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Engineering Equality: Conceptual Engineering as a Method in Anti-Discrimination Law

RESEARCH ARTICLES

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ABSTRACT

Anti-discrimination law names the grounds of prohibited discrimination in a closed list or an open clause such as in Article 14 of the European Convention on Human Rights. This article asks how conceptual engineering can reconstruct the taxonomy of protected characteristics to better fulfil the law's equality objectives. The article distinguishes applying a legal category according to its existing criteria from changing those criteria or the legal consequences attached to the category. It argues that such changes require an explanation of how the revised category would better serve its legal purpose. On this reading, *Bayev and Others v Russia* (ECtHR, 2017) applied a concept of 'family life' revised in *Schalk and Kopf v Austria* (2010), and Russia's subsequent response to *Bayev* shows that authoritative judicial development does not ensure domestic implementation. The article proposes a statutory definition of a protected characteristic keyed to relative group disadvantage, a synthesis that draws on Tarunabh Khaitan's account and open-clause practice, addresses combinations of characteristics and separates protection from gender recognition. It also identifies the proposal's costs.

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1 INTRODUCTION

Conceptual engineering is the practice of assessing and improving the concepts, or more broadly the representational devices, through which we think and talk.[1] Applied to anti-discrimination law, it offers a way to scrutinise the categories that define who the law protects. Some instruments enumerate protected characteristics in a closed list, as the UK Equality Act 2010 does; others give grounds as examples and leave the list open, as Article 14 of the European Convention on Human Rights (ECHR) does with its reference to 'other status'.[2] In either form a category can be laid out in terms that obstruct the recognition of the disadvantage that the law exists to address. In the United Kingdom, the Gender Recognition Act 2004 provides for recognition of an acquired gender as male or female, and until 2010 the European Court of Human Rights (ECtHR) treated the relationship of a same-sex couple as part of 'private life' but not of 'family life'.[3] This article asks how such categories should be revised, and how to tell revising a category apart from applying it.

This article addresses the following research question: *how can the philosophical method of conceptual engineering be applied to reconstruct the taxonomy of protected characteristics in anti-discrimination law so as to better fulfil the law's equality objectives?* I advance two claims. The first is methodological: conceptual engineering supplies a diagnostic for distinguishing the revision of a legal concept from its application, and standards for assessing revisions by whether they serve the concept's function, preserve continuity and can be implemented. The second is substantive: applied to the concept of a protected characteristic, the method supports a statutory definition that ties coverage to relative group disadvantage. Section 5 explains how the proposed statutory definition combines Khaitan's account of relative group disadvantage with the admission of additional protected grounds through open clauses. The section identifies the contribution of stating the admission criterion expressly in legislation and addressing combinations of characteristics.

I use Linderfalk's vocabulary of identifying criteria and legal consequences to distinguish two elements of a legal category: the conditions for membership and the legal effects attached to membership.[4] The test proposed here asks whether an outcome can be justified while retaining both elements or requires at least one to change. The starting point is the criteria and consequences established by the legislation and case law preceding the decision or reform under examination. An outcome counts as application where those criteria and consequences remain unchanged, and as revision where at least one changes. Courts may describe either activity as interpretation. Where the earlier legal materials support competing readings, the analysis must explain whether the proposed outcome preserves or changes the category under each reading. Continued reliance on an abstract commitment such as equality does not settle whether the more specific legal category has changed. Where revision occurs, its justification must explain how the change serves the category's legal purpose, preserves relevant continuity and can be implemented, while addressing the governing legal materials.

The article combines doctrinal and theoretical analysis. The doctrinal analysis centres on the ECtHR's judgment in *Bayev and Others v Russia*,[4] which held that Russia's ban on the 'promotion' of homosexuality among minors violated the Convention. A single decision cannot show that courts generally engineer concepts. *Bayev* illustrates how the understanding of 'family life' adopted in *Schalk and Kopf* subsequently operated as an established premise in the Court's reasoning.

The theoretical strand supplies standards for assessing revisions. It draws principally on Paul-Mikhail Catapang Podosky's comparison of various accounts of conceptual engineering and

1 Herman Cappelen, *Fixing Language: An Essay on Conceptual Engineering* (OUP 2018) 3; Herman Cappelen and David Plunkett, 'Introduction: A Guided Tour of Conceptual Engineering and Conceptual Ethics' in Alexis Burgess, Herman Cappelen and David Plunkett (eds), *Conceptual Engineering and Conceptual Ethics* (OUP 2020) 1, 3.

2 Equality Act 2010, s 4; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 14.

3 Gender Recognition Act 2004, s 9(1); *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) [92]–[94].

4 *Bayev and Others v Russia* Apps nos 67667/09, 44092/12 and 56717/12 (ECtHR, 20 June 2017).

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Rogelio Miranda Vilchis's analysis of conflicts between the functions a concept serves.[5] Podosky argues that the Functional Account, which evaluates concepts by the purposes of the practices in which they are used, would best meet the requirements of projects aimed at social justice. Section 5 applies this framework for conceptual engineering to the legal criteria governing recognition of protected characteristics.

Sections 2 and 3 set out the legal background and the case study, Section 4 the method, Section 5 its application and Section 6 the proposal's costs and implementation; Section 7 concludes.

2 PROTECTED CHARACTERISTICS, LEGAL TAXONOMY AND INTERSECTIONALITY

2.1 CLOSED LISTS AND OPEN CLAUSES

The systems examined here illustrate two common designs for identifying the grounds of prohibited discrimination. The first is a closed list. The UK Equality Act 2010 lists nine protected characteristics.[6] A list of this kind tells courts and duty-bearers in advance which forms of differential treatment attract legal scrutiny, and the list can only be extended by legislation.

The second is an open clause. Article 14 ECHR prohibits discrimination 'on any ground such as' the grounds it lists, 'or other status.'[7] The ECtHR has used the clause to recognise grounds the drafters did not list, including sexual orientation[8] and gender identity.[9] Section 15 of the Canadian Charter of Rights and Freedoms combines the two models. It lists grounds and admits 'analogous grounds', which the Supreme Court of Canada identifies as personal characteristics that are immutable or changeable only at unacceptable cost to personal identity.[10]

Neither model states why the grounds it names are protected. I draw here on Tarunabh Khaitan's account, developed principally through a comparison of discrimination law in Canada, India, South Africa, the United Kingdom and the United States, with European Union and Council of Europe law considered through the study of UK law. I use that account to explain why particular grounds warrant protection. On Khaitan's account, a protected ground classifies persons into groups, at least one of which is significantly more likely than at least one cognate group to suffer abiding, pervasive and substantial disadvantage; the ground must also be effectively immutable or constitute a valuable fundamental choice.[11] The disadvantage condition is tied to social facts. Khaitan treats evidence that an unprotected ground, such as weight, satisfies that condition as a strong but defeasible reason for protection: if, all things considered, it ought to be protected, the failure lies in the law's unresponsiveness.[12] A closed list can respond to changes in those facts only through legislation; an open clause can respond through adjudication, after a claimant has persuaded a court to admit the new ground.

2.2 WHERE FIXED DEFINITIONS FAIL

Gender shows most clearly how a category can be defined in terms that obstruct recognition of the people it exists to protect. The Gender Recognition Act 2004 allows a transgender person to obtain legal recognition of an acquired gender, which must be either male or female.[13] Since *For Women Scotland Ltd v The Scottish Ministers*, such recognition does not alter a person's sex for the purposes of the Equality Act 2010, in which the Supreme Court read 'sex' as biological

5 Paul-Mikhail Catapang Podosky, 'Can Conceptual Engineering Actually Promote Social Justice?' (2022) 200 Synthese art 160; Rogelio Miranda Vilchis, 'Improving Conceptual Engineering by Differentiating the Functions of Concepts' (2022) 13 Logos & Episteme 359.

6 Equality Act 2010 (n 2) s 4.

7 ECHR (n 2) art 14.

8 *Salgueiro da Silva Mouta v Portugal* App no 33290/96 (ECtHR, 21 December 1999) [28].

9 *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015) [96].

10 Canadian Charter of Rights and Freedoms, s 15(1); *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 [13].

11 Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 31–38, 49–61.

12 ibid 37.

13 Gender Recognition Act 2004, ss 1(1), 9(1).

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sex.[14] The Supreme Court has held that Article 8 ECHR does not require states to issue passports bearing a non-gendered 'X' marker, and the ECtHR has found no violation in France's refusal to replace 'male' with 'neutral' or 'intersex' on an intersex applicant's birth certificate.[15] On these authorities, the 2004 Act makes no provision for recognising a gender outside male and female, and Article 8 has not been held to require one. Non-binary people's protection against discrimination does not depend on certification, since the gender-reassignment characteristic in section 7 of the Equality Act requires no certificate, but the scope of protection for non-binary people depends on whether the treatment they experience falls within the provisions concerning gender reassignment or 'sex'.[16]

The ECtHR's treatment of 'family life' provides an example of a legal category whose membership criteria have changed. Sally Haslanger describes the function of family thought as the organisation of domestic life, and observes that in Western contexts this function became contingently caught up in hetero- and bio-normativity, so that a married husband and wife with their biological children came to stand for the family as such.[17] In *Schalk and Kopf v Austria* the ECtHR held that, in view of the rapid evolution of social attitudes, it would be 'artificial' to deny that a cohabiting same-sex couple in a stable partnership enjoys 'family life.'[18]

Sections 2.1 and 2.2 thus identify two problems: admitting an additional ground, and revising the criteria of an existing category. Where a category lists the identities it covers, correcting it requires amending the list or stretching its terms by interpretation, and which response is available depends on the instrument and on the institution authorised to change it.

2.3 INTERSECTIONALITY: A WORKING DEFINITION

Because legal categories are organised around single traits, they have struggled to accommodate discrimination that arises from a combination of them. Kimberlé Crenshaw introduced the term 'intersectionality' in 1989 to criticise the 'single-axis framework' of anti-discrimination doctrine, which limits inquiry to the experiences of otherwise privileged members of each group.[19] In *DeGraffenreid v General Motors* the court refused to recognise the plaintiffs' combined race-and-sex claim. Its treatment of the sex claim relied on the employer's history of employing white women, while the race complaint was dismissed with a recommendation that it be consolidated with another race-discrimination action. Crenshaw's criticism was that these separate frames obscured the particular employment history and disadvantage of Black women.[20] She later distinguished structural, political and representational intersectionality, and offered the concept as provisional.[21]

For legal purposes I adopt Shreya Atrey's formulation, on which intersectionality attends to the 'patterns of group disadvantage' produced by multiple identities understood as a whole and in context.[22] In this article I use three terms: multiple discrimination, in which a person suffers discrimination on different grounds that can each be proved separately; additive discrimination, in which grounds are treated as combining or compounding disadvantage; and intersectional discrimination, in the sense just defined, in which the disadvantage is produced by the interaction of grounds.[23] A workplace ban on headscarves illustrates the concern: an analysis that treats women or Muslims as internally uniform groups may obscure the particular

14 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [2026] AC 315 [172], [264]–[265].

15 *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559; *Y v France* App no 76888/17 (ECtHR, 31 January 2023).

16 Equality Act 2010 (n 2) ss 7(1), 11.

17 Sally Haslanger, 'Going On, Not in the Same Way' in Alexis Burgess, Herman Cappelen and David Plunkett (eds), *Conceptual Engineering and Conceptual Ethics* (OUP 2020) 230, 250–51.

18 *Schalk and Kopf* (n 3) [93]–[94].

19 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139, 139–40.

20 ibid 141–43.

21 Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1244–45.

22 Shreya Atrey, *Intersectional Discrimination* (OUP 2019) 37.

23 ibid 109, 113–14, 118, 127–28.

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disadvantage experienced by Muslim women.[24] The Equality Act 2010 contains no operative provision for combined claims of this kind, since section 14, on 'combined discrimination,' has not been brought into force.[25] In EU law, the Court of Justice held in *Parris v Trinity College Dublin* that no new category of discrimination results from a combination of grounds where discrimination on each ground taken in isolation has not been established.[26]

Legal classifications can influence the social relations they describe in several ways. First, classification has legal consequences: placing a person or relationship within a protected category can determine access to rights and remedies.[27] Second, the language of classification can influence how legal participants understand and respond to the people classified. Linderfalk's account of legal conceptual terms draws attention to these effects on beliefs, attitudes and behaviour.[28] Third, people may respond to a classification by accepting, contesting or adapting to it. Those responses can alter the practices and understandings associated with the classified group, prompting further changes in how the group is classified. Podosky discusses this interaction through Hacking's account of looping effects.[29] Butler advances a related argument about law's role in producing the subjects it claims to represent.[30] These accounts identify ways in which legal classification can shape social relations; whether a particular classification has produced those effects remains an empirical question.

3 CASE STUDY: FROM *SCHALK AND KOPF* TO *BAYEV*

3.1 FACTS AND LEGAL ISSUES

Between 2006 and 2012 several Russian regions prohibited 'public activities aimed at the promotion of homosexuality among minors,' and in 2013 the federal Code of Administrative Offences introduced liability for the 'promotion of non-traditional sexual relations among minors.'[31] The applicants, three gay rights activists, held static demonstrations between 2009 and 2012 outside a secondary school in Ryazan, a children's library in Arkhangelsk and the St Petersburg City Administration, with banners such as 'Homosexuality is normal.' Each was convicted of an administrative offence and fined.[32] The Russian Constitutional Court had rejected challenges to the laws holding, among other things, that the State could protect minors from information capable of 'creating a distorted impression of the social equivalence of traditional and non-traditional marital relations.'[33]

The questions in Strasbourg were whether the laws were a necessary restriction of freedom of expression under Article 10(2) and whether they discriminated on grounds of sexual orientation contrary to Article 14. The Court described the very existence of the legislative ban as the central issue.[34] The Government's justification depended on describing the banners as 'propaganda' meant to impose a homosexual lifestyle on children and to corrupt their view of traditional family values.[35]

24 Erica Howard, 'Intersectional Discrimination and EU Law: Time to Revisit Parris' (2024) 24 International Journal of Discrimination and the Law 292, 305–08; Iyiola Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 Modern Law Review 723.

25 Equality Act 2010 (n 2) s 14; Atrey (n 23) 8–10.

26 Case C-443/15 *Parris v Trinity College Dublin and Others* EU:C:2016:897, para 80.

27 Ulf Linderfalk, 'The Functionality of Conceptual Terms in International Law and International Legal Discourse' (2013) 6 European Journal of Legal Studies 30, 34–36.

28 ibid 33, 41–43.

29 Podosky (n 6) s 3.2.

30 Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 2.

31 *Bayev* (n 5) [8]–[9], [12]–[13], [16], [23], [34].

32 ibid [10]–[11], [14]–[15], [17]–[18].

33 ibid [20], [22], [25].

34 ibid [61].

35 ibid [46], [74].

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3.2 THE COURT'S REASONING: APPLICATION AND REVISION

On 20 June 2017 the Court held, by six votes to one, that Russia had violated Article 10, and Article 14 taken together with Article 10.[36] *Bayev* was the Court's first judgment on the 'propaganda' laws themselves, and it drew several points from *Alekseyev v Russia*, which concerned bans on Pride marches.[37]

In the terms of Section 1, the Court's treatment of 'propaganda' applied existing standards and offered no better definition of the term. It took the Government's own definition, the 'active dissemination of information aimed at inducing others to subscribe to particular sets of values,' agreed with the Venice Commission that the terminology allowed extensive interpretation, and took that breadth into account in assessing the justification.[38] The Government could not explain how a minor could be enticed into a homosexual lifestyle, still less produce science-based evidence that sexual orientation is susceptible to change under external influence, and the Court dismissed the allegation as lacking any evidentiary basis.[39] These are findings about evidence, proportionality and the breadth of the law, and they required no revised concept of propaganda.

Linderfalk's analysis helps explain the importance of evidence in the Court's treatment of the term 'propaganda'. A term borrowed from political discourse, such as 'propaganda,' can provoke a condemnation that the legal analysis has not earned, and a term can also conceal the absence of identifying criteria.[40] The statutory formula 'non-traditional sexual relations', which the Government said had been chosen to avoid the word 'homosexual', gave no criteria for telling neutral information apart from promotion.[41] In assessing proportionality, the Court required evidence for the Government's claims of harm and considered the breadth of the statutory language. Its reasoning therefore scrutinised both the asserted danger and the uncertainty surrounding the prohibited conduct, without supplying a new definition of propaganda.

The Court's reliance on the legal category of 'family life' illustrates a different relationship between application and revision. The Government argued that public acceptance of homosexuality was incompatible with maintaining family values as the foundation of society.[42] The Court saw no incompatibility, 'especially in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life,"' and added that a State choosing how to protect the family must take into account developments in society.[43] For that proposition it cited *Schalk and Kopf*, and that is where the revision took place. There the Court changed the identifying criteria of 'family life,' justifying the change by the evolution of social attitudes and by the equivalence between a cohabiting same-sex couple in a stable partnership and a different-sex couple in the same situation; it did not claim that the concept had always included such couples.[44] In *Bayev* the revised understanding of 'family life', by then part of the Court's case law, helped rebut the Government's argument from family values. *Bayev* is better described as the application of a concept engineered seven years earlier than as an act of engineering.

The Court also read formulas such as 'a distorted image of the social equivalence of traditional and non-traditional sexual relationships' as embodying a predisposed bias on the part of a heterosexual majority against a homosexual minority,[45] and held that the exercise of Convention rights by a minority group cannot be made conditional on its acceptance by the majority.[46]

36 ibid [84], [92].

37 ibid [39], [66], [70], [77]; *Alekseyev v Russia* Apps nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010).

38 *Bayev* (n 5) [76].

39 ibid [77]–[78].

40 Linderfalk (n 27) 41–47.

41 *Bayev* (n 5) [48], [75]–[76].

42 ibid [65], [67].

43 ibid [67].

44 *Schalk and Kopf* (n 3) [93]–[94].

45 *Bayev* (n 5) [68]–[69], [90].

46 ibid [70].

3.3 JUDGMENT AND IMPLEMENTATION

By December 2023, implementation of the judgment in *Bayev and Others v Russia* still required general measures: the Committee of Ministers reiterated the need to repeal the 'anti-propaganda' laws and take further legislative and practical steps to protect LGBTI rights.[47] Russia had ceased to be a party to the Convention on 16 September 2022, but remained bound to implement the relevant judgments, whose execution the Committee continued to supervise. At its December 2023 meeting, the Committee deplored the absence of information from the authorities and the widely reported deterioration of LGBTI rights, and reiterated the obligation to take all possible measures to eradicate discrimination based on sexual orientation.[48]

The case can be read as showing both that judicial conceptual reform succeeds and that it fails. These two readings concern different things. Within the Convention system the revision of 'family life' was authoritative and helped decide the case. The aftermath establishes a gap between the Court's authoritative reasoning and domestic implementation. It does not, by itself, establish how the Russian population understood 'family,' or whether resistance resulted from disagreement about meaning, political incentives or rejection of Strasbourg's authority. Christian Nimtz's account, discussed in Section 4.4, offers one possible explanation: conceptual change may fail to travel where the relevant institutions are not treated as authoritative. That explanation is a theoretical interpretation of the case, not an independently tested account of social uptake. The revision of 'family life' applied in *Bayev* had already occurred in *Schalk and Kopf*; Section 5 examines a proposed revision of the criteria for recognising protected characteristics.

4 METHODOLOGICAL FRAMEWORK: CONCEPTUAL ENGINEERING IN LAW

4.1 ENGINEERING AND INTERPRETATION

Conceptual engineering has been described as the assessment of our representational devices, reflection and proposals for improving on them, and efforts to implement the improvements.[49] Here I distinguish describing a concept's current use from evaluating its fitness for purpose and proposing revisions.[50] Herman Cappelen names law, with psychiatry, as the clearest case outside philosophy: those who make and interpret laws argue explicitly about what terms such as 'murder,' 'person' and 'intention' should mean.[51]

David Chalmers distinguishes engineering that builds a new concept, from engineering that fixes or replaces an existing one and engineering that keeps the old word from engineering that adopts a new one.[52] A legislature that introduced 'gender reassignment' as a protected characteristic built a new category under a new name; a court that extended 'family life' to same-sex couples revised an existing concept and kept its name. Keeping the word lets a revised concept inherit the roles the word already plays, which Chalmers illustrates with the difference between 'civil union' and 'marriage.' In law the inherited roles are doctrinal, which is why disputes over legal categories are so often disputes over who may use the existing word.

The test introduced in Section 1 asks whether an outcome requires a change to the existing criteria or legal consequences of a category. The same question applies to judicial decisions and legislative reforms, although courts and legislatures differ in their authority to make such changes. David Plunkett and Timothy Sundell argue that many of the disputes Ronald Dworkin used to motivate his interpretivism are better understood as metalinguistic negotiations, in which the parties are negotiating which concept a term should express.[53] Cappelen makes

47 Committee of Ministers, Decision CM/Del/Dec(2023)1483/H46-30 (1483rd meeting (DH), 5–7 December 2023) para 4.

48 ibid paras 1, 3.

49 Cappelen and Plunkett (n 1) 3; Cappelen (n 1) 3.

50 Cappelen and Plunkett (n 1) 3–5, 9.

51 Cappelen (n 1) 27–28.

52 David J Chalmers, 'What Is Conceptual Engineering and What Should It Be?' (2025) 68 Inquiry 2902,.

53 David Plunkett and Timothy Sundell, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' (2013) 19 Legal Theory 242, 268–69.

a similar point about 'marriage' and 'rape': parties to such disputes would not be moved by proof that the term has historically excluded the contested cases.[54] Under the ECtHR's evolutive approach the Convention is a living instrument, to be interpreted in the light of present-day conditions, so that the Court can settle such a negotiation while presenting the result as interpretation.[55] Distinguishing application from revision identifies the additional justification required when a court changes a legal category's membership criteria or legal consequences. Those justificatory questions about purpose, continuity and implementation are not peculiar to conceptual engineering, and courts ask them without its vocabulary. The contribution of this approach to conceptual engineering is to organise questions of purpose, continuity and implementation around an explicit account of the proposed change to the legal category.

4.2 FOUNDATIONS AND FIXED POINTS

The foundational question here is whether conceptual reform requires unrevisable starting points. Cappelen proposes the working hypothesis that all representational devices remain open to revision, against Chalmers's suggestion that some concepts are too basic to engineer.[56] A related question in anti-discrimination law is whether protection should depend exclusively on a characteristic being biologically fixed. The critiques of immutability developed by Khaitan and Solanke challenge that restriction.[57] Butler's account of the legal production of subjects raises a further concern about treating the identities recognised by law as wholly independent of legal classification. These arguments provide reasons to question biological immutability as the exclusive basis for protection. They remain compatible with asking whether a person should be required to change a characteristic or identity to avoid disadvantage. Section 5 therefore combines a criterion of relative group disadvantage with the requirement that the characteristic cannot, or should not have to, be changed.

Assessment still needs a standard. I treat the legal commitments used to assess a particular revision, such as the guarantee in Article 14 that Convention rights are secured without discrimination, as provisionally fixed, while accepting that those commitments may themselves be questioned in a different inquiry. Otto Neurath's image of sailors who must rebuild their ship on the open sea, never able to dismantle it in dry dock, describes the position.[58] It also marks a limit. The functional approach to conceptual engineering does not settle which legal commitments should be treated as fixed for a particular inquiry, and disagreement about them is often the real dispute. In *For Women Scotland* the Supreme Court reasoned from the coherence of the Equality Act's sex-based provisions to a biological reading of 'sex.' A functional critique of that conclusion might dispute the functions attributed to those provisions or how well competing readings serve them, and neither route removes the need to address the Act's text and structure.[59]

4.3 JUSTICE-ORIENTED ENGINEERING: HASLANGER, JENKINS AND PLURAL CONCEPTS

Haslanger and Jenkins disagree in a way that bears on the legal treatment of gender. Haslanger argues that our concepts of woman and race should be revised so that they become tools for identifying and combating oppression. On her ameliorative definition, to be a woman is to be systematically subordinated along some dimension on the basis of observed or imagined bodily features presumed to be evidence of a female's biological role in reproduction.[60] Katharine Jenkins accepts Haslanger's ameliorative approach but argues that Haslanger's proposed concept of woman excludes some trans women. She proposes two target concepts: gender as class, which tracks social position as Haslanger's concept does, and gender as identity, which

54 Cappelen (n 1) 28–30.

55 *Tyrer v United Kingdom* (1978) Series A no 26 [31].

56 Cappelen (n 1) 194–95.

57 Khaitan (n 12) 56–61; Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart 2017) 54–60; Butler (n 31) 2–3.

58 Otto Neurath, 'Protocol Sentences' (George Schick tr) in A J Ayer (ed), *Logical Positivism* (Free Press 1959) 199, 201.

59 *For Women Scotland* (n 15) [172], [264]–[265].

60 Sally Haslanger, 'Gender and Race: (What) Are They? (What) Do We Want Them To Be?' (2000) 34 Noûs 31, 42.

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turns on whether a person's internal 'map' for navigating social and material reality is one formed to guide someone classed as a woman.[61]

The exchange carries a lesson for law. Ingo Brigandt and Esther Rosario argue that different aims may require different concepts of gender, one for identifying and explaining gender-based discrimination and another for assigning legal rights and social recognition.[62] A term such as 'sex' or 'gender' may therefore be doing two legal jobs with different requirements, and Section 5.4 applies this distinction to protection against gender discrimination and legal recognition of gender.

4.4 THE IMPLEMENTATION PROBLEM

Conceptual engineering faces what has become known as the implementation problem: the difficulty of ensuring that a proposed revision is taken up by the relevant community of users.[63] Two of its dimensions matter here. The first is continuity. A concept changed too far may cease to be the same concept, so that the revision changes the subject.[64] Every legal system values the stability of the concepts through which like cases are treated alike, though traditions secure it differently: common-law systems partly through the doctrine of precedent, civil-law systems through codification and settled lines of decisions. The ECtHR, which is not formally bound by its previous judgments, has held that legal certainty, foreseeability and equality before the law require it not to depart from precedent without good reason.[65] Functional accounts offer a way of meeting the requirement: a revision preserves continuity when the revised concept performs the function the old one performed, even if its extension changes.[66]

The second dimension comes from semantic externalism, on which the meaning of a term is fixed partly by facts beyond any individual's control, so that a decision to engineer a concept may fail because the wider community does not follow.[67] Law differs in one respect. An authorised statutory or judicial revision can change the criteria a concept carries within the legal order, subject to the rules of jurisdiction and precedent, and this is an implementation channel that ordinary language lacks. Authority of this kind does not secure compliance, still less uptake beyond the institutions it binds. Nimtz offers one account of how conceptual change travels beyond institutions: speakers often follow linguistic norms because they accept as legitimate the normative beliefs of those to whom they look for guidance, so that change may fail to travel where the relevant institutions are not treated as authoritative.[68] He concedes that for politically divisive terms there may be no group that most speakers treat as authoritative.[69]

4.5 THE FUNCTIONAL ACCOUNT AND ITS RIVALS

Accounts of conceptual engineering differ on what is changed when a concept is engineered. Podosky uses the label 'Functional Account' for views on which a representational practice has a goal or purpose, whether that is the role the practice plays or, on Mona Simion and Christoph Kelp's etiological view, the function that explains why the practice persists. On the first view, engineering revises a practice while preserving its goal; on the etiological view, it succeeds when a designed function comes to explain the practice's continued use.[70]

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61 Katharine Jenkins, 'Amelioration and Inclusion: Gender Identity and the Concept of Woman' (2016) 126 Ethics 394, 396–97, 410–11.

62 Ingo Brigandt and Esther Rosario, 'Strategic Conceptual Engineering for Epistemic and Social Aims' in Alexis Burgess, Herman Cappelen and David Plunkett (eds), *Conceptual Engineering and Conceptual Ethics* (OUP 2020) 100, 117–18.

63 Sigurd Jorem, 'Conceptual Engineering and the Implementation Problem' (2021) 64 Inquiry 186, 186–88.

64 Cappelen (n 1) 97–101.

65 *Christine Goodwin v United Kingdom* [GC] App no 28957/95 (ECtHR, 11 July 2002) [74].

66 Miranda Vilchis (n 6) 361–62; Podosky (n 6) s 4.3.

67 Cappelen (n 1) 61–64, 72–75.

68 Christian Nimtz, 'Engineering Concepts by Engineering Social Norms: Solving the Implementation Challenge' (2024) 67 Inquiry 1716, 1722–23, 1726–30, 1734–35.

69 ibid 1735–36.

70 Podosky (n 6) s 4.3; Mona Simion and Christoph Kelp, 'Conceptual Innovation, Function First' (2020) 54 Noûs 985.

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The concept of a *protected characteristic* serves to identify the grounds associated with the disadvantage that discrimination law addresses. A functional revision would change the criteria for recognising protected grounds so that the category better serves that purpose.[71] Podosky argues that conceptual engineering can promote social justice only if four requirements are met: it must be possible to implement a proposal deliberately in large communities; a proposal must be able to change existing social categories through the looping effects described in Section 2.3; it must be possible, where this is part of the project, to bring a population to adopt it for the reasons that motivated it; and implementation must not carry a high risk of harmful consequences.[72] The Functional Account meets these requirements better than its rivals, chiefly because its proponents need not know how meaning is fixed and can observe whether a practice has changed, which also allows those who push a practice in one direction to be held responsible for doing so.[73] Podosky stresses that the conclusion is comparative and conditional: it identifies which account would best serve social justice if it were true.[74]

The rivals fail at different points. On Cappelen's Worldly Account, conceptual engineering changes the reference, intension and extension of terms, and Cappelen concedes that the processes governing such changes are typically inscrutable and largely beyond our control.[75] On Sarah Sawyer's Alignment Account, engineering brings the extension of a term into line with the subject matter fixed by the concept it expresses, and Podosky argues that for social kinds there is generally no way to tell when such alignment has been achieved.[76] These difficulties make both accounts less immediately useful for the deliberate implementation of legal revisions considered here.

The Functional Account faces an objection that bears directly on legal reform. Cappelen questions whether concepts have stable, non-trivial functions capable of determining which revisions preserve the topic.[77] Miranda Vilchis's account, although not written as a reply to Cappelen, supplies part of an answer. It distinguishes kinds of function a concept may serve, among them accurate representation and epistemic, sociopolitical and moral functions, and it yields a test: a revision is defective if it adds a function that conflicts with one the concept already performs.[78] The test does not fully meet the objection, since Miranda Vilchis remains neutral on what a function is.[79] In law the objection has a partial answer. Legal concepts have functions assigned to them by the instruments that use them, through purpose clauses, preambles and case law, which narrow disagreement about function without ending it.

5 RE-ENGINEERING THE TAXONOMY OF PROTECTED CHARACTERISTICS

5.1 FROM FIXED LIST TO FUNCTIONAL CATEGORY

This section applies the framework for conceptual engineering to the concept of a protected characteristic. The first step is to identify the existing legal criteria for recognising a protected ground. In the Equality Act 2010 the identifying criterion of a protected characteristic is membership of the list in section 4, and the legal consequences are the duties the Act attaches to treatment because of a listed characteristic. Under Article 14 ECHR a ground qualifies if it is listed or is an 'other status,'[80] and under section 15 of the Canadian Charter if it is enumerated or analogous to the enumerated grounds.[81]

71 Podosky (n 6) s 4.3.

72 ibid ss 3.1–3.4.

73 ibid s 5.3.

74 ibid ss 1, 6.

75 Cappelen (n 1) 53, 72–75, 137–40; Podosky (n 6) s 4.1.

76 Sarah Sawyer, 'Talk and Thought' in Burgess, Cappelen and Plunkett (eds) (n 1) 379; Podosky (n 6) ss 4.2, 5.2.

77 Cappelen (n 1) 180–88.

78 Miranda Vilchis (n 6) 364, 366, 372–73.

79 ibid 362 n 1.

80 ECHR (n 2) art 14; *Salgueiro da Silva Mouta* (n 9) [28]; *Identoba* (n 10) [96].

81 *Corbiere* (n 11) [13].

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The second step is to identify the concept's function. On Khaitan's account a ground is protected because at least one of the groups it defines is, or is likely to be, significantly disadvantaged relative to at least one cognate group in ways that are abiding, pervasive and substantial, and because the ground is effectively immutable or constitutes a valuable fundamental choice. The purpose of discrimination law is to reduce significant advantage gaps between protected groups and their cognates.[82] The function of the concept is then to identify the grounds that warrant legal protection because of the relative disadvantage associated with them. Lauren Sudeall Lucas reaches a similar conclusion from United States' equal protection doctrine, in which identity categories act as proxies for structural concerns such as a history of discrimination and exclusion from the political process.[83] Solanke, approaching the question through stigma, proposes threshold questions for deciding which characteristics merit protection.[84] The reasons for selecting a ground do not determine who may invoke the resulting protection, a point taken up in Section 5.2.

The third step is to assess the current concept against that function. A closed list can perform this function for the grounds it includes, but it cannot admit an additional ground through adjudication, however strong the claim under the functional criterion. Where a closed-list system also requires grounds to be analysed separately, it may obstruct recognition of disadvantage produced by their interaction; the obstacle then arises from that mode of analysis as well as from the list itself.[85] Open clauses do better, and existing open-clause systems already permit contextual and intersectional reasoning. Their limitation lies elsewhere. Neither Article 14 nor section 15 states the disadvantage-based criterion that explains why grounds are protected, and the Canadian test for analogous grounds is framed primarily in terms of immutability.

5.2 A PRINCIPLE-BASED PROPOSAL

The fourth step is to design the revision. I propose a principle-based statutory definition of a protected characteristic: a characteristic, or a combination of characteristics, is protected where it distinguishes groups at least one of which is significantly more likely than at least one cognate group to suffer abiding, pervasive and substantial disadvantage, and where a person cannot change it, or should not be required to change it, to avoid that disadvantage. 'Principle-based' describes the definition's justificatory basis; once enacted, the definition would operate as a legal rule incorporating an evaluative standard. Cognate groups are the other groups that the same characteristic defines, as men are in relation to women. For a combination, the relevant comparison may involve groups that differ in one or more of the combined characteristics; it should be identified in context and with reasons, and the definition requires neither a single universal comparator nor disadvantage relative to every conceivable comparison group.

The disadvantage criterion governs admission to the protected domain beyond the existing grounds. Those grounds remain conclusively protected, with their existing scope, exceptions and modes of protection, including protection where treatment concerns a perceived characteristic or association with another person, and claimants relying on them need not prove their structural justification afresh. Preserving existing modes of protection includes retaining their asymmetries. For example, section 13(3) of the Equality Act 2010 provides that more favourable treatment of disabled people does not, for that reason alone, constitute discrimination against a non-disabled person.[87] Combinations of existing grounds would likewise qualify for protection without fresh proof of their structural justification, so that intersectional claims built on listed grounds would not become harder to bring than single-ground claims. The admission requirement applies only where protection depends on recognising a characteristic, or a combination including a characteristic, outside the existing protected domain. A claimant relying on an existing ground remains free to show how an unlisted characteristic or circumstance shapes the disadvantage, without having to establish that characteristic as an independently protected ground.

82 Khaitan (n 12) 31–38, 56–61, 121.

83 Lauren Sudeall Lucas, 'Identity as Proxy' (2015) 115 Columbia Law Review 1605, 1607, 1609–10.

84 Solanke, *Discrimination as Stigma* (n 58) 162–63.

85 Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) 81 Modern Law Review 598; Solanke, *Discrimination as Stigma* (n 58) 43–49, 138, 143–45.

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Recognition of an additional characteristic or combination should ordinarily carry forward to later cases, subject to the reconsideration procedure proposed in Section 6.4, so that protection is not lost automatically as evidence changes. For newly recognised grounds, the proposed default is protection against treatment because of the characteristic, not protection confined to members of the group whose disadvantage secured its recognition. Sudeall Lucas offers a related but distinct approach to identifying the relevant group: under her value-based model, claimants define the group and the court assesses the claim against substantive criteria.[86]

The proposed statutory definition of a protected characteristic combines existing approaches. The admission criterion brings together Khaitan's relative disadvantage condition with his requirement that the ground be effectively immutable or a valuable fundamental choice, and it treats Solanke's stigma and Sudeall Lucas's exclusion from the political process as evidence of the disadvantage it requires. The statutory definition's provision for recognising additional grounds follows the open clauses of Article 14 and section 15 of the Charter.[87] Those systems already permit contextual and intersectional reasoning. The Supreme Court of Canada has analysed the combined effect of gender and parenting under the ground of sex without deciding whether parental status is an analogous ground, and has held that a claimant's intersecting identities and circumstances are relevant at both stages of the equality analysis.[88] The contribution of the statutory definition proposed here is to make the disadvantage-based admission criterion explicit, preserve existing grounds and expressly address combinations involving unlisted characteristics. The case for this design concerns the transparency and consistency of the route to protection, not the impossibility of comparable outcomes under current law.

The proposed statutory definition of a protected characteristic can be compared with the judicial development of protected grounds through principle-based interpretation. Dworkin's account of law as integrity requires legal propositions to follow from the principles that provide the best constructive interpretation of the community's legal practice.[89] Courts applying open equality clauses can likewise assess claimed grounds by reference to the purposes of the equality guarantee, without adopting Dworkin's broader theory.[90] The statutory definition proposed here makes a particular criterion for admitting additional grounds explicit: relative group disadvantage, together with the requirement that the characteristic cannot, or should not have to, be changed. The legislature would adopt that criterion following public debate, and courts would apply it to claims for protection. Courts would still need to interpret disadvantage, assess evidence and identify appropriate comparisons. The proposed reform therefore makes the basis for recognition more explicit while retaining a substantial role for judicial judgment.

5.3 INTERSECTIONAL RECOGNITION

The proposed statutory definition of a protected characteristic offers a different way of recognising intersectional discrimination from adding specified combinations of characteristics to a closed list. A legislature could protect combinations such as 'Black women' where bias against them is documented, but that reproduces the list structure at a finer grain, leaving a claimant whose combination has not been listed in the position of any claimant outside a closed list. It also invites the worry expressed in *DeGraffenreid*, where the court declined to create new classes of protected minorities 'governed only by the mathematical principles of permutation and combination'.[91] Atrey argues that the worry has not materialised where courts have entertained intersectional claims.[92]

86 Sudeall Lucas (n 84) 1648.

87 ECHR (n 2) art 14; Canadian Charter of Rights and Freedoms, s 15(1).

88 *Fraser v Canada (Attorney General)* 2020 SCC 28, [2020] 3 SCR 113 [116]; *Quebec (Attorney General) v Kanyinda* 2026 SCC 7 [40].

89 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 26; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 225.

90 Dworkin, *Law's Empire* (n 91) 225.

91 *DeGraffenreid v General Motors* 413 F Supp 142 (ED Mo 1976) 145, quoted in Crenshaw, 'Demarginalizing' (n 20) 142.

92 Atrey (n 23) 60–61.

Under the statutory definition proposed in Section 5.2, protection can extend to a characteristic considered individually or to a combination of characteristics. Recognition of a protected ground establishes coverage; it does not by itself establish unlawful discrimination. The claimant must also satisfy the applicable test linking the challenged treatment or practice to that ground, and any available defence remains separately applicable. Evidence of group disadvantage may be relevant to more than one of these inquiries, but establishing coverage does not, without more, establish discrimination. The treatment of combinations comes close to Khaitan's solution, on which an effects-based analysis allows a claimant to satisfy the group-membership requirement twice over where both components are protected grounds.[93] The statutory definition proposed here also provides for recognition of combinations in which one component is not a listed ground, such as a racial identity combined with poverty, where it is the combination that marks a group exposed to disadvantage. The route is additional, not a compulsory reclassification: a claimant who can bring the claim under race may show within that claim how poverty shapes the disadvantage and needs separate recognition of the combination only where the claim depends on recognition of that combined ground.[94] Existing doctrine can also take an unlisted characteristic into account within a claim based on a recognised ground. In *Kanyinda*, the majority examined the circumstances of women refugee claimants within its analysis of discrimination on grounds of sex. Crenshaw describes intersectional subordination as frequently 'the consequence of the imposition of one burden that interacts with preexisting vulnerabilities.'[95]

Recognising additional grounds through an evidential inquiry into group disadvantage imposes costs that a closed list avoids. Where a claim relies on a characteristic or combination not yet recognised, the claimant must produce evidence of group disadvantage, and for small or newly visible groups the evidence may be thin; Atrey records courts demanding statistics specific to a narrowly defined subgroup and then discounting them for their small sample size.[96] Qualitative as well as statistical evidence should therefore be admissible to establish the disadvantage condition. Once coverage is established, the applicable burden-shifting rules should govern proof of the alleged discriminatory treatment.

Parris illustrates the distinction between establishing coverage, proving discrimination and assessing an applicable justification or statutory exception. The claimant sought confirmation that his partner would qualify for a survivor's pension on his death. The scheme required marriage or civil partnership before the age of 60; he entered a UK civil partnership at 63, which subsequently acquired recognition in Ireland. The Court of Justice rejected the sexual-orientation claim and held that the age-based difference fell within Article 6(2) of Directive 2000/78. It also rejected discrimination based on combined grounds where discrimination on neither ground separately had been established.[97] Under the proposal, coverage would not be in issue: age and sexual orientation are both listed grounds, and their combination falls within the protected domain without fresh proof of disadvantage. The second question would be whether the rule disadvantaged older gay men under the ordinary test for indirect discrimination, and the third whether an applicable justification or statutory exception defeats the claim. Recognising the combined ground would not itself displace Article 6(2) or establish that the claimant should have succeeded. Erica Howard argues that EU law could already reach such claims by purposive interpretation of the existing directives; the statutory reform proposed here would make recognition of combinations of protected characteristics explicit in the rules governing coverage.[98]

5.4 GENDER AND THE RISK OF REIFICATION

The discussion of gender recognition in Section 2.2 raises a further question for conceptual engineering: could revising legal gender categories entrench classifications that some people

93 Khaitan (n 12) 162–63.

94 Compare *Kanyinda* (n 90) [40]–[42], where the majority considered the intersecting circumstances of women who were refugee claimants within a claim on the ground of sex and left open whether refugee-claimant status is an analogous ground.

95 Crenshaw, 'Mapping the Margins' (n 22) 1249.

96 Atrey (n 23) 194–95.

97 *Parris* (n 27) paras 17–18, 22–25, 55–62, 68–82.

98 Howard (n 25) 301–02.

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seek to resist? The obvious response to a binary scheme is to add categories, so that non-binary, genderqueer and genderfluid people can be recognised and protected as such, but that response has costs. Robin Dembroff analyses genderqueer as a 'critical gender kind,' whose members collectively destabilise the assumption that the only possible genders are two exclusive and exhaustive kinds.[99] Certifying further categories may meet the demands of some people it affects while fixing in legal form identifications that others hold in order to resist categorisation. Butler's question whether constructing 'women' as a coherent and stable subject amounts to an unwitting regulation and reification of gender relations applies to a new legal category as well.[100] Sudeall Lucas draws on research indicating that being required to identify in a way that does not match one's self-understanding may cause psychological and emotional harm, illustrated by biracial people pressed to adopt a single racial identity.[101] That research concerns racial classification. It gives a reason to examine the risks of legal gender classification, not evidence that every additional recognition category would have the same effect.

The method suggests separating two uses of gender categories, as Brigandt and Rosario's pluralism allows.[102] The first is protective: anti-discrimination law uses 'sex' and 'gender reassignment' to identify treatment that tracks gendered disadvantage. UK law already partly reflects this distinction, since protection under section 7 does not depend on a gender recognition certificate.[103] Under the statutory definition of a protected characteristic proposed in Section 5.2, a characteristic associated with departure from binary gender norms could qualify for protection even where section 7 does not apply. Recognition would require the specified evidence of relative group disadvantage and satisfaction of the condition that the characteristic cannot, or should not have to, be changed to avoid that disadvantage. Legal recognition of gender raises a separate question: how the State records a person's gender in official documents. The second use is recognition: the Gender Recognition Act and the rules on official documents determine how the State records a person's gender. Miranda Vilchis's analysis of conflicting functions explains why the two uses should be kept apart: making protection depend on recorded status would make access to the protective scheme contingent on a separate recognition system, and the two would pull in different directions wherever recorded status fails to capture the disadvantage at issue.[104]

On the side of recognition, a further strand of legal scholarship questions whether particular administrative purposes require gender classification at all. Dean Spade's study of gender reclassification policies shows how far the rules for changing a gender marker vary between agencies,[105] and in *Normal Life* he argues that administrative gender categories distribute vulnerability and security.[106] Davina Cooper and Flora Renz consider how law could still address gender discrimination if the State stopped assigning gender status.[107] For legal gender recognition, I recommend a separate review of whether each administrative purpose requires the State to record gender. Where a classification by gender has no function that requires it, the binary problem disappears with the classification; where it has one, the question is what that function needs, and the answer may differ between a sex-segregated service and a passport. The argument does not establish that additional recognition options are always undesirable, or that all non-binary people seek the abolition of legal gender status. The statutory proposal developed here concerns equality-law coverage; on recognition, the article identifies a separate programme of review and does not offer a replacement for the 2004 Act's status scheme.

99 Robin Dembroff, 'Beyond Binary: Genderqueer as Critical Gender Kind' (2020) 20(9) Philosophers' Imprint 1, 15–16.

100 Butler (n 31) 5.

101 Sudeall Lucas (n 84) 1629.

102 Brigandt and Rosario (n 63) 117–18.

103 Equality Act 2010 (n 2) s 7(1).

104 Miranda Vilchis (n 6) 372–73.

105 Dean Spade, 'Documenting Gender' (2008) 59 Hastings Law Journal 731, 734–37.

106 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2015) 73–74, 77–83.

107 Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43 Journal of Law and Society 483.

6 CHALLENGES AND IMPLEMENTATION CONSIDERATIONS

6.1 POLITICAL AND SOCIAL RESISTANCE

Efforts to revise legal concepts meet ideological and institutional resistance, as the aftermath of *Bayev* shows. The statutory definition of a protected characteristic proposed in Section 5.2 would meet familiar resistance, since it removes the gatekeeping that a list performs for legislatures and gives courts a criterion that some will regard as open-ended; the conclusive status of listed grounds and the evidential requirements described in Section 5 answer part of that objection. Podosky's requirement that a revision be adoptable for the reasons that motivate it applies more weakly in law than in ordinary language, because duty-bearers must comply with legal definitions whether or not they accept the reasons for them, and Podosky accepts that adoption for the wrong reasons may often be good enough.[108]

6.2 WHO SHOULD REVISE

A further question is which institutions should adopt and apply the proposed statutory definition of a protected characteristic. Podosky makes control a requirement of justice-oriented engineering, and records, without developing it, an objection he attributes to Matthieu Queloz and Friedemann Bieber: that institutionalised control over conceptual uptake may fall into the wrong hands or limit freedom of thought in ways that undermine consent.[109] The objection applies with particular force to courts, whose control over legal concepts is real and whose democratic accountability is indirect.

The proposed statutory reform divides responsibility between legislatures and adjudicators. The legislature would enact the definition of a protected characteristic, allowing public debate about its protective purpose and costs. Courts and tribunals would apply the statutory admission criterion, which assess evidence of group disadvantage case by case, as Canadian courts applying the analogous-grounds test already do. Courts would still develop the definition at its edges, but by applying a stated criterion.

6.3 LEGAL CERTAINTY AND CONTINUITY

An open standard has a cost in legal certainty. Under a closed list a duty-bearer knows in advance which characteristics are protected. Under the statutory definition of a protected characteristic proposed in Section 5.2, duty-bearers would retain that advance certainty about the listed grounds, their combinations and characteristics already recognised; for others, a duty-bearer cannot know with the same confidence whether differential treatment will attract scrutiny. Three features reduce the cost without removing it. The listed grounds remain conclusive. Recognition carries forward to later cases, subject to the reconsideration procedure proposed in Section 6.4, so that coverage becomes more determinate over time. Recognised analogous grounds in Canada have this continuing effect, marking a potential basis of discrimination in later cases without being established afresh in each.[110] The analogy does not extend to the withdrawal procedure proposed in Section 6.4. And where the applicable framework permits justification, recognition of a protected ground initiates that inquiry and does not conclude it. The proposal does not introduce a general justification defence where existing law provides none; under the Equality Act 2010, direct discrimination is open to general justification only where the protected characteristic is age.[111] The proposal therefore redistributes uncertainty between duty-bearers and claimants and does not remove it.

The proposed statutory definition retains the protective purpose identified in Section 5.1 and the existing paradigm cases, and in that sense it preserves continuity as Section 4.4 defines it. A closed list also gives duty-bearers advance notice and reserves admission to protection to the legislature, however, and the proposal changes how both are secured. Distinguishing the functions a concept serves, as Miranda Vilchis recommends, makes such a tension visible; it

108 Podosky (n 6) ss 3.3, 5.3.

109 Podosky (n 6) s 3.1 and n 6; Matthieu Queloz and Friedemann Bieber, 'Conceptual Engineering and the Politics of Implementation' (2022) 103 Pacific Philosophical Quarterly 670.

110 *Corbiere* (n 11) [8]–[10].

111 Equality Act 2010 (n 2) s 13(2).

does not show that the tension is absent.[112] Functional continuity is therefore a reason for the revision, not a conclusive answer to objections about certainty and institutional competence, and the case for the proposal depends on whether the safeguards described here and in Section 6.4 make those costs acceptable.

6.4 MONITORING AND ADJUSTMENT

Because recognition of additional grounds under the proposed statutory definition depends on evidence of relative group disadvantage, that recognition should be reviewed as social conditions change. Khaitan notes that there are reasons to retain a ground after a group has ceased to be disadvantaged until the change is secure,[113] and a newly recognised ground should accordingly not lose protection as soon as a disadvantage gap narrows. Equality bodies are the natural institutions to collect evidence of how groups, including groups defined by combinations of characteristics, are faring. The Functional Account directs this monitoring towards whether recognition of an additional ground continues to serve the protective purpose for which the ground was admitted.[114]

For reconsideration I propose the following procedure, which does not describe existing law. Judicial recognition of an additional ground would be subject to appeal and to the ordinary rules of precedent, and where a recognition binds, later claimants would not have to establish the ground's structural justification afresh. Withdrawal of protection should be reserved to the legislature, acting on an equality body's assessment and after consultation with the groups affected. The assessment should consider whether the reduction in disadvantage is durable and whether withdrawing protection would risk a recurrence of group disadvantage, and withdrawal should operate prospectively, leaving accrued claims intact. As in Section 6.2, courts apply the stated criterion case by case, while the decision to narrow the protected domain, like the decision to define it, is taken where its costs can be debated.

7 CONCLUSION

This article asked how conceptual engineering can be applied to reconstruct the taxonomy of protected characteristics. Its first answer concerns method: conceptual engineering supplies a diagnostic for distinguishing the revision of a legal concept from its application under retained criteria, and standards for judging revisions by function, continuity and implementation. Read with that diagnostic, *Bayev* applied a concept of 'family life' revised in *Schalk and Kopf*, and Russia's subsequent response to *Bayev* shows a gap between authoritative reasoning and domestic implementation.

The second answer is a proposal to define a protected characteristic by the function the existing lists perform: a characteristic or combination is protected where it distinguishes groups exposed to significant relative disadvantage and a person cannot change it or should not be required to. The proposed statutory definition synthesises open-clause practice with Khaitan's account. The contribution of this statutory reform is to state the admission criterion expressly, preserve existing grounds and address combinations of characteristics. The statutory reform's costs fall on duty-bearers, who face less advance certainty in new cases, and on claimants relying on unrecognised characteristics or combinations, who face evidential burdens. Preserving established grounds, carrying recognition forward and admitting qualitative evidence can reduce these costs without eliminating them.

Legislatures and equality bodies could begin with a conceptual audit of anti-discrimination law, identifying categories whose current criteria fail the functions the law assigns them and the evidence on which revisions could be based. Such an audit would assess legal categories and the criteria governing their use. Whether a revised concept is taken up beyond the institutions it binds depends on conditions the method can identify but not supply.

112 Miranda Vilchis (n 6) 372–73.

113 Khaitan (n 12) 35.

114 Podosky (n 6) s 5.3 and n 24.

COMPETING INTERESTS

The author has no competing interests to declare.

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