⁹⁹ Part one of this section outlines the complaints and judgments in these cases. This is followed by an analysis of the judgments and the extent to which intersectionality was applied. The final part of this section examines other case law to evaluate the possibilities for an intersectional approach in human rights law.

a. Cases before the ECtHR and the CEDAW Committee

In the case of *V.C. v Slovakia*,¹⁰⁰ the ECtHR examined the claim of a Romani woman that her rights were violated under Articles 3, 8, 12, 13 and 14 of the European Convention on Human

95 See above, note 80, p. 1028.

96 See above, note 3, p. 3.

97 See above, note 80, p. 1023.

98 *Ibid.*, p. 1023.

99 UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. A/RES/54/4, 1999.

100 *V.C. v Slovakia*, Application No. 18968/07, 8 November 2011.

Rights.¹⁰¹ On 23 August 2000, the applicant was sterilised in a public hospital without her full and informed consent. The applicant stated that she did not understand the term sterilisation and signed a consent form in fear that if she did not, the consequences would be fatal. At this point she was also in the final stage of labour and in pain.¹⁰²

In the case of *N.B. v Slovakia*,¹⁰³ the applicant also alleged a breach of Articles 3, 8, 12, 13 and 14 of the Convention due to her coercive sterilisation in a public hospital.¹⁰⁴ She stated she felt intoxicated under the influence of medication when signing the consent form and remembers a doctor saying she would die unless she signed the papers.¹⁰⁵ At the time of delivery, the applicant was underage and her mother had not been asked to give consent for the sterilisation. The case of *I.G. and Others v Slovakia*,¹⁰⁶ involved three applicants who claimed breaches of Articles 3, 8, 12, 13 and 14 on account of their sterilisations in a public hospital.¹⁰⁷ All applicants claimed they were sterilised without their full and informed consent.¹⁰⁸

i. Claims of Discrimination

For all of the above cases, Article 14 was alleged to be violated in conjunction with Articles 3, 8 and 12.¹⁰⁹ In the case of *V.C.*, the applicant relied on a number of international reports to make the point that “discrimination against Roma in Slovakia extended to all facets of their lives.”¹¹⁰ She argued that the procedure should be seen:

*[I]n the context of the widespread practice of sterilising Romani women which had its origins in the communist regime and in the enduringly hostile attitudes towards persons of Roma ethnic origin.*¹¹¹

101 Article 3, prohibition of torture; Article 8, right to respect for private and family life; Article 12, right to marry; Article 13, right to an effective remedy; and Article 14, prohibition of discrimination, of the European Convention on Human Rights.

102 See above, note 100, Para 15.

103 *N.B. v Slovakia* Application No. 29518/10, 12 June 2012.

104 *Ibid.*

105 *Ibid.*, Para 10.

106 See above, note 63.

107 *Ibid.*

108 The case of the third applicant was not considered by the Court as she died before judgment was made.

109 See above, note 100, Para 169; See above note 103, Para 111; and see above, note 63, Para 158.

110 See above, note 103, Para 19.

111 See above, note 100, Para 90.

She asserted that this climate had influenced medical personnel in her segregated treatment in the hospital and her sterilisation, which constituted ethnic discrimination.¹¹² The applicant submitted documents that outlined a history of coercive sterilisation of Roma women in Czechoslovakia. Figures were submitted showing that a disproportionate number of Romani women were sterilised in the region where she was from.¹¹³ This was supplemented with a variety of reports, including information from Amnesty International researchers working in Finnish refugee reception centres. These researchers had noted unusually high rates of sterilisation of Romani women who were seeking asylum from eastern Slovakia in Finnish refugee reception centres, with Presov Hospital (where the applicant was sterilised) being specifically identified.¹¹⁴

Also relying on these reports and others, the applicants in *N.B. and I.G. and Others* submitted that their ethnicity played a determining role in their sterilisation.¹¹⁵ In *I.G. and Others*, a 2003 Body and Soul report was referenced, which included an interview with the chief gynaecologist at Krompachy Hospital, where the women were sterilised. This included a statement from the chief gynaecologist that “Roma did not know the value of work, that they abused the social welfare system and that they had children simply to obtain more social welfare benefits.”¹¹⁶ The applicants submitted that they had received inferior treatment at the hospital due to racial prejudice on the part of medical personnel.¹¹⁷ The applicants also pointed to statements by public figures calling for regulation of Roma fertility.¹¹⁸ The applicants in all of the above cases submitted that they had a segregated service in “gypsy” rooms.¹¹⁹ The second applicant in *I.G. and Others* submitted that she had experienced verbal abuse from health practitioners during her stay.¹²⁰

Each of the applicants submitted that they were also discriminated against on the grounds of sex.¹²¹ *V.C.*, referring to documents from the CEDAW Committee, submitted that a failure to accommodate the fundamental biological differences between men and women in reproduction was discriminatory, and her sterilisation without informed consent was a form of

112 *Ibid.*, Para 170.

113 *Ibid.*, Para 45.

114 *Ibid.*, Para 47.

115 See above, note 103, Para 47; and see above, note 63, Para 75.

116 *Ibid.*, and see above, note 63, Para 32.

117 *Ibid.*, Para 30.

118 *Ibid.*, Para 159.

119 See above, note 100, Para 18; see above, note 103, Para 19; and see above, note 63, Para 31.

120 See above, note 63, Para 31.

121 See above, note 103, Para 118.

violence against women.¹²² In *I.G. and Others*, the applicants also submitted that their sterilisations were a form of violence against women and that:

*[T]heir ensuing infertility resulted in a psychological and social burden which was much heavier on women, in particular in the Roma community where a woman's status was often determined by her fertility.*¹²³

ii. *Court Judgments*

In *V.C.*, the Court found that although there was no indication that medical staff intentionally ill-treated the applicant, they displayed “gross disregard for her right to autonomy and choice as a patient.”¹²⁴ The Court subsequently found a violation of Article 3.¹²⁵ Similar to the case of *V.C.*, in *N.B.*, the Court stated that the procedure was incompatible with the requirement of respect for the applicant’s human freedom and dignity and violated Article 3.¹²⁶ The same conclusion was reached in *I.G. and Others*.¹²⁷

In *V.C.*, the Court considered that the Article 14 complaint should be read in conjunction with Article 8, based on the assessment that the forced sterilisation affected the applicant’s bodily functions and had adverse consequences for her private and family life.¹²⁸ In its consideration of the Article 8 complaint, the Court concluded “that the documents before it indicate that the issue of sterilisation and its improper use affected vulnerable individuals belonging to various ethnic groups.”¹²⁹ The Court further concluded there was no evidence to suggest that doctors acted in bad faith with intentional racial motivation or that the sterilisation of the applicant was part of an organised policy.¹³⁰ The Court found that Slovakia failed to comply with its positive obligation under Article 8 of the Convention because:

[T]he absence at the relevant time of safeguards giving special consideration to the reproductive health of the applicant as a Roma woman resulted in a failure by the respondent State to comply with its positive obligation to secure to her a suf-

122 See above, note 100, Para 171.

123 See above, note 63, Para 160. Emphasising this could be seen as problematic as it implies that fertility is primarily important as a matter of status granted by others, not that its importance is for each woman to determine for herself.

124 See above, note 100, Para 119.

125 *Ibid.*, Para 120.

126 See above, note 103 Para 81.

127 See above, note 63, Paras 124 and 126.

128 See above, note 100, Para 176.

129 *Ibid.*, Para 146.

130 *Ibid.*, Paras 119 and 177.

*efficient measure of protection enabling her to effectively enjoy her right to respect for her private and family life.*¹³¹

Having found a violation under Article 8, the Court did not consider it necessary to determine whether there was a breach of Article 14.¹³² In *N.B.*, the Court noted that an issue had arisen in Slovakia regarding improper sterilisations and that:

*Such practice was found to affect vulnerable individuals belonging to various ethnic groups. However, Roma women had been at particular risk due to a number of shortcomings in domestic law and practice at the relevant time.*¹³³

A violation of Article 8 based on the same reasoning as in *V.C.* was found in *N.B.* and in *I.G. and Others* also.¹³⁴ As in *V.C.*, in *N.B.* and *I.G. and Others*, the Court stated that it did not find it necessary to separately determine if Article 14 of the Convention was also breached on the basis that a violation of Article 8 had been found.¹³⁵

iii. *A.S. v Hungary*¹³⁶

In 2004, the CEDAW Committee examined a complaint by Ms A.S. under the Optional Protocol. A.S. claimed to have been subjected to coerced sterilisation in a Hungarian hospital. Medical records show that upon arrival at the hospital the author was dizzy, bleeding more than average and was in a state of shock.¹³⁷ While on the operating table, after finding out that she had lost her child, she was asked to sign a “barely legible” note, handwritten by the doctor with the word sterilisation written in Latin.¹³⁸ In stating the facts of the case, the author pointed to her extremely vulnerable situation as a woman who lost her child and as a member of a marginalised group of society – the Roma.¹³⁹ It was noted that “she and her partner live in accordance with traditional Roma customs – where having children is said to be a central element of the value system of Roma families.”¹⁴⁰

131 *Ibid.*, Para 154.

132 *Ibid.*, Para 180.

133 See above, note 103, Para 96.

134 *Ibid.*, Para 99; and see above, note 63, Para 146.

135 See above, note 100, Para 180; See above, note 103, Para 123; and see above, note 63, Para 167.

136 *A.S. v Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2004.

137 *Ibid.*, Para 2.3.

138 *Ibid.*, Para 2.2.

139 *Ibid.*, Para 9.4.

140 *Ibid.*, Para 2.4.

The Committee first considered the alleged violation of Article 10(h) of the CEDAW which provides the right “to access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”¹⁴¹ The Committee noted that given the author’s poor health on arrival, any information she received was under stressful and therefore inappropriate conditions which constituted a violation of her rights under Article 10(h).¹⁴²

The Committee also considered whether the author’s rights had been violated by performing the sterilisation without her informed consent. The Committee noted the poor health of the author and that fact that the author had to sign a barely legible consent note where the Latin term had been used for sterilisation. The Committee therefore found her rights under Article 12, which requires the state to eliminate discrimination in access to health care services, including family planning, were violated.¹⁴³ Given the sterilisation was performed without full and informed consent and deprived the author of her natural reproductive capacity, the Committee further found that the author’s right to decide freely on the number and spacing of children under Article 16 was violated.¹⁴⁴ The author’s ethnicity was not addressed by the Committee.

b. Analysis of Decisions

While all cases examined above recognised that Romani women’s rights were violated; from an intersectional perspective, they are extremely disappointing. Both the ECtHR and the CEDAW Committee missed an opportunity to apply an intersectional lens to their decisions. The ECtHR’s decisions not to examine discrimination in any of the cases is quite shocking. Given the extent of material submitted demonstrating endemic discrimination against Romani women, and assertions by the Court itself which indicate an implicit acknowledgement of discrimination, an examination of discrimination was warranted. The CEDAW Committee, while asserting that the coercive sterilisation constituted discrimination against women, made no reference to ethnicity and thus failed to get to the root of the case as one of intersectional discrimination. This part of the article analyses the missed opportunities in these cases in more detail.

In the cases before the ECtHR, it is difficult to understand how the Court felt it was not necessary to examine the discrimination claims. In each of the three cases, the Court noted (in these or similar terms) that:

141 Convention on the Elimination of All Forms of Discrimination against Women, United Nations, G.A. Res. 34/180, 1979, Article 10(h).

142 See above, note 136, Para 11.3.

143 *Ibid.*, Para 11.3; and CEDAW, Article 12(1).

144 See above, note 136, Para 11.4.

*[T]he objective evidence is not sufficiently strong in itself to convince the Court that it [sterilisation] was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated.*¹⁴⁵

However, in line with its own previous case-law, the burden of proof should have shifted to the Government. In *Timishev v Russia*,¹⁴⁶ the Court noted that “[o]nce the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified.”¹⁴⁷ Lindsay Hoyle notes “that the moment at which the court is persuaded to shift the burden depends on the specific circumstances, the nature of the charges, and the Convention right violated.”¹⁴⁸ The case law of *D.H. and Others*¹⁴⁹ is analogous in that although no discriminatory intent was evidenced, the disproportionate placement of Roma children in special schools created a presumption of indirect discrimination. Given the evidence of discrimination provided by the applicants in each of *V.C.*, *N.B.* and *I.G. and Others*, and the pattern of cases appearing before the Court, the burden of proof should have shifted to the Government.

The Court’s own acknowledgement that Romani women are more likely to experience coercive sterilisations points to a clear need to examine the allegations of discrimination. In all cases, the Court noted the submission by the Council of Europe Commissioner for Human Rights that indicated that improper sterilisation affected vulnerable individuals belonging to various ethnic groups, of which Roma were at particular risk.¹⁵⁰ The Court also states in *V.C.* that “the same was implicitly admitted by the group of experts established by the Ministry of Health, who recommended special measures in respect of the Roma population.”¹⁵¹ In previous case law, discrimination has been interpreted by the Court as “treating differently, without an objective and reasonable justification, persons in relevantly similar situations.”¹⁵² Even if the policy of sterilisation could not be considered directly discriminatory, it is very evidently indirectly discriminatory; in *D.H. and Others*, the Court established that different treatment may take the form of a general policy or measure that has disproportionate effects on an ethnic group, in breach of the Convention.¹⁵³ These cases were an opportunity to build on the progressive approach adopted by the Court in *D.H. and Others* where a pattern of discrimination was examined. This was an

145 See above, note 100, Para 171; See above, note 103, Para 78; and see above, note 63, Para 165.

146 *Timishev v Russia*, Application Nos. 55762/00 and 55974/00, 13 December 2005.

147 *Ibid.*, Para 57.

148 See above, note 64, p. 23.

149 *D.H. and Others v Czech Republic*, Application No. 57325/00, 13 November 2007, Paras 194–195.

150 See above, note 100, Para 146; see above, note 100, Para 96; and see above, note 63, Para 143.

151 See above, note 100, Para 178.

152 *Willis v the United Kingdom*, Application No. 36042/97, 11 June 2002, Para 48.

153 See above, note 149, Para 175.

opportunity for the Court to apply a substantive notion of equality to the analysis in line with an intersectional approach.

Instead, by sidestepping the applicants' claims of discrimination "the majority diminished the focus of the case to the hospital's improper sterilisation procedures, rather than the Government's systematic sterilisation of Romani women."¹⁵⁴ The judgments of the Court individualised the applicants' cases and dislocated their experiences from the structures of oppression that resulted in them, as Romani women, experiencing coercive sterilisations. As the dissenting Judge Mijovic states in *V.C.*, the Court missed the essence of the case, and this is also true of *N.B* and *I.G. and Others*.¹⁵⁵ The history of sterilisation policies targeted at Romani women, and the ongoing negative attitudes towards Roma, combined with a number of cases being presented to the Court, demonstrate discrimination. Judge Mijovic's states:

*The fact that there are other cases of this kind pending before the Court reinforces my personal conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia. To my mind, the applicant was "marked out" and observed as a patient who had to be sterilised just because of her origin, since it was obvious that there were no medically relevant reasons for sterilising her. In my view, that represents the strongest form of discrimination and should have led to a finding of a violation of Article 14 in connection with the violations found of Articles 3 and 8 of the Convention.*¹⁵⁶

In each of the three cases, the Court posits Roma as a vulnerable group without making reference to the structural factors that result in the marginalisation of Roma. The judgments in relation to Article 8 note that the State failed to comply with its positive obligation to protect the applicants as members of the "vulnerable Roma community".¹⁵⁷ The description of the applicants as members of the vulnerable Roma community without reference to state policies or an examination of discrimination dislocates this vulnerability from the structures that have caused this. The role of the state in this is obscured. The Court received numerous reports that revealed systematic state discrimination against Roma, across a number of areas. These included segregated maternal health services, the delay and denial of health care to Roma and discrimination in other areas of health, education and employment.¹⁵⁸ An intersectional analysis by the Court would have considered the structural factors at work and linked this "vulnerability" of Romani women to the policies and practices of Slovakia.

154 See above, note 64, p. 27.

155 See above, note 100, Dissenting Opinion of Judge Mijovic, p. 43. Judge Mijovic was the only Judge who dissented in relation to discrimination in the three cases.

156 *Ibid.*, p. 44.

157 *Ibid.*, Para 179; see above, note 103, Para 122; and see above, note 63, Paras 143-145.

158 See above, note 100, Para 47; see above, note 103, Para 47; and see above, note 63, Paras 32 and 75.

Another key issue with the Court's interpretation was the focus on the intention of the medical practitioners. Whether discrimination is intentional is not the relevant factor in determining if the legal test for discrimination has been satisfied.¹⁵⁹ In any event, at least in the case of *V.C.*, intent could be seen despite the Court's finding the contrary.¹⁶⁰ In *V.C.*'s case, her ethnicity was specifically recorded on her medical details and she had subsequently experienced segregated services, was provided with misinformation and coerced into signing a consent form in labour. Thus, the assertion by the Government that the ethnicity of the applicant was recorded on medical records in order to ensure "special" treatment is extremely problematic.¹⁶¹ The Court notes that this indicates "a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed"¹⁶² and that "it does not suggest that special care was to be, or was in fact, exercised to ensure that the full and informed consent of such a patient was obtained before any sterilisation was contemplated."¹⁶³ The State "explained that the reference to the applicant's Roma origin had been necessary as Roma patients frequently neglected social and health care"¹⁶⁴ This recording of ethnicity suggests a mindset based on stereotypes that resulted in different and discriminatory treatment for Romani women. This surely demonstrates intentional discrimination.

Furthermore, the Court made no reference to gender discrimination in any of the three cases. Given the decision of the CEDAW Committee in *A.S. v Hungary*, and the similarity of experiences between the circumstances of *A.S.* and the applicants before the ECtHR, it is very clear that the sterilisations in the cases before the Court constituted discrimination against women. The CEDAW Committee's General Comment No. 19 outlines various forms of gender-based violence, including coercive sterilisation, as discrimination against women.¹⁶⁵ Since the Court found in all of the cases that the applicants had been coercively sterilised, violating their rights to freedom from inhuman and degrading treatment, it should also have found that these cases constituted gender discrimination.

The CEDAW Committee decision in *A.S. v Hungary* focuses on the issue of informed consent, including availability of adequate information. The Committee found that the sterilisation was coercive and therefore constituted gender discrimination. However, the Committee did not consider the author's identity beyond her gender. This resulted in a partial and incomplete examination and articulation of the author's situation. Such an approach does not capture the complexity of the issue, nor will it place the appropriate demands on states to pro-

159 See above, note 69, p. 127.

160 See *V.C. v Slovakia*, above note 100, Para 119.

161 *Ibid.*, Para 151.

162 *Ibid.*, Para 151.

163 *Ibid.*, Para 151.

164 *Ibid.*, Para 151.

165 CEDAW Committee, *General Recommendation no 19: Violence against women*, 1992.

vide appropriate remedies. For example, even the simple measure of including a requirement for translation to the Romani language in the Committee's recommendation that its views be widely distributed to all sectors of society.¹⁶⁶ The approach of the CEDAW Committee is partly due to the UN structures which have often addressed racial and gender discrimination as two separate problems. This can be seen in how the complaint to the Committee was tailored with an almost exclusive focus on gender. The facts of the case note the author's ethnicity and religion as relevant factors,¹⁶⁷ however, the complaint itself focuses on Articles 10 (h), 12 and 16(1)(e), of the CEDAW.¹⁶⁸ Drawing on Crenshaw's analysis of the experiences of Black women, this single ground analysis relegated the identity of the Romani woman to a location that resists telling.¹⁶⁹

c. Possibilities for an Intersectional Analysis

The ECtHR has at some points moved closer to an intersectional analysis than observed in the above cases. In the case of *B.S. v. Spain*,¹⁷⁰ the applicant alleged that she had been discriminated against on account of her skin colour and her gender.¹⁷¹ Third party interventions in this case emphasised intersectional discrimination.¹⁷² The Court found a violation of Article 14 of the Convention taken in conjunction with Article 3 in its procedural aspect. The wording of the Court shows some moves towards a more intersectional approach, which states "domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute."¹⁷³ This acknowledgment of the applicant's position as an African woman is a progressive move by the Court. Although, the vulnerability could be posited in different terms rather than ascribing it as "inherent" to the applicant's position. *D.H. and Others*, as mentioned above, does address structural discrimination and acknowledged that the history of discrimination of Roma must be taken into account when examining cases.¹⁷⁴ This is important as intersectionality is not just about naming different grounds but linking experiences of discrimination across grounds to the structures that cause such discrimination. Although the ECtHR could not be said to have adopted a fully intersectional approach in cases thus far, these cases demonstrate that it is possible for the Court to move towards an intersectional analysis. The ERRC have recently submitted a third-party intervention to the ECtHR in the yet to be decided case of *Maděrová*

166 *A.S. v Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2004, Para 11.6.

167 *Ibid.*, Paras 2.4, 9.4.

168 *Ibid.*, Para 3.1.

169 See above, note 14, p. 1242.

170 *B.S. v Spain*, Application No. 47159/08, 24 July 2012.

171 *Ibid.*, Para 29.

172 *Ibid.*, Para 57.

173 *Ibid.*, Para 62.

174 See above, note 143, Para 182.

v Czech Republic,¹⁷⁵ a case of forced sterilisation.¹⁷⁶ The intervention identifies forced sterilisation as a form of intersectional discrimination against women and urges:

*The Court to apply the notion of intersectional discrimination under Article 14 of the Convention and recognise the particular vulnerability of victims of forced sterilisation and their need for a separate remedy apart from the ordinary legal procedures open generally to victims of ill treatment.*¹⁷⁷

Such an approach if adopted by the ECtHR would be a major step in recognising intersectional discrimination.

Since the decision in relation to *A.S. v Hungary*, the CEDAW Committee has explicitly recognised intersectionality in General Recommendation No. 28.¹⁷⁸ Further, since the publication of the General Recommendation, the Committee has also considered intersectionality in its judgments, including making explicit reference to it. In *Pimentel v Brazil*,¹⁷⁹ the Committee ruled on a case of maternal death, finding that the author was discriminated against on the basis of her sex, her status as a woman of African descent and her socio-economic background.¹⁸⁰ In *Kell v Canada*, the Committee found that Kell was a victim of intersectional discrimination based on her status as an Aboriginal woman who had also experienced domestic violence.¹⁸¹ The Committee states that “as the author is an aboriginal woman who is in a vulnerable position, the State party is obliged to ensure the effective elimination of intersectional discrimination.”¹⁸² These cases represent a significant and progressive shift in the approach of the CEDAW Committee in applying an intersectional lens to decisions.

Conclusion

The experiences of Romani women as outlined above demonstrate a deeply disturbing picture of endemic discrimination and human rights abuses. Such abuses have been legitimised by narratives of the need to control the social risk that Roma pose and narratives of Roma

175 *Maděřová v Czech Republic*, Application No.32812/13, 16 May 2013.

176 ERRC, “Third Party Intervention, Application No.32812/13”, 11 December 2015.

177 *Ibid.*, p.1.

178 CEDAW Committee, *General Recommendation no. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2, 2010.

179 *da Silva Pimentel v Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 27 September 2011.

180 *Ibid.*, Para 7.7.

181 *Kell v Canada*, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008, 26 April 2012.

182 *Ibid.*, Para 10.3.

as abusing social protection systems.¹⁸³ These narratives are all too familiar today across Europe. Analysis of the widespread practice of coercive sterilisation of Romani women demonstrates the importance of an intersectional approach. The attack on Romani women and the abuse of Romani women's bodies to control the Roma community reveals a unique experience of discrimination and subordination. Class-based discrimination also comes into play whereby financial incentives or punitive measures have been used to promote sterilisation. Furthermore, the historical experience of state sanctioned sterilisation in the former Czechoslovakia cannot be disconnected from the continued experience of coercive sterilisation by Romani women in Slovakia and the Czech Republic. When dislocated from structures of power and experiences of discrimination across multiple identities, an incomplete and inadequate analysis of coercive sterilisations ensues. The pattern of human rights abuses and state culpability is obscured. Such impunity paves the way for future abuses.

The failure by the ECtHR to even examine discrimination in the cases of coercive sterilisation of Romani women is egregious. The focus of the cases was diminished to the individual hospital's sterilisation procedures, rather than the State's systematic sterilisation of Romani women. Furthermore, the Court's lack of analysis of structural discrimination represented a set-back from previous judgments. Speaking about the case of *V.C.*, the dissenting Judge Mijovic noted that the judgment failed to grasp the essence of the case.¹⁸⁴ Likewise, the CEDAW Committee decision in *A.S. v Hungary* demonstrated a one dimensional and inadequate approach to intersectionality. An intersectional approach in the courts is important so that the courts will not miss the essence of discrimination in their judgments. Patterns of discrimination and subordination are not straightforward and can appear neutral and benign. An intersectional analysis is key to revealing the insidious ways in which oppression and discrimination operate. This is crucial to bring human rights law closer to the lived experiences of people experiencing human rights violations.

There are some positive signs for the incorporation of an intersectional approach in human rights law. The ECtHR has shown that it does have the capacity to address multiple identities and structural discrimination. However, its approach has not been consistent. The ECtHR could build on its progressive judgments and substantive understandings of equality in *B.S. v Spain* and *D.H. and Others*. The role of third party interventions would seem quite important in progressing intersectional analysis in the Court. The CEDAW Committee offers hope as a potential driver of intersectionality in human rights law, as its recent decisions were underpinned by an explicit articulation of intersectionality. Intersectional approaches in the courts have the capacity to articulate different types of remedies that more effectively bring justice to people and communities facing human rights abuses. The suggestions by the ERRC of special remedies to support claims in the cases of coercive sterilisation provide such an example.

183 See above, note 3, p. 28.

184 See *V.C. v Slovakia*, above note 100, Dissenting Opinion of Judge Mijovic.

While endemic and entrenched discrimination against Romani women will not be addressed and challenged merely through legal approaches, it is one of many tactics that can be part of wider change. Roma rights activists are pursuing a range of advocacy approaches seeking acknowledgement and redress for coercive sterilisations. Human rights law is just one avenue for this. However, in the context of states that continue to obstruct justice and deny the discrimination that they are accountable for, it is important that human rights bodies are naming and challenging discrimination effectively. In this respect, an intersectional analysis in human rights cases is of crucial importance for Romani women.

Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15

Shreya Atrey¹

Abstract

In the world's largest democracy, which frequently prizes itself for its "diversity", how has intersectional discrimination been excluded from the ambit of Article 15 of the Indian Constitution to date? This article is interested in examining this inscrutability. The motivation is to explore how intersectionality needs to manoeuvre the foundational roadblock of the constricted view of discrimination as based only on a single ground. Through the example of sex discrimination, the article examines how the interpretation of the general constitutional guarantee of non-discrimination contained in clause (1) of Article 15 has restricted the prohibition of discrimination to a single ground, preventing the recognition of intersectional discrimination. However, as this article argues, a legitimate interpretation of clause (1) neither makes it a closed list of grounds nor limits it to single ground discrimination; but instead is concerned with finding the basis of discrimination in enumerated or analogous grounds. The final analysis thus offers a qualitative reconstruction of Article 15(1) by linking the basis of discrimination to grounds, incorporating the possibility of accommodating multiple grounds in a discrimination claim.

Introduction

This article seeks to understand how intersectional discrimination has fallen by the wayside of Article 15 of the Indian Constitution. The aim is to examine the jurisprudence relating to the interpretation of clause (1), especially the phrase "*on grounds only of* religion, race, caste, sex, place of birth or any of them" (emphasis added), and whether it admits intersectionality. This devolves into two inquiries: first, how discrimination law jurisprudence in relation to

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Article 15 has foreclosed the routes to recognising intersectional discrimination; and secondly, how Article 15(1) can be reimagined to address intersectional discrimination. Section one of this article examines the case law which reveals the increasing impossibility of bringing a multi-ground claim of discrimination under clause (1). It specifically considers case law which has developed clause (1) in a way which adopts a particularly narrow view of prohibiting only single-ground discrimination. Section two then seeks to demonstrate the possibility of addressing multi-ground claims, i.e. based on more than one ground, under Article 15(1). I argue that a legitimate interpretation of “on grounds only of” relates to finding the *basis* of discrimination by linking the discriminatory act or effect to grounds. Once this is recognised, it becomes evident that the phrase can accommodate not just a broad and contextual understanding of single ground discrimination but also complex and intersecting forms of multi-ground discrimination. The cumulative result of these suggestions can be explained with the help of an example: I may be denied admission into a school because: (i) I could not complete the admission test in the time allotted and hence received a mark below the qualifying mark; or (ii) although I received a good mark, the qualifying mark for women was higher than that for men; or (iii) I could not appear in the qualifying examination because it excluded me as a Muslim woman from making an application; or (iv) the school’s uniform policy ended up excluding me as a Muslim woman who wore a jilbab. While (i) may not necessarily devolve into a discrimination claim *per se* since the causal basis is not anchored in a ground (like race, caste, religion, disability, gender etc.), (ii) can be easily framed as a discrimination issue based on sex or gender. This article argues that claims like (iii) and (iv), wherein the causality is directly or indirectly linked to multiple dimensions of the claimant’s identity (in this case, gender and religion) are also covered in the non-discrimination guarantee of Article 15(1) of the Indian Constitution. The article thus seeks to present a prelude to reading in intersectionality in Article 15(1) by expanding its scope from single to multi-ground discrimination.

There are two caveats as to the scope of this article. First, the survey is confined to constitutional jurisprudence in relation to Article 15, especially in relation to sex discrimination. The wherewithal of Article 15 is often subsumed within or confused with the right to equality under Article 14; or the entire provision is sometimes overshadowed by the varied and abundant reservation jurisprudence under Article 15(4) and (5). As the basic constitutional text on non-discrimination, it is important to locate intersectionality primarily within Article 15(1) rather than the right to equality under Article 14, even as the latter remains foundational and complementary.² The effort is then to delineate the distinct contribution of the non-discrimination guarantee that is incorporated in Article 15(1), which in turn is crucial

2 In that sense, it is useful to note that claims like (iii) from the example above *have* in fact been brought before the courts, by Hindu or Muslim women, arguing religion-based sex discrimination as violating the right to equality under Article 14. But seldom have such cases been argued on multiple grounds in relation to the general non-discrimination guarantee under Article 15(1). The focus of these cases remained on whether the sex-based classification under religious or personal laws was “reasonable” or “non-arbitrary” under Article 14, or otherwise permissible under Articles 25 or 26 relating to freedom of religion under the Constitution. See *Githa Hariharan v Reserve Bank of India* AIR 1999 SC 1149; *Mohd Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945; and *Danial Latifi v Union of India* (2001) 7 SCC 70.

in addressing intersectional discrimination. This redefined focus on Article 15(1) provides a clearer understanding of discrimination, intersectional or otherwise. But this aspiration cannot all be realised here. Questions such as having a formidable test or touchstone for assessing discrimination, the possibility of reading in analogous grounds, defining the level of scrutiny and burden of proof, establishing a test for justifications etc., all deserve more elaborate treatment than what can be provided here. The focus of this article is narrow – to examine how Article 15(1) has come to be given a particularly limited interpretation especially in the context of sex discrimination and what can be done to change this focus to prepare the way for recognising complex forms of discrimination. I hope the analysis is instructive for other jurisdictions who are committed to addressing intersectionality à la discrimination law but are grappling with the preliminary problem of a quantitative view of discrimination limited to a single ground.

Secondly, it is useful to note that in the Indian context, none of the forms of multiple, additive, combination, compound, overlapping or intersectional discrimination (other than single ground discrimination) have been recognised. In this sense, wherever I indicate the absence of Indian jurisprudence having engaged with intersectional discrimination, I am necessarily indicating the absence of recognition of any concept of discrimination on more than one ground. However, I use the term intersectional discrimination from the outset, to explain the possibilities or hindrances in recognising the concept as such (distinct from multiple or combination discrimination), which I believe explains both comprehensively and correctly, the true nature of discrimination suffered on two or more grounds. Thus, the claim for admitting multiple grounds in a discrimination claim under Article 15(1) is being specifically made for recognising intersectional discrimination. In this sense, this is an exploratory article which hopes to envision a case of intersectional discrimination by opening up the possibility of admitting multi-ground claims in discrimination.

It is useful to set the reference point of intersectional discrimination which this article is preparing ground for in suggesting multi-ground discrimination claims. Intersectional discrimination represents the qualitative sense of invoking the quantitative idea of multi-ground discrimination. This qualitative understanding is relevant to the extent that it explains the alternative to rejecting the limited quantitative view of Article 15(1) as prohibiting only single-ground discrimination. Intersectionality theory understands identity as a result of unique and shared characteristics of intersecting grounds like race, sex, gender, disability, class, age, caste, religion, sexual orientation, region etc. Intersectionality emerged as the practical and legal application of the theoretical characterisation of black women's identities shaped by their race, class and gender. It was first translated in the legal realm by Kimberlé Crenshaw in her 1989 piece which highlighted that any real commitment towards eliminating racism and patriarchy cannot ignore those located at the intersections of both, i.e. Black women.³

3 Crenshaw, K., "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, Vol. 4, 1989, p. 166.

Black women’s experiences were seen as defined by the intersection of blackness and femaleness – this meant that they shared some experiences of discrimination with white women and Black men, but also reflected experiences of being both Black and female, in a unique way.⁴ The appreciation of both unique and shared dimensions of Black women’s experiences of race and sex characterised the method of intersectionality in discrimination law.

This is how intersectionality theory explains the nature of discrimination based on more than one personal characteristic or one identity of individuals; and the term “intersectional discrimination” is used to accurately signify this qualitative dimension of discrimination suffered when multiple identities intersect. It is different from other forms of discrimination like multiple, additive, combination, compound or overlapping discrimination. Multiple discrimination usually refers to discrimination based on more than one ground, such that discrimination needs to be proved in succession based on each ground individually.⁵ Additive discrimination means the sum of discrimination based on multiple grounds, for example, the net discrimination suffered as a Dalit woman is the sum of discrimination against Dalit men and against women. Similarly, the idea of combination discrimination is used to convey some concoction or confluence of discrimination based on two or more grounds (but often confined to two grounds only).⁶ Overlapping discrimination may be described as based on *any* of the implicated grounds such that, say, a claim of race and sex discrimination could be imagined as spheres of race and sex discrimination which may operate separately, collide or subsume one another.⁷ Compound discrimination is mainly used for claims where two or more grounds combine together to form a single compound ground.⁸ Intersectional discrimination on the other hand, defined by explanations of uniqueness and sharedness, cannot be captured in these other common understandings which take a fragmented, cumulative or mathematical view of multi-ground claims. It is towards this qualitative understanding of intersectional discrimination that this article hopes to throw open the doors of Article 15(1).

This article seeks to show that the judicially imposed limitation on Article 15(1) as prohibiting only single ground discrimination is ill-conceived. If discrimination does not come about in discrete packets of experiences based on a single ground, its legal basis must be broadly

4 *Ibid.*

5 For example, see the decision of the UK Court of Appeal in *Bahl v The Law Society* [2004] EWCA Civ 1070.

6 This approach may be seen as characteristic of the US discrimination jurisprudence which sees multi-ground claims as combinations of “sex-plus” and “race-plus” categories of discrimination. See, for example, *Judge v Marsh* (1986) 649 F Supp 770. In the UK, the Equality Act 2010 in Section 14 also limits combination discrimination to two grounds.

7 Eaton, M., “Patently Confused: Complex Inequality and *Canada v. Mossop*”, *Review of Constitutional Studies*, Vol. 1, 1994, p. 231; *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (SCC) 582, per Lamer CJ; and *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), Para 34 per Nkabinde J.

8 Shoben, E.W., “Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination” *NYU Law Review*, Vol. 55, 1980. See *Corbiere v Canada* [1999] 2 SCR 203.

conceived to allow real and diverse experiences to be recognised when based on more than one ground.⁹ If this has not been the case, it is useful to examine what impedes it.

1. “On Grounds Only Of” as Excluding Intersectionality

This section examines the discrimination law jurisprudence under Article 15 and how it relates to intersectionality. The purpose is to consider the case law as bearing on the central inquiry: how has discrimination law under Article 15 debarred intersectionality? There are no test cases which directly aid this examination. Thus, the effort is to identify legal principles in existing case law which together arrest the possibility of recognising intersectional discrimination. I argue that there are at least three discernible threads pertaining to: (i) the misinterpretation of “only” in the text of Article 15(1); (ii) the misapplication of Article 15(3) which allows protective discrimination in favour of women; and (iii) the overreach of reservation jurisprudence under Article 15(4) and (5) to limit the scope of clause (1). Pursued consistently by the Supreme Court, these approaches can mislead to the point of either excluding intersectional discrimination from the ambit of clause (1) or justifying it as ameliorative and hence non-discriminatory under clauses (3) to (5).

a. “On Grounds Only Of” as the Basis of Discrimination

Clause (1) of Article 15 of the Indian Constitution provides that, “[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” Early Article 15 jurisprudence indicates an interpretation of the phrase “on grounds only of” as linking the basis of discrimination to grounds, i.e. signifying the special sense of causation in discrimination. Unlike other areas of law where causation explains the link between cause and effect,¹⁰ the speciality of discrimination law is in linking the cause and effect through the device of “grounds”. Thus, for example, it is not enough in discrimination law to show that an employer had a policy which lead to the dismissal of a pregnant female employee; it must be shown that the dismissal is linked to grounds, in this case, that of sex or pregnancy. This is true for both direct discrimination, where discrimination is explicitly based on certain grounds, as well as indirect discrimination where discrimination is the result of neutral policies which are applied to everyone but have a particularly discriminatory impact on some based on their personal characteristics of race, sex, gender, caste, sexual orientation, disability, religion, age etc.

Whilst this strand of thought is visible in early jurisprudence, subsequent cases seem to have substantially drifted away from this perspective. It is then useful to recall the initial context in

9 Harris, A.P., “Race and Essentialism in Feminist Legal Theory”, *Stanford Law Review*, Vol. 42, 1990; Spelman, E., *Inessential Woman: Problems of Exclusion in Feminist Thought*, Women’s Press, 1990; and Grillo, T., “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House”, *Berkeley Women’s Law Journal*, Vol. 10, 1995.

10 Hart, H.L.A. and Honoré, T., *Causation in the Law*, Oxford University Press, 1985, p. 4.

which such a qualitative, rather than quantitative, interpretation of Article 15(1) was made and accepted. The phrase “on grounds only of” has been borrowed from Section 298(1) of the pre-constitutional Government of India Act 1935.¹¹ The provision stated that:

No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

The meaning of “on grounds only of” in Section 298(1) came to be considered by the Bombay High Court in *Punjab v Daulat Singh*.¹² The case involved a challenge to the validity of Section 5 of the Punjab Alienation of Land (Second Amendment) Act 1938 which purported to insert a new Section 13A in the Punjab Alienation of Land Act 1900. The impugned provisions imposed restrictions on certain agricultural tribes acquiring, holding or disposing of property. The question before the court was whether the restrictions were based “on the ground of descent alone”.¹³ In determining this appeal, the Court had to decide upon the applicable test of discrimination. The dissenting opinion of Beaumont J in the court below had opined that the correct test should be to consider the scope and object of the impugned Act, so as to determine the ground of discrimination. The Bombay High Court rejected this test and accordingly the contention that descent was not the only, or even the primary, ground on which the restrictions were enacted.¹⁴ Lord Thankerton, writing for the majority held that:

*[I]t is not a question of whether the impugned Act is **based only on one or more of the grounds** specified in Section 298(1), but whether **its operation may result** in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the **reaction** of the impugned Act on the personal right conferred by the sub-section.¹⁵ (emphasis added)*

Thus, Lord Thankerton rejects the *object and purpose* test for discrimination and lays down the test of discriminatory *result or effect* flowing from a prohibition or restriction based on grounds. Two observations follow. First, both the tests seem to consider Article 298(1) and

11 The Government of India Act 1935 was passed by the colonial government and it came to form the basis of the Constitution which was drafted between 1947 and 1950. It introduced features like quasi-federalism, direct elections, establishment of Federal Court etc., which were later retained in the Indian Constitution. Although it did not include a bill of rights, provisions like Section 298(1) provided the cue for developing other provisions like the non-discrimination guarantee in Article 15(1), by incorporating the language used in the colonial legislation.

12 *Punjab v Daulat Singh* (1946) 73 IA 59, (1946) FCR 1.

13 *Ibid.*, Paras 15–17, 20.

14 *Ibid.*, Para 20.

15 *Ibid.*

particularly “on grounds only of” as an exercise of finding the *basis* of discrimination as embedded in grounds – whether proclaimed or in effect.¹⁶ Secondly, Lord Thankerton implicitly accepts that the basis of discrimination can be single or multiple grounds (“it is not a question of whether the impugned Act is *based only on one or more of the grounds* specified in Section 298(1)”). This is an illuminating admission. So long as any discriminatory effect ensues on the basis of one or more grounds, the provision or the statute will be deemed discriminatory. The *Daulat Singh* decision marks the earliest indication of: (i) both direct and indirect discrimination being prohibited under clause (1); (ii) when based on one or more grounds. Thus, a reasonable interpretation of *Daulat Singh* perforce suggests that the phrase “on grounds only of” signifies the basis of discrimination to be one or more grounds under Section 298(1).¹⁷

Lord Thankerton’s test was endorsed in *Bombay v Bombay Education Society*.¹⁸ The case related to the policy of restricting admission to English speaking pupils, specifically of Anglo-Indian and European descent, in the English medium schools of Bombay. This was contended as in breach of Articles 15(1) and 29(2) for denying admission on the ground only of religion, race, caste, language or any of them.¹⁹ The government responded that the restriction was not discrimination based only on the ground of religion, race, caste, language or any of them “but on the ground that such denial will promote the advancement of the national language and facilitate the imparting of education through the medium of the pupil’s mother tongue.”²⁰ This object and purpose based justification was denied by the Court as an incorrect test in light of *Daulat Singh*, and the Court proceeded with applying Lord Thankerton’s test in that “[w]hatever the object, the immediate ground and direct cause for the denial” dictates the inquiry.²¹ Considering also that the immediate grounds of discrimination in this case were multiple and crosscutting, identified by the Court as descent, language and religion, it becomes clear that the formulation in *Bombay Education Society* supports, following *Daulat Singh*, at least three things: (i) reference to “ground” as the causal basis (“on grounds only of”) upon which discrimination occurred; (ii) the causal basis being defined by grounds under Article 15(1), viz. religion, race, caste, sex, place of birth or any of them; and (iii) the possibility that the causal basis could lie in multiple grounds.

16 In this way, Lord Thankerton’s test also recognises the possibility of what could have been developed as the category of indirect discrimination based on result or effect of certain actions or policies. Recognition of indirect discrimination still remains wanting in India.

17 Seervai, H.M., *Constitutional Law of India*, 2001, p. 558.

18 *Bombay v Bombay Education Society* (1955) 1 SCR 568, pp. 581, 583–584.

19 Article 29(2) of the Constitution of India provides that: “[n]o citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”

20 See above, note 18, p. 582.

21 *Ibid.*, p. 583.

b. “On Grounds Only Of” as the Sole Basis of Discrimination

Subsequent case law did not follow the interpretive cues from *Daulat Singh* and *Bombay Education Society*, but instead, reduced Article 15(1) to prohibiting discrimination only on one ground, that too interpreted in a highly isolated way. This reductionist turn was brought about by interpreting the permission of protective discrimination for women under Article 15(3) as supporting discrimination based not only on sex but also on “other grounds” and/or “several considerations”.²² The line of reasoning went thus: since clause (1) prohibited discrimination only on a single ground, discrimination resulting from more than one ground or coupled with other considerations should not be considered pernicious and can in fact be justified under clauses (3), (4) and (5). Following this change of course, the State has since readily cited discrimination on more than one prohibited ground as a justification for a breach of Article 15(1).

Early Calcutta High Court jurisprudence paved the way for interpreting the word “only” in a restrictive way to limit the protection from sex discrimination. In *Mahadeb v Dr BB Sen*,²³ the Court considered Order 25, Rule 1, Sub-rule 3 of the Civil Procedure Code which provided that:

On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property in India.

In examining whether this provision was discriminatory against women on the basis of sex, Mukharji J opined that:

*The word “only” in [Article 15(1)] is of great importance & significance which should not be missed. The impugned law must be shown to discriminate because of sex alone. If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not, in my judgment, come within the provision of Article 15(1) of the Constitution. Equality of sex as embodied in the constitutional guarantee of Article 15(1) of the Constitution draws only this limit that sex by itself alone will not be a ground of discrimination by the State. Superadded to sex, if there are proprietary considerations, then the discrimination cannot be said to be on the ground of sex alone.*²⁴

Applying this reasoning, Mukharji J held the provision to be non-discriminatory because it was based not just on sex but also on the “important consideration of ‘sufficient immoveable

22 Article 15(3) of the Constitution of India provides that: “[n]othing in this article shall prevent the State from making any special provision for women and children.”

23 *Mahadeb v Dr BB Sen* AIR 1951 Cal 563.

24 *Ibid.*, Para 28.

property in India.”²⁵ According to him “[p]ossession of sufficient immoveable property in India is not a consideration bearing on sex at all.”²⁶ What went unappreciated in this isolated understanding of sex discrimination was how other identities and statuses like economic capacity, property ownership and poverty intersected with women’s subordinate position to entrench their sex-based disadvantage and create new forms of disadvantage based on these other “considerations”. In adopting this artificial view of sex discrimination where the category of “sex” operated in isolation rather than in association with women’s complex identities of race, religion, caste, disability and socio-political and economic contexts,²⁷ the Court misses the nature and complexity of discrimination against women, including the fact that forms of disadvantage intersect and intensify discrimination.²⁸

The Calcutta High Court in *Anjali Roy v State of West Bengal*²⁹ continued the trend of understanding sex discrimination as solely based on the ground of sex *and no other ground*.³⁰ The case involved an order which restricted the admission of women into a male-only honours college. The High Court held that the restriction did not constitute discrimination within the meaning of Article 15(1). The holding was premised on the interpretation of Article 15(1) as:

What the Article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article (...) the discrimination which is forbidden [in Article 15(1)] is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article.³¹ (emphasis added)

All three sentences above convey different meanings. In the first sentence it appears that multi-ground discrimination is also caught by the prohibition in Article 15(1); while the second sentence indicates that it is only single-ground discrimination which is prohibited by Article 15(1); and finally the third sentence seems to go a step further than the second and indicates that discrimination on multiple grounds is not caught by Article 15(1). The Court’s

25 *Ibid.*, Para 29.

26 *Ibid.*

27 Gedalof, I., *Against Purity: Rethinking Identity with Indian and Western Feminisms*, Taylor and Francis, 1999; Nabar, V., *Caste as Woman*, Penguin, 1995, Chapter 1; and Dietrich, G., “Women and Religious Identities in India after Ayodhya” in Bhasin, K., Said, N. and Menon, R. (eds.), *Against All Odds: Essays on Women, Religion and Development from India and Pakistan*, Kali for Women, 1994.

28 MacKinnon, C.A., “Problems, Prospects, and ‘Personal Laws’” *International Journal of Constitutional Law*, Vol. 4, 2006, p. 190.

29 *Anjali Roy v State of West Bengal* AIR 1952 Cal 825.

30 *Ibid.*, p. 839.

31 *Ibid.*

final ruling seems to be based on none of them. The Court held that no “discrimination was made against the appellant only on the ground that she was a woman”³² and the restriction was “due to the introduction of a comprehensive scheme for the provision of education facilities to both male and female students.”³³ The Court further elaborated:

*The cardinal fact is that she was not refused admission merely because she was a woman, but because [of] a scheme of better organisation of both male and female education (...) which covered development of the Women’s College as a step towards the advancement of female education, and also relieving the pressure on the [men’s college] which was a mixed college.*³⁴

Thus, in the final analysis, the basis of the Court’s decision is not sex coupled with another ground which justified discrimination, but sex coupled merely with other organisational considerations which defeats a finding of sex discrimination. In this way, the Court not only bars multi-ground discrimination but also interprets justificatory considerations as “grounds” to bar both single and multi-grounds claims – by using the term “ground” as in common parlance meaning merely a reason or justification for discrimination rather than the specific sense of discrimination in clause (1) (as personal characteristics of individuals defined by religion, race, caste, sex, place of birth or any of them). What comes of this view is that discrimination based on sex and other considerations, including other enumerated grounds, is justified and not caught by clause (1). Only discrimination that is based *solely* and *directly* on sex is captured by clause (1). What is clearly thrown out of the window is the first assertion of the Court that: “[w]hat the Article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article.” This is made clear in subsequent cases where the government continues to use other mere considerations as grounds for justifying a breach of Article 15(1) on the basis that they are promoting the interests of women under Article 15(3).

In the case of *Dattatraya Motiram More v State of Bombay*,³⁵ the Supreme Court examined the provisions of the Bombay Municipal Boroughs Act which reserved seats for women in elections. The provisions were challenged as being in violation of the right to equality under Article 14, the prohibition of discrimination under Article 15 and the right to equality of opportunity in matters of public employment under Article 16 of the Constitution. The Court construed Article 15(3) as a proviso to Article 15(1) and thus validated the reservation of seats as protective discrimination in favour of women. The decision further explained the scope of Article 15 as follows:

32 *Ibid.*, p. 830, Para 17.

33 *Ibid.*

34 *Ibid.*

35 *Dattatraya Motiram More v State of Bombay* AIR 1953 Bom 311. Reaffirmed in *Vijay Lakshmi v Punjab University* AIR 2003 SC 3331.

*It must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is **only on one of the grounds** mentioned in Article 15(1). If there is a discrimination in favour of a particular sex, that **discrimination would be permissible provided it is not only on the ground of sex**, or, in other words, the classification on the ground of sex is permissible provided that classification is the **result of other considerations**.³⁶ (emphasis added)*

This statement is in stark contrast with the earlier jurisprudence in *Daulat Singh* and *Bombay Education Society*. But, in line with *Mahadeb* and *Anjali Roy*, it signifies the change in the apex Court's stance for supporting: (i) reading the text of Article 15 to mean prohibition of discrimination *only* on one of the enumerated grounds; (ii) not covering discrimination which is not just on one ground but also a result of other grounds or considerations; and thereby (iii) necessarily allowing such discrimination to be justified as protective and favourable to women under Article 15(3). The final point, continuing on from *Anjali Roy*, reinforced the idea that once the measure is advanced by the government as for the protection of or for the benefit of women, the Court validated it under clause (3). What is interesting to note is that this is applied equally to measures which denied an opportunity to women, viz. attending a particular honours college open only to men (*Anjali Roy*) and those which provided them with special status and rights, viz. reservation of seats for women in local municipality elections (*Dattatraya*). In both the cases, the logic of serving the interests of women through clause (3) comes heavily couched in the language of protectionism, viewing women as the weaker sex, thus, reinforcing the very stereotypes discrimination is meant to combat.³⁷ The lack of scrutiny of the protective aim of the government seems to be justified on the basis that the discrimination was based not *just* on sex. In this way, *Anjali Roy* and *Dattatraya*, despite their very different contexts, heralded the same trend; that discrimination on more than one ground or discrimination based on other considerations incidental to a prohibited ground is not prohibited by Article 15(1). This trend continued in later jurisprudence, which has affirmed that:

*[W]hile Article 15(1) would prevent a State from making any discriminatory law (inter alia) **on the ground of sex alone**, the State, by virtue of Article 15(3), is permitted, despite Article 15(1), to make special provisions for women, thus clearly carving out a permissible departure from the rigours of Article 15(1).*³⁸ (emphasis added)

36 *Ibid.*, Para 7.

37 As MacKinnon observes: “[d]espite the sometimes positive outcomes, the language of inferiority [in cases like *Dattatraya*] is often problematic in these cases and is not abating.” MacKinnon, C.A, “Problems, Prospects, and ‘Personal Laws’” *International Journal of Constitutional Law*, Vol. 4, 2006, p. 189.

38 *Government of Andhra Pradesh v PB Vijaykumar* AIR 1995 SC 1648, Para 14. This was confirmed in *Yusuf Abdul Aziz v Bombay* 1954 SCR 930.

Whilst the second part of this reasoning may not be faulted in that it construes clause (3) as a proviso for clause (1), thus keeping open the possibility of special provisions in favour of women; what is faulty is that it is premised on the first part which interprets the ambit of clause (1) to be limited to a single ground alone, that too a very restricted reading of that ground which is isolated from the context and other identities it operates in association with. This construction of clause (1) effectively overthrows intersectionality, which proposes a complex understanding of disadvantage based on multiple and intersecting contexts and identities related to grounds, by using it as a justification for discrimination which can be validated under clause (3) rather than seeing it as a form of discrimination *per se*. Although discrimination in the name of protection has been read down and is now subjected to heightened forms of scrutiny after the Supreme Court decision in *Anuj Garg v Hotel Association of India*,³⁹ the possibility that multi-ground discrimination may be justified still persists.⁴⁰ These apprehensions culminated in *Air India v Nergesh Meerza*,⁴¹ the contours of which have not been entirely challenged to date.

c. “On Grounds Only Of” as “Only and Only” a Single Ground of Discrimination

In *Air India v Nergesh Meerza*,⁴² air hostesses working with Air India challenged the constitutional validity of the Air India Employees Service Regulations (Service Regulations). The challenge related to three particular conditions under the Service Regulations which provided that an air hostess was to retire from service upon one of the following occurring: (i) on attaining the age of 35 years (extendable at the discretion of managing director to 45 years); (ii) on marriage if it took place within four years of the service; or (iii) upon first pregnancy. The air hostesses contended that these conditions violated Article 14 under both the prevailing tests of equality – treating likes alike and non-arbitrariness. They argued that the Service Regulations: (i) were based on unintelligible distinctions between similarly situated classes of female air hostesses and male assistant flight pursers; and (ii) the termination of services upon first pregnancy or marriage within four years was manifestly unreasonable and wholly arbitrary. Further, they claimed a violation of Article 15 on the basis that air hostesses were particularly selected for discrimination mainly on the ground of sex or disabilities arising thereof.⁴³ Air India argued that there was no infringement of Article 14 as: (i) the two classes were defined by intelligible differentia having regard to the nature of job functions, the mode of recruitment, qualifications, promotional avenues and the circumstances of retirement, and Article 14 would

39 *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1.

40 This is especially so in relation to discrimination against women in religious or personal laws where courts have consistently held that “[i]f there can be found *any rationale* behind *any general or customary law* making such a discrimination between a male and a female in favour of the male based not solely on the ground of sex, then such a law cannot come within the sweep of Article 15.” See *Nalini Ranjan Singh v State of Bihar* AIR 1977 Pat 171, Para 8-A.

41 *Air India v Nergesh Meerza* 1982 SCR (1) 438.

42 *Air India v Nergesh Meerza* (2008) 3 SCC 1.

43 See above, note 41, Para 19.

not be attracted since it applied only to discrimination between the members of the same class *inter se*; and (ii) the bar on pregnancy and marriage was justified based on public interest and practical considerations of costs involved in recruitment and training. Further, Article 15 was not infringed since the recruitment of the air hostesses was sex based recruitment but not merely on the ground of sex alone as it was “swayed by a lot of other considerations”.⁴⁴

Applying the test of reasonable classification, the Court found the distinction between the two classes (male and female) to be consistent with Article 14.⁴⁵ The Court then proceeded to examine if the service conditions were nonetheless, discriminatory on grounds of sex under Article 15. While Air India contended that any discrimination under the service conditions was made not only on the ground of sex, but also in due regard to a lot of other considerations; the air hostesses rebutted this by arguing that the real discrimination was on the basis of sex which was “sought to be smoke screened by giving a halo of circumstances other than sex.”⁴⁶ The Court was persuaded by Air India and held that owing to several elaborate differences in service conditions of air hostesses and assistant flight pursers (highlighted in relation to Article 14 above), it could not be said that these were distinctions made “on the ground of sex only”. The Court relied upon the principles cited in previous cases like *Yusuf Abdul Aziz* and explained thus:

*[W]hat Articles 15(1) and 16(2) prohibit is that discrimination should not be made **only and only** on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination **on the ground of sex coupled with other considerations.**⁴⁷ (emphasis added)*

The Court then applied its second test of equality (non-arbitrariness),⁴⁸ and ultimately found two of the three conditions relating to pregnancy and age to be against Article 14, but upheld the condition of termination upon marriage within four years of service.⁴⁹ The last condition was upheld on the basis of family planning, improving health and maturity of the employee with growing age and hence ensuring the success of marriage, as well as the economic costs of training the crew.⁵⁰

Since this case was argued as a claim of sex discrimination which also devolved upon marital status, age and pregnancy – all of which can qualify as “considerations” incidental to sex, or

44 *Ibid.*, p. 455.

45 *Ibid.*, p. 472.

46 *Ibid.*, p. 473.

47 *Ibid.*, p. 441.

48 *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3, p. 38.

49 See above, note 42 Para 83.

50 *Ibid.*, Para 82.

even as analogous grounds,⁵¹ the reasoning that discrimination can only be caught by clause (1) when *only and only* made on the ground of sex is as myopic as is incorrect. It strips the prohibition of sex discrimination of any necessary content and stands as a rejection of discrimination, whether single ground or intersectional, by failing to account for the intersectional nature of sex discrimination, which does not operate in isolation of other identities like age and marital status and the socio-political and economic contexts of the society. This isolated reading of sex discrimination not only limits the ambit of what counts as discrimination based on “sex”, but also the possibility of classifying discrimination as intersectional, i.e. based on multiple intersecting enumerated or analogous grounds. In the first sense, what appears heavily in the *Air India* case is the fact that gendered aspects of sex discrimination may not be seen as discriminatory *per se*. This view also stifles the possibility of understanding the category of “sex” or “gender” contextually, to go beyond formalistic constructions of men and women and to address and correct the social constructs of these categories.⁵² As Indira Jaising asserts:

*Discrimination is always on the basis of sex in its gendered state. The use of the word ‘only’ in this Article has enabled the courts to segregate sex from gender and uphold blatantly discriminatory legislation.*⁵³

In the second sense, the Court’s analysis in *Air India* is a striking example of how principles of equality and non-discrimination can be construed to ignore and in fact justify discrimination which cannot neatly fit into a transfixed and non-interactive category of sex discrimination. In this way, the Court’s reading of the phrase “on grounds only of” stands for dismissing both a contextual and intersectional analysis of discrimination under Article 15.

In a third way, the Court’s reasoning also feeds off the trend of using protectionism under clause (3) to deny discrimination under clause (1). The fact that the Court yields to arguments such as allowing female air hostesses to mature by delaying their marriage prospects to ensure successful marriages is based on a patronising view of sex and gender and an appropriation of women’s personal autonomy.⁵⁴ It views women as incapable and in need of direction from the state. In the same vein, while striking down the pregnancy condition, the Court reinforces the stereotypes associated with women’s reproductive roles by adopting a

51 *Naz Foundation v Government of NCT* 2009 (160) DLT 277.

52 Nussbaum, M.C., “India: Implementing Sex Equality Through Law”, *Chicago Journal of International Law*, Vol. 2, 2001, p. 49.

53 Jaising, I., “Gender Justice and the Supreme Court” in Kirpal, B.N. et al (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford India Paperbacks, 2000, p. 294. Similarly, Martha Nussbaum has argued that the constitutional interpretation in some sex discrimination cases has driven a wedge between sex and gender through the use of the word “only”. Nussbaum, M., “India, Sex Equality, and Constitutional Law” in Baines, B. and Rubio-Marin, R. (eds.), *The Gender of Constitutional Jurisprudence*, Cambridge University Press, 2005, p. 180.

54 See above, note 42, Para 82.

stance of protecting “the most sacrosanct and cherished institution”⁵⁵ of Indian womanhood, i.e. pregnancy, and not because it is pernicious per se for the state to regulate women’s choices or to reinforce stereotypical roles of women.⁵⁶ Thus, even if the right decisions are reached in discrimination cases, the uninspiring reasoning embedded in state protectionism genuinely diminishes the possibility of worthwhile sex discrimination jurisprudence, let alone a credible treatment of intersectional discrimination.

The development of jurisprudence since *Air India* has shown progress in certain respects. Incidents of sex or gender will no longer be ousted from the prohibition of sex discrimination or justified as protective discrimination without scrutiny.⁵⁷ The decision in *Anuj Garg v Hotel Association of India*⁵⁸ is seminal in this respect. The case involved a constitutional challenge to a statutory provision which prohibited employment of any woman in premises in which liquor was consumed in public. In declaring the provision unconstitutional, the Supreme Court denied an interpretation of the Constitution based on “romantic paternalism”⁵⁹ of the State which reinforced “incurable fixations of stereotype morality and conception of sexual role.”⁶⁰ The Court thus proposed that the test to review protective discrimination under 15(3) should be one of heightened scrutiny such that the consequences and effects of legislation are examined and not just its stated aims. Thus, the Court acknowledges that protective aims cannot be justified without proper scrutiny, and certainly cannot be justified when they override women’s freedom, personal autonomy and dignity.⁶¹ *Anuj Garg* sets right the acontextual view of sex discrimination as one based on the biological category of sex under clause (1) and the unquestioned protectionism of the state under clause (3).⁶²

However, what remains to be addressed is the problematic approach of justifying discrimination based on more than one ground.⁶³ According to Kalpana Kannabiran:

55 *Ibid.*

56 Shenoy, D., “Courting Substantive Equality: Employment Discrimination Law in India”, 2013, available at: http://www.kentlaw.iit.edu/Documents/Institutes%20and%20Centers/ILW/Jackson%20Louis%20Writing%20Competition/Shenoy_EmploymentLawIndia.pdf.

57 *National Legal Services Authority v Union of India* (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013), Para 59.

58 See above, note 39.

59 *Ibid.*, Para 42.

60 *Ibid.*, Para 44.

61 *Ibid.*, Paras 20, 38, 41, 45, 49.

62 However, *Anuj Garg* is not the first in this regard. For example, the Madras High Court in *Vasantha R v Union of India*, 2001 II LLJ 843 struck down as unconstitutional, a provision of a law that prohibited women from working at night in factories since it was discriminatory on the sole ground of sex. See also *National Legal Services Authority (NALSA) v Union of India*, Writ Petition (Civil) No. 400 of 2012, Supreme Court of India (15 April 2014).

63 Thus decisions rejecting justification of discrimination as protective when based on several considerations should be distinguished from circumstances where there is no purported protective aim.

This [approach] exemplifies the disaggregative norm of interpretation based on a reductionist reading of the constitutional fragment: “on grounds only of sex, caste, language, place of birth or any of them.”⁶⁴ (emphasis added)

As Kannabiran further asserts:

Moving away from a disaggregated approach to understanding non-discrimination and liberty, and instead adopting a holistic cross-sectoral, intersectional approach that looks at connections and possibilities that might enrich the scope of non-discrimination, involves a shift that forces a re-examination of a range of materials hitherto inadequately explored in constitutional jurisprudence and legal research on non-discrimination.⁶⁵

In hoping to adopt the intersectional approach described in section one and which Kannabiran alludes to, we need to strip Article 15(1) of its quantitative delimitation. Before turning to consider how this can be done, the final part of this section considers the overwhelming thrust of reservation jurisprudence under Article 15(4) and (5) and how it feeds into diminishing the scope of clause (1).

d. “On Grounds Only Of” and Clauses (4) and (5) of Article 15

The reservation jurisprudence under clauses (4) and (5) of Article 15 creates its own unique inconsistencies in the process of opening the doors of clause (1) to intersectional discrimination.⁶⁶ Reservation jurisprudence is the epicentre of discrimination law and thus it is useful to study its impact on the general non-discrimination guarantee in clause (1).⁶⁷ This part briefly touches upon a small but significant part of this vast reservoir of reservation jurisprudence – how intersectionality informs the process of classification and sub-classification of classes for reservations.

64 Kannabiran, K., *Tools of Justice: Non-Discrimination and the Indian Constitution*, Routledge India, 2012, p. 337

65 *Ibid.*, p. 460.

66 Clauses (4) and (5) of Article 15 of the Constitution of India provide that: “(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. (5) Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.”

67 For a comprehensive exploration of reservations in India, see Galanter, M., *Competing Equalities: Law and the Backward Classes in India*, Berkeley, 1984.

Clauses (4) and (5) allow the State to make special provisions for the advancement of socially and educationally backward classes, including for Scheduled Castes or the Scheduled Tribes listed in the First Schedule of the Constitution. The Supreme Court has consistently reiterated the test for identifying which backward classes qualify for reservation as one which cannot *solely* be based on enumerated grounds because it would run afoul of clause (1).⁶⁸ However, considering the text of clauses (4) and (5) which begin with “[n]othing in this article”, it is clear that the reservations are meant to justify and validate something which may be discriminatory under clause (1). The judicial test for determining the classes for reservations thus renders the constitutional drafting as confusing and redundant. The literal interpretation of the opening words of clauses (4) and (5) (“nothing in this article”) has been largely overlooked and reservations continue to operate on the premise that the selection of classes is *not* to be made on the basis of a single ground.⁶⁹ But the allowance for intersectional discrimination to be justified when *ameliorative* because it is for the advancement of certain classes under clauses (4) and (5) should not also lead to a presumptive justification of *hostile* intersectional discrimination under clause (1).

Even as clauses (4) and (5), like clause (3), are framed as non-obstante clauses, special provisions permissible under these clauses have a narrower compass than the general non-discrimination guarantee in clause (1). They are specific in as much as they relate only to the State’s prerogative for making special provisions for identified classes. It is settled that these clauses do not confer *rights* as such and are discretionary tools for the government to be pursued towards the broader goal of promoting substantive equality.⁷⁰ Thus, to interpret this discretionary power under clauses (4) and (5) to confine the scope of a broad right would be counterintuitive under the constitutional scheme. In agreeing with the formula for reservations to be based on an intersectional criteria, one should not also assume that intersectional discrimination is therefore acceptable and not caught by the general non-discrimination guarantee under clause (1).

Furthermore, once having recognised an intersectional basis of extending special provisions under clauses (4) and (5) such that classes are selected not *solely* on the basis of a single ground, the rejection of intersectionality *within* reservations is an even more curious anomaly.⁷¹ This concern relates to the rejection of sub-classification within the Scheduled Castes and Scheduled Tribes List to extend reservations or special measures to those most

68 *Janki Prasad Parimoo v State of J & K* AIR 1973 SC 930; *Makhan Lal v State of J & K* AIR 1971 SC 2206; *ABSK Sangh (Rly) v Union of India* AIR 1981 SC 298; and *Triloki Nath Tiku v State of J & K* AIR 1969 SC 1.

69 *Pradeep Jain v Union of India* AIR 1984 SC 1420; *Anant Madan v State of Haryana* AIR 1995 SC 955; *Jagdish Saran v Union of India* AIR 1980 SC 820; *Chitra Ghosh v Union of India* AIR 1970 SC 35; and *Narayan Sharma v Pankaj Kumar Lekhar* AIR 2000 SC 72.

70 *EV Chinnaiah v State of AP* AIR 2005 SC 162; and above, note 17, p. 556.

71 *Ibid.*, *EV Chinnaiah v State of AP*; *Indra Sawhney v Union of India* AIR 1993 SC 477, Paras 81–82; and *Kerala v NM Thomas* AIR 1976 SC 490.

deserving of it.⁷² Even if the entire class is considered deserving of reservations, given the limited quotas available, it is prudent to micro-classify to identify the most deserving even within this broad constitutional classification of Scheduled Castes and Scheduled Tribes certified by the president under the First Schedule of the Constitution.⁷³ This possibility is recognised in relation to backward classes for permitting sub-classification:

*[T]here is no constitutional or legal bar to a state categorising the backward classes as backward and more backward (...) It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes.*⁷⁴

Sub-classification, if permitted, would be subject to the general equality jurisprudence which allows classification which is rational, relevant, based on intelligible differentia, and with a nexus between the differentia and the object to be achieved.⁷⁵ Given these governing principles, the rejection of sub-classification in relation to Scheduled Castes and Scheduled Tribes remains an unprincipled and unsubstantiated overture in Indian discrimination jurisprudence.⁷⁶

The treatment of intersectionality in classification and sub-classification of classes for reservations under clauses (4) and (5) thus presents a curious case and does not appear to be based on an understanding that intersectional discrimination may be prohibited under clause (1). But it reinforces the inconsistencies in the interpretation of clause (1) within the scheme of Article 15. The recurring theme is that of recognising multiple grounds for justifying rather than rejecting intersectional discrimination.

72 However, note that sub-classification in backward classes is permissible per *Indra Sawhney v Union of India* AIR 1993 SC 477 and see *EV Chinniah v State of AP*, above note 70.

73 Sociological and anthropological literature is replete with references to entrenched sub-classification and hierarchies within Dalits and other backward classes. Accepted in *Indra Sawhney v Union of India* AIR 1993 SC 477, Para 88. See also Dumont, L., *Homo Hierarchicus: The Caste System and its Implications*, Paladin, 1972; Moffatt, M., *An Untouchable Community in South India: Structure and Consensus*, Princeton University Press, 1979, p. 3; and Sudhakar Rao, N., "The Structure of South Indian Untouchable Castes: A View" in Shah, G., (ed.), *Dalit Identity and Politics: Cultural Subordination and the Dalit Challenge*, Sage Publications, 2001, p. 74–96. See also Mendelsohn, O. and Vicziany, M., *The Untouchables: Subordination, Poverty and the State in Modern India*, Cambridge University Press, 1998, p. 19.

74 See above, note 71, Para 92A.

75 See Jain, M.P., *Indian Constitutional Law*, LexisNexis, 2012, p. 1005; See *EP Royappa v State of Tamil Nadu*, above note 48; and *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar* (1959) SCR 279.

76 For a detailed discussion of this see Anup, S., "Judicial Discourse on India's Affirmative Action Policies: The Challenge and Potential of Sub-Classification", Doctoral Thesis, University of Oxford, 2013.

2. Re-envisioning “On Grounds Only Of”

Having considered the unfavourable outlook of Article 15(1) jurisprudence towards multiple grounds of discrimination, this section proceeds to consider how this jurisprudence can be reconstructed to admit multiple grounds in a discrimination claim under Article 15(1). I seek to demonstrate that for each of the governing principles and practices discussed above, the case law is either wrong in principle, or has been wrongly interpreted to exclude multiple grounds in a discrimination claim. This section is divided into two parts which consider the meaning of the phrases used in clause (1) – “on grounds only of” and “or any of them”.

a. “On Grounds Only Of” as Signifying Causation

In this part, I argue that no popular theory of constitutional interpretation: textual, original, or transformational can lead to the interpretation of “on grounds only of” as indicating a prohibition of discrimination on a single enumerated ground only. The purpose is to reset the normative boundaries of the constitutional guarantee from being quantitatively limited to one which recognises discrimination as having roots in certain kinds of personal characteristics identified as grounds.

The principal objection to Article 15 jurisprudence which is affirmed and applied in *Air India*, is its interpretation of Article 15 as prohibiting discrimination *only* on one of the enumerated grounds. It is important then to dissect the meaning of “only” as employed in the phrase “on grounds only of”. Two preliminary remarks are necessary. First, it is useful to observe that the title of Article 15 does not use the word “only”. It simply states: “[p]rohibition of discrimination on grounds of religion, race, caste, sex or place of birth”. Although titles may not be conclusive in determining the scope of a provision, they are still a relevant “internal aid” in clarifying the meaning in case of ambiguity.⁷⁷ If this is the case, then the absence of “only” in the substantive provision should not make the scope of the guarantee any narrower than that of the title. Secondly, there is internal inconsistency in case law as to the meaning of “only” in Article 15(1).⁷⁸ Besides referring to a single ground in a discrimination claim, “only” has also been understood as prohibiting discrimination on *enumerated* grounds but no more, such that Article 15(1) signifies a closed list of grounds (i.e. religion, race, caste, sex, place of birth).⁷⁹ The Delhi High Court decision in *Naz Foundation v Delhi Administration*⁸⁰ introduced the ground of “sexual orientation” as an analogous ground under Article 15(1) and thus has

77 *Krishnaih v State of Andhra Pradesh*, AIR 2005 AP 10.

78 Saraswati, S.N., *Right to Equality in the Indian Constitution: A Gandhian Perspective*, Concept Publishing Company, 2002, p. 170.

79 *Ranjit Kuman Rajak v State Bank of India* 2009 (5) Bom CR 227 (rejecting disability as a ground); *MX v ZY* AIR 1997 Bom 406 (rejecting HIV-status as a ground); and above, note 64, p. 30.

80 *Naz Foundation v Delhi Administration* WP(C) No.7455/2001, High Court of Delhi (2 July 2009).

challenged the view that Article 15(1) is an exhaustive list of grounds.⁸¹ Citing decisions from the Canadian Supreme Court⁸² and South African Constitutional Court,⁸³ the Court found that:

*[T]here will be discrimination on an unspecified ground if it is based on attributes [and] characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.*⁸⁴

The analysis was directly based on *Anuj Garg*⁸⁵ where the Supreme Court had held that personal autonomy was inherent in the grounds mentioned in Article 15 such that: “[t]he grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual.”⁸⁶ Similar reasoning has been pursued by the Equal Opportunity Commission in India in defining “deprived groups” and “deprivation index” to bring disability within the fold of clause (1).⁸⁷ Whilst the decision in *Naz Foundation* was reversed in *Koushal*,⁸⁸ the latter Supreme Court decision did not speak to the *Naz Foundation* reasoning on analogous grounds and ruled on a different ground of parliamentary supremacy in upholding the criminalisation of sodomy.⁸⁹ There is still therefore interpretive wiggle room and maybe even declaratory force in the *Naz Foundation* reasoning supporting the view that Article 15(1) is not a closed list of grounds.

At the very least, the efforts made in recognising sexual orientation and disability as grounds protected under clause (1), indicate the need for constitutional reinterpretation of the word “only” as signifying an open list of grounds for protection. However, this does not mean that “only” can be interpreted to mean discrimination on just *one* ground since Article 15 can now operate as an open list. In fact, both these quantitative views of Article 15(1) lack a justifiable basis. Yacoob J of the South African Constitutional Court, writing extra-judicially, supports such a bipartite reconstruction in his remarks made on the Indian Constitution:

81 *Ibid.*, p. 84, Para 104. See also *National Legal Services Authority (NALSA) v Union of India*, Writ Petition (Civil) No. 400 of 2012, Supreme Court of India (15 April 2014).

82 *Egan v Canada*, (1995) 29 CRR (2nd), Para 176-177; *Vriend v Alberta*, (1998) 1 SCR 493, Para 90; and see *Corbiere v Canada*, above note 8. Citizenship, sexual orientation, marital status and Aboriginal residence/off-reserve band member status are the grounds which have been declared analogous under the Canadian Constitution.

83 *Prinsloo v Van Der Linde*, 1997 (3) SA 1012; and *Harksen v Lane*, 1998 (1) SA 300.

84 See above, note 80, p. 83–84, Para 103.

85 See above, note 39, Paras 33, 45.

86 *Ibid.*, Paras 51, 112.

87 See above, note 64, p 13.

88 *Suresh Kumar Koushal v Union of India* (2013) Civil Appeal No. 10972.

89 *Ibid.*, Para 32.

It goes without saying that a poor Dalit deaf lesbian woman in a wheelchair is far more vulnerable and in greater need of constitutional protection than a female university teacher who has all her faculties and who is part of the “dominant” classes. If this is not recognised, constitutional jurisprudence could suffer. And there is no need to limit protection to the grounds expressly mentioned in the Constitution.⁹⁰

It is also useful to note that nothing in the drafting of the Constitution indicates an original intent for interpreting Article 15(1) to exclude multi-ground discrimination of the kind referred to by Yacoob J. Reference to the Constitutional Assembly Debates (CAD) demonstrates that there was nothing in the discussions which construes Article 15(1) as either restricting the number of grounds in a claim, or considers it to be a closed list. In fact, there is no discussion on the usage or implication of the word “only” in the CAD. However, there are signs that a causative understanding of “on grounds only of” is supported in the CAD. The drafting history of Article 15 indicates that a drafting suggestion to insert “on mere grounds of” (instead of “on grounds only of”) was not opposed (however this was not put to vote since it was not put forward as an amendment).⁹¹ In fact, the initial wording of Article 15 did not contain “only” in its text. References to the draft text of Article 15 by various members did not always use the word “only” or touch upon its consequence.⁹² To this extent, there is no indication that discrimination based on multiple grounds was meant to be excluded from the ambit of Article 15(1).

90 Yacoob, Z.M., “Societal Morality to Constitutional Morality”, *The Hindu*, 30 December 2011, available at: <http://www.thehindu.com/opinion/lead/societal-morality-to-constitutionalmorality/article2758601.ece>.

91 Deshmukh suggested this proposition: [t]hat the State shall not make nor permit any discrimination against any citizen, on mere grounds of religion, race, caste or sex.” Explaining that, “[t]he idea is if you put it like that, that would cover all cases”. However, since there was no formal amendment suggested, this was not put to vote. *Constituent Assembly of India Debates, Vol III*, 29 April 1947, available at: <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm>.

92 See, for example, “Article 15 forbids discrimination on the ground of race, religion, caste or community”, statement made by Nagappa, *Constituent Assembly of India Debates*, 21 November 1949, available at: <http://parliamentofindia.nic.in/ls/debates/v11p7m.htm>. See also the statement made by Shri Kamalashwari Prasad Yadav, “[t]here was a time, Sir, when the whole of Asia was looking to Japan but today the eyes of the whole of Asia are fixed towards India. They are watching if we are making any discrimination or not in our treatment to the citizens on the ground of religion, caste, language and race; they are keenly watching the progress we are making towards achieving our ideals”, *Constituent Assembly of India Debates, Vol. XI*, 25 November 1949, available at: <http://parliamentofindia.nic.in/ls/debates/vol11p11.htm>; statement made by Shrimati Renuka Ray, “[q]uite rightly, it has been laid down that the State shall not discriminate against any citizen on grounds of religion, race or sex”, *Constituent Assembly of India Debates, Vol VII*, 9 November 1948, available at <http://164.100.47.132/LssNew/constituent/vol7p5.html>; and statement made by Tajamul Husain, “the State shall not discriminate against any citizen on the grounds of religion, caste, etc.”, *Constituent Assembly of India Debates, Vol VII*, 9 December 1948, available at: <http://parliamentofindia.nic.in/ls/debates/vol7p23.htm>.

Further, textual (literal) and transformative (purposive) interpretations affirm a causative understanding of the phrase “on grounds only of” in clause (1). These are the two central tools of interpretation pursued in tandem in constitutional cases.⁹³ The dual emphasis on the words themselves and their transformative context is the key to constitutional interpretation in India.⁹⁴ It is thus appropriate to use both the letter and spirit of the Constitution to discern the legitimate meaning of the phrase “on grounds only of” in clause (1). According to the Oxford English Dictionary, the word “only” can be used widely, and amongst its most popular uses include: (i) as an adverb meaning “[s]olely, merely, exclusively; with no one or nothing more besides; as a single or solitary thing or fact; no more than. Also, with a verb or verb phrase: no more than, simply, merely”; (ii) as an adjective with an attributive sense of being “unique” in character, or “alone” and; (iii) as a preposition meaning “except for”.⁹⁵ Restating the language in clause (1): “no one shall be discriminated on grounds only of”, it is clear that “only” cannot possibly be an adjective in this sentence. This interpretation falls foul of the basic canons of English language where an adjective is used for naming an attribute of the immediately succeeding noun.⁹⁶ Further, it could not have been used as a conjunction meaning “except for, but” since that would totally inverse the meaning of the non-discrimination guarantee. Thus, the only possibility is of it being used as an adverb here. The question that remains is whether as an adverb it has a quantitative or a qualitative meaning. Does “only” in the phrase “on ground only of” signify “solely”, “singularly”, “uniquely”, “merely”, “exclusively” in a qualitative sense or a quantitative one?

As an adverb, the positioning of “only” in a sentence matters:

The traditional view is that the adverb only should be placed next to the word or words whose meaning it restricts: I have seen him only once rather than I have only seen him once. The argument for this, a topic which has occupied grammarians for more than 200 years, is that if only is not placed correctly the scope or emphasis is wrong, and could even result in ambiguity. But in normal, everyday English, the impulse is to state only as early as possible in the sentence, generally just before the verb. The result is, in fact, hardly ever ambiguous.⁹⁷ (emphasis omitted)

This explanatory statement is useful. It indicates that although there is free rein in using “only” as a limiting adverb either before or after the object it seeks to limit, it should not be

93 *Anwar Ali Sarkar v The State of West Bengal* [1952] SCR 284, per Bose J; and above, note 80, Para 114. See also *Maneka Gandhi v Union of India* AIR 1978 SC 587; and *CPIO, Supreme Court of India v Subhash Chandra Agrawal* Special Leave Petition (C) No 32855 OF 2009.

94 See *S H Sheth v Union of India* (1976) 17 Guj LR 1017, 1040; and *KP Varghese v Income Tax Officer Ernakulam* AIR 1981 SC 1922.

95 “Oxford English Dictionary Online”, Oxford University Press, available at: <http://ezproxy-prd.bodleian.ox.ac.uk:2355/view/Entry/131463?result=3&rskey=52TAQb&>.

96 Aarts, B., “Adjective” in *Oxford Dictionary of English Grammar*, Oxford University Press, 2014.

97 Butterfield, J., *Oxford A-Z of English Usage*, Oxford University Press, 2013, p. 133.

absurd or ambiguous in common usage. In its current positioning in clause (1), the word “only” may qualify the immediately succeeding *list* of grounds or the term *grounds* just preceding it. But the fact that it is placed before rather than after “of” in the phrase “on grounds only of” diminishes the possibility of it limiting the list of grounds as such. On the other hand, if “only” was meant to be used as “solely” or “merely” in the sense of limiting the number of grounds upon which a discrimination claim be based, it is clearly misplaced in the phrase “on grounds only of”. Had the phrase been “only on grounds of” the adverb would have correctly limited the number of grounds since it would appear before “on”, signifying the limitation on the number of grounds to be relied upon in a claim. In its current positioning it cannot logically stand for meaning “solely” or “merely” as a limitation on the number of grounds used in a claim.

A student of the English language would then strip the phrase “on grounds only of” of any quantitative sense. She would use “only” as referring to “simply”, “merely”, “exclusively” or “just” such that it relates to the inadequacy or inappropriateness of certain grounds being the basis of discrimination under clause (1), but leaving open the possibility of justifying such discrimination as well. In the legal semantics of discrimination law this would mean that discrimination is prohibited when *based on, for the reason of* or *because of* these grounds: religion, race, caste, sex, place of birth.⁹⁸ In the context of sex discrimination, Gardner explains that, “[i]n most jurisdictions, sex discrimination is defined (...) as differential treatment ‘on grounds of’ sex or ‘by reason of’ sex or ‘because of’ sex or ‘based on’ sex.”⁹⁹ Although he goes on to establish a case of causation in direct discrimination,¹⁰⁰ the jurisdictions he cites have used these phrases to cover both direct and indirect forms of discrimination.¹⁰¹ It is then important that the emphasis on “basis” of discrimination should not be equated with the model of direct discrimination based on discriminator’s intention or animus but to be connected with the idea that the effect or impact of discrimination is suffered because of certain grounds, whether or not a defendant actually so intended and whether the legal test requires the presence of defendant’s intention to discriminate on a ground.

Whilst early US and UK discrimination jurisprudence recognised only direct discrimination, it has gradually moved away from relying on intention or motive-based models of discrimination and readily accepts indirect discrimination, which too is based on grounds albeit in a

98 See, for example, the US Civil Rights Act 1964, Section 703a; the UK Sex Discrimination Act 1975, Section 1 and 2; the UK Race Relations Act 1976, Section 1; the UK Disability Discrimination Act 1995, Section 5; the UK Equality Act 2010, Section 13 and 19; the Canadian Charter of Rights and Freedoms, Section 15(1); and the Constitution of the Republic of South Africa 1996, Section 9(3).

99 *Ibid.*; Gardner, J., “On the Ground of Her Sex(uality)” *Oxford Journal of Legal Studies*, Vol. 18, 1998, p. 179.

100 *Ibid.*

101 See UK Equality Act 2010, Sections 13 and 19; Canadian Charter of Rights and Freedoms, Section 15(1); and Constitution of the Republic of South Africa 1996, Section 9(3) above, note 98. See also *Griggs v Duke Power Co.* 401 US 424 (1971).

different way than direct discrimination.¹⁰² The common basis of both forms of discrimination is that discrimination ensues on the basis of certain grounds and the causal phrases are taken to reflect this understanding. This exactly resembles Lord Thankerton's test in *Daulat Singh* for determining discrimination such that causation speaks either to what is proclaimed or is the effect of the impugned provision, and is also similar to SR Das J's opinion in *Bombay Education Society*. This interpretation is most clearly visible in the text of the non-discrimination guarantee under Section 9(3) of the South African Constitution which declares that:

*The state may not **unfairly discriminate** directly or indirectly against anyone **on one or more grounds**, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*¹⁰³ (emphasis added)

The phrase "on one or more grounds" does not only indicate a multi-ground view of discrimination but also links unfair discrimination to the list of grounds, indicating that it is grounds *on which* discrimination must ensue to qualify as discrimination as such. Similar sense is conveyed by the phrase "based on" in Section 15(1) of the Canadian Charter of Rights and Freedoms, "because of" in Section 13 of the Equality Act 2010 and "in relation to" in Section 19 of the Equality Act 2010.

Thus, in finding the *basis* of discrimination through "on grounds only of", there is an emphasis on the causative element in discrimination, i.e. something is discriminatory *because* it is based on certain grounds.¹⁰⁴ The causal link itself can be either direct or correlative.¹⁰⁵ Thus, to prove discrimination it is not only necessary to show a causal link between the wrongful act and its discriminatory consequence but that the act and consequence flow from certain kinds of identities recognised as "grounds" or "personal characteristics".¹⁰⁶ "[O]n grounds only of" should then be interpreted as an adverb signifying the qualitative basis of discrimination in grounds connecting the discriminator's act or omission (law, rule, criterion, policy, practice, decision) which disadvantages the claimant adversely *based on* (whether directly or indirectly) certain kinds of identities (referred to as grounds or personal characteristics in discrimination law).

b. Giving Meaning to "Or Any of Them"

Besides the misinterpretation and misapplication of "on grounds only of" in clause (1), a fundamental flaw in the Indian discrimination jurisprudence is the partial reading of the

102 Khaitan, T, *A Theory of Discrimination Law*, Oxford University Press, 2015, pp. 159–162.

103 South Africa Constitution, Section 9(3).

104 Anderson, C.L., "Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA", *Mississippi Law Journal*, Vol. 82, 2013, p. 68.

105 See above, note 102, pp.165–167.

106 The causal link can be either direct or correlative. See above, note 102, pp.165–167.

clause. The case law at no point engages with the complete clause which ends with “or any of them”. The partial reading strips the prevailing jurisprudence of normative force. Re-interpreting clause (1) while reckoning with its full wherewithal including the phrase “or any of them”, stands as a clear indication of clause (1) covering multi-ground discrimination within its ambit.

There is no discussion in the CADs as to the meaning of the concluding phrase “or any of them” in Article 15(1).¹⁰⁷ However, the current jurisprudence leaves these words redundant in the context of Article 15(1). Given that the principles of constitutional interpretation proscribe any interpretation which renders some of the words or text as surplus, it is important to reinvigorate Article 15(1) jurisprudence to give the phrase “or any of them” its full and contextual meaning. This is supported by Kannabiran, who suggests that:

*[A] re-examination of article 15(1) leads us to conclude that the phrase “or any of them” enables a consideration of intersectionality in non-discrimination jurisprudence that need not any more be limited to **one** of the stated indices alone. Article 15(1) could also be interpreted to mean that discrimination is prohibited on a single ground or on a combination of grounds, listed in the clause and not listed, with the court then bearing the responsibility of examining discrimination on one ground in conjunction with other factors.*¹⁰⁸

The placing of “or” in clause (1) is dispositive in this matter: “[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth *or* any of them” indicates that the basis of discrimination can be any of the grounds, alone or in some combination. Once having interpreted “on grounds only of” as finding the basis of discrimination, “or” can only logically allow for multiple grounds to be the basis of discrimination. Given that “or” may mean “and/or” in legal semantics, either construction leads to the recognition of discrimination on more than a single ground under clause (1).

Conclusion

The purpose of this article has been to address a preliminary roadblock in the interpretation of Article 15(1) to encompass intersectional discrimination. This roadblock relates to the quantitative interpretation of clause (1), especially the phrase “on grounds only of”, as limiting the possibility of finding discrimination to be based on more than a single ground of discrimination. I have traced the trajectory of constitutional thought which has led to this and argued that such a quantitative delimitation to the general non-discrimination guarantee is: semantically inaccurate; historically unsupported in constitutional drafting; and ill-conceived within the contours of discrimination law. The phrase can instead be reinterpreted as signifying the *basis* of discrimination in grounds of discrimination, whether single or multi-

107 Shiva Rao, B., *The Framing of India's Constitution*, Indian Institute of Public Administration, 1968, pp. 182–192.

108 See above, note 64, pp. 460–461.

ple. Surpassing this interpretative hurdle is the first step to admitting the possibility of finding intersectional discrimination in Article 15(1). But the task of constructing discrimination jurisprudence which accommodates intersectionality cannot be accomplished with a single stroke. This article has sought to open the possibilities for considering how multi-ground claims which represent intersectional discrimination may become a part of Article 15. Removing its quantitative veneer thus clears the decks for improving our exploratory vision of intersectionality in discrimination law.

Intersectionality and Interdependence of Human Rights: Same or Different?

Johanne Bouchard and Patrice Meyer-Bisch¹

Introduction

Between September 2013 and December 2015, the Interdisciplinary Institute for Ethics and Human Rights and the Department of Public Law of the University of Fribourg collaborated with the Geneva Academy of International Humanitarian Law and Human Rights on a research project on the intersectionality of human rights violations and multiple discrimination. Although situations which combine multiple human rights violations and multiple forms of discrimination (defined in our research as intersectional human rights violations), have a particularly devastating impact on their victims, it appeared that these situations had not been sufficiently considered within the international human rights system. This project, supported by the Swiss Network for International Studies, used a multidimensional case study approach to analyse different types of intersectional human rights violations in order to map the dynamics and consequences of these combinations of violations on the persons experiencing them. It also considered current institutional responses to these situations in order to identify obstacles, challenges and possible avenues for change, focusing particularly on the human rights treaty monitoring bodies and their methods of work. The research aimed to clarify the multiple dimensions of intersectional human rights violations and, in collaboration with several experts from international human rights and civil society organisations, to formulate strategic proposals to better address them.

In this paper, we present some of the arguments that the research has allowed us to develop, as well as a number of our conclusions. The first section discusses the interdisciplinary approach to human rights and how it was key to the development of our research questions. In the second section, we explain how we took the concept of intersectionality beyond its traditional range of application to apply it to all violations of human rights. The relevance of doing so was demonstrated through the analysis of a number of case studies, selected to explore the applicability of the concept. The central elements of these case

1 Interdisciplinary Institute for Ethics and Human Rights, University of Fribourg, Switzerland. Many other persons contributed significantly to the research presented here, either as members of the research team or as experts and co-authors of the cases studies. We would like to acknowledge their contributions and thank each of them, as the projects would not have been possible without their insights. See the following website for more information: www.unifr.ch/iiedh/fr/recherche/ethique-politique-dh/snis (in French).

studies are presented here and used as examples to illustrate, in the third section, the implications of the interdependence of human rights violations to the design of effective remedies. The last section presents some of our conclusions both in terms of academic research and institutional proposals made to our colleagues working in the UN human rights system.

1. The Interdisciplinary Discipline of Human Rights

a. *The Political Nature of Human Rights*

The development of human rights suffers from being too often understood as deriving essentially, if not exclusively, from the judicial realm.² However, originally and inherent in their nature, human rights are political: the shared exercise of citizenship. In 1993, the Vienna Declaration and Program of Action, just as the Universal Declaration of Human Rights before it, was a political engagement, reaffirmed the will of all states parties to the UN to recognise, respect and protect human rights and to work together towards their implementation for all.³ After years of opposing views on the nature of civil, cultural, economic social and political rights, all states were ready to affirm the universality, indivisibility and interdependence of all rights.⁴ But did the parties involved really understand what these three principles meant and what their implementation could imply?

Because human rights are ethical norms intended to underpin constitutions and practices, this political commitment should have been translated into actions, instruments, measures and mechanisms at the level of each state party, but also throughout the organisation of the UN. It should have changed the practice of the organs monitoring these rights to foster a more integrated approach to the interconnectedness between the rights, starting with

2 See Meyer-Bisch, P., "What makes a people? The grammar of the development of freedoms", in *Human rights: a grammar for development* (translation by the authors, original title in French: "Qu'est-ce qu'un peuple? La grammaire du développement des libertés", *Les droits de l'homme : une grammaire du développement*), L'Harmattan, 2013, pp.19-31 ; see also, in the same publication, Gandolfi, S., Rizzi, F., Bouchard, J., Meyer-Bisch, P. and Melo, A. "Human rights, grammar of the development of individuals and their organisations" (translated by the authors, original title in French : "Les droits humains, grammaire du développement des personnes et de leurs organisations"), pp. 11-15.

3 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, Preamble, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

4 Since the *Vienna Declaration and Programme of Action* in 1993, the three principles have been systematically taken up in the declarations and recommendations of different UN organs, the Human Rights Council in particular. See, for example, Convention on the Rights of Persons with Disabilities (CRPD), Preamble, Para (c); General Assembly, "Resolution 60/251: Human Rights Council", UN Doc. A/RES/60/251, 3 April 2006, Preamble; and Human Rights Committee, "Resolution 5/1: Institution Building of the United Nations Human Rights Council", UN Doc. A/HRC/RES/5/1, 18 June 2007, Annex, Section B, Para 3 (a), creating the Universal Periodic Review mechanisms.

the practice of the UN mechanisms themselves.⁵ However, in 2008, people working at the Office of the High Commissioner for Human Rights (OHCHR) with the treaty monitoring bodies still saw the implementation of the three principles of universality, indivisibility and interdependence of all rights as a challenge for the UN human rights system, which required much more in-depth consideration.⁶

In spite of the formal acceptance of universality, indivisibility and interdependence as foundational human rights principles, there is no common agreement as to how they should be operationalised in policies or in the legal work of the UN.⁷ How can those principles penetrate a discipline such as law, which builds the legitimacy of its rulings on previous decisions, its methods of analysis on the strict separation of each article and, at the international level, the competence of its monitoring bodies on a singular instrument (covenant or treaty)? In their analysis of states' periodic reports and of individual complaints, UN treaty monitoring bodies analyse each article (right) of their respective human rights instruments. States respond by developing laws and policies addressing each of these rights, most of the time separately. But what happens when a situation concerns two or more rights? What happens when these rights are enshrined in different instruments? How can the established process then take into account the indivisibility and interdependency of the rights, in terms of causes and consequences?⁸

Law is necessary: it *publicly demonstrates* the coherence of a legal system of written laws and the practices that this system gives rise to, performing a preventive and sanctioning function. This is its contribution to a democratic political order. However, an analysis of rights violations makes it clear that the law cannot cover everything. The function of the law is inseparable from other rationalities that depend on other disciplines; the first of

5 See General Assembly, "Resolution 48/141: High Commissioner for the promotion and protection of all human rights", UN Doc. A/RES/48/141, 20 December 1993, creating the Office of the High Commissioner for Human Rights (OHCHR).

6 During the international colloquium on "Ethics of cooperation and democratisation of international relations" (translated by the authors, original title of the event in French: "Ethique de la coopération et démocratisation des relations internationales"), Bergamo, 23–25 October 2008, organised by the United Nations Educational, Scientific and Cultural Organization (UNESCO) Chairs of Fribourg and Bergamo, the head of the OHCHR treaty service expressed the need for the creation of a group to reflect on the ways in which indivisibility could be factored into the strengthening process for the UN human rights mechanisms. This request opened the door to the development of this research, and has also made its way into the treaty monitoring bodies themselves, as can be seen in the report of the chairs of the human rights treaty bodies on their twenty-seventh meeting, General Assembly, *Implementation of human rights instruments*, UN Doc. A/70/302, 7 August 2015, Paras 59–60.

7 For an analysis of this observation, see Alston, P., "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals", *Human Rights Quarterly*, Vol. 27, 2005, pp. 755–829.

8 These were some of the questions that guided the development of the research hypothesis.

which are the other social sciences that contribute to the understanding of freedoms, to their protection and to sanctions in the event of liberticidal practices and inequalities.⁹

b. The Intuition Motivating our Research

The development of the idea for our research started from the observation that too little attention had been dedicated, in theoretical and practical studies, to the universality, indivisibility and interdependence of human rights. Our intuition was that it would probably be easier to demonstrate the interdependence of the violations of human rights rather than their positive interdependence (how the realisation of one right contributes to the realisation of other rights). One of the rare known demonstrations of interdependence concerned the definition of extreme poverty as a “sequence of precarities”, an aggravated cycle of abuse in which the impact of the violation of one right contributes to causing the violation of another right, which further contributed to the violation of yet another right and so on.¹⁰ In discussions with experts from the OHCHR which works with treaty monitoring bodies, we identified discrimination as a cross-cutting form of human rights violations; one that could be used to help reinforce indivisibility and interdependence of human rights, particularly through the existing body of work on intersectional theories.

Intersectional theories, which became prominent in gender studies in the early 1990s, have been applied within a range of disciplinary fields, including critical legal studies, sociology, ethnography and, more recently, public policy analysis.¹¹ Theories of intersectionality seek to explain the interaction between multiple and interlocking forms of oppression, noting that this combination creates experiences of subordination and exclusion that are both qualita-

9 These concepts of philosophy of law have been developed through the writings of François Ost, Michel Van de Kerchove and Mireille Delmas-Marty in many of their writings. See in particular Ost, F., *The nature outlaw. Ecology at the test of law* (translation by the authors of the original French title: *La nature hors la loi. L'écologie à l'épreuve du droit*), La découverte, 1995 ; Van de Kerchove, M., *Milestones for a critical theory of law* (translation by the authors of the original French title: *Jalons pour une théorie critique du droit*), St-Louis University press, 1987; Delmas-Marty, M., *Towards a Truly Common Law*, Cambridge University Press, 2002 (original in French, *Pour un droit commun*, Paris, Seuil, 1994); and Delmas-Marty, M., *Ordered pluralism; the imagined forces of law (II)* (translation by the authors of the original French title: *Le pluralisme ordonné: Les forces imaginantes du droit (II)*), Seuil, 2006,

10 Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The realization of economic, social and cultural rights: Final Report on Human Rights and extreme poverty, submitted by the Special Rapporteur, Mr. Leandro Despouy*, UN Doc. E/CN.4/Sub.2/1996/13, 28 June 1996. See also Human Rights Council, *Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights*, UN Doc. A/HRC/15/41, 6 August 2010.

11 See, for example, Walby, S., Armstrong, J. and Strid, S., “Intersectionality: Multiple Inequalities in Social Theory”, *Sociology*, Vol. 46, 2012, pp. 224–240; Hankivsky, O., (ed.), *An Intersectionality-Based Policy Analysis Framework*, Institute for Intersectionality Research and Policy, Simon Fraser University, 2012; and Ontario Human Rights Commission, *An intersectional approach to discrimination: addressing multiple grounds in human rights claims*, Discussion Paper, 9 October 2001.

tively and quantitatively different from discrimination that occurs on the basis of a “single ground”, or from the addition of two or more grounds.¹² Could the same be said about “intersectional” violations of human rights? Could this concept help us understand the dynamics of multiple and interdependent violations of human rights?

While many academics working on the intersection of various grounds of discrimination noted the connection discrimination had with other human rights violations, research linking theories of intersectionality with human rights law, policies and institutions remained scarce. On the other hand, the practice of the majority of existing human rights architectures, both at national and international levels, still tended to compartmentalise human rights violations into discrete categories, as much as the policy arrangements and institutions tended to separate the promotion and protection of human rights into different sectors. This meant that only a few – if any – practical examples of interdependence and indivisibility of human rights violations were available. In this context of lack of data on “intersectional” human rights violations, it seemed natural that policy-makers, judicial officers, human rights experts and legislators would not possess the tools or adequate information to understand the prevalence, dynamics and consequences of interdependent human rights violations.

At the time of preparing the project, discussions about the need for intersectional analyses of human rights violations had already driven part of the process of strengthening the UN human rights treaty monitoring system,¹³ but there still remained a gap between theoretical acknowledgment of the indivisibility and interdependence of all human rights and the implementation of these principles in the context of concrete cases. What was needed to legitimate a change in the existing architecture was a demonstration of the limits that the current system had and of the added value of approaching human rights violations as interdependent. Could we, on the basis of the analysis of concrete cases, demonstrate the intersectional dynamics of interdependent violations of various human rights? Could these cases help us identify ways to adapt the existing methods of work of the UN human rights treaty monitoring system to better take into account the universality, indivisibility and interdependence of human rights in practice? And most importantly, what would this change for the people concerned by such violations?

With these research questions in mind, we developed an interdisciplinary research framework and methodology – various disciplines of law, political philosophy and anthropology – that took into account the inherently multidimensional nature of human rights and the need

12 See, for example, Crenshaw, K., “Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color”, *Stanford Law Review*, Vol. 43, 1991, pp. 1241–1299; and McCall, L., “The Complexity of Intersectionality”, *Signs: Journal of Women in Culture and Society* Vol. 3, 2005, pp. 1771–1800.

13 See OHCHR, “The treaty body strengthening process”, 2012, available at: www2.ohchr.org/english/bodies/HRTD/index.htm. See in particular OHCHR, *Strengthening the United Nations Human Rights Treaty Body System: Dublin II Meeting outcome document*, November 2011.

to analyse both international human rights law practice and the individual cases of violations on the ground.

2. A Broader Use of the Concept of Intersectionality

a. *The Relationship Between Discrimination and Human Rights*

As noted above, the concept of intersectionality has been used to analyse situations where multiple grounds of discrimination overlap, creating different consequences or forms of vulnerability that the mere addition of the concerned grounds cannot account for. In other words, intersectional discrimination gives rise to a new situation, for which existing measures and responses are not sufficient or adequate anymore.¹⁴ Our intention in the research was to broaden the use of this concept to explore:

- i. If the same intersectional process applied to multiple violations of human rights, creating new and different situations than a simple addition of the violations; and
- ii. If comparable consequences could be observed, meaning that the measures and responses usually designed to repair violations of the single rights, even when combined, were not sufficient or adequate anymore.

Three elements allowed us to think that the concept of intersectionality could be broadened to violations of human rights. The first is that, from a human rights perspective, discrimination is a violation of human rights. We considered discrimination in our research as a stand-alone human rights violation, violating the right to equal dignity of the person or persons concerned. A close analysis of the list of prohibited grounds recognised by international human rights instruments and the practice and quasi-jurisprudence of the treaty monitoring bodies¹⁵ supported this position. The focus is not on the motives behind the differential treatment, but on the discriminatory act in itself: an arbitrary differentiation in treatment¹⁶

14 On this argument, see Previtali, A., “The difficulties of jurists when faced with the notions of multiple discrimination and intersectionality : the need to understand the central question” (translated by the authors, original title in French: “Les difficultés du juriste face aux notions de discrimination multiple et d’intersectionnalité : le besoin de comprendre la question centrale”), 2016.

15 We considered the 10 main international human rights instruments: Universal Declaration of Human Rights; International Convention on the Elimination of all forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discriminations against Women; Convention Against Torture and other cruel, inhuman or degrading treatment or punishment; Convention on the Rights of the Child; International Convention on the protection of all Migrants Workers and members of their families; and International Convention for the protection of all Persons from Enforced Disappearance; and the CRPD.

16 See, for example, Human Rights Council, *General Comment No. 18: Non-discrimination*, 1989, Para 13, which states that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.

resulting in the violation of the right to equal dignity of the person(s) concerned.¹⁷ Our research encompassed both the situation in which persons are treated differently in similar circumstances and the situation in which persons are treated the same who should be treated differently (as both situations may amount to prohibited discrimination).¹⁸

The second element derives from our extensive research on cultural rights and their recent development in the international human rights system. In its General Comment No. 21,¹⁹ the Committee on Economic, Social and Cultural Rights (CESCR) adopted a wide interpretation of the right to take part in cultural life, stressing that it covers:

[T]he right of everyone – alone or in association with others or as a community – to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice.²⁰

The General Comment also makes it clear that cultural diversity is the necessary condition for this choice to be effective, and that guaranteeing the participation of all in cultural life on the basis of their identity will ensure that vibrant, cultural diversity is maintained and developed.²¹ As further stated by the CESCR, this also includes the right not to be subjected

17 We incorporated all grounds that have been recognised in the 10 main treaties themselves and in the subsequent interpretation by the treaty monitoring bodies (general comments, general recommendations or individual cases), amounting to a list of at least 27 grounds. More information about this aspect of the research can be found in the working paper, Boucharde, J., *Intersection 2: grounds of discriminations*, 11 December 2015, available at: www.unifr.ch/iiedh/fr/recherche/ethique-politique-dh/intersectionalite.

18 See, for example, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the ICESCR)*, UN Doc. E/C.12/2005/4, 11 August 2005, Para 13; CESCR, *General Comment No.20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR)*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 10(a); and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc. CEDAW/C/CG/28, 16 December 2010, Para 16.

19 CESCR, *General Comment No. 21: The right of everyone to take part in cultural life (art. 15, para 1(a), of the ICESCR)*, UN Doc. E/C.12/GC/21, 21 December 2009. This interpretative comment relies widely on the 2007 *Fribourg Declaration on Cultural Rights* for its definitions of the nature, scope and application of cultural rights.

20 *Ibid.*

21 This principle of mutual protection between human rights and cultural diversity was first introduced in UNESCO’s *Universal declaration on cultural diversity*, 2005, Article 4, and formulated more precisely in General Assembly, “Resolution 64/174: Human rights and cultural diversity”, UN Doc. A/RES/64/174, 18 December 2009, Para 10. It was further developed more precisely for cultural rights, in particular in the resolution creating the mandate of Special procedure in the field of cultural rights, HRC, “Resolution 10/23: Independent expert in the field of cultural rights”, UN Doc. A/HRC/10/23, 26 March 2009, Para 9(d), and in the first report of that expert, HRC, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36, 22 March 2010, Para 24.

to any form of discrimination based on cultural identity. When considering the prohibited grounds of discrimination, one can see that the grounds are constitutive elements of identity. Each person's identity is constructed by relying more or less strongly on gender, age, religion, ethnic, social and national origin, language, etc.; everyone defines one's self against or in accordance with what each of these element means in the context in which they live. Discrimination on these prohibited grounds can therefore amount to discrimination on the basis of one's cultural identity, and could be considered as a violation of cultural rights, or the right to the equal dignity of each person's identity.²²

Finally, it appeared to us from the analysis made of extreme poverty that the effects of discrimination and of other human rights violations, especially when unresolved, were often similar in the way that they expose the person concerned to a higher level of vulnerability that could then lead to further violations of their human rights. If unresolved violations of human rights could overlap and intersect in the same manner as grounds of discrimination did in cases of intersectional discrimination, maybe the intersectional process observed as a distinctive dynamic between various grounds of discrimination could also apply to various violations of human rights. For the purpose of our research, we considered the concept of intersectionality to apply to all complex situations of intertwined violations of many human rights, where the violations are so closely related that it cannot be distinguished which violation or ground of discrimination causes which impact.

b. Selecting and Informing Case Studies: Interdisciplinary Methodological Considerations

In light of the considerations discussed above, our objective in selecting the cases to study was to find cases in which a variety of human rights violations, including discrimination on the basis of different grounds, created a situation that was both quantitatively and qualitatively different from the mere addition of the "single" violations.

Considering the wide number of possible combinations of violations in situations of intersectionality (as we defined it), no selection could be exhaustive. The cases chosen were therefore illustrative, featuring different combinations of rights and grounds of discrimination, different geographic territories and contexts. The hypothesis was that, while each case of intersectionality would feature a specific combination of human rights violations, an analysis of several cases could give rise to findings about the limits and opportunities that the current human rights system presents and, eventually, to evidence based proposals for legislative and policy reform.

While many elements were considered in the choice of the cases to study, the most important for our team was the possibility to have as direct a link as possible to the persons experiencing the violations. This was essential for two reasons. Firstly, to consider complex situations involving many human rights violations, we needed more information

22 These considerations are further developed in a separate article by the authors, to be published shortly.

than what is usually provided to existing complaint mechanisms. Secondary sources were therefore often too limited to be used. Secondly, we wanted to be able to appreciate the effects of the measures implemented to resolve the situation, and their effectiveness for the persons concerned in the medium or long run. This meant engaging in a follow-up exercise that is usually very hard to conduct for mechanisms addressing complaints of human rights violations.

The eight cases chosen took place in different social, geographic, political, cultural and economic contexts.²³ Each featured a combination of civil, cultural, economic, political and social rights and at least one ground of discrimination. The intersectional nexus – or intersection of human rights violations and discrimination – triggering the complex situation in each case is summarised below.

- i. In the case of a journalist in the context of the intensifying conflict in Sri Lanka, we identified violations of the right to freedom of opinion and expression, the right to take part in cultural life, the right to safety of the person and protection against arbitrary arrest and detention, combined with discrimination on the ground of political opinion, ethnicity, religion and as a journalist (considered under “other status”).
- ii. In the case of the forced eviction of travelling people (*gens du voyage*, as used in French) in France, the rights violated were the right to housing, freedom of movement and the right to freely choose one’s place of residence, the right to a standard of life that respects human dignity, the right to choose and exercise a way of life and the cultural practices of one’s choice, combined with discrimination on the basis of ethnicity (in this case, the persons consider themselves as belonging to a certain community and choosing a particular way of life, which was perceived as ethnicity) and socio-economic status.
- iii. In the case of the use of sexual violence against women as a strategy of war in the Democratic Republic of Congo, the main rights violated were the right to life, to physical integrity, to safety of the person and protection against torture and slavery, combined with discrimination on the grounds of sex, socio-economic status, and ethnicity.
- iv. In the case concerning forms of slavery practices specific to women and girls in Mauritania, discrimination on the basis of birth (caste) and sex are combined with violations of the rights to nationality (registration as a citizen) and to marry and found a family. Depending on the ethnic component of the population, further rights are violated, including the right to education and to physical integrity.
- v. In the case of violations of the right to education in rural areas of Burkina Faso, the main right violated was the rights to education, combined with discrimination on the basis of place of residence, socio-economic status and sex.
- vi. In the case considering the impact of austerity measures on young people in Greece, the main rights violated were the rights to work and its correlated rights (the right to

23 The eight cases are published on our website, each as a separate document (series *Intersection 5*), with further resources relating to that case. See working papers available at: www.unifr.ch/iiedh/fr/recherche/ethique-politique-dh/intersectionalite.

- join a trade union, the right to fair pay and to safe conditions of work), the right to social security and the right to education. This was combined with discrimination on the basis of age.
- vii. In the case of the stolen generations of Indigenous Australian children forcibly separated from their parents, the concerned grounds of discrimination include ethnicity (including skin colour and parentage), age, gender, physical and mental health, cultural practices, economic status and place of residence, combined with violations of the rights to self-determination, to family life, to education, to work, to freedom of religion or belief, to freedom of expression, to equality before the law including access to justice and effective remedies, to freedom of movement, cultural rights and the protection of physical integrity.
 - viii. In the case of the forced sterilisation of Roma women in the Czech Republic, the main rights violated are the right to inviolability of the person, to protection against illegitimate interference in private life, home and correspondence, to marry and found a family, to protection of motherhood including family planning, to appropriate health care, combined with discrimination on the grounds of sex, ethnicity and disability.

Each of these cases concerned past violations and had been considered by different existing human rights mechanisms. To capture this wide spectrum in a way that would allow in-depth analysis of each case as well as comparative considerations between the cases, we developed a method of documenting the cases that included desk research about the context of the country and the responses given by the relevant human rights mechanism involved in the case, combined with collecting the life story of the persons concerned in order to inform the complexity of the intersectional violations and their impacts, as well as to understand the person's assessment of the effectiveness of the measures taken.²⁴ History, sociology, anthropology, religious studies, economic and institutional studies complemented the discipline of law to embrace and analyse each of the complex cases.

c. The Intersectional Process: Multiple Violations and Discrimination

By starting the analysis from the situation of intersectional violations as expressed by the persons concerned, identifying the various human rights violations including discrimination that contributed to the complexity of what we called the "original" situation revealed to be quite easy. Listening to each life story with a broad human rights perspective, it was fairly clear which rights were violated and what the relevant grounds of discrimination were. When taking into consideration the testimony of the persons concerned and their circumstances, the interdependency of the violations and indivisibility of human rights were obvious. It was also obvious that the violations experienced reached across categories of rights (civil and political; economic, social and cultural) and single grounds of discrimination (for example gender, age, race and ethnicity or disability), again raising the question of the capacity of human rights mechanisms designed to address only one

24 The resulting methodological framework developed to inform each case study for this research is available as a working paper, see *ibid*.

category of right or one ground of discrimination to respond adequately to all the violations concerned.

One of the challenges when considering the life story narratives was to clearly differentiate between two types of interdependent reactions between the various human rights violations:

- i. Chain reactions of violations: in this interdependence, causality can be identified – this violation caused this impact, which increased the vulnerability of the person and exposed them to this further violation – even if the addition of the subsequent violations can amount to an aggravated situation, as is the case for extreme poverty;
- ii. Intersectionality: this interdependence blurs the lines of causality, to a point where it is not possible anymore to identify which violation had which impact. The closely intertwined violations of human rights impact the person concerned in ways that are quantitatively and qualitatively different than the sum of each violation taken separately.

Each of the cases studied presented both of these types of interdependence. The situation from which we started our analysis (the “original” situation) was chosen because it corresponded to the second type: a situation in which simultaneous violations of many human rights were so complex that it was impossible to attribute the impact on the persons concerned to one or the other human rights violations involved. Were the persons evicted in France because of their way of life or because the area was run down? Or was it discrimination against the community of travelling people that led to the location being left without sanitation? Was the journalist being pursued because of his political opinion, the fact that he belonged to a certain ethnic group and religion or because of his journalistic activities? Or is it that his opinion should not have been expressed by someone of his ethnic group? It is difficult to say, since all of these elements concur in a way that is not linear. From the point of view of the persons concerned, it was not always the first time that they experienced a violation of any of their human rights taken separately, or the first occurrence of discrimination for any one of the grounds involved, but the situations serving as the starting point of our analysis were chosen because of the combination of violations experienced at this point. Chain reactions of violations occurred as well and could be identified as a consequence of this first situation of intersectionality and of the failure to remedy to it. However, in each of the cases, the “original” situation and its impacts were different than the sum of each violation separately.

This confirmed the relevance and applicability of the concept of intersectionality to the analysis of violations of human rights more broadly (and not solely to discrimination). Using this concept, we could demonstrate more precisely the indivisibility and interdependence of human rights violations. However, it still did not support an argument that changes to the methods of work of the UN treaty monitoring bodies needed to be made, nor identify what these changes should be. To achieve this, we needed to further analyse the cases.

3. Intersectional Contamination: the Implication of Human Rights' Interdependence for Effective Remedies

a. *Complex Causes, Multiple Consequences and Partial Remedies*

The analysis of the case studies not only demonstrated that the interdependence of human rights violations could be intersectional, it also pointed towards interdependence in the form of chain reactions. This type of interdependence became particularly evident when we looked into what happens *after* the original nexus of violations occurred. What we saw was that the original violations had far-reaching impacts in terms of chain reactions of violations. This led us to further analyse the responses provided in each case to remedy the human rights violations and to consider their effectiveness for such complex situations.

In all the cases we studied, we noticed that the measures taken to remedy the situation were only designed to respond to the violation of one or two rights, considered more urgent, or to discrimination on one ground, perceived as more visible or important. This is in large part the consequence of the way that mechanisms receiving complaints are constructed, being competent to receive information only on one category of rights, from which the plaintiff has to select a main “entry door” (a single right or a combination, but only within one human rights instrument), or one main ground of discrimination. This division of the rights and grounds of discrimination between various monitoring bodies requires persons or organisations wishing to complain about intersectional situations to select only part of the violations to be addressed.²⁵ Many times, this selection is made according to strategic considerations (which mechanism is faster, closer or requires less documents) and in full knowledge of the many aspects of reality that will be left out.

The logical consequence is that the responses provided are also partial, if not completely ineffective. In these cases, compensation for the victims falls well below the real damage, sometimes weakening them even more; the perpetrators – when rightly identified – are only made accountable for a portion of the injury and are allowed impunity for the rest; and society, unable to restore justice, loses trust in the legitimacy of the rule of law and its own institutions. One of the important lessons learned from the cases studied is that, from the moment the “original” violation and the complexity of the situation are not properly recognised, *remedies and measures cannot be comprehensive nor adequate*. This observation leads us to acknowledge that the human rights monitoring system, as it has been elaborated until now, has important limits when it comes to analysing and providing adequate responses to intersectional violations of multiple human rights.

b. *The Three Types of Contamination and the Levels of Seriousness*

Unremedied human rights violations or partial responses to intersectional situations are not only insufficient; they tend to continue to have negative impacts. In each of the eight cases

25 For more details about the complaint procedures to the treaty monitoring bodies, see OHCHR, *23 Frequently asked questions about the Treaty Bodies Complaint Procedures*, available at: www.ohchr.org/Documents/HRBodies/TB/23FAQ.pdf.

we studied, the unremedied violations and partial or inadequate responses caused a negative chain reaction that led to further human rights violations. This extension of the violation can be compared with the spread of a virus; a contamination.

For the Sinhalese journalist, the “original” violations took place during the radicalisation of civil violence between 2005 and 2008 in the Western Province of Sri Lanka. He faced threats and harassment, violating his right to freedom of expression, to take part in cultural life, to safety and security of the person and protection against arbitrary arrest and detention on the basis of his opinion, ethnical and religious identity and profession. He explained that the political context of radicalisation and repression of freedom of expression made it difficult for him to alert the police and seek or expect reasonable protection.²⁶ Without this possibility, his exposure to danger rose, causing further human rights violations, until he had to flee the country. This is what we identified as *comprehensive contamination*; the contamination spread in to further aspects of our journalist’s life (he remained weakened by the lack of adequate response to the original violations, which heightened the risk of further violations), and also allowed the perpetrators to be reinforced by the climate of impunity to continue with their behaviour.

The degradation of his situation also had a direct impact on his family, causing them social and financial insecurity, but also leading to fears for their own security due to the precarious nature of their situation and his sudden exile. The fact that the threats and harassments against him remained unpunished also had an impact on other human rights activists and journalists, making them fearful of their own security and causing them to self-censor, thereby violating their rights to freedom of expression and to take part in cultural life. Impunity in this case contributed to the existing tensions in the society, worsening the situation for our journalist and the climate of fear for all involved. More broadly in society, similar individual cases concerning other journalist, human rights advocates or other individuals that were experiencing threats were not investigated, the individuals not being protected, which eroded trust in the rule of law and in society. Tensions began to escalate into violence. This corresponds to what we identified as *horizontal contamination*, where the impacts of the un-remedied violations start affecting other persons related to the victims. Families and friends are often affected, but also, as in this case, members of a shared community, who become further exposed to similar violations.

The Australian case study gives an example of the third type of contamination we identified, *vertical contamination*, which refers to the long-lasting impact on the persons to the point where it has an impact on the following generations. For the Indigenous Australian families,

26 The gravity of the situation was presented in OHCHR, *Report of the OHCHR Investigation on Sri Lanka (OISL)*, UN Doc. A/HRC/31/CRP.2, 16 September 2015, Paras 63, 213, 217–218, 231, 257 and 260. The threat to media workers and tendency for impunity in cases of harassment had been also acknowledged by treaty monitoring bodies before and after the period concerned in the case study. See in particular Human Rights Committee, *Concluding observations of the Human Rights Committee: Sri Lanka*, UN Doc. CCPR/CO/79/LKA, 1 December 2003, Para 18, and Committee against Torture, *Concluding observation of the Committee against Torture: Sri Lanka* UN Doc. CAT/C/LKA/Co/3-4, 8 December 2011, Para 13.

the “original” situation of forced removal of their children, starting in 1910, was a violation of their rights to self-determination, to family life, to education, to cultural rights, to equality before the law, including equal access to justice and remedies. These violations were all perpetrated on the basis of ethnicity (including skin colour and parentage), age, gender, physical and mental health, cultural practices, economic status (poverty) and geographical location. Since the children placed in care by the welfare policies were deprived of their relationship with their parents and original communities, lines of transmission, ensuring access to and participation in cultural heritage, traditions and practices, knowledge of one’s own history and that of one’s family, all the shared values and meaning of everyday acts, were cut off, depriving these children of their own cultural resources for their whole life. One of the women concerned, waiting for the birth of her child, admitted feeling completely helpless when it came to motherhood, as she had no significant experience of this role, having been deprived of her own mother, and did not know what she would could transmit as cultural and family heritage. The damage inflicted by the intersectional violations and the lack of appropriate reparation contributed to creating long-lasting cultural, social, economic,²⁷ and in this case, emotional, differences that encompass subsequent generations.

To summarise, the seriousness of intersecting human rights violations can be understood as comprising three dimensions, aggregated or not:

- i. The seriousness of that violation of the person’s rights (injury), in terms of the capacity of the victim to claim redress;
- ii. The interdependent effect of several violations, which act as an “aggravating factor” through multiplication (aggravation through comprehensive contamination); and
- iii. The number of direct and indirect victims, which can reach the dimension of a massive violation (aggravation through extension) and may encourage the belief that the victims themselves are at least in part responsible for the violations (“there is no smoke without fire”).

The result of this is that, when faced with intersecting violations, nobody knows where to begin. The dominant impression is of a “bottomless pit”. Actors wishing to react, be they governmental or otherwise, have limited resources and authority, and recognise with resignation that their actions will likely only address some of the symptoms and consequences, but not the sources of the problem. At this stage, we have observed in the case studies that a leaden silence tends to prevail: the magnitude of the injury reaches a point where it cannot be directly contemplated nor expressed anymore. The strongest example of this was the Mauritanian case: the official discourse speaks of “sequelles” (after effects) of slavery concerning only a few isolated cases, and the situation of girls and women subject to practices of slavery is often minimised as a traditional arrangement between families. No one wants to admit how broad and grave the situation is.

27 See Makkonen, T., “Multiple, compound and intersectional discrimination: bringing the experience of the most marginalized to the fore”, Institute for Human Rights, Åbo Akademi University, 2002, p. 9.

c. The Multiple Actors' Perspectives and their Role in the Search for Adequate Reparations

Every infringement of a human right produces – by virtue of the universality of the dignity of the person affected – a legal tort and invokes the responsibility of the state and its institutions, directly or indirectly, to reestablish and confirm the rule of law. This should be done in cooperation with all other relevant stakeholders.

For each case study, part of the work consisted in identifying the institutions and mechanisms that should provide protection against the human rights violations concerned and guarantees for their non-recurrence, and to analyse how these had addressed (or not) the situation and what types of measures they recommended and put in place to ensure effective remedies. These included primarily the governmental and national legal institutions, as well as the relevant regional mechanisms, in the various relevant fields including law, social policies and educational measures, to name a few. Specific emphasis was put on the human rights mechanisms of the UN, but civil society organisations and other informal initiatives were also taken into account, when they contributed to finding solutions or providing support to the persons concerned.

What struck us was the difficulty in providing adequate forms of reparation. In all of the cases, no matter how many measures of reparation were added up, when these aimed to address only part of the violations intertwined in the “original” situation, they continued to miss the target. The sum of all the measures taken – recognising responsibilities, legal procedures, adjustments in social policies, compensations for part of the harm experienced, etc. – failed to really provide durable remedies, understood as at least stopping the ongoing negative contamination in all three directions mentioned above. This is particularly true once the chain reactions had started and time had allowed for wider contamination.

In each case of intersectional violations of human rights, it was quite interesting to note the number of existing actors, resources and mechanisms that could contribute to remedies, either on specific aspects or with a more general mandate, and the long list of identified actions that had actually taken place. In the majority of cases, what failed was not so much actions as effective coordination between actors and mechanisms, creating gaps and interruption in the protection and rendering it impossible for any one body to apprehend the entire situation. Instead of acting together or in complementary way, these actors or mechanisms intervened in parallel, each in their restricted field. In the worst examples of this failure to work together, such as for the French travelling people forcibly evicted from their homes or the young Greeks suffering from the impact of the austerity measures, existing institutions and mechanisms involved kept invoking the responsibility of others, and sending the persons from one office to the next. After 10 years of fighting and advocacy and a favourable decision before the European Court of Human Rights,²⁸ some of the French persons evicted still don't have a place they can call home. At the national level, some governmental agencies refuse to imple-

28 *Winterstein and others v France*, Application No. 27013/07, 17 October 2013.

ment and follow-up on the recommendations formulated by UN human rights mechanisms. In other cases, efforts to remedy intersectional violations become dislocated. For example, in the Democratic Republic of Congo, legal procedures were engaged against some of the authors of sexual crimes committed against women (and in some cases, against men) but judgements were not always enforced, measures to support and rehabilitate the women victims are mainly put in place by different NGOs but are not coordinated, and almost nothing has been done to rehabilitate the men involved (as both victims and authors) and to reestablish trust between members of the community.

But it is also through the presence of multiple actors in the research of adequate remedies that we found the most efficient practices, when three conditions are met. First, the study of these cases shows that, when civil society actors (through organisations as well as informal networks) and local authorities in all sectors coordinate their actions as the first line of response, this is the best way to stop the spread of negative impacts. This implies recognising what is done by first-line actors, even informally, and the remedies available in the society itself. The second condition is to ensure that, whenever required, these first networks of responses are reinforced and followed through by other levels of responses. Actions have to flow from the ground up, and then reach all the appropriate levels to repair the harm done and prevent recurrence and further damage. The third condition we see emerging is the importance of continued engagement from all level in the implementation of the responses. In other words, decisions from courts, promises from authorities and recommendations from UN mechanisms will only be efficient if all involved actors, and not only the victims, continue to demand their implementation and take their part in their implementation. This means ensuring adequate information is shared about these higher level decisions, through for example translation in the appropriate languages and wide diffusion of the recommendations.

The prevention or the remedy of multiple injuries occurring in intersectional violations requires optimal interaction among and between: the public actors (at all levels), private actors and civil society organisations; cultural, economic, social, legal and political actors; and all the legal processes. Only then can the damage caused by intersectional violations of human rights to the victims, their families and communities and to the wider society, be treated in an adequate manner.

4. Some Proposals

a. The Need for More Interdisciplinary Analysis

When considering how far the impacts of intersectional violations of human rights reach and how complex the elaboration and design of adequate responses and reparations is, one realises that these complex situations are systemic, involving elements from history, politics, economics and culture that go far beyond the person's directly harmed, but concern whole societies. In view of this conclusion, sectorial approaches and mechanisms relying mainly or solely on one discipline, law, will never be sufficient to embrace them, neither in their comprehension, nor in the edification of adequate responses.

Throughout our research, the study of the grounds of discrimination in the light of recent developments in the field of cultural rights, and the analysis of cases of intersectional violations of multiple human rights, including violations through discrimination, both highlight the importance of including more disciplines of social sciences, their tools and concepts in the analysis, investigation and redress of human rights violations. It is not sufficient to involve all these disciplines only at the level of remedies: to understand how the violations work, where they originate from and the impact that they have requires the inclusion of insights from more disciplines at an earlier stage. This means having a variety of disciplines represented in existing human rights monitoring mechanisms, at the national, regional and international levels. It is with a broader comprehension of the violations that we will be able to prevent their recurrence and restore human dignity after violations have been committed.

A better understanding of the complex situations that intersectional human rights violations involve can help devise responses that take into consideration the whole range of stakeholders that are able to contribute to prevention and remedies (not only reacting, but acting prior to contamination). What the case studies have also demonstrated is the importance of coordination between all involved actors in order to design the most adequate responses that will embrace the whole of a particular situation. This means also involving the rights holders in choosing the right responses, which may be different from those that obligation holders immediately think of. The involvement of rights holders should be the basis of a human rights based approach, but it is still sometimes forgotten. Most importantly, the original objective, to restore the dignity of the persons whose rights have been violated, should always be kept in sight. For those involved in the situations we have looked into, this has not been the case.

As human rights are in essence political, all actors and all types of policies can play a role in the promotion, protection and implementation of human rights. This means that human rights analysis should be developed in all policy-making institutions, as a transversal tool. To have people from all disciplines feel concerned with, and relevant to, the field of human rights requires human rights teaching and analysis to extend from a specialised field of law studies to embrace all faculties of our universities and more generally, to be transmitted through civic education, including in schools. In this sense, our universities have an important role to play if we want to improve our human rights records across the world.

b. Some Thoughts about the Work of the UN Mechanisms

From the insights gathered throughout our research and the analysis of the case studies, it is possible to formulate some pragmatic and progressive proposals to monitoring bodies that should contribute to the search for coherence in the long term.²⁹

29 For a presentation of proposals collected in the course of the research, see working paper, "Intersection 6: Mesures et recommandations/ Measures and recommendations", 11 December 2015, available at www.unifr.ch/iiedh/fr/recherche/ethique-politique-dh/intersectionalite.

The first type of proposals concerns doctrinal clarifications. The UN human rights treaties and their monitoring bodies were built with a doubly divided approach: between the two categories of rights as delineated in the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, then between the various sorts of violation, either torture or the various grounds of discrimination (such as sex, race, disabilities, etc.). This divided approach must be progressively corrected in order to clearly introduce the principles of indivisibility and interdependence. This could, for example, take the form of more common work on the definition of these principles and of other key concepts relevant to all treaty bodies.

Another type of proposal concerns the methods of work of the bodies and procedural clarification. To breach the divisions of the system, more spaces for transversal work between the treaty bodies and also with external partners could be created to share observations and analysis. This is done already to a certain extent in the UN system, owing to numerous initiatives, but the concluding experiences are not as known and valued as they should be.³⁰ Methods of work should be developed to allow complex situations involving intersectional violations of multiple human rights to be considered as a whole, and not only through one entry point. On this point, the experiences across mandates, like the regular joint work by the special procedures to address complex cases,³¹ could help constitute a catalogue of realistic proposals to be reinforced and developed in the treaty body system.

Conclusion

The study of specific situations of intersectional human rights violations should be developed further, to look into more cases and strengthen and complete the observation of our research so far. The shared feeling from our research team is that these cases tell us much about the limits of the current human rights monitoring system, and even more about the avenues that need to be explored so that this system fulfils the aspiration we all share for the universal realisation of human rights. What is needed is a paradigm change benefiting a more concrete approach to persons in their milieus, an approach which is more systematic, more participative, more observant, attentive to tracing, and to restoring and developing chains of knowledge.

30 See, *ibid*, for examples.

31 See, for example, the joint report on communications from the special procedures, published three times a year on at: www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx.

“Intersectionality is a frame that prompts us to ask what falls between movements and what happens when these different systems of power and oppression overlap.”

Kimberlé Crenshaw

“What I see as the heart of intersectionality is (...) a negative synergy of the various elements that operate to deprive a person of their rights and to submit them to domination, discrimination and oppression. This accumulation is both fascinating and sometimes very difficult to grasp.”

Patricia Schulz



Intersectionality in Promoting Equality

The concept of intersectionality came to the fore in post-colonial studies and critical race feminism, where it formed part of a critique of how legal and advocacy campaigns which focused on single characteristics tended to ignore the individuals who existed at the intersections of multiple characteristics, such as Black women.¹ Since this time, intersectionality has been discussed and debated more broadly in academic circles and within the media in more recent years. Many see intersectionality as the key to understanding the unique nature of our identities. They view the recognition of intersectionality and intersectional discrimination as crucial to identifying the discrimination faced by individuals, and more broadly in addressing the structural factors that lead to such discrimination.² Yet, the concept of intersectionality has also faced strong criticism from those who say that it has little substance of its own and that it focuses too closely on the individual.³ As both a term and a concept, it is still largely unrecognised in equality law and arguments have been made as to whether the law, which largely treats protected grounds of discrimination as distinct categories, can effectively address intersectionality.⁴

The Equal Rights Trust spoke with two experts to discuss the contribution of the concept of intersectionality to advancing equality. Professor Kimberlé Crenshaw is a leading authority in the area of civil rights, black feminist legal theory, and race, racism and the law. She is widely known for her central role in the development of the idea of intersectionality. She is a Professor of Law at University of California, Los Angeles and Columbia Law School and

- 1 See, for example, Crenshaw, K., "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", *Stanford Law Review*, Vol. 43, 1991; and Kapur, R., "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International Post-Colonial Feminist Legal Politics", *Harvard Human Rights Journal*, Vol. 15, 2002.
- 2 May, V.M., *Pursuing Intersectionality: Unsettling Dominant Imaginaries*, Routledge, 2015, p. 21. For a discussion see Smith, B., "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective", in this issue.
- 3 See, for example, Nash, J., "Re-thinking intersectionality", *feminist review*, Vol. 89, 2008; and 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.
- 4 Solanke, I., "Infusing the Silos in the Equality Act 2010 with Synergy", *Industrial Law Journal*, Vol. 40, 2011, p. 330.

is the founding director of the Center for Intersectionality and Social Policy Studies. Patricia Schulz is a member of the Committee on the Elimination of All Forms of Discrimination against Women and since her appointment to the Committee has been designated country rapporteur on several occasions. Previous to serving on the Committee, she was Director of the Federal Office for Gender Equality, Switzerland from 1994 to 2010. In her early career she worked as a barrister in Geneva and joined the Faculty of Law at Geneva University as a lecturer.

Equal Rights Trust: You are widely recognised for your expertise on equality and your work on intersectionality. How did you become involved in this area of work? What life experiences and major influences played a role in getting you to your present position?

Kimberlé Crenshaw: I grew up in the mid-western town of Canton, Ohio during a time when Black people were still being killed for trying to vote and broad swathes of the US remained under the grip of formal white supremacy. My parents were both what we used to call “race people,” meaning that they resisted the subordinate status of Black people and raised my brother and me to recognise and speak out against racial injustice. Being born and socialised into activism at a young age set the path for me to continue to challenge forms of discrimination that intersect with white supremacy. As I progressed from high school to college and then on to law school, I became active in contemporary issues around inequality. I graduated from Cornell University with a degree in Africana studies and government. I received a solid foundation about the political and economic dimensions of racial power, but fairly little about the gendered dimensions of racism. Gender tended to be marked as pertaining to women only, and there wasn’t a settled practice of integrating an explicit gender prism into race analysis, or *vice versa*.



Kimberlé Crenshaw

I moved on from Cornell to study at Harvard Law School, where I became involved with the struggle for faculty diversity. One of the moments of recognition for me about the consequences of a racial justice agenda that wasn’t gendered, and a gender justice agen-

da that wasn't raced, came to the fore when we were advocating for the inclusion of both people of colour and women. Hiring committees formed to look at candidates based on either gender or race, but neither committee came forward with recommendations of women of colour. It became clear that the gender committee thought that women of colour would be handled by the race committee and *vice versa*. It was evident to me that if anti-racism isn't explicitly gendered, or if feminism isn't explicitly raced, women who can come up under either race or gender don't actually come up at all. I also noticed that, even within our movements, the leadership of Black women was often marginalised. Finally, as I moved into graduate school, I found cases where Black women struggled to represent their own interests when those interests didn't align either with the way white women experienced sex discrimination or with how Black men experienced race discrimination. It was in trying to visualise what was missing in conventional ways of thinking about racism and sexism that I began to use the metaphor of the intersection to capture those experiences.

Patricia Schulz: The Second World War played an influential role in my upbringing. My mother was an American who lived in France and she came to Switzerland to marry my father during the war, so the war was very much part of their lives and fed into our discussions around the table. Later, while discussing the war at school, I was completely puzzled by what had happened. How could the Germans, who were so advanced culturally and technologically, be taken with the idea that they were allowed to exterminate other people? Jews, Roma, trade unionists, communists, homosexuals, socialists – those that were defined as “others”. This led me to think about the “us versus them” mentality, and it is a notion that has never left me. I could also see that some of the people killed were both foreigners and socialists, and that maybe they had been killed because of both of these identities. That was the first time I thought about the concept of discrimination, and I realised that it can go to such extremes as wanting to destroy people.



Patricia Schulz

When I was about 20, I realised that I was not going to be able to tackle all forms of discrimination – I was a feminist so I decided to concentrate on discrimination against women. At that time, Swiss legislation was still very backward, our Civil Code was patriarchal in defining women's and men's roles and organising a hierarchical relationship between them, which was reflected in many other laws and areas of life. For instance, women didn't have the right

to vote at the federal level, which I found hugely frustrating. I had a brother who was not interested in politics and who was allowed to vote, yet, although I was very interested in politics, I was not allowed to vote just because I was a woman.

I studied law because I wanted to understand the system that instituted these power relationships. After I got my degree in law and passed my bar exams, I worked as a barrister for four or five years. During this time, I took on a number of cases funded by legal aid, including representing women who were seeking a divorce. I was able to see how difficult it was for these women to access and claim their rights through the court system, and often this was because these women were foreigners. This was a very concrete experience of intersectionality at the start of my career as a lawyer, and it stayed with me even though I didn't have the word to name the phenomenon at the time.

Through my work as a feminist, including meeting with women from other countries, I came to realise that while being a woman was in itself an aggravating circumstance for any difficult situation, being poor, uneducated, Black in a white society, or a person with a disability, etc., would make your life even more difficult. It was then that I started to reflect on discrimination in a more theoretical way. I began working in the Faculty of Law at the University of Geneva and wrote a number of articles on discrimination against women. Finally, in 1994, I became the Director of the Federal Office for Gender Equality in Switzerland where the issue of intersectional discrimination became prominent in our work.

Equal Rights Trust: A range of different meanings are attributed to the term “intersectionality”. How would you define intersectionality? And could you provide an example?

Patricia Schulz: What I see as the heart of intersectionality is the dynamics between the various grounds of discrimination. It is not just the addition of different grounds of discrimination, but a negative synergy of the various elements that operates to deprive a person of their rights and to submit them to domination, discrimination and oppression – terms that you can find embedded in the literature on intersectionality. This accumulation is both fascinating and sometimes very difficult to grasp.

We see a lot of examples of intersectionality in our work at the Committee on the Elimination of Discrimination against Women. For example, if you consider a woman, her sex is the first ground on which she may be discriminated against, but this woman also belongs to an ethnic minority, she lives in a rural region, and she is illiterate. She is expelled from the land she used to live on because her husband died and his family took the land. When you consider all these elements and their interplay, you can see the dynamics that led to her being deprived of her rights and see she has been subjected to intersectional discrimination.

Kimberlé Crenshaw: I think of intersectionality as a term that captures the fact that systems of oppression are not singular; they overlap and intersect in the same way that power does. Many of us now would say “yes, of course” to that observation, but as far as prevailing practices in law and many other disciplines were concerned, racism was analysed as separate

and distinct from patriarchy, which in turn was framed as separate from class oppression. As a consequence, the understanding of any of these systems is rendered incomplete if little attention is paid to the ways in which sub-groups within larger groups experience subordinating structures.

The best example of intersectionality for me is *DeGraffenreid v General Motors*,⁵ a case of Black women in an industry that was racially segregated and gendered. This was one of the early cases that I encountered that prompted my effort to construct a framework to capture these overlapping dynamics. In this industry, jobs that were appropriate for women weren't appropriate for Black women and jobs that were appropriate for Black men weren't appropriate for Black women. This was because the gender logic of the workforce put women in front office jobs and the racial logic put Black people at the bottom of the labour hierarchy, definitely not in the front office. So these were gendered and raced structures that marginalised all women and marginalised all Blacks, but the consequence of the two together meant that Black women had virtually no space in the industry. This kind of intersectional subordination would be missed where racism is framed solely in terms of how non-white men are impacted or sexism is framed solely in terms of how white women are impacted.

One thing that has been missing in the uptake of intersectionality is recognition that it is a relationship between identities – that is a social categorisation – and structures. Some talk about intersectionality solely as a marker of multiple identities and others talk about intersectionality solely in terms of structures. The point is that structures are made legible through their impact on particular people, and particular people are situated within these structures in marginalised and subordinated ways because of who they are seen to be. They are not separate in a way that allows you to talk only in terms of identity or only in terms of structures. My sense is that the relationship between social categorisation and structures is now starting to be more recognised.

Equal Rights Trust: In most jurisdictions, equality law still adopts a model of discrimination which treats protected grounds as discrete categories which do not overlap or interact. In your work, what issues or cases of intersectional discrimination have you encountered that were not adequately addressed by this model?

Kimberlé Crenshaw: Most cases that involve intersectional discrimination are not adequately addressed. *DeGraffenreid v General Motors*, for instance, involved a situation where thinking of discrimination only in terms of race or only in terms of gender resulted in only a partial understanding of what was happening to Black women. The courts that heard these cases could have permitted Black women to represent themselves, and they could have interpreted the law to say that if you're protected from discrimination on any one ground of race or gender, then you're certainly protected from discrimination based on the combination of the two.

5 *DeGraffenreid v General Motors Assembly Division*, 558 F.2d 480.

The reason given by the Court in *DeGraffenreid* for not allowing Black women to combine race and gender was a concern that this would multiply and open a “Pandora’s Box”, with ever increasing sub-divisions of potential plaintiffs. This was policy reasoning, rather than strictly legal reasoning. The Court was also incorrect in its perception that allowing Black women to make a case on the basis of race and gender would constitute a preference for them because no one else could combine two causes of action to make a claim against an employer. What we see in this decision is the way that the law limits the opportunities to challenge race and gender hierarchies in employment and in other institutions. Additionally, we see an assumption that giving Black women the opportunity to challenge a form of discrimination that they alone face is seen as preferential treatment. But not allowing them to do so is not seen – as it should be – as discrimination against them.

Patricia Schulz: I want to discuss two aspects of our work at the CEDAW Committee, the first being the examination of states’ reports and the second being the individual communications under the Optional Protocol.

In its examination of states’ reports on their implementation of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee often sees that the reports describe instances of intersectional discrimination but without an awareness of what intersectional discrimination is. In these countries, the concept of intersectional discrimination still hasn’t been recognised in legislation or by the courts, and so the Committee asks these states to prohibit intersectional discrimination through anti-discrimination legislation. One problem with the majority of existing anti-discrimination legislation, and the majority of institutional systems, is that women are still forced to choose to bring a claim based either on discrimination on the grounds of sex or on another ground but cannot bring a claim on intersecting grounds or even more than one ground. This is true even of countries that otherwise have good gender equality legislation. If you have a woman who feels she has been discriminated against not only as a woman but also as a person with a disability, or due to her sexual orientation or gender identify, she will most likely not be able to have all of the dynamics of her case considered because the law only recognises one ground or because she has to decide which body to bring a claim before. Many bodies will only consider one aspect of a claim. For example, specialised bodies may deal only with race discrimination or only with discrimination based on disability. The actual harm carried out towards the woman will therefore not be fully examined and the compensation, if any is granted, may also differ depending on the body examining the case. There is therefore a need to consider the re-organisation of justice systems to break this silo mentality. One of the ways to change the system is to enable the various bodies to look into other grounds when these are meaningful in a case. Alternatively, systems can be entirely overhauled so that they can address intersectional discrimination. The Committee tries to raise awareness of the need for reform, and in our discussions with the delegations of states parties we highlight these issues in relation to access to justice and how discrimination is defined in national law.

When the Committee examines individual cases, we can clearly see that countries are ill-equipped to deal with cases of intersectional discrimination. For example, one case involved

a young Brazilian woman, Alyne da Silva Pimentel, who died while pregnant.⁶ We had to decide whether her death was due to the “normal” dysfunction of the health system or whether the treatment she received was due to gender discrimination. After a thorough analysis, we came to the conclusion that she had suffered intersectional discrimination; in addition to being a woman, she was poor and of African descent, and it was this combination of characteristics that led to her death. In our review of these cases, and in our review of states’ reports, we see it as our responsibility to try to clarify what intersectional discrimination is and how the state party could improve their response to it.

Equal Rights Trust: Intersectionality has gained prominence amongst academics but not yet been widely recognised in law and otherwise. To what extent have you found that lawyers, government and other stakeholders recognise that intersectional discrimination is a problem that needs to be addressed? What do you think is the biggest obstacle to its recognition?

Kimberlé Crenshaw: There are some communities outside of the academic world in which intersectionality has become more of a familiar concept outside. At the World Conference against Racism, for instance, intersectionality played a significant role in integrating gender issues into the international conversation about race, racism and xenophobia. Intersectionality has been explicitly taken up within human rights and international discourses for at least a decade. What the question points to is not so much intersectionality’s limited role outside of academic circles, but its limited circulation within a narrower sphere of political and governmental discourses. But it is the realised contemporary political discourses around racism or patriarchy that aren’t fully engaged with newer thinking of which intersectionality is part. One has to have a sense that racism is more than an individual level bias or prejudice, or that patriarchy is more than the rule of thumb over women. In order to talk about how those systems come together, you have to have a sense of the broader, structural ways that female-bodied people are subject to various forms of subordination and the ways that racialised hierarchies are still playing out. In a neoliberal moment where most disparities in society are increasingly articulated in terms of individual incapacity, the ability to talk about overlapping systems is even more rare. It is difficult to initiate conversations about how systems interact in the current moment, and this makes it much more challenging for a term like intersectionality to do the work that it needs to do.

An interesting example of stakeholder recognition of intersectionality is in the ongoing political campaign for president in the US. We’re witnessing a political campaign unlike any other that we’ve seen, at least in my lifetime, in which the traditional parameters of discourse have exploded and that is both good and bad. We’re seeing things being expressed on the right that haven’t been part of traditional politics in quite some time. At the same time we’re seeing things open up on the other end of the spectrum as well. Intersection-

6 *da Silva Pimentel v Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 27 September 2011.

ality has been mentioned in presidential debates and that is a new development. As with all things, there will always be contestation about how the concept will be defined and deployed. It remains to be seen whether the interventions will reflect conventional approaches to social problems or whether rhetoric about intersectionality will find substantive expression through specific policy.

Patricia Schulz: At the CEDAW Committee, many of the NGOs that send reports or come to our sessions provide us with excellent information on intersectionality. Many of the women who come to our sessions, including women with disabilities or women from other groups such as indigenous women, lesbian and transgender women, also explain their specific situation as being a woman and another “something”. We also see a number of governments aware of what intersectional discrimination is, although a large number are still not aware, or not sufficiently aware.

The main obstacles to the recognition of intersectionality are ignorance and stereotypes, and the “us versus them” mentality. There can be a refusal to open up to new views and to question one’s own practice, reflections, identity and values. It’s very uncomfortable to acknowledge that you may consciously or unconsciously have practised discrimination. In addition, I think the culture of some professional groups may also be an obstacle at times. For instance, we have seen judges who are often fairly reluctant to the idea that they should be building capacity. In my country, Switzerland, I have seen blatant cases of stereotyping by judges and some judges are not aware of the existence of stereotyping as a form of discrimination or of intersectional discrimination, and their blindness to these types of discrimination contributes to their preservation. For me, there is a need to raise awareness of the nature and frequency of intersectional discrimination and of the “us versus them” divide that is always present in each of us. We need to make it an individual and collective responsibility to be aware of our own mentality and the harm we can cause.

Equal Rights Trust: Some, such as Joanne Conaghan, argue that intersectional discrimination cannot be addressed by law because its complexity and focus on individual rather than group identity do not easily fit within prevailing models of non-discrimination law. In your view, is law able to address the problem of intersectional discrimination?

Patricia Schulz: I think the law *can* address the problem of intersectional discrimination but under certain conditions. Trying to address issues of economic and social justice in the language of the law is no easy task. Having to use the language of the law and the avenues that the law foresees brings a reduction of the complexity of the reality of discrimination. Intersectionality allows us to more easily recognise that a person is a composite of many aspects and identities, etc. This recognition reintroduces the complexity that the law tends to reduce.

If you design appropriate anti-discrimination legislation and imbue the institutions applying this legislation with an awareness of intersectional discrimination and of the dynamics be-

tween the various components of discriminatory treatment, there is no reason why the law cannot deal with intersectional discrimination. After all, it deals with other very complex issues. If you also review the organisation, the structure, and the mandates of the courts and the other institutions (the ombudspersons, the national human rights institutions, various commissions and committees, etc., that deal with human rights), to include intersectional discrimination, you can address intersectional discrimination in a competent way.

Kimberlé Crenshaw: Certainly there have been challenges in mobilising the law to address intersectional forms of discrimination but I would also resist analysis that over determines what the law can and cannot do. What the law has done does not exhaust its possibilities. One could have said a hundred years ago in the US that law could not fundamentally transform a white supremacist society because group identity did not fit within prevailing models of discrimination, at least not until that point in history. Yet, we know now that one of the most significant conceptual revolutions to happen in the twentieth century was a shift within law between an institution which more or less insulated and reproduced white supremacy. And it did so by for grounding notions of group harm and remediation. We can therefore never completely conclude what the law cannot do.

Of course it is clearly true that complexity is challenging for law, however, I would point out that the more significant problem is not complex *per se* but how it interacts with power. In my writing, I point out that white males are complex identities, particularly when they are challenging affirmative action and equal protection remedies.⁷ White male plaintiffs have challenged programmes arguing that in providing opportunities to white women and Black men they are discriminating against white men. It's a similar argument, although from a position of privilege, to the argument Black women have made. But courts, to my knowledge, have never said to white male plaintiffs "you can't make that claim because whites who are women are not being disadvantaged and men who are Black are not being discriminated against", which is essentially what has been said to Black women. White men start with a presumption of power within whatever regime, and Black women start without that. So, I think the question about what the law can do is indeed an important one but I think it's more important to talk about how the law insulates power and privilege rather than how it disassembles when dealing with complexity.

Equal Rights Trust: In your work, have you encountered any jurisdictions where law or policy encompasses discrimination and inequalities based on an intersection of characteristics? What lessons can be learned from these jurisdictions?

Patricia Schulz: In my work, I don't think I have seen the "model" country, even among the gender equality champions of northern Europe. We certainly see a number of countries that are moving in the right direction and where there is a clear recognition of intersectional dis-

7 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.

crimination in the definition of discrimination. These countries try to deal with intersectional forms of discrimination in an efficient manner and I think we can learn a lot from them by examining how the combination of comprehensive anti-discrimination laws and action help overcome intersectional discrimination. These countries combine a recognition of the individual person's right to be protected against discrimination including multiple, intersecting discriminations, with taking action through affirmative action plans and legislation. Affirmative action has made us think about the connection between individual rights and collective rights. Intersectional discrimination goes a step further, considering multiple characteristics, intersecting identities and their dynamics.

Kimberlé Crenshaw: I wouldn't say it's a jurisdictional question, but rather there are some issues and types of cases where courts have been more receptive to the reality of intersectionality than others. Early on in the development of sexual harassment law, many of the first cases of sexual harassment were actually Black women plaintiffs who were challenging race and gender harassment in the workforce, but the courts tended only to pick up on the gender-based aspects of that harassment. So first of all, while intersectional vulnerabilities sometimes travel under the singular frame of gender discrimination, the dynamics underlying discrimination reflect vulnerability on the basis of both race and gender.

Second, courts have said that evidence of race bias should be analysed together with gender bias in some cases. The current challenge is determining how to go about doing this, and that's where there is difficulty in showing how the combination of the two actually makes a difference in the court's jurisprudence. There are some cases that have successfully done this. For example, in *Lam v University of Hawai'i*,⁸ a court rejected the defendant's effort to defend a law suit brought by a woman of colour by effectively separating the plaintiff's race and gender into two distinct claims. Beyond I think that, as in both the development of feminist anti-discrimination law and race-based anti-discrimination law, the more important point of departure is how the culture and advocacy campaigns conceptualise the problem of discrimination. Until we're able to think of racism in its full gendered dimension within our advocacy structures, it should not be surprising that law will not get far ahead of the way we, in our various advocacy modes, actually talk about these issues.

Equal Rights Trust: In 2000, the Committee on the Elimination of Racial Discrimination adopted a recommendation recognising the special impact of some forms of racial discrimination on women, and multiple discrimination is referred to in the Convention on the Rights of Persons with Disabilities. Have these recognitions of intersectional discrimination led to changes in how treaty bodies approach discrimination?

Patricia Schulz: The UN treaty bodies are now more aware of the reality and impact of intersectional discrimination. I think that they share in the idea that it is not just an addition of grounds of discrimination, and that they see the dynamics of the various grounds in opera-

8 *Lam v University of Hawai'i* 40 F.3d 1551 (9th Circ. 1994).

tion. They realise that by measuring the violations of human rights caused by intersectional discrimination, you can evaluate the impact of intersectional discrimination.

The treaty bodies try to have a coherent approach and to follow each other's work as much as possible. However, the nature of treaty bodies means that unfortunately most of the time, the members of the CEDAW Committee cannot meet with the members from other treaty bodies to discuss and further our thinking. Treaty bodies are not like a court system with judges sitting every day in chamber. Treaty body members are experts who come to Geneva for their sessions a few weeks per year, and apart from that they have other jobs and commitments. So the bodies try to generate collective evolution through their writing. I think that there is now more and more recognition of intersectionality and intersectional discrimination expressed by treaty bodies in their communications, in their inquiry reports and in their concluding observations and recommendations to states. In addition to the Committee on the Elimination of Racial Discrimination, other treaty bodies have dealt with intersectional discrimination in their General Recommendations. This is certainly the case for the CEDAW Committee, in its General Recommendations No. 28 (on core obligations of state parties),⁹ No. 30 (women in conflict, post-conflict and transition situations),¹⁰ No. 32 (gender dimensions of asylum, refugee status and statelessness),¹¹ and No. 34 (rural women).¹²

Kimberlé Crenshaw: I think that now is an important time to conceptualise and broaden how each form of discrimination has been framed. This question has been, to date, put to advocates, lawyers and individuals who have been struggling to have multiple forms of discrimination recognised. There have been many questions about what intersectionality does and does not do, both within law and within academic circles. My answer is that we learn what intersectionality does and does not do by asking those who are actually using it, by those who have utilised openings to make certain things possible that might not have been possible prior to the broadening of the conception of discrimination.

Equal Rights Trust: In your view, how important is the recognition of intersectionality to ensuring equality? What other factors beyond intersectionality need to be addressed?

Kimberlé Crenshaw: Some of the work that the African American Policy Forum and the Center for Intersectionality and Social Policy Studies have been doing together reveals how viewing

9 Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010.

10 CEDAW Committee, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 1 November 2013.

11 CEDAW Committee, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, UN Doc. CEDAW/C/GC/32, 14 November 2014.

12 CEDAW Committee, *General Recommendation No. 34, Rights of rural women*, UN Doc. CEDAW/C/GC/34, 4 March 2016.

social problems from an intersectional lens can be a critical point of departure in developing more robust advocacy against social injustice. For example, we have been working on the sexual abuse of women of colour by police officers which presents a classic case of intersectional vulnerability. Just this past year, for example, Daniel Holtzclaw, a police officer in Oklahoma, was accused of sexually assaulting 13 Black women in Oklahoma City. When we consider which women were more likely to be subject to state sanctioned violence, it is clear that each element of social marginality contributes to their vulnerability. Women who are racially stereotyped, socially marginal, and economically powerless, women who have been involved in the criminal justice system, women who may be homeless, women connected with the commercial sex industry, women who are facing disabilities or those who may be chemically dependent – all face heightened risks of abuse when they interact with abusive officers emboldened by the power of the badge. Holtzclaw is not alone in the US and likely not alone around the world. Acknowledging these intersectional vulnerabilities allows us to see state-sanctioned violence beyond the more familiar circumstance of Black bodies being beaten or shot by police, or to see that gender-based violence is not exclusively a private injury occurring between men and women. Intersectionality is a frame that prompts us to ask what falls between movements and what happens when these different systems of power and oppression overlap. But beyond visibility must be accountability. The need for greater accountability prompts us to think upstream about the individuals and institutions that must be held responsible for developing a practice that is deeper and more responsive to multiple and overlapping forms of discrimination. This is not simply a conceptual challenge but a political one. What are the levers that are available to push if we are to move beyond the rhetoric of acknowledging intersectional vulnerability to actually doing something about it? When we talk about intersectionality, we're talking about people who are marginal within the movements that represent them. There are power contestations that happen both within groups and also between them. This matrix of power must be navigated with the awareness that there are both moments of coalition between and among groups and that this means that we may sometimes act in concert and sometimes be in conflict at the same time.

Patricia Schulz: The awareness of intersectionality is a step in the right direction towards substantive equality. It takes us beyond just formal equality, having the same laws for women and men, to laws that will help overcome material, substantive inequality because they are better able to include reality. To take this step as a whole legal and political system, you need to raise awareness, to train multiple actors in the political and justice systems, to train law enforcement personnel and many other stakeholders such as educators, health personnel, social services and employers. It's definitely not something that happens overnight, but it's an in depth process of realisation and respect for what makes us diverse as human beings. We need to learn to respect and appreciate diversity and difference.

Among other factors to be addressed, I would include access to justice more broadly. Can you go to court and are the courts efficient, accountable, are their personnel well trained, are the judges corrupt? Do people know their rights? Is there legal aid if you don't have the financial means to pay for a lawyer? In short, is there good governance in the justice system? As I previously mentioned, stereotyping is another big issue; we see gender stereotypes in action

all the time, including by judges. Gender stereotyping in general and judicial gender stereotyping are discriminatory and deny the lived reality of people, whereas the recognition of intersectionality is the recognition of the lived reality of people, as much as the law manages to translate and include reality in its abstract concepts.

My last point is that even if intersectionality is adequately addressed in a country, in its legal system and its institutions, even if it's a clear concept and well applied, it will not replace political action or collective action outside the strict constraints of legal language and norms. So I see a need for a combination of elements, using intersectionality in the courts and all of the bodies tasked with developing and implementing the law, and also using it outside this context as an instrument in political discourse to make visible what often remains hidden – the way in which domination occurs and the way in which people's rights are violated.

TESTIMONY

“Personally, as a Rohingya woman, I feel that I have been subject to greater discrimination than if I were a Rohingya man or if I were a non-Rohingya woman. It is hard to describe this discrimination because it’s not visible or easily measurable. I can just *feel* it.”

Wai Wai Nu



Layers of Marginalisation: Life for Rohingya Women

Testimony from Myanmar

Rohingya are an ethno-religious minority from Rakhine state in Myanmar. Having been effectively stripped of their citizenship and made stateless through a Citizenship Law passed in 1982, they have faced decades of severe discrimination and persecution. They face restrictions on their rights to travel, to marry and have a family and in their access to education and healthcare. Many are also living in internment camps, subject to forced labour and/or facing extortion. As the country has been undergoing reform, the situation for Rohingya has worsened, and they face widespread and systematic violence. Many have fled, undertaking a perilous journey to other countries. Those that survive this, often face insurmountable difficulties being recognised and resettled in third countries due to their lack of citizenship status.

The Equal Rights Trust spoke with Wai Wai Nu, a former political prisoner who is now working as an activist to advance human rights and combat the discrimination faced by the Rohingya community. She spoke about the severe discrimination faced by Rohingya in Myanmar, the challenges facing women in Myanmar following 60 years of military rule, and how being both Rohingya and a woman means she, and other Rohingya women, face unique and intersecting discrimination.

My name is Wai Wai Nu and I am a 29-year-old Rohingya woman. I was born in Rakhine state in the western part of Burma and I grew up in Rangoon.

In 2005, when I was 18, my family and I were sentenced to 17 years in prison – five years under the National Emergency Security Act and 10 years under the Citizenship Act. Officially, we were charged as my father had moved us to Rangoon without a family registration form and had obtained a national security card under a fake name. However, my family and I believe that there was a hidden agenda which led to our imprisonment. Before we were imprisoned, my father had joined with the opposition leader Daw Aung San Suu Kyi and became a member of the Committee Representing People’s Parliament (CRPP). The CRPP is an opposition group which emerged after the 1990 election, when the military government refused to transfer power to the winning parties. After the election, the CRPP called on the military government to transfer

power and allow the winning parties to constitute the parliament and my father was involved in this ongoing work. At first, only my father was arrested and then, two months after he had been in prison, they came to our family home and arrested everyone. We think that they only did this because we are Rohingya and that they put the whole family in prison to teach my dad a lesson about speaking up as a Rohingya and as a member of the opposition. My imprisonment was the result of my being both Rohingya and the daughter of a political activist.

I find it very hard to look back to my time in prison, the conditions were difficult and it is hard to relive them. The prison was in Rangoon and it is one of the most notorious prisons in Asia. There were many mental and physical challenges, and difficulties concerning how the prison authorities treated prisoners. All of my experiences in prison – the conditions, being put there without a fair trial or an appeal, meeting other women who had encountered similar problems, the prison system – all of these experiences and the courage it took to meet them led to me becoming a human rights activist and founder of Women Peace Network – Arakan, where I work with other groups to promote human rights and tolerance. As a human rights activist, I believe in the universality of human rights and I want to promote the advancement of human rights around the world. However, I work for my own community, the Rohingya community, as well.

I think that Rohingya women face different layers of discrimination and marginalisation. All women in Burma face various forms of discrimination. As Burma is a developing country that was ruled by the military for 60 years, women here face a much more difficult situation than women in other parts of the world. Women face discrimination in many areas of their life, including in leadership roles. Had I not founded Women Peace Network – Arakan and instead joined a male-led group or any other civil society organisation, where the majority of the leadership are men, it would have been difficult to be recognised as a capable woman or to take a leadership role. That is a challenge that many women face in this country, just because they are women. Many women also face discrimination and violence in their own homes. The discrimination that women face can often be worse depending on the place that they are living, their status, their ethnicity and their religion. If you are from a highly marginalised ethnic group then you will encounter far more discrimination in terms of the lack of recognition that the government gives to you, and in terms of them talking to you or representing you.

Rohingya experience terrible discrimination which has led to the indescribable situation that they are currently facing in Burma. During my lifetime, the view of the government has



Wai Wai Nu

changed towards Rohingya and is now much, much worse. When I was young, in the late 1980s and the early 1990s, the Rohingya community were equal, and they were regarded as citizens of this country and people of this country. In my father's time, he could be a public servant, he got his degree certificate, he could practice his profession and be a teacher at the government school. But after 1992, discriminatory restrictions on the livelihoods of Rohingya began. At this point, although things got worse, the government never claimed that Rohingya were illegal immigrants or labelled them as Bengali or as foreigners. However, after the political change in 2010, our situation deteriorated as the government started to use the rhetoric that Rohingya are illegal Bengali's and not from Burma. Rohingya were then excluded from so many areas of life.

This change can be described in one word for Rohingya – “hell”. Since then there have been no positive changes for the Rohingya community, and in fact, the government has stripped all remaining fundamental rights from Rohingya in this country. The government discriminates against, and persecutes, all Rohingya and does very little to protect them. The government is taking away the right to citizenship from Rohingya, including from women and their children, and taking away their access to education, healthcare and jobs and their freedom of movement. This discrimination has caused thousands of Rohingya to flee from the country, with many others being put in jail arbitrarily and many have been killed. Finally, the government took away the rights of Rohingya to have a registration card. This has caused the current situation we are seeing now, where many Rohingya have been left stateless and living in confinement. There are 150,000 Rohingya living in camps in Burma.

When I came out of prison I faced many barriers because I was Rohingya and because my father had been involved in the opposition. By way of example, I had to struggle to obtain my degree certificate. Although I had finished my university education, the university would not issue me a certificate and I had to fight to be awarded my certificate. I won the fight and have the certificate now. But even today, I still cannot be a lawyer because of my identity as Rohingya. I think this helps to illustrate the level of institutional discrimination Rohingya face.

In addition to the discrimination we face as Rohingya, Rohingya women face some additional forms of discrimination in society and in the community. The impact of the lack of security for Rohingya is particularly acute for Rohingya women. Not only does the government not intervene to protect Rohingya women, much of the sexual violence comes from the security forces themselves. Not just when the women go outside their home, but even when they are at home; security forces can come into your home, rape you, abuse you and torture you. Women in camps also face security risks. This does not happen to other women. There is also the systematic discrimination of imposing restrictive and discriminatory policies on Rohingya women, such as restrictions on the number of children that Rohingya women may have and restrictions on their ability to marry. If a Rohingya woman wants to get married, she has to get permission from the town administrators. If a Rohingya woman has more than two children, she may have to pay a fine or go to prison and the children may not be included in the family registration list. The government also imposes discriminatory birth control policies. So there is certain specific and



systematic discrimination that is directed towards Rohingya women in Myanmar by the government. Many of these laws and policies have been enacted over the past two decades. You cannot imagine this situation occurring in most other parts of the world.

Personally, as a Rohingya woman, I feel that I have been subject to greater discrimination

than if I were a Rohingya man or if I were a non-Rohingya woman. It is hard to describe this discrimination because it's not visible or easily measurable. I can just *feel* it. I feel that my identity as a Rohingya woman has meant I have been restricted in my ability to live the life that I want to. This is true of my professional life, family life, social life and political life.

One of the things I often see is that, rather than acknowledging and addressing the main cause of the problems faced by Rohingya women and women more broadly, the common reaction is to blame women themselves, or to see the disadvantages faced by Rohingya women as being a problem within the Rohingya community for which the community itself is to blame. The government as well as government-led scholars blame the Rohingya community as a whole and particularly the religious leaders, saying we should empower and educate Rohingya women. However, they say this simply to avoid responsibility and to avoid addressing the root causes of the problem. They blame the community for not being educated. They forget, or pretend to forget, that because of government restrictions, Rohingya children are not able to be educated and may be illiterate. All women should be educated and be able to study and go to school, but their lack of opportunities to do so should not be used to excuse discrimination against them or as an excuse to hide a political agenda.

The persecution of Rohingya is a political agenda; the military-led government is denying the fundamental rights of Rohingya in this country and using Rohingya as a scapegoat to benefit politically. I think that what is allowing this discrimination and persecution to occur is a lack of information. Rohingya have been segregated from mainstream Myanmar and marginalised by the media. The corruption of the governmental, judicial and administrative bodies in the country also contributes to this discrimination. There needs to be political dialogue and the restoration of peace and justice through fundamental rights.

The government has the power to change how Rohingya women, and the Rohingya community more broadly, are treated. They have the power to abolish all discriminatory policies and

they should grant Rohingya citizenship rights and dignity. As the National League for Democracy begins the process of taking control of parliament and the government, I hope it will take some initiatives towards restoring justice and peace, and grant our basic rights as our country's people. There is also a lot that the international community could do to make that possible. They could hold the government accountable for their actions against Rohingya by using the media, talking with the government and by showing solidarity with Rohingya. I think that we also need to be careful when we talk about Rohingya as stateless. Originally, the Rohingya were an indigenous group in this country, they enjoyed full citizenship and equal rights with all other Burmese citizens and ethnic groups. So when people describe Rohingya as stateless, I think that can sometimes lead to a misunderstanding, giving the opportunity to those who are trying to deny the rights of Rohingya to say that we are not from Burma. It allows the government to avoid taking responsibility to address the problems and does not hold them accountable. The persecution of Rohingya creates statelessness and when we talk about stateless Rohingya it can create more confusion.

Although I enjoy my role as a human rights activist, I feel somewhat forced into it by my position as a Rohingya woman and because of the injustices I face in my life. I feel I need to stand up for my community because I know my community and I know what the conditions are like in my country. I never thought I would need to become a human rights activist or politician. Sometimes I wish that I could be a free, young woman and pursue a free life with less pressure. If I were not a Rohingya woman and if I could live a different life, I would be a teacher at the university, a lawyer, a judge or a diplomat. These were my dreams when I was young when I, and my community, didn't face this much discrimination.

“The decision of the Court of Appeal in Bauer is problematic from an equality perspective. By adopting an equal burden analysis, the traditional focus in pre-employment examination claims has shifted from the necessity of a test to its potentially discriminatory impact (...)

The difficulty of the Court of Appeal’s ruling is that it applies at the initial stage of enquiry: where gendered fitness norms are applied equally within gendered groups no case of discrimination can be made. Whether such a test is justifiable in and of itself is of no concern. And whilst this may, in some cases, lead to better representation of women, it is also laden with difficulties, with the potential to perpetuate, rather than correct, inequality.”

Sam Barnes

Physical Fitness and Gender Discrimination: Entrenching Stereotypes

Case Note: *Bauer v Lynch*, No. 14-2323 (4th Cir. 2016)

Sam Barnes¹

The decision of the Court of Appeal for the Fourth Circuit in *Bauer* represents the latest solution to a complex issue in equality law: how best to accommodate physical difference. Overturning a judgment of the District Court, the Court of Appeal found that where men and women are held to comparable standards of fitness, no Title VII² discrimination claim arises. In this author's analysis, the approach of the Court operates against countervailing trends in American jurisprudence: serving to entrench, rather than remove, discriminatory practices in the field of employment. Where a particular standard of physical fitness is required, that standard ought to be applied equally irrespective of age, sex or race. Where a level of fitness is required as a business necessity, any test of physical capacity ought to be tailored towards the specific demands of the job.

1. Facts

To become a special agent with the Federal Bureau of Investigation (FBI), candidates are required to undergo an intensive 22-week training programme at the FBI Training Academy in Quantico, Virginia. Graduation from the Academy is dependent on the successful completion of a physical fitness test (PFT) consisting of timed runs, push-ups and other markers of physical performance. Several cases have been brought to American courts challenging PFTs on account of their disparate impact on women.³ The FBI sought to address this problem by normalising testing standards between genders. Following an extensive study, minimum requirements were identified and implemented. As accepted by the Court, passing rates between men and women were statistically insignificant under the new test.

1 Sam Barnes is a Legal Research Intern at the Equal Rights Trust. The comment in this note is the author's own and does not necessarily represent the views of the Trust.

2 Specifically, *Bauer* alleged that the Federal Bureau of Intelligence's gender-normed physical fitness test (PFT) contravened the prohibition on discrimination contained in §2000e-16(a) and §2000e-2(1) of the Civil Rights Act of 1964, (Title VII) 78 Stat. 253, 42 U. S. C..

3 See Hollar, D., Physical Ability Tests and Title VII, *The University of Chicago Law Review*, Vol. 67, No. 3, 2000, pp. 777–803.

FBI Minimum Physical Fitness Standards		
Event	Men	Women
Sit-ups	38	35
300-Metre Sprint	52.4 Seconds	64.9 Seconds
Push-ups	30	14
1.5 Mile Sprint	12 Minutes, 42 Seconds	13 Minutes, 59 Seconds

Despite passing the initial fitness screening required in order to access the Academy training programme, in July 2009, Jay Bauer was forced to resign his position having failed to meet the 30 push-up minimum requirement. He filed a civil action against the FBI, arguing that the gender-normed fitness test contravened §2000e-16(a)⁴ and §2000e-2(1) of the Civil Rights Act 1964. Under §2000e-2(l) different cut-off scores in employment related tests on the basis of race, colour, religion, sex, or national origin are barred. Under §2000e-16(a), discrimination by federal employees on the grounds of race, colour, religion, sex, or national origin is similarly prohibited.⁵ The District Court granted summary judgment in Bauer's favour, and the case was appealed to the Court of Appeal for the Fourth Circuit.

2. Decision

According to *Manhart*,⁶ "facial" sex discrimination will be apparent "where the evidence shows treatment of a person in a manner which, but for that person's sex, would be different."⁷ Ascribing § 2000e-2(a)(1)⁸ its plain, unambiguous meaning, it was clear to the District Court that the differential fitness standards imposed on men and women on account of their sex were unlawful: there is no exception for innate physiological difference. Congress "was clearly aware of any such average physiological differences" but chose not to accommodate them.⁹

The Court of Appeal rejected this analysis. The "but for" test, set out in *Manhart*, does not address whether gender-normalised standards treat men differently from women. In *Gerdorn*,¹⁰ the Court of Appeal for the Ninth Circuit recognised that where "no significantly greater bur-

4 In the District Court, Bauer incorrectly relied upon § 2000e-2(a) which concerns discrimination in the private sector. The Court of Appeal, correctly applying §2000e-16(a) treated the two provisions as comparable "with the liability standards governing the former being applicable to the latter".

5 See above, note 2.

6 *City of Los Angeles, Dep't of Water & Power v Manhart*, 435 U.S. 702, 711 (1978).

7 *Ibid.*

8 See above, note 4.

9 *Bauer v Holder*, 25 F. Supp. 3d 842 (E.D. Va. 2014).

10 *Gerdorn v Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982).

den” was imposed on either sex, a higher maximum weight limit for men than for women could be justified. Likewise, decisions of the Supreme Court would support the view that gender-normed fitness tests may be compatible with Title VII. In *VMI*,¹¹ whilst stressing that generalisations could not be used to exclude female candidates from the Virginia Military Institute, the Supreme Court recognised that some differences between men and women “were real, not perceived” and could, therefore, “require accommodations”.

Of the few Title VII cases directly addressing the issue of gender-normed fitness standards, none have found a difference in treatment unlawful. In *Powell*,¹² the District Court was required to assess whether an FBI physical fitness test unlawfully discriminated against male applicants. Recognising that physiological differences result in males and females performing differently in PFTs, the Court concluded it did not. The PFT in question merely took account of existing biological differences. In *Hale*,¹³ the Equal Employment Opportunity Commission made a similar finding. Hale complained that the FBI “held females to less rigorous physical requirements than males”, violating the prohibition on sex discrimination. The administrative court judge found that distinctions based on physical differences between men and women are not necessarily discriminatory in nature.

Having analysed the above case law, the Court of Appeal vacated the previous judgment and remanded the case back to the District Court. According to the Court of Appeal, men and women “are not physiologically the same” for the purposes of physical fitness tests. Whether a PFT discriminates, therefore, will depend on whether it requires men and women to demonstrate different levels of fitness. Accordingly, gendered fitness standards will not contravene Title VII provided that “an equal burden of compliance” is imposed on men and women “requiring the same level of physical fitness of each”. As the FBI test purported to meet this standard, the Court concluded that the District Court had erred in its disposition of Bauer’s motion for summary judgment.¹⁴

3. Comment

The decision of the Court of Appeal in *Bauer* is problematic from an equality perspective. By adopting an equal burden analysis, the traditional focus in pre-employment examination claims has shifted from the necessity of a test to its potentially discriminatory impact. Whilst this may, in some cases, increase female participation in certain fields of employment, there are inherent dangers with accepting biological difference as a legitimate ground for differential treatment. This note will concern itself with three: the risk of direct discrimination; the negative impact of sex-based generalisation; and the wide discriminatory ambit of physical fitness tests.

11 *United States v Virginia (“VMI”)*, 518 U.S. 515, 540 (1996).

12 *Powell v Reno*, No. 96-2743, 1997 U.S. Dist. LEXIS 24169 (D.D.C. July 24, 1999).

13 *Hale v Holder*, EEOC Dec. No. 570-2007-00423X (Sept. 20, 2010).

14 *Bauer v Lynch*, No. 14-2323, (4th Cir. 2016), pp. 25–6.

a. *Physical Fitness Tests*

Pre-employment exams are used by employers to determine whether a candidate can meet basic job requirements. Where it can be proven that a test has a disproportionate impact on members of a protected class, the legality of that test will be subject to review. If the claim concerns disparate treatment (as in *Bauer*), an employment test may be justified as a bona fide occupational qualification (BFOQ).¹⁵ If the test has a disparate impact on members of a protected class, it may be justified as a business necessity. These defences have been subject to different interpretations by American courts; however, both are materially concerned with the necessity of a test itself.¹⁶ In the absence of a valid defence, a test must be removed or altered in order to remove its discriminatory impact. If, however, no group suffers harm, a case of discrimination cannot be made. The value of the test, from an equality perspective, is immaterial.

Two types of test have been developed by employers to evaluate physical ability. The first, known as a job simulation test,¹⁷ examines a prospective employee's ability to complete tasks that they would be required to carry out in the course of their job.¹⁸ The second, known as a physical fitness test, aims to assess an overall level of fitness. Tests of this nature are less focused on actual job tasks, requiring a candidate to demonstrate a high level of endurance or strength. The test is designed to determine whether a candidate is physically fit, which may be beneficial for the performance of some specific duties.¹⁹

In *Bauer* it was emphasised by counsel that the test was adopted in order to assess a general standard of fitness – it was not designed as a job simulation test.²⁰ Other tasks, required as part of the training programme, would measure applicants' ability to perform special agent functions. Whilst a high standard of physical fitness would support these functions, physical

15 Alternatively, disparate treatment may be justified where there is “a strong basis in evidence to believe it will be subject to disparate impact liability”. See *Ricci v DeStefano* 557 U.S. 557, 585 (2009). Under the bona fide occupational qualification (BFOQ) defence, a required job qualification must be reasonably necessary to the “essence of the business”. See, Manley, K., “The BFOQ Defence: Title VII’s Concession to Gender Discrimination”, *Duke Journal of Gender Law & Policy*, 2009, pp. 169–210.

16 Although this defence has garnered multiple interpretations (see above, note 3), recent case law would suggest circumscribing its application to those “minimum qualifications [required] for successful performance of the job”. See *Meditz v City of Newark*, No. 10-2442 (3d Cir. Sept. 28, 2011), citing a number of Supreme Court judgments. The same standard was adopted in *Lanning*, and tacitly approved by the Court of Appeal in *Bauer*. See *Lanning v Se. Pa. Transp. Auth.*, 181 F.3d 478 (3d Cir. 1999).

17 This type of test is also known as a physical ability/agility test.

18 Society for Human Resource Management Foundation, *Selection Assessment Methods: A Guide to Implementing Formal Assessments to Build a High-Quality Workforce*, 2005, p. 15, available at: https://www.shrm.org/about/foundation/research/documents/assessment_methods.pdf.

19 *Ibid.*, p. 12.

20 *Jay Bauer v Loretta Lynch, Oral Argument*, 15 September 2015, available at: <https://www.courtlistener.com/audio/13469/jay-bauer-v-loretta-lynch>.

fitness was a benefit in and of itself: candidates in good physical shape are less frequently injured and better prepared for training exercises.

The District Court, having already established that the PFT was facially discriminatory, sought to establish whether it could be justified as a BFOQ. The Court found it could not. Bauer's final (and failed) attempt to complete the test took place in the final week of the training programme. By that point his training had effectively concluded – he would graduate injury free. Regarding the general justification provided by counsel, the District Court noted that FBI officers are not required to undertake physical fitness tests once they have graduated from the academy. Although such tests are encouraged (albeit at a lower required passing rate than for Academy graduates), failure – either to undertake or successfully complete such a test – is inconsequential. The Court therefore concluded that the FBI had failed to link the PFT to any “qualifications that affect an employee's ability to do the job”.²¹

b. The Limits of “Equal Burden”

The decision of the Court of Appeal was ultimately concerned with gender parity. Wherever a minimum level of physical fitness or ability is required, certain groups will be more likely to pass the test, leading to a higher representation of those groups within the workforce. By accommodating biological differences, the field is equalised: men and women enjoy an equal prospect of success. There are, however, important limits to this line of reasoning:

i. Direct Discrimination

The most obvious problem with the Court of Appeal's approach is that it directly discriminates against male candidates. Men are held to a more onerous standard of fitness than women. When considering the serious doubt raised by the District Court as to the necessity of the PFT, this difference in treatment is difficult to justify. The FBI had decided against imposing the same fitness standards on serving FBI agents and other parts of the training programme would test applicant's abilities to perform actual job tasks. Without the PFT, men and women would graduate the academy with an equal rate of success, irrespective of their gender, and without the need to impose a more onerous standard on male applicants. Had the Court of Appeal decided in the alternative, it is likely that the test would have been abandoned – removing its discriminatory impact in whole. Instead, by accommodating biological difference, the necessity of the test becomes irrelevant. As long as men and women are held to comparable levels of fitness, differential treatment is justified.

Of course, not every case involving physical fitness testing will correspond to the facts of *Bauer*. Even the District Court seemed to recognise that in certain situations the adop-

21 As required under the BFOQ defence.

tion of differential fitness standards may be justified.²² If the physical fitness of different groups directly corresponds to an ability to perform a particular role, gender normalised testing may be permissible.²³ The difficulty of the PFTs is that they rarely correspond directly to job tasks. As such, they require a high degree of scrutiny, absent under an equal burden analysis.

Many of the arguments made in defence of gendered fitness tests centre on the need for equal representation between groups in professions where women have historically been excluded. But biological difference is distinct from other arguments of gender inclusivity. International human rights law permits (and even obliges) positive action measures²⁴ in order to accelerate *de facto* equality between men and women. However, such measures are temporal. Differences due to biological difference are permanent in nature.²⁵ Similarly, a reasonable accommodation approach, (adopted by the Canadian Court),²⁶ does not sit easily with gendered-fitness norms.²⁷ Reasonable accommodation is designed to meet the needs of a *particular* individual with a particular set of personal characteristics.²⁸ Unlike the present case, such an accommodation will not usually give rise to a separate claim of disparate treatment.²⁹

22 See above, note 9.

23 See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, Para 76. Here, gendered aerobic standards in fire-service testing were advocated by the Canadian Supreme Court. Where a minimum aerobic standard is necessary to perform a job safely, an employer should ask “whether members of all groups require the same minimum aerobic capacity” and if not, “to reflect that disparity in the employment qualifications”.

24 See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, 1979. Under Article 4(1) of CEDAW, “temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination”.

25 And thus prohibited. See *ibid.* Interestingly, the CEDAW Committee has recognised that in certain circumstances, biological differences may require the “*non-identical treatment of women and men*”. However, this is limited to measures aimed at protecting maternity. See the Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: On article 4, paragraph 1, on temporary special measures*, UN Doc. HRI/GEN/1/Rev.7, 2004, Para 8.

26 See above, note 23. On a number of occasions, the Court of Appeal justified its approach by reference to the need to “accommodate” women. Yet, even if a reasonable accommodation analysis was applied, many of the difficulties identified below, especially in relation to age discrimination, would still be present.

27 Outside of the Canadian context, few courts have recognised a duty to accommodate on the grounds of sex. See European Commission, *Reasonable Accommodation beyond Disability in Europe?*, 2013, available at: http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_beyond_disability_in_europe_en.pdf.

28 *Ibid.*, p. 39.

29 Hence, whilst it may be unreasonable to prevent an employer from having their employees work on Sundays due to the religious requirements of a particular staff member, it may be appropriate to accommodate that individual’s religious belief.

ii. Gender Stereotypes

When the issue of female representation is set aside, arguments made in support of an equal burden analysis lose their potency. Stereotypes and generalisations are salient in employment policies because they are utilised in order to discriminate between groups. Statistical evidence of difference, as a basis for differential treatment, has been rejected in a number of discrimination cases in Europe.³⁰ In *Lindorfer*,³¹ the Court of Justice of the European Union was required to determine whether a decision of the Court of First Instance breached the principle of non-discrimination by finding that the use of variable factors accounting for differences between the male and female life expectancy were objectively justified. The Court found that it had. In the opinion of Advocate General Jacobs, it was observed:

[D]iscrimination of the kind in issue involves ascribing to individuals average characteristics of a class to which they belong (...) What is objectionable (and thus prohibited) in such discrimination is the reliance on characteristics extrapolated from the class to the individual, as opposed to the use of characteristics which genuinely distinguish the individual from others and which may justify a difference in treatment.³²

Generalisations drawn from class characterisations (even where true) do little to evidence the ability of a particular member of that class to perform a specific task. If, as in *Bauer*, the necessity of an employment test itself is not sufficiently validated, whether individuals are held to comparatively equal standards is irrelevant. In accounting for biological difference, the use of such generalisations is justified. And this may have consequences beyond the realm of physical fitness.

Take the following example. The role of a flight attendant is one traditionally held by women. An airline introduces a maximum weight policy for airline staff. Under an ordinary claim of disparate treatment (where gendered standards were introduced), or disparate impact (where no gendered standards were introduced), the policy would fail for lack of proximity to actual job requirements. Under an equal burden test, however, a weight restriction bearing no relationship to actual job requirements could be adopted provided that the burden imposed was equally applied. In an area where men (even with equal selection policies) may be less inclined to apply, stereotyped roles such as the “skinny-female flight attendant” are entrenched, damaging long-term opportunities of gender equality even where a similar burden is placed on other groups. Equal burden, in this scenario, would contradict the established jurisprudence of the American Supreme Court,³³ who have consistently warned against the

30 See, for example, *X*, C-318/13, 3 September 2014.

31 *Lindorfer v Council of the European Union*, C-227/04, 11 September 2007.

32 *Ibid.*, 27 October 2005, Decision of the Advocate General, Para 59.

33 The Supreme Court has accepted the existence of height and weight disparities between men and women, rejecting both as a marker of physical capacity due to their discriminatory impact and lack of proximity to actual job requirements. *Dothard v Rawlinson*, 433 U.S. 321 (1977).

use of “generalisations” or “tendencies” as a means to justify discriminatory treatment on the grounds of sex³⁴ and have rejected the use of discriminatory gender stereotypes as a legitimate ground for disparate treatment.³⁵

iii. *Affected Groups*

One final issue, not yet discussed in this note, concerns the ambit of employment tests. Women are unlikely the only group adversely impacted by physical fitness requirements.³⁶ When the equal burden analysis is applied to other affected classes (such as older applicants), the difficulty of the *Bauer* judgment becomes clear. Although Title VII does not extend to discrimination on the grounds of age, a claim could be brought under the Age Discrimination in Employment Act (ADEA). It is important to note, under the ADEA, an employment practice that has a disparate impact on individuals of a particular age may be justified where it is “based on reasonable factors other than age”.³⁷ This is a lower threshold than the business necessity defence established under Title VII and could, in theory, be utilised to defend a claim of disparate impact age discrimination where gender-normed fitness standards are introduced. Alternatively, applying a biological difference model to age, employers would be required to impose a bi-partite test: one capable of accounting for both age and gender disparities. In *Bauer*, no such account was given.

Aside from the practical difficulties of designing an employment test that is sufficiently measured to provide for all potentially affected groups,³⁸ there is a final difficulty with the *Bauer* decision. As discussed above, where a test is not necessary, an adverse impact or treatment claim will usually result in the removal (or modification) of that test in order to eliminate its discriminatory impact. Under an equal burden approach, however, any employment policy would only need to be modified to the extent that a statistical discrepancy within groups is accounted for. Other groups, similarly affected, would be required to bring separate claims in order to remove the discriminatory standard. When considering the intersection between age and gender in physical fitness, this seems unnecessarily burdensome – perpetuating inequality where a test does not relate to actual job requirements.

34 See above, note 11.

35 Even where the stereotype in question is “unquestionably true”. See above, note 6.

36 Courts in Europe have accepted the potential limitations imposed by age on physical ability and fitness. See, *Colin Wolf v Stadt Frankfurt am Main*, C-229/08, 12 January 2010.

37 Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1).

38 It is difficult to envisage any PFT sufficiently developed to withstand multiple disparate impact claims. Where biological difference is accounted for, a test may be required to impose multiple standards (a younger woman; an older man; etc.) The case becomes more interesting when applied to race. Researchers have noted a positive correlation between race and performance in certain sports. See, Bejan, A. and others, “The Evolution Of Speed In Athletics: Why The Fastest Runners Are Black And Swimmers White”, *International Journal of Design & Nature and Ecodynamics*, Vol. 5, 2010, pp. 199–211.

Conclusion

Although the case has been remitted back to the District Court, it seems unlikely, following the Court of Appeal's decision, that Bauer will be successful in his claim. The use of physical fitness tests will continue to prove controversial. Irrespective of the approach taken, in certain situations it is likely that some group will be adversely affected. The difficulty of the Court of Appeal's ruling is that it applies at the initial stage of enquiry: where gendered fitness norms are applied equally within gendered groups no case of discrimination can be made. Whether such a test is justifiable in and of itself is of no concern. And whilst this may, in some cases, lead to better representation of women, it also laden with difficulties, with the potential to perpetuate, rather than correct, inequality.

EDITORIAL

Intersectionality

ARTICLES

Jade Glenister

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Ben Smith

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Ivona Truscan and
Joanna Bourke-Martignoni

International Human Rights Law and Intersectional Discrimination

Siobhan Curran

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Shreya Atrey

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Johanne Bouchard and
Patrice Meyer-Bisch

Intersectionality and Interdependence of Human Rights: Same or Different?

INTERVIEW

Intersectionality in Promoting Equality

TESTIMONY

Layers of Marginalisation: Life for Rohingya Women

CASE NOTES

Sam Barnes

Physical Fitness and Gender Discrimination: Entrenching Stereotypes