Multiple Discrimination: How Law can Reflect Reality

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1. Introduction

Multiple discrimination is discrimination against one person on the basis of more than one ground. A black disabled woman may, for instance, experience discrimination on the grounds of her disability, her race and her gender. Consideration of this phenomenon and its implications for equality legislation is a necessary corollary of recognition that individuals have multiple identities. Clearly, people are multi-dimensional and so cannot be classified according to, or defined by, a single characteristic. Each of us has a gender, sexuality, age, ethnicity, etc. and no single aspect of our identity is necessarily more important than all the others. Any one of an individual’s attributes, or any combination of them, may, therefore, form the basis of discrimination. In spite of this truism, many models of anti-discrimination law deal with each ground of discrimination separately. The law thus conceives of potential claimants as the bearers of single characteristics and assumes that discriminators are simple creatures who will only base their discrimination on one ground at a time. Further, in recognising only a single aspect of a person’s identity, the law fails to reflect the fact that people sharing one protected status may differ in respect of their other characteristics. It operates on the premise that all people within a protected group are the same.

This mismatch between law and reality has had several undesirable consequences. Firstly, equality law frameworks fail to provide adequate protection to individual victims of multiple discrimination. Secondly, in failing to accommodate the reality of a person’s identity, such equality regimes indicate to the individual that her identity is not valued by society. This is clearly a consequence which should be avoided, if it is accepted that equality law is intended to protect human dignity. Thirdly, it has engendered an over-simplified, single-ground analysis of discrimination among policy makers. As a result, policies intended to tackle discrimination fail to conceive of the types of disadvantage which arise out of multiple discrimination. Finally, the single-ground focus of the law has been mirrored in civil society. The lack of legal protection has therefore led indirectly to a dearth of moral and practical support for victims of multiple discrimination.

This article will seek to elaborate on the inadequacies, identified above, of a system of discrimination law which denies the reality of multiple discrimination and will make practical recommendations as to how the imperative for change might best be met. The legislative framework in Great Britain, which, at the time of writing, is under intense scrutiny owing to government reform proposals, will serve as an illustration of the particular features of an equality law regime which require attention if they are to be rendered fit to address multiple discrimination.

The second part of this article will outline the different ways in which a person’s multiple characteristics can interact to form the basis
of discrimination and will examine whether single-ground legislation can provide redress for such discrimination. Part three will explore the mismatch between the law’s approach and the reality of human experience and its implications for human dignity. This article will then show that discrimination experienced on the basis of more than one ground can be both qualitatively and quantitatively different from the sum of discrimination on each of those grounds. This will serve to support the writer’s central argument, which is that multiple discrimination demands a specific response from the law, not only to improve access to justice for individuals, but so that policy makers (part four) and civil society (part five) are made aware of and equipped to tackle the specific implications of the multiple discrimination experience. Part six will present arguments which suggest that states are obliged to tackle multiple discrimination by international law. Finally, an overview of the features of the British legislative framework which render it unfit to address multiple discrimination (part seven) will precede a detailed analysis of how legislation might best be designed to do so (part eight).

2. Practicalities: Multiple discrimination and Claims under Single-Ground Legislation

Types of Multiple Discrimination

A person’s multiple identities may result in that person experiencing discrimination on one ground on one occasion and on another ground on a different occasion. While a lesbian may on one occasion be rejected for promotion because she is a woman, she may on a subsequent occasion be excluded from a social event because she is a lesbian. In such circumstances, the victim of discrimination will be able to compartmentalise her experience of discrimination into separate unlawful acts based on a single ground. Each could be considered separately in any legal proceedings.

A person may, as a result of her multi-dimensional identity, experience separate discriminatory acts in relation to different grounds, each of which contributes to the same less favourable treatment. This facet of multiple discrimination has been referred to alternatively as compound, cumulative or additive discrimination. Gay Moon illustrates this point by reference to the facts in Perera. In this case, a personal specification for a job contained several discriminatory requirements, each of which operated to exclude the claimant from being successful in his application for that position. While no single requirement would alone have made his application fail, each one of the discriminatory requirements which the candidate was unable to fulfil contributed to make it increasingly unlikely that he would be selected for the job. Again, though, it is possible to see that each ground could be analysed separately under the law.

Intersectional discrimination is the term widely used to describe situations in which two or more grounds operate inextricably as the basis of discrimination, such as, for example, where black women are refused promotion in an organisation in which white women and black men are promoted. While the possession of either attribute alone (that is, the disadvantaged gender or race) would not have led to the discrimination, it is the combination of race and gender which form the grounds of the less favourable treatment. A victim will not be able to show that, but for her race or gender, she would have been treated differently. In legal proceedings the grounds must, therefore, be dealt with together. Since it is intersectional discrimi-
nation which requires specific treatment under the law, the remainder of this article will focus largely on this facet of multiple discrimination.

Claims under Single-Ground Legislation

In Great Britain, the courts have ruled out the possibility of bringing a successful case of intersectional discrimination on the basis of the current legislative framework. In Bahl v The Law Society a woman claimed that she had been discriminated against both on the ground that she was Asian and on the ground that she was a woman.4 The Court of Appeal decided that each ground must be separately considered by the tribunal and a judgment made in respect of each. The claimant’s case failed because she could not show that any aspects of her treatment related to only one ground.

Since this judgment, an applicant can bring a case in respect of intersectional discrimination by focusing on a sole ground, choosing the ground in respect of which her case is strongest, or by claiming alternate or cumulative grounds. This situation is, however, unsatisfactory. Where two or more grounds have in fact operated inextricably, so that the person would not have been discriminated against had she not had each one of the protected characteristics, being forced in law to address each ground separately will necessarily weaken a victim’s case. Even if a case concentrating on just one of multiple grounds were successful, such a result would be unsatisfactory to the victim because it would fail to acknowledge the reality of the victim’s experience and the extent of the injustice suffered. It is inconsistent with the dignity of the whole individual to exclude from protection treatment that the individual as a whole has received.5

The current state of the British law poses the risk that discrimination will go unchallenged and that victims will remain uncompensated. Yet intersectional discrimination is not a peculiar type of act which, as a matter of principle, should remain outside the scope of equality legislation. The black disabled victim of intersectional discrimination will be thwarted in a claim of race discrimination by the existence of black able-bodied comparators and in a claim relating to disability by the existence of white disabled comparators who have not suffered the same treatment. This does not, though, show that the defendant does not discriminate against black or disabled people, it merely shows that she does not do so in all circumstances.6

Further, the occurrence of multiple discrimination is not a rare phenomenon. Jurisdictions which have legislation providing for situations of multiple discrimination have monitored the number of cases being brought on multiple grounds. The Ontario Human Rights Commission has announced that 48% of discrimination cases brought between 1997 and 2000 related to multiple discrimination.7 In 2006, 21% of cases brought under the Irish Employment Equality Act and almost 30% of cases brought under the Equal Status Act were brought in relation to more than one ground.8 These figures show that this is a significant matter which all jurisdictions should equip their legal systems to address.

Despite the deficiencies of the current British legislation in this respect, the government has stated in its reform proposals that it does not have evidence that people are losing or failing to bring cases in relation to multiple discrimination and has indicated that this is a matter largely of academic interest.9 Next then, we will consider why “ac-
academic commentators” are concerned that multiple discrimination should be properly addressed by anti-discrimination law.

3. Conceptual Problems: Multiple Discrimination and Human Dignity

The Joint Equality and Human Rights Forum, an organisation which represents the human rights and equality bodies of Britain, Ireland and Northern Ireland, commissioned a study, “Rethinking Identity”, to explore the implications of multiple identity. One of its most important conclusions is that identity is important to “people’s positive sense of self”. Respect for people’s sense of their own identity is, therefore, integral to respect for their dignity.

One of the aims of equality legislation is to protect human dignity. If, however, discrimination law imposes its own notion of identity on individuals, it will undermine the very values it is intended to uphold. There are two ways in which discrimination law can do so. Firstly, it requires a victim to place herself, in her legal pleadings, within a category (black/Asian/woman/man). If the available categories do not reflect the claimant’s perception of her identity, she will be required to describe herself in terms with which she does not identify. The legislator thus indicates that her true identity is not valued by society, as it is not worthy of protection against discrimination. Secondly, discrimination law which categorises those it seeks to protect will encourage policy makers to conceive of the individuals they serve in terms of the categories defined by the law. The resulting policies, designed by reference to artificial notions of identity, are likely to exert pressure upon their subjects to live according to those notions. People will try and fit into the categories which have influenced policy-design in order to gain the benefit of those policies. If discrimination law is susceptible to thus influence people’s sense of self, it should be designed so that the notions of identity it protects reflect human experience. Equality legal regimes which categorise identity and require each protected characteristic to be dealt with in isolation will, though, necessarily fail to reflect peoples’ sense of self. This is because they are based on an assumption that protected groups are objectively identifiable, mutually exclusive and internally homogeneous. A failure to address intersectional discrimination is, in fact, only one symptom of this flawed approach. It is valuable to consider here the broader sense in which a categorical approach to identity is divorced from human experience, because this will influence discussions as to how multiple discrimination should be addressed by the law.

The categorisation of identity implicit in the current structure of equality legislation reflects society’s construction of identity, not the individual’s experience. A participant in Rethinking Identity told researchers, “I don’t see myself as a person with a disability. It’s only the other person who sees me as that”. The law effectively labels and objectifies people and encourages society to do so also. This is belittling for the individual and damaging to human dignity. On this basis, it is the system of categorisation itself which should be challenged, if the law is not to undermine human dignity.

Even if a system of categorisation were accepted as an undesirable but practical necessity, the labels commonly available under equality law are inappropriate. The British law’s approach is based on an assumption that groups can be defined according to objective characteristics. This is by no means uncontroversial:
“intersectionality as a tool of feminist analysis today acknowledges that identity composition reflects the broader power formations in society.”

This mismatch between the available labels and individual experience is even greater for victims of multiple discrimination. In selecting mutually exclusive categories to define groups, equality law serves to exaggerate differences between groups and ignores differences within groups. This does not reflect an individual’s sense of her own complex identity for several reasons. Firstly, there is no clear dividing line between grounds. Thus, for example, ethnicity is “intimately bound up with religion”. Secondly, the grounds are not, in fact, mutually exclusive. People are not either disabled or gay, but can be both. Individuals do not consider themselves as overwhelmingly defined by their gender or their race, but as a complete whole. Finally, an approach which renders differences within groups invisible has meant that the grounds are “defined as if they have fixed unchanging essences.”

People within a group are not, though, all the same. Thus, even where people share the same “objective” multiple identities, the possession of the characteristics which make up that identity will not mean the same to every person within the group. For some people, one identity can feature more strongly than another identity or other identities. People may emphasise one aspect of their identity in one context and another aspect in another context. Here again then we see that even if it were possible to provide labels which are more nuanced and so applicable in theory, the practice of labelling itself would remain objectionable.

A failure to recognise multiple discrimination is thus only one way in which categorical equality law regimes are divorced from the lived experience of identity. If equality law is to be fit for purpose it must seek to achieve a certain amount of fluidity in its response to individual experiences of discrimination.

4. The Specificity of the Multiple Discrimination Experience and Policy Responses

The intersectional discrimination experience can be different from other types of discrimination in three ways. Firstly, discrimination which is known to affect a disadvantaged group may have causes and consequences which are different in respect of a subset within that group. More significantly, subsets may experience discrimination which does not touch the wider group. Further, the disadvantage experienced by subsets may be greater than that experienced by the group as a whole. Each of these points has implications for policy makers, which will be addressed here.

If policy makers are not encouraged to look at the multidimensional aspects of discrimination, their understanding of the discrimination suffered will be very simplistic. Crenshaw, referring specifically to the interrelation between race and gender, has argued that “neither the gender aspects of racial discrimination nor the racial aspects of gender discrimination are fully comprehended within human rights discourses”. A failure to acknowledge the phenomenon of multiple discrimination in the law has overemphasised the homogeneity of groups. This means that policies aimed at improving the situation of a group are designed by reference to the needs of the most dominant members of that group, that is, those who are in a position to represent the group and define its interests. Such policies fail to conceive of, and thus fail to address, the specific needs of subsets within the group. If, for example,
a link is identified between disadvantage in the labour market and gender, but analysis goes no further than this, the compound disadvantage experienced by Asian women or black women, will remain invisible. Where policy makers are unaware of the true complexities of the problem, the effectiveness of remedial efforts will be limited. Any measure aimed at addressing the disadvantage of the group as a whole, without distinction, will be inappropriate to improve the situation of the whole group, because the causes of the disadvantage will not be the same for all within its parameters. Further, such efforts may only be of assistance to the “dominant” members of a disadvantaged group and so not target those who are the most disadvantaged within the disadvantaged. Ashiagbor notes that though the increase in rights for part time workers has had a positive impact upon women’s experiences in the labour market, it is of more benefit to white women than to black women, since black women are more likely than white women to work full time.22

An intersectional approach to analysing discrimination not only allows policy makers to identify new aspects (gender, racial etc.) of discrimination which has already been recognised, but also reveals types of discrimination which would otherwise remain invisible.23 If policy makers fail to look at multidimensional aspects of discrimination, they will identify the most obvious problems of the group as a whole, but will miss the less obvious specific concerns of groups within groups. An example of this was given in “Rethinking Identity”. Participants found that, as disabled women, they were not expected to have sex or children. One such participant found that when attending a doctor’s surgery for a postnatal check up, which was to include a cervical smear, the examination couch was inaccessible to her. Though the service had been designed with the needs of women in mind, account had not been taken of the specific needs of disabled women. Neither a disabled man, nor a woman who was not disabled, would have faced this barrier. In failing to conceive of the problems occasioned by multiple discrimination, the law provides no motivation to tackle them.

In addition to being “qualitatively different” intersectional discrimination can also be “quantitatively worse” than discrimination on a single ground.24 The Equalities Review found that, “multiple markers of disadvantage” drastically reduce the likelihood of being employed.25 The employment penalty suffered by Pakistani and Bangladeshi women at the beginning of the 21st century was 30 per cent, which compared with 12 per cent for Pakistani or Bangladeshi men and 23 per cent for women as a whole.26 These figures illustrate that where a person belongs to more than one disadvantaged group, she will be more likely to suffer hardship than those belonging to only one such group. The greater disadvantage experienced by victims of multiple discrimination might suggest that such discrimination should be specifically targeted. Yet, if the law fails to recognise the interaction of grounds, the specific and more extreme manifestations of disadvantage associated with it will go unaddressed.

The very fact that equality legislation exists to protect certain groups, in addition to human rights instruments guaranteeing rights for all, recognises that protective measures should be well targeted and address the problems of the most disadvantaged specifically.27 To recognise and address multiple discrimination in equality policies is merely to take this understanding – that some are unfairly disadvantaged in relation to others and so require specific protection under the law - a stage further, so that the disadvantaged within the disadvantaged are also protected.
5. Development of Civil Society

An important message which has resulted from the limited research into multiple discrimination is that it is not sufficiently recognised by civil society. While there are excellent examples of best-practice among NGOs in addressing this phenomenon, the level of awareness and commitment is not consistently high across the sector and many organisations find themselves limited by the terms of their mandate. If the law were to explicitly recognise the existence of multiple discrimination as a valid concern and offer new legal possibilities to challenge institutional behaviour, this would raise awareness in civil society and encourage the development of new groups, or links between existing single-ground organisations, to exploit those possibilities. This view is shared by Hannett, who argues that the existence of a single equality statute can serve as a “focus for links and solidarity between groups facing discrimination.”28 A recent study on multiple discrimination carried out on behalf of the European Commission also supported this proposition and prioritised the promotion of multiple-ground NGOs as one of its seven concluding recommendations.29

There are two broad reasons which make it important for civil society to respond to multiple discrimination. These mirror the reasons, identified in Parts three and four, that law should do so. Firstly, NGOs can enhance respect for human dignity. Civil society organisations representing multiple identities serve to affirm the value of those identities. They also counteract the negative impact on dignity which single-ground organisations can have. Such organisations have been found to encourage their members (whether explicitly or implicitly) to suppress elements of their identity which are not common to all members. “Rethinking Identity” documents the isolation of lesbian, gay and bisexual (LGB) disabled people owing to prejudice towards disabled people in the LGB community and the existence of homophobia in the disability movement.30 Secondly, organisations addressing intersectional issues can work to raise awareness and so encourage policy makers to address the specificity of the intersectional experience. Rethinking Identity found that intersectional issues, such as those specific to disabled people from ethnic minorities, are marginal to both disabled groups and race equality movements and so remain invisible.31 Ground specific groups compete over territory but none address the needs at the intersections.

6. EU and International Law

The next section will briefly analyse the extent to which the phenomenon of multiple discrimination has been recognised by, or incorporated into, European32 and international legal instruments protecting equality and whether either of these two systems impose obligations on states to implement domestic legislation prohibiting this type of discrimination.

European Law

The European equality directives do not contain provisions dealing expressly with situations of multiple discrimination, but they do recognise the existence of the phenomenon:

“In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should...aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”33

Further, it has been suggested that a purpo-
sive interpretation of the European equality legislation would result in a finding that it prohibits multiple discrimination. To return to the example used earlier, a failure to address discrimination against subsets of women will undermine efforts to tackle discrimination against women generally. If then, the purpose of the European legislation is to eliminate discrimination against women, this purpose demands that instances of multiple discrimination against disadvantaged subsets of women be prohibited. This reasoning would, of course, apply to the other grounds protected.

Similar arguments have been outlined by others. A recent study on multiple discrimination carried out on behalf of the European Commission suggests that references to race and gender in the recitals of the Employment Equality Directive, which deals with disability, age, religion and sexual orientation, indicate that the directive is intended to work in conjunction with existing provisions in relation to the other grounds. It is argued by the authors of that report that this is a valid basis upon which to assert that the EU equal treatment legislation does, in fact “encompass the possibility of addressing Multiple Discrimination on all protected grounds”.

Whether or not the current European legislation can be said to require member states to outlaw multiple discrimination, it certainly does not prohibit them from enacting legislation to address this problem. The directives do, of course, allow Member States to offer greater protection in national legislation than that required by the directives.

The legality of positive action measures to address multiple discrimination is less clear, but Fredman argues that since it is permissible under European law to take measures to compensate for disadvantage “linked to” the grounds protected by the directives, positive measures targeted at those suffering multiple discrimination will be permitted under European law, so long as they comply with the requisite criteria. Such measures will be linked to a ground protected by a directive, notwithstanding the fact that they will also be linked to another ground.

Finally, it should be noted that there has been increasing interest in multiple discrimination among the institutions of the European Union. This has been most clearly illustrated by the European Commission, which commissioned the Danish Institute of Human Rights to carry out a study on multiple discrimination. The second of the seven recommendations resulting from the study was that EU and national legislation should be amended to provide effective protection against multiple discrimination. It is possible that this may influence the content of future European law.

International Law

Many international human rights treaties contain provisions protecting the right not to be discriminated against. A detailed analysis of the discrimination provisions of each international treaty and related jurisprudence is beyond the scope of this paper. It is, however, appropriate to note that human rights treaty bodies have shown significant and increasing willingness to find a right to be protected against multiple discrimination within existing human rights provisions. The Human Rights Committee has, for example, observed that “[d]iscrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status”. The Committee on the Elim-


each regime. In some cases this is as the result of a policy decision that the protection in respect of one ground should be more extensive than that afforded other grounds. In other cases, concepts which are common to all the legislation have been defined differently in respect of different grounds. Further, different exceptions apply in relation to different grounds. These factors, which effectively produce a hierarchy of grounds, would make it difficult to bring a case claiming intersectional discrimination even if it were technically possible to do so.

**Direct Discrimination**

In order to show direct discrimination under the current legislative framework in Great Britain, the claimant must show that her treatment was less favourable than that which was, or would have been, afforded to another person, referred to as the “comparator”. It is well known that cases can be won or lost according to whether an appropriate comparator is chosen by the claimant. These problems of proof are exacerbated in cases of intersectional discrimination. The courts in Britain have not allowed reference to an “opposite” comparator. A black woman seeking to prove sex discrimination must compare her treatment with a “man”. His race, be it black, white or otherwise, is not taken into account for the purposes of a sex discrimination case. In a claim of race discrimination a black woman must refer to a white comparator, who is gender-free for the purposes of the comparison. Such a rule thwarts claims relating to situations in which it is only black women that are disadvantaged. The alleged discriminator would be able to point to non-disadvantaged white women to disprove a claim of sex discrimination. If the respondent is able to identify black men who have not been subjected to the same treatment as the claimant, this will weaken her case of race discrimination.

**Indirect Discrimination**

In proving indirect discrimination, it is necessary to show that an apparently neutral provision, criterion or practice (PCP) places members of a protected group at a particular disadvantage when compared with the comparator group. In order to prove this, reference is often made to statistics. If the law fails to take into account intersectional discrimination, claimants will be required to compare statistics relating to the broad groups defined by the law. Where the PCP disadvantages only a sub-group of the wider group, a claimant’s case will be weakened by the inclusion of those not adversely affected by the PCP within the “disadvantaged” pool. A commonly used example of indirect discrimination will serve to illustrate this point. If an employer requires that all staff work full time, women, who statistically are more likely to have childcare responsibilities, will be less likely than men to be able to comply with this requirement. It is, however, also statistically true that black women are more likely than white women to work full time. If protected groups are only defined according to single characteristics, in determining whether the requirement to work full time is indirectly discriminatory against women as a group, it will be necessary to assess the number of men that can comply with the requirement to work full time and to compare this with the number of women that are able to do so. The inclusion of black women within the class of women will serve to weaken the statistical data in support of a white woman’s case.49

**Equal Pay**

In relation to most grounds unequal pay is treated as direct or indirect discrimination. Claims relating to pay are, however, excluded from the scope of the Sex Discrimination
Act 1975 (SDA). Instead, the Equal Pay Act 1970 (EPA) inserts a clause into contracts of employment to the effect that any term in a woman’s employment contract which is less favourable than that contained in a comparable man’s contract is treated as modified so as not to be less favourable. Further, while in claims of discriminatory pay based on other grounds it is possible to refer to a hypothetical comparator as evidence of discrimination, in equal pay claims relating to gender, it is necessary to identify an actual comparator. Time limits and compensatory regimes also differ between equal pay and discrimination cases. These distinct regimes and differing evidential burdens present obstacles to claims in relation to discriminatory pay which are based on the intersection of gender with another ground. Moreover, the particular difficulties associated with bringing a successful equal pay claim, which are well rehearsed, are likely to have a disproportionately negative impact upon those who suffer intersectional discrimination. The need to refer to an actual comparator in equal pay claims has meant that equal pay legislation is unable to address instances of occupational and workplace segregation, which contribute considerably to the gender pay gap. It is possible that this issue will impact particularly upon those experiencing multiple discrimination, because occupational and workplace segregation occurs along intersectional lines. Studies have, for instance, shown that women with a migrant background are particularly concentrated in low paying, low status and insecure sectors of the labour market, such as cleaning, catering, personal and domestic services, health and care.  

8. **Implications for Law Makers**

It is mainly the disjunctive structure of the equality regime in Great Britain and differences in the protective regime in respect of each ground which have led the judges to exclude a more flexible approach to proving a multiple discrimination claim. Multiple discrimination can, therefore, be addressed through a few quite simple steps. More radical proposals have, however, been made as to how legislation might best address this phenomenon.

**Structure**

It is clear from the preceding discussion that multiple discrimination should be addressed by a single equality law, encompassing all grounds. To make multiple discrimination claims a reality in practice, the act should avoid creating a hierarchy of grounds and should, therefore, so far as possible, provide for the same level of protection across grounds. Where relevant, equality legislation should apply the same concepts, definitions and processes to all grounds. Specifically, unequal pay should fall to be considered under the provisions dealing with direct and indirect discrimination.

In designing equality legislation to address multiple discrimination, legislators must decide how the exceptions which apply to each individual ground should apply to a combination of grounds. There appear to be two possible approaches. When an exception applies to one ground, this might block the whole claim from succeeding. Alternatively, legislators may, as they have done in Germany, consider it appropriate to allow a claim to proceed, unless an exception applies to each ground. Clearly, the second approach will be that which is most protective, but would require a careful analysis of the significance of exceptions in respect of each ground, which is beyond the scope of this paper.
Redefining Discrimination

It has been explained above that the fundamental issue that has rendered multiple discrimination claims in Great Britain unsuccessful is one of proof. The judges have felt restrained in referring to “opposite” comparators and appropriate statistics because of the divide between grounds in the legislation. On this basis, removal of these obstacles should, without more, overcome the barriers to bringing a successful claim of discrimination on more than one ground. The experience in the United States would, however, suggest otherwise. The inclusive structure of Title VII of the Civil Rights Act renders it favourable to an intersectional application. The judiciary has, however, restricted its potential in this respect by holding that claimants are not permitted to combine more than two grounds as the basis of a claim.56 Even if equality law is designed so as to eliminate technical legal and procedural barriers to claims of multiple discrimination, judges may continue to take a conservative approach to this issue if legislation does not expressly provide that claims may be brought in relation to a combination of grounds.57 The Canadian Human Rights Act 1985 was amended to insert a provision to the effect that a discriminatory practice includes a practice based on one or more prohibited grounds or on the effect of a combination of prohibited grounds.58 The European Commission’s report, “Tackling Multiple Discrimination”, highlights the importance of this amendment in encouraging the development of an intersectional approach, as it “inevitably drew attention to the need for Courts, Human Rights Commissions and Tribunals to consider whether intersectional discrimination has occurred”.59 In order to raise awareness of the need to deal with this phenomenon among tribunals, courts, civil society and policy makers, legislation should expressly prohibit discrimination based on more than one ground and on a combination of grounds.

We have seen that a comparative approach to the analysis of direct discrimination has presented obstacles to bringing claims of multiple discrimination. The Ontario Human Rights Commission has stressed that:

“[A]n intersectional analysis would recognize that comparisons must be used with great caution as an inappropriate comparison can lead to the dismissal of a case that should have been adjudicated.”60

The notoriously difficult task of choosing an appropriate comparator and of adducing evidence to show how that comparator would have been treated (if a hypothetical comparator is referred to) becomes increasingly onerous as the number of grounds for the treatment increases. One way of eliminating these difficulties is to move from a system of law which asks whether a person was treated less favourably than someone else, to one which asks why a person was treated in the way that she was.61 It is recognised by the judiciary in Great Britain that this might be more practical in certain cases:

“...in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the ‘less favourable treatment’ issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the ‘reason why’ issue)...Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining...Sometimes the less favourable treatment issue cannot be resolved without, at the same time, decid-
ing the reason-why issue. The two issues are intertwined. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case.\textsuperscript{62}

This approach might be reflected in legislation in the way proposed in the Equality Bill introduced by Lord Lester of Herne Hill Q.C. in the House of Lords.\textsuperscript{63} The bill defined direct discrimination thus:

\textbf{“10 Meaning of direct discrimination} \\
(1) A person (“P”) directly discriminates against another person (“B”) if, for a reason related to one or more of the prohibited grounds— \\
(a) P treats B less favourably than another person (“C”) is, has been or would be treated by him in a comparable situation; or \\
(b) P subjects B to a detriment.”

Section 10(1)(b) merely requires that “B” show that she was subjected to a detriment “for a reason related to one or more of the prohibited grounds” and does not require “B” to show that this treatment was less favourable than the treatment of some other person, thus avoiding the need to identify a comparator. This would not, as the government of the UK has suggested, mean that people can bring claims of discrimination on the basis that they have simply been treated badly,\textsuperscript{64} as “[t]hey would have to show that they were subjected to a ‘detriment’ on grounds of their age, etc.”\textsuperscript{65} This, though, presents its own difficulties, which must be addressed through appropriate rules in relation to proof of discrimination.

\textbf{Proof} \\
In cases concerning direct discrimination, claimants will often face insurmountable difficulty in showing what was in the mind of the respondent in meting out the treatment suffered. Unlawful discrimination is not usually overt, nor even deliberate. The challenge of proving the reasons behind treatment will be even greater for victims of multiple discrimination, when any one or more of a number of grounds may have motivated the respondent. This should be taken into account in the allocation of the burden of proof under equality legislation. The EU directives provide that where a claimant establishes facts from which it could be presumed that there has been direct or indirect discrimination, it shall be for the defendant to prove that there has not been any such discrimination.\textsuperscript{66} Domestic provisions to this effect have the potential to transform a technical right to bring claims of multiple discrimination into a reality in practice. Their impact in this respect will, though, depend on judicial decisions as to what facts are sufficient to shift the burden of proof. If the courts were to hold that claimants must prove that they were subjected to a detriment, but need not adduce evidence as to the reason behind that treatment, a claimant belonging to more than one protected class could plead alternate or cumulative grounds without having to prove which ground or grounds motivated the alleged discriminator. Once detrimental treatment were shown that could have been based on any one or more of a number of grounds, it would be for the respondent to show that there was a non-discriminatory reason for the treatment. The obvious objection to such an approach is that it will allow a flood of claims which, though they relate to unreasonable treatment, do not concern discriminatory treatment. Tribunals would not, though, proceed directly from a finding
of a detriment to an inference of discrimination, but would make such an inference in the absence of an adequate explanation for the treatment. The respondent could prevent any inference being drawn by satisfying the tribunal that she had a genuine “innocent” reason for the treatment. The reason would have to be non-discriminatory, but need not be reasonable. In effect all that a respondent would be required to prove is that decisions were not made arbitrarily. Since arbitrary treatment is often the only evidence of discrimination and it is frequently responsible for giving effect to subconscious discrimination, it should be guarded against by equality legislation. Ultimately, if the law is to get to the root of multiple discrimination, it must tackle the subtle and complex ways in which a range of discriminatory factors can interact to form the basis of discriminatory conduct. The only way that it might do so is to demand that a respondent take the simple step of explaining conduct which on the face of it appears unjustified, rather than requiring claimants to take on the impossible task of proving which factors influenced respondents’ actions.

**Grounds**

Parts two and three of this article established that if a legal system is to respect the right of individuals to live according to their own sense of identity and effectively guard against all unfair multiple discrimination a more holistic approach must be taken to defining the grounds protected by equality legislation. As much discriminatory disadvantage arises out of complex structural, systemic and institutional factors, it can not always be attributed to the acts of one individual, against another individual, on the basis of an individual ground. People do not see themselves, or others, as a product of their constituent, but discrete, identities and so much discrimination will arise out of a vague feeling that a person will not “fit in” rather than treatment with clearly identifiable grounds. The problems which arise in relation to multiple discrimination are in fact just an illustration of the problems of a legislative approach to equality which focuses more on the reason for bad treatment, than on its effect on the individual:

“We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction... we risk undertaking an analysis that is distanced and desensitised from real people’s real experiences.... More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.”

It is suggested that a more substantive approach to determining whether a ground is protected, where the focus is on the evidence of unfair disadvantage and the impact of the treatment on the victim, will serve to address discrimination when this is due to a multitude of structural, systemic and institutional reasons.

**The South African Approach**

A system of equality law which has been designed with such considerations in mind is that of South Africa. Monaghan argues that the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (the “Promotion of Equality Act”) is more suited than other equality regimes to tackle multiple discrimination thanks to its focus on substantive equality, the breadth of the grounds protected and its quasi-general-
ized approach. The Act outlaws discrimination on a list of grounds, but also on any other ground where discrimination on that ground causes or perpetuates systemic disadvantage or undermines human dignity. It might be argued that that by simply making allowance for further grounds, the South African legislation does not avoid the fundamental problems of a categorical approach, but merely allows the protection of additional categories. This is not the case, however, because of the way in which the further grounds are to be identified. The focus of analysis as to whether a ground is protected rests on the effect of treatment on the individual and requires a contextual analysis of the claimant’s situation. New grounds may thus be very different in nature from the listed grounds and might be defined according to a claimant’s own sense of identity. The fluid South African approach is thus able to address any ground, however defined by the claimant, so long as it can be shown to constitute a ‘marker of disadvantage’, or that it is an important element of a person’s sense of self. Such a system would, therefore, eliminate the main obstacles to bringing a claim of intersectional discrimination associated with categorical discrimination law. In doing so, it will allow people to express and live according to their identity and encourage policy makers to investigate and tackle the more complex causes and consequences of disadvantage.

A Non-Exhaustive List of Grounds

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) protects against “discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Though the provision does not refer explicitly to discrimination on a combination or multiplicity of grounds, the non-exhaustive list of grounds leaves open the possibility for the European Court of Human Rights (ECtHR) to find that a combination of grounds constitutes another protected status. This has been the approach of the Supreme Court of Canada in interpreting Article 15 of the Charter of Rights and Freedoms (the Canadian Charter), which also includes a non-exhaustive list of grounds. It has held that an intersection of grounds can be considered as analogous to, or a synthesis of the listed grounds. The opportunity to apply an intersectional analysis in this way has not yet been exploited by the Strasbourg court. Even had it done so, there would remain doubts as to the ability of legislation which protects enumerated and analogous grounds to address all of the complexities of the multiple discrimination experience. Unlike the Promotion of Equality Act, neither the ECHR nor the Canadian Charter specify how further grounds should be identified. This has led the ECtHR to confine itself largely, though not entirely, to the identification of grounds which are analogous to the listed grounds, and thus “personal characteristics”. Many grounds which might be considered important to an individual’s sense of identity will thus gain the protection of the ECHR, as many of these could be described as intimate characteristics. This approach is, though, undeniably less fluid than the South African approach and is less likely, in practice, to be flexible enough to recognise grounds which are too far removed from the listed grounds or too multi-faceted for the comfort of the judges. Further, no account will be taken of whether the posited ground is an indicator of disadvantage. Similarly, the majority decision of the Canadian Supreme Court in Corbière v Canada analysed the enumerated grounds of section 15(1) and concluded that:
"It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."74

On this basis the majority held that the level of group disadvantage is an inappropriate consideration in the identification of new grounds. L’Heureux Dubé J., writing a dissenting judgement on behalf of Iacobucci, Gonthier and Binnie JJ, agreed that “[a]n analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging”, but stressed that an alternative basis for determining whether a ground is protected by s. 15 is whether “those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked”.75 It would seem that L’Heureux Dubé J. was advocating an analysis similar to that demanded by the Promotion of Equality Act, comprising both a dignity and a disadvantage analysis, whereas the more conservative approach of the ECHR and the majority in Corbière has been limited to the first of such considerations.

The majority in Corbière appeared to be concerned that the approach adopted by L’Heureux Dubé J. involved a circular analysis, which required a finding of discrimination in order to identify a new ground. This is true only in the sense that a finding of historic discrimination indicates that a ground should be protected, not, as was suggested,76 so as to conflate the finding of a new ground with a finding that the act complained of is discriminatory. Where a group can be seen to be historically disadvantaged, the correlation between possession of the group’s common attributes and disadvantage should be seen as evidence of a discriminatory system. If the system were free from bias, such patterns would not exist. In this way, markers of discrimination can be identified as grounds upon which discrimination must have occurred in the past and should be protected against in the future. This is so whether or not the shared attribute is an important part of the group’s sense of identity. There is clear evidence that people experience discrimination on the basis of “statuses” which are markers of disadvantage, but are unlikely to form an element of their identity, as self-defined. The final report of the Canadian Human Right Acts Review Panel stated:

“Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy.”77

Clearly “disadvantage” and “poverty” are relative concepts and their protection as protected grounds will have serious implications for legal certainty. The courts will minimise this impact, though, where they refer to objective markers of disadvantage in order to identify a new ground, rather than disadvantage itself. The Court of Appeal for Ontario has, for example, found the receipt of social assistance to be such a marker.78 Only socially identifiable groups should gain the benefit of legislation.

In the context of this article, the strongest argument in favour of a disadvantage approach to the identification of new grounds is that only such an analysis will be sensi-
tive enough to people’s lived experiences to address the subtle and complex reasons for which people experience discrimination. It will afford protection to those who are without doubt discriminated against, such as those of low social class, but who are unable to gain the protection of discrimination law gained on the narrow categories currently protected. This will be particularly important in the protection of intersectional discrimination, since one can imagine situations in which social class might be the trigger factor that leads to discrimination in relation to other grounds. While a middle class young/black/disabled/transgender person might not be subjected to discrimination, a young/black/disabled/transgender person of lower class might well be.

Whether or not disadvantage is considered relevant to the recognition of new grounds, the legal certainty objection to a non-exhaustive list of grounds will still stand. Clearly, there is a concern that such an approach places those potentially liable for discrimination in a position of uncertainty as to their obligations. Legislators must decide whether this is a lesser evil than an approach that guarantees to victims of complex discrimination the legal certainty that they will not gain the protection of equality legislation. Where a more flexible approach to protected grounds is introduced in combination with a shift in the nature of equality legislation, so that it focuses more on collective responsibility to promote equality, rather than individual fault finding, concerns as to uncertain legal liability should carry less weight. A more fundamental concern with such an approach is that where the protected grounds are opened up to be more inclusive and less certain, so must potential justifications. The absolute prohibition of direct discrimination under current British legislation is considered one of the regime’s strengths. A wider concept of protected grounds would mean that this absolute protection would probably be lost. While it is possible that this approach would still, on balance, result in greater overall protection, whether or not this is so would depend largely on the judiciary’s application of these principles on a case by case basis. Further, it should be borne in mind that any approach which conflates concepts of direct and indirect discrimination and makes it possible to justify both types of discrimination will probably not be in compliance with the requirements of European law in respect of equality and will not, therefore, currently be a model for the design of discrimination law in member states of the European Union.

Duties

It is generally accepted among equality experts that if substantive equality is to be achieved within a reasonable timeframe, or at all, there needs to be a shift in equality law regimes from systems based on retrospective individual fault finding to systems which impose obligations on organisations and individuals to take proactive measures to generate change. It is necessary to ensure that those responsible for designing measures to promote equality are aware of and equipped to address the specific challenges to equality posed by multiple discrimination.

Mainstreaming

The importance of mainstreaming for the promotion of equality is widely recognised. This article has, furthermore, highlighted the specific nature and increased seriousness of disadvantage experienced by those who suffer multiple discrimination. For these reasons it is suggested that duties to mainstream equality considerations should provide that such considerations include
multiple discrimination.40 It has been recognised that,

"The institutional domain poses perhaps the greatest challenge to understanding and accommodating the full complexity of human diversity. It requires a rethink of equality and diversity policies that incorporates an integrated approach. Such an approach is first of all based on the assumption that individuals have multiple identities. Secondly it analyses service and employment systems from the perspective of intersecting personal characteristics."41

Such a recommendation cannot be made without acknowledgement that this will be perceived as excessively burdensome. This immediate reaction should, however, be alleviated to some extent, if such an obligation is conceived of as a requirement which is inherent in existing obligations to mainstream equality considerations into policy making. Generic policies aimed at improving the situation of a group as a whole will be ineffective as they are based on over-simplified understanding of discrimination. Express reference to multiple discrimination is merely a direction as to how to render policies designed under existing mainstreaming duties more effective.

The need to incorporate an intersectional analysis into policy design has already been recognised in some jurisdictions. Spanish legislation imposes a duty of cross-sectional equality mainstreaming42 and the Ontario Human Rights Commission has confirmed that "an intersectional analysis has been added as one of the lenses through which [its] policy work is conducted"43

Data Gathering

Referring to its proposal for multiple discrimination mainstreaming, the “Rethinking Identity” report remarked:

"While this may seem an awesome task, its practical implementation may benefit from research that identifies the experiences and aspirations of multiple identity groupings, and research on the identities of those who use the services or who are employed by them. This can provide a starting point for developing a mindset of integrated diversity, and bringing this to bear on system design and professional attitude and behaviour."44

A duty to collect data in order to facilitate evidence-based decision making is particularly relevant in respect of multiple discrimination because of the current invisibility of much multiple discrimination. Currently, illuminating data in respect of multiple discrimination is sparse. The “Rethinking Identity” report noted that statistical data was not always available in respect of the groups with which they wished to work. The importance of this matter for tackling multiple discrimination is increasingly recognised. Indeed, the European Commission’s study on multiple discrimination devoted one of its seven concluding recommendations to data collection.45

Professor Fredman has explained that data gathering techniques must change in the light of multiple discrimination:

"US experience shows that when there is a duty to monitor women and ethnic minorities, the groups tend to be defined as mutually exclusive, so that 'ethnic minorities' becomes 'black men.' The definition of women then focuses on white, middle class, able bodied women...Since the aim is to redress disadvantage, and to promote a positive sense
of identity based on full participation, the groups need to be defined accordingly. For example, sub-groups should be demarcated because they exhibit disadvantage due to their cumulative identities... The need to promote participation and positive identity means that it is best to leave individuals to self identify, and groups to define themselves, always bearing in mind the asymmetric nature of equality.”

Finally, given that recognition of multiple discrimination is an attempt to provide for discrimination in all its diversity, the gathering of data in respect of multiple discrimination should seek to be inclusive. The most widely discussed example of intersectional discrimination is the consequences of the interaction of race and gender. However, it is widely being recognised that multiple identities interlock to form the grounds for discrimination in a wide variety of ways. A recent report of the European Commission found that a tendency to concentrate on the intersection of race and gender probably resulted from a lack of information in relation to other groups. Data gathering, if properly conducted, should serve to redress this invisibility.

Consultation

If equality legislation is to effectively address experiences of multiple discrimination, it should ensure that the development of anti-discrimination policies involves grassroots participation, through the inclusion of a duty to that effect.

The longstanding absence of intersectional discrimination from public discourse, which has persisted until recently, has lead to widespread ignorance of its implications for real people. While policy makers may feel comfortable that they can identify how race and gender considerations should impinge upon their policy making, they are less likely to be familiar with how intersectional discrimination should be dealt with, making consultation necessary. Crenshaw argues that:

“...because the specific experiences of ethnically and racially defined women are often obscured within broader categories of race or gender, the full scope of their intersectional vulnerability cannot be known and must in the last analysis, be built from the ground up.”

Further, in designing legislation to tackle intersectional discrimination, it must be borne in mind that the very purpose behind doing so is to recognise and respect diversity, by eliminating decision-making based on stereotypes. Consultation with those who experience multiple discrimination is an essential means of doing so.

Explicit reference to multiple discrimination in an obligation to consult will encourage policy makers to ensure that those with whom they consult are representative of the diverse interests within affected groups. Fredman highlights the “crucial importance” of representative participation and cites Patel in this respect:

“Many relations between the state and minority communities are mediated through unelected self appointed community leaders, who are men, usually from socially conservative backgrounds with little or no interest in women’s rights or social justice. Most are from religious backgrounds and their interests lie in preserving the family and religious and cultural values.”

This example serves to illustrate that those organising consultations with a view to developing equality policies should be aware of the need to avoid indirectly silencing
dissenting voices through their choice of participants, if such policies are to address multiple discrimination.91

Reasonable Adjustments

The prohibition of indirect discrimination is an essential element of discrimination legislation, requiring barriers to be removed where they place a certain group at a particular disadvantage. Such barriers will be removed, though, by reference to the needs of the dominant members of the group. A duty to make reasonable adjustments (also referred to as reasonable accommodation) assesses barriers which an individual faces through a contextual analysis. This contextual analysis on a case by case basis is important because of the observations we have made about the individuality of identity. People do not necessarily attach equal weight to the identities that they hold and people may emphasise one aspect of their identity in one context and another aspect in another context.92 Thus policies aimed at tackling multiple discrimination necessarily require some element of individualisation and fluidity. Reasonable adjustments address the specific needs of the individual in the specific context that they are made and so can take into account the implications of a person’s identity for that person. Discriminatory barriers faced by individuals will be identified by reference to their individual experiences of identity, rather than through assumptions based on stereotypes.93 The importance of reasonable adjustments in addressing multiple discrimination has been acknowledged by the Ontario Human Rights Commission94 and more recently at a round-table of the national equality bodies in the EU.95 Legislators should thus consider whether equality legislation should provide for a broad duty to make reasonable adjustments in respect of all grounds, or a combination of them.

Positive Action

The potential of mainstreaming duties to bring about widespread change will be greatly increased if they are combined with the possibility of taking positive action to promote substantive equality. The limited data available indicates that multiple discrimination is linked with deeper disadvantage in society. It is victims of multiple discrimination that need, then, to be the target of positive action, and legislation should be designed to allow this. Taking into account intersectional discrimination in developing positive action measures will address the concern of some96 that positive action is only of benefit to the most advantaged within a disadvantaged group, while those who are less dominant within the group become increasingly marginalised.97

It is well established that organisations are hesitant about taking positive action for fear of unwittingly becoming liable for unlawful discrimination against those that did not benefit from positive measures. These concerns are likely to be heightened in respect of measures targeting a subset within a group which is usually considered as a beneficiary of positive action because of its historically disadvantaged status. Thus if an organisation takes positive action in relation to Muslim women, it will be concerned that it will have discriminated against Muslim men. This problem can be addressed however, by legislation or associated guidance making it clear that action supported by robust evidence will not be considered unlawful.

Remedies

As has been discussed above, experiences of multiple discrimination can result in heightened disadvantage. On this basis, some
suggest that equality legislation should allow account to be taken of the multi-ground dimension of multiple discrimination in the determination of sanctions, making it possible to award aggravated damages. The reasoning of L’Heureux-Dubé J. in relation to discriminatory legislation might be applied to individual acts of discrimination:

“No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable.”

Thus because of the particular vulnerability of an individual subjected to multiple discrimination, the damage to that person may be more profound and this should be acknowledged in awards of damages for injury to feelings. This approach is endorsed by the Ontario Human Rights Commission.99 Further, the Austrian Disability Equality Act contains a provision stating that multiple discrimination may be taken account of in the award of damages. The Romanian Equal Treatment Act (2006) also provides that discrimination on two or more grounds constitutes an “aggravating circumstance”.

Equality Bodies

A single equality body, responsible for equality work in respect of all grounds, will best be able to promote work to eliminate multiple discrimination. A single institution reduces conceptual barriers to addressing multiple discrimination and is of practical importance, because it makes it possible for coherent, overarching and coordinated strategies to be developed addressing these issues.100 In research conducted directly with national equality bodies, they have referred to the challenges of dealing with intersectional cases when separate equality bodies exist in respect of each ground of discrimination. 101 A single equality body will be able to offer litigants comprehensive advice on all grounds, rather than forcing them to choose between single ground institutions dealing with only one of the multiple grounds behind the discrimination experienced.102 The recently published report of the European Commission is enthusiastic about the potential of the Equal Employment Opportunity Commission in the United States, the documents of which “seem to indicate a tendency towards mainstreaming the intersectional approach”, to “pave the way for a broader understanding and acceptance of cases involving more than one ground of discrimination”.

9. Conclusion

The complex balance in equality law between respect for individual dignity and worth and the importance of social context and group association plays out in the context of multiple discrimination. The equality debate, which has so far concentrated on single-ground discrimination, has taught us that value-judgements should not be made about an individual based on that person’s group membership. Rather, regard should be had to an individual’s value independently of that group. Yet we have learnt that group membership is not irrelevant to the way we should treat a person, because it determines our “starting points” in life and because group membership can be important to a person’s sense of self, and thus should be accommodated, if people are not to be forced to conform to the dominant culture. In the context of multiple discrimination, then, subjects a person to detriment on the basis of their membership of several groups is no
more justified than doing so on the basis of a single ground, but multi-group membership should be recognised if people are to be able to live according to their true identity and if the consequences of multiple group membership are to be addressed.

We have seen, largely by reference to the legislative framework of Great Britain, that equality legislation which has been designed without regard to the need to tackle multiple discrimination can and does fail to provide a means of legal redress to victims of such discrimination. Yet it is indisputable that where discrimination occurs on the basis of more than one ground, each of which society has recognised as an unfair basis for the conferral of advantage and detriment, a victim should not be excluded from the protection of equality legislation because of the particular way in which the grounds combined to form the basis of that discrimination. It is therefore pressing that discrimination law should be designed so as to secure a remedy for individual victims of multiple discrimination.

Even more important than this, policies, procedures and practices must be designed so as to take account of and accommodate multiple identities and the experience of multiple disadvantage. This lesson too can be extracted from the single-ground equality debate. It is increasingly recognised that the achievement of substantive equality demands action on the part of policy makers to remove barriers and accommodate difference between groups. This is not about positive discrimination, it is about rectifying a flaw in a system which, as a consequence of having been designed by the most dominant groups for the most dominant groups, fails to meet the needs of all those it must serve. To maintain policies designed by reference to the “norm”, which is in fact the dominant group, leads people to suppress those characteristics which are not shared with the “norm” in order to fit into the system. This not only denigrates the value of those characteristics, but also fails to address structural forces which have meant that disadvantage is closely associated with the possession of certain personal characteristics. These considerations are important in the multiple discrimination context. If the idea that diversity should be recognised and accommodated is not exploited to its full, so that policies are designed only with regard to the single-ground issues, they will, for example, take into account the needs of people with disabilities, but will be designed for a gender-neutral, ethnicity-neutral, sexuality-neutral and ageless disabled person. This will lead disabled people to suppress their gender, ethnicity, sexuality and age and will fail to rectify the increased disadvantage experienced by people with multiple barriers. Failure to recognise the differences within groups and addressing only the differences between groups will ignore the most important lessons learnt throughout the evolution of equality law.

Different approaches to addressing multiple discrimination have been outlined. It is possible simply to list the protected grounds and specify that discrimination based on any one or more is unlawful. Alternatively, equality legislation might include a non-exhaustive list of grounds. If this approach is favoured, the legislator must decide whether to direct the judiciary as to how it is to identify further protected grounds. Experience has shown that a failure to do so is likely to result in a cautious approach from courts and tribunals, confined to the recognition of grounds which are an essential element of identity and eschewing those grounds which can be shown to be markers of disadvantage. It is true that a disadvantage analysis of potential new grounds would seriously undermine legal certainty, particularly when combined, as it
necessarily would be, with flexible justification provisions. Yet such an approach would have the potential to release discrimination law from the strictures of a categorical approach to identity and a formal notion of equality, the consequences of which include a failure to address multiple discrimination. This potential would, though, lie in the hands of the judiciary. The choice between such an approach and one which leaves the extension of equality protection to a legislature restricted by the demands of an equality-opposed electorate is not an obvious one and deserves further attention.

1 Paola Uccellari is Consultant to The Equal Rights Trust. This article resulted from research commissioned by the Trust and is a part of larger research project.
6 See above, Moon, n.4.
11 See above, Zappone, n.9, p.2.
12 The writer acknowledges that there is much controversy as to whether ‘dignity’ should inform the development of equality legislation, largely owing to ambiguity as to the implications of this term. See Reaume, Denise. "Discrimination and Dignity", Louisiana Law Review, 2003, Vol.63, pp.645-95; Graham, Emily. "Law v Canada: New Directions for Equality under the Canadian Charter?" Oxford Journal of Legal Studies, 2002, Vol.22, No.4, pp.641-61). There is, however, generally consensus that equality law should defend everybody’s feeling of self-worth and should thus protect people against being penalised for their identity. It is in this narrow sense that the right to dignity is referred to in this article.
13 See above, Zappone, n.9, p.19.
16 See above, Fredman n.13, p.158.
17 See above, Fredman n.13, p.158.
18 See above, Fredman n.13, p.158.
20 See above, Pierce, n.18, p.18.
24 See above, Hannett n.21, p.81.
26 See above Equalities Review Panel, n.24, p.63.
27 See above, Makkonen, n.22, p.58.
28 See above, Hannett, n.21, p.85.
30 See above, Zappone, n.9, p.135.
31 See above, Pierce, n.18, p.24.
32 References in this article to European law are to the law of the European Union.
35 Recitals 2, 3 and 10.
36 See above, European Commission, n.28, p.20.
40 See above, European Commission, n.28, p.53.
46 Para.(p).
48 See above, Makkonen n.22, p.51.
50 Section 6(6).
51 Save where the employer can show that variation between the woman's contract and the man's contract is genuinely due to a material factor which is not the difference in sex.
52 Though this requirement is arguably now in breach of European law. See above, Monaghan, n.48, para.6.304.
See above, Moon, n.1, p.14.
56 Judge v Marsh 649 FSupp.770 (DDC 1986).
57 See above, Hannett, n.21, p.76.
58 Section 3(A).
61 See above, Moon, n.1, p.9.
62 Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 paras.7, 8 and 11 (Lord Nicholl)
64 See above, Department for Communities and Local Government, n.8, para.1.15.
65 Professor Sir Bob Hepple QC FBA and Mary Coussey CBE in a letter dated 28 August 2007 to the Discrimination Law Review Team at the Department for Communities and Local Government in response to the Consultation Paper.
68 See above, Monaghan, n.48, para.5.10.
69 Section 1(1)(xxi) defines the ‘prohibited grounds’ as:
“(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, dis
ability, religion, conscience, belief, culture, language and birth; or
(b) any other ground where discrimination based on that other ground—
(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is com
parable to discrimination on a ground in paragraph (a).”
70 “15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
72 For discussion see Vakulenko, above, n.14.
73 Kjeldsen v Denmark, Judgement of 7 December 1976, Series A, No.23 (1979-80) 1 EHRR 711; Budak v Turkey (App No 57345/00) ÉCHR 7 September 2004 and Beale v UK (App No 16743/03) ÉCHR 12 October 2004.
74 Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R.203, para.13 (McLachlin and Bastarache JJ., writing for Cory, Lamer C.J. and Major).
75 Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R.203, para.60.
76 Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R.203, para.7 (McLachlin and Bastarache JJ.).
78 Falkiner v Ontario (Ministry of Community and Social Services) [2002] O.J.No.1771.
80 See above, Makkonen, n.22, pp.36-37.
81 See above, Zappone, n.9, p.144.
82 See above, European Commission, n.28, p.20.
83 See above, Ontario Human Rights Commission, n.6, p.29.
84 See above, Zappone, n.9, p.144.
85 See above, European Commission, n.28, p.55.
87 See above, European Commission, n.28, p.47.
88 See above, Crenshaw, n.20.
89 See above, Fredman, n.85, p.27.
90 Patel, Pragna. “Notes on Gender and Racial Discrimination: An urgent need to integrate an intersectional

91 See above, Fredman, n.85, p.27.
93 See above, Ontario Human Rights Commission, n.6, p.25.
94 See above, Ontario Human Rights Commission, n.6, p.25.
96 See above, Fredman, n.38, p.18.
97 See above, Makkonen, n.22, p.52.
100 See above, Hannet, n.21, p.85.
101 See above, European Commission, n.28.
102 See above, Hannet, n.21, p.85.
103 See above, European Commission, n.28, pp.26-27.
104 See above, Fredman, n.85, pp.4-5.