

Multiple discrimination – problems compounded or solutions found?

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Recent European equality directives have expanded the number of prohibited grounds for discrimination. This has led to an increasing awareness of the problems experienced by people who have been subjected to discrimination on more than one ground. Our current legal provisions do not address this. This article, reflecting current work undertaken by the Equalities Project at JUSTICE, considers the options for law reform in order to address multiple discrimination appropriately.

Introduction

The Government commissioned the Equalities Review to consider how to:¹

provide an understanding of the underlying long-term causes of disadvantage that need to be addressed by public policy

in relation to equality and diversity.

This is a large and somewhat amorphous task, but one matter that it is surely necessary to consider is the extent to which different kinds of disadvantage are found in the same situation. There have been a number of research projects that have pointed to the coexistence of such disadvantage in the day-to-day experience of many different classes of people.

For example, the Equal Opportunities Commission has recently investigated the problems experienced by Bangladeshi, Pakistani and Black Caribbean women at work.² They have concluded that although these young women leave school with good qualifications they are more likely to be unemployed than comparable white women and less likely to be in senior roles within the workplace. This is a problem of multiple discrimination, or what is sometimes called intersectional discrimination.

Though this problem of multiple discrimination has been shown by research to be widespread, there have been few cases where multiple ground discrimination has been raised. Those cases which have been raised directly have suffered from evidential

problems. For pragmatic reasons lawyers have tended to argue them on the strongest available ground and to ignore the other aspects. This is not satisfactory since it represents only a half truth about the case. There is therefore much for both the Equalities Review and the Discrimination Law Review to consider. However the interim report of the Equalities Review has had little to say about this kind of discrimination.

This is a significant omission. It seems that neither the Equalities Review nor the Discrimination Law Review have yet really started to grapple with these problems. Thus this paper seeks to help make good that omission by considering the nature of the problem, the way in which UK law has approached it so far, and the possibilities for change within the context of European constraints. It discusses approaches in comparative legal systems and concludes with some recommendations for further consideration.

The nature of the problem of multiple discrimination

People are frequently disadvantaged as a result of more than one cause, so discrimination is very often complex. A person may suffer disadvantage because she is a black woman; another may suffer discrimination because he is a disabled gay man; yet another because she is a Muslim woman. The multiplicity of possibilities is obvious. These multiple identities are part of the diversity of our society. Recognising this kind of diversity is now understood to be important in the next step in promoting social inclusion of the most disadvantaged.

In 1990 Kimberlé Crenshaw discussed this kind of problem in relation to African American women and pointed out the inadequacy of a single ground approach to discrimination law:

...in race discrimination cases, discrimination tends to be viewed in terms of sex or class-privileged Blacks; in sex discrimination cases, the focus is on race- or class-privileged women.

This focus on the most privileged group members marginalises those who are multiply burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of

*racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon...Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.*³

This distorted single issue way of thinking about discrimination influences the way that politics are presented: struggles against prejudice become posed as arising only from singular issues and remedies are therefore crafted to reflect this. Kimberlé Crenshaw's comments were written in relation to the United States but they are certainly true of the way that both UK and European discrimination law has been written, as is discussed later in this article. Yet the political thinking on this issue is undoubtedly changing. For instance, Patricia Hewitt, when Secretary for Trade and Industry, put the point well when setting expectations for our domestic equality organisations. She pointed out:⁴

As individuals, our identities are diverse, complex and multi layered. People don't see themselves as solely a woman, or black, or gay and neither should our equality organisations.

This need to address multiple identities became one of the primary reasons for moving from separate equality commissions to a single new Commission for Equality and Human Rights (CEHR). While multiple discrimination is now widely recognised by those working in the equality field as a serious problem,⁵ little has been done to create coherent legal rights to address it .

Take an ethnic minority woman who suffers discrimination because of her racial or ethnic origin *and* her gender. Suppose also that she is disabled, or gay or old or any combination of these. The current law will only focus on one of these factors at a time. Thus her treatment as an ethnic minority person is compared to that of a white person: her treatment as a woman is compared with the treatment afforded to a man, and so on. This paper asks: is this the right way to approach her situation, and if not what is?

Intuitively the answer to the first question is 'no': it is often not possible to separate out different aspects of a person's identity. It is easy to see that the discrimination that a black

woman may experience may be wholly different from that experienced by a black man or a white woman. Indeed it may be argued that to take such a single issue approach is itself a form of discrimination. Professor Sandra Fredman has observed: ⁶

The more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection.

That the intuitive answer to the question posed above is the right answer has been born out by a more penetrating enquiry into the nature of prejudice. Thus it has been shown that people who are prejudiced against any ethnic group are twice as likely as the population as a whole to be prejudiced against gay and lesbian people, and four times as likely to be prejudiced against disabled people.⁷ This research provides a very strong basis to infer that when someone is the subject of discrimination on the ground of one aspect of their individuality they may also be subjected to discrimination on another aspect. This has been called *intersectional prejudice*.

Types of multiple discrimination

There are many different ways in which multiple discrimination can be experienced.⁸ Such discrimination might occur when someone experiences discrimination on different grounds on different occasions and it might occur when there is a combination of grounds on each occasion.

The second additive type could, for instance, arise where a series of attributes are desirable attributes to be searched for in the process of selecting for a particular job. A typical selection might be based on a preference system, in which if an applicant lacks one preferred attribute he will lose a point and if he lacks two he will lose two points and so on.

The facts of *Perera v Civil Service Commission (no 2)*⁹ provide an example of this kind of approach. In this case the employer set out a series of requirements for a potential post-holder. Mr Perera was turned down for the job because of a variety of factors which were taken into account by the interviewing committee - his experience in the UK, his command of English, his nationality and his age. In this case the lack of one factor did not prevent him getting the job but it did make it less likely, and the lack of two factors decreased yet further his chance of selection for the job. Ultimately he was unsuccessful because his

personal circumstances were such that he was not preferred on a variety of different grounds.

There is yet a third type of multiple discrimination which occurs when the discrimination involves more than one ground and these grounds interact with each other in such a way that they are completely inseparable. This is the type of discrimination addressed in *Bahl v the Law Society*¹⁰ which is discussed further below.

The capacity of UK law to address these issues

The capacity of UK statutory discrimination law to address these types of multiple discrimination is hugely hampered by the way in which it has developed on a ground specific basis. It is usually said that discrimination law started with race discrimination laws,¹¹ followed soon after by sex,¹² later joined by disability,¹³ and then transgendered status. Sexual orientation, religion or belief came later as a result of new European laws and were finally joined in 2006 by age.

Each piece of legislation reflects the campaigns waged by different single interest groups and none specifically addresses multiple discrimination. But what is inevitable is that sooner or later such a case would come up. That happened in *Bahl v the Law Society*, where the questions whether, and if so how, this legislation could be used to address alleged multiple discrimination were critical to the ultimate resolution of the case. The result was not positive and certainly did not reflect the kinds of analysis of interaction set out above.

In *Bahl*, an Asian woman claimed that she had been subjected to discriminatory treatment both on the grounds that she was Asian and also on the grounds that she was a woman. At first instance, the employment tribunal ruled that she could compare herself to to a *white man*, so that the combined effect of her race and her sex could be considered. However, both the Employment Appeal Tribunal and the Court of Appeal ruled that this was not possible and was indeed an incorrect interpretation of the law.

In the Court of Appeal Lord Justice Peter Gibson held:¹⁴

In our judgment, it was necessary for the ET to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did in favour of Dr Bahl on whom lay the burden of proving her case. It failed to do so, and thereby, as the EAT correctly found, erred in law.

Thus the Court of Appeal judgment made it clear that each ground had to be disaggregated, separately considered, and a ruling made on it, even if the claimant had experienced them as inextricably linked. To understand why this approach was taken it is necessary to explain at some length the role of an apt comparison in UK law.

The role of the comparator in UK law

In a direct discrimination case such as *Bahl* it is currently necessary to consider whether there has been less favourable treatment than that which would have been afforded to a comparable person who does not have the same critical characteristics as the complainant. Thus the comparator in an ordinary sex discrimination case brought by a woman is a man whose circumstances are the same or not materially different.

In some cases, particularly where there is a real competition for a post or some other benefit, there will be an actual person who can be considered appropriately as the comparator. Here the law requires that there be a comparison between the treatment of the claimant and that received by a real person comparator. However where no real person exists that fits the bill for a direct comparator whose circumstances are the same or not materially different from that of the claimant then a different task has to be undertaken. Here it is sometimes said that the court must consider what would be the treatment of a hypothetical comparator.

If there is no exact comparator but there is evidence as to how others in not entirely dissimilar circumstances have been treated, this evidence may explain why the complainant has been treated in the way that they have. The evidence helps the tribunal to hypothecate what would happen to someone in the same circumstances as the complainant but lacking their particular characteristics.

These points have been explained in *Shamoon v Chief Constable of the Royal Ulster Constabulary*.¹⁵ In that case Lord Scott said:¹⁶

Comparators come into play in two distinct and separate respects... First, the statutory definition of what constitutes discrimination involves a comparison: '... treats that other less favourably than he treats or would treat other persons'. The comparison is between the treatment of the victim on the one hand and of a comparator on the other hand. The comparator may be actual ('treats') or may be hypothetical ('or would treat') but 'must be such that the relevant circumstances in the one case are the same, or not materially different, in the other' ... If there is any material difference between the circumstances of the victim and the circumstances of the comparator, the statutory definition is not being applied. It is possible that, in a particular case, an actual comparator capable of constituting the statutory comparator can be found. But in most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator...

...secondly, comparators have a quite separate evidential role to play... The victim who complains of discrimination must satisfy the fact finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground eg sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, ... by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was

treated less favourably than she would have been treated if she had been the [fully relevant] comparator.

Thus, it can be seen that the role of the comparator can be over-emphasised. While the primary role is to establish if there has been less favourable treatment of the complainant vis-à-vis another real person, the secondary evidential role is to supply a basis from which it may be inferred how it should be hypothecated that a real comparator (had they existed) would have been treated. This is one of a series of different ways of proving that discrimination has occurred, and this secondary limb role could easily be replaced by asking the question why the discrimination has occurred. There is no reason why the answer to such a question could not encompass several grounds without difficulty.

The importance of this question was explored by Lord Nicholls in his opinion in the same case:¹⁷

...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, deciding 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. Or was it for some other reason?

So asking why was a person treated in the way in which they were has an important part to play in the analysis of any direct discrimination case.

But it must also be remembered that in cases of multiple discrimination it may not be easy to construct a hypothetical comparator who does not share any of the prohibited characteristics with the claimant. It may become a difficult and somewhat unreal task. This is important since in such cases a fully relevant direct comparator will be very unlikely to be found. So this is likely to be the kind of case in which it is preferable to ask the question why the claimant was treated as she was. In this way the employment tribunal or court will not have to spend much intellectual effort to little purpose trying to hypothecate whether a person has been treated less favourably than some other because of the entirety of the multiple grounds on which he or she relies.

The limits imposed by European law on a multiple discrimination claim

In Recital 14 of the Race Directive the possibility of combined gender and race discrimination is acknowledged:¹⁸

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.

So it might be thought that some more specific provision would have been made in the text of the Directive. Unfortunately it was not. Despite this express recognition of the problems of multiple discrimination, all the relevant anti-discrimination directives have adopted a single ground comparison model and none makes any express provision for combatting multiple discrimination.

However, it has been suggested that it may be possible to read the European anti-discrimination directives purposively, as prohibiting discrimination on combined grounds, in the fields of employment and occupation. Professor Dagmar Schiek has argued that:¹⁹

The purposive method of interpreting any norm of Community law would lend itself to assisting the Community courts to actually acknowledge these dimensions of multidimensionality. It would not do justice to the purposes of all the equality instruments taken together to deny the specific situation of intersected human beings.

Clearly it would be much more preferable that European law should expressly deal with the possibility of multiple discrimination, and there are signs of a developing discussion within the European Commission on this point. A conference addressing these issues is likely to occur as a result of the Commission's arrangements for 2007 as the European Union's Year of Equal Opportunities for All.

Harassment

There is an alternative route in both UK and European law to a finding of discrimination. The UK route has been introduced as a result of the extended definition of direct discrimination in European law which equates harassment with direct discrimination.

European law in relation to racial harassment may be taken as a paradigm of the approach in relation to all grounds. Thus:²⁰

Harassment shall be deemed to be a form of discrimination...when unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment ...

In the UK this definition has been transposed in a more generous way by replacing the conjunctive 'and' with the disjunctive 'or' in between 'person' and 'of creating'.

It can be seen immediately that this is not a comparison test. The key issues are violation of dignity and/or a hostile working environment. It seems entirely possible in a European context that dignity may be especially violated by a combination of grounds as well as on a single ground. However under domestic law it remains to be seen whether the reasoning of *Bahl* would be applied in such a case.

A different approach to multiple discrimination in Canada

In Canada there is a very different definition of discrimination from that used within the UK.²¹ The Canadian concept of discrimination depends less on a comparison of the treatment of complainant and another as on the effect on the complainant. Moreover

Canada has eroded the distinction between direct and indirect discrimination with the result that its concept of discrimination is much closer to our concept of harassment. This has enabled multiple discrimination to be more fully considered.

Canadian legislation now uses the same provisions for each ground of discrimination: consequently, there is an increasing awareness of the need for an intersectional approach to discrimination so as adequately to address multiple grounds.

This is interesting not only from a comparative point of view but also because a similar awareness could emerge once the new Commission for Equality and Human Rights is up and running, even if domestic equality law has not developed in the same way. There is a statutory requirement that the CEHR focus on diversity, so it would be natural for it to address the complexity of multiple identities. This highlights the forthcoming intensity of tension between the political awareness of the problem and the inadequacy of existing laws.

Canadian discrimination provisions come into play at a number of different levels. Canada is a federation of provinces: its equality provisions derive from legislation at both the federal and the provincial levels. Canada places these equality laws in human rights legislation. At the zenith at the federal level is the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act 1985. While the Charter operates to limit all provincial and national legislation²², the Canadian Human Rights Act has a limited application to federal institutions and federally *governed* institutions such as the federal government, banks, airlines and the Canadian armed forces. Beneath the federal level, each province has a Human Rights Act and/or Charter that specifically enacts equality law. There are slightly different provisions from province to province.

The Canadian Charter has an open list of grounds making it easier to adapt the law to encompass multiple grounds for discrimination. A combined ground has been seen as simply a possible new ground.

There had been a tension between these two measures, in that the Canadian Human Rights Act had a closed list of grounds, so such a straightforward solution was not so readily available when it was applicable. As a result of the increasing recognition of the complexity of discriminatory events, a clause was added to the Canadian Human Rights

Act 1985 to clarify that a discriminatory practice includes one that is based on more than one ground:²³

For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

This approach reflects fully the state of political discourse. Thus the Ontario Human Rights Commission considers that discrimination on multiple grounds is different from that experienced on any of the individual grounds. For example, it considers that the experience of discrimination suffered by a black woman is intrinsically different from that suffered by a black man, or a white woman. It is the:²⁴

...intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone...

This Canadian approach permits the particular experience of an individual to be both acknowledged and remedied. It is clearly very significant that it can do so. The Ontario Human Rights Commission estimated that between April 1997 and December 2000 48% of the complaints that they had received included more than one ground.²⁵

The Ontario Human Rights Commission point in particular to difficulties suffered by older people with disabilities, people with disabilities from ethnic minority groups, and ethnic minority people who have a particular religion, for example. They assert that taking an intersectional approach has led to a greater focus on society's response to the individual and a lesser focus on what category the person may fit into. This enables a court to make a more person specific analysis of the effect of treatment in question. The Commission concludes:²⁶

within the Commission, there is a growing recognition that we can improve our understanding of the impact when grounds of discrimination intersect and that tools for applying an intersectional analysis will be very helpful in the handling of complaints, from inquiries through to litigation, and in our policy work.

Is a pragmatic approach the way forward?

The approach to the problem which the Court of Appeal said in *Bahl* was necessary may require the complainant and litigator to take a pragmatic approach and to choose one ground as the leading point in the case. Where such an approach is taken it is obvious that the decision how to proceed is likely to be based on the availability of evidence, or perhaps on the strength of the law in that particular area. As I shall explain below I do not consider that this is an adequate response to the problem.

Professor Carasco, who wished to take a discrimination case, has provided an interesting illustration of the problem of this pragmatic approach to evidence.²⁷

Proving systemic discrimination based on gender in my case was made possible by the availability of research and statistics relating to women in Canadian universities. Proving systemic discrimination based on the combination of race and gender would have been a lot more difficult simply because of the paucity of women of colour in Canadian universities and the corresponding lack of salary data...As a woman of colour, I could not help wondering if it was indeed necessary to prove that other women of colour had been treated in a similar fashion before my own treatment, as a woman of colour, could be acknowledged.

Canada (AG) v Mossop,²⁸ decided before the changes outlined above, provides another illustration of the problems of a pragmatic approach to the law. In that case, a gay man failed in his claim for bereavement leave in order to attend his partner's father's funeral. At the time that the case was heard sexual orientation was not a prohibited ground for a discrimination claim so it could not be used; however 'family status' was a recognised ground. The case was therefore argued on this ground. It was lost because the evidence of discrimination on grounds of 'family status' was insufficiently strong.

It is also interesting because of the comments in the powerful minority judgment of Madame Justice L'Heureux Dubé:²⁹

...categories of discrimination may overlap, and...individuals may suffer historical exclusion on the basis of both race and gender, age and physical

handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.

What are the possible solutions for the UK?

So, if a purely pragmatic approach is not the right way forward, what are the possible solutions for the UK? A law that permits complaints of multiple as well as single ground discrimination would surely be an improvement. The question is how could this be done without diluting or making less effective the current anti-discrimination provisions?

Differential exclusions

A very important initial problem is to unify the reach of the legislation. Each prohibited ground for discrimination has been given its own different set of exceptions. Whilst there are some, such as the genuine occupational requirement provisions, which are common to all the grounds, there are others such as age discrimination which have a much wider set of exclusions.

How much does this matter? Is it possible to apply one exception to one aspect of the case and another, or indeed none, to the other aspect of the case? The answer to these questions depends on the kind of society that is desired. A society that puts a high value on social inclusion might conclude that in a case of multiple discrimination the exceptions should be very limited. In a more liberal society less concerned with equality in the fullest sense a less strict approach might be taken.

Germany has taken the former approach in its very recent legislation. The German solution to this problem is to say that any justification must apply to each of the grounds in question:³⁰

Discrimination based on several of the grounds...is only capable of being justified...if the justification applies to all the grounds liable for the difference of treatment.

The German provisions for establishing direct and indirect discrimination are the same for all the named grounds, although the General Non-Discrimination Act does have differential justification requirements, both for religion or belief and for age. This clause will mean that with any combined grounds justification will need to be established to the highest standard.

Once the issue of exceptions is addressed, what are the possible ways of enabling multiple discrimination to be addressed?

1. Opening the list of grounds

Currently both the UK legislation and the European directives operate with a fixed and closed list of named grounds for prohibiting discrimination. By contrast, Article 14 of the European Convention of Human Rights uses an open text and prohibits 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.*³¹

An open ended set of grounds like this enables a discrimination claim to be made out in relation to any combination of these grounds, so facilitating multiple discrimination claims.

This is clearly one solution to the problem of how to make a multiple discrimination complaint, although it would entail making major changes to the structure of UK discrimination legislation. However it has a major consequence: if the range of grounds is unlimited it is impossible to have a principle that direct discrimination is incapable of justification. Consequently, all forms of discrimination, whether direct or indirect, would have to be open to justification. Such a solution would put a much greater emphasis on the 'justification' of alleged discriminatory acts and in so doing it could put more power into the hands of the judiciary and perhaps create more uncertainty.

2. Extended harassment solution

Another radical alternative would be to ignore the distinction between direct and indirect discrimination, with their need for a comparative assessment, and to substitute an extended concept of harassment. Abolishing the distinction outright would probably not be consistent with European law and hence it would be necessary to continue with the existing definitions of direct and indirect discrimination. However, that does not mean that the concept of harassment could not be expressly enlarged so as to permit actions founded on several grounds where a person's dignity has been violated. This would take effect when it can be shown that the claimant has been treated in a manner which reflects prejudice, stereotyping, historic disadvantage or the exclusion from benefits or opportunities that are particularly significant because access to them constitutes part of the minimum conditions for a life with dignity.

If such a solution was to be adopted it would be essential to ensure that there is a strong objective test for the violation of dignity to prevent its misapplication to minor or trivial events. However, in the light of current political sensitivities concerning the scope of harassment this solution is, perhaps, not likely to prove popular. It is, however, in essence the way that Canadian law operates.³²

3. Multiple comparisons

Another possible solution is expressly to permit multiple comparisons to be made, enabling courts and tribunals to combine consideration of two or more grounds, perhaps with a limit as to the maximum number of grounds that could be considered in any one case. A black woman could compare her situation to that of a white man. A two ground comparison such as this would be relatively easy, and may not even require the construction of a hypothetical comparator. However, as discussed above the more elements that are added into the comparative exercise the more theoretical and difficult it becomes to imagine who might be the hypothetical better treated comparator. This approach requires a ready answer to the question does a black lesbian disabled woman compare herself to a white able-bodied heterosexual man, or a white able-bodied heterosexual woman, or some other combination of similarities and opposites.

So this approach certainly raises the question: are such comparisons too complicated to be practical?

While they will certainly not be without difficulty, there is some evidence that they can be undertaken within a more limited framework. In America the courts have developed the notion of ground-plus to deal with this problem.³³ This approach effectively limits consideration to two grounds for discrimination so the complainant has to elect which is alleged to be the primary and which the secondary cause of action.

Of course it may well be asserted that in cases of truly intersectional discrimination such distinctions will be difficult, if not impossible to make.

The unified approach of the Canadian Human Rights Act 1985 that a discriminatory practice includes one that is based on more than one ground could also be relevant here.³⁴ The adoption of a similar clause might be possible within the UK jurisprudence without the need to adopt the rest of the Canadian definition for discrimination which is substantially different from the UK model. Though it is likely that the existence of different exclusions, scope and level of protection for some of the prohibited grounds would give rise to problems with this solution, although these should not be insurmountable.

4. A greater emphasis on 'but for' and 'reason why'

Two questions that are often asked in all discrimination cases are

1. Would the disadvantage have been experienced 'but for' the operation of the prohibited grounds?
2. Why was the treatment in question afforded to the complainant?

The answers to these questions will certainly help establish discrimination on multiple grounds, particularly if it is asked more specifically 'were the combination of grounds in question the 'reason why' the disadvantage occurred?' An increased emphasis in the legislation on these questions together with a decrease in the emphasis on establishing a comparator would certainly provide a more apt way of considering the issues that are raised in multiple discrimination cases.

Some conclusions

While the existence of multiple discrimination is not in doubt, the best way to tackle it is far less clear or obvious and requires careful consideration. Yet if the reality of disadvantage, discrimination and inequality in the 21st century is to be tackled the law must find a workable solution. Within the limits of the EC equality directives there are some adjustments to our existing provisions that could be made.

Firstly, the inclusion of a provision similar to that in the Canadian Human Rights Act, clearly permitting action to be taken in respect of discrimination based on several grounds, should be introduced. As the comparison becomes more complex with each additional ground it might be prudent, at least initially, to limit the number of grounds that could be combined, perhaps to a maximum of three grounds.

Secondly, the omission of clauses requiring that 'the circumstances in the one case are the same, or not materially different, in the other' would prevent the stymieing of cases on the grounds that they were too complicated to be addressed. This would lessen the importance of a hypothetical comparator and put more emphasis on the 'reason why' the discrimination occurred.

Thirdly, a choice will have to be made as to whether to take the German approach to exclusions or to have some more liberal but less socially inclusive solution.

Finally it should be noted that the provisions for remedies in the single ground domestic legislation will need to be altered to make it clear that awards for injury to feelings can reflect the fact that discrimination has occurred on more than one ground.

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¹ See <http://www.theequalitiesreview.org.uk/about.aspx>

² See <http://www.eoc.org.uk/Default.aspx?page=17693>.

³ Kimberle Crenshaw, 'Demarginalising the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum*, 1989, p150.

⁴ DTI press release 12/5/04.

⁵ See, for example, *UN General Assembly Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2000*, declaration no 2 : 'We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.'

⁶ Sandra Fredman, 'Double trouble: multiple discrimination and EU law', *European Anti-Discrimination Law Review*, issue no 2, 2005, pp13-18 at p14.

⁷ *Profiles of Prejudice*, Stonewall, 2001.

⁸ See Timo Makkonen, Multiple, compound and intersectional discrimination: bringing the experiences of the most marginalised to the fore, Institute for Human Rights, Åbo Akademi University, April 2002.

⁹ [1983] IRLR 166.

¹⁰ [2004] IRLR 799.

¹¹ See the Race Relations Acts of 1965 and 1968. The Race Relations Act 1976, though much amended, is now the core of the provisions by which race discrimination is outlawed.

¹² See the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

¹³ In fact there is a plausible argument for saying that the Disabled Persons Employment Act 1944 was the first to deal with the need of disabled persons for some positive action to remedy their disadvantaged place in society. This Act was repealed and replaced by the Disability Discrimination Act 1995.

¹⁴ [2004] IRLR 799, para 137.

¹⁵ [2003] IRLR 285.

¹⁶ *Ibid.*, paras 107-108.

¹⁷ *Ibid.*, paras 7,8 and 11.

¹⁸ Council directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁹ See D Schiek, 'Broadening the scope and the norms of EU gender equality law: towards a multidimensional conception of equality law', *Maastricht Journal of European and Comparative Law*, vol 12, no 4, 2005, pp427-466, at p 465.

²⁰ See Article 2(3) of Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

²¹ See G Moon, 'From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the UK?', *European Human Rights Law Review*, 2006, issue 6 (forthcoming).

²² See *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

²³ Canadian Human Rights Act 1985, section 3.1 as amended in 1998.

²⁴ M Eaton, 'Patently confused, complex inequality and *Canada v Mossop*', (1994) 1 Rev. Cons. Stud.203 at 229.

²⁵ *An Intersectional approach to discrimination; addressing multiple grounds in human rights claims*, discussion paper, Ontario Human Rights Commission, 2001, p11.

²⁶ *Ibid.*, p 6.

²⁷ E Carasco, 'A case of double jeopardy: Race and Gender', (1993) 6 CJWL 142 at p 152.

²⁸ [1993] 1 SCR 554.

²⁹ *Canada (A.G.) v Mossop*, [1993] 1 SCR 554 at p 645.

³⁰ General Non-Discrimination Act 2006 (AGG), art 1, ch 1, para 4 – I am grateful to Dr Mark Bell for drawing my attention to this provision.

³¹ Emphasis added.

³² See G Moon, n21 above, and G Moon and R Allen, 'Dignity discourse in equality law: a better route to equality?', EHRLR, 2006, issue 6 (forthcoming).

³³ See D Schiek, n19 above, at p456, referring to *Phillips v Martin Marietta Corp.*, 400 US 542 (1971) and *Jeffries v Harris County Community Action Association* 615 F 2d 1025 (5th Circ.).

³⁴ 'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.' Canadian Human Rights Act 1985, section 3.1.