'Intersectionality': A Blind-Spot Missed in the British Equality Framework?

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ABSTRACT

The current British Equality Framework is premised upon a single-ground approach which assumes that people's identities may neatly be classified into manageable characteristics in order to claim protection. Accordingly, a black woman facing discrimination on the basis of being a black woman per se will fail to receive protection under the current approach. This is where intersectionality steps in; to appreciate that an individual's identity components may be so intertwined that an attempt to split them up will not be reflective of the intersectional subject's experience. Thus, an intersectional approach internalises the real-lived experiences of its subjects rather than attempting to force them to suppress aspects of their identities in order to claim protection. Subsequently, the disparity between the British Equality Framework and the intersectional approach advocated for in this paper exposes a gap in the fight against discrimination. This paper considers that gap a 'blind-spot'. Therefore, intersectionality theory will be used to analyse the British Equality Framework in order to prove the prevalence of the blind-spot and uncover its origins. It will be shown that the current framework lacks an intersectional approach. The paper concludes by calling for steps to correct it and subsequently offer protection to those once neglected by the current single-axis approach.

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INTRODUCTION

Is a black woman really just an unraced sex or an unsexed race? Since its conception, the British[1] Equality Framework has protected against discrimination based on a single identity characteristic such as sex[2] *or* race[3] *or* disability.[4] Unsurprisingly, this single-ground approach was reflected in the current Equality Act 2010,[5] which defines direct discrimination as an unfavourable treatment on the basis of *a* protected characteristic[6] out of the nine protected characteristics.[7] This approach enjoys the advantage of tailoring the remedies available to each instance of discrimination. However, it fails to consider that 'gender reaches into disability'[8] and that 'black people can be old'[9]; i.e. it fails to notice the reality of the human identity as one that cannot always be broken down into manageable characteristics.

This is where intersectionality theory comes in. Conceptualised in the late 1900s, intersectionality was conceived to disrupt the exclusion of black women from social movements and political discourse as a result of the single-ground approach inherent in policymaking and the Anti-Discrimination Law ('ADL').[10] Accordingly, the current approach assumes that a black woman's identity can be broken down separately into race and sex, rather than conceiving the two as inseparable. However, intersectionality posits that both racism and sexism, as two different systems of oppression, interlock to produce her uniquely formed experience, which is conceptually different from the sum of both grounds. Accordingly, this paper argues that there exists a gap between the real-lived

[1] This paper refers to 'Britain' as England and Wales only.
[2] Sex Discrimination Act 1975.
[3] Race Relations Act 1965.
[4] Disability Discrimination Act 1995.
[5] Equality Act 2010.
[6] ibid s 13(1).
[7] ibid s 4.
[8] Eli Clare, *Exile and Pride: Disability, Queerness and Liberation* (South End Press, 1999).
[9] Judy Scales-Trent, *Notes of a White Black Woman* (Pennsylvania University Press, 1995) 173.
[10] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine' (1989) 1989(1) University of Chicago Legal Forum 139.

intersectional experiences of individuals and the law, thus resulting in a 'blind-spot'.

Preliminarily, it should be noted that this paper is concerned only with workplace-related direct discrimination based on any two of the nine protected characteristics. The discussion is limited to dual discrimination because this paper believes in an incremental approach to acknowledging intersectionality within the Framework. Otherwise, this paper predicts that the legislative and the executive will resist intersectionality on the basis that it could strain the resources of both the courts and businesses. As such, and as will be seen later, the executive has already rejected dual discrimination on that basis.

The first section puts forward the theory of intersectionality as an analytical framework on the premise that an individual's identity features intertwine inseparably to create a distinctly formed intersectional experience. Further, the theory sheds light on the identity politics problem caused by ADL's essentialist account of identities. Moreover, intersectionality, as an account of power, exposes the ways in which structural discriminatory dynamics interact to marginalise victims existing at the intersections. In doing so, intersectionality exposes the blind-spot and informs what solutions may be offered to remedy it.

The second section uses intersectionality as a device to analyse the British intersectional discrimination jurisprudence to prove the prevalence of the blind-spot. An intersectional lens is utilised to analyse the judicial approach to discrimination claims in *Lewis,*[11] *Mackie,*[12] *O'Reilly,*[13] and *Hewage.*[14] However, the majority of the section focuses on the seminal case of *Bahl,*[15] which rejected the recognition of intersectional discrimination under the framework. Moreover, this section addresses the comparator requirement and its strict judicial application as a means to impeding intersectional discrimination. The collective result of the above arguments proves this paper's thesis that the current framework fails to protect victims against intersectional discrimination.

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[11] *Lewis v Tabard Gardens TMC Ltd* [2005] ET/2303327/04.
[12] *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co.* Case 1806128/03.
[13] *O'Reilly v BBC* (unreported, 20102200423/2010 19 November 2010 ET).
[14] *Hewage v Grampian Health Board* [2012] IRLR 870 SC.
[15] *Bahl v Law Society* [2004] IRLR 799, [2004] EWCA Civ 1070.

The final section considers potential reforms within the British Equality Framework. The first proposal concerns the reintroduction of section 14[16] ('s.14') into the Equality Act 2010 to provide a formal cause of action against direct dual discrimination. The second proposes that the judges, when faced with a dual discrimination s.14 claim, exercise a relational analysis towards the two forms of oppression to locate the victim's unique intersectional location. This section also addresses why the widely supported positive actions model is ill-suited in addressing intersectionality. Finally, the third reform proposes a change in the judicial application of the comparator requirement. The shift involves changing the question from 'but for' to 'but why'. The section concludes with a three-stage test proposed to be used by judges when faced with s.14 claims. This is believed to assist in correcting the blind-spot, as it explicitly incorporates an intersectional approach in dealing with discrimination.

I. INTERSECTIONALITY

Although the concept of 'intersectionality' finds it origins back in the 1800s,[17] Kimberlé Crenshaw officially coined the term in 1989.[18] She used intersectionality to target the marginalisation of black women within ADL, feminist movements, and critical race theory. She employed intersectionality as an analytical framework to expose the tendency 'to treat race and gender as mutually exclusive categories of experience'.[19] Such approach assumed that a black woman was *either* a woman (sex) *or* black (race). Regrettably, this is not reflective of her reality as a black woman *per se* where sex and race fused 'inextricably'[20] to render her intersectional experience greater 'than the sum of racism and sexism'.[21] Accordingly, the real-lived experiences of individuals do not map onto the law, making the aforementioned blind-spot all the more apparent.

[16] Equality Act 2010, s 14.
[17] Howard Zinn, A People's History of the United States (New York: Harper Perennial Modern Classics, 2005) 124.
[18] Crenshaw (n 10).
[19] ibid 139.
[20] *Jeffers v Thompson*, 264 F Supp 2d 314 (D Md 2003).
[21] Crenshaw (n 10) 140.

A. Multiple Identities

Intersectionality is premised upon the notion that an individual's identity characteristics are intertwined and not easily separable. ADL disregards this notion, which instead splits an individual's identity into 'classified, manageable aspects'.[22] Accordingly, an Asian woman's identity is split up into race and sex[23] by virtue of the additive approach which has long been inherent in ADL discourse. This is problematic as it marginalises the experiences of those whose identity aspects cannot be fragmented into neat 'pockets'[24] and thus it fails to account for their interests.

Accordingly, Figure 1 can be used to visualise an intersectional subject's experience as qualitatively different than the sum of its two constituent components.

The current approach assumes

race + sex = Asian woman

The reality of her experience is:

race x sex = Asian woman

Hence,

Asian woman - race ≠ sex

Asian woman - sex ≠ race

Figure 1: Visual representation of intersectional discrimination

As Figure 1 demonstrates, intersectionality 'fills out the Venn diagrams at points of overlap where convergence has been neglected'[25] by ADL discourse.

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[22] Aileen McColgan, 'Reconfiguring Discrimination Law' (2007) Public Law, 74-94, 77.
[23] ibid.
[24] Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993-1994) 2 Queen's Law Journal 179, 193.
[25] Catharine A MacKinnon, 'Intersectionality as Method: A Note' (2013) 38(4) The University of Chicago Press 1019.

Not to mention, ADL's blind-spot produces negative conceptual and practical effects for its victims. The Human Rights Forum[26] study[27] acknowledged identity as essential to 'people's positive sense of self'.[28] In turn, this mandates respect for their dignity, a value equality law aims to protect.[29] Accordingly, Uccellari correctly observes that if discrimination law lays down its own notions of identity on individuals, then it will strip them of the values that legislation ought to protect. Therefore, if ADL postulates its own notions of identity, then it will strip victims of such values.[30]

A further practical effect of the single-axis categorisation is that it encourages policymakers to evaluate the individuals they are accountable to by reference to previously established legal groups. This induces these policymakers to design policies by reference to artificial notions of identity,[31] which will force individuals to identify with one category over another in order to reap the benefits of these policies. It becomes apparent that the single-axis approach operates in a cycle: because legislation induces artificial categories and provides for no recourse around that, policymakers then assume that human experiences are being accounted for, and thus they introduce policies that correspond with the law's singular dimension. This is where intersectionality, as a heuristic, intercedes and breaks the cycle by exposing its failure to honour the complexity of the human experience.

B. Identity Politics

Moreover, intersectionality reveals that ADL over-fixates on pre-determined identity groups.[32] Traditional ADL discourse treats identity groups as

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[26] This is the organisation representing the human rights and equality bodies of Britain, Ireland and Northern Ireland.

[27] Katherine E Zappone, 'Conclusion: The Challenge of Diversity' in Katherine E Zappone (ed) *Rethinking Identity: The Challenge of Diversity* (JEHRF 2003) 24.

[28] ibid 2.

[29] Denise Reaume, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 645.

[30] Paola Uccellari, 'Multiple Discrimination: How Law Can Reflect Reality' (2008) 1 The Equal Rights Review 24.

[31] ibid.

[32] Walby et al., 'Intersectionality: Multiple Inequalities in Social Theory' (2012) 46(2) Sociology 224.

internally homogenous thereby overlooking intra-group differences.[33] Accordingly, a black woman's experience is compared to that of a white woman's or of a black man's and she can therefore only receive protection if she proves her experience is similar to either group's. It is not. This essentialist account, Fredman notes, obscures real differences within identity groups.[34] Adopting such an account could lead to policies that address the needs of a group's most dominant members,[35] while ignoring the needs of any sub-categories.

Contrarily, Makkone[36] argues that the reason behind this oversimplification of group interests is that it serves a depiction of complex real-life phenomena which is more manageable and understandable. Thus, he asserts, recognising the full diversity of group members would be burdensome and, at times, self-contradictory. Although there exists practical merit in his arguments against focusing on sub-groups, this oversimplification comes at the expense of silencing sub-group members' voices. A consequence of which involves potential damage to their lived experiences as they may consider themselves not worthy of being heard,[37] which may generate negative psychological effects such as depression and anxiety as a result of societal exclusion.[38] After using intersectionality to expose the limits and consequences of mutually exclusive groups, it now serves as a useful tool in the policymaking process to ensure such the avoidance of these consequences.

C. Power Dynamics

Intersectionality does not only reveal that individuals are multi-faceted, but also draws attention to the ways in which power dynamics operate to marginalise

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[33] Sandra Fredman, 'Equality: A New Generation?' (2001) 30(2) Industrial Law Journal 145, 158.
[34] Sandra Fredman*, Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (Publications Office of the European Union 2016).
[35] Crenshaw (n 10).
[36] Timo Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore' (2002) Institute for Human Rights. Åbo Akademi University.
[37] For Claimant interviews and experiences see, Chapter 4 in M Hudson, 'ACAS Research Paper 01/12: The Experience of Discrimination on Multiple Grounds' (2012).
[38] Makkonen (n 36) 7.

victims. As an account of power, intersectionality reveals how these force structures create and employ identities.[39] As a result, it focuses on 'the way things work [rather] than who people are'.[40] Accordingly, Tomlinson notes: 'If... intersectionality is a matter of identity rather than power' then we 'cannot see which differences make a difference. Yet it is exactly our analyses of power that reveal which differences carry significance'.[41] Hence, a failure to recognise the dynamics, which dictate the subject's experience risks, leave her or him invisible at the intersection of power structures.

However, MacKinnon's caution against treating identities as irrelevant bears significant weight here. This is because identities are the ossified outcomes of structural intersections.[42] The latter leads to the emergence of identities and their subsequent solidification, making the former a direct consequence of the latter.

Nonetheless, the degree and nature of discrimination varies with cultural, socio-political and economic context. Therefore, an over-emphasis on identities risks disguising economic and distributive issues.[43] An individual's identity is not the problem per se; the problem is rather the way in which it is socially constructed and accordingly treated.[44] For instance, Fredman identifies race as a social construct, 'a marker for oppression rather than a biological reality'.[45] Accordingly, an ethnic minority in one nation might constitute the majority in another. Therefore, ethnicity itself does not automatically attract oppression. Rather, oppression occurs as a result of the power relations which dictate the social construction of race in a society. As such, Fredman's notion of substantive

[39] Fredman (n 34).
[40] Chun et al, 'Intersectionality as a Social Movement Strategy: Asian Immigrant Women Advocates' (2013) 38 Signs 917, 923.
[41] Barbara Tomlinson, 'To Tell the Truth and Not Get Trapped: Desire, Distance, and Intersectionality at the Scene of Argument' (2013) 38 Signs 993, 1012.
[42] MacKinnon (n 25) 1023.
[43] Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in E Grabham, D Cooper, J Krishnadas, D Herman (eds) *Intersectionality and Beyond, Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 30-31.
[44] MacKinnon (n 25).
[45] Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (n 34) 30; this approach is also endorsed by the European Union as seen in Directive 2000/43, Preamble, Recital 6.

equality bears relevance here as it 'explicitly incorporates differences in power relationships'.[46] This will be referred to in the final section.

Now that intersectionality sheds light on the blind-spot, it will be used in the next section to analyse the British Equality Framework.

II. BRITISH EQUALITY FRAMEWORK

Having explained what intersectionality is in the previous section, the theory will be used in this section as a tool to analyse the judicial and legislative approach to intersectional discrimination in Britain. To achieve this aim, this section has four objectives. First, a brief analysis of the equality regime in Britain will be provided for contextual purposes. Second, this paper will distinguish between additive (or compound) discrimination and intersectional discrimination. Third, this paper uses an intersectional lens to analyse the judicial approach to intersectional discrimination claims in the cases of *Lewis*,[47] *Mackie*,[48] *O'Reilly,*[49] and *Hewage.*[50] However, the majority of this section will focus on the seminal case of *Bahl,*[51] which rejected the recognition of intersectional discrimination. Finally, the legislative comparator requirement and its subsequent strict judicial implementation will also be criticised using an intersectional lens.

The Equality Act 2010

Historically, the British Equality framework was focused on protecting a single characteristic[52] at any given time. This followed as a logical consequence of political movements such as feminism or queer liberation which have traditionally focused on single characteristics.[53] Carried forward onto the Equality Act 2010,

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[46] ibid.
[47] *Lewis v Tabard Gardens TMC Ltd* (n 11).
[48] *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co.* (n 12).
[49] *O'Reilly v BBC* (n 13).
[50] *Hewage v Grampian Health Board* (n 14).
[51] *Bahl v Law Society* (n 15).
[52] For example: Sex Discrimination Act 1975 (SDA), Race Relations Act 1965, Disability Discrimination Act 1995.
[53] Ben Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 16 The Equal Rights Review 73, 74 <http://

this has not changed. The Equality Act 2010 defines direct discrimination as occurring if 'because of *a* protected characteristic, A treats B less favourably than A treats or would treat others'.[54] An advantage of this approach involves the tailoring of specific remedies to each bias[55] after that protected characteristic is 'isolated and magnified' from other identity aspects.[56] However, this exhaustive method fails to notice that 'gender reaches into disability'[57] and that 'black people can be old';[58] i.e. it fails to recognise intersectionality which blossoms on the 'conjuncture of social structures'[59] and not on the pre-determined categories. A further barrier to intersectional discrimination claims involves the strict comparator requirement, which requires courts to make a comparison between the claimant and someone similarly situated but for the claimed characteristics.[60] As a starting point, it can be seen that the legislation potentially impedes intersectional discrimination claims.

A. Scope

This section will not engage with empirical evidence which points to the extent of intersectional discrimination in the UK.[61] This is because the Government Equalities Offices published a report in 2009 where it admitted to there being no remedy under the current framework for intersectional discrimination.[62]

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www.equalrightstrust.org/ertdocumentbank/Intersectional%20Discrimination%20and%20Substantive%20Equality%20A%20Comparative%20and%20Theorectical%20Perspective.pdf> accessed 18 February 2019.

54 Equality Act 2010, s 13. For a list of the protected characteristics see the Equality Act 2010, s 4.

55 Ioyola Solanke, 'Putting Race and Gender Together: A New Approach To Intersectionality' (2009) 72(5) The Modern Law Review 723, 724.

56 ibid.

57 Clare (n 8).

58 Scales-Trent (n 9).

59 Johanna Kantola and Kevät Nousiainen, 'Institutionalizing Intersectionality Europe' (2009) 11(4) International Feminist Journal of Politics 459, 462.

60 Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23(1) Oxford Journal of Legal Studies 65, 67.

61 MacKinnon (n 25); see also Gay Moon, 'Justice for the Whole Person: The UK's Partial Success Story' in Anna Lawson and Dagmar Schiek (eds) *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011) 167-8.

62 Government Equalities Office, 'Equality Bill: Assessing the Impact of a Multiple Discrimination Provision' (2009) para 3.4.

Thus, this section does not aim to prove the prevalence of a protectoral gap, because there evidently is none. Instead, this section uses intersectionality to uncover the reasons behind this gap, so as to encourage the government to acknowledge the severity of intersectional discrimination rather than considering it a costly inconvenience. It should be recalled that this paper is only interested in direct dual discrimination based on the nine protected characteristics under the Equality Act.[63] The reason for narrowing the scope of the analysis in such a way is that data demonstrates that less than 1% of cases are presented on more than two grounds.[64]

B. Additive Discrimination vs. Intersectional Discrimination

Both 'additive' (or compound) discrimination and 'intersectional' discrimination fall under the umbrella term 'multiple discrimination' and are used by scholars interchangeably.[65] However, this paper uses the below stated definitions throughout. Additive discrimination occurs 'where someone is treated less favourably because of more than one protected characteristic at one time but the forms of discrimination are distinct'.[66] Therefore, the multiplicity of the discrimination has a *quantitative* effect that increases in size and not nature.[67] The current framework effectively protects against additive discrimination[68] since it requires claimants to advance all grounds of the discrimination independently.[69] For instance, the Employment Tribunal (ET) in the *Ali*[70] case concluded that an Asian woman was discriminated against on grounds of race *and* sex. Neither a

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[63] Equality Act 2010, s 4.
[64] Government Equalities Office (n 62) para 4.9, 119 of 13,000 clients.
[65] European Commission, *Tackling Multiple Discrimination. Practices, Policies and Laws* (Brussels: Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.4, 2007) 17.
[66] James Hand, 'Combined Discrimination - Section 14 of the Equality Act 2010: A Partial and Redundant Provision?' (2011) 2 Public Law 482.
[67] Smith (n 53) 80.
[68] Karen Monghan, *Monaghan on Equality Law* (Oxford University Press 2003), para 5.1.2; see also *Nwoke v Government Legal Service and Civil Service Commissioners* (1996) 28 Equal Opportunities Review 6.
[69] Solanke (n 55) 728.
[70] *Mrs S Ali v (1) North East Centre for Diversity & Racial Equality* (2) Jamiel Bux Case No: 2504529/03.

man nor a white woman would have been treated similarly.[71] This approach arguably minimises complexity in judicial decision-making by concentrating on separate grounds.

Conversely, intersectional discrimination involves someone being treated less favourably because of more than one protected characteristic on one occasion but it is the 'unique combination of characteristics that results in discrimination'.[72] Hence, it involves a "new compound subject"[73] with a *qualitatively* different experience whose characteristics, unlike those in additive, cannot be disaggregated. An example involves situations where an African woman who, as a result of race and sex combined, is forced to undergo Female Genital Mutilation. The same is not commanded of women in general nor from African men.[74]

C. Case-law Under an Intersectional Lens:

There are some decisions which suggest that the British judiciary is capable of recognising direct intersectional discrimination. For instance, the Employment Tribunal ('ET') in *Lewis*[75] recognised the qualitatively different experience embodied by black women and concluded that a black woman was discriminated against based on her race and sex combined. Similarly, in *Mackie,*[76] an Indian woman, successfully claimed race and sex discrimination. The Tribunal used a hypothetical comparator to conclude that the unfavourable treatment was because she was an *Indian woman.*[77] Hence, both these decisions imply that the courts are neither as conceptually nor legally blind to intersectional discrimination

[71] See also case *Ms R De Thomas v Patrick Thompson* Case No: 1201589/00 and 1202242/00 (sex and race) and case *Miss A Rawat v Kirkless Metropolitan Council (1) Mr Singh (2) Mr G Harker(3) Ms J Lancaster(4) Mr S Laher(5)* Case No: 1804500/98 (sex and/or race).
[72] Citizens Advice Bureau, 'Potential Intersectional Discrimination Cases' (2009) Citizens Advice 30 <https://www.citizensadvice.org.uk/Global/Migrated_Documents/corporate/md-evidence-report.pdf> accessed 07 September 2020.
[73] Iyiola Solanke, 'Infusing the Silos in the Equality Act 2010 with Synergy' (2011) 40(1) Industrial Law Journal 336, 340.
[74] Makkonen (n 36) 29.
[75] *Lewis v Tabard Gardens TMC Ltd* (n 11).
[76] *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co.* (n 12) discussed in N. Bamforth, M. Malik and C. O'Cinneide (eds.), *Discrimination Law: Theory and Context: Text and Materials* (Sweet & Maxwell 2008) 526.
[77] ibid 526.

as a quick glance into the case law might suggest. However, these cases preceded the Court of Appeal decision in *Bahl*[78] which ruled against the recognition of intersectional discrimination.

(i) Bahl v Law Society

Arguably, the *Bahl*[79] case confirms this paper's hypothesis that the British framework inherently suffers from an intersectional blind-spot. The claimant, Bahl, advanced a discrimination case against her employer on the basis of her status as a black woman. Her claim for intersectional discrimination was successful at the ET stage[80] which concluded: 'We do not distinguish between… race or sex… in reaching this conclusion…. There was no basis… for comparing her treatment with that of a white female, or a black male, office holder.'[81] However, both the Employment Appeal Tribunal[82] ('EAT') and the Court of Appeal[83] ('CA') rejected the ET's reasoning and stressed upon the need to split up the grounds into race and sex, and provide evidence separately. Thus, the higher courts rejected the possibility of intersectional discrimination achieving recognition.

This case clearly represents the judicial restraints imposed by the legislation's monocular approach.[84] Since the legislation protects against single, mutually exclusive 'characteristics' rather than complex, compounded identities, it blinds the courts from seeing intersectionality. This approach failed to adequately protect Bahl, a victim at the intersection of oppressions, who sought refuge in the Equality Framework. By requiring Bahl to break down her intersectional experiences into manageable claims, the CA effectively failed to reflect her multi-

78 *Bahl v Law Society* (n 15).
79 ibid.
80 *Law Society v Bahl EAT* 1056/01, [2003] UKEAT 1056_01_3107, [2003] IRLR 640, EAT/1056/01, [57] – [67].
81 *Bahl v Law Society* (n 15) [135].
82 *Law Society v Bahl* (n 80).
83 *Bahl v Law Society* (n 15).
84 Smith (n 53) 91.

layered experience and the true extent of their suffered injustice.[85] *Bahl*[86] exposes the Framework's systemic incapacity to acknowledge and protect intersectional discrimination victims.

By imposing its own notion of identities, equality legislation and subsequent court judgements signal to these victims that their identities are not valued by society, nor are they worthy of protection.[87] Further, the so-called 'fairness' approach to equality, adopted by the CA, which fails to recognise discrimination grounds as interlinked, is 'structurally antithetical to developing a nuanced recognition of intersectionality'[88] within anti-discrimination discourse.

The lack of an intersectional perspective is also apparent in Gibson LJ's remark when he stated that it is rare to find a woman guilty of sex discrimination against another.[89] Again, this is symptomatic of the essentialist thinking referred to earlier.[90] This line of reasoning assumes that all women share the same experience defined by the group's dominant members.[91] Correspondingly then, this reasoning assumes that Bahl's experience is limited to that of white heterosexual women's. In reality though, Bahl's experience, as a *black woman,* is not captured by this line of reasoning and is thus left without recourse. There exists evidence in Solanke's work which proves that black women's experiences are not similar to white women's.[92] This also can be used as a basis for reforms to be discussed in the next section.

(ii) Aftermath of *Bahl*

[85] European Commission (n 65) 21.
[86] *Bahl v Law Society* (n 15).
[87] Zappone (n 27) 134; Uccellari (n 30) 27.
[88] Judith Squires, 'Intersecting Inequalities' (2009) 11(4) International Feminist Journal of Politics 496, 506.
[89] *Bahl v Law Society* (n 15) [137] (Gibson LJ).
[90] Solanke (n 55) 731.
[91] Smith (n 53) 91.
[92] Solanke (n 55).

The danger of *Bahl,*[93] as a Court of Appeal decision, concerns the precedent it sets which inevitably binds future courts.[94] Or one would assume. It appears from the widely publicised *O'Reilly*[95] case that Tribunals remain sympathetic to intersectional claims. In that case, the ET stated that an individual could be discriminated against because of the combination of both age and sex (although only age discrimination was made out). It explained that 'the prescribed reason need not be the sole… or even the principal reason, why a person suffers detrimental treatment…'.[96] *O'Reilly*[97] appears to be in complete defiance to *Bahl.*[98] However, a closer look into the Tribunal's reasoning reveals similarities with the *Bahl*[99] approach. In *O'Reilly*[100]*,* the tribunal *acknowledged and accepted* intersectional discrimination as a possible occurrence whereas the higher courts in *Bahl*[101] *refused to acknowledge* that same proposition. Yet, the constraints of the British law took hold on the Tribunal in *O'Reilly*[102] and forced them to choose one characteristic (age) that the claim could be advanced under.[103]

The Tribunal simplified the claimant's complex, intersectional experience (based on age and sex) for the sake of practical convenience. This effectively demonstrates that the Framework deems worthy of protection only one aspect of her identity whilst completely ignoring its intersection with another aspect. Taking an intersectional approach would have reinforced the claimant's sense of self-worth and her faith in a Framework designed to protect her. Nonetheless, this leads to an interesting observation: while the courts are willing to acknowledge intersectional discrimination, the legislation prevents them from doing so. Therefore, courts' lack of an intersectional perspective is a reflection of the position taken in statutes.

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93 *Bahl v Law Society* (n 15).
94 See *Nagarajan v London Regional Transport* [1998] IRLR 73; *Network Rail v Griffiths-Henry* [2006] IRLR 865.
95 *O'Reilly v BBC* (n 13).
96 ibid 245.
97 ibid.
98 *Bahl v Law Society* (n 15).
99 ibid.
100 *O'Reilly v BBC* (n 13).
101 *Bahl v Law Society* (n 15).
102 *O'Reilly v BBC* (n 13).
103 Sheena Smith, 'Intersectionality and Law: Theoretical Issues' (2011) European Training and Research Centre for Human Rights and Democracy 1, 22.

Another Supreme Court case which would seem to conflict with the principle in *Bahl*[104] is *Hewage.*[105] There, the claimant advanced a discrimination claim on grounds of both race and sex by comparing her treatment to that of a white male. She was not required to split her claim into (i) race, whereby she would have had to compare herself to a white female; and (ii) sex, whereby her comparator would have been a black man. Some argue that *Hewage*[106] signals a shift in the law since the Supreme Court did not take issue with the Tribunal's approach.[107] However, the court did not explicitly endorse intersectional discrimination, nor did they overturn *Bahl.*[108] Therefore, the current framework still does not recognise intersectional claims.

A further effect of *Bahl*[109] is that it dictates the approach undertaken by lawyers in advancing discrimination claims. Under the current regime, lawyers strategically second-guess which dismantled thread of an intersectional discrimination claim will succeed in court.[110] This 'lawyering'[111] angle advances the 'strongest'[112] ground and ignores the others[113] in fear of losing the case completely.[114] However, this approach debatably weakens the claim[115] considering the unfavourable treatment was based on the idiosyncratic fusion of two

[104] *Bahl v Law Society* (n 15).
[105] *Hewage v Grampian Health Board* (n 14).
[106] ibid.
[107] ibid.
[108] *Bahl v Law Society* (n 15).
[109] ibid.
[110] Sandra Fredman, 'Positive Rights and Positive Duties: Addressing Intersectionality' in D Schiek and V Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Mutlidimensional Equality Law* (Routledge-Cavendish 2009) 73.
[111] Suzanne Goldberg, 'Intersectionality in Theory and Practice', in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds) (2009), Intersectionality *and Beyond: Law, Power and The Politics of location* (Oxford, Routledge-Cavendish 2009) 124.
[112] Equal Opportunities Commission, 'Advising Ethnic Minority Women About Discrimination at Work' (2004) 1, 5.
[113] Gay Moon, 'Multiple Discrimination – Problems Compounded or Solutions Found?' (2006) 3 Justice Journal, 4.
[114] ibid.
[115] Uccellari (n 30) 26.

grounds. Moreover, this requirement assumes that people have a choice as to which aspect of their identity 'will haunt them and which one they'll be free of'.[116]

Subsequently, the current approach encourages competition between different structures of inequalities[117] resulting in an 'Oppression Olympics'.[118] That is, different groups are made to compete for the label of being 'most oppressed'[119] to gain political attention and policy remedies for their group instead of cooperating towards seeking institutional reform which could alter the logic of distribution of resources.[120] This is an unsatisfactory approach as it clearly does not reflect the intention of the legislator. Furthermore, it can be settled that 'victims of bias should not have to approach anti-discrimination law as consumers and make choices where none actually exist'.[121] To such victims, their identity features do not exist in disjunctive vacuums; they cannot reasonably be expected to cherry-pick which of their sole features mandated the less favourable treatment. To summarise, intersectionality theory was used here as a 'tool to look beneath the surface'[122] so as to uncover the negative effects of the decision in *Bahl*.[123]

D. The Comparator

The comparator requirement for establishing discrimination is, arguably, the 'most difficult barrier'[124] to intersectional discrimination claims. It is rooted in the

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116 C Jones and K Shorter-Gooden, *Shifting: The Double Lives of Black Women in America* (Harper Collins, 2003) 59.

117 Angie-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality As a Research Paradigm' (2007) 5 Perspect. Polit. 63, 68; see also Elisabeth Holzleithner, 'Mainstreaming Equality: Disentangling Grounds of Discrimination' (2005) 14 TRANSNAT'L L. & CONTEMP. PROBS. 927, 944-45.

118 ibid 68.

119 ibid.

120 ibid.

121 Solanke (n 55) 748.

122 Oddný Mjöll Arnardóttir, 'Multidimensional Equality from Within: Themes from the European Convention on Human Rights' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009) 66.

123 *Bahl v Law Society* (n 15).

124 Susanne Burri and Dagmar Schiek 'Multiple Discrimination in the EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?' (2009)

Aristotelian doctrine of formal equality which asserts that likes must be treated alike.[125] This approach is unsurprising, considering the Equality Act's formal equality underpinnings, which consistently demand comparison between likes. If there is no real person to be used for comparison, a hypothetical one is constructed.[126] Accordingly, the treatment of a woman would be compared to that of a man, a disabled person to a non-disabled person, and so on. Considering the legislation allows comparison for only one ground,[127] it becomes clear why this requirement hinders intersectional discrimination claims. The comparator must not share the protected characteristics.

Hence, when it comes to multiple characteristics, it is near impossible to locate or construct a comparator that does not share any of the claimant's protected characteristics.[128] For instance, would a Muslim lesbian claimant, advancing a direct discrimination claim based on sexual orientation and religion, be compared to a non-Muslim straight woman, or a non-Muslim gay individual? The first option shares with the claimant the protected characteristics of 'sex' whilst the second option shares the 'sexual orientation', both of which are protected characteristics. Whilst it is beyond the scope of this article to answer this question, the latter illustrates the difficulties of finding a suitable comparator in intersectional discrimination cases.

Even if several grounds for discrimination are advanced,[129] *Bahl*[130] clarified that only one comparison can take place at any chosen time. Furthermore, even if the courts were willing to accept intersectional discrimination, they are required to find a comparator. Indeed, judges previously acknowledged that comparators are not always available nor helpful. This is exacerbated in cases of intersectional

European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 6, 18.

125 6 ARISTOTLE, ETHICA NICOMACHEA V.3.1131 a-I 131 b (W.D. Ross trans., 1925).

126 Equality Act 2010, s 23.

127 Gay Moon, 'Justice for the Whole Person: The UK's Partial Success Story' in Anna Lawson and Dagmar Schiek (eds) *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011).

128 Moon (n 113) 466; Equal Opportunities Commission (n 112) 9.

129 Equality Act 2010.

130 *Bahl v Law Society* (n 15).

discrimination as seen above.[131] As Hannett[132] correctly observes, an analysis of the courts' approach regarding comparators is hampered by their failure to virtually locate the appropriate comparator, or even expressly state the comparator used.[133]

Nevertheless, the *Bahl*[134] case can be used to point out the courts' conservative use of the comparator requirement. In *Bahl,*[135] the lack of such a requirement was fatal to the claim. Hence, this paper finds merit in Goldberg's claim that the comparator exercise is being transformed from a heuristic device[136] (i.e., a process supposed to *aid* decision-making) to a *defining element* in discrimination cases.[137] Based on the decision in *Bahl*[138] and other case law previously discussed by this paper, it becomes apparent that the courts consider an appropriate comparator, or lack thereof, to be a decisive factor in discrimination cases. This leaves claimants, such as the Muslim lesbian above, without a fighting chance by which to advance their claim and subsequently obtain justice. Therefore, the courts' focus on the comparator requirement in deciding discrimination cases actively limits their ability to recognise intersectional discrimination.

Additionally, establishing discrimination under British law is a comparative exercise.[139] Consequently, because a comparator does not take into account the exclusionary patterns that result in an intersectional subject's unique disadvantage, it fails to protect them. This 'comparator-obsessed legal regime'[140] conflicts with intersectionality's claim that identities are not based on pre-determined categories,

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131 Sandra Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 European Anti-Discrimination Law Review 13; Aileen McColgan, *Discrimination Law: Texts, Cases and Materials (*Hart 2005).

132 Hannett (n 60).

133 See *Khanum v IBC Vehicles Ltd* (unreported EAT/685/98, 15 September 1999), EAT concluded that both race and sex discrimination took place without expressly identifying the comparator.

134 *Bahl v Law Society* (n 15).

135 ibid.

136 Suzanne Goldberg, 'Discrimination By Comparison' (2011) 120(4) The Yale Law Journal Company Inc. 728.

137 ibid.

138 *Bahl v Law Society* (n 15).

139 Hannett (n 60) 84.

140 Goldberg (n 136) 752.

rather they are based on the social structures that create them. As such, it is the intersection at which these pre-determined categories exist that intersectionality puts the spotlight on. Therefore, this comparator requisite is revealed by intersectionality as being 'over-inclusive': its role as a heuristic to reveal discrimination is overstated by the courts as it fails to notice the unique disadvantage suffered intersectionally. This lends support to this paper's thesis that the current framework lacks an intersectional lens. Thereby, an intersectional solution, discussed in the next section along with other reforms, would be to loosen the requirements for the comparator.

III. REFORMS

This section proposes and reviews reforms. It should be noted that there exist international human rights solutions[141] which aim to address intersectional discrimination. However, due to their non-binding nature, they will not be discussed. Accordingly, this section proposes three reforms that range from legislative measures to subsequent judicial interpretations. Conclusively, this section crafts a three-stage judicial test relating to intersectional claims to potentially correct the blind-spot. As a note, this section uses the terms 'dual discrimination' and 'intersectional discrimination' interchangeably.

1. (Re)introducing Legal Measures

The first reform entails the use of law. This entails re-introducing section 14 ('s.14') of the Equality Act, which was designed to expressly prohibit direct discrimination 'if, because of a combination of two of the [protected] characteristics [(except for marriage/civil partnership and pregnancy/maternity)], a person treats another less favourably than… a person who does not share either of these characteristics'.[142] Bringing a s.14 claim does not preclude the possibility of bringing a claim based on a single ground or on both grounds independently.[143]

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[141] For example: Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of Persons with Disabilities; For a full discussion on international human rights solutions, see Gauthier de Beco, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law' (2017) 17(4) Human Rights Law Review 633-663 < https://doi.org/10.1093/hrlr/ngx029> accessed 02 March 2019.
[142] Equality Act 2010, s 14.
[143] Moon (n 127) 172.

This is suitable because not every discrimination case will be based on dual characteristics.

The executive's decision not to implement s.14 was justified on the basis that it would be too 'costly' on businesses[144] in relation to the cost of new cases, the compensation of successful cases, and the out-of-court award settlements.[145] However, this paper contends that these costs are unmatched to those incurred by victims left without access to justice.[146] The Government Equality Office ('GEO') itself found that the number of new cases, after s.14's implementation, would surge by only 10% for 2 years, as the courts and tribunals establish substantial precedent. However, the estimated 2% success rate of s.14 cases potentially justifies its 'costly' implementation. Since this rate is clearly low, the concern that substantial business resources will be directed towards compensating victims is now moot. In addition, familiarisation costs were estimated at £14 per Small and Medium Businesses and at £32 per large enterprises. These costs are arguably unmatched by those incurred by individuals, should they be left without recourse. Finally, it is important not to overlook the benefits afforded to individuals should s.14 be implemented; these include monetised compensations from successful cases and overall increased morale and sense of belonging, which in turn increase productivity.[147] Ultimately, the government's decision to not implement s.14 based on costs is unjustified.

Accordingly, s.14 provides a formal cause of action on to which dual discrimination claims can be based. This potentially increases the potential success of such claims.[148] Indeed, this is condoned by Trade Unions, who term s.14 as a 'hook' to which such claims may be attached.[149] Furthermore, a s.14 claim does

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144 HM Treasury/Department for Business Innovation & Skills, The Plan for Growth (London: HMSO, 2011) 53.

145 Equality Bill Impact Assessment Version 3 (House of Common Reports Stage, 2009) 220 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243602/9780108508677.pdf> accessed 05 April 2019.

146 Solanke (n 73) 355.

147 Equality Bill Impact Assessment Version 3 (n 145) 221.

148 Moore et al, 'Research Paper: Addressing Discrimination in the Workplace on multiple grounds – the Experience of Trade Union Equality Reps' (2011) ACAS, 1-27 <http://www.acas.org.uk/media/pdf/f/p/0212_Multidiscrim_TU_Equality_Reps.pdf> accessed 05 April 2019.

149 ibid 17.

not require the claimant to prove discrimination on each ground separately,[150] thereby ensuring that the dual discrimination is the *sole reason* of the unfavourable treatment.[151] This would plausibly lead to a more serious judicial recognition of intersectional discrimination as they realise its qualitative distinction from single-ground claims. It would resemble the ET's approach in the cases of *Lewis*[152] and *Ali*[153] mentioned earlier. Consequently, this demonstrates to these victims that their legal framework is capable of protecting them should societal practices fail them. This is likely to increase their sense of inclusion in society which subsequently positively impacts their well-being and their productivity within the workforce.[154]

Conversely, it could be argued that a statutory definition of dual discrimination prevents a more flexible development of the concept which may hinder the incorporation of intersectionality into the framework.[155] However, this could be countered by the fact that all other prohibited discriminatory practices,[156] since the conception of anti-discrimination law 40 years ago,[157] have embodied this rigidity, so by analogy, dual discrimination should too. Even though intersectionality differentiates dual discrimination from other claims, the discriminatory practice itself remains within the ambit of the Equality Act.[158] Thus, as a first step towards correcting the blind-spot of the current approach, this paper embraces the reintroduction of s.14.

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150 Equality Act 2010, s 14(2).
151 Moon (n 113).
152 *Lewis v Tabard Gardens TMC Ltd* (n 11).
153 *Mrs S Ali v (1) North East Centre for Diversity & Racial Equality* (n 70).
154 Zappone (n 27).
155 Dagmar Schiek and Susanne Burri, 'Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?' (2009) European Network of Legal Experts in the Field of Gender Equality, 23 <https://www.researchgate.net/publication/46718012_Multiple_Discrimination_in_EU_Law_Opportunities_for_legal_responses_to_intersectional_gender_discrimination_European_Commission_Directorate_General_for_Employment_Social_Affaires_and_Equal_Opportuniti> accessed 07 April 2019.
156 For example: direct discrimination under s 13 of the Equality Act 2010, and indirect discrimination under s 19 of the Equality Act 2010.
157 For example: Sex Discrimination Act 1975 (SDA), Race Relations Act 1965, Disability Discrimination Act 1995.
158 Equality Act 2010, s 14.

Although s.14(2) excludes the protection of marriage/civil partnership and pregnancy/maternity, this paper advocates for their inclusion if a truly intersectional approach is to be embodied. The exclusion was justified on the grounds that they are unlikely to apply[159] as there was no evidence to showcase that these characteristics, combined with others, would cause problems. Specifically, regarding pregnancy and maternity, the GEO justified its exclusion based on the fact that these characteristics do not require a comparator, and that it would 'be difficult to see how pregnancy and maternity could be included in a dual discrimination claim in combination with another protected characteristic which does not require a comparator'.[160] With regard to marriage and civil partnerships, their exclusion was justified on the basis that such claims will likely be advanced on the basis of sex or sexual orientation respectively.[161]

Nevertheless, intersectionality is premised upon acknowledging the *uniquely* formed identities of individuals. Therefore their exclusion by the executive implicitly rejects that premise by dismissing these grounds' potential interactions with the other eight protected characteristics.[162] Accordingly, a *single mother* would not be able to advance a s.14 claim based on marital status and sex, although research on maternal stereotypes exhibits a link between perceived lack of incompetence and motherhood at work.[163] Conversely, this oversight could debatably be attributed to the lack of parliamentary scrutiny s.14 received due to its late introduction into the Equality Bill.[164] Nonetheless, this section identifies this oversight as an intersectionally-blind one, and therefore proposes the inclusion of these grounds to rectify it.

(i) Legal Certainty

The solidification of protection against dual discrimination in legal text limits judicial discretion in determining whether such claims are capable of being

[159] Hand (n 66) 2.
[160] Equality Bill Impact Assessment Version 3 (n 145) 215.
[161] Hand (n 66).
[162] Equality Act 2010, s 4.
[163] Joan Williams and Stephanie Bornstein, 'The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias', 59 Hastings L.J 1311-1358, 1327.
[164] Hand (n 66) 3.

protected under the framework. Thus, the implementation of s.14 explicitly crystalises the protection against dual discrimination, thereby offering legal certainty. Correspondingly, limiting judicial discretion is alleged to be a favourable approach because, as McColgan asserts, the judicial body has not proven itself to be relied upon to exercise such discretion in favour of the disadvantaged.[165] This can be demonstrated by reviewing the jurisprudence discussed in Section 2. One can clearly observe the lack of a principled method in determining whether intersectional discrimination could be offered protection under the current framework, which in turn led to inconsistent decisions.[166] This paper acknowledges that the judges' own abilities to appreciate intersectional discrimination were confined by Parliament's decision not to solidify the protection. Nonetheless, the law needs to address the fact that intersectional discrimination has fallen through the cracks of the Framework.

Shockingly, the respondents in *O'Reilly,*[167] relying on *Bahl,*[168] attempted to argue that, in the absence of s.14, combined discrimination claims are not actionable.[169] Although the argument was rejected in *O'Reilly*, barring s.14, it cannot be held with certainty that it will be rejected again in future cases. This uncertainty is likely to discourage victims of intersectional discrimination from seeking justice considering the already time-consuming and expensive legal proceedings exacerbated by the cut in Legal Aid for employment cases by the Equality Act.[170] Nevertheless, this judicial inconsistency may be justified based on this paper's main thesis that the current framework lacks an intersectional perspective. Therefore, judges cannot reasonably have been expected to comprehend the conceptual difference of intersectional claims and increase discrimination law's complexity, because there simply did not exist a reason for them to do so. To that extent, this legal certainty accompanying s.14 helps correct the blind-spot by reminding judges of the conceptual difference of intersectional claims.

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165 McColgan (n 22) 12.
166 See discussion in previous section of the courts' inconsistent approaches.
167 *O'Reilly v BBC* (n 13).
168 *Bahl v Law Society* (n 15).
169 Allan Roberts, 'Discrimination Update 2: Tricky Issues Under the Act' (2012) Guildhall Chambers para 22.
170 On April 2013, Legal Aid for employment cases was cut by the Legal Aid Sentencing and Punishment of Offenders Act 2012.

This is not to say that s.14's introduction to the framework will be implemented seamlessly. As mentioned earlier, it is estimated that it would take about 2 years for the courts to interpret s.14 and establish robust precedent. Moreover, the time for businesses and SMEs to familiarise themselves with s.14's provision and implement dual discrimination policies within their internal rules needs to be factored. Therefore, legal certainty will not be fully achieved just by the implementation of s.14. However, this paper believes that the two-year time frame is proportionate when compared to the alternative of leaving intersectional discrimination without any access to recourse. As a result, this paper encourages the introduction of s.14 as the first step of the process to achieving legal certainty in terms of intersectional discrimination recognition. This presents the first step of correcting the blind-spot.

2. Capacious Approach

Although s.14 arguably opens the door for intersectionality, it is disputably insufficient by itself to incorporate a fully intersectional approach.[171] This is owing to its focus on the pre-determined categories present in the Equality Act.[172] Thereby, it incorporates only one facet of intersectionality which claims that people have multiple identities, whilst failing to notice its other essential claim which centralises the role of intersecting power dynamics. Hence, it omits the peculiar factor of intersectional discrimination as compared to other multiple discrimination forms.[173]

Accordingly, this section proposes that judges exercise a capacious approach to dual discrimination claims that requires them to undertake a relational analysis of the two forms of oppression. This requires placing the claimed grounds, relative to the other, in their historical, cultural and political contexts that led to this specific instance of discrimination.[174] Consequently, the unique link between these two structures will become visible to the judges who will be able to appreciate the claimant's distinct experience. To illustrate, under a s.14 claim brought by a Muslim woman, the courts would take Islam (religion) and search

[171] Moore et al. (n 148) 18.
[172] Equality Act 2010, s 4.
[173] Solanke (n 73) 356.
[174] European Commission (n 65) 31.

within its historical, cultural, and political developments for its relationship with the female sex. Muslims, as a historically marginalised group,[175] intersect with the female sex, as another historically marginalised group, to produce a Muslim female's unique disadvantage. It does not matter whether the court chooses religion or sex as a starting point; the relationship between the two grounds is what matters.

Whereas the current approach focuses on difference, this suggested approach focuses on the structural powers shaping an individual's identity. Hence, it avoids obscuring the 'historical and continuing realities of inequality facing the subordinated group within each ground'.[176] This paper acknowledges that this relational analysis inevitably translates to increased costs and an elongated time frame both in terms of the claimant's and the courts' resources. However, this paper is still adamant that the increased costs are unmatched to the experiences of intersectional discrimination victims. Therefore, an approach which focuses on the systematic oppressions, albeit more resource-extensive in terms of costs, time and new expertise, can reflect a more nuanced understanding of inter-sectionality.[177]

This approach means that the claimants would not have to suppress their identities to fit into 'arbitrary pigeonholes'[178] in order to claim protection, thereby possibly relieving the identity politics problem[179] discussed earlier. Moreover, this approach makes it redundant to argue for the much-advocated-for[180] open lists measure. The latter would have opened a 'Pandora's box' to litigation claims,[181] which would not have been warmly welcomed by judges. An opens-lists approach entices an unpredictable variety of grounds to be advanced before the court,

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175 For a more detailed discussion of Islam's historical marginalisation, please see Robina Mohammad, 'Marginalisation, Islamism and the Production of the 'Other's' Other' (1999) 6(3) Gender, Place and Culture 221 <https://www.tandfonline.com/doi/abs/10.1080/09663699925006?journalCode=cgpc20>.

176 Colleen Sheppard, 'Grounds of Discrimination: Towards an Inclusive and Contextual Approach' (2001) 80 Can Bar Rev 893, 908.

177 European Commission, 'Gender Mainstreaming: Active Inclusion Policies' (2010) 5-6.

178 Denise Réaume, 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40 Osgoode Hall Law Journal 113.

179 Solanke (n 73) 357.

180 Réaume (n 178) 135-136; Smith (n 53); Conaghan (n 43) 21-48.

181 European Commission (n 65) 67.

naturally trailing excessive legal uncertainty. To overcome this litigation floodgate and prevent excessive settlement and compensation costs, a defence justifying discrimination was deemed practical. However, this would have conflicted with the fundamental legal principle that direct discrimination should never be justified.[182] Subsequently, the suggested capacious approach accords normatively with intersectionality's overarching aim to overcome 'dominant ways of thinking about discrimination'[183] by bringing the experiences of those marginalised by intersecting structures to the fore.

Even this approach could fall into the trap of assuming homogeneity in the experiences of those at intersecting grounds. The socio-economic status of a transsexual woman, as identified by this relational analysis under s.14, will not automatically be shared by the next transsexual woman. Although judges might find similarities in these women (i.e., they are both subject to the oppressional power dynamics of transphobia and sexism), judges need to be wary not to assume that a previous contextual analysis identically applies to the next. Thus, a case-by-case analysis of the evidential factors is needed to accommodate people's distinct experiences which might end up translating as more time and costs in litigation. Nevertheless, the courts can find comfort in the fact that although these two women's experiences are not identical, they will be similar; hence not every similar case demands a relational analysis generated from scratch. Furthermore, the more cases are brought on different dual combinations, the more the courts will become accustomed to such exercises, thereby increasing efficiency. Relatedly, the precedent-based legal system further facilitates the familiarisation process and thus allows for efficiency. Whether the relational analysis should be exercised by reference to social research or by reference to previous British discrimination jurisprudence is a matter that requires further research. Nonetheless, this paper acknowledges that a 'radical restructuring'[184] from this framework's formal equality approach, which focuses on identities, to one that is based on substantive equality [185] and systematic disadvantage, mandates time for implementation. However, this paper believes that this step towards acknowl-

[182] Moon (n 127) 168.
[183] Crenshaw (n 10) 150.
[184] Smith (n 53) 101.
[185] Hannett (n 60) 81; See also Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 CLJ 562.

edgeing intersectional discrimination is overdue and is thus worth the time it needs.

Before moving forward, it is wise to note the following.

Positive Action

The widely suggested[186] positive-actions model actively identifies subgroups particularly vulnerable to intersectional discrimination[187] so they can 'easily'[188] be offered employment-related support. This entails positive measures such as targeted advertisements or selected training, which derive their lawfulness from the Equality Act.[189] It aims to train and assist applicants from these subgroups to overcome their disadvantage in infiltrating the job market, relative to applicants that are not from these groups. Considering its focus on structurally marginalised groups, it is alleged to be more suited to tackling intersectionality than the complaints-led approach.[190] The limits of the proactive approach are widely discussed[191] and are outside this paper's scope. Nevertheless, this section is not persuaded by its overambitions in tackling intersectional discrimination.

As argued earlier, intersectional discrimination experiences differ on a subjective basis therefore remedying them arguably requires a case-by-case analysis. Subsequently, the said model will not be able to identify *all* victims at the intersections of oppressive systems, considering there are potentially 36[192] combinations and that is assuming homogeneity in each group (which was proved otherwise). In light of the Framework's precedents-based system, the subgroups' identification process can be said to be somewhat efficient, thereby detracting from the value of arguments against it. Nonetheless, having said that, even if all

186 Uccellari (n 30); Fredman (n 110) 73-89.
187 Fredman (n 110) 73.
188 Jess Bullock and Annick Masselot, 'Multiple Discrimination and Intersectional Disadvantages: Challenges and Opportunities in the European Union Legal Framework' (2012) 19 Colum J Eur L 57, 79.
189 Equality Act 2010, s 158.
190 Bullock and Masselot (n 188).
191 Fredman (n 110).
192 These were calculated by finding out how many dual combinations can be made out from within the Act's nine protected characteristics.

subgroups were identified, offering positive measures to a wide group range is likely to undermine the approach's purpose and will likely increase instances of positive discrimination[193] (which is unlawful under the Equality Act).[194] Hence, a reactive approach based on subjectivity rather than a proactive approach which focuses on generality is more suited to correct the framework's blind-spot.

3. The Comparator: 'But for' to 'But why'

The final reform concerns the comparator test. Although s.14 allows for comparison on dual grounds,[195] and thus constitutes an improvement from the current one-ground comparison, it can be argued that it still impedes intersectional discrimination claims. Under s.14, the claimant's unfavourable treatment is assessed against that of a real or hypothetical comparator who does not share the claimed protected characteristics. Hence, a black woman's treatment would potentially be compared to a white man's.[196] This would arguably increase the likelihood of her claim's success because it is easier to prove that a white man would not have been subjected to that same treatment.[197] However, this approach raises the difficulty of finding an adequate comparator as explained earlier in Section 2. Subsequently, this unwelcome consequence means that victims will not be able to access justice because their claims would fail a test designed to help them succeed.

To overcome the aforementioned difficulties, this section proposes a move from the current approach predicated, on the 'but for' question, to the one that asks, 'but why'. This shifts the focus to the function that the group membership played in the decision, rather than group membership *per se.*[198] The new approach,

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193 Theresia Degener, 'Intersections between Disability, Race and Gender in Discrimination Law' in Story' in Anna Lawson and Dagmar Schiek (eds) *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011) 29.

194 Equality Act 2010.

195 Maria Onufrio, 'Intersectional Discrimination in the European Legal Systems: Towards a Common Solution?' (2013) 14(2) 126-140, 130.

196 Indeed, the cases of *Lewis*, *Mackie* and *Hewage* involved white men as comparators to black women's claims.

197 Moon, 'Multiple Discrimination – Problems Compounded or Solutions Found?' (n 113).

198 Solanke (n 55).

proposed by Watt,[199] would ask whether group membership was the *reason* for unfavourable treatment. Hence, if the reason was the victim's uniquely-defined social location (identified under the capacious approach), then discrimination could be established. Additionally, there exists evidence that the British judiciary has slowly welcomed this approach. In *Shamoon,*[200] Lord Nichols urged tribunals to focus on 'why the claimant was treated as she was'[201] because at times the less favourable treatment and its reason why are intertwined.[202] Since then, courts at various levels, including the Supreme Court, endorsed this approach,[203] thereby demonstrating judicial predisposition. Furthermore, this approach possibly progresses intersectional discrimination claims in a less restricted manner than that of a strict comparator test. This is because it potentially avoids the difficulties with (a) finding an adequate comparator and (b) treating a comparator (or its lack thereof) as a decisive factor. Consequently, the 'but why' approach plausibly constitutes a further step towards closing off the blind-spot.

Interestingly and unprecedently, this paper argues that the 'but why' approach is the one which correctly reflects Parliament's intention when drafting the direct discrimination provision. Indeed, the provision, s 13(1)[204] states that:

> A person (A) discriminates against another (B) if, *because of* a protected characteristic… [emphasis added].

It appears that the 'but why' approach has always been present in the legislation, but it was subsequent judicial interpretations that diverted it into a 'but for' test. Indeed, this proves that the former approach is better suited to dealing with discrimination cases. To further prove that the 'but for' approach is the incorrect one, the courts themselves at times have acknowledged that comparators are not always available[205] or helpful.[206] It could be argued that the

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[199] Bob Watt, 'Goodbye "But For", Hello "But-Why?"' (1998) 27 Industrial Law Journal 2.
[200] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] 2 All ER 26.
[201] ibid [11].
[202] ibid.
[203] *Ladele v The London Borough of Islington* [2009] EWCA Civ 1357 (Elias J); *Cordell v Foreign and Commonwealth Office 2012 ICR 280* EAT (Underhill J); *Hewage v Grampian Health Board* (n 14).
[204] Equality Act 2010, s 13.
[205] Hannett (n 60) 83.
[206] ibid.

courts developed the 'but for' test as a result of the formal equality perspective imposed by the British framework which advocates for the Aristotelian doctrine of equal opportunities. However, the fact that they constantly struggle with locating the appropriate comparator and the fact that discrimination victims are subject to the mercilessness of the strict comparator requirement all attest to the argument that the 'but for' approach is not the right one. Therefore, this calls for imposing the 'but why' question, to follow the legislature's wishes.

To consolidate the aforementioned reforms, this paper proposes a three-stage test that is believed to allow intersectionality to enter the current framework. Thus, under a s.14 claim, the test for establishing a dual discrimination claim would be:

(1) Did the claimant suffer from less favourable treatment compared to others in the workplace? (this is presumed from the facts presented by the claimant)[207]

(2) If yes, was this unfavourable treatment based on the combination of two of the protected characteristics whose interaction with one another attracts disadvantage? (the capacious approach)

(3) If yes, was the less favourable treatment imposed because of the claimant's position? (the 'but why')

CONCLUSION

This paper concludes by reiterating that the British Equality Framework, as it stands, lacks an intersectional perspective of human identities. Premised on a single-ground approach, the framework fails to recognise the experiences of those existing at the intersections of structural oppressions. This has been proven to produce several damaging conceptual, practical and psychological effects on those individuals. It remains an unsatisfactory approach, that the government acknowledges this protectoral gap, but is doing nothing to address it. Having

[207] This has not changed from the current approach.

analysed the Framework in the second section via an intersectional lens, it was apparent that the wording of direct discrimination under the Equality Act 2010 lacks an intersectional outlook. This was then seen to spill over to the judicial approach concerning intersectional discrimination claims as evidenced by the *Bahl*[208] and *O'Reilly*[209] cases. Furthermore, the comparator requirement and its strict judicial application were argued to impede the progression of intersectional discrimination claims. The section then concluded that the current single-axis framework is intersectionality-blind. Accordingly, if the Equality Framework wishes to uphold the values it claims to protect such as human dignity, equality, and justice, then the issue of intersectional discrimination needs to be taken more seriously. This in turn requires the understanding of intersectionality, as explained in the first section, as a means to recognise the origins of the blind-spot and subsequently address it using the proposals advanced in the final section. The reintroduction of s.14 proposed in the final section accompanied by the three-stage test is believed to potentially incorporate intersectionality into the Framework.

[208] *Bahl v Law Society* (no 15).
[209] *O'Reilly v BBC* (no 13).