

## MULTIPLE DISCRIMINATION IN BRITAIN: IMMUTABILITY AND ITS ALTERNATIVE

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I would first like to express my thanks to the organizers of this conference for inviting me to participate in this meeting. I have been asked to speak on the topic of multiple discrimination in Britain. This concept – multiple discrimination - has recently been entrenched in the new Equality Act 2010 (EA 2010). My intention is to talk about the concept as launched, the new provision and the basic design of anti-discrimination law.

My paper has two parts: Part I is primarily descriptive and historical – I begin in this section with historical observations, so as to, firstly, locate the new provision in the trajectory of black feminist legal thought (I.i) and secondly in the history of discrimination law in Britain (I.ii). The purpose of this historical foray is to illustrate from whence the concept was launched, and what has happened as it has travelled through time and space. This background puts the current provisions in context and also sets the scene for the argument in Part II. At the end of Part I discuss the provision on multiple discrimination in the Equality Act 2010 (I.iii).

In Part II, I present a critique of the multiple discrimination provision and develop my main argument for a fundamental rethink of the design of anti-discrimination law. My own opinion is that although using the language of intersectionality, British law has in fact deprived this concept of its content. In leaving the substance of the concept behind, the provision in the Equality Act has not made the analytical shift from single dimension to multiple consciousness. Thus although the formal recognition that discrimination is not a zero sum practice is welcome, we are still some way from an holistic approach to discrimination. I argue that we need to move the debate away from a numbers game. I present the basis of a design which I believe will allow for intersectionality in a way which recognises 'multiple jeopardy' yet avoids an 'oppression Olympics'<sup>1</sup> and can also provide a basis for a coherent anti-discrimination law in the European Union.

### I. The Evolution of Intersectional Multiple Discrimination (Intersectionality)

It is perhaps misleading to speak of evolution, as the development of intersectionality bears few of the traces of linearity evoked by the word. The development could be described as an evolution if the word

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<sup>1</sup> J. Kantola and K. Louisianan (2009) "Institutionalising Intersectionality in Europe: Legal and Political Analyses." A paper presented in *the First European Conference on Politics and Gender*, Queen's University Belfast in H. Y Choo and M. Marx-Ferree 'Practicing Intersectionality in Sociological Research: A critical analysis of inclusions, interactions and institutions in the study of inequalities' (2009) (on file with author).

is understood more in its Latourian sense, whereby evolution has three dimensions - time, space and intensity - and these elements act independently as well as together.

The concept of intersectionality was developed to establish a multiple-consciousness perspective. It could be argued that it was launched centuries ago, by a strong, tall, enslaved black woman in the nineteenth century – Sojourner Truth. When Sojourner Truth raised her voice to poignantly ask ‘aint I a woman’ at Seneca Falls in 1851<sup>2</sup>, she highlighted the specific subjugation of black women under the patriarchal system of slavery. Her simple question was not drawn from a grand theory and she had no name for her idea, but her focus was the same as those who later developed the idea of intersectionality: black women. At the time of her question, the suppression of this group was absolute and intense, overt and sanctioned by law. Yet her idea was marginalized: black women were not included in the suffragette movement to gain voting rights. Intersectionality had no salience.

However over 100 years later, when Kimberle Crenshaw wrote ‘Demarginalising the Intersection of Race and Sex’, her seminal piece in the *Chicago Legal Forum*, the oppression of this same group (African American women) had changed: by that time it was less intense, made unlawful and arguably more covert.<sup>3</sup> The concept has however gained traction - time has given the idea of multiple discrimination some judicial and legislative recognition. The idea has surfaced even if the practice of discrimination has become more subtle.

In those intervening years, intersectionality has been applied to social campaigning work, especially by organisations within marginalized groups (eg. the Combahee River Collective in the US). It has also been developed and re-presented as it has crossed the Atlantic: the intersectionality and multiple consciousness discussed by Crenshaw, Matsuda and Caldwell has in Britain relatively quickly gained formal recognition and mutated into three manifestations: cumulative, additive and intersectional multiple discrimination.

But more on this later: the key point that I want to make here is that evolution works on multiple levels: time, space and intensity. These can be separated out into their distinct elements. This is not the case with intersectional multiple discrimination, or intersectionality.<sup>4</sup> As Deborah King<sup>5</sup> puts it, thinking in terms of “multiple jeopardy” challenges the idea that “each discrimination has a single, direct and independent effect on status, wherein the relative contribution of each is readily apparent” as well as the “non-productive assertions that one factor can and should supplant the other” (p.47).

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<sup>2</sup> H. Zinn (2005) *A People’s History of the United States*, ????: Harper Perennial Modern Classics, 124.

<sup>3</sup> See J. Jordan Zachary (2009) *Black Women, Cultural Images and Social Policy*, New York: Routledge.

<sup>4</sup> K. Crenshaw (1989) ‘Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracial Politics’ *University of Chicago Legal Forum* 139

<sup>5</sup> D. King (1988) “Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology.” *Signs* 14:1, 42-72 at 47 (cited in Feree, p7)

### I.i Intersectionality: a brief history of the concept

It seems to have been the attitude of the judiciary towards the concept of multiple discrimination that re-kindled scholarly activity on the topic in the late 1980s and 1990s. African American women had been unsuccessful in their attempts to win claims of intersectional discrimination in employment under Title VII of the Civil Rights Act in the 1970's.<sup>6</sup> At that time, judges did not accept that black women formed a specific group, seeing them as a subset of all (mainly white) women or all blacks (mainly men). In *Degraffenreid v. General Motors*, a district court rejected this idea as an attempt to seek double protection or create a 'super-remedy.' The complainants were told to bring an action for race discrimination OR sex discrimination, 'but not a combination of both.'<sup>7</sup> In *Munford v. James T. Barnes & Co.*<sup>8</sup> where both sexual and racial discrimination was alleged in a case on sexual harassment, the district court dealt only with the sexual discrimination claim and passed a summary judgment on the race discrimination claim.

In *Rogers v American Airlines*<sup>9</sup>, an employee argued that the policy of American Airlines prohibiting braided hairstyles discriminated specifically against her as a black woman. Rogers had worked for American Airlines for eleven years before the airline instituted a dress policy which prohibited the wearing of braids. She argued that the policy discriminated indirectly against black women because braids have been 'historically, a fashion and style adopted by Black American women, reflective of cultural, historical essences of the Black women in American society.' A federal Court again refuted any interactive relationship between race and gender, and reasoned that firstly, Rogers could not show that braids were specific to black women as Bo Derek had worn them in the film '10' and secondly, that unlike an Afro which was immutable, braids were mutable because they could be easily changed.<sup>10</sup> There were clearly no black women or men on that Court.

Courts in America have become less hostile to the idea of intersectionality. In 1980, in *Jefferies v. Harris City Commission*,<sup>11</sup> a federal court acknowledged that black women could experience discrimination even if black men and white women did not. Jefferies' claim would have failed were

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<sup>6</sup> R. Castro and L. Corral (1993) 'Women of Colour and Employment Discrimination: Race and Gender Combined.' 6 *La Raza Law Journal* 159.

<sup>7</sup> *Degraffenreid v. General Motors* 413 F Supp 142 (E D Mo 1976)

<sup>8</sup> 441 F. Supp. 459 (E.D Mich. 1977). See J. Ellis (1981) 'Sexual Harassment and Race: A Legal Analysis of Discrimination' 8 *North Dakota Journal of Legislation* 30..

<sup>9</sup> 527 F. Supp. 229 (S.D.N.Y. 1981)

<sup>10</sup> Discussed in D. W. Greene (2008) 'Title VII: What's Hair (and other race based characteristics) got to do with it?' *University of Colorado Law Review*, Vol. 79, 1355.

<sup>11</sup> *Jefferies v. Harris Cty. Community Action Association* 615 F. 2nd 1025 (5th Cir. 1980). See Scales Trent and

intersectionality not recognized because HCC had hired both a white woman and an African American male in the role at issue. In a bold interpretation, the Circuit Court held that non-iteration by Congress did not exclude black women as a distinct group from the protection provided by Title VII to single-attribute groups. In particular, the Court refused to 'condone a result which leaves black women without a viable Title VII remedy.'<sup>12</sup>

In *Lam v. University of Hawaii*,<sup>13</sup> the Federal Court of Appeal (Ninth Circuit Court) rejected the 'bisection' of identity conducted by a lower court in a case covering three attributes. Lam, a woman of Vietnamese descent, alleged discrimination on the basis of race, sex, and national origin following her unsuccessful application for the post of Director of the Law School's Pacific Asian Legal Studies Program.<sup>14</sup> The 'mathematical' approach taken by the District Court, which looked for evidence of racism and then sexism, was held to be incorrect because 'where two bases for discrimination exist, they cannot be neatly reduced to distinct components' because 'attempt[ing] to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.'<sup>15</sup> Again the Court argued that refusing the claim would leave migrant women without a remedy in the face of discrimination.

I have discussed elsewhere the reception of intersectionality in the British courts.<sup>16</sup> It has in a few cases been recognized by lower courts, but in the case of *Bahl*<sup>17</sup> this decision was reversed at the higher level. In that case, Justice Elias stated that whilst a finding of discrimination on the grounds of race and sex was possible after consideration of the evidence in relation to each ground,

'[i]f the evidence does not satisfy the tribunal that there is discrimination on grounds of race or on grounds of sex considered independently, then it is not open to a tribunal to find either claim satisfied on the basis that there is nonetheless discrimination on grounds of race and sex when both are taken together . . . . Nor can the tribunal properly conclude, if it is uncertain about whether it is race or sex, that it will find both.'

It was this strict judicial adherence to the statutes that created a gap in protection. The law had no way to address situations where a person suffered less favourable treatment because of more than one

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Crenshaw for further examples.

<sup>12</sup> *Id.* at 1030 - 1032.

<sup>13</sup> *Lam v. University of Hawaii* 40 F. 3d 1551, 1561 (9th Cir. 1994). See also *Hicks v. Gates Rubber Co* 833 F.2d 1406 (10th Cir 1987) and *Lewis v. Bloomsburg Mills Inc.* 773 F.2d 561 (4th Cir 1985).

<sup>14</sup> *Id.* at 1554-1558.

<sup>15</sup> *Id.* at 1562.

<sup>16</sup> I. Solanke 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) *Modern Law Review* 72(5) 723.

<sup>17</sup> See also *Network Rail v Griffiths-Henry* [2006] IRLR 865.

personal attribute, especially where it was 'the unique combination of characteristics that results in discrimination, in such a way that they are completely inseparable' known as intersectional multiple discrimination. The scenario in *Jeffries* was used as the default example - where a black woman is passed over for promotion by her employer because she is a Black woman, she would have to bring separate claims of discrimination because of race and sex yet may not succeed in either claim if her employer can show that Black men and white women are not discriminated against and therefore that her treatment was not because of race or sex alone. It was to rectify this omission that the provision on multiple discrimination was inserted into the Equality Act 2010.

The Equality Act begins in Chapter 1 by laying out the newly termed 'protected characteristics'. There are eight in total, listed in alphabetical order: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation. The prohibition of multiple discrimination is outlined in Chapter 2 which lays out 'prohibited conduct': this includes direct discrimination; combined discrimination: dual characteristics; discrimination arising from disability, gender reassignment discrimination: cases of absence from work; pregnancy and maternity discrimination outside of employment; pregnancy and maternity discrimination: work cases and indirect discrimination. The proximity of 'combined discrimination' to 'direct discrimination' is relevant – the former only applies to the latter. This is one of the limitations which has come under sharp criticism, but is probably not surprising given the government objective to design a provision which was easy to understand and apply 'in everyday situations – by small businesses as well as large firms, by small schools and large government departments' and avoided 'disproportionate burdens on those who have responsibilities under the law.'<sup>18</sup>

Section 14 states that:

'A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.'<sup>19</sup>

The huge advantage of this section is that it frees claimants who feel that they are suffering from discrimination due to more than one characteristic from the burden of producing separate evidence to demonstrate discrimination in relation to each characteristic as per *Bahl*. As the Act says,

'B need not show that A's treatment of B is direct discrimination because of each of the

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<sup>18</sup> Government Equalities Office (2009) 'Equality Bill: Assessing the impact of a multiple discrimination provision' 10-11 (GEO 2009).

<sup>19</sup> EA 2010 2(14)(1)

characteristics in the combination (taken separately).<sup>20</sup>

However, a multiple discrimination claim will fail if discrimination is lawful by virtue of a genuine occupational requirement: under section 14.4,

'...B cannot establish a contravention of this Act by virtue of subsection (1) if, in reliance on another provision of this Act or any other enactment, A shows that A's treatment of B is not direct discrimination because of either or both of the characteristics in the combination.'

So if another provision in the Equality Bill makes less favourable treatment lawful in relation to either of the characteristics in the combination, as where an exception or a justification is applicable, the less favourable treatment would not be unlawful under the multiple discrimination provision. For example, 'if a man who is denied a job in a domestic violence refuge alleges this denial is because he is a disabled man, but in fact it is because being a woman is an occupational requirement for the post, a multiple discrimination claim combining sex and disability would not succeed – because, based on the facts, there was no disability discrimination and the sex discrimination was not unlawful.'<sup>21</sup>

Article 14, however, is not a panacea and will not fully replace multiple single strand claims. There is a hint in the GEO *Peers Briefing* that it is to some extent a remedy of last resort:

'Clause 14 is based on a careful examination of the evidence available concerning multiple discrimination. It is not intended that this provision should be a panacea for all forms of discrimination; rather, it provides a specific legal remedy for those who have experienced less favourable treatment because of a combination of protected characteristics, where currently it may difficult, complicated and sometimes impossible to get a legal remedy. Just as multiple single strand claims are often necessary now, multiple claims may be necessary in the future, even with the advent of dual discrimination.'<sup>22</sup>

Nonetheless, it cannot be denied that with this change, protection against discrimination in Britain has taken another huge step. It remains questionable, however, whether it really has stepped towards intersectionality and multiple jeopardy. Before answering this question, I want to go back in time to consider why this idea was missing in the first place – or in other words, where was Ms Sojourner Truth during the initial design phase of anti-discrimination law?

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<sup>20</sup> EA 2010 2(14)(3).

<sup>21</sup> GEO 2009, 15.

<sup>22</sup> Government Equalities Office (2009) 'Peers Briefing' (PB).

## I.ii The origins of the design of anti-racial discrimination law

A key question for me is how separate categories of discrimination were arrived at? This requires a foray into the past and into international politics: I have discussed in my recent book (*The Evolution of Anti-Racial Discrimination Law*) the role of the United Nations in the development of the post-war narrative of anti-discrimination law. A crucial location for the post-war non-discrimination agenda was the United Nations, in particular the Commission on Human Rights (CHR).

On April 29<sup>th</sup> 1946 the first meeting of the Commission on Human Rights (CHR) of the Economic and Social Council was held in New York<sup>23</sup>. Mr Henri Laugier, Assistant Secretary General in charge of Social Affairs reminded the meeting in his opening words that:

‘..it is a new thing and it is a great thing in the history of humanity that the international community organised after a war which destroyed material wealth and spiritual wealth accumulated by human effort during centuries has constituted an international mechanism to defend the human rights in the world...We are only at the starting point of a very great enterprise, the volume of which and the action of which will have to grow, day after day’<sup>24</sup>

The task of the CHR was to discover the basis for a fundamental declaration on human rights which would be acceptable to both current members of the United Nations, as well as those who might subsequently seek admission into the ‘international community’. It was specifically asked to ‘define the violation of human rights within a nation, which would constitute a menace to the security and peace of the world and the existence of which is sufficient to put in movement the mechanism of the United Nations for the maintenance of peace and security’, (national social unrest which has international implications) and beyond this to ‘suggest the establishment of machinery of observation which will find and denounce the violations of the rights of man all over the world.’<sup>25</sup> As early as 1946, the Commission had been working on draft papers for an international Bill of Human Rights: the Cuban and Panamanian delegation had presented proposals on the contents of this.<sup>26</sup> These drafts listed a number of common concerns, including the right to equal protection and equality before the law without distinction as to race.<sup>27</sup> Other prohibitions included religion, colour, class and sex. At its ninth meeting, the CHR agreed to recommend to the Economic and Social Council that the full Commission should draft an

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<sup>23</sup> UN E/HR/6 1 May 1946.

<sup>24</sup> UN E/HR/6 p1&2.

<sup>25</sup> UN E/HR/6 p3.

<sup>26</sup> In April 1946, the Cuban Delegation to the General Assembly of the United Nations presented a draft ‘Declaration on Human Rights’ (UN E/HR/1 22 April 1946) and later that month the Panamanian delegation also presented to the General Assembly a ‘Statement of Essential Human Rights’ (UN E/HR/3 26 April 1946)

<sup>27</sup> The Cuban draft listed race, religion, colour, class or sex; the Panamanian mentioned race, religion, sex ‘or any other reason’.

International Bill of Rights as soon as possible, to be circulated among the United Nations governments for suggestions.

Categorisation was institutionalized from the outset: the CHR created a sub-commission on the prevention of discrimination and protection of minorities (SPDPM) which became the driving force behind much of the work at the UN on racial discrimination. In 1949, it took on the task of systematically studying the 'main types of discrimination which impede the equal enjoyment by all of human rights and fundamental freedoms and the causes of such discrimination.'<sup>28</sup> During its sixth session, the SPDPM adopted a resolution calling for the collection of 'information on the legislative and judicial practices of various countries with regard to measures of the cessation of any advocacy of national, racial or religious hostility.'<sup>29</sup> The study, completed in 1955, made use of texts of constitutions, statutes and administrative instruments and preliminary studies on legislative and judicial practice were prepared for sixty-seven countries including the UK and Germany (both the FRG and the BRD).<sup>30</sup> By January 1956, the year before the creation of the European Economic Community (EEC), the Sub-Commission was preparing a draft resolution to undertake a study of discrimination in the field of employment and occupation.<sup>31</sup> The delegation of (then) Czechoslovakia presented the SPDPM with a draft resolution on Manifestations of Racial and National Hatred and Religious and Racial Prejudice.<sup>32</sup>

The strongest support for this came from the newly independent countries in Africa and Asia, South America and Eastern Europe, whose memory of such hatred and prejudice was the keenest. Adopted unanimously in the Third Committee, with just three abstentions,<sup>33</sup> the resolution condemned all manifestations of racial and national hatred as violations of the UN Charter and the Declaration of Human Rights, and called upon the governments of all states to take action to prevent this revival.<sup>34</sup> The SPDPM decided to keep this issue at the forefront of its agenda. The CHR unanimously adopted an amended version of this resolution in March 1961<sup>35</sup>. It was subsequently adopted by the Economic and Social Council in the 16<sup>th</sup> Session. The Council recommended that the General Assembly should,

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<sup>28</sup> UN E/EN.4/Sub.2/40/Rev.1 7 June 1949 'United Nations – Commission on Human Rights (Sub-commission on preventing discrimination and the protection of minorities), The Main Types and Causes of Discrimination (Memorandum submitted by the Secretary General, New York.

<sup>29</sup> UN E/CN.4/Sub.2/172 9 November 1955.

<sup>30</sup> UN E/CN.4/Sub.2/172, p20.

<sup>31</sup> E/CN.4/Sub.2/176/Rev.1 4 January 1956. The international instruments already adopted included ILO Convention No. 111 and Recommendation No. 111 on racial discrimination in employment and occupation (adopted on 25 June 1958). UN E/CN.4/Sub.2/234 29 November 1963, 16th Session, Annex.

<sup>32</sup> UN A/4615 Report of the Economic and Social Council, 6 December 1960 - 1961, 15th Session.

<sup>33</sup> China, Ethiopia and the Union of South Africa. UN Document A/C3/SR999, p85, paragraphs 4-8.

<sup>34</sup> Appendix, UN A/C.3/L.848/Rev.2.

<sup>35</sup> UN E/3456 Commission on Human Rights, 20 February 1961 – 17 March 1961, Report of the 17th Session, 14 -17.

inter alia,

'call upon the Governments of all States to take all necessary steps to rescind discriminatory laws which have the effect of creating and perpetuating racial prejudice and national and religious intolerance wherever they still existed, to adopt legislation if necessary for prohibiting such discrimination, and to take such legislative or other appropriate measures to combat such prejudice and intolerance...'<sup>36</sup>

The seeds of the International Declaration on the Elimination of All Forms of Racial Discrimination (ICERD) were sewn in this call.

The resolution was again discussed in the General Assembly. Opening the general debate, the Israeli delegate noted the 'strange paradox of an age in which man could release the vast energy of the atom but could not exorcise from the human heart the demons of hatred, envy and greed that led one group to exploit, ill treat or even wipe out another.' He recalled not only the Jewish victims of the Nazi regime, who comprised about half of the twelve million civilians who had been murdered, but also 'the Slav peoples, to be exterminated or turned into slaves, and the Negroes who had been considered sub-human' during the Nazi promotion of racial supremacy doctrines.<sup>37</sup> The ensuing debate proved to be so controversial that eight meetings were devoted to the item instead of the allotted three.<sup>38</sup>

The controversy was also due to the other resolution under consideration: a Convention on the Elimination of Racial Discrimination. There was disagreement on whether the legal measures suggested in this document were appropriate: some delegations felt that a multilateral juridical instrument would be of undoubted value<sup>39</sup> but others, including the UK<sup>40</sup> (led by Clement Attlee) and France, did not see such measures as the way forward.<sup>41</sup> Eventually, however, both resolutions were adopted unanimously: by the 20 November 1963, the General Assembly had adopted Resolution 1904 (XVIII) proclaiming the United Nations Declaration on the Elimination of all Forms of Racial Discrimination, and Resolution 1906 (XVIII) on the preparation of a draft International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The draft Declaration and Convention were to be prepared by the CHR<sup>42</sup> for submission to the Assembly by, respectively, its 18<sup>th</sup> and 19<sup>th</sup>

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<sup>36</sup> Resolution 826 B (XXXII) UN A/4820 Report of the Economic and Social Council, 6 August 1960 – 4 August 1961, 16th Session, Supplement No 3.

<sup>37</sup> UN Document A/C.3/SR1165, p156, paragraphs 8-9.

<sup>38</sup> UN Document A/C.3/L980 Work Programme of the Third Committee, 28 September 1962, 17th Session.

<sup>39</sup> For example Venezuela (A/C.3/SR1165, para 45), Romania (A/C.3/SR1166, para 18) and Greece (UN Document A/C.3/SR1167, paragrah 35).

<sup>40</sup> UN Document A/C.3/SR1165, paragraphs 37-42.

<sup>41</sup> UN Document A/C.3/SR1167, paragraph 3-10.

<sup>42</sup> UN Document A/PV/1187 7 December 1962, p1044, paragraph 41.

meetings.<sup>43</sup>

Proposals on the draft convention were submitted by then Czechoslovakia, to which the governments of Honduras, Madagascar, Nigeria, Trinidad and Tobago and the UK attached statements of support.<sup>44</sup> Another joint proposal was submitted by the delegations of the US, UK and the USSR and Poland. The SPDPM devoted 21 of its 27 plenary meetings in January 1964 to the draft convention. Observers at the sessions included representatives of the specialised agencies as well as 37 non-governmental organisations.<sup>45</sup> The draft Convention defined racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, national or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'<sup>46</sup> State signatories to the Convention were, for example, to be called upon to remove racial discrimination from public life. Under Article 2.1(a) each state party was to undertake to 'engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.'<sup>47</sup> Article 2.1(c) called for each State party to 'take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.' Article 4 required signatories to condemn all propaganda and organisations based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempted to justify or promote racial hatred and discrimination in any form. Signatories were also to immediately adopt legal measures to eradicate incitement to and acts of racial discrimination.

In Resolution 1780 (XVII), adopted in 1962, the General Assembly of the UN requested the Commission on Human Rights (CHR), working with the Sub-Commission on Prevention of Discrimination and Protection of Minorities (SPDPM) and bearing in mind debates and views of the specialized agencies, to submit a draft international convention on the elimination of all forms of racial discrimination (ICERD). Protection against religious discrimination was deferred. The first legal prohibition of discrimination in Britain appeared just a few years later in 1965.

The concept of discrimination did not exist in English law prior to 1965. It was seen as a radical departure from established legal tradition to incorporate it. Under the common law, before the making of

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<sup>43</sup> UN A/5503 Report of the Economic and Social Council 4 August 1962 – 2 August 1963, 18th Session, Supplement No 3, p73.

<sup>44</sup> UN A/C.3/L.1010; Note by Secretary General E/CN.4/Sub.2/234 29 November 1963, 16th Session.

<sup>45</sup> UN E/CN.4/873 11 February 1964, Report of the 16th Session, p6-8.

<sup>46</sup> Draft United Nations Convention on the Elimination of Racial Discrimination. PRO Document HO 376/3.

<sup>47</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195. Entered into force January 4, 1969.

the first Race Relations Act 1965, people could discriminate against others on the grounds of colour, race, nationality or ethnicity to their hearts content. This 'unbridled capacity to discriminate' or treat people differently was the 'mischief and defect for which the common law did not provide.'<sup>48</sup> A few cases concerning racial discrimination had been successful before the courts<sup>49</sup>, but even the most creative adjudication could not develop the common law to provide an appropriate remedy for the most common forms of discrimination arising in the areas of accommodation or employment.<sup>50</sup> It was to remedy this situation that racial discrimination was made unlawful.

There were earlier attempts to introduce such a prohibition, but the internal will was lacking and the international pressure had not yet reached its peak. Throughout the 1950s two British MPs – Reginald Sorenson and Fenner Brockway - had made many attempts to introduce such via a private Bill. In 1951, MP George Sorensen had proposed a 'Colour Bar Bill', which although unsuccessful, had prompted the Foreign Office to review its obligations under international agreements which it had signed.<sup>51</sup> In the ten years from 1956 – 1966, Lord Fenner Brockway also presented Colour Bar Bills to the British Parliament. Brockway, who through his Congress of Peoples against Imperialism<sup>52</sup> was also closely involved with independence movements in the colonies and Pan-Africanists in the UK, made nine separate attempts to introduce legislation making racial discrimination a criminal offence in public places, hotels, common lodging houses, public houses, entertainment restaurants, and dance halls. Punishment for this crime was a maximum fine of £25 or, where applicable, withdrawal of licenses or registration.<sup>53</sup>

The Brockway Bill sought to address the impact of racial violence in Britain on relationships with the colonies.<sup>54</sup> His original measure included employment in firms with more than fifty employees and promotion, but this provision was later withdrawn<sup>55</sup> due to trade union opposition.<sup>56</sup> Private residences were also excluded: Brockway regarded that it went 'beyond the sphere of legislation...to say that

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<sup>48</sup> Lord Simon of Glaisdale, *Applin v Race Relations Board*, [1974] All ER 73.

<sup>49</sup> *Scala Ballroom (Wolverhampton) Ltd. v. Ratcliffe*[1958] 1 WLR 1057; [1958] 3 All E.R. 220; 102 SJ 758; *Constantine v. Imperial Hotels Ltd.* [1944] 1 K.B. 693.

<sup>50</sup> A. Lester and J. Bindman (1972) *Race and Law*. Middlesex: Penguin Books, 25.

<sup>51</sup> Letter dated 4 January 1951 from the Foreign Office in reply to a query from Miss E J Emery of the Commonwealth Relations Committee pertaining to Sorenson's Colour Bar Bill. PRO Document FO 371/88835.

<sup>52</sup> D. Goldsworthy (1971). *Colonial Issues in British Politics 1945 – 61*. Oxford: Oxford University Press, 257-8.

<sup>53</sup> S. Abbott (ed.) (1971) *The Prevention of Racial Discrimination in Britain*. Oxford: Oxford University Press, 239.

<sup>54</sup> Hansard, 1955 – 56, Vol. 554, June 11-22: 249/50.

<sup>55</sup> F. Brockway (1967) *This Shrinking Explosive World: a study of race relations*. London: Epworth Press, 81-2 (footnote).

<sup>56</sup> Abbott (1971: 239).

persons should not have the right to decide who should enter their own homes as lodgers.<sup>57</sup> Legislation was justified and necessary only in public spheres, particularly those dependent upon licences from public authorities, such as hotels, cafes and restaurants, dance and concert halls, leasing, and employment.

His Bills were consistently rejected as the wrong way to tackle the problem.<sup>58</sup> None ever reached a Second Reading. The government, aside from a general reluctance not to introduce the concept of racial discrimination into English law, was particularly anxious not to tread upon the common law right of employers to hire as they saw fit, save for a few exceptions protecting ex-servicemen and disabled persons.<sup>59</sup>

This was also the reason for the cautious response to the new UN Convention: it was agreed across government that legislation on racial discrimination should be avoided. The UK delegate to the UN was advised to be careful not to commit the Government in any way to eventual ratification of a Convention because

‘1. It is uncertain whether we shall be able to accede to such an instrument; judging from the extreme language which has already been used in the debates on the declaration the convention is liable to contain certain unacceptable provisions; and

2. we have reservations about the effectiveness of legislation as a means of eliminating racial discrimination.’<sup>60</sup>

In addition, the government sought to protect its status as a colonial power by preventing the removal of ‘the distinction between racial discrimination and colonialism.’<sup>61</sup> Yet, within a year these reservations had lost their salience. In the General Election of 1964, a promise<sup>62</sup> appeared in Labour’s manifesto, *The New Britain*, that a Labour government would legislate against racial discrimination and incitement in public places, and give special help to local authorities in areas where Commonwealth citizens had settled.<sup>63</sup> Harold Wilson stated that ‘If a Labour government came to power and Mr Fenner Brockway’s

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<sup>57</sup> Hansard, 1955 – 56, Vol. 554, June 11-22: 248.

<sup>58</sup> Hansard, 1956 – 57, Vols 569: 1425-1438 & Vol 570:1602-1608.

<sup>59</sup> Public Records Office (PRO) File LAB 8/3070, Letter 14.4.65.

<sup>60</sup> PRO File LAB 13/1936, Note from the Foreign Office on the Draft Declaration Against All Forms of Racial Discrimination, dated 23 September 1963.

<sup>61</sup> PRO File LAB 13/1936, Note from the Foreign Office on the Draft Declaration Against All Forms of Racial Discrimination, dated 23 September 1963.

<sup>62</sup> Rose suggests that the policy was more a hurried response to Conservative proposals than the result of lengthy deliberations on the topic. J. B. Rose (1969) *Colour and Citizenship: a report on British race relations*. London: IRR/Oxford University Press, 224.

<sup>63</sup> ‘Race Relations: Working Party Report’, Labour Party (July 1967: 8).

Bill had not by then reached the statute-book, Labour would take the Bill over, with whatever minor amendment that may be necessary, and turn it into a Government measure and legislate it.<sup>64</sup> This undertaking was strengthened in a 'law reform' speech to the Society of Labour Lawyers a few months later, where Wilson 'pledged to introduce legislation against racial incitement and discrimination'.

Labour managed to win the general election in October that year with a bare majority of four. The new Government's proposals were laid out in the Queens Speech, delivered on 3<sup>rd</sup> November. It was stated that the government 'will take action against racial discrimination and promote full integration into the community of immigrants who have come here from the Commonwealth.' The Home Secretary made further statements during the debate on the Expiring Laws Continuance Bill where he said that 'an essential measure is legislation to prevent discrimination against coloured persons in public places. It is our intention to introduce that legislation' and 'If we can find the necessary definitions – they are extremely difficult – we would add to that legislation against incitement.'<sup>65</sup>

These pledges did not remove the hesitancy and uncertainty about the radical path along which English law was being taken. There was a definite regret on the part of the Home Secretary Frank Soskice that the day had come for special laws to be passed to protect people on the grounds of their race or colour:

'We have hitherto never thought it necessary in our legislation to embody special protection for individuals on the ground of their race, colour and so on. To have to do so is in a sense a confession of weakness and is to be regretted. The real reason for doing so is the presence of a substantial number of coloured immigrants and the need to make certain that they are fully integrated into the community.'<sup>66</sup>

In the same memo, Soskice proposed a 'package deal' which formally linked immigration control to integration measures. The measures were designed, firstly, to tighten immigration control and secondly 'to integrate the coloured immigrants in a genuine sense into the community as first and not second class citizens.' A new Bill would contain administrative measures to strengthen the existing immigration rules and give the Home Secretary additional powers to curb evasion of these controls. In addition this new Bill included a provision prohibiting 'what may be loosely described as discrimination against persons on the ground of their colour and perhaps race or origin in public places.'<sup>67</sup> The 'package' also contained a further bill to amend the Public Order Act 1936 by prohibiting racial incitement. This approach formally harnessed integration measures to immigration control. When presented to the

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<sup>64</sup> PRO File HO 376/3. Study group on Commonwealth Immigrants Racial Discrimination in Public Places and Incitement. Memorandum concerning the draft Bill prepared by the Committee on Racial Discrimination of the Society of Labour Lawyers.

<sup>65</sup> Hansard, 1964 -65, Vol. 702, November 16-27: 287-8.

<sup>66</sup> PRO File HO 376/68, Memo by the Home Secretary, 6 January 1965.

<sup>67</sup> PRO File HO 376/68, Memo by the Home Secretary, 6 January 1965.

House in the November debate on the Expiring Laws Continuance Bill, it received broad acceptance as a legal way to deal with an urgent social problem.

During the political discussions, the Society for Labour Lawyers stressed that the law should 'protect those attacked for what they are, not for what they may believe or do.'<sup>68</sup> For this reason, religious groups per se were not included among those it proposed should be protected, except where religion was a pointer to ethnicity. The Labour government of the day settled the content of the legislation based upon two main considerations: firstly, what would be practical in application and thus effective, and secondly what would be seen as in line with the emerging international instrument, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD focused on race and consciously excluded religion: this pattern was followed by the British government.<sup>69</sup>

Agreement was finally reached towards the end of 1965. The Government had also decided to sign the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) on September 22, just a few weeks before passage of the Race Relations Bill,<sup>70</sup> although it was generally agreed that ratification should await the outcome of deliberations arising from the first annual report of the Race Relations Board and the PEP report.<sup>71</sup> The arguments for signature and ratification were strong: the elimination of racial discrimination had become a major preoccupation of the United Nations - given the continuing situations in South Africa and Rhodesia - and ratification was highly recommended in order to maintain the reputation the UK had striven to acquire in the United Nations.<sup>72</sup> A carefully worded statement was prepared explaining the UK's decision to sign as a 'natural consequence' of internal developments:

'I wish to announce that, as the British Foreign Secretary has already informed the Assembly, Her Majesty's Government have decided that the United Kingdom should sign the International Convention on the Elimination of All Forms of Racial Discrimination and this will be done at an early opportunity. This decision is an indication of the importance attached by my Government to the elimination of one of the most dangerous evils present in the contemporary world situation - the deprivation of human rights because of race, colour, descent or national or ethnic origin. Internationally and domestically we regard the promotion of racial equality as a task of the highest priority. My country approaches this problem with the special experience derived from our efforts to maintain racial harmony within our own borders...Our decision to

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<sup>68</sup> Memorandum on Draft Bill: 3.

<sup>69</sup> PRO: HO 376/68.

<sup>70</sup> PRO LAB 13/2421.

<sup>71</sup> PRO: T227/2534.

<sup>72</sup> PRO: LAB 13/2421 report of the Human Rights Working Group on the Ability of the UK to accept ICERD.

sign the Convention on Racial Discrimination is a natural consequence of those policies.<sup>73</sup>

On 8 November 1965, the first Race Relations Act passed into law.<sup>74</sup> The Act was more a statement of policy than a substantial prohibition. It was essentially a symbolic measure, which sought to secure the peace in public places rather than tackle racial discrimination in employment or any other field. These provisions were first introduced in 1968 and developed in 1976 with subsequent reforms occurring in 2000, 2003, 2006 and finally 2010. It is clear to see that as with EU gender equality legislation, much has been achieved since these humble beginnings, due primarily to well placed and sustained political activism.

### I.iii Multiple Discrimination in the Equality Act 2010

We have moved a long way since 1965. As Hepple writes, we are now entering the fifth generation of anti-discrimination law in Britain.<sup>75</sup> This fifth generation has seen a conceptual development. As with the concept of indirect discrimination, the idea of what we call multiple discrimination originated in the USA.<sup>76</sup> Many are familiar with the important contribution to the debate on multiple discrimination in Britain by Fredman and Szyszczak<sup>77</sup>, who recognized the need for anti-discrimination law to be more holistic. Hannett<sup>78</sup> thereafter wrote on the different forms of multiple discrimination for a British audience: additive and intersectional. These and other authors took up the mantra being raised in the US, that victims of multiple discrimination – predominantly black women – were left without a remedy due to the narrow design of discrimination law.

Multiple discrimination received a boost in the European sphere at the start of the new millennium, when it was mentioned in relation to gender in the EU Directives activating Article 13 TEC<sup>79</sup> (now Article 19 TFEU). The idea was not defined in these measures nor a subsequent Directive<sup>80</sup> proposed by the

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<sup>73</sup> PRO: LAB 13/2421.

<sup>74</sup> Race Relations Act 1965, c. 73.

<sup>75</sup> B. Hepple (2010) *European Rights Review*, 2010.

<sup>76</sup> See Hepple (1972).

<sup>77</sup> S. Fredman and E. Szyszczak (1992) "The Intersection of Race and Gender" in B. Hepple and E. Szyszczak (eds) *Discrimination: The Limits of the Law*. London: Mansell.

<sup>78</sup> S. Hannett (2003) "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" 23 *Oxford Journal of Legal Studies* 65.

<sup>79</sup> See preamble [14] of Council Directive 2000/43 of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin. OJ 2000, L180/22 (Directive2000/43); and preamble [3] of Council Directive 2000/78 of 27 November 2000 Establishing a General Framework For Equal Treatment in Employment and Occupation. OJ 2000, L303/16 (Directive 2000/78).

<sup>80</sup> 'Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation' at <http://www.equalrightstrust.org/ertdocumentbank/europa%20directive.pdf>. Similar wording appears in Paragraph 13 of the preamble.

Commission to expand protection from discrimination in EU law. A Commission study concluded that 'sometimes the term multiple discrimination has been used to refer to additive or accumulative discrimination on one hand, or as a general term for both additive and intersectional discrimination on the other.'<sup>81</sup> The concept has not been widely adopted in EU legal systems. Britain is one of only few EU MS<sup>82</sup> which have specifically provided for multiple discrimination to be recognized in the courts. Section 2.14 of the EA 2010, British law now implements the protection indicated in EU measures with a 'dual discrimination provision, which will enable people to bring claims where they have experienced less favourable treatment because of a *combination* of two protected characteristics.'<sup>83</sup>

Multiple discrimination is not defined in the Act but an explanation of this term is provided by the Government Equalities Office (GEO). Multiple discrimination is recognized in one of three forms: cumulative multiple discrimination is the situation where a person 'is treated less favourably because of more than one protected characteristic, but each type of discrimination occurs on separate occasions.'

**Additive** multiple discrimination is by contrast where

'a person is treated less favourably because of more than one protected characteristic and, although the two forms of discrimination happen at the same time, they are not related to each other. For example, a lesbian experiences both homophobia and sexist bullying from her employer during the same incident.'

These two forms of multiple discrimination were already recognised in the law and no change was required. Only **intersectional** multiple discrimination was not accommodated by the current framework, and it was this omission that the Government sought to remedy.<sup>84</sup> This was where:

'the discrimination involves more than one protected characteristic and it is the unique combination of characteristics that results in discrimination, in such a way that they are completely inseparable. This often occurs *as a result* of stereotyped attitudes or prejudice relating to particular combinations of the protected characteristics.'

Intersectional multiple discrimination therefore refers to a unique inseparable combination of characteristics which triggers stereotypes. In fact, it seems to be the existence of a stereotype which, according to this definition, welds the characteristics together.

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<sup>81</sup> European Commission (2007) 'Tackling Multiple Discrimination Practices, policies and laws' Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.4.

<sup>82</sup> Austria, Germany and Romania also specifically address multiple discrimination in their legislation. European Commission (2007), 20.

<sup>83</sup> GEO (2009) Explaining the Equality Bill: Dual Discrimination.

<sup>84</sup> GEO (2009), 10-11.

This starting point is different to that taken by black feminist legal scholars, for whom intersectionality is more than combining characteristics in a way that is inseparable. As said by Scales-Trent<sup>85</sup> intersectionality points to the experience of an inescapable synergy of 'degraded statuses.' In the case of black women, these are 'the disabilities of blacks and the disabilities which inhere in their status as women' which result in a condition 'more terrible than the sum of their two constituent parts.'<sup>86</sup> Intersectionality indicates a 'multiple consciousness'<sup>87</sup> that is a new '*integrated, undifferentiated, complete whole*,'<sup>88</sup> just as when tin and copper put together make bronze, not 'coppertin' or 'tinper.' Although the default example of intersectional discrimination feature black women,<sup>89</sup> this sense of synergy is missing from the EA provisions. I think that categorisation continues to underly the provision: for example the EA allows claims where because of a combination of the two relevant protected characteristics, 'a person treats another less favourably than they treat or would treat a person who does not share **either** of those characteristics.' This indicates an additive logic. It seems to me that the concept of intersectional multiple discrimination in the EA has been appended to the single-dimension logic of anti-discrimination law<sup>90</sup> – this is not intersectional but additive.

The language used in GEO documents indicates this further. For example, the Peers Briefing states that

'If, for example a black disabled woman is discriminated against, it is likely that the discrimination she experienced was because of any one of the three strands, or because of a combination of any two of these protected characteristics, but less likely to only be because of the particular combination of the three. Evidence shows that enabling claims combining two protected characteristics addresses most (90%) of the cases of intersectional discrimination.'

There is no sense of synergy here but very clearly the idea of 'splitting' reigns. Other examples in the

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<sup>85</sup> J. Scales-Trent (1989) 'Black Women in the Constitution: Finding Our Place and Asserting Our Rights.' 24 *Harv. C. R.-C.L. L. Rev.* 9.

<sup>86</sup> Scales-Trent (1989, 1).

<sup>87</sup> M. Matsuda (1989) 'When the First Quail Calls' 11 *Women's Rights Law Reporter* 7.

<sup>88</sup> R. Austin (1989) 'Sapphire Bound!' *Wisconsin Law Review* Issue 3, 540.

<sup>89</sup> The CAB exploratory study commissioned by the GEO used the following definition in its survey: 'Multiple discrimination occurs when a person is treated less favourably because of more than one of the protected characteristics. It can be experienced in several different ways. When the discrimination involves more than one protected characteristic and it is the unique combination of characteristics that results in discrimination, in such a way that they are completely inseparable, then this is known as intersectional multiple discrimination and the current discrimination law framework does not always provide a remedy for it. For example, a Black woman passed over for promotion by her employer because she is a Black woman would have to bring separate claims of discrimination because of race and sex. However, she may not succeed in either claim if her employer can show that Black men and white women are not discriminated against and therefore her treatment was not because of race or sex alone'.

<sup>90</sup> Crenshaw (1989) 150.

consultation documents do not help to clarify, as they refer only to 'multiple discrimination in practice' and do not differentiate between cumulative, additive and intersectional.<sup>91</sup>

Now of course there is nothing to prevent a development of the idea: indeed although the 'multiple consciousness perspective'<sup>92</sup> was originally asserted in relation to black women, there is no reason why any group which demonstrates that it is discrete, insular and powerless such as young black men<sup>93</sup> or Asian women<sup>94</sup> should not be able to claim similar protection.<sup>95</sup> Yet I would contend that the content of the concept should retain its fundamental quality and not be diluted. There are factors that give intersectional discrimination its specific quality, making it different from additive discrimination. For example, the crux for victims of intersectional discrimination is that they lack choice: they '...don't get to choose which one [attribute] will haunt them and which one they'll be free of.'<sup>96</sup> There is no scope for 'combination.' They have to manage all together and in the absence of an ability to do so, as in *Lam* and *Jefferies*, would have no access to a remedy. It is therefore not enough to have a unique combination of characteristics (that lends itself to a stereotype), but the combination must make them discrete, insular and powerless.

The problem for me is that the introduction of this concept has left behind the thinking that created it. Is this absence of synergy important? I answer yes: it is important because the multiple consciousness represents a shift in perspective: it is about centralizing those whose lives are blighted by their devalued characteristics and de-centralising the white male norm. The provision does not contain the idea of 'multiple jeopardy'. In the absence of centralization of 'multiple jeopardy' the white male norm remains centre stage and the holistic promise of intersectionality remains unfulfilled.

Commentators on section 14 have argued for a higher combination of characteristics to be recognised, and for indirect discrimination and harassment to be brought within the remit of intersectional claims. Hepple explains the background to these restrictions:

'The limitation to two grounds was a compromise made by the Equality ministers in the Government in the face of the opposition of the Business lobby, supported by Business ministers, who opposed any provision on multiple discrimination. The new provision only allows

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<sup>91</sup> GEO (2009) 11, 13, 16 and 19.

<sup>92</sup> Matsuda (1989) 7.

<sup>93</sup> I. Solanke, 'Stigma: An Alternative Limiting Principle in Anti-discrimination Law?' in D. Schiek and V. Chege (2008) (eds), *European Union Nondiscrimination Law: Comparative Perspectives on Multi-Dimensional Equality Law*. Abingdon: Routledge-Cavendish.

<sup>94</sup> V. Wei (1996) 'Asian Women and Employment Discrimination' 37 *Boston College Law Review* 771, 773.

<sup>95</sup> As in *Ennever v Metropolitan Police*, where the claimant cited discrimination on grounds of race, sex, religion and disability. Appeal No UKEAT/0051/06/SM, *Ennever v Metropolitan Police* (unreported).

<sup>96</sup> C. Jones and K. Shorter-Gooden (2003) *Shifting: The Double Lives of Black Women in America*. New York: Harper

a combination of two claims of direct discrimination, and a claim of direct and indirect discrimination cannot be combined. So if a disabled woman is denied flexible working and she alleges indirect discrimination on grounds of sex and direct discrimination because of disability, she will not be able to combine these in a single claim where it is unclear which of them caused the unfavourable treatment. Again the reason given for this was that it would be “unduly burdensome” to business.<sup>97</sup>

Inclusion of these aspects would be a welcome improvement, but this alone would not resolve the absence of the synergy originally underlying intersectional multiple discrimination. My conclusion is that Section 14 is a superficial change and any developments to it perpetuate that superficiality. The question therefore is how to go further? In order for this to happen, I think we need to change the fundamental design of discrimination law. The key to this is replacing the limiting principle of immutability.

## II. Immutability and its alternative

Earlier I mentioned Ms Rogers, who worked for American Airlines. In her case, she argued that the firm's policy discriminated indirectly against black women because braids have been ‘historically, a fashion and style adopted by Black American women, reflective of cultural, historical essences of the Black women in American society.’ In coming to its decision the federal court drew upon the notion of immutability. It not only reasoned that Rogers could not show that braids were specific to black women because Bo Derek had worn them in the film ‘10’ (!) but secondly, that unlike an Afro which was immutable, braids were mutable because they could be easily changed.<sup>98</sup>

The idea of immutability is central to legitimizing anti-discrimination law. It has long been the case that anti-discrimination law could only be seen as politically legitimate if law were used to protect people for what they are rather than what they choose. Indeed, this was expressed during discussions in Britain in the 1960s and remains fundamental to employment discrimination jurisprudence in the USA. However, it is also clear that the centrality of immutability has been loosened – anti-discrimination law has become more contextualised as it has responded to the political reality of social identities. Indeed, recognition of multiple discrimination necessitates a reflection on context:

‘Literature on Multiple Discrimination indicates that in order to explore the phenomenon of

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Collins, 59.

<sup>97</sup> B. Hepple (2010) ‘The New Single Equality Act in Britain’ *Equal Rights Review*, 16.

<sup>98</sup> Discussed in D Wendy Greene (2008) ‘Title VII: What’s Hair (and other race based characteristics) got to do with it?’ *University of Colorado Law Review*, Vol. 79, 1355.

Multiple Discrimination, it is important to examine the context in which discrimination arises. By contextualising discrimination we shed light on the historical, social, cultural and political processes and developments which have significance for the occurrence of discrimination – and hence Multiple Discrimination – in society.<sup>99</sup>

So why not replace immutability altogether in favour of a principle which inherently captures context and embeds this in the ethos and design of anti-discrimination law? A principle which captures this is stigma.

### II.i Stigma

I hoped I showed earlier that there is no inherent reason why legal protection from discrimination is organised upon the basis of categories. This was perhaps just the favoured design at the time. We may now speak of 'protected characteristics' but the logic of their creation remains the same. It may be that if the creation of 'protected characteristics' were informed by the logic of stigma rather than the logic of immutability (Lenhardt 2004; Solanke 2008), discrimination law could move beyond the limited consciousness it currently contains to a more holistic remedy.

A stigma is like a blemish or stain. Although an imprecise concept, a stigma is an attribute which, even though not necessarily immutable, is denigrated<sup>100</sup> and 'deeply discrediting'<sup>101</sup> in a way that 'tarnishes'<sup>102</sup> the whole identity of an individual. Stigmatisation is the social imposition of a negative relationship to a personal attribute which permits the 'doubting of the person's worthiness.'<sup>103</sup> All other traits, including abilities, 'are subordinated to or negated by this trait, which is immediately felt to be more central to the 'actual' identity of the individual'.<sup>104</sup> Stigmatisation is the mechanism by which a person's humanity is reduced and justifies the reduction or removal of civility, opportunities and life chances.

Stigmas can be immutable but not all are: they can relate to physical, character or personality traits borne by the individual or a relative. They can occur alone or in groups. I am not suggesting that all stigmas become characteristics protected under discrimination law. Under this logic, discrimination law

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<sup>99</sup> European Commission (2007) 31.

<sup>100</sup> A. Dijker and W. Koomen (2007) *Stigmatization, Tolerance and Repair*. Cambridge: Cambridge University Press, 8.

<sup>101</sup> E. Goffman (1990) *Stigma: Notes on the Management of Spoiled Identity*. London: Penguin, 12.

<sup>102</sup> R. Page (1984) *Stigma*. London: Routledge and Kegan Paul, 19.

<sup>103</sup> G C Loury (2002) *The Anatomy of Racial Inequality*. Cambridge, Mass.: Harvard University Press, 61.

<sup>104</sup> Page (1984: 10).

would focus on stigmas to which the public response is always punitive<sup>105</sup> rather than just negative (Nussbaum 2004: 176); which therefore make a significant difference in relation to access to and acquisition of resources in key areas, such as health, housing, education, training and employment; and which finally are difficult to escape (Levin and van Laar 2006: 4). Using the logic of stigma anti-discrimination law could offer a remedy for single, multiple and intersectional forms of discrimination: it would address the gap in the current protection in a deep rather than superficial way and answer the concerns over numerical limits whilst retaining external boundaries for discrimination law.

In promoting the use of stigma, I am also not suggesting a completely new approach to discrimination law but seeking an alternative underlying rationale which entrenches the new more contextual concerns and centralises the multiple consciousness of intersectional discrimination. Stigma widens the spotlight of discrimination law to situate the complete individual in society. They are by definition contextual: they are socially determined and maintained thus to focus on them is to prioritise social meanings.<sup>106</sup> Because they cannot be examined 'in isolation from the economic and social structure of a given society'<sup>107</sup>, they go beyond identity politics and individual attitudes to point towards the role of society in everyday discrimination. Restoration of the link between discrimination and society is necessary because it firmly anchors discrimination law: discrimination law separated from society can lose its rationale and measures to remedy past injustice or secure future equality are easy to attack as 'reverse' discrimination. There would be no need to change current protected characteristics but use of this logic would also open the door to bringing new socially relevant characteristics under the scope of anti-discrimination law and also move beyond the perpetrator ideology: discrimination is not always the consequence of active prejudice.<sup>108</sup>

### II. iii Taking context into the courtroom

Stigmas are by definition contextual – they are socially determined and maintained.<sup>109</sup> As mentioned above, the spotlight of discrimination law has already widened to consider context. However, in order to

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<sup>105</sup> Page (1984: 3)

<sup>106</sup> Goffman (1990: 14).

<sup>107</sup> Page (1984: 155).

<sup>108</sup> C. M. Steele (2010) *Whistling Vivaldi and other clues to how stereotypes affect us*. New York: Norton and Company.

<sup>109</sup> Goffman (1990: 14).

address intersectional claims, the courts would also need to take a new approach so that context can become integral to judicial decision-making. Fredman points out that judges and lawmakers have been fearful of opening “Pandora’s box” to claims of multiple discrimination – how should they deal with them?<sup>110</sup> An answer to this lies in the social framework analysis: if the design of ADL changes to facilitate a response to context, then the judicial purview must likewise be broadened to consider social context.

In order to adjudicate intersectional claims, courts need a way to consider social context in their decision-making. A method for a contextual analysis was suggested by Charles Lawrence. Writing specifically on race, he proposed that courts test the cultural meaning of a challenged act by gathering evidence from the social context in which the decision was made.<sup>111</sup> In Britain, the need to consider context in determination of discrimination was suggested by Lord Griffith in his dissent in *James v. Eastleigh Borough Council*<sup>112</sup>, where he argued that the reason for differential treatment was not the difference in sex, but the difference in economic well being. In his view, the context informing the disputed rule was determined by economic reality - those living on a pension were usually less well off than those who are working. Set against this social framework, there had been no sex discrimination even though Mr James remained a member of the protected group.

Canada provides an example of the use of social context in judicial decision-making. In 1997, the Supreme Court of Canada upheld the original judgement of Judge Corrine Sparks<sup>113</sup> to acquit a Black youth (R.D.S.)<sup>114</sup> of assault charges against a white police officer during the arrest of another youth. The case had been referred to the Supreme Court because after making her judgement, Judge Sparks had made general comments about strained relations between police and non-white groups, and the tendency for police to overreact when dealing with those groups. Her comments lead to accusations that she was biased and a petition for her decision to be reversed.<sup>115</sup> In upholding the decision and conduct of Judge Sparks, the Supreme Court said:

The requirement for neutrality does not require judges to discount their life experiences.

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<sup>110</sup> S. Fredman (2005) ‘Double trouble: Multiple Discrimination and EU law’ *European Anti-Discrimination Law Review* Issue No. 2, 14.

<sup>111</sup> C. Lawrence (1987) ‘The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism’, 39 *Stanford Law Review* 317, 355–81.

<sup>112</sup> *James v Eastleigh Borough Council* [1990] 2 AC 751.

<sup>113</sup> At that time the only Black judge in Nova Scotia, Canada.

<sup>114</sup> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

<sup>115</sup> Sonia Sotomayor was likewise accused of bias and subjected to similar treatment when she discussed the value of her experiences as an American of Latina heritage in her role as judge. The text of her speech has been republished in the New York Times. Available at <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html> [accessed: 25 September 2009].

Whether the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts. A very significant difference exists between cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.'

A majority of 6-3<sup>116</sup> rejected the accusations and the request to overturn the decision. The Supreme Court held that a reasonable person would not think that Judge Sparks was biased and further, that Judge Sparks had used her experience and knowledge of the community to understand the social context behind the case.

In the US, context has been analysed using social framework analysis (SFA) (Monahan et al 2008; Borgida and Kim 2007). This has been used in cases of race and sex discrimination in the USA. The SFA is a process for systematic consideration of the context surrounding a set of facts arising from a case. This process is usually conducted via the review of scientific studies presented in court by an expert witness. The expert assists the court in its decision-making by providing a detailed context against which to evaluate the acts complained of. The role of the expert witness is not to establish a link for the court, but to educate it on the causes and consequences of the type of discrimination concerned, so that it has an empirically rich backdrop upon which to come to a decision.

There are cases<sup>117</sup> where social evidence offered by qualified social scientists has played a key role in employment discrimination litigation: 'by offering insight into the operation of stereotyping and bias in decision-making, social framework experts can help fact finders to assess other evidence more accurately' (Hart and Secunda 2009: 2). In the land-mark class action case of *Wal-Mart*, there was no piece of paper saying that women were not to be promoted, yet there was clearly a problem in the career progress of women. To expose the practices which facilitated discriminatory outcomes, ie. the context in which the women worked, details were gathered on Wal-Mart's organisational history, structure and processes, culture, practices and correspondence, diversity and equal opportunity policies. These were then examined against the backdrop of social research on organizational inequalities to determine the likelihood that the discrimination complained of could occur (Bielby 2003). The court is left to decide whether or not it did occur.

Courts therefore have a variety of approaches that can be taken to incorporate context into their decision-making. It remains to be seen how widespread these will become, but their adoption seems

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<sup>116</sup> Lamer C.J. and Sopinka and Major JJ. dissenting.

<sup>117</sup> For example, in the USA: *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233-35 (1989), *Beck v The Boeing Company*, case No.2:00-cv-00301-MJP (W.D. Wash. Nov. 10 2003, *Dukes v Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Circuit, Dec 11th 2007).

necessary if intersectionality is to be taken seriously.

### Conclusion

The original design of legal protection from discrimination can be described as a process of 'stratification.' By creating a specific committee to focus on race, the UN CHR simultaneously introduced categorisation. The ICERD is a specification of the broad aspirations outlined in the UN Declaration of Human Rights. In order to provide protection, legal measures divided complex human beings into separate and distinct stratum, which subsequently became strands of discrimination law. The common sense of this approach has increasingly been challenged.

Britain is one of few countries who have introduced a legal facility for multiple discrimination to be tackled. However, the new Equalities Act is very cautious. The GEO recognised in its Consultation Paper that 'People are complex, with many different characteristics making up who they are. This can affect the opportunities open to them and how they are treated.'<sup>118</sup> Yet not all protected characteristics can form part of a combined discrimination claim: marriage and civil partnership are for example specifically excluded<sup>119</sup> as are combinations that include a complaint of direct disability discrimination relating to special educational needs falling within Section 116.<sup>120</sup> Further exclusions can be specified by the responsible Minister.<sup>121</sup>

These limitations may have been inevitable given the multiple objectives of the GEO:

'The introduction of protection from multiple discrimination is intended to provide protection for individuals who experience intersectional multiple discrimination, for which it is difficult, complicated and sometimes impossible to get legal protection or remedy. In considering the issue of multiple discrimination and in designing a remedy, we believe we have provided a solution to address the gap in the law without complicating the law or placing undue burdens on employers and service providers.'<sup>122</sup>

It may be the concern for the impact on business that caused a recognition of multiple discrimination which takes only a half hearted step away from categorisation and the single dimension approach. Consequently the Equality Act 2010 has incorporated multiple discrimination without multiple

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<sup>118</sup> GEO (2009: 8).

<sup>119</sup> EA 2010 S2(14)(2).

<sup>120</sup> EA 2010 S2 (14)(5).

<sup>121</sup> EA 2010 S2(14)(6).

<sup>122</sup> GEO (2009: 28).

consciousness: the premise of the statutory limitations is splitting of characteristics so that one or the other can be removed to bring the complaint within the provision. Discrimination law has in textual terms taken a step forward yet conceptually it has not moved at all.

I suggested that this conceptual step could only occur when the basic design of discrimination law is revised. To this end I suggested that the idea of stigma replace the concept of immutability as a device to determine which prejudicial behaviour discrimination law should target. I also suggested various approaches to carry the recognition of context into the courtroom. It is questionable if, without these changes, discrimination law will be equipped to truly tackle intersectional discrimination.