Putting Race and Gender Together: A New Approach To Intersectionality

Iyiola Solanke*

European anti-discrimination legislation explicitly calls for member states to consider a legal response to multiple discrimination, either additive (arising from many grounds) or intersectional (a result of an interaction of grounds). In traditional Anglo-American anti-discrimination frameworks the structure of separate statutes forces complainants to choose one ground or another. In Britain, cases such as Nwoke v Government Legal Service indicate a judicial willingness to recognise additive discrimination, while cases such as Bahl highlight the difficulties of dealing with intersectionality. This article suggests that to overcome current difficulties with intersectional discrimination, first the qualitative difference of intersectional claims must be clarified; secondly, the logic of immutability underlying grounds must be replaced by one which accommodates intersectionality; and thirdly, a method is required which enables courts systematically to incorporate social context into judicial decision-making. With these three changes, the qualitative difference of intersectionalism can be both understood and activated in the courts.

INTRODUCTION

There is no inherent reason why legal protection from discrimination is organised on the basis of categories. Whether closed or non-exhaustive, categorisation has been the preferred method for the provision of legal protection from discrimination. In Britain and the USA, the enumerated categories are exhaustive. By contrast, the Canadian Charter on Rights provides a non-exhaustive list of grounds of discrimination, as does the European Convention on Human Rights (ECHR). Within Europe, many EU member states (Finland, Hungary, Latvia, Poland and Slovenia) have used non-exhaustive lists to implement EU anti-discrimination law. Categorisation is therefore not preordained, but may have been inevitable given the nature of political campaigns for discrimination law.

Campaigns for discrimination law did not occur in a vacuum: for example, the Suffragettes did not include voting rights for black or poor women – black women were conspicuously absent at the Seneca Falls Anti-Slavery Convention.

*School of Law, University of East Anglia, Norwich. My thanks to the anonymous reviewers at the Modern Law Review for their comments and corrections, and participants at the Second European Conference on Multidimensional Equality Law in Leeds 2009 for their input.


of 1848 where mainly middle-class white delegates debated the motion for women’s suffrage. As noted by Anna Julia Cooper: ‘the white woman could at least plead for her own emancipation; the black woman, doubly enslaved, could but suffer and struggle and be silent.’ Likewise, campaigns for racial equality did not take gender into account: black women disappeared into a vacuum. Throughout history, campaigns for racial and gender equality each incorporated a blindness — strategic or unconscious — to the other. Consequently, as Crenshaw concluded, feminists, civil rights activists and courts have shared a blind spot.

Not only courts but feminists and civil rights thinkers have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks. Black women are regarded either as too much like women or Blacks and the compounded nature of their experience is absorbed into the collective experiences of either group or as too different, in which case Black women’s Blackness or femaleness sometimes has placed their needs and perspectives at the margin of the feminist and Black liberationist agendas.

In the late 1970s political projects emerged which sought to address this lack of coalition in reform movements. For example, the Combahee River Collective, a black lesbian feminist organisation spoke in 1977 of the ‘futility of privileging a single dimension of experience as if it constituted the whole of life’ advocating instead an integrated analysis and practice in recognition that racial, sexual, heterosexual and class oppression were interlocking rather than independent systems.

Categorisation and limitation of grounds can therefore be explained as a consequence of political activism, but also may be due to legal pragmatism. The single- issue focus did have an important advantage — it facilitated the creation of specific remedies which could to some extent be tailored to each bias. Gender discrimination is not analogous to racial discrimination and neither of these may be similar to disability discrimination. In order for law to provide an effective remedy for persons who suffered detriment due to a particular characteristic, that characteristic had to be isolated and magnified, bracketed from all other aspects of identity. These totems are the entrenched ‘grounds’ upon which discrimination is unlawful. Bracketing was an effective method to foreground characteristics operating in the dark and thereby provide a remedy in law. Targeting protection to the specific injustice also affected the reach of the law: for example, the use of the

6 A. J. Cooper, A Voice From the South: By A Woman From the South (1892, New York: Oxford University Press, 1988).
7 G. T. Hull, P. Bell Scott and B. Smith, But Some of Us Are Brave: All the Women Are White, All the Blacks Are Men: Black Women’s Studies (New York: The Feminist Press, 1982).
9 See n 6 and n 8 above.
genuine occupational qualification was given a much narrower scope in relation
to race than gender when these anti-discrimination statutes were drafted in Brit-
ain in the 1970s.\textsuperscript{11} However, the exhaustive method used in Britain and the USA has come under
increasing criticism for its inability to recognise that ‘black people can be old, that old
people can suffer gender discrimination, and that women can be discriminated
against because they are Latinas.’\textsuperscript{12} For although robust, these grounds are rigid: as a
result protection can only be sought in relation to one ground or an aggregation of
separate grounds. This inflexibility compromises the ability of anti-discrimination
law in these countries to respond to discrimination arising from the interaction,
rather than mere addition, of grounds. Such \textit{intersectional} discrimination is said to be
qualitatively different to additive discrimination.\textsuperscript{13} Race and gender, for example,
have a cumulative effect that is more than a composite of the two parts, yet the cur-
rent structure of discrimination law precludes a ‘holistic’ approach.\textsuperscript{14}

There is a need for this rigidity to be addressed. The two European Union
(EU) Directives based on Article 13 EC now mention multiple discrimination.
Directive 2000/43\textsuperscript{15} on equal treatment in relation to race and ethnicity, and Direc-
tive 2000/78\textsuperscript{16} establishing equal treatment in relation to religion or belief, disabil-
ity, age and sexual orientation in employment and occupation state in their
preambles that the Community, in implementing the principle of equal treat-
ment, should ‘aim to eliminate inequalities, and to promote equality between
men and women, especially since women are often the victims of multiple discri-
mination.’\textsuperscript{17} As I will show below, claims of multiple discrimination have
appeared in the British courts but whilst additive claims have been recognised,
intersectional claims have not fared as well here as in other jurisdictions such as
Canada, Ireland and the USA.\textsuperscript{18}

This article suggests three changes that may assist courts in Britain to take inter-
sectionality seriously. First, the qualitative difference of intersectional claims must
be clarified: this can be done using empirical evidence. I use empirical studies to
establish the different circumstances faced by black women in the labour market
and public life. Secondly, the idea of grounds needs to be revisited in order to
move beyond the traditional categorical approach.\textsuperscript{19} I suggest this can be done

\begin{itemize}
  \item Sex Discrimination Act 1975, s 7; Race Relations Act 1976, s 5.
  \item J. Scales-Trent, \textit{Notes of a White Black Woman: Race, Colour, Community} (University Park, PA: Penn-
  \item S. Hannett, ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple
  \item S. Fredman and E. Szyszczak, ‘The Interaction of Race and Gender’ in B. Hepple and E. Szyszczak
  (eds), \textit{Discrimination: The Limits of the Law} (London: Mansell, 1992). See also D. W. Carbado and
  \item 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 (hereafter Directive
  2000/43).
  \item Directive 2000/43, preamble at [14]; Directive 2000/78, preamble at [3].
  \item European Commission, \textit{Tackling Multiple Discrimination: Practices, Policies and Laws} (Brussels: Eu-
  ropean Commission, 2007) 17.
\end{itemize}
by replacing the logic of immutability underlying grounds with a limiting principle more aligned to social realities, such as stigma.20 Thirdly, in order to tackle the qualitative difference of intersectional discrimination, a qualitatively different question is required. Building upon the subjective interpretation of “but for?” proposed by Bob Watt, I use the ‘social framework analysis’21 to develop an alternative nuance for this question. This approach, I argue, gets to the central issue of intersectional discrimination, which cannot be recognised by focusing only on individual motive but must also acknowledge the power of the socio-cultural context within which it is able to occur. By sharpening the lens through which discrimination is recognised,22 these changes may help courts to ensure that discrimination law remains responsive to its environment, as well as prepare for envisaged legislative reform.23 However, reform is not a prerequisite — as I will show, logic and interpretation have previously allowed changes without explicit amendment.

I begin with a discussion of the different manifestations of multiple discrimination — additive and intersectional — where I use recent case law from Britain and the USA to illustrate the different judicial fortunes of these ideas. This comparison is most relevant, given that both countries share a closed categorical heritage yet are reaching different conclusions concerning intersectionality. In the second part, I explore the qualitative difference of intersectional discrimination on the grounds of race and gender. The reader will notice a reliance on a limited range of studies conducted in the USA and UK. This is unavoidable given the general paucity of ethnic data in most EU member states,24 and the lack of detailed survey research on black women in particular.25 Even in the USA, the number of such studies is small and I quote at length from the most in depth survey to date on the working experiences of African American women. Having done this, in the third part, I outline prerequisites for creating a remedy for addressing intersectional claims in

25 An exception is the comparative study on black and ethnic minority women in science. See: http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2009/02/27/caredit/a0900030 (last visited 19 March 2009).
Britain: the development of an alternative threshold concept and the use of a new approach to an old question. Finally, I consider how this new approach can be applied.

**ADDITIVE AND INTERSECTIONAL DISCRIMINATION**

It took just over fifty years for the Treaty of Rome to be amended to explicitly prohibit discrimination on the grounds of race and ethnicity. The Treaty of Rome was silent on this issue: community law outlawed discrimination only on the grounds of nationality and sex. The creation of an extreme right wing grouping in the European Parliament led to the establishment of the Evrigenis Committee, the first formal body within the European Community to consider racial discrimination. The subsequent multi-institutional Declaration became an important symbol in the pan-European movement against racial discrimination that emerged in the 1990s. In 1997, the member states agreed to insert a new Article 13 into the Treaty of Rome. Article 13 provided that the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In response to a resurgence of nationalism in Austria, the Commission submitted an Action Plan Against Racism and two Community Directives: Directive 2000/43 and Directive 2000/78. These Directives explicitly called for recognition of multiple discrimination but neither instrument defined multiple discrimination. The recent Directive proposed by the Commission to expand...

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26 Originally Art 6 EC, now Art 12 EC.
27 Originally Art 119 EC, now Art 141 EC.
31 Article 13, Treaty of the European Community, as amended by the 1997 Amsterdam Treaty.
protection from discrimination in Community law failed to rectify this. This omission has been criticised – beyond the institutions, ideas on the concept of multiple discrimination in the European arena continue to flourish. Attention has come to rest on two key manifestations: additive and intersectional.

Additive discrimination refers to discrimination occurring in relation to more than one ground. It can be described as sex- or race- ‘plus’. Where a complaint cites more than one ground, in order to succeed the applicant must provide evidence to satisfy all grounds advanced. This was done successfully in the case of *Nwoke v Government Legal Service*, where a court held that a Nigerian woman was discriminated against because of her race and her sex. Nwoke had applied for a post in the Government Legal Service. Her ranking after the interview was ‘E’: this was the lowest grade, with ‘A’ being the highest. However, it was discovered that all white applicants – both male and female – were graded higher than Nwoke, even if they had a lower degree class. The court found that the only reason for her low grading was her race, which meant she had suffered unlawful racial discrimination. In addition, however, even those white women who were graded higher than Nwoke were unlikely to be offered a job, and if appointed they were paid less. There was therefore also separate evidence of sex discrimination – all women were at a disadvantage when compared to men – and the court accordingly held that the Government Legal Service was discriminating on the grounds of sex. Nwoke successfully alleged race and sex discrimination. She was able to provide separate evidence to prove that she had suffered discrimination because she was black, and also because she was female.

A further example of additive discrimination is the case of *Ali v North East Centre for Diversity and Racial Equality*, where a tribunal found that a Pakistani Muslim woman had been harassed because of her sex and race. A co-worker, Mr B, had humiliated her in front of her colleagues and family, had subjected her to unsubstantiated complaints about her work, had drawn her into questionable financial...
dealings and expected her to cook for him. The tribunal found that she had been subjected to such treatment because she was a Muslim woman who had grown up in Pakistan – a male employee, a white female employee or a Muslim woman who had been brought up in Britain would not have been treated in the same way.

Additive discrimination is aggregative and therefore differs from intersectionality. Aggregation fails, for example, to acknowledge the black woman as an ‘integrated, undifferentiated, complete whole’ with a ‘consciousness and politics’ of her own. For black women, it is argued, racism and sexism do not create an either-or proposition. They don’t get to choose which one will haunt them and which one they’ll be free of. They have to manage both. Should legal protection be hostage to the choice of ground? Intersectional claims therefore go beyond addition to demand recognition of discrimination due to an interaction of characteristics. The nature of the claim is therefore of a different quality. Although this ‘multiple consciousness perspective’ 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 or Asian women – should not be able to claim similar protection.

There have been a few cases concerning intersectional discrimination in Britain. *Lewis v Tabard Gardens* concerned Ms Lewis, a black woman, who worked for Tabard Gardens as an administrator. She criticised a colleague, Mr Otite, a Nigerian man, in front of her line manager, Mr Dunne, a white man. Dunne told Lewis that she should not speak to Otite like that because as a Nigerian man he could not take instructions from women. At a subsequent meeting Dunne continued to make strong criticisms of Lewis and told her to resign or negotiate a compromise agreement. She agreed to consider the latter and was placed on ‘garden leave’.

However, before she could respond to an offer, one of the directors, Ms Pauliszky, contacted her to say that Dunne had behaved improperly and that she could return to a new position where she would have limited contact with him. The case came before an employment tribunal, which found that Lewis had been treated

50 See n 40 above, 37.
51 *Lewis v Tabard Gardens TMC Ltd* [2005] ET/2303327/04.
52 ‘Garden leave’ is the term given to the period during which an employee who leaves the employer is required to serve out a period of notice at home (or ‘in the garden’). The employee continues to receive all salary and benefits and is prohibited from commencing employment with new employers until the garden leave period has expired. It is a common practice in relation to employees with access to confidential information or customers. See S. Bone, *Osborn’s Concise Law Dictionary* (London: Sweet and Maxwell, 2001).
less favourably by Dunne: he had not criticised others in the organisation in such an unconstructive way or told them to resign or accept a compromise agreement. His remarks about Nigerian men together with his unreasonable treatment of Lewis led the tribunal to find that his treatment of her was partially influenced by her sex and race – he would not have treated a white male employee with whom he had performance issues in this way. Likewise in *Mackie v G & N Car Sales*,53 a tribunal held that an Indian woman had been summarily dismissed because of her sex and racial origin: had she been a white man possessing identical qualities, she would not have been subjected to the less favourable treatment.

Whilst employment tribunals in Britain appear willing to acknowledge intersectionality, *Bahl v Law Society*54 – the only intersectional case thus far to reach the Court of Appeal – suggests that upon appeal to a higher court such rulings will be overturned. Kamlesh Bahl, who in 1998 became the first woman of colour to occupy a post in the hitherto all-white senior management of the Law Society,55 complained that the Society had subjected her to detrimental treatment during her employment because she was a black woman per se. As in *Lewis* and *Mackie*, Bahl won her case at the tribunal stage. However, whilst the tribunal was willing to recognise the qualitative difference of the intersectional discrimination claimed by Bahl, the Employment Appeal Tribunal (EAT) and the Court of Appeal were only prepared to acknowledge that the discrimination may have been additive. There was little dispute in relation to the animosity at The Law Society towards Bahl but the law did not accommodate the notion that Bahl may have been the victim of discrimination because she was a black woman per se – she could be recognized as a victim of discrimination due to race and gender in quantitative but not qualitative terms – her claim could be additive but not intersectional.

It is interesting to compare the stance of the lower and higher courts in Britain with those in the USA, where the rejection of intersectional claims in the lower courts has been reversed by the higher courts. For example, in *Jeffries v Harris Cty Commission*56 a Federal Court overruled a District Court to find that black women were a specific class under anti-discrimination employment legislation (Title VII). The Federal Court held that black women could be discriminated against even in the absence of discrimination against black men or white women. In *Degraffenreid v General Motors*,57 the District Court rejected the claim that black women could be a distinct class under Title VII58 but the Federal Court reversed this, stating that

53 *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co* Case: 1806128/03, discussed in N. Bamforth et al, n 43 above.
55 The regulatory body for all solicitors in England and Wales.
56 *Jeffries v Harris Cty Community Action Association* 615 F. 2nd 1025 (5th Cir. 1980). Jeffries, an African-American woman, brought an intersectional claim that she was discriminated against by her employer on the grounds of her race and sex. A race claim or gender claim alone would have failed because the company had employed both a white woman and an African-American man in the position at issue.
57 *Degraffenreid v General Motors* 413 F Supp 142 (E D Mo 1976). The District Court rejected what it called a ‘super-remedy’ and ruled that the complainant must bring an action for race discrimination or sex discrimination, ‘but not a combination of both’.
absent a clear Congressional statement of intent not to protect black women as a
group distinct from women and blacks, it would not condone a result which leaves
black women without a viable Title VII remedy. Similarly, in Lam v University of
Hawaii,\(^{59}\) the Federal Court of Appeal (9th Circuit) overruled what it called the
‘mathematical’ approach taken by the District Court of looking for distinct evi-
dence of racism and then sexism. The Federal Court rejected the reduction of the
claim to distinct components as an attempt to ‘bisect a person’s identity’ which
would distort or ignore the particular nature of the migrant woman’s experiences.\(^{60}\)

In both Lam and Degraffenreid, the Federal Courts recognised that refusing the
claim would leave the women without a remedy in the face of discrimination.
This is a concern as yet un-articulated in the British High Courts. There is not
only an unwillingness to acknowledge the need to provide such a remedy but a
failure to recognise why this may be important. In Bahl, Gibson LJ made the
observation that it is very rare to find a woman guilty of sex discrimination
against another woman.\(^{61}\) His observation is important for it illustrates the very
blind spot highlighted by Crenshaw and Scales-Trent at the ‘interstice’ where not
only two major social problems – race and gender – meet, but also two major
legal issues – the rights of blacks and the rights of women.\(^{62}\) Underlying Justice
Gibson’s remark is the erroneous assumption that the experiences of black women
are analogous to those of white women.

Increasingly, research demonstrates that this is not so. Even in the absence of
systematic racial violence, for example slavery or colonialism, race and gender
make a qualitative difference to the way in which black women experience discri-
mination.\(^{63}\) When put together, race and gender – two discredited statuses –
adopt a synergy of their own which creates a new condition far worse than the
sum of the two parts.\(^{64}\) As the social studies below illustrate, race and gender
are not merely dual ‘isms’ but are ‘so intertwined that they end up hidden within
one another like pieces of sharp ice that collect in a snowball careening down a
hill. They build on one another.’\(^{65}\)

THE QUALITATIVE DIFFERENCE OF RACE/GENDER
INTERSECTIONAL DISCRIMINATION

Evidence of the qualitative difference of discrimination as experienced by black
women can be found in the results of empirical social studies, for example the
African American Women’s Voices Project, a 1994 study by the American Bar
Association on black women lawyers and recent studies by the Fawcett Society

\(^{59}\) Lam v University of Hawaii 40 F. 3d 1551, 1561 (9th Cir. 1994) (Lam). Lam, a woman of Vietnamese
descent, alleged discrimination on the basis of race, sex and national origin following her unsuc-
cessful application for the post of Director of the Law School’s Pacific Asian Legal Studies Pro-
gram.

\(^{60}\) Lam at [1562].

\(^{61}\) Bahl n 55 above at [137].

\(^{62}\) See n 40 above.


\(^{64}\) See n 40 above.

\(^{65}\) See n 45 above, 42.
and Trade Union Congress (TUC) on black women in Britain. These studies demonstrate that gender and race create a qualitative difference due to negative myths and stereotypes which can covertly influence decision-making.

The African American Women’s Voices Project is the largest and most comprehensive study to date on African American women’s perceptions and experience of racism and sexism. It used open-ended questions to ask women about their perceptions of stereotypes of black women, their major difficulties as black women, their experience of racial and gender discrimination, and their coping strategies. The 333 female respondents were aged between 18 and 88, lived in 24 different states of America and Washington DC and came from a variety of educational backgrounds, incomes, marital statuses, and sexual orientations. The survey also included in-depth interviews with a cross-section of 71 women, aged 18 to 80. The results provide a ‘meaningful glimpse’ into the world of black women.

The majority (97 per cent) of respondents said that they were aware of negative stereotypes of African American women and 80 per cent said they have been personally affected by persistent racist and sexist stereotypes. They had experienced discrimination most frequently at work, as well as sexual abuse and harassment elsewhere.\(^{66}\) In general, the results suggest that the lives of black women in America are still governed by ‘a set of old oppressive myths circulating in the White-dominated world’: in the world of work, these include the myth of inferiority, of being lazy, stupid and unmotivated, inarticulate. This can be indirectly expressed in double-edged compliments such ‘You’re so articulate’ or being directly told as an academic that you only get tenure because you are black.\(^{67}\) Another is the myth of being unshakeable, being ‘tough, pushy and in charge rather than soft, feminine and vulnerable’, a superwoman with no needs who is to be feared rather than loved. The myth of non-femininity builds upon this: the women in the survey spoke of having to be ‘traditionally feminine and uniquely strong’ in order to be professionally successful. Assertiveness often led to judgements of being harsh\(^{68}\) – whilst white men are seen as strong if loud, women are labelled aggressive and black women are condemned as being negatively aggressive if they speak quickly and loudly.\(^{69}\)

Myths beyond the professional world, but nonetheless influencing experiences within it, include the myths of promiscuity and criminality. The myth from slavery of the over-sexed, carefree, immoral black woman was felt to persist, making black women specifically more susceptible to direct sexual harassment than white women: ‘because of their gender, the black women were accosted in a way that black men are not, and because of their race, they were sexually harassed differently from many white women’.\(^{70}\) The myth of criminality makes black women drivers more likely to be stopped by the police than women of all other ethnicities and as consumers, more likely to be treated disrespectfully by assistants, followed

\(^{66}\) \textit{ibid} 4–9.
\(^{67}\) \textit{ibid} 17. See also n 40 above, 120–121.
\(^{69}\) \textit{ibid} 97.
\(^{70}\) \textit{ibid} 43.
These myths and stereotypes are difficult to challenge and overcome: longevity has made them invisible yet they continue to operate subconsciously, affecting how one thinks, feels, and perceives others, even while one purports to be unbiased and tolerant. They may be manifested in very subtle ways as ‘micro-inequities’ – insults ‘widely perceived as being minor and forgivable’ and thus difficult to complain about. Given the likelihood of being chastised as over-sensitive rather than supported to seek a remedy, most black women respondents developed individual strategies to cope with the impact of these myths on their professional and personal lives.

However, the impact of silently bearing these myths can be seen in the high numbers of black women who are distressed or depressed: in a survey by the US National Centre for Health Statistics of more than 43,000 US adults, black women were three times as likely as white men and twice as likely as white women to have recently experienced distressing feelings, like boredom, restlessness, loneliness, or depression. Black women also have a disproportionately high risk for hypertension and depression. A 2002 Gallup Poll found black women to be more dissatisfied with how black people and women are treated in society: 61 per cent of black women compared to 47 per cent of black men said they were dissatisfied with ‘how blacks are treated in society’; when asked about ‘how women are treated in society’, 48 per cent of black women were dissatisfied, compared to just 26 per cent of white women. Whilst black women are by no means the only group to bear the burden of myths (all marginalised groups – Native Americans, Latinos, gays, lesbians, and others – are compelled to conform, to adjust, to shift in response to bigotry) Jones and Shorter-Gooden assert that ‘because of the singular way racism and sexism converge in the lives of Black women . . . Black women may have to shift more often and more consistently than most other Americans.’

The negative impact of these myths and the tension between the behaviour expected and the behaviour accepted from a black woman, is rarely mitigated by level of education: a study by the American Bar Association found that lawyers of colour face gender discrimination in minority bar associations and race discrimination in majority bar associations. Being a lawyer of colour and a woman was seen as a double negative in the marketplace. The study discovered that lawyers of colour are ‘ghettoized’ into certain practice areas with other options implicitly closed; they are forced to repeatedly establish their credentials to professors, peers and judges; and have more difficulty achieving prominence in the profession.

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72 Jones and Shorter-Gooden, n 69 above 34.

73 ibid 55.

74 ibid 8.

75 ibid 63. See also P. B. Organista, K. M. Chun and G. Marín, Readings in Ethnic Psychology (Abingdon: Routledge, 1998).

This data supports the assertion made by Hemmons that ‘discrimination is an inevitable factor in the life of a Black woman, no matter from which class, geographic region or family background she originates . . . discrimination limits whatever chances and opportunities are available to her. Wherever she goes there are ceilings.’77

A recent study on black women in Britain by the Fawcett Society found that they have fewer educational qualifications, are paid less than both white women and white men, and are excluded from society at all levels, especially high public office.78

Black and Minority Ethnic (BME) women are severely under-represented in British politics. Women overall are underrepresented, as are BME men, but the situation is particularly acute for BME women. There are only two BME women MPs at Westminster, just 0.3% of the total of 659 MPs. These two women, Diane Abbott and Oona King, are the only two Black women ever to have been elected to parliament. There has never been an Asian woman MP at Westminster. The Scottish Parliament and Welsh Assembly do not have any BME women representatives.79

The barriers identified in the Fawcett study are multiple: the sexism also experienced by white women and the racism also experienced by black men, in addition to the exclusion from political elites and networks, combined with the poor procedures which allow discrimination to have an impact on candidate selection. Britain may be ready for a black Prime Minister,80 but we are still many generations away from a black female Prime Minister.

In relation to the British legal profession, the Fawcett report noted that whilst there are many black women legal professionals, ‘they are significantly under-represented in senior positions’: there are no black women judges in the House of Lords or Court of Appeal. In 2004, Linda Dobbs became the first black woman ever to be appointed to the High Court. The Fawcett Commission on Women and the Criminal Justice System ‘found that a ‘glass ceiling’ operates for women across the system, and this is particularly so for black and minority ethnic women who face multiple discrimination.’81

The TUC came to a similar general conclusion in its research on black women and employment in Britain.

Black women are still concentrated in low paid jobs in public services, retail and other service sectors and face major barriers to gaining both full and part time employment . . . It is clear that there are still managers who faced with a black

79 ibid 32.
81 See n 79 above, 44.
woman will stereotype them into the type of work that they think they should be doing or that they think them capable of doing . . . through racial and gender discrimination black women face a double disadvantage in accessing and participating in the labour market.⁸²

Even as entrepreneurs,⁸³ owners of successful enterprises⁸⁴ and scientists⁸⁵ the experiences of black women differ from white women.

The vast majority of black women therefore negotiate situations that white women do not face, such as invisibility in public life, inaudibility in political life workplace isolation, especially if in a position of authority,⁸⁶ and labour market vulnerability. Whether employees or self-employed, white women are not confronted with either the social stereotypes or, indeed, the social estrangement that black women must tackle: whilst white men and women always interact with each other – as co-workers, mothers, fathers, brothers and sisters or partners – it is possible for both white men and women to have never interacted with a black woman or man. This can have serious consequences: media research has shown that in the absence of personal experience, stereotypes inform interaction – whereas people use both real world examples and prototypes to understand groups to which they belong, they depend upon only prototypes in relation to groups to which they do not.⁸⁷ The section above has demonstrated how detrimental and dangerous the prevailing stereotypes and their application can be. This social estrangement is heightened when religion is combined with race and gender.⁸⁸

Therefore, if Gibson LJ had taken intersectionality seriously in the case of Bahl,⁸⁹ he may have realised that intra-gender discrimination need not be as rare as he imagined. White women are not per se less susceptible to race and gender bias than white men, especially when dealing with a black woman in a career or position which conflicts with stereotypes on gender and race. Gender affinity of itself is not enough to prevent these stereotypes translating into evaluations and expectations of potential careers of black women⁹⁰ – the myths are too insidious and

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⁸⁸ See n 6 above, 83.
⁸⁹ Bahl n 55 above at [137].
lack of interaction serves to ease their proliferation.91 If Hillary Clinton and Barack Obama had to negotiate gender and race biases during the 2008 presidential nomination campaign, then how much more the ordinary black woman?92

**A QUALITATIVELY DIFFERENT APPROACH**

Intersectional claims based on race and gender are qualitatively different because these two ‘isms’ compound each other in a specific, complex way. The bigotry is not only doubled but deepened because it rests upon assumptions so embedded and tenacious that they are barely visible. Therefore if English courts are to take these intersectional claims seriously, legislators, legal professionals and judges (still mostly white and male)93 need to acknowledge this. In this section, I suggest approaches to recognise and address intersectionality in law. Below I argue that two revisions can make British anti-discrimination amenable to such claims: first, the development of a new approach to categories by replacing the threshold concept of immutability with stigma and secondly, the adoption of an approach in judicial decision-making which goes beyond motive to highlight context.

**Beyond immutability: stigma as a threshold concept**

An option to achieve recognition for intersectional discrimination is the creation of an open-ended or non-exhaustive list of grounds. This is the approach taken, for example, to Article 15 of the Canadian Charter of Rights and Freedoms.94 A non-exhaustive equality guarantee allows for a more holistic approach and could accommodate intersectionality and the complexity of individuals without forcing them to ‘split’ themselves so that they fall under one ground or another.95 Under the Charter, an action is ‘discriminatory’ if it is ‘capable of either promoting or perpetuating the view that the individual adversely affected by it was less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration’.96 The Ontario Human Rights Commission in Canada has been a strong advocate of the

93 See n 79 above.
94 Article 15 states that ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’
96 L’Heureux-Dube J (dissenting) in *Egan v Canada* [1995] 2 SCR 513, Sup Ct (Can), 520. See also her dissent in *Canada (Attorney General) v Mossop* [1993] 1 SCR 55, 645–646 (reprinted in N. Bamforth et al, n 43 above, 536–537).
intersectional approach. Although a more holistic methodology, as Uccellari points out this approach does not give any guidance on how further grounds of discrimination should be identified.

Both holism and identification of new grounds can be achieved by revisiting the traditional logic informing grounds – categories per se are not necessarily the problem: it is the logic underlying their creation that may need to be addressed. It is therefore necessary to consider what logic currently guides the creation of ‘grounds’ in law – why is one attribute accepted as worthy of protection and another not? Is there an entry criterion? I have argued that immutability – the idea of permanence and the absence of choice – is a key concept governing when law will be used to protect an attribute. In both Britain and the USA, this idea acted as a threshold legitimating the use of law to protect against some forms of prejudice but not others. Immutability guided the design of the first Race Relations Act in Britain and determines why the Equal Protection Clause of the United States Constitution provides certain groups with legal protection and others not. Since the landmark de-segregation case of Brown v Board of Education in the USA, the experience of discrimination of African Americans has been the litmus test for the question of whether a group qualifies for this protection. In Frontero, the Supreme Court explicitly stated that the group had to be defined by a permanent and unchanging feature ‘determined solely by accident of birth’. However, the way in which the principle is used is not always clear – in Rogers v American Airlines it was held that a braided hairstyle could easily be changed and was therefore mutable, whilst an afro was natural and thus immutable.

Discrimination law has over time changed its relationship with immutability – the introduction of protection from religion and sexual orientation in Britain are arguably indications it is no longer a strict principle. Yet the persistence of this underlying logic means that it is difficult to legitimately create a remedy for

97 See n 19 above, 18.
107 See n 102 above. See also on how the use of the concept of soft immutability in the Ninth Circuit has been used to provide protection for male-to-female transgender asylum seekers: J. Landau, ‘Soft Immutability’ and ‘Imputed Gay Identity’: Recent Developments in Transgender and Sexual Orientation Based Asylum Law’ (2005) 32 Fordham Urban Law Review 237.
biased treatment due to other attributes, such as size. 108 ‘Fattism’ is rampant in employment yet fatphobia in the workplace 109 provokes little or no public outrage because body-size is seen as voluntary, or mutable. 110 However, although the logic of immutability restricts access to a remedy, such a limiting principle is necessary: first, it lends legitimacy to anti-discrimination law and secondly, without it the protection from discrimination could become so broad as to make the law meaningless. Discrimination law must be selective: it should focus on those prejudices which are deeply socially salient and damaging to individual dignity rather than personally irritating. The question immediately arises as to what qualifies as a ‘socially salient’ injustice? If grounds are not identified using immutability as a guide, what legitimacy-conferring logic can be used instead?

One option would be stigma. A stigma is like a blemish or stain. Stigma is never neutral 111 or used for positive purposes. 112 Although an imprecise concept, stigma always refers to an attribute that is denigrated 113 or ‘deeply discrediting’. 114 Stigmatisation is the social imposition of a negative relationship to a personal attribute which permits the ‘doubting of the person’s worthiness’. 115 It is the mechanism by which first, a person’s humanity is reduced which secondly, 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. 116 Stigma, it can be argued, is the raw material of grounds: if the totems were collapsed, categories removed, and grounds ‘put’ back together, one would be left with a messy collection of social stigmas.

However, an advantage of stigma – its breadth – is also a disadvantage. In the absence of enumeration, what makes one stigma more salient than another and who should decide this? Whilst all anti-discrimination grounds may be ‘purified’ stigma, not all stigmas are grounds protected under discrimination law, and nor should they be. I would argue that discrimination law focus on those stigma(s) which are both difficult to escape 117 and make a significant difference to individual access to and acquisition of resources in key areas, such as health, housing, education, training and employment. These are attributes which, even though not necessarily immutable, ‘tarnish’ the whole identity of an individual, so that other ‘characteristics’ are subordinated to or negated by this trait, which is immediately felt to be more central to the “actual” identity of the individual.” 118 The public

111 See n 13 above, 123.
114 See Goffman, n 21 above, 12.
115 See Loury, n 21 above, 61.
116 For example, the children of ex-convicts and addicts bear the stigma of their parents.
response to such stigmas is always punitive. This logic would accommodate traditional grounds – race, gender – as well as newer grounds – religion, sexual orientation, weight, disability – but would exclude groups such as smokers or those who wear glasses: it is arguable whether these are attributes and they do not arbitrarily affect life chances in the way that being fat, for example, does.

The use of stigma could free discrimination law from rigid, atomised grounds yet retain outside boundaries for discrimination law. It could guide the creation of broader, non-exhaustive yet limitable legal protection. Its use as a threshold principle would have a number of advantages: first, stigma legitimates the use of law beyond the permanent/produced dichotomy: it includes immutable characteristics but is not limited to them. Secondly, it is flexible enough to facilitate both additive and intersectional discrimination: stigma can travel alone, but also in aggregate and interacting forms. However thirdly and perhaps most importantly, stigma widens the spotlight of discrimination law to situate the individual in society. Stigmas are by definition contextual: they are socially determined and maintained, and to focus on them is to prioritise social meanings. Because they cannot be examined ‘in isolation from the economic and social structure of a given society’, 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 important 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.

In promoting the use of stigma, I am not suggesting a completely new approach to discrimination law – immutability is, after all, a part of stigma – but seeking an alternative underlying rationale which is compatible with the existing framework yet enables recognition of intersectional claims. However, in order to address intersectional claims, the courts would also need to take a new approach to an old question so that context can become integral to decision-making.

‘But for’ revisited

The new understanding of the qualitative difference of intersectionality and the focus on stigma can be systematically activated in judicial decision-making by taking a new approach to the question ‘but for.’ In response to the original causative interpretation of this statutory wording by the courts, Watt suggested that ‘but for’ adopts a subjective nuance: below I suggest a social nuance. I will begin with a reminder of the determination of discrimination under the Sex Discrimination Act 1975 (SDA).

The SDA 1975 was passed to outlaw discrimination on the grounds of sex. It prohibited direct and indirect discrimination in a range of areas, including

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119 ibid 3.
120 See n 110 above.
121 See Goffman, n 21 above, 14.
122 See n 119 above, 155.
employment and access to goods and services. The case of *James v Eastleigh Borough Council*24 concerned the latter, namely access to the local swimming pool. Mr and Mrs James, both aged 61, visited a public swimming pool run by Eastleigh Borough Council. The Council policy of providing free swimming facilities for persons of pensionable age meant that women over 60 were eligible for free entry, whilst men had to pay until they reached the male pensionable age of 65. Mrs James therefore entered free of charge, whilst Mr James paid a small fee (75p). Mr James brought an action under the Sex Discrimination Act 1975, claiming that the Council had unlawfully discriminated – the refusal to provide him with free swimming while providing it for his wife amounted to less favourable treatment and therefore unlawful discrimination under section 1(1)(a) of the Act.

His claim was initially dismissed, and the Court of Appeal affirmed this decision. It was held that the council had not intended to discriminate between men and women but had intended to provide free swimming to pensioners; it therefore had not been guilty of unlawful discrimination merely because the difference in pensionable age between men and women resulted in Mr James being treated differently to his wife when they visited the swimming pool. This was reversed, however, in the House of Lords where speaking for the majority, Lord Ackner held that the Council had discriminated. The Lords reasoned that the statutory pensionable age of 60 for women and 65 for men was itself directly discriminatory because it treated women more favourably than men ‘on the ground of sex’ and this fell squarely within section 1(1)(a) of the 1975 Act. That the original gender-based distinction was not of the Council’s making made them no less guilty of unlawful discrimination, neither did the fact that the motive for discrimination was benign. It did not matter that the Council had not intended to discriminate between men and women but had intended to provide free swimming to pensioners. Regardless of the intention, the simple fact was that ‘but for’ his sex, Mr James would have received the same treatment as his wife. Eastleigh Borough Council was therefore guilty of unlawful direct discrimination in refusing to provide Mr James with swimming facilities on the same terms as women of the same age.

The symmetrical approach of Lord Ackner excluded any consideration of motive – absence of an intention to discriminate was irrelevant. There were only two relevant questions: first, whether there had been unfavourable treatment and secondly, whether the complainant belonged to a group protected by the Act. Using such a test, both men and women were entitled to a remedy. Only Lord Griffith and Lord Lowry disagreed with this test. Lord Griffith proposed a substantive approach which went beyond treatment and categories to consider both motive and context. He argued that motive was significant: in the case of James, the reason for differential treatment was not the difference in sex, but the difference in economic wellbeing. The context informing the rule was also important: Eastleigh Borough Council determined the entrance fee policy based upon economic reality – those living on a pension are usually less well off than those who

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are working. Set against this social framework, there had been no sex discrimi-
nation even though Mr James remained a member of the protected group.

Drawing upon these proposals, Watt suggested that motive be formally incor-
porated into jurisprudence on discrimination via an adjustment to the focus of
the second question in the traditional test: the focus would not only be whether the
complainant was a member of a protected group, but more specifically whether
group membership was the reason for the unfavourable treatment. In other words,
did the respondent impose that unfavourable treatment because of the complai-
nant’s membership of a group defined on the basis of a forbidden ground? This
shifted attention from group membership per se to the role played by that group
membership in the contested decision. The focus therefore moved from ‘but for’
to ‘but why?’ If this test were applied to James the answer would have been nega-
tive: the unfavourable treatment did not arise because of the sex of Mr James – this
had not played a role in decision-making. Using this test, the Council would
therefore not have breached the SDA 1975.

There is evidence that ‘but why?’ has been adopted. In Shamoon v Chief Con-
stable of the Royal Ulster Constabulary, Lord Nicholls encouraged tribunals to con-
centrate on discovering ‘why the claimant was treated as she was’ and whether
the reason for the treatment was indeed a prohibited ground. In Bahl, the EAT said
likewise.

All unlawful discriminatory treatment is unreasonable but not all unreasonable
treatment is discriminatory, and it is not shown to be so merely because the victim
is either a woman or of a minority race or colour. The reason for acting must be one
of the proscribed grounds and there must be a lack of explanation for it.

More recently in Network Rail Infrastructure Ltd v Griffiths-Henry, the EAT stated that
‘Plainly there cannot be a finding of sex or race discrimination every time an
employer carries out a selection process unfairly to the detriment of somebody
who is black or female.’ Motive has therefore slowly come to play a role in the
determination of discrimination.

Consideration of context has made less progress but this could be addressed by
adding a further nuance to the traditional two-part test. The first question would
remain the same whilst the second question would adopt a more social nuance.
This nuance would direct the attention of judges, as suggested by Lord Griffith,
to the context within which the decision-making took place. Instead of asking
‘but why..?’ courts could ask ‘but how..?’ ‘How’ focuses less on reasons and more
on means and extent: the way and intensity with which something is done, or in
this case, the way in which social stigmas informed the discriminatory act(s)
complained of and to what extent. ‘But how?’ would introduce a qualitative shift
in thinking about the identification of unlawful discrimination. It encourages

125 Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] 2 All ER 26
(Shamoon). See also the approach of Lord Nicholls LJ in Chief Constable of West Yorkshire Police v
128 Network Rail Infrastructure Ltd v Griffiths-Henry [2006] IR LR 865 at [29].
an observation of society in order to excavate deeply embedded stigmas and stereotypes which underlie discrimination. It does not ignore individual actions but throws a spotlight upon the context of actions to identify a relationship between social stigma(s) and individual decision-making. This basic question of ‘but how?’ could therefore help judges to assess the likelihood of intersectional discrimination.

The social framework analysis

Judges in the United States actively incorporate such contextual questions into their decision-making using a method known as ‘social framework analysis.’ Social framework analysis refers to the use of general social science research to 'construct a frame of reference or set a background context for deciding factual issues crucial to the resolution of a specific case.' Peer reviewed research is used to establish general causality (whether a link exists between two factors, for example smoking and lung cancer) rather than specific causation (whether causation occurred in a particular situation, for example if smoking Brand X caused the lung cancer of Ms A). In discrimination cases, it is not used to identify a specific link, but to help the court by generally establishing the role of discriminatory stereotypes and the potential influence of those stereotypes on organisational decisions. While the correct method of incorporating such research is still debated, social evidence offered by qualified social scientists has come to play 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.’

An early example of the use of social framework analysis was the evidence given by a psychologist, Susan Fiske, in a case concerning sex discrimination. In her testimony to the court, Fiske explained how stereotyping may have influenced the decision by partners at PriceWaterhouse to reject the partnership application of the sole female candidate Ann Hopkins. Hopkins’ application had been denied for two successive years even though her performance was comparable to or exceeded that of male partnership candidates. A male partner advised her to dress more femininely, wear make-up, style her hair and carry a briefcase to

129 See Monahan, Walker and Mitchell, n 22 above, 2.
increase her chances for promotion. In order to help the court with its decision-making, Fiske placed the partnership procedure at Price Waterhouse within the context of research on gender stereotyping. In so doing, she established the risk that such stereotyping influenced the management decision. Fiske did not establish sex discrimination at Price Waterhouse but helped the court in its assessment by providing a backdrop against which the disputed procedure and decision could be evaluated.

Experts provided similar help to courts more recently in *Beck v The Boeing Company* and *Dukes v Wal-Mart* by demonstrating how a general stereotype informs ostensibly benign employment practices. In the case of *Boeing*, a group of women claimed that they had been denied promotion, training and overtime opportunities and that they were paid less because of their gender. They furthermore claimed that they were subject to victimisation when they complained: some were relocated and others were ostracised. An expert witness, Eugene Borgida, presented social science research to explain gender stereotypes and their consequences. Borgida explained the content of these stereotypes, their effects on judgments of men and women and their salience in different contexts, for example in the workplace when behaviour is incongruent with the stereotype. Using this general information as a social context against which to set the policies and practices at Boeing, he evaluated the likelihood of sex discrimination within the company.

Social framework analysis was equally central to the decision in *Dukes*, the largest employment discrimination class action in US legal history. More than 1.5 million female employees in 3,400 Wal-Mart stores located throughout 41 regions in the USA sought in total over $1.5 billion in a gender discrimination claim. At the filing of the complaint in 2001, women constituted 67 per cent of all hourly workers, 88 per cent of Customer Service Managers and 78 per cent of Department Managers yet only 35.7 per cent of Assistant Managers, 23 per cent of Co-Managers and 13 per cent of Store Managers in those same outlets. It was argued that this disparity was the result of promotion practices that contained ‘built-in headwinds’ which disadvantaged female Wal-Mart employees, such as the informal ‘tap on the shoulder’ system of selection for management training or the arbitrary policy requiring management employees to agree to relocation.

The court heard expert evidence from a sociologist, Dr William Bielby, who concluded that discretionary and subjective elements of Wal-Mart’s personnel system and inadequate oversight and ineffective anti-discrimination efforts contribute to disparities between men and women in their compensation and career trajectories at the company. Bielby came to this conclusion after reviewing Wal-Mart organizational charts, correspondence, memos, presentations relat-

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135 *Dukes v Wal-Mart Stores, Inc* 474 F.3d 1214 (9th Circuit, 11 December 2007) (*Dukes*).

136 *Beck v The Boeing Company* Case No 2:00-cv-00301-MJP (W. D. Wash. November 10 2003).

137 See n 131 above, 120.

ing to personnel policy and practice, equal employment opportunity issues, docu-
ments describing the culture and history of the company, external reports and the 
testimonies of managers, those responsible for creating and implementing the 
company's personnel policies, and those making decisions about compensation, 
hiring, promotion, job assignment. These internal details were not examined 
in isolation, but against the backdrop of social research on organisational 
inequalities.\footnote{139}

The social framework analysis adds value by explaining stereotyping, the con-
ditions under which it occurs, when it is most likely to infiltrate decision-making 
and the consequences when it does so. The expert witness assists the court by 
looking at organisational policies and practices in the light of reliable social 
research on stereotypes and through this examination establishing the extent to 
which such practices and procedures may prohibit or perpetuate the operation of 
invidious bias in the workplace. The judge or jury is left to establish whether this 
was actually the case or not. This explicit recognition of stereotypes can help to 
identify the social power which under-girds individual interactions in the work-
place, sometimes even over-riding formal hierarchies.\footnote{140}

**APPLYING ‘BUT HOW?’**

The use of expert evidence in discrimination cases in Britain is not unknown.\footnote{141} 
Whilst used in the USA primarily in sex discrimination cases, there is no reason 
why a social framework analysis cannot be used to operationalise intersectional 
discrimination in British courts. Such analyses could meet three specific objec-
tives: first, to effectively highlight social stereotypes and stigmas and establish 
how they intrude into organisational decision-making – below I will explore 
how this could have been done in Bahl. Secondly, as it highlights subtle discrimi-
nation, it could also be an effective means of identifying and tackling new forms, 
such as institutional racism. Thirdly, its use may re-set the balance in the applica-
tion of the new rules concerning the burden of proof.

As the new Vice-President at the Law Society, Bahl’s role was to drive forward 
reforms. However, by all accounts, she drove too hard: complaints of bullying 
staff and undermining her peers led to an internal inquiry in 2000, which ulti-
mately led to her resignation and complaint of detrimental treatment both during 
her employment and the subsequent inquiry. She was initially partially successful: 
using a white man as a hypothetical comparator, the employment tribunal upheld 
some of her allegations of race and sex discrimination against the two defendants 
(Mr Sayer and Ms Betts) and the Law Society. The court found that a white man 
would not have been treated as Ms Bahl was treated, that Mr Sayer and Ms Betts 
had committed unconscious direct sex and race discrimination, and that the Law 
Society was liable for their actions.

author).}

\footnote{140}{See n 87 above.}

\footnote{141}{Justice Silber used expert evidence in R (on the application of Watkins Singh) v Governing Body of Aber-
dare Girls’ High School and Rhondda Cyon Taf Unitary Authority [2008] EWHC 1865 (Admin) at [23].}
In coming to this conclusion, the tribunal looked at race and sex together.

We do not distinguish between the race or sex of the Applicant in reaching this conclusion. Our reason for that is simple. The claim was advanced on the basis that Kamlesh Bahl was treated in the way she was because she is a black woman. Kamlesh Bahl was the first office holder that the Law Society had ever had who was not both white and male. There was no basis in the evidence for comparing her treatment with that of a white female, or a black male, office holder. We can only draw inferences. We do not know what was in the minds of Robert Sayer and Jane Betts at any particular point. It is sufficient for our purposes to find, where appropriate, that in each case they would not have treated a white person or a man less favourably.\(^{142}\)

The EAT reversal was upheld in the Court of Appeal where Peter Gibson LJ described the above passage as ‘puzzling’.\(^{143}\) The EAT did not understand why the tribunal decided against the use of a white female or black male office holder as a comparator for Bahl. 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,

\[\text{[i]f the evidence does not satisfy the tribunal that there is discrimination on grounds of race or on grounds of sex considered independently, then it is not open to a tribunal to find either claim satisfied on the basis that there is nonetheless discrimination on grounds of race and sex when both are taken together . . . Nor can the tribunal properly conclude, if it is uncertain about whether it is race or sex, that it will find both.}^{144}\]

It was not possible for Bahl to claim race and gender as a single combined ground of discrimination: these two aspects had to be treated separately and independent evidence in support of each brought forward. Elias LJ concluded that the employment tribunal erred in law by failing to distinguish between the elements of alleged race and sex discrimination with the result that it was too hasty in concluding that Dr Bahl had proven that discrimination had occurred in respect of either ground.

The Employment Tribunal may have been able to be more specific in its findings had it employed a social framework analysis. It would have first asked whether there had been unfavourable treatment, and secondly by what means or to what extent stigma informed the unfavourable treatment complained of. In order to answer this second question, it would be necessary to consider whether any stigma attached to the group of which the defendant claimed membership, followed by the use of the social framework analysis to elucidate the nature and consequences of that stigma and finally an evaluation of the extent to which this stigma did or did not influence the decision complained of.

I have demonstrated above that black women face specific challenges in the workplace. As a black woman, Bahl therefore belonged to a stigmatised group.

\(^{142}\) Bahl n5 above at [135].

\(^{143}\) ibid at [136].

\(^{144}\) The Law Society v Kamlesh Bahl [2003] IRLR 640 at [158].
The analysis could then have continued with a review of practices and procedures within the Law Society. As in Wal-Mart, this could have included examination of literature describing the culture and history of the Law Society, organizational charts, different types of documents including emails, memos, formal and informal reports, papers on policy relating to human resourceing and personnel issues, respect for diversity, incorporation, activation and enforcement of any statutory duties. Interviews could have been conducted with managers and those responsible for oversight and enforcement of the company’s personnel policies and related matters. This would have provided an insight into the culture of the Law Society.

This culture would then have been placed within the context of scientific research on stereotypes associated with black women and the experiences of black women in institutions and organisations. This examination would not determine the presence of discrimination but would help, as in the cases discussed above, to ascertain the risk or prevalence of discrimination against black women at the Law Society. In such a contextual analysis, the fact that Mr Sayer would shout to achieve his objectives and would even ‘fake’ shouting to do so, could indicate a culture which allowed stereotypes to determine acceptable behaviour.

Having established a level of risk of intersectional discrimination, it would be left to the court to determine the actuality of this, ie the extent to which social stigma had actually contaminated practices and individual decision-making within the organisation.

The construction of this detailed social frame of reference may have clarified the initial finding in Bahl: had the tribunal used general social science research to provide a context for the facts of the case, the reason for its conclusion may have been more transparent to the Justices in the Employment Appeal Tribunal and the Court of Appeal, who may nonetheless have overturned it on other grounds. The question of ‘but how?’ would at a minimum have allowed Bahl’s claim of intersectional discrimination to be taken seriously, even if the outcome were still not in her favour.

By looking at particular instances of alleged discrimination in the context of social stigmas and stereotypes, awareness is brought into courtrooms that will enhance both the effectiveness of anti-discrimination law and judicial decision-making. Beyond this, the systematic use of social research in discrimination cases in Britain would enable equality laws to remain effective in combating other forms of more subtle discrimination, such as institutional racism and ‘second generation’ discrimination – decision-making which favours the inclusion of those with whom management feels ‘comfortable’ and excludes others. Discrimination is rarely perpetuated overtly but more frequently via informal and lawful cultural, social and networking practices.

145 ibid at [151].
148 See Loury, n 21 above.
In addition, use of social science research to incorporate consideration of context may re-set the balance in relation to the burden of proof. Following the statutory shift in the burden of proof, the British courts are increasingly inclined to take explanations of the defendant into account at the prima facie stage. The House of Lords has confirmed that the words ‘the complainant proves facts’ does not mean that only the facts presented by the complainant should be considered. It appears that this approach will apply horizontally to all cases concerning discrimination: it was reiterated by the EAT in *Mohmed v West Coast Trains Ltd* that the tribunal should have regard to all the evidence and confirmed by Justice Mummery in *Madarassy v Nomura International Plc* and *Appiah & Anor v Bishop Douglass Roman Catholic High School*.

As has been made clear in *Igen* and *Madarassy*, the new statutory provision does not confine the court or tribunal to a consideration of the claimant’s evidence at the first stage. The evidence adduced on behalf of the respondent also falls for consideration. It is for the claimant at least to establish facts from which it could be inferred that there has been discrimination ‘on racial grounds’. If, having considered *all* the evidence, the court or tribunal comes to the conclusion that the facts do not establish a prima facie case of a difference in treatment *on racial grounds*, no burden is transferred. What *Igen* and *Madarassy* make abundantly clear is that section 57ZA and its equivalents do not require the court or tribunal to assess the evidence of the complainant in isolation, in the way that, for example, a court deals with a submission of no case to answer.

Bearing in mind that the burden of stigma and stereotypes is asymmetric – it is borne by the bearer of the attributes, who must become adept at managing responses on an everyday basis – I contend that if at a prima facie stage the evidence of the complainant is being set within the context of the explanations of the respondent, it is only fair that the explanations of the respondent also be set within a wider context. As shown above, use of a social framework analysis can be crucial to ascertain the risk of any type of discrimination and would therefore assist the complainant in building a *prima facie* case.

149 Article 8(1) of the EU Race Directive has been implemented via a new s 54A inserted (19 July 2003) by the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626). Section 2 states that ‘Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—(a) has committed such an act of discrimination or harassment against the complainant, or (b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.’

150 *Mohmed v West Coast Trains Ltd* UK EAT/0682/05/DA. This was the first case under the Employment Equality (Religion or Belief) Regulations to reach the Employment Appeal Tribunal.


152 *Appiah & Anor v Bishop Douglass Roman Catholic High School* [2007] EWCA Civ 10 at [43]. This case concerned racial discrimination in education.

153 *ibid* at [43] (emphasis in original).

154 See Goffman, n 21 above, 31.
CONCLUSION

In this article, I have focused on the problems faced by black women in relation to the single-dimension logic of equality law: because courts have proceeded from ‘the premise that, although racism and sexism share much in common, they are nonetheless fundamentally unrelated phenomena’ 155 black women can be left without a remedy in some cases of discrimination. This premise is proved false by history and contemporary reality. Furthermore, in the long term this belief in ‘race-sex independence or distinctiveness’ 156 empowers the ubiquitous white male.

The black woman’s invisibility serves to blind all women and all blacks to the interactive relationship between race and gender, leads to the development of legal theories and social policies directed at either race or gender without fully considering the implications of such theories and policies and ultimately assures the perpetuation of domination on the basis of race and gender for all women and all members of subordinated races. 157

Intersectionality highlights that anti-discrimination laws have posited discrimination as a zero-sum game: if one form, then not the other. However, discrimination is not zero-sum at all: it is often not just one or the other ground but can be many together acting in addition or intersecting. Victims of bias should not have to approach discrimination law as consumers, and make choices where none actually exist.

The current Labour administration has stated an intention to explore whether to allow discrimination claims to be brought on combined multiple grounds, such as where someone is discriminated against because she is a black woman. 158 It may be able to achieve this goal using the concept of stigma, which I suggested as an alternative to the logic of immutability used to create categories. The purging of stigma is about removing the negative meaning attached to attributes. Whilst attributes may be innate, stigmas are produced. It is the production and perpetuation of stigmas, whether they travel alone or in packs, that discrimination law must challenge rather than recognition of the attributes per se.

In promoting the use of stigma, I am not advocating a completely new approach to discrimination law: what I suggest in this article is a further revision of the threshold principle in order to facilitate broader protection from discrimination by widening the entrance criteria. Stigma is already implicit in discrimination law: it lurks behind every form of prohibited bias. I am suggesting here that it be used more explicitly and systematically. Focused use of stigma could provide a way for the protection of discrimination law to be deepened and widened with-

156 ibid, 373.
157 ibid, 395.
out losing its outer boundaries – even intersectionality has its limits – or repeatedly engaging in lengthy legislative reform procedures.

‘But how?’ may likewise help courts deal with intersectional claims. It is a question which holds the decision-maker responsible but also makes society complicit – it links individual freedom to act with the social context and structure within which the individual acts. It also encourages judges to consider the ways that ‘social structure both enables and constrains personal freedom and well-being’.

This is important in tackling persistent discrimination because it locates some responsibility for this in society: if social structure contributes to the perpetuation of discrimination, then society also bears the burden to address this. From this perspective, measures to address structural discrimination are integral to an anti-discrimination policy: positive action therefore becomes a legitimate remedy rather than an exception.

The social analysis framework demonstrates how context can be systematically examined by using expert knowledge. Such an analysis incorporates motive and context, individual and society. However, effective use of social framework analysis depends upon the existence of social science research. Its use in the European Union beyond Britain is at present therefore limited because most member states still do not collect ethnic data. The need to acknowledge and address intersectional discrimination is another compelling reason why such studies must be conducted urgently.

160 See n 43 above, 340–362.