Can Intersectionality Contribute to Effective Equality?

Colm O'Cinneide, Professor of Constitutional and Human Rights Law, UCL

Keynote Address

ECRI Annual Seminar, 26 September 2022.

Introduction

In this address**,** I wish to explain (i) why intersectionality matters; (ii) why we should not be afraid of intersectionality; and (iii) the challenge of 'operationalising' intersectionality within European law and policy.

My essential message is simple: intersectionality is an essential tool for understanding the multiple dimensions of discrimination, including (a) its individual, structural, institutional, and historical dimensions as well as (b) its 'cross-ground' dimensions (race, gender, disability and so on). Incorporating intersectional perspectives into anti-discrimination law and policy makes sense – even if it some imagination may be required to do this effectively.

Why Intersectionality Matters

Almost all academic discussion of intersectionality begins by referring the US academic Kimberlé Crenshaw's famous 1989 paper on the topic. This set out a penetrating critique of the limits of the 'single-axis', ground-specific approach that had dominated thinking about equality and non-discrimination since the 1960s. As is well known, Crenshaw argued that both feminist theory and anti-racist politics were limited by a failure to recognise the special forms of disadvantage suffered by individuals and groups who are caught in the overlap of different forms of discrimination.[1] She argued that the specific forms of discrimination faced by black women were often overlooked by feminists focused on gender discrimination and anti-racist activists focused on race discrimination.

This concept of intersectionality is sometimes described as a radical new idea. (Indeed, sometimes its critics attack it as an artificial American import.) However, it is an insight that would have made sense to many people a hundred years ago, when trade union activists and others were attempting to focus attention on the particular problems faced by working class women.

In essence, intersectionality recognises that (i) social identities such as gender, class, race, age, disability and sexual orientation are porous and 'open'; (ii) discriminatory social practices can overlap and reinforce each other; (iii) such 'intersectional discrimination' helps to reinforce power imbalances in society, often in subtle ways; and (iv) anti-discrimination law and policy that ignores these problems and focuses on a single-axis approach will be ineffective.[2] More generally, it calls into question the traditional 'siloed' approach of equality

[1] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 140 *The University of Chicago Legal Forum* 139-167, 154..

[2] Collins argues that intersectionality is based upon the insight that 'cultural patterns of oppression…are bound together and influenced by the intersectional systems of society, such as race, gender, class, and ethnicity'. P. H.

law and policy, and encourages a turn towards a 'multi-dimensional' understanding of discrimination and the focused measures needed to combat it.[3]

In an era where social identity has become more complex and multi-faceted, intersectionality has become a popular idea.[4] It now exerts a significant influence over how inequality is conceptualised in many different academic disciplines. Activists and campaigning organisations have also found it a useful concept. Intersectionality has even crept into wider public discourse – often in a distorted form.[5] (In a way, this testifies to its impact.)

Furthermore, intersectionality often harmonises with other ways of thinking about equality especially 'substantive equality' or 'vulnerability' approaches. Intersectionality shares with such perspectives an ambition to move beyond the ground-specific, formalist, decontextualised approach of much existing equality law and policy, and towards a more substantive engagement with the structural nature of discrimination in contemporary societies.

In her ground-breaking work on the topic, Solanke has thus emphasised that intersectionality is an essential tool for combating social 'stigma', in its manifold forms – and helps to focus attention on the 'social context' that generates disadvantage.[6] In this respect, she also emphasises the need to distinguish between 'additive' discrimination, i.e. when a victim may be able to bring two separate claims on two different grounds such as race and gender, and 'intersectional' claims, where the focus is on the overlap or multiplying effect of both grounds. The potential of intersectionality as an analytical tool lies in this ability to diagnose overlapping inequalities, which form the basis of much contemporary inequality – see e.g. the situation of migrant women, or single parents with a disabled child, or women wearing the headscarf, or Roma young men seeking to enter the labour market.

Why We Should Not Be Afraid of Intersectionality

Academics and activists have applied intersectionality critique to identify gaps and shortcomings in existing equality law. Many now agree that the 'single-axis' focus of much discrimination law is inadequate. They also criticise 'formal' approaches to discrimination, i.e. a focus on the rationale for less favourable treatment rather than on its substantive impact.[7] As a result, there is growing support for extending existing legal prohibitions on discrimination to cover intersectional forms of discrimination.

However, courts are often very reluctant to interpret existing law as covering intersectional discrimination. The concept is seen as new, or controversial. Also, there is a fear that it will open the doors of legal liability, on the basis that employers will be unable to anticipate new

---

Collins, 'Gender, Black Feminism, and Black Political Economy' (2000) 568 (1) *Annals of the American Academy of Political and Social Science* 41–53, 42.

[3] Collins suggests that intersectionality can function as a form of 'critical praxis', challenging the manner in which interlocking 'vectors of oppression' serve to perpetuate established inequalities. P. H. Collins, 'Intersectionality's Definitional Dilemmas' (2015) 41 (1) *Annual Review of Sociology* 1-20.

[4] D. Carbado and C. Harris, 'Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory' (2019) 132 *Harvard Law Review* 2193.

[5] J. Coaston, 'The Intersectionality Wars', *Vox*, 28th May 2019, https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination.

[6] I. Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 *Modern Law Review* 723-749.

[7] S. Fredman, *Discrimination Law* (2nd edn; OUP, 2012).

claims. There is concern that this will confuse the existing state of the law, encourage speculative claims, and downgrade the weight and seriousness of discrimination law. For example, such concerns have been put forward by successive UK governments to justify their refusal to bring the 'dual discrimination' provisions of s. 14 of the Equality Act 2010 into force by ministerial order.[8]

In some ways, this concern is understandable. Intersectionality may be an old concept, but has little legal pedigree. Courts and lawyers like established legal doctrines, which have been seen to work (preferably first in other countries). It can be difficult sometimes to see how intersectional comparisons can be made for the purpose of direct and indirect discrimination analysis. 'Operationalising' intersectionality is potentially tricky, in law and policy.

However, these concerns can be overstated. If courts and other legal actors are prepared to take account of social context, and to focus on the impact of discrimination rather than its formal rationale, then it should be possible to identify intersectional discrimination – and to require employers and service providers to justify their decisions that helped to generate such disadvantage.

Shreya Atrey's work is important in this regard. She describes how courts in a range of different jurisdictions, as well as several international human rights bodies, have adopted a 'flexible' and context-sensitive approach to comparator analysis.[9] This opens the way for engagement with intersectionality. This term is not always used. But nevertheless it describes what, in effect, is happening.

For example, the Strasbourg Court has begun to take account of the vulnerable status of particular groups in determining the scope of state obligations under Article 14 ECHR – including groups defined by two or more characteristics.[10] State action which subjects such groups to particular disadvantage can be subject to more intensive review than applied in other contexts, while states may also be subject to positive obligations to take special measures to secure equality of treatment for such groups.

This 'vulnerability' approach has only been partially integrated into the Strasbourg jurisprudence.[11] Furthermore, it is not always applied in a consistent or rigorous manner – and the Court's case-law in this context has sometimes been criticised for reinforcing negative stereotyping about the alleged inherent powerlessness of such 'vulnerable' groups.[12] Nevertheless, the relevant ECHR case-law recognises that the overlapping impact of various structural power imbalances may have a particularly negative impact upon specific groups. It thus reflects aspects of intersectionality critique.

The stand-out case in this regard thus far is *B.S. v Spain*, where the Strasbourg Court found a violation of Article 14 take with Article 3 ECHR in respect of a failure to investigate

[8] S. 14 prohibits discrimination based on the overlap of two 'protected grounds'.
[9] S. Atrey, *Intersectional Discrimination* (Oxford University Press, 2019). Also S. Atrey, 'Comparison in Intersectional Discrimination' (2018) 38 (3) *Legal Studies* 379.

[10] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emergent Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056.
[11] O. Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual? (2017) 4(3) *Oslo L. Rev.* 150-171.
[12] K. Nieminen, 'Eroding the Protection against Discrimination: The procedural and de-contextualized approach to *S.A.S. V France* (2019) *International Journal of Discrimination and the Law*.

allegations of police harassment directed towards an African woman working as a prostitute. The Court recognised the applicant's 'particular vulnerability' arising from the intersection of her gender and ethnic origin taken together with the nature of her work.[13]

Also, more recently, in the case of *JD and A v UK*, the Court concluded that the UK had acted disproportionately in deducing housing benefits from mothers who had been the victims of domestic violence who were deemed to be occupying accommodation with more space than their families required, notwithstanding that the accommodation in question had been specially modified to ensure their personal safety.[14]

In both these cases, the Court recognised that state parties owed particular obligations to specific groups of women defined by overlapping forms of disadvantage. This shows how the Court's developing 'vulnerability' case-law is potentially able to accommodate a form of intersectionality, in situations of clear 'group vulnerability' at least.

A similar approach has been adopted by a range of UN and other Council of Europe bodies in determining the scope of human rights obligations. Indeed, certain human rights bodies have explicitly recognised intersectional discrimination as constituting a breach of equality rights.[15] National courts have also shown some openness in this regard, albeit while generally moving with baby steps. Slowly, law and policy are demonstrating how intersectionality can be 'operationalised'.

The Challenges for European Law

The need for intersectional approaches is increasingly recognised in Council of Europe and EU legal instruments. This is significant: a concept whose use was once confined to academic and activist work is gradually putting down roots in European policy instruments. It is even beginning to manifest itself in law.

As far back as 2000, 'multiple discrimination' was recognised to be a problem in the recitals of the EU anti-discrimination directives 2000/43 and 2000/78. Now, the problem of intersectional discrimination has been recognised by the European Parliament, and incorporated into the European Commission's key equality policy frameworks as a key 'horizontal principle'.[16] Article 10(2) of the pending Minimum Wages Directive requires

[13] App No 47159/08 (ECtHR, 24 July 2012).
[14] Applications nos. 32949/17 and 34614/17, Judgment of 24 October 2019.
[15] In particular, the Committee on the Elimination of Discrimination against Women (CEDAW) acknowledged intersectionality as a 'basic concept for understanding the scope of the general obligations of States parties [to the Convention]'.CEDAW, General Recommendation No 28: The core obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010 ('CEDAW, General Recommendation No 28') at para 18.
[16] European Parliament resolution of 6 July 2022 on intersectional discrimination in the European Union: the socio-economic situation of women of African, Middle-Eastern, Latin-American and Asian descent; European Network against Racism (ENAR) report of 14 September 2020, 'Intersectional discrimination in Europe: relevance, challenges and ways forward'; EIU FRA report of 4 April 2019 entitled 'Second European Union Minorities and Discrimination Survey – Roma women in nine EU Member States'; Commission Communication of 3 March 2021 entitled 'Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030' (COM (2021) 0101); Commission Communication of 5 March 2020 entitled 'A Union of Equality: Gender Equality Strategy 2020-2025' (COM (2020) 0152); Commission Communication of 18 September 2020 entitled 'A Union of equality: EU anti-racism action plan 2020-2025' (COM (2020) 0565); Commission Communication of 7 October 2020 entitled 'A Union of Equality: EU Roma strategic framework for equality, inclusion and participation' (COM (2020)0620); Commission Communication of 12 October 2020 entitled 'Union of Equality: LGBTIQ Equality Strategy 2020-2025' (COM (2020) 0698).

states to collect relevant data 'disaggregated by gender, age, disability, company size and sector. Perhaps most dramatically, Article 3 of the current proposed directive on pay transparency provides that 'pay discrimination under this Directive includes discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or Directive 2000/78/EC'. If enacted, this would open the way for intersectional pay equality claims – a potentially important breakthrough.

Similarly, in the Council of Europe, Recommendation CM/Rec(2016)7 of the Committee of Ministers to member states, on *Research on Young People's Access to Rights*, calls on the member states of the Council of Europe to address the discriminatory practices faced by young people, with special attention to multifaceted identities and intersectionality of discrimination. ECRI has been using an intersectional approach in its monitoring work, for example drawing attention to the specific vulnerabilities experienced by Roma women, Black men or Muslim women.[17] There are also interesting traces of intersectionality in the collective complaints case-law of the European Committee on Social Rights.[18]

The challenge now, as mentioned, is to extend, reinforce and 'operationalise' these commitments. Experience from the ECHR's vulnerability approach and the other case-law mentioned above will be important. It may well also be important for law and policy to take note of the importance of poverty and class as intersectional factors, and not just confine its focus to the 'established' equality grounds protected by anti-discrimination law.[19] This may not always be legally possible to achieve, especially if poverty is not a protected ground (as it is not under e.g. the EU framework). However, it should be an important focus of policy work.

More generally, the primary challenge is to focus the attention of legal and political actors on the need to take account of social context in (i) adjudicating discrimination claims and (ii) framing policy responses to inequality – and to recognise the value of intersectionality as a diagnostic tool. Bodies like ECRI have a key role to play in this regard – as do national equality bodies, who have a particularly important role to play in encouraging state institutional structures to move beyond 'silo' approaches.

[17] See ECRI General Policy Recommendation No. 5 (revised) on preventing and combating anti-Muslim racism and discrimination); and General Policy Recommendation No. 9 (revised) on preventing and combating Anti-semitism.

[18] See e.g. Complaint 48/2008, *ERRC v Bulgaria* (Decision on the merits 31 March 2009),

[19] C. O'Cinneide, The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication. In S. Atrey, P. Dunne (Eds.), *Intersectionality and Human Rights Law* (Hart, 2020) 59-82.