

Intersectionality in the British Courts

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Overview

- Stratification – strengths and weaknesses
- Intersectionality – a qualitatively different problem?
- Addressing intersectionality
 - From immutability to stigma
 - A qualitatively different question

Stratification

- Political mobilisation
 - Legal norms reflect social and political power
 - Gender campaigns overlooked race and vice versa
- Legal pragmatism
 - Targeted protection
 - Characteristics magnified

Strengths and weaknesses of stratification

■ Strengths

- Effective lobbying campaigns
- Effective legal remedies

■ Weakness

- Protection can only be sought from one form of discrimination or the other
- Limits recognition of additive discrimination
- Precludes recognition of intersectionality

Additive Discrimination

- *Nwoke v. Government Legal Service*

- Discrimination on grounds of race

All white applicants ranked higher after interview even if degree class lower

- Discrimination on grounds of gender

White women who were graded higher than men were unlikely to be offered a job, and if appointed were paid less.

Intersectional Discrimination

- *Bahl v. Law Society*
 - First black female officer at the Law Society
 - Accused of bullying
 - Internal disciplinary procedure -> resignation
 - Complaint by Bahl that the Law Society discriminated on grounds of race and gender

Bahl v. Law Society

■ ET

- Evidence of unconscious race and gender discrimination
- Use of white male comparator
- Finding that a white man would not have been treated in this way

■ EAT and CA

- Impossible to claim a single combined ground of race and gender discrimination
- ET failed to identify evidence in relation to each ground of discrimination

Intersectional Discrimination?

- *Lewis v. Tabard Gardens*

- Discrimination on grounds of gender and race
Lewis was reprimanded by Mr Dunne, her white male manager for criticising a black male colleague, Mr Otite. Told to resign or negotiate a compromise agreement.

ET – Dunne would not have treated a white male employee in this way.

Qualitative Difference of Intersectionality

- Synergy of two degraded statuses
- Stereotypes and myths affect everyday life and possibilities:
 - Inferiority
 - Unshakeability
 - Non-femininity
 - Criminality
 - Promiscuity

Impact on opportunity

- ABA Study on black women lawyers (1994)
 - Being a black female lawyer seen as a double negative in marketplace
 - Black female lawyers are "ghettoised" in certain practice areas (family, immigration)
 - Black female lawyers must always prove themselves
 - Struggle to achieve prominence in the profession

Impact on opportunity

- Fawcett Society study (2005)
 - Black women are excluded from society at all levels, especially high public office
 - Black women are paid less than white women and white men
 - Black women achieve fewer educational qualifications

Black women negotiate..

- Invisibility in public life
- Inaudibility in political life
- Absent from positions of authority
- Workplace isolation
- Vulnerability
- Social estrangement
 - Low levels of trust
 - Reliance on stereotypes for understanding

Intersectional claims are qualitatively different because...

- They are not just an addition but a deeper burden
- More obscure than single strand discrimination
- Arise from a complex myriad of explicit and implicit biases

A qualitatively different approach

- In order to address intersectional claims effectively, two changes are required
 - Move beyond language of immutability and grounds: stigma as an alternative threshold concept
 - Move beyond a focus on individual perpetrators to social stereotypes

Beyond 'Grounds'

- Immutability as a limiting principle
 - USA 14th Amendment (strict scrutiny)
 - *Frontero v. Richardson*
- Stigma as a limiting principle
 - Socially inscribed negative meanings
 - Various types (physical, behavioural, biographical, visible and invisible, immutable)
 - Insidious, rest upon entrenched assumptions
 - Used to justify withholding of equal treatment
 - Used for social control

Advantages

- Hones in on social stereotypes
- Goes beyond narrow grounds
- Facilitates complexities
- Can travel alone or in multiples
- Removes need for a comparator
- Contextual – draws attention to society

Beyond the individual perpetrator

- Ask a qualitatively different question
 - "but for" as a causal question (*James v. Eastleigh*)
 - Unfavourable treatment?
 - Group membership?
 - "but for" as a subjective question (*Network Rail v. Griffiths*)
 - Unfavourable treatment?
 - Group membership the reason for that unfavourable treatment?
 - "but for" as a social question
 - Unfavourable treatment?
 - Social stigma attached to group membership the reason for that unfavourable treatment?

Advantages of stigma test

- Widens protection of discrimination law
- Empowers claimants by freeing them from a real or hypothetical comparator
- Embeds discrimination law in society rather than interest groups
- Focus on society rather than individuals creates potential for more socially focused remedies, such as positive action.

Summary

- Idea of grounds constrains recognition of multiple discrimination and intersectionality
- In order to tackle intersectionality, it is necessary to
 - Move beyond grounds and the threshold concept of immutability to stigma
 - Move towards asking "but why?" as a social rather than a subjective question