



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.

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