REALISING INTERSECTIONALITY IN DISCRIMINATION LAW

DPhil Thesis

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ABSTRACT

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The central aim of the thesis is to understand why intersectionality remains at the fringes of mainstream discrimination law and to provide an alternative vision to the dominant conception of single-axis discrimination. This aim is pursued by translating intersectionality theory into the conceptual and doctrinal precincts of comparative discrimination law of South Africa, Canada and the United Kingdom.

The thesis is divided into three parts. Part One posits the framework of 'intersectional integrity' as forming the backbone of the category of intersectional discrimination. Its normative core insists on mapping the intersections between identities as creating unique and shared patterns of group disadvantage by considering people's identities as a whole. It is this bipartite framework against which the doctrine is considered.

Part Two deals with the doctrinal limitations which impede a successful claim of intersectional discrimination. The comparative analysis fine-combs through the judicial interpretation to understand how it fares against the framework of intersectional integrity. The judicial strategies emerging from the doctrinal analysis are consolidated in the form of a graded spectrum which captures the proximity of each response from the category of intersectional discrimination. Beyond this conceptual reimagination, it also considers how other tools in discrimination law need to be recalibrated to accommodate an intersectional claim. These include the conception of equality and discrimination, the criteria for selection of analogous grounds, the understanding of indirect discrimination, the relationship between impact and justification analysis, apportioning the burden of proof and determining the standard of scrutiny.

Part Three consolidates the normative insights emerging from the thesis. A restatement of the theoretical and doctrinal recalibrations helps imagine how a lawyer would walk through the labyrinth of discrimination law for realising a claim of intersectional discrimination.

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TABLE OF ABBREVIATIONS

AFLJ – Australian Feminist Law Journal

BWLJ – Berkeley Women's Law Journal

CC – Constitutional Court of South Africa

CEUP – Central European University Press

CJWL – Canadian Journal of Women and Law

CLJ – Cambridge Law Journal

CLP – Current Legal Problems

CLR – California Law Review

CUP – Cambridge University Press

DLJ – Duke Law Journal

EADLR – European Anti-Discrimination Law Review

ECJ – Court of Justice of the European Union

EHRC – Equality and Human Rights Commission

EHRLR – European Human Rights Law Review

EJIL – European Journal of International Law

EJWS – European Journal of Women's Studies

EPW – Economic and Political Weekly

EUP – Edinburgh University Press

FLS – Feminist Legal Studies

GJICL – Georgia Journal of International and Comparative Law

GMLR – George Mason Law Review

HL – House of Lords

HLR – Harvard Law Review

HRLR – Human Rights Law Review

HUP – Harvard University Press

IJCL – International Journal of Constitutional Law

IJDL – International Journal of Discrimination and the Law

IJO – International Journal of Obesity

ILJ – Industrial Law Journal

JCLI – Journal of Contemporary Legal Issues

JERRC – Journal of the European Roma Rights Centre

JHR – Journal of Human Rights

JILI – Journal of Indian Law Institute

JLE – Journal of Law and Equality

LLR – Louisiana Law Review

LQR – Law Quarterly Review

MhLR – Michigan Law Review

MJRL – Michigan Journal of Race and Law

MLR – Modern Law Review

OJLS – Oxford Journal of Legal Studies

OHLJ – Osgoode Hall Law Journal

OHRC – Ontario Human Rights Commission

ONSC – Ontario Superior Court of Justice

OUP – Oxford University Press

PL – Public Law

PPA – Philosophy and Public Affairs

PP – Perspectives on Politics

PUP – Princeton University Press

QLJ – Queen's Law Journal

NLR – Nebraska Law Review

NSCA – Nova Scotia Court of Appeal

NYURLSC – New York University Review of Law and Social Change

NYU Press – New York University Press

RCS – Review of Constitutional Studies

SAJHR – South African Journal on Human Rights

SCC – Supreme Court of Canada

SCI – Supreme Court of India

SCLR – Supreme Court Law Review

SLR – Stanford Law Review

StLR – Stellenbosch Law Review

TLR – Tulsa Law Review

TPG – The Professional Geographer

TUP – Temple University Press

UCLF – University of Chicago Legal Forum

UCLR – University of Chicago Law Review

UKSC – United Kingdom Supreme Court

UKEAT – United Kingdom Employment Appeal Tribunal

UMKCLR – UMKC Law Review

UNBLJ – University of New Brunswick Law Journal

UNGA – United Nations General Assembly

UPJLSC – University of Pennsylvania Journal of Law and Societal Change

UPLR – University of Pennsylvania Law Review

UTLJ – University of Toronto Law Journal

WYBAJ – Windsor Year Book of Access to Justice

YLJ – Yale Law Journal

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INTRODUCTION

> Recall the face of the poorest and the weakest [person] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to [her]. Will [she] gain anything by it? Will it restore [her] to a control over [her] own life and destiny? In other words, will it lead to *swaraj* [freedom]…?
>
> ~Gandhi

The Gandhian Talisman is a simple yet powerful thought of universal appeal: that guidance for actions should be considered from the perspective of relieving the most vulnerable persons. If discrimination lawyers were to seek its inspiration,[1] *who* is the poorest and the weakest person Gandhi would have us recall in designing our course of action? Would it be the disabled, aged, gays, women, Muslims or Dalits?[2] Or could it be those who are multiply disadvantaged like Dalit women, Muslim gays, elderly disabled persons or even elderly disabled gay Dalit Muslim women? It is not hard to conceive that the intersections of multiple identities like being old, disabled, gay, female, Dalit and Muslim may itself denote a position of disadvantage or may even exacerbate the disadvantage suffered by people. The fact that some of the most dispossessed are those with multiple disadvantaging identities is not an extraordinary reflection. What is

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1 In order to be inspired by the Talisman, one does not necessarily need to subscribe to the translation of the Gandhian idea of 'swaraj' as 'freedom', 'liberty' or 'autonomy' in discrimination law, given that the sense in which Gandhi invoked the term was extremely broad. See G Aloysius, *Nationalism Without a Nation in India* (OUP 1997) 180 (noting that Gandhi kept the notion of *swaraj* deliberately 'delightfully vague'). Gandhi's articulation can then both accommodate values of equality and non-discrimination and in turn be consistent with varying justifications of equality and non-discrimination, whether based in egalitarianism or liberty. For an all-encompassing justification of equality and non-discrimination, see Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) ch 1. For an overview of different versions of equality and non-discrimination, see Colm O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 IJDL 7; Patrick Shin, 'Is There a Unitary Concept of Discrimination?' in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

2 The disadvantage associated with identities is a product of context. While Muslims and Blacks may not be disadvantaged *as* Muslims and Blacks in Saudi Arabia and Nigeria respectively, they are disadvantaged because of being religious and racial minorities in India and the United States respectively. The reference to disadvantage associated with particular identities in this thesis may not thus be a universal claim but true at least for certain contexts.

puzzling is the fact that this self-evident understanding may have escaped the compass of discrimination law. How has discrimination law overlooked those who are disadvantaged based on their multiple identities? Inspired by the Talisman, the thesis seeks to understand and respond to this counterintuitive limitation which excludes those severely disadvantaged by multiple identities from the protection of discrimination law.

The thesis is situated in the realm of intersectionality theory which explains people's disadvantage based on more than one personal characteristic or identity of race, caste, religion, gender, sex, sexual orientation, disability, age etc within discrimination law. The demand for recognising and redressing such disadvantage existed at least over a century before the term 'intersectionality' appeared.[3] But the term became a semantic and conceptual success when introduced by Kimberlé Williams Crenshaw in 1989.[4] Crenshaw's efforts were primarily directed towards translating intersectionality into discrimination law in order to recognise Black women as being subject to a form of discrimination based on both race and sex. She identified 'the dominant conception'[5] of thinking about discrimination as along 'a single categorical axis'[6] as the root cause of our inability to address intersectional disadvantage suffered by Black women in discrimination law. Over a quarter of a century later, discrimination law has not entirely overcome this dominant conception to admit intersectionality. The official prose on non-discrimination, whether in constitutional or legislative guarantees or in existing doctrine, does not mirror the strides made in intersectionality theory.[7] Even when there have been

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3 See Chapter One, nn 3-4.

4 Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) UCLF 139.

5 ibid 150.

6 ibid 140.

7 Compare Parts One and Two of the thesis, conclusions consolidated in Chapter Six, Parts III, IV.

some positive developments, they fall well short of the target.[8] As Fredman remarks, 'it remains the case that the more a person differs from the norm [of being defined by a single axis of disadvantage], the less likely she is to gain protection [in discrimination law].'[9]

This thesis seeks to revive this debate in light of contemporary developments to examine how intersectionality has fallen by the wayside of discrimination law.[10] This project adds a distinctive dimension to the ongoing debate in two ways. First, it transcends the discussion of intersectionality from its originating context in the United States in relation to Black women's condition defined by race and sex and extends it to speak comparatively in other contexts like South Africa, Canada, the United Kingdom, India and Europe in relation to anyone with multiple disadvantaging identities. At the same time, the comparative project has a normative dimension of creating a common and shared account which generally relates to liberal democracies, common lawyers and others who are similarly concerned about the redressal of intersectional disadvantage. Secondly, it creatively articulates 'the intersectional question' in the vernacular of discrimination law in a comprehensive way.[11] While intersectionality has been widely

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8 The target being the category of intersectional discrimination which is located at the far end of the graded spectrum which consolidates the responses to multi-ground claims in comparative discrimination law. See Chapter Three, II.C, III.

9 Fredman (n 1) 143.

10 Some seminal contributions on the subject include Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011); Gay Moon, 'Multiple Discrimination: Justice for the Whole Person' (2009) 2 JERRC 5; Jennifer C Nash, 'Re-Thinking Intersectionality' (2008) 89 Feminist Review 1; Joanne Conaghan, 'Intersectionality and UK Equality Initiatives' (2007) 23 SAJHR 317; Sandra Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 EADLR 13; Leslie McCall, 'The Complexity of Intersectionality' (2005) 30 Signs 1771; Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 OJLS 65; Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 CJWL 3925; Douglas Kropp, '"Categorical" Failure: Canada's Equality Jurisprudence—Changing Notions of Identity and the Legal Subject' (1997) 23 QLJ 201; Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 QLJ 179.

11 This is inspired by framing of challenges around women's inequality as 'the woman question'. Thus, 'the intersectional question' refers to the entire breadth of concerns outlined in

developed in social, political and identity theory,[12] and has also been examined in relation to specific discrimination law issues (with particular concentration on 'grounds' of discrimination),[13] the critical bite of this project lies in translating the concerns of the theory within the general scheme of discrimination law. Thus, together, the site and scale of this project break new ground in the area.

The central purpose of this thesis is to understand and respond to the conceptual limitation in discrimination law of imagining discrimination beyond 'single axis' claims and to develop a normative account of 'intersectional discrimination.' Two simultaneous inquiries feed into this central purpose: first, how has discrimination law responded to intersectionality in addressing claims based on multiple identities? Secondly, how can discrimination law be recalibrated to realise intersectional claims? In the course of pursuing these lines of inquiries, this thesis will make several unique contributions: first, delineating and defending the core of intersectionality theory; secondly, translating it into a framework of 'intersectional integrity' for the purposes of discrimination law; thirdly, identifying the conceptual and doctrinal limitations of discrimination law practice from South Africa, Canada and the UK in addressing intersectional discrimination; and fourthly, responding to these limitations by offering conceptual and doctrinal recalibrations for translating intersectionality into a successful claim of intersectional discrimination.

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intersectionality theory relating to the disadvantage associated with the position of those with multiple identities.

12 For example, see Patrick R Grzanka (ed), *Intersectionality: A Foundations and Frontiers Reader* (Westview 2014); Nina Lykke, *Feminist Studies: A Guide to Intersectional Theory, Methodology and Writing* (Routledge 2010); Yvette Murphy et al, *Incorporating Intersectionality in Social Work Practice, Research, Policy, and Education* (NASW 2009); Davina Cooper, Didi Herman, Emily Grabham and Jane Krishnadas (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009).

13 See n 10; Chapter Three, n 22.

The next three sections set out the materials, methodology, scope, structure and the central arguments of the thesis.

I. SOURCES AND METHODS

In choosing the sources and methods for this thesis, the net is cast widely. Besides the natural choices of intersectionality theory and discrimination case law, I also peruse feminist theory, identity theory, disability law and discrimination law theory. The sources are employed in conducting both doctrinal and theoretical analyses for making a normative case for intersectional discrimination. The motivation behind this eclectic methodological foundation is straightforward. Intersectionality remains largely aspirational in discrimination law. Thus, the project to realise it within the contours of discrimination law is not constrained by pre-defined and settled foundations of practice. As an exercise in first principles, it is then relatively liberated in how it seeks to accomplish this aim. Further, when intersectionality theory and discrimination law themselves are inspired by feminist theory, identity theory, disability law and philosophy of discrimination, these sources can justifiably move from the perimeter to the epicentre of the analysis. In fact, as Kannabiran conceives, this approach may even be expedient as: 'The effort to use a plurality of sources points towards the existence of multiple locations of [discrimination] law in action, and to the need to span the entire range in order to grasp the complexity of the problem and its solutions.'[14] The attempt then is to arrive at a normative account which is widely conceived and hence richer—in that it reflects not just the principles directly derived from intersectionality theory and

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14 Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 43.

discrimination law, but also their foundational influences and learnings which often remain latent and may even be missed otherwise.

The Rawlsian methodology of 'reflective equilibrium' is deployed to marshal this discursive set of materials into a coherent account of intersectional discrimination.[15] Originally conceived as a tool for making moral judgments in ethics and philosophy, the methodology is a particular fit for the kind of exercise being undertaken in this thesis. The method of reflective equilibrium is used to arrive at an account which is both internally consistent amongst the principles which give rise to it and also consistent with other principles and particular cases in which it is applied. It involves sketching a tentative theoretical account (in this thesis, what I term as 'intersectional integrity') and testing it against particular cases (in discrimination law). The initial account is then considered in light of this application and the principles are revised accordingly. The thesis follows this deliberative process of reasoning back and forth between the theory and comparative doctrine. Part One outlines the principles which inform intersectional integrity, the normative framework which forms the backbone for a claim of intersectional discrimination. Part Two tests this framework against comparative doctrine—it applies and recalibrates the conceptual framework based on its interaction with positive law. Part Three consolidates and restates the principles key to the conceptual account which emerges at the end of this process of reflective equilibrium. Two things remain significant in pursuing this central methodology: first, the enduring possibility of *revising* the account; and the emphasis on testing the account against *particular cases*. The possibility of revision upon reflection is particularly important for nascent accounts, like the present one, which will continue to develop as intersectional cases emerge. The emphasis on particular cases also appreciates rather than suppresses

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15 John Rawls, *A Theory of Justice* (1st edn, OUP 1971) 20, 48–51.

the peculiarities of new cases which may belie a single formula but reflect multiple permutations and combinations of direct and indirect discrimination, based on enumerated or analogous grounds in open or closed lists, argued on single or multiple grounds etc.[16] The process of arriving at a reflective equilibrium is then crucial not just for the present project, but for future efforts in developing the account in light of emerging jurisprudence.

Adopting a leading methodology like reflective equilibrium means that there are no strict boundaries between theoretical and doctrinal analyses. The two feed into one another throughout the thesis. The sections below seek to highlight the standpoints adopted when theoretical or doctrinal analysis is being conducted and the choice of materials in both.

A. Theoretical Analysis

The thesis utilises five distinct but related theoretical perspectives—intersectionality theory; feminist theory, especially Dalit and Black feminist writings; disability theory; identity theory; and discrimination law theory. These materials steer the theoretical inquiry which aims to: '[foster] a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.'[17] Thus, the approach is used to arrive at an account of intersectional discrimination which can then be tested and revised in light of comparative doctrine.

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16 The examples of cases from comparative doctrine considered in Chapters Three, Four and Five reflect the vast array of possible intersectional claims.

17 Michael Pendleton, 'Non-Empirical Discovery in Legal Scholarship—Choosing, Researching and Writing a Traditional Scholarly Article' in Wing Hong Chui and Mike Conville (eds), *Research Methods for Law* (EUP 2007) 159.

Intersectionality theory as developed by Crenshaw and other Black feminists forms the theoretical backbone of the project. The key learnings from this theory will be translated into the account of intersectional discrimination. The contemporary evolution of 'the intersectional question' is traced through its twenty-six years of development to arrive at a framework for challenging the disadvantage suffered on the basis of multiple identities in discrimination law. Chapter One sets out the origins of the theory, extrapolates and defends its normative core from its original context of Black women, and tests its general applicability and relevance by extending it to the context of Dalit women in India.

The feminist legal method seeks to infiltrate jurisprudence with women's experiences and perspectives.[18] But the enterprise is more inclusive and generalist in that it challenges traditional legal methods and exclusionary practices that create hierarchies of power, and thus represents a critique from the standpoint of all dispossessed.[19] The emphasis on reckoning with the positionality of those relegated to the margins of legal protection is key to feminist methods and this project.[20] Its perusal provides explanatory force to the demand for reorganising the boundaries of traditional discrimination law to include those who have been excluded from its protection *because* they are severely disadvantaged. Chapter One extensively draws upon writings of Dalit feminists and Black feminists in excavating the meaning of being disadvantaged not only on the basis of gender but also caste, race and class. Since Dalit and Black feminism themselves

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18 Deborah L Rhode, 'Feminist Critical Theories' (1990) 42 SLR 617, 619; Lydia A Cloughtery, 'Feminist Legal Methods and the First Amendment Defense to Sexual Harassment' (1996) 75 NLR 1, 2; Robin West, 'Jurisprudence and Gender' (1988) 55 UCLR 1, 65.

19 Kathryn Abrams, 'Feminist Lawyering and Legal Method' (1991) 16 Law and Social Inquiry 373, 375; Katherine T Bartlett, 'Feminist Legal Methods' (1990) 103 HLR 829, 833, 878. Cf Anne Phillips, 'Feminism and the Politics of Difference or Where Have all the Women Gone?' in Aileen Kavanagh and John Oberdiek (eds), *Arguing About Law* (Routledge 2009) 607.

20 See generally Kim VL England, 'Getting Personal: Reflexivity, Positionality, and Feminist Research' (1994) 46 TPG 80.

emerged as a response to being excluded from mainstream feminist theories, they provide a particularly relevant and insightful way of reckoning with the intersectional question at hand.

Identity and disability theories are employed in Chapter Two to elucidate the meaning and relevance of 'integrity' in supporting claims of intersectional discrimination. While intersectionality has developed in close association with and as identity theory, the connection with disability law provides a useful example of a context in which its principles seem to have been relevant. It is used as an example in which integrity is used for giving force to the claim of considering people's identities as whole and complete. Article 17 on the right to integrity in the United Nations Convention on the Rights of Persons with Disabilities shows this development of reasoning in interpreting integrity.

Finally, the recent literature on the philosophy of discrimination law provides a useful template for testing the justificatory limits of the dominant conception of thinking about discrimination along a single-axis.[21] It also provides a steer for developing the normative account of intersectional discrimination in light of broader theories of discrimination.

B. Doctrinal Analysis

The thesis seeks to test the conceptual boundaries of intersectional discrimination against comparative doctrine of South Africa, Canada and the UK. References are also made to discrimination jurisprudence from the United States, India, and the Court of Justice of the European Union. Two choices require an explanation here—that of pursuing doctrinal analysis and the selection of jurisdictions.

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21 See generally Deborah Hellman and Sophia R Moreau, 'Introduction' in Hellman and Moreau (n 1).

First, the purpose of the doctrinal analysis is to *understand* and *explain* how courts in different jurisdictions have actually responded to real or potential cases of intersectional discrimination.[22] This is important because it gives real depth and purpose to the aim of arriving at a normative account that is embedded in practical experience and hence relevant in and sensitive to contexts in which it may be applied. Since the purpose of sketching a normative account here *is* for supporting actual cases of intersectional discrimination, testing it against existing doctrine provides an opportunity to reflect on, revise and reaffirm the principles of the account, in line with the methodology of reflective equilibrium. This approach is particularly significant for discrimination law which is essentially a product of context. Fredman captures this aptly:

> Anti-discrimination law is necessarily a response to particular manifestations of inequality, which are themselves deeply embedded in the historical and political context of a given society. Discrimination laws are only effective if they are moulded to deal with the types of inequality which have developed in the society to which they refer.[23]

A firm grasp of the actual cases *and* the context in which they arise is not merely an option but a methodological imperative in working with discrimination law. However, unlike the Dworkinian theory of interpretation that aims to present legal practice in its best light, the doctrinal analysis here is not pursued with a justificatory aim in mind.[24] While the discussion of doctrine is rife with critical perspectives, there is no sense of *justifying* it in light of the framework of intersectional integrity, but an inclination simply to *test* it against the framework.[25] The difference lies in the fact that discrimination law's treatment of (potential) multi-ground claims has been extremely varied and patchy. In fact, the theory of intersectionality arose in recognition of the reality that discrimination

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22 Pendleton (n 17) 159.

23 Fredman (n 1) 38.

24 Ronald Dworkin, *Law's Empire* (HUP 1986) chs 2–3.

25 See Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) ch 3.

law (in the United States) did *not* accommodate intersectional claims. Given this operating premise, the purpose of *justifying* the existing doctrine in light of the theory seems ill-advised. The evaluation of comparative doctrine is then with a perspective which acknowledges that the framework is an outpost in the arena of mainstream discrimination law; and at the same time tests how a range of judicial responses interact with the framework.

Secondly, a word about the choice of jurisdictions is necessary. The primary reason for choosing the three jurisdictions—South Africa, Canada and the UK is that they provide a diverse cross-section of cases for the present analysis. Each case from these jurisdictions is illustrative of a distinctive way in which intersectionality has been reckoned with.[26] The reason why these jurisdictions provide particularly rich fodder, which can be evaluated cohesively without the danger of over-generalisation, is their shared premise of discrimination law.[27] The discrimination laws in the three jurisdictions have a common premise in central concepts they employ, for example, direct and indirect discrimination, grounds, burden of proof, justification analysis, reasonable accommodation etc. While there are substantial differences in how these concepts actually transpire within particular discrimination laws regimes, these differences do not defeat their allegiance to these central concepts per se.[28] For example, even as direct discrimination under the Equality Act operates with a finite number of grounds in the form of a closed list unlike the Canadian and South African counterparts, the understanding of 'grounds' themselves seems to be a common one.[29] Similarly, what is

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26 See the consolidation of these distinct responses in the form of a graded spectrum in Chapter Three, II.C.

27 Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.

28 Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 12–13.

29 See South African Constitution, s 9(3); Canadian Charter, s 15(1); Equality Act, ss 13, 14, 19.

'unfair discrimination' under the South African Constitution is 'discrimination' under the Canadian Charter and may be 'less favourable treatment'/'direct discrimination' and 'particular disadvantage'/'indirect discrimination' under the Equality Act;[30] but the substantive explanations of these concepts confirm that the jurisdictions are in fact involved in a common project.[31] Though inter-jurisdictional differences remain important to this project and are appropriately noted, they do not themselves make the choice of studying these jurisdictions together irreconcilable. Since inter-jurisdictional conversations[32] and cross-pollination of concepts[33] are entrenched in the practice of discrimination law, it is important for the project on intersectional discrimination to speak to and profit from this feature.[34]

Furthermore, given the fact that the thesis works with three relatively mature discrimination law regimes, despite references to discrimination against Dalit women in Part One, the thesis does not consider Indian discrimination law in further detail. The comparison of Dalit feminism and Black feminism provides the explanatory material for the framework of intersectional integrity, but the doctrine in India does not squarely relate to it or to the question of intersectional discrimination. This is because the terrain

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30 ibid.

31 See the connections made in Sandra Fredman, 'Comparative Study of Anti-discrimination and Equality Laws of the US, Canada, South Africa and India', European Network of Legal Experts in the Non-Discrimination Field, Manuscript for European Commission (2012) <http://ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf> accessed 20 July 2015.

32 For similar projects which work with comparative doctrine from these jurisdictions, see Fredman (n 1); Khaitan (n 28).

33 See generally Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499. For example, indirect discrimination and harassment specifically developed in the United States but have been imported by other jurisdictions widely.

34 This is characteristic of the way South African equality jurisprudence has developed in reference to its Canadian counterpart. See Albie Sachs, 'Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court' (1999) 5 RCS 76; Adam M Dodek, 'Canada as Constitutional Exporter: The Rise of the "Canadian Model" of Constitutionalism' (2007) 36 SCLR 309.

of Indian discrimination law vastly differs from its counterparts. Prima facie, the general prohibition of discrimination in Article 15(1) of the Indian Constitution seems to be limited to direct discrimination on a single enumerated ground. The development of concepts like analogous grounds, indirect discrimination, reasonable accommodation, justification analysis and standard of review has been slow and wanting. Accordingly, the intersectional question too has been slow to emerge in the discourse of discrimination law even though, as recourse to Dalit feminism shows, concerns over intersectionality are rife. Thus, even though the Dalit feminist scholarship is useful for testing the generalisability of intersectionality theory, the legal backdrop of the Indian discrimination practice is not similarly constructive for the project at hand. The hope then is that the experience of other jurisdictions with intersectional discrimination will provide the necessary steer for imagining and initiating developments elsewhere, including India.

It is also useful to iterate that the purpose of studying South Africa, Canada and the UK together is also not for directly *comparing* them against one another but for comparing their jurisprudence as against the framework of intersectional integrity. Thus the normative account of intersectional discrimination arrived at is one which is true to the principles of intersectionality theory and to the common premise of discrimination law which is shared between these jurisdictions. Thus, the account should be equally applicable to other similar jurisdictions like India and the United States whose discrimination law shares these central features. The fact that the normative account is inspired by comparative doctrine from these jurisdictions, which have some of the most progressive discrimination law practice, makes it both contemporary and compelling in redressing intersectional discrimination.

II. SCOPE AND CAVEATS

This part delineates the boundaries within which the account of intersectional discrimination is constructed in this thesis. There are three defining features of it—**(i)** operating assumptions; **(ii)** limited scope; and **(iii)** terminological preferences.

At the outset, it is important to note three assumptions on which the thesis proceeds: first, that intersectionality has *not* yet been (fully) realised in discrimination law; secondly, that it has at least been *reckoned with* in discrimination law; and thirdly, that it *can* be realised in discrimination law. These assumptions are drawn from an appreciation of the academic,[35] judicial,[36] legislative[37] and policy efforts[38] in imprinting the motif of intersectionality in mainstream discrimination law. These efforts operate on the premise that intersectionality has not yet materialised in discrimination law. But the growing body of jurisprudence confirms that discrimination law continues to be a natural site for responding to intersectionality.[39]

This thesis then operates from the standpoint which assumes an appreciation of some form of multi-ground discrimination and a commitment to address it. The project involves ascertaining *how* this may actually be achieved. Given the vastness of this task,

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35 See n 10.

36 For seminal statements in this regard, see *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [113] (Sachs J); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) [40] (Ackermann J); *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (SCC) [53]–[54] (L'Heureux-Dubé J); *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) [93] (Iacobucci J); *Corbiere v Canada* [1999] 2 SCR 203 (SCC) [61] (L'Heureux-Dubé J).

37 See Equality Act, s 14; Canadian Human Rights Act, s 3.1.

38 Fredman (n 31); 'An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims' (2001) Discussion paper of the OHRC <http://www.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf> accessed 20 July 2015.

39 See nn 10, 32.

the thesis is made viable through six essential caveats. First, it is confined to the adjudicative realm and considers discrimination law mainly in the form of an individualised tort-law model for redressing violations. This is consistent with the way discrimination law itself has developed through the common law route by adjudicators arriving at general principles from specific cases.[40] The thesis does not then focus on legislative and policy interventions, important as they are. Secondly, the comparative case law is confined to selected appellate level cases which were adjudicated under the general constitutional or federal guarantees of non-discrimination. It thus bypasses an analysis of lower court or tribunal decisions adjudicated under specific legislations. The comparative project remains cohesive enough for being analysed in one breadth only by excluding these contextual relativities which emerge in specialised jurisprudence. Given the limits of comparative analysis drawn in the previous section, the selected sample of cases is picked for illustrating the most interesting ways of responding to intersectionality, rather than for being comprehensive. Thirdly, the thesis focuses on vertical rather than horizontal discrimination. Thus, cases involve a challenge to state action or policy and do not concern private individuals, even as discrimination in the private sphere may be covered and remains an important field of study for intersectional discrimination.[41] Fourthly, the comparative doctrine covers only the text of judgments and does not refer to other materials, such as lawyers' submissions, victims' testimonies, judges' interviews or other empirical evidences. These materials remain highly relevant in understanding how courts have responded to intersectionality but they cannot be sincerely perused here given the constraints of time and resources in accessing these in particular jurisdictions.

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40 Denise G Réaume, 'Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law' (2002) 40 OHLJ 113, 142.

41 This is especially true for South Africa because the non-discrimination guarantee under the Constitution in Section 9 also applies horizontally.

Fifthly, the thesis does not seek to resolve broader questions in intersectionality theory or discrimination law in reference to intersectionality, like, the relationship between equality and discrimination[42] or the development of intersectionality as a social theory and as a theory of identity.[43] This project is devoted to understanding what it takes to realise a successful multi-ground claim which is true to the principles of intersectionality. While broader issues remain pertinent, they cannot be effectively dealt within this scope. Sixthly, the thesis recognises the possibility that there maybe other possible ways of responding to intersectional discrimination which have not yet emerged in comparative doctrine or through other routes in discrimination law like affirmative action, reasonable accommodation, positive duties and innovative remedies in class-action litigation. This thesis cannot do justice to exploring these routes without compromising the viability of this project. It is best to earmark them for future research.

Given such scope, the account of intersectional discrimination presented in this thesis is a limited one. The principles informing this account are necessary but not sufficient to posit the category of intersectional discrimination. Thus, the account is one which identifies the core or essence of intersectional claims rather than one which addresses every aspect of it. There are clear arenas of developing this account further. The account can be built upon to fill in finer details such as using intersectional criteria in affirmative action or applying a different standard of review for different combinations of grounds etc. The thesis paves the way for this by offering a conceptual and doctrinal primer to developing the category of intersectional discrimination.

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42 For an exposition of this relationship, see Mark Bell, 'The Right to Equality and Non-Discrimination' in Tamara K Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003).

43 See n 10.

Lastly, a note about the terminology used in the thesis is necessary. 'Intersectionality' is used to refer to the theory itself while 'intersectional discrimination' denotes the category of discrimination which embodies an understanding of intersectionality but is embedded with principles of discrimination law. The thesis uses the term 'multiple identities' broadly for all group identities which may denote a position of disadvantage in a particular context, including Blacks, women, Dalits, gays, disabled, Muslims, Jews, aged etc. These identities relate to certain categories called 'grounds' or 'personal characteristics' in discrimination law like race, gender, caste, sexual orientation, disability, religion, age etc. The inability to catalogue *all* imaginable group identities of disadvantage and possible grounds of discrimination by terminating the list with the 'embarrassed "etc"' does not necessarily indicate, what Butler calls, a 'sign of exhaustion.'[44] As this thesis shows, a robust idea of disadvantage in discrimination, coupled with a constellation of factors for identifying analogous grounds should allow a wider range of groups to claim on multiple bases, including economic condition, height or weight as potential grounds of discrimination.[45] The thesis thus employs 'etc' at the end of lists of identities/grounds to reaffirm the possibility of expansion of the iterated categories.[46]

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44 Judith Butler, *Gender Trouble* (Routledge 1990) 182.

45 ibid.

46 This is easier when the list is officially an open one as in Section 9(3) of the South African Constitution and Section 15(1) of the Canadian Charter. But even where the lists are closed, there are possibilities of reading in analogous grounds within enumerated grounds. For example, gender reassignment was considered a species of sex discrimination by the ECJ in *P v S and Cornwall County Council* [1996] IRLR 347.

III. ARGUMENT AND STRUCTURE

The central argument of this thesis is that the process of realising intersectionality into a successful claim of intersectional discrimination involves conceptual and doctrinal recalibrations in discrimination law. The normative case for the category of 'intersectional discrimination' unfolds at two levels—first, I posit the framework of 'intersectional integrity' as providing the conceptual backbone for understanding the qualitative meaning of an intersectional claim; secondly, I show that each of discrimination law's central concepts, which include the meaning of discrimination, identification of analogous grounds, direct and indirect discrimination, impact analysis, comparator test, justification analysis, burden of proof, standard of scrutiny and expressivism, need to be recalibrated in order to respond to the framework. In the first instance, the bipartite framework of intersectional integrity involves an emphasis on *unique and shared patterns of group disadvantage* by considering the claimant *as a whole*. A Venn diagram with intersecting multiple identities is used to illustrate the thrust of these demands in a simple yet precise way. In the second instance, the interaction of comparative doctrine with this framework yields not one but six different ways of responding to intersectionality, which are consolidated in the form of a six-point graded spectrum. Each response signifies a different way in which the courts understand the causal and expressive explanations of disadvantage based on multiple identities in a claim and thus shows varying levels of compatibility with the demands of the framework. The category of intersectional discrimination located at one end of the spectrum signifies the aspirational standard for responding to claims based on multiple identities. The realisation of this aspirational category requires not just the conceptual clarity offered by the framework but also doctrinal support from the central features of discrimination law. Understanding the qualitative dimensions of intersectional discrimination requires at least

the following—first, the possibility of making contextual comparisons instead of relying on the comparator test; second, a broad conception of intersectional wrongs, coupled with a constellation of factors for identifying analogous grounds. In addition, judges would have to be committed to impact analysis, especially in cases of indirect intersectional discrimination whose patterns of disadvantage are far more invidious and disguised. Lastly, a burden of proof no more onerous than that in single-axis claims and a searching standard of scrutiny for evaluating justifications will be particularly important in intersectional claims.

The thesis consists of six chapters divided into three parts. Part One (Chapters One and Two) lays down the theoretical principles that inform the framework of 'intersectional integrity' underpinning the category of intersectional discrimination.

Chapter One on 'Mapping Intersectionality Theory' introduces intersectionality theory. Its purpose is twofold: first, to locate the origins of the theory in its initial context of critical race feminism in the United States and secondly, to see how the theory can be extended to subjects beyond its initial protectorate of Black women to, for example, Dalit women. I show the similarities and differences between Black feminism and Dalit feminism, and find common ground in the way they situate themselves against mainstream feminism. This common ground found in the articulations of their positions as informed both by sexism and racism/casteism demonstrates the possibilities of extending the normative insights of intersectionality theory developed in the context of Black feminism to other contexts. In this process, the chapter identifies and defends the normative core of intersectionality theory. I argue that the central insight of intersectionality is its insistence on finding unique and shared experiences of disadvantage based on multiple identities of race, caste, sex, gender, sexual orientation, disability, age, etc. It can be imagined in the form of a Venn diagram with intersecting spheres of group disadvantage. The generality of the normative underpinnings of

intersectionality theory indicates its abiding strength in understanding the diversity of disadvantage associated with multiple identities.

Chapter Two on 'A Framework of Intersectional Integrity' integrates the normative insights identified in the previous chapter into a framework of 'intersectional integrity'. This framework is suggested as forming the conceptual basis for envisioning a category of 'intersectional discrimination'. If the purpose of discrimination law is to identify and redress people's disadvantage based on certain kinds of identities ('grounds') then intersectional discrimination is meant to identify and redress the patterns of disadvantage which are both unique and shared between groups defined by these grounds. Further, in order to recognise this disadvantage as a whole without distorting people's experiences of discrimination, I argue that we need to underline and support intersectional discrimination with 'integrity'. This idea of integrity is embedded in intersectionality theory, and is confirmed by its syntactical meaning and its development in the context of identity theory and disability law. I argue that this understanding of integrity is critical to the account of intersectional discrimination as it resists the tendency to splinter experiences of racism, sexism, homophobia, casteism etc into isolated and uninteractive compartments. Together with the core of intersectionality theory, integrity forms the bipartite backbone of intersectional discrimination. It is against this framework of intersectional integrity that the doctrinal treatment of intersectional discrimination is evaluated in comparative law.

Part Two explores the existing doctrinal limitations in realising the framework of intersectional integrity with reference to comparative law. Chapters Three and Four consider the issues of causation and comparison in intersectional discrimination, while Chapter Five considers the jurisprudence in relation to other central concepts like the substantive concept of discrimination, indirect discrimination, analogous grounds, burden of proof and justification analysis.

Chapter Three on 'Intersectional Discrimination in Comparative Law' explores how discrimination law responds to actual or potential claims of intersectional discrimination. The inquiry in this chapter is carried out in reference to South African, Canadian and the UK discrimination law. I examine ten cases—*Bahl*, *Bhe*, *Corbiere*, *Hassam*, *Brink*, *Gumede*, *Moseneke*, *Volks*, *Gosselin* and *Hugo*.[47] These cases are classified into three sets: **(i)** those argued on multiple grounds; **(ii)** those which made reference to other grounds/identities but were decided on a single ground; **(iii)** those which did not make a reference to multiple grounds and were decided on a single ground, but demonstrated relevance of other grounds as well. Each demonstrates a distinctive way in which the courts have dealt with an actual or potential claim of intersectional discrimination. The overall purpose is to test the judicial outcome in light of the framework of intersectional integrity to examine whether the courts are able to locate multiple identities as the basis of intersectional discrimination. The central argument is that the judicial response reveals a spectrum of diverse responses which can be graded according to their compliance with the framework. While some judicial strategies incisively reflect this framework, others miss it by a long shot. The result can be visualised as a graded spectrum with intersectional discrimination at one end, and single-axis discrimination at the other. The further one is from intersectional discrimination, the further is the approach from the framework of intersectional integrity.

Chapter Four on 'Comparators in Intersectional Discrimination' considers whether the heuristic of comparison is helpful in identifying the multiple identities that are implicated in the resulting harm of intersectional discrimination. I use three examples of *DeGraffenreid*, *Bahl* and *Falkiner* to test whether the heuristic is compliant with the framework of intersectional integrity in detecting unique and shared patterns of

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47 See Chapter Three, nn 3–13.

disadvantage and in treating a claimant's identity as a whole. The chapter concludes that comparison cannot be too helpful in its popular form of strict comparison or its more liberal form of flexible comparison. This is because it is neither a normative fit nor an operationally straightforward approach for identifying intersectional discrimination. Its application thus lacks the principled basis court seem to allude to in applying the test. I suggest that a possible alternative could be to use comparison in a contextual way, based on the probative value of comparative evidence. This approach flows from the comparative exercise carried out by the South African Constitutional Court in *Hassam* and can be useful in supporting intersectional integrity. The simplicity of the approach can alleviate the arbitrariness in the use of strict and flexible comparisons and can promote judicial accountability in requiring adequate justifications for drawing comparative deductions from available evidence.

Chapter Five on 'Central Concepts in Discrimination Law and Intersectional Discrimination' examines the doctrinal recalibrations necessary in existing discrimination law practice for accommodating intersectional claims. Based on the comparative doctrine considered in Chapters Three and Four, this chapter considers six issues in particular: **(i)** the conception of wrong or harm in intersectional discrimination; **(ii)** the criteria for identifying analogous grounds in intersectional claims; **(iii)** the significance of impact analysis especially in appreciating claims of indirect intersectional discrimination; **(iv)** justification inquiry and its standard of review; **(v)** burden of proof upon claimants, especially in class action litigation; and **(vi)** expressive dimensions of intersectional claims. This chapter emphasises the need for judicial sensitivity in identifying and redressing intersectional wrongs in a broad way, coupled with inclusive criteria for identifying analogous grounds of discrimination in multi-grounds claims. This is argued in reference to the example of poverty which has hitherto been at the margins of discrimination law but remains highly relevant in intersectional discrimination and thus

can be conceived as a possible analogous ground. The chapter outlines the recalibrations necessary for other central tools in responding to intersectional discrimination, especially the directions for future research in developing this account further. I emphasise the difficulty in appreciating indirect intersectional discrimination, which is harder to detect and hence to be redressed, without applying the framework of intersectional integrity. A consistent focus on impact analysis, which is not subsumed by justificatory considerations, a formidable standard of review coupled with a commensurate burden of proof can ensure that invidious forms of intersectional discrimination do not escape the scrutiny of discrimination law.

Part Three consolidates and restates the key principles which make up the account of intersectional discrimination. Chapter Six on 'Finding for Intersectional Discrimination' uses the example of a potential claim of intersectional discrimination by a fat Black man cited by Lord Phillips in the seminal UK Supreme Court case of *R v JFS*.[48] In constructing a response to this hypothetical claim, the chapter collates the conceptual and doctrinal conclusions emerging in the thesis. The chief conclusion here is that no single manoeuvre can alone activate the category of intersectional discrimination. Discrimination law has to be imagined as a complex apparatus made of connected cogwheels, all of which need to be recalibrated in order to process a claim of intersectional discrimination.

The Conclusion recapitulates the central purpose of this thesis, the steps undertaken in pursuing it and the coordinates for arriving at an account of intersectional discrimination.

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48 [2009] UKSC 15.

PART ONE

THEORY

CHAPTER ONE

MAPPING INTERSECTIONALITY THEORY

INTRODUCTION

The most effective way to do it, is *to do it*.[1]

Intersectionality theory seeks to understand the structural and dynamic consequences of interaction between multiple forms of disadvantage based on race, sex, gender, disability, class, age, caste, religion, sexual orientation, region etc.[2] Intersectionality emerged as the practical and legal application of the theoretical characterisation of Black women's identities shaped by their race, gender and class. Pursued widely and vividly in fiction,[3] social and political theory,[4] intersectionality was first translated into the legal realm by Kimberlé Williams Crenshaw through her 1989 article,[5] with the aspiration of addressing it in discrimination law. Its development in the context of Black feminism in the United

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1 Kalamu Ya Salaam, 'Searching for the Mother Tongue: An Interview with Toni Cade Bambara' in Linda Janet Holmes and Cheryl A Wall (eds), *Savoring the Salt: The Legacy of Toni Cade Bambara* (TUP 2007) 63.

2 Kimberlé W Crenshaw, 'The Structural and Political Dimensions of Intersectional Oppression' in Patrick R Grzanka (ed), *Intersectionality: A Foundations and Frontiers Reader* (Westview 2014) 17.

3 Writings of Alice Walker, Toni Morrison, Maya Angelou, Pauline E Hopkins, June Jordan, Gayl Jones, Zora Neale Hurston, Nella Larsen, Gloria Naylor, Ann Petry, Harriet E Wilson, Toni Cade Bambara, Jessi Redmon Fauset, Terry McMillan and Paule Marshall have inspired the movement for women of colour for over a century.

4 Audre Lodre, bell hooks, Patricia Hill Collins, Paula J Giddings, Angela Y Davis, Gloria T Hull, Kimberly Springer, Barbara Smith, Erik S McDuffie, Deborah King, Elizabeth Spelman, Patricia Williams have extensively pursued Black feminist thought in social, political and legal theory.

5 Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) UCLF 139.

States provided the steer for feminists elsewhere for conceptualising their disadvantage as intersections of racism, sexism, classism, able-bodiedness, heteronormativity etc.[6]

This chapter is aimed at mapping the origins and development of intersectionality theory in the context of Black women in the United States and extending it to the context of Dalit women in India. The purpose is to delineate and defend the normative core of the theory which provides a conceptual framework for understanding structural subordination and disadvantage beyond its initial context. The chapter argues that the central insight of intersectionality is indefeasible in alerting us to the unique and shared patterns of group disadvantage which must be supported by explanatory accounts of such disadvantage. The adoption of this intersectional lens is visible in the writings of Dalit feminists even as they did not exploit the site of discrimination law to address their intersectional disadvantage associated with caste, gender and class. This example confirms the normative strength and global appeal of intersectionality and illuminates the kind of explanations which go towards feeding the conceptual framework of intersectionality. Together with the next chapter, this chapter forms the theoretical backbone against which the doctrine in Part Two of the thesis is examined.

Part I of the chapter traces the trajectory leading to the coining of the term 'intersectionality'. It identifies two impetuses which prompted the conceptualisation of intersectionality theory by Crenshaw: first, the rich reservoirs of critical race feminism and anti-essentialist literature provided the theoretical grounding for the translation of intersectionality into discrimination law; and secondly, the failure of three test cases:

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6 See Davina Cooper, Didi Herman, Emily Grabham and Jane Krishnadas (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009); Andrea Doucet and Janet Siltanen, *Gender Relations in Canada: Intersectionality and Beyond* (OUP 2008); Mark E Casey, Sally Hines and Yvette Taylor (eds), *Theorizing Intersectionality and Sexuality* (Palgrave-Macmillan 2010); Esther Ngan-Ling Chow, *Analyzing Gender, Intersectionality, and Multiple Inequalities: Global, Transnational and Local Contexts* (Emerald 2011).

DeGraffenreid v General Motors,[7] *Payne v Trevanol*[8] and *Moore v Hughes*[9] in redressing intersectionality. These two strands help in identifying the roots of the development of intersectionality both in theoretical and legal terms.

Part II seeks to deconstruct the meaning of intersectionality by employing the imagery of a Venn diagram, which can effectively explain both the shared and unique experiences of persons with multiple intersecting identities. It then proceeds to respond to some of the pertinent critiques of intersectionality theory. I argue that even as intersectionality has its roots in law, its limitations have more to do with its failure to translate the socio-legal understanding into concrete legal tools, rather than its normative shortcomings. The aim then is to defend intersectionality by identifying its key learnings, which can be translated into discrimination law. These are identified with the realisation that even as intersectionality continues to capably provide the frame for canvassing discrimination against persons with intersectional identities, it remains a necessary but insufficient tool for remedying intersectional discrimination. It needs to be complemented with the value of integrity (next chapter) and supplemented with recalibrations in the theory and practice of discrimination law (Part Two; conclusions consolidated in Chapter Six).

Part III turns to analogising the developments in Black feminism with those in Dalit feminism. It introduces the background in which Dalit feminism emerged and the strategies pursued in furthering the movement. The elucidation of disadvantage based on caste, gender and class for Dalit women has a striking resemblance to methods in intersectionality, even though not called by this name or pursued through discrimination

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7 413 F Supp 142 (ED Mo 1976) (*DeGraffenreid*).

8 673 F 2d 798 (5th Cir 1982) (*Travenol*).

9 708 F 2d 475 (9th Cir 1983) (*Hughes*).

law. This discussion seeks to extend the contexts in which intersectionality may become relevant and thus confirms its theoretical resilience.

Part IV consolidates the insights from this chapter and restates the chief principles that inform intersectionality: **(i)** the conceptual framework stressing on both unique and shared patterns of disadvantage; **(ii)** marshalling explanatory accounts of causation by applying this framework; **(iii)** navigating the theoretical and practical hurdles between categories like 'identities', 'individuals', 'groups', 'grounds', 'context', 'relations'; and **(iv)** allowing the possibility of making a universal case of intersectional discrimination. In the course of the thesis, these insights are referred to, revisited, revised and reaffirmed to arrive at a reflective equilibrium of the conceptual and doctrinal tools for supporting the category of intersectional discrimination.

I seek to introduce three caveats as to the scope and methodology of this chapter. First, I use the category of 'women' without either adopting the unqualified paradigmatic white middle-class woman's experience as serving the vantage point for feminist theory or deconstructing all women's experiences as so unique as to render untenable the use of this category. I seek to reconstruct this tension between mainstream feminism and anti-essentialism to create space for asserting intersectionality (and hence differences) *as* a matter of feminist theory and politics rather than *apart* from it.[10] It is neither contradictory nor undesirable to choose this reconciliatory standpoint for advancing the aims of both feminist theory and discrimination law.

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10 This position is developed and defended in the course of the thesis to emphasise that intersectionality never sought to purely dismantle or create identities but to recognise the interaction between categories, while at the same time being aware of the definitional limitations of categories. For a similar position, see Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (HUP 1987). Cf Judith Butler, *Gender Trouble* (Routledge 1990).

Secondly, even as I am aware of the dangers in analogising,[11] I consider the analogy between the development of Dalit feminism and Black feminism as useful for explaining the aspirations and realities of two reasonably comparable groups of feminists. As Grillo and Wildman explain:

> We have no other way to understand each other's lives, except by making analogies to events in our own experience. Thus, the use of analogies provides both the key to greater comprehension and the danger of false understanding.[12]

To avoid the dangers of false understanding and for making good use of the analogy, the chapter compares and contrasts the two movements despite beholding similarities. Thus, the analogies between related feminisms, when pursued responsibly, should neither make similarities appear as unqualified universal truths, nor should their differences seem insurmountable.

Thirdly, the theoretical methodology for this chapter uses feminist theory to provide the crucial background for understanding intersectional identities in discrimination law.[13] As Davis argues, stepping outside the realm of law allows us to develop a critical attitude towards it.[14] In our context, it places intersectionality back at the centre of the discourse on discrimination law, just as Black and Dalit feminists place their intersectional identities at the centre of feminist discourse. Feminist theory directs us to the origin of ideas about intersectionality and explains what inspired and formed the basis for feminists to pursue legal claims based on intersectionality.

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11 See Margaret A Simons, 'Racism and Feminism: A Schism in the Sisterhood' (1979) 5 Feminist Studies 384; Deborah K King, 'Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology' (1988) 14 Signs 42.

12 Stephanie M Wildman and Trina Grillo, 'Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other-Isms)' (1991) 2 DLJ 397, 398.

13 In this sense, I am only using feminist theory without also reviewing mainstream race/caste literature either in the United States or in the Indian context.

14 Angela Y Davis, 'Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Keynote Address' (1991) 43 SLR 1175.

I. THE ORIGINS OF INTERSECTIONALITY THEORY

This part discusses two impetuses which informed the development of intersectionality theory as proposed by Crenshaw. The first one related to the position of anti-essentialists and critical race feminists, who had started highlighting the centrality of differences in both feminist and anti-racism discourse. The second one related to the failure of three test cases: *DeGraffenreid*, *Travenol* and *Hughes*, which exposed the gap in discrimination law theory and practice for accommodating claims based on more than one ground. In pursuing these two strands of developments, this part seeks to highlight both the theoretical and legal background which influenced the way in which intersectionality was conceptualised.

A. Anti-Essentialism: Locating Difference at the Centre of Feminist Theory

Around the 1980s in the United States, feminists had started seeing through the far too homogenous portrayal of the women's condition in feminist theory. They queried the methodological appeal to universality and the need to represent the condition of all women *as women* alone. The realisation that such a universal condition of women did not in fact exist started the struggle to have differences between women recognised and translated into theory.

Essentialism, in the context of feminist theory, refers to the notion that women's experiences have a common and uniform essence, which can be defined independently of their race, class, age, or caste etc. This 'essence' undermines the differences among women and creates a pinpoint experience for measuring all women's experiences. Essentialism then, defeats what Harris identifies as the promise of feminist

methodology—that of listening to women's stories.[15] Even when qualified with references to differences in passing or in explanatory footnotes, essentialism is inadequate in reconstructing a truly authentic and representative feminism. It does nothing to subvert what has been created as the norm and creates a different 'other', rather than using the differences to redefine dominant paradigms.

In response, the anti-essentialists decried the notion of a generic 'woman' and sought to highlight the heterogeneity in women's experiences.[16] The purpose was to destabilise the epicentre of feminism as the white middle-class woman and to broaden what qualify as women's experiences by defining 'complex experiences as closely to their full complexity as possible and [without ignoring] voices at the margin.'[17]

Black feminists found it even more problematic that this essentialist tone in feminist theory was replicated in legal discourse. Feminist legal theory failed in critiquing law's unitary and isolationist voice by abstracting and generalising women's experiences instead of challenging the abstraction with accurate detailing of women's lived experiences.[18] In this sense, feminist legal theory simply replaced the neutral legal abstraction with the abstraction in feminist theory—that of a paradigmatic woman in the image of a white middle-class woman which served as the legal category of women protected from discrimination.

At the same time, Black women had already identified their inability to squarely relate to race identity politics which had excluded references to their experiences and expectations. Just as the mainstream feminists created a paradigm in the white woman,

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15 Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 SLR 581, 585, 601.

16 Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press 1990) ix.

17 Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 BWLJ 16, 22.

18 Harris (n 15) 585.

race activists had created a paradigm in the Black male. This brought the Black feminists to challenge their exclusion from or the unacknowledged inclusion at the margins of both race and feminist movements.

Black feminists thus demanded a reconceptualisation of both race and feminist theories by locating differences at the centre of these movements. This purpose of redefining the theory rather than creating a subaltern theory of differences remains a defining force for Black feminists today.

B. Learnings from the Three Test Cases

Along with the concurrent waves of anti-essentialism and critical race feminism, the unsuccessful claims based on the combined grounds of race and sex in *DeGraffenreid* (1976), *Travenol* (1982) and *Hughes* (1983), provided the impetus for the conceptualisation of intersectionality theory by Crenshaw. All three cases revealed an apparent lack of normative vision in understanding and responding to intersectionality in discrimination law. It is the reflection on their failures that explains the space and need for Crenshaw's contribution.

Crenshaw sought to explicate how race and gender both affected Black women's employment experiences and in trying to subsume their experience in either the race or gender discourse, discrimination law failed to appreciate those at the intersection of both. The decision in *DeGraffenreid* remains the classic case in point. In *DeGraffenreid*, Black female employees of General Motors challenged the 'last hired-first fired' lay off policy as discriminating against them on the basis of both race and sex.[19] The United States District Court of Missouri summarily dismissed the possibility that claims could be based

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19 *DeGraffenreid* (n 7) 143.

upon two grounds, namely, race and sex at all. It interpreted the claim based on both race and sex as a demand for recognising a 'new special sub-category'[20] or 'special class'[21] for the grant of a 'new "super-remedy"'[22] beyond the contours of Title VII of the Civil Rights Act 1964 which prohibits discrimination on the basis of race, colour, religion, sex or national origin. It concluded that: 'this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.'[23]

Thus, according to the Court, Black women could be protected only to the extent that their experience coincided either with those of Black men or white women but they had no cause of action on their own. However, since both Black men and white women were treated favourably by General Motors, the claimants could not establish either race or sex discrimination.[24] It was this absence of discrimination on either ground that should have alerted the Court to the uniqueness of Black women's claim. But instead of revisiting the principle of identifying discrimination based on one ground at a time, the Court understood the claim as an appeal for inclusion of a new ground. It misconstrued the claim as one demanding the creation of 'a new classification of "black women"'[25] (and thus opening the 'the hackneyed Pandora's box' for creation of new classes of protected minorities) rather than one for recognising the interaction between already existing categories. The sheer lack of conceptual imagination in thinking about

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20 ibid 143.

21 ibid.

22 ibid.

23 ibid.

24 The inappropriateness of comparator analysis in intersectional claims is discussed in Chapter Four.

25 *DeGraffenreid* (n 7) 145.

discrimination based on two grounds as possessing a unique character defeated the *DeGraffenreid* claim in an unfortunate way.

Furthermore, the failure of the claim in *Travenol* confirms that even if Black women are recognised as a separate category, intersectionality requires more than just the expansion of groups or grounds in order to be addressed in discrimination law. In *Travenol*, Payne, a Black woman challenged a host of Travenol's employment practices as being discriminatory on the basis of race and sex.[26] She was certified to claim on behalf of the class of Black women and her claim was allowed in part. Payne challenged the decision, including the relief, on the basis that Black males were erroneously excluded from the class certified by the district court. The concerned Rule 23(a) of the Federal Rules of Civil Procedure provided that: 'the representative parties will fairly and adequately protect the interests of the class.' In reaffirming its corollary that 'a class representative may not head a class including persons whose interests substantially conflict with his or her own,'[27] the Fifth Circuit Appeals Court dismissed the appeal upholding the district court opinion that a claim of sex discrimination necessarily denotes a conflict between men and women, notwithstanding their common race.[28] Thus, the Court in denying the representation of Black males through Black females, barred the possibility of Black females claiming for all Blacks as such.[29] They failed in viewing Black women's intersectional identities, although unique, as also having common ground with white women and Black men and hence capable of representing Blacks and women as well—just as white women and Black men could represent their constituencies, including

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26 *Travenol* (n 8) 805–807.

27 ibid 810.

28 ibid 810–11.

29 ibid 813.

Black women. The Court's view of the claim based on two grounds was of a chemical compound which looses the characteristics of its constituent elements, rather than as a mixture which retains some properties of its constituent elements, even as it may possess its own unique properties. Thus, even though the *Travenol* Court accepts intersectionality in class certification by allowing Black women to claim *as* Black women, it does so by isolating Black women's identity into an uninteractive category and thus fails to appreciate their shared experiences of race discrimination with Black men.

In the same vein, the case of *Hughes* demonstrates the Court's unwillingness to certify the class of Black women to represent *all* women. Tommie Moore, a Black female employee had brought a complaint against Hughes Helicopters Inc, a manufacturer of commercial and military helicopters, for discriminating against Black females in the selection of supervisory and upper-level craft positions.[30] The Court dismissed the Black women's claim to represent all women since there were *only* Black women and not women as such being discriminated against.[31] This reduced the relevant comparator pool for Moore to statistically prove discrimination in the disputed job classifications and her disparate impact claim eventually failed.[32] Moore could neither draw upon the labour pool of all Black women (since only 'qualified' Black women were considered as the relevant comparator group by the Court) nor could she use the statistics relating to all women which clearly supported the statistical basis of their disparate impact claim.[33] Thus, while *Travenol* forbade Black women to claim on behalf of all Blacks, *Hughes* foreclosed the possibility of Black women claiming for all women. The Court's reasoning

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30 *Hughes* (n 9) 478–479.

31 ibid 480.

32 The problem of drawing strict comparisons in intersectional claims is discussed in Chapter Four.

33 *Hughes* (n 9) 479.

dismissed the lived realities of Black women's experiences *as* women's experiences. The reference point of white women defined the category of sex discrimination while Black women were ousted from drawing upon their experience of sex discrimination shared with other women.

DeGraffenreid, *Travenol* and *Hughes* demonstrate the judicial unease in thinking about claims based on more than one ground. While *DeGraffenreid* dismissed the possibility of Black women claiming as Black women, *Travenol* and *Hughes* denied that Black women could claim on behalf of Black men and white women respectively. This conceptual myopia in understanding the position of Black women and their relationship with others, eventually either conflated (*DeGraffenreid*) or diminished (*Travenol* and *Hughes*) the nature of discrimination at hand. The absence of a judicial formulation which explained what it meant to be discriminated on both race and sex, thus formed the basis of Crenshaw's contribution.

II. THE CONTOURS OF INTERSECTIONALITY THEORY

Crenshaw used the decisions in *DeGraffenreid*, *Travenol* and *Hughes* to demonstrate the theoretical approaches which marginalised the experiences of Black women in discrimination law. She explained the central case of discrimination law as mainly concerned with those disadvantaged by a single ground (say gender) and privileged in every other way (race, class, disability, sexual orientation, marital status etc).[34] Thus, for example, laws against gender discrimination sought to protect only white heterosexual able-bodied middle-class women. This narrow (top-down) conceptualisation under discrimination law excluded complex identities shaped by the interaction of two or more

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34 Crenshaw (n 5) 151.

grounds. For Black women, it meant that unless their experiences coincided with male experiences of race and white experiences of sex, they were not protected under discrimination law. This brought Crenshaw to call for reimagining the 'dominant ways of thinking about discrimination'.[35]

This part examines how intersectionality theory was initially conceptualised as a response to the single axis framework of discrimination law. It uses the imagery of a Venn diagram to explain the nature of disadvantage based on two or more identities. I also identify and address some relevant critiques of intersectionality theory which have emerged in recent years. The purpose is to delineate the critiques from the normative core of intersectionality and to defend this core which is preserved despite criticisms of the theory.

A. Intersectionality as 'Unique and Shared Patterns of Group Disadvantage'

Crenshaw highlighted that any real commitment towards eliminating racism and patriarchy cannot ignore those located at the intersections of the two movements—i.e. Black women.[36] The appreciation of both shared and unique features of Black women's experiences of race, sex and class, characterised the method of intersectionality in discrimination law. Black women's experiences were seen as defined by the intersection of blackness and femaleness—this meant that they shared experiences *with* white women and Black men, and also had experiences as being both Black and female, *as* Black women. But both of these dimensions were noted as missing from the discourse of discrimination law. While the uniqueness of Black women's position was denied in

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35 ibid 150.

36 ibid 166.

DeGraffenreid; *Travenol* and *Hughes* denied that there was anything shared between Black women on one hand and Black men and white women on the other. At the same time, Black women's experiences could neither be deflated into experiences of Black men or white women, nor be inflated into a new 'super category' of race and sex. The disagreement with the judicial conceptualisation of Black women's discrimination claims was thus met with explanations from Black feminist literature, termed 'intersectionality' by Crenshaw. She explained thus:

> Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.[37]

This synergy between intersecting grounds can be explained in terms of a mathematical Venn or set diagram, which pictorially illustrates all finite relationships between intersecting sets. The several points of intersections depict unique and shared patterns of disadvantage.[38] Thus, for example, to map the patterns of violence against women of colour, Crenshaw used intersectionality to demonstrate that violence against Black women was frequently a product of intersecting patterns of both racism and sexism.[39] If we are to represent violence against poor women of colour as a Venn, it is a product of three intersections yielded by race (Black), class (poverty) and gender (women) as depicted in Figure 1:

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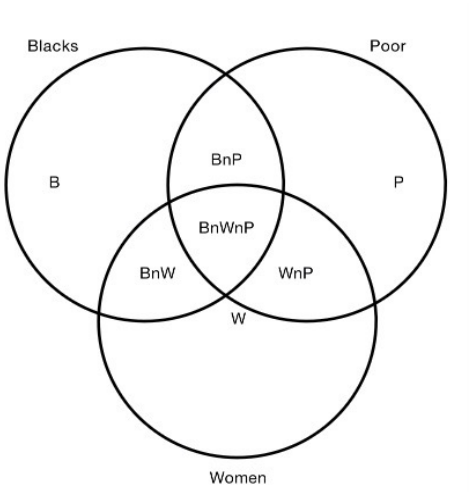
37 ibid 149.

38 This formulation is inspired by Justice Kate O'Regan's formulation in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) (*Brink*) and is explained below.

39 Kimberlé W Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 SLR 1241, 1243.



[Figure 1: Violence Against Black Women]

The groups of Blacks (B), women (W) and poor people (P) intersect and together yield the portion 'BnWnP'. This portion demonstrates shared properties of the three intersecting circles; and at the same time, it also depicts certain unique characteristics which are not shared with the non-intersecting portions [B-(BnW+BnP)] (Blacks, who are neither women nor poor), [P-(WnP+BnP)] (economically disadvantaged who are neither Blacks nor women) and [W-(BnW+WnP)] (women who are neither Black nor poor). It also depicts some shared characteristics with Black women (BnW), with poor Blacks (BnP) and with poor women (WnP)). However, the only way to fully comprehend the position of poor Black women is to take into consideration both unique (BnWnP) and shared combinations of race, class and gender (B, W, P). This is the position of poor Black women who face sexual violence not only as Black, women or poor but as all of them, at the same time.

The perusal of the Venn diagram also makes clear that the *pattern* representing *unique and shared* qualities is to be traced as spheres of *intersecting groups facing structural disadvantage*. This framing is adopted from O'Regan J's formulation in *Brink* which recognised that 'discrimination against people who are members of disfavoured groups

can lead to patterns of group disadvantage and harm'[40] and thus the purpose of the non-discrimination guarantee is to address 'systematic patterns of discrimination on grounds.'[41] O'Regan J's formulation fits the context of intersectionality aptly in that it emphasises three things in addition to intersectionality's own message of 'unique and shared' qualities: **(i)** the idea of *pattern*; **(ii)** the focus on *groups* based on *grounds*; and **(iii)** the emphasis on *disadvantage*. The idea behind pattern is that it connotes historic and abiding motifs of systematic disadvantage which have been entrenched over time and will continue to cause considerable harm.[42] In addition, the focus is on groups (women, disabled, Blacks, gays etc) defined by grounds (gender, disability, race, sexual orientation etc) of discrimination rather than individual qualities (viz. character, strength, morality etc) because the body of discrimination law is particularly concerned with the harm which is perpetuated (against individuals or groups) based on group-identities.[43] Finally, the emphasis on disadvantage is to understand the kind of harm or wrong that is perpetuated along group-identities, that which is persisting, pervasive and substantial.[44] Thus, the focus is on groups which are *significantly* more disadvantaged than other groups defined by a particular ground, and that disadvantage has existed for an appreciable length of time and spans a wide sphere of human activity.[45] The emphasis on these three elements (patterns, groups based on grounds, and relative disadvantage) is mirrored in

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40 *Brink* (n 38) [42].

41 ibid [41].

42 ibid.

43 Kate O'Regan, 'Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa's Sexual Orientation Equality Jurisprudence' (2013) 37 NYURLSC 307, 308–309.

44 Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 35–38; Iris Marion Young, *Justice and the Politics of Difference* (PUP 1990) 43–45.

45 Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 26–28, 138–139; Khaitan, ibid, ch 2; *Brink* (n 38) [42].

case of intersectional discrimination, wherein the demand is to trace the nature of disadvantage at the intersections (unique and shared patterns) of group-identities (group disadvantage) defined by grounds of discrimination. This chief formulation captures the key insights of intersectionality in discrimination law and thus represents the defining motif of the category of intersectional discrimination.

B. Intersectionality: A Fine Balance

Intersectionality theory at its core rejects the understanding of discrimination as a function of a single categorical axis and emphasises the need to recognise discrimination resulting from the intersections of multiple axes of race, sex, class, caste, religion, disability, sexual orientation etc. It seeks to reconceptualise the way we understand discrimination into unique and shared experiences to present an accurate vision of the prevailing social inequalities which corresponds with people's lived realities. It is this normative core that I will draw upon for the purposes of the thesis in order to develop intersectionality in discrimination law.

As much as intersectionality has continued to be refined and improved over the last twenty-six years, it has been subject of some equally trenchant critiques.[46] The primary challenges to intersectionality question: **(i)** whether it has any general applicability given its roots of Black feminism in the United States; **(ii)** if it adopts an uncritical view of identity categories; **(iii)** if it leads to a proliferation of groups and grounds for protection; **(iv)** its 'legal redressability' in discrimination law; **(v)** its excessive focus on individual identities rather than group-status; and **(vi)** whether it is merely a rhetorical tool without any analytic traction. The purpose of these challenges has been to

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46 For a comprehensive treatment of concerns raised against intersectionality see Robert S Chang and Jerome McCristal Culp Jr, 'After Intersectionality' (2002) 71 UMKCLR 485.

show how intersectionality is now out of kilter. This section seeks to address these key concerns with intersectionality. The aim is to defend the normative core of intersectionality which is preserved despite 'post-intersectionality' developments and critiques.

At the outset, it is important to recognise that certain developments in intersectionality theory have indeed been illuminating and have strengthened the theory. For example, sharper connections have been made between privilege and subordination in identifying the resulting nature of intersecting identities and disadvantage.[47] Thus, intersectionalists emphasise that even the position of white women must be characterised both as one of privilege (owing to their colour or race) and subordination (due to their gender).[48] In this sense, intersectionality is seen as a universal condition and all discrimination is capable of being expressed in intersectional terms. This places intersectional discrimination at the centre of discrimination law practice and makes us rethink cases like *James v Eastleigh Borough Council*[49] and *President of the Republic of South Africa v Hugo*.[50] In *James*, the Court viewed the use of pensionable age (65 years for men; 60 years for women) for treating women more favourably as direct discrimination on grounds of sex under Section 29 of the UK Sex Discrimination Act 1975. In basing their decision on the 'but for' test ('would the complainant have received the same treatment from the defendant but for his or her sex'), the majority overemphasised the sex of the complainant who was male and the disadvantage accruing on its basis from the exclusion

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47 Darren Hutchinson, 'Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination' (2001) MJRL 285, 311; Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-based Disadvantage' (2008) 24 SAJHR 397, 406. However, Crenshaw herself noted the 'implicit' dimension of privilege in whiteness and maleness for conceptualising discrimination. See Crenshaw (n 5) 151.

48 Joanne Conaghan, 'Intersectionality and UK Equality Initiatives' (2007) 23 SAJHR 317, 329.

49 [1990] 2 AC 751 (HL) (*James*).

50 [1997] ZACC 4 (CC) (*Hugo*). See Chapter Three, III.B.2 for a discussion on *Hugo*.

of free swimming pool access. Since both the claimant and his wife were 61 years of age, the significance of a lower retirement age for women (due to women's lower employability and economic dependence) was lost on the majority (as the *motive*, which was considered irrelevant) and the criteria of discrimination became mainly 'gender-based' (as the relevant *intention* upon which the defendant acted). By relegating age to motive, the reasoning precluded the possibility of considering the criteria as intersectional, based both on gender and age.

Similarly, in *Hugo*, the respondent (a single father of a child under twelve) had challenged the President's decision of pardon and reprieve for mothers in prison, who had children under the age of twelve years. The Constitutional Court of South Africa held that the decision did not unfairly discriminate on the ground of sex or gender. The majority identified only the privileges associated with the male gender as relevant in assessing the unfairness of discrimination and underplayed the disadvantages owing to the status of being a single father. These cases demonstrate a gap in viewing discrimination as both a function of subordination and privilege and thus capable of being expressed more accurately and comprehensively in intersectional terms.

On the other hand, the critiques seek to show the limited appeal of intersectionality in pointing out its various shortcomings. Intersectionality originated in a specific context: for explicating Black women's position of disadvantage in the United States. But it was neither offered as a totalising theory of identity, nor were gender and colour mandated to be the only two grounds to serve the theory.[51] However, a large part of post-intersectionality literature has sought to challenge its conceptual, jurisprudential and methodological boundaries.[52]

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51 Grzanka (n 2) xv.

52 Jennifer C Nash, 'Re-Thinking Intersectionality' (2008) 89 Feminist Review 1.

Conceptually, intersectionality is sometimes seen as thin on its normative foundations. First, the critique seeks to show that the context of Black women in the United States cannot be divorced from theory, which then limits its general applicability since it does not consider other intersections like sexual orientation, disability or religion.[53] This critique misunderstands the roots of intersectionality theory as a demand for recognition of a new *category* of 'Black women' rather than recognising the normative insight for appreciating *intersections* between identity categories of race and gender.[54] This mischaracterisation was echoed by the *DeGraffenreid* Court which saw Black women's claim as demanding the 'creation of new classes of protected minorities'[55] and hence opening 'the hackneyed Pandora's box'.[56] But the demand is actually not for creating more sub-classes or categories (or at least not always) but only to recognise interactions between existing categories (viz. disability, sexual orientation, age, class/socio-economic condition).[57] Understood as such, the focus of intersectionality is to redefine the principles for identifying discrimination and not the expansion of grounds per se. The fear of proliferation or splintering of categories beyond recognition does not resonate with the framing of central insights of intersectionality.[58] In fact, Black feminists continually stressed that their disadvantage be studied *as* a matter of gender and race

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53 Hutchinson (n 47) 311.

54 Nancy Ehrenreich, 'Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems' (2002) 71 UMKCLR 251, 267.

55 *DeGraffenreid* (n 7) 151.

56 ibid.

57 For further discussion on this, see Chapter Five, Part II and Chapter Six, Part IV.A. See *Corbiere v Canada* [1999] 2 SCR 203 (SCC), discussed in Chapter Five, III.A.3, as an example where a new category *can* be admitted as an analogous ground.

58 Joan W Scott, 'Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism' (1988) 14 Feminist Studies 33, 37; Alice Ludvig, 'Differences Between Women?: Intersecting Voices in a Female Narrative' (2006) 13 EJWS 245, 247; Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 EJWS 193, 197–204.

both, not *aside* of it. In the same vein, they defined their inclusive purpose as initiating change for and engaging with all dispossessed populations and hence justifying their guiding principles 'lifting as we climb'[59] or 'when they enter, we all enter.'[60] Thus, intersectionality cannot be seen as initiating what Martinez calls 'Oppression Olympics'[61]—interpreting intersectionality as a tool for each group to contend for their particular location to be recognised as unique and forming a separate ground of discrimination.[62] In this light, the modifications to intersectionality theory, of 'multidimensionality',[63] 'interconnectedness',[64] 'holistic examination'[65] and 'co-synthesis',[66] made for including other intersections like gender-sexual orientation, disability-gender, race-sexual orientation etc, are only extensions of intersectionality theory and not distinct conceptual frameworks in themselves. It is then difficult to agree that the inclusive agenda of intersectionalists is one which is limited to its initial context of Black feminism and any further application of it will either proliferate identities ad infinitum or require a new normative construction to explain its intersectional qualities.

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59 This was the inspiration for the National Association of Colored Women's Club, chosen upon its formation in 1896.

60 Crenshaw (n 5) 167.

61 Elizabeth Martinez, 'Beyond Black/White: The Racism of Our Times' (1993) 20 Social Justice 20, 22–34. See also Ange-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5 PP 63.

62 Crenshaw (n 5) 40.

63 Hutchinson (n 47) 311.

64 Francisco Valdes, 'Theorizing OutCrit Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits' (1999) 53(4) University of Miami Law Review 1265.

65 Elvia Arriola, 'Welcoming the Outsider to an Outsider Conference: Law and the Multiplicities of Self' (1997) 2 Harvard Latino Law Review 397.

66 Peter Kwan, 'Complicity and Complexity: Cosynthesis and Praxis' (2000) 49 DePaul Law Review 673, 688.

At the same time, intersectionality is attacked for its reliance on identity-categories like race and gender as belying its anti-essentialist roots whose logical point of conclusion would be to expunge all identity categories as such. This challenge draws from the post-structural insight which calls on identity nihilism because social constructions of identities like race and gender are inherently inadequate and exclusionary.[67] Their claim is that instead of challenging the use of such identity categories per se, intersectionality does an incomplete job of adopting anti-essentialism. It fetishises categories by pointing out only their intersections rather than abandoning allegiance to them all together.[68] For them, the problem lies not in the ignorance of intersections but in the use of identity categories as such.[69] While this charge cannot be denied completely, its overreaching implications should make one cautious of abandoning identity categories as the primary sites of organisational politics, especially in law. The insistence on recognising Black women's experiences *as both* gender and race discrimination does not seem to sanction an uncritical and rigid understanding of race and gender per se.[70] In fact, part of the intersectional enterprise *is* to reorganise the boundaries regulating the social meaning of these identities by sorting out those who qualify and those who do not. This is evident in the discussion on Dalit feminism in the next part—the claim being that explanations of intersectionality accommodate an inclusive and fluid understanding of caste.[71] In this sense, though it does not espouse an annihilation of identity categories, intersectionality allows for critical treatment of these

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67 Barbara Risman, 'Gender as a Social Structure: Theory Wrestling with Activism' (2004) 18 Gender and Society 429.

68 Butler (n 10) 182.

69 Leslie McCall, 'The Complexity of Intersectionality' in Grzanka (n 2) 60.

70 For an extended discussion and defence of this position, see Chapter Six, III.D and III.E.

71 See infra III.C.

categories given that they operate as sites for political action. This may actually be a product of its roots in discrimination law which uses these categories for addressing status-based disadvantages. But given that these critiques hold some water, a restatement of the relationship between these categories—identities, grounds and context of individuals and groups is offered in Chapter Six. Until then, the thesis relies on a baseline consensus on: **(i)** the use of personal characteristics or grounds like race, gender, disability, sexual orientation, religion etc in discrimination law, **(ii)** as forming the basis of disadvantage, i.e. stereotyping, prejudicing, demeaning, denial of dignity or autonomy, oppression, exploitation, marginalisation, material deprivation etc, **(iii)** which accrues to people because of their multiple identities like being Black, Dalit, female, gay, disabled, Muslim etc.

Intersectionality is also targeted for its jurisdictional and jurisprudential capabilities in being translated into discrimination law. A key challenge here is to its foundational reliance on 'grounds' of discrimination. For example, Iyer challenges grounds as being too 'uninteractive' and isolated for supporting an intersectional analysis.[72] Writing in relation to Section 15 of the Canadian Charter, she criticises discrimination law's focus on 'grounds' which forces claimants to ignore their own distinct experiences of discrimination, and to caricaturise themselves so that they fit into the experiences recognised within prefabricated categories. Iyer is concerned primarily with the mechanical use of grounds because 'the categorical approach to equality fails to comprehend the complex social identities.'[73] This is a relevant critique which alerts us to the appropriate *use* of grounds of discrimination, but does not challenge their normative significance in explaining intersectional discrimination as such. The purpose of

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72 Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 QLJ 179.

73 ibid 181.

intersectionality theory has been to emphasise *interaction* between grounds and thus break the tendency towards isolating and homogenising the experiences associated with them. Iyer's final claim that—'We need to open up the pockets and permit them to interact,'[74] neither displaces the centrality of grounds in discrimination law nor does it affect their continued significance in understanding intersectional discrimination. It in fact strengthens the final assertions of intersectionality theory—of exploring the complexity between intersecting grounds.[75]

In the same vein, there are doubts about the 'legally redressability' of intersectionality under the discrimination law regimes of Canada,[76] UK[77] and South Africa.[78] Critics argue that the traditional concepts in discrimination law, whether relating to grounds, comparators, adduction of statistical evidence, causation etc, do not 'fit' an intersectional analysis. For example, Pieterse argues that in the South African context:

> The [Constitutional] Court's ground-focused approach [fails] to perceive and address intersectional discrimination, since it both encourages and rewards arguments focused on specific, listed grounds. While acknowledging the phenomena of intersectionality, the Court has often proceeded with its inquiry in relation to only the 'main' ground of discrimination alleged, or has dealt with claims of intersectional discrimination by separately considering discrimination on each of the grounds alleged, rather than by inquiring into their conglomerate effect.[79]

This critique is the focus of this thesis in its central aim of realising intersectionality in discrimination law. It seeks to translate the conceptual contribution of intersectionality theory into the practice of discrimination law. The doctrinal survey in

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74 ibid 204.

75 See Chapter Six, III.D and III.E for a defence of grounds for supporting intersectional discrimination.

76 Iyer (n 72); Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 CJWL 3925.

77 Conaghan (n 48); Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 OJLS 65.

78 Pieterse (n 47).

79 ibid 420.

Part Two of the thesis will confirm the apprehensions expressed in these critiques in that there is no easy road to realise intersectionality in discrimination law. I go on to argue that these concerns do not unsettle the theoretical basis of intersectionality but speak to particular applied concepts in discrimination law in failing to accommodate intersectional claims.

Furthermore, Conaghan,[80] McCall[81] and Hancock[82] challenge the privileging of individual over group identity within intersectionality theory. In a seminal contribution to intersectionality, Grillo contests the abstraction and misrepresentation of individuals in legal discourse which fragments their identities into discrete units without considering them as a whole.[83] Conaghan criticises Grillo's excessive emphasis on individual experiences which may leave little room for organised, collective movements.[84] Similarly, within the legal context, Pieterse argues that the South African Constitutional Court has sometimes overly focused on the characteristics and circumstances of individual applicants, which do not squarely represent group-based disadvantage.[85] Duclos too has argued that in the Canadian context: 'The most fundamental error in current antidiscrimination doctrine lies in its location of difference in the individual complainant rather than in his or her relationship with others.'[86] Although these concerns with solipsism in intersectionality are contextual and embedded in specific discrimination

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80 Conaghan (n 48).

81 McCall (n 69).

82 Hancock (n 61).

83 Grillo (n 17) 17–19.

84 Conaghan (n 48) 321.

85 Pieterse (n 47).

86 Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 CJWL 25, 47. For a detailed account of the relationship theory of social organisation, see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2012).

laws, they attack a fundamental concern in all discrimination law regimes—whether it is about individuals or about groups. Discrimination law apparatus, although triggered in tort-law style by individual claimants, takes group-based disadvantage as its vantage point for identifying discrimination.[87] Meant as a tool for remedying the disadvantage suffered by individuals due to their group-identities, discrimination law's immediate purpose is to provide a remedy in the particular claim brought before it.[88] In this sense, the focus on individual identity emphasises only this—that we should not essentialise individual identities just because they do not neatly fit into a dominant understanding of group identities. Thus, intersectionality seeks to reemphasise that individual identity is a function of intersecting locations of group-based disadvantage even when each component or the whole does not immediately fit into a recognised group. This is the final balance intersectionality seeks to tread between individual and group identity and is elaborated upon in Chapters Two and Six.[89]

What seems to emerge from these critiques is that the most critical challenges to intersectionality theory are concerned with its 'application and delivery' and our failure to supplement it with 'more effective analytical and strategic tools'.[90] This concern is one which squarely relates to translating intersectionality theory into discrimination law and does not attack the theoretical basis of intersectionality for recognising multiple and intersecting grounds of identity when considering how social identities are constructed. In fact, its theoretical foundations are universally relevant and analytically defensible. The

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87 See Denise G Réaume, 'Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law' (2002) 40 OHLJ 113.

88 Cf Pieterse (n 47).

89 This discussion is pursued in greater detail in Chapter Two which explains how integrity as a value embedded in intersectionality balances the individual and group-based concerns in discrimination law. See also Chapter Six, III.D and III.E.

90 Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Cooper et al (n 6) 21–22.

next section seeks to justify this stance by extending these learnings to the context of Dalit women in India.

III. DALIT WOMEN AND INTERSECTIONALITY

As the previous part highlighted, one of the key critiques of intersectionality theory queries whether it has any normative traction independent of its birth context of Black feminism in the United States. This part seeks to respond to this concern by exploring the common basis of struggles of Black feminists in the United States and Dalit feminists in India. The analysis shows that even as there are conceivable differences in context and the absence of the term 'intersectionality' in the Dalit feminist discourse, the common language and explanations of the respective positions of disadvantage of Black women and Dalit women reveals their common conceptual foundations. They are both concerned with mapping the uniqueness of their position *as* Dalit women or Black women, as well as what they share *with* Dalit men and upper-caste women, and Black men and white women. This shared conceptual aim thus transcends limitations of context and provides a firm epistemic inroad into understanding intersectional disadvantage suffered on multiple bases.

Section A takes the example of caste to highlight that other categories like religion, creed or region have shaped women's gendered identity in India. This indicates an inherently intersectional idea of gender in the Indian context. Section B traces how Dalit feminism arose and how it differed from mainstream upper-caste middle-class ('Brahminical') feminism. Section C analogises between the theoretical underpinnings of Black and Dalit feminisms. Finally, in section D, I extend the central insights of intersectionality theory to explain the position of Dalit women. Together these sections

confirm the global avail and normative fortitude of intersectionality theory such that it remains pertinent for addressing disadvantage based on multiple identities.

I seek to introduce three caveats to the discussion in this part. First, the understanding of 'caste' employed herein refers to a hierarchical system used as a marker of social, economic and political identity which is fixed at birth and is constructed and sustained primarily by the constraints on inter-marriage and inter-dining. The prohibition on inter-marriage between various castes (endogamy) can be seen as the principal propeller of the caste system that reproduces and reinforces the social, educational, economic and political disabilities and privileges associated with caste.[91] The term 'Dalit' then inclusively refers to the lowest rung ('sudras') and the outcaste ('untouchables') (constitutionally identified as the Scheduled Castes and also some Other Backward Classes) who have been saddled with the worst effects of the caste system.[92] Although there are complex compositions and sub-divisions within Dalits, it is important to note that the term, as popularised by Phule and Ambedkar, now stands as a symbol of assertive pride and resistance for all oppressed and downtrodden.[93] In this sense, 'Dalit' is a broad term used to denote all untouchables, outcastes and lower castes whether included within the ambit of Scheduled Castes or Other Backward Castes or all other excluded or depressed classes defined by caste.[94]

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91 Gabriel Dietrich, 'Dalit Movement and Women's Movements' in Anupama Rao (ed), *Gender and Caste*: *Issues in Contemporary Indian Feminism* (Kali for Women 2005) 76.

92 Marc Galanter, 'Law and Caste in Modern India' (1963) 3 Asian Survey 546, 544–559; Marc Galanter, 'Caste Disabilities and Indian Federalism' (1961) 3 JILI 205, 220.

93 Pranjali Bandhu, 'Dalit Women's Cry for Liberation: My Rights are Rising Like the Sun, Will You Deny This Sunrise?' in Rao (n 91) 109.

94 In this sense, it is used as an overarching term like the term 'backward classes' employed by Marc Galanter to denote all Scheduled Castes and Scheduled Tribes and Other Backward Classes. Marc Galanter, *Competing Inequalities: Law and the Backward Classes in India* (OUP 1984).

Secondly, the term 'Dalit women' is used rather loosely in this thesis, and hence inclusively. I am aware that the position of women who are Dalit Christians and Dalit Muslims (or tribal and nomad women who remain at the fringes of the Dalit identity), cannot be squarely defined with reference to caste, gender and class, without analysing the implications of religion (or tribe) separately.[95] However, if we follow Galanter's *associational* view of caste, the composition of caste is characterised by a complex of features including but not limited to religious features.[96] 'Dalit' identity may then be extremely complex from *within*, such that the position of Dalit women can be studied taking their caste identity as simultaneously *defined* by multiple intersections and *intersecting* with other identities.

Thirdly, in discussing the Indian feminist movement, I am concentrating on post-colonial developments. This is because, although the women's movement coincided with the freedom struggle against British colonial rule during 1857-1947, Constitutional developments after 1947 reconstructed new boundaries for raising the woman question. Thus, even as I recognise the value in extending this discussion to colonial-India, I will be focussing on the women's movement as it unfolded against the backdrop of substantive rights and freedoms guaranteed under the Constitution.

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95 In fact, caste groups may have nothing to do with Hindu religion at all. See *Abdul Kadir v Dharma* (1895) ILR 20 Bom 190; Marc Galanter, 'The Religious Aspects of Caste: A Legal View' in DE Smith (ed), *South Asian Politics and Religion* (PUP 1966) 277.

96 According to this view, caste is defined as 'a body of persons with internal autonomy and rule-making powers, but characterized neither by a fixed place in some larger religious order nor by distinctive and idiosyncratic religious beliefs or practices. It is a kind of association with its own principles of affiliation and its own internal order.' Galanter, ibid 279.

A. An Intersectional Category of Gender

Whether one considers the case of white or Black feminism, they both proceed by challenging women's exclusion or marginalisation.[97] In contrast, the breakaway point for the Indian feminist discourse was the realisation that women were in fact subordinated by their 'inclusion' in the social, economic and political life of the nation. This was because women were needed to create and sustain other edifices of caste, nation, region, class and religion.[98] Such 'inclusion' of women by appropriating their gendered identity forms the basis of feminist understanding in India.[99] Irene Geadolf captures this accurately: 'Indian feminist scholarship [has a] double focus on women's productive and subordinated role in constituting social identities informed by differences of gender, race, nation and other marked community categories.'[100]

To understand this process of production of other identities *via* gender, take the example of caste. The caste system is perpetuated through endogamy (the practice of marrying within one's caste and correspondingly proscribing inter-marriage) and is thus based on a strict regulation of women's sexuality.[101] Patriarchy controls the sexuality of Brahmin and upper-caste women by regulating it with concepts such as 'purity' and

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97 Irene Gedalof, *Against Purity: Rethinking Identity with Indian and Western Feminisms* (Taylor and Francis 1999) 183, 201.

98 See Gabrielle Dietrich, 'Women and Religious Identities in India after Ayodhya' in Kamla Bhasin, Nighad Said and Ritu Menon (eds), *Against All Odds: Essays on Women, Religion and Development from India and Pakistan* (Kali for Women 1994) 44; Gedalof (ibid) 31–32.

99 See Tanika Sarkar, 'A Prehistory of Rights: The Age of Consent Debate in Colonial Bengal' (2000) 26 Feminist Studies 601; Partha Chatterjee, 'The Nationalist Resolution of the Women's Question' in Kumkum Sangari and Sudesh Vaid (eds), *Recasting Women: Essays in Indian Colonial History* (Rutgers University Press 1990); Partha Chatterjee, 'Colonialism, Nationalism, and Colonized Women: The Contest in India' (1989) 16 American Ethnologist 622.

100 Gedalof (n 97) 178.

101 Amrita Chhachhi, 'Forced Identities: The State, Communalism, Fundamentalism and Women in India' in Deniz Kandiyoti (ed) *Women, Islam and the State* (Macmillan 1991) 163–167.

'chastity' and thereby prohibiting marriage outside caste; while at the same time using the bodies of lower caste women as sites of sexual exploitation.[102] Women thus, serve as the gateways of the caste system, through which they are in turn subordinated and oppressed.[103]

As the operation of caste confirms, gendered identities of women have been both constitutive of and constituted by other identities.[104] Thus, women in India are not just affected by their exclusion but also by their appropriated inclusion. While Western feminism had to be alerted that the 'insistence upon a subject for feminism obscures the "social and discursive production of identities,"'[105] Indian feminists began with a diametrically opposite challenge: that of delineating the gendered identity of women by analysing women's central role in the 'social and discursive production of identities.' In this sense, Butler's charge of leaving the articulation of differences amongst women to the 'embarrassed etc'[106] is not squarely applicable in the Indian context. In fact, Indian feminists had to struggle with amassing the category of women at all, from the confines of the 'unembarrassed et cetera' of caste, nation, region, class and religion. Thus, the Indian feminist movement began with nothing like a pure site of identity as 'women' but a fundamentally intersectional notion of women to begin with.[107]

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102 Vidyut Bhagwat, 'Dalit Women in India: Issues and Perspectives: Some Critical Reflections' in PG Jogdand (ed), *Dalit Women in India: Issues and Perspectives* (Gyan Publishing House 1995) 6.

103 Dietrich (n 98) 74–76; Sharmila Rege, 'Dalit Feminist Standpoint' in Rao (n 91) 94–95.

104 See Kumkum Roy, 'Where Women are Worshipped, There the Gods Rejoice' in Tanika Sarkar and Urvashi Butalia (eds), *Women and the Hindu Right: A Collection of Essays* (Kali for Women 1995) 10-28; Kumkum Sangari, 'Consent, Agency and Rhetorics of Incitement' (1993) 28(18) EPW 867.

105 Iris Marion Young, 'Gender as Seriality: Thinking about Women as a Social Collective' (1994) 19 Signs 713, 715–716.

106 Butler (n 10) 143.

107 See Lakshmi Arya, 'Imagining Alternative Universalisms: Intersectionality and the Limits of Liberal Discourse' in Cooper et al (n 6).

B. Dalit Feminism

> [B]arring in certain noteworthy exceptions, the plight of Dalit woman as such has rarely been there as a priority item on [women's movements'] agenda…One can also make similar comment on the obvious gender bias in the Dalit movement also.[108]

In an attempt to reclaim the gendered identity of women, the 'second-wave' of the Indian feminist movement beginning 1970s onwards, started by isolating women's identities from caste, region and religion.[109] Since women's identity had been historically fragmented and divided along these lines, the purpose was to reconstruct identity politics around gender.[110] This attempt to present a category of women independent of other identities translated into a form of mainstream feminism only for those saddled by gender but privileged in other ways, i.e. upper-caste middle-class Hindu women. Dalit women, who were burdened not just by gender but also by caste and class, remained absent both in theory and in the practice of mainstream feminism. Similarly, Dalit women remained absent from the revived anti-caste movement, which had also gained momentum in the 1970s.[111]

This exclusion from the contours of both Dalit and feminist movements was key to the articulation of Dalit women's position. As Guru explains, Dalit women justify the case for their separate discourse on both these 'external' (Brahminical forces regulating the issue of 'women') and 'internal' factors (the patriarchal domination within the Dalit

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108 Jogdand (n 102) xiii.

109 Avinash Dolas, 'Dalit Women and the Women's Movement in India' in Jogdand (n 102) 116–117.

110 Rao (n 91) 2.

111 It is worth reiterating that the exploration of Dalit feminism vis-à-vis anti-caste movement, in addition to the mainstream feminist movement, remains a useful project even if not undertaken here. This chapter is primarily exploring women's exclusion from mainstream feminist movements and thereby from the category or group of 'women' who are protected under gender or sex discrimination in law when they are disadvantaged by their multiple identities of race, caste, disability, age, sexual orientation, marital status, class etc.

movement).[112] Dalit feminism then emerged as a response to the 'masculinization of dalithood and a savarnisation of womanhood.'[113] ('Savarna' in Hindi can be roughly translated into English as upper or highest caste). In highlighting that Dalit women cannot be collapsed into the unqualified category of 'women' in the women's movement or 'Dalit' in the caste movement, Dalit feminism sought to create an alternate paradigm that more accurately represented and explained the realities of Dalit women. It was neither a plea for inclusion nor representation within the feminist movement but to re-examine the very core of it—of how to conceptualise the subordination of women.[114]

Dalit feminism insists on the qualitative difference between the position of upper-caste middle-class Hindu women who spearheaded the national women's movement, and their own position. Just as white women were burdened by the 'pedestal' and its implications such as lack of employment opportunities, dependency, and undervalued household work; the upper-caste middle-class women considered themselves burdened by their image as '[t]he good woman, the chaste married wife/mother, empowered by a spiritual strength.'[115] They espoused causes which related to their 'status', like dowry, divorce, property rights, issues of consent for and in marriage and enforced widowhood.[116] These did not resonate with Dalit women who were concerned about their material inequality, caste subordination and sexual oppression. As different castes may be autonomously governed by their own internal system and

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112 Gopal Guru, 'Dalit Women Talk Differently' in Rao (n 91) 80–81.

113 Sharmila Rege, 'Dalit Women Talk Differently: A Critique of "Difference" and Towards a Dalit Feminist Standpoint Position' (1998) 33(44) EPW 39, 42.

114 Dolas (n 109) 118.

115 Samita Sen, 'Motherhood and Mothercraft: Gender and Nationalism in Bengal' (1993) 5(2) Gender and History 231, 232; Kancha Ilaiah, 'Why I am Not a Hindu' in Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Stree 2009) 87.

116 Chakravarti, ibid 25.

principles, Dalit women had already begun contesting issues of status vis-à-vis Dalit men. For example, they had long before popularised marriages without priests, widow remarriage and elimination of dowry.[117] Further, in the private sphere, though Dalit women were responsible for running the household just as upper-caste women, they were neither exalted in their homes, nor were they afraid of retaliating against domestic abuse by their husbands.[118] At the same time, they always occupied the public sphere since they had to move out of their houses whether for accessing water from wells or for earning meagre wages for menial jobs. They were both ill-treated by the upper-caste women employers or house masters, and sexually exploited by the upper-caste men. In this sense, the middle-class upper caste Hindu women did not share with Dalit women the realities of their oppression; instead, they had contributed to the exploitation of their Dalit sisters.[119] Such qualitative differences in the position of Dalit women became the basis of a separate Dalit feminism in India starting in the 1980s.

Despite the interest in exploring Dalit women's disadvantage along the lines of gender and caste, India has not had test cases like *DeGraffenreid*, *Travenol* and *Hughes* to demonstrate the gap in discrimination law for addressing such disadvantage. Thus, the issue has never been legally ripe to be pursued constitutionally via the non-discrimination guarantee under Article 15. As indicated in the Introduction, the absence of this precludes further consideration of Indian discrimination law which has not squarely grappled with the intersectional question in relation to Dalit women or otherwise. A closer look at two strategic factors reveals why law never took centre stage in Dalit women's struggles.

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117 Supriya Akerkar, 'Theory and Practice of Women's Movement in India: A Discourse Analysis' (1996) 30(17) EPW 2, 12.

118 Dolas (n 109) 118–119.

119 Guru (n 112) 80–83.

As described above, Dalit women did not squarely identify with the 'status' issues being raised in the women's movement since the 1970s. Since these issues were pursued as law reform demands, Dalit feminists had grown increasingly sceptical of pursuing the legal route, which had hitherto neglected or contributed to their subordination. Issues of dowry, domestic violence, divorce and property rights brought about laws and amendments which did not touch the realities of Dalit women's existence.[120] For example, as mentioned above, Dalits had long before started and continued to oppose upper-caste practices like child marriage and dowry.[121] New laws like the statute relating to domestic violence did not address Dalit women's exploitation as domestic workers—an issue lying at the fringes of both private and public spheres and at the core of physical abuse suffered by Dalit women.[122] Further, the disconcerting issue of sexual violence against Dalit women was often degenerated into simply an issue of gender based violence without a caste dimension. The learnings from *Mathura*[123] and *Bhanwari Devi*[124] gang-rape cases are instructive.

In *Mathura*, a sixteen-year-old tribal girl had come to register a complaint against her brother who was harassing her for her relationship with her boyfriend. She was gang-raped by policemen in the police station. While the Bombay High Court convicted

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120 Dowry Prohibition Act 1961 (prohibiting the giving or taking of dowry), Protection of Women from Domestic Violence Act 2005 (an act for providing 'more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto'), Marriage Laws (Amendment) Act 1976 amending the Hindu Marriage Act 1955 (extending divorce and judicial separation provisions to Hindus), Hindu Succession (Amendment) Act 2005 amending Hindu Succession Act 1956 (allowing daughters equal rights with sons in the family property).

121 Rege (n 113) 92–93.

122 Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) 15 UPJLSC 455, 472–473. Protection of Women from Domestic Violence Act 2005 enacted to address domestic violence does not address the problem of violence against domestic workers.

123 *Tukaram v State of Maharashtra* 1979 AIR 185 (SCI) (*Mathura*).

124 *Vishaka v State of Rajasthan* 1997 AIR 3011 (SCI) (*Bhanwari Devi*).

the two policemen, the Supreme Court reversed the judgment and dismissed both the circumstantial evidence as well as the testimony of Mathura, calling it 'a concoction'[125] and 'a tissue of lies.'[126] The legal reform pursued by feminist groups related to change in evidentiary rules in rape cases but the legal debate, just like the Court, ignored the specific vulnerability of lower-caste women.[127] The systemic nature of their sexual exploitation was normalised by failing to give any attention to caste in characterising the nature of custodial and sexual violence against lower-caste women. In fact, the caste of the complainant became the reason for disbelieving and defeating her gender-based claim.

Similarly, Bhanwari Devi's gang-rape was exclusively genderised by feminists despite clear caste implications of her violations. Bhanwari Devi worked as a '*saathin*' (friend) grassroots worker employed as part of the Women's Development Project by the state of Rajasthan. As a *saathin*, she worked to convince local villagers against child marriage and had tried to frustrate the wedding of a nine month old girl in a powerful Gurjar family of her village. In retaliation she was gang-raped by upper-caste Gurjar men to penalise her for pursuing the cause against child marriage, especially as against their family. The Sessions Judge at the Distinct Court dismissed the complaint on the basis that upper-caste men could not possibly have raped a Dalit woman.[128] The issue flared up and was pursued by Indian feminists in the form of the demand for protecting

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125 *Mathura* (n 123) 817.

126 ibid 816.

127 The Criminal Law Amendment Act 1983 amended the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act with respect to the law relating to rape including custodial rape, introducing the offence of revealing the identity of a rape-victim, changes in burden of proof when the woman avers that she did not consent.

128 Shivam Vij, 'A Mighty Heart' (2007) <http://archive.tehelka.com/story_main34.asp?filename=hub131007A_MIGHTY.asp> accessed 15 July 2015.

women against sexual harassment at the workplace. While justice for Bhanwari Devi remains elusive with the appeal pending at the Rajasthan High Court twenty three years after the incident, the feminist groups expedited their relief through a public interest litigation petition in the Supreme Court of India. The apex court began addressing the petition which finally resulted in the Supreme Court Sexual Harassment in Workplace Guidelines as:

> The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action and *no further mention of it, by us, is necessary*. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate …[129]

The characterisation of the petition stemming from Bhanwari Devi's gang-rape as merely a case of sexual harassment rather than sexual assault or rape perpetrated on the basis of caste is symptomatic of the totalising overtures in feminist efforts. By pursuing her gang-rape as a broader issue of 'gender equality',[130] the feminists not only appropriated the test case which really belonged to Dalit women but also failed in fulfilling their own promise of realising gender justice for *all* women. While gender justice was pursued, it only related to middle-class upper-caste women and obliterated the specific form of abuse against lower-caste and Dalit women. Consequently, the Supreme Court Guidelines on Sexual Harassment did not specifically address the situation of Dalit women like Bhanwari Devi who were targeted not *only* because they were women but because of their intersectional identity of being female, Dalit and *saathin* workers.[131] Without directly addressing the nature of the harm involved in sexual assault and harassment against Dalit women, cases like Bhanwari Devi's continue to be

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129 *Bhanwari Devi* (n 124) 3011.

130 ibid.

131 Pinki Virani, 'Long Wait for Justice' (2001) <http://hindu.com/2001/03/04/stories/13040611.htm> accessed 30 March 2015.

mischaracterised (rape devolving into sexual harassment), disbelieved (the credence attached to Dalit women's complaints or testimonies) and ultimately discarded (dismissing the possibility that upper-caste men *can* and *do* perpetuate sexual violence against Dalit women). The feminist undertaking of Bhanwari Devi's case reveals the persisting side-lining of the intersectional nature of caste and gender in case of Dalit women. Without a dedicated focus on the nature of Dalit women's disadvantage as both a women's issue and a caste issue, their situation cannot be addressed in any sincerity.

These two cases of caste based gender violence revealed the bias of the Indian judiciary and legal feminists in reckoning with Dalit women's issues *as* a matter of both gender and caste, i.e. intersectionality. The dissonance with the mainstream feminist and legal discourse limited the possibility of addressing Dalit women's disadvantage through a discrimination claim. But even as these reasons (in addition to the slow pace of development of discrimination jurisprudence under Article 15(1) of the Constitution) may have deterred a test case of intersectional discrimination, they contributed to the development of intersectional reasoning in Dalit feminist literature.

C. Dalit Women, Black Women and Intersectionality

The discussion in the last two sections highlights the unique and shared conceptions of gender-based disadvantage—in the context of Dalit women, they faced some unique challenges associated with their position of being *both* women and Dalit; as well as shared the disadvantage associated with sexism and casteism with upper-caste women and Dalit men respectively. The exploration of substantive dimensions which explain these claims of uniqueness and sharedness adds epistemic depth to the central insight of viewing multiple identities as a function of intersectionality. This conceptual similarity between Dalit feminism and Black feminism coincides in its reference to the normative core of

intersectionality, even as Dalit feminism does not refer to it by the same name and did not extend that reasoning to discrimination law. Since the development of Black and Dalit feminism almost coincides in time, neither had an initial possibility of borrowing across continents from one another. Culminating around the 1980s, their comparable agendas as viewed three decades later, provide a useful point of departure for applying intersectionality theory to different subjects and sites. Three theoretical coincidences between the movements are critical in asserting the general applicability of the normative core of intersectionality.

First, both Dalit and Black feminists broke away from their respective mainstream feminist movements upon realising that an unqualified category of women did not adequately explain or address the position of women who were also Dalit/Black. In fact their mutual discord with caste and race movements on the one hand, and Brahminical and white feminisms on the other, is captured in their comparable slogans: 'All Men are Black, All Women are White'[132] and 'All Dalits are male and all women savarna'.[133] Hence they developed with the central insight that women's subordination cannot exclusively be explained by reference to gender, and other identities like race and caste created both shared and unique experiences in women's positions. Their common demand was for reconceptualising the way gender subordination was understood and to rewrite feminist theory from the standpoint of those who were multiply disadvantaged. Thus, like Black feminists, the demand of Dalit feminists has been for initiating an epistemological shift in feminist theory. Their demands coincide in that the feminists are

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132 Gloria T Hull, Patricia Bell Scott and Barbara Smith (eds), *All the Women Are White, All the Blacks Are Men But Some of Us Are Brave* (Feminist Press 1982).

133 Rege (n 113) 42.

asked not to speak *as* or *for* Dalit (or Black) women but to 'reinvent themselves as dalit feminists'[134] or to bring Black women from 'margin to centre'.[135]

Secondly, both the Dalit and Black feminists reject their portrayal as 'victims'. They seek to reconstruct their identities as resolute and resilient, and beyond their social roles as mothers, wives, labourers or slaves. This is in addition to being viewed as a complete whole without being fragmented into uninteractive categories of being Black, female or poor. This agenda specifically coincides with the development of intersectionality theory as asserting 'integrity' of identity. As will be argued in the next chapter, the demand for people and their identities to be viewed as a whole is key in translating intersectionality into discrimination law.

Thirdly, Dalit feminists share with Black feminists their larger goal of creating a paradigm for fighting oppression on behalf of every oppressed group and the demand for Dalit women's emancipation is for the 'emancipation of entire womanhood.'[136] As Vidyut Bhagwat remarks:

> The core of dalit consciousness is made of protest against exploitation and oppression. In short, the term dalit stands for change and revolution. *By using the term Dalit women we are trying to say that if women from dalit castes and of dalit consciousness create a space for themselves for fearless expression i.e. if they become subjects or agents or self, they will provide a new leadership to Indian society, in general and to feminist and dalit movements in particular.*[137]

The theoretical convergences in the position of Black and Dalit feminists show that the idea of intersectionality is in fact a common one—that people's experiences of disadvantage are unique and shared between their multiple and intersecting group identities. This meeting point provides the cue for extending the intersectionality

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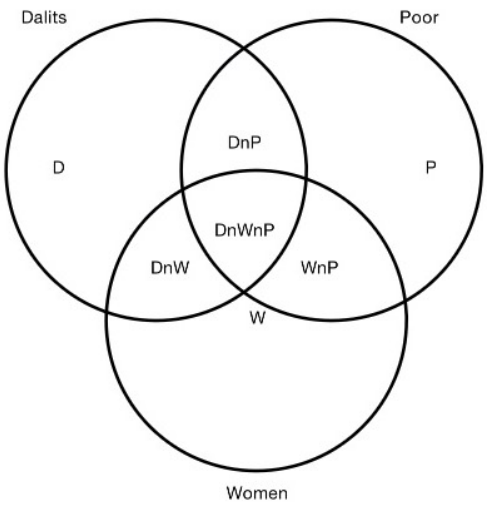
134 ibid 45.

135 bell hooks, *Feminist Theory: From Margin to Centre* (South End Press 1984).

136 Surendra Jondhale, 'Theoretical Underpinnings of Emancipation of Dalit Women' in Jogdand (n 102) 107. See also Dolas (n 109) 116.

137 Jogdand (n 102) 2 (emphasis in original).

framework for understanding the disadvantage associated with people's multiple identities more generally in discrimination law, along the lines of disability, sexual orientation, age, creed, region, religion etc. Figure 2 depicts the position of Dalit women as a Venn diagram of gender, caste and class:



[Figure 2: Discrimination Against Dalit Women]

The three spheres represent the group identities of being Dalit, poor and women. When they intersect, the pattern 'DnWnP' represents the situation of poor Dalit women in particular. But they also share disadvantage with Dalit men [D-(DnW)] and upper caste women [W-(DnW)]. Thus, the most comprehensive and accurate way of conceiving the situation of poor Dalit women is to consider the Venn diagram as a whole (DuPuW) which appreciates both unique and shared patterns of group disadvantage based on gender, caste and class. The Venn demonstrates the inadequacy of understanding categories in isolation and hence the usefulness of mapping the intersections between identities. This conceptual framework helps unravel the substantive explanations of disadvantage attached to the positions of those who are disadvantaged by multiple identities. Intersectionality theory understood as a Venn supports the explanatory

accounts of Dalit feminists in their efforts to juxtapose gender against other structural inequalities.

For each case of intersectionality, the explanations of what unique and shared patterns of group disadvantage look like will be highly specific to the identities in question and the context in which they emerge. They will also inevitably be framed by supporting works in sociology, anthropology, political theory, economics, law etc which provide evidence of the qualitative nature of intersectional disadvantage. [138] Intersectionality then fulfils a limited but significant role in providing the conceptual framework for distilling the explanations of disadvantage experienced by persons with multiple identities. This contribution can neither be underappreciated nor overstated. It is important to grasp the central normative insight of intersectionality and to proceed by supplementing it with other tools. This thesis is concerned with examining the tools of discrimination law in particular.

IV. MOVING FORWARD WITH INTERSECTIONALITY

This thesis is about translating intersectionality theory into discrimination law. The theoretical understanding which emerges in this chapter forms the normative backbone upon which this translation is meant to transpire. This part seeks to briefly consolidate the key learnings from this chapter. The next chapter continues the theoretical project by delineating the idea of 'integrity' from intersectionality theory to reinforce its importance in discrimination law. Together these components form the bipartite framework of 'intersectional integrity' which is proffered as the conceptual frame for assessing claims

138 King (n 11) 49.

of intersectional discrimination. The insights from intersectionality theory which inform this framework and the project at hand are summarised below.

A. Conceptual Framework for both Uniqueness and Sharedness

> [E]xclusion and subordination can be rationalized by both difference and sameness rhetorics, inclusionary objectives can be similarly enhanced by assertions of sameness as well as difference.[139]

The imagery of the Venn diagram captures the core of intersectionality theory: that it is both about unique and shared experiences of discrimination. Both of these have been stressed at various points in literature on intersectionality theory, but seldom together and with equal force. The contributions in Black feminist literature either come down on the side of pressing the unique disadvantage of Black women or their relevance in mainstream feminism and anti-racism movements because of what they share with them.[140] The fact that a complete statement of their position of disadvantage will have to be defined in reference to both these features often remains unarticulated.[141] But an appreciation of this point is key to working with intersectionality in discrimination law. It would avoid the conceptual errors visible in the three test cases: the *DeGraffenreid* Court denied that there was anything different in the claimant's position as Black women from the position of white women and Black men employees at General Motors; and the *Travenol* and *Hughes* Courts disputed that there was anything shared between the groups of white women, Black men and Black women and that Black women could also claim on their behalf.

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139 Crenshaw (n 2) 179.

140 Nash (n 52) 12.

141 Cf Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323.

B. Marshalling Explanatory Accounts of Causation

> Intersectional approaches look to forms of inequality that are routed through one another, and which cannot be untangled to reveal *a single cause*.[142]

The normative core of intersectionality theory beckons rich explanatory accounts of disadvantage and discrimination suffered on intersectional basis. Herein lies the critical bite of the conceptual framework: that it distils explanations of intersecting patterns of group disadvantage. The epistemic depth in marshalling qualitative and quantitative evidence of disadvantage is what gives the framework its deserved relevance. The accounts in sociology, anthropology, psychology, feminist theory, political theory, economics and other disciplines explored from the vantage point of those disadvantaged because of their multiple identities can provide germane fodder for understanding intersectional disadvantage. Without these explanations of *how* discrimination is actually caused on the basis of multiple identities, intersectionality would remain merely a rhetorical tool.

C. Intersectional Categories: Identities, Individuals, Groups and Grounds

> Recognizing that identity politics takes place at the site where categories intersect thus seems more fruitful than challenging the possibility of talking about categories at all. Through an awareness of intersectionality, we can better acknowledge and ground the differences among us and negotiate the means by which these differences will find expression in constructing group politics.[143]

Intersectionality provides a prism for understanding inequality of a particular kind—that which results from multiple intersecting identities. These identities are associated with disadvantage based on certain grounds like race, gender, sex, disability, sexual orientation,

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142 Cooper et al (n 6) 1 (emphasis supplied).

143 Crenshaw (n 39) 1299.

age, religion etc. The vantage point is specifically of individuals who belong to groups which have been subjected to specific forms of disadvantage based on these grounds. What becomes clear in this formulation is that intersectionality works with different concepts of identities, groups, grounds, contexts, relationships and the tensions between them in a complex way. As the thesis comes to discuss in Part Two, the doctrinal manifestation of the relationship between these categories can be convoluted because there is no neat transition of these categories from intersectionality theory into discrimination law. As Chapter Six argues, these tensions can be resolved by recognising the limitations in both intersectionality theory and discrimination law in working with predetermined categories.[144] The resolution lies in conceptually delineating between these categories and recognising what function each serves. At this point, it is important to stress that the purported dangers of proliferation of grounds, splintering of identities, rank ordering of disadvantage and an uncritical adoption of identity categories do not squarely materialise in discrimination law.[145] In fact, true to Crenshaw's initial promise, these categories can continue to serve as sites of mobilising identity politics of change.

D. A Universal Case

> In conceiving of privilege and oppression as complex, multi-valent, and simultaneous, intersectionality could offer a more robust conception of both identity and oppression.[146]

In making a case for recognising intersecting experiences of disadvantage, intersectionality also reveals the usefulness of examining not just identities of disadvantage but also their interaction with axes of privilege. In pointing out that white

144 See Chapter Six, Part III.

145 ibid.

146 Nash (n 52) 12.

women *have* a race, the purpose is not to undermine their experiences of sexism and patriarchy but to stress the experiential differences between white women and Black women when there may be a chasm of race separating them. Framing all experiences of disadvantage as running along *both* axes of privilege and subordination, does two things—**(i)** it exposes and addresses the incompleteness in our understanding of what constitutes discrimination; and **(ii)** it makes protection from discrimination inclusive and universal. These claims become evident as illustrated in section II.B above in reference to *Hugo* and *James*, both of which seem to struggle with (a)symmetry and the uni-dimensional focus on a single ground of discrimination. Part Two of the thesis reinforces this point that the choice of viewing discrimination as running only along a single axis of disadvantage may not actually be normatively indefeasible. The case law then verifies that making a universal case for seeing all discrimination as intersectional can be both plausible and advantageous.[147]

CONCLUSION

This thesis uses intersectionality theory with the purpose of redressing individual disadvantage when suffered on the basis of multiple group-identities associated with grounds of discrimination. Intersectionality walks this fine line between using categories (viz. gender) critically and embedding them with experiences of difference based on other categories (viz. race, caste, class, religion, disability, sexual orientation etc). This simultaneous focus lies at the heart of intersectionality theory and in turn of the concept of intersectional discrimination.

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147 See esp *Hugo* (n 50) discussed in Chapter Three, III.B.2.

This chapter sought to lay the theoretical foundation for the thesis by tracing the origin and normative boundaries of intersectionality theory. The purpose was to demonstrate the possibilities in employing intersectionality to explicate the positions of other persons with intersectional identities, beyond the original context of Black women in the United States. The mapping of the unique and shared patterns of group disadvantage in relation to Dalit women's position demonstrates the kind of explanatory accounts required to support an intersectional claim. The chapter has also defended this normative core of intersectionality by responding to some of the key critiques of the theory which have emerged in the 'post-intersectionality' literature. In the next chapter, I argue that this normative core be supplemented with the idea of 'integrity' and thus form a part of a conceptual framework of 'intersectional integrity' informing intersectional discrimination. Together these two chapters provide the framework against which comparative doctrine is to be tested in Part Two of the thesis.

CHAPTER TWO

A FRAMEWORK OF INTERSECTIONAL INTEGRITY

INTRODUCTION

> Intersectionality can be used to analyse law, in particular anti-discrimination law, to unpack the material and discursive effects of legal identity categories on socially constituted subjects. A cluster of arguments emerge here around the *inadequate recognition of the complexly situated subject* by various lawmaking or law-enforcing bodies or policy initiatives. The type of analysis then takes the following form: a subject might encounter the law, or the state, only to find that her experiences of inequality do not fit the dominant model. These analyses not only point to the repressive or coercive functions of top-down power, they also signal the exacerbation of hierarchical power relations through *law's failure to recognise the subject's full identity, position or the complexity or messiness of her experiences.*[1]

The claim that discrimination law may have failed in reckoning with the *full identity* of an intersectional claimant is the starting point of all projects for recognising intersectional discrimination. The claim further devolves into consideration of more substantive failures in discrimination law which are to do with: discounting the meaning of intersectionality, limiting the number of grounds in a discrimination claim to one, failing to interpret the nature of intersectional harm broadly or having a constellation of factors to read in analogous grounds, imposing an unreasonable burden of proof on claimants or abating the standard of review for intersectional claims. These issues are considered in relation to comparative doctrine in Part Two of the thesis. This chapter complements its predecessor by distilling another key demand of intersectionality theory—of appreciating individual integrity in discrimination law.

The first chapter delineated the core of intersectionality theory as highlighting the unique and shared patterns of disadvantage based on people's personal characteristics. Its

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[1] Davina Cooper, Didi Herman, Emily Grabham and Jane Krishnadas (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 2.

real thrust lies in rejecting unidimensional views of people's experiences when they belong to more than one disadvantaged group. Intersectionality insists that people's personal characteristics be neither broken down into isolated compartments nor lumped together. Thus, the complete version of the claim is that intersectional disadvantage associated with multiple identities is appropriately understood when their *unique and shared* aspects are considered *as a whole*.

This chapter delves deeper into the claim that intersectionality insists on viewing people's identities *as a whole*. The abiding insistence on this premise is visible not just in intersectionality theory but also identity theory, disability law and discrimination law. I take this common thread to represent a normative fidelity to the idea of 'integrity' in relation to individual identity. Using integrity's semantic meaning and its development in the context of disability law, I take its essence to be affirming the wholeness of people's identities. I argue that this understanding of integrity is critical to the account of intersectional discrimination. It explains the importance of treating a claimant's intersectional identities in discrimination law as a complete whole for both diagnostic and expressive reasons—i.e. to accurately understand and address the treatment being complained of and also to understand what messages such treatment conveys about intersectional identities. Together with the core of intersectionality theory described in Chapter One, integrity will serve as the bipartite backbone for the conceptual framework of intersectional discrimination. It is against this framework that the doctrinal treatment of multi-ground claims in discrimination law will be evaluated in Part Two of the thesis.

There are two preliminary points to note regarding the approach in this chapter. First, the proposal that integrity elucidates what is at stake in intersectional discrimination does not need to meet a standard for establishing integrity as a separate right in the Hohfeldian sense. Given the existing formulations of the right to integrity, it could well be the case that right to integrity is itself a separate and also a related right to the right to

non-discrimination. But a justification of the right to integrity is beyond the scope of this thesis. It is also unnecessary in that the appeal to integrity is seen as deriving from the concept of intersectionality itself and can thus be considered relevant as a foundational value in human rights and identity politics generally. It is in this loose sense that I seek to show how it can support intersectional claims in discrimination law in two ways. First, it explains the importance of treating the unique and shared aspects of group disadvantage together for appreciating an intersectional claim fully and accurately. Secondly, it constitutes a wrong in itself when an intersectional claim fails to treat a claimant as a whole. Integrity then is offered as forming a part of the 'inner morality' of intersectional discrimination in Fuller's terms, to explain what exactly is conceptually salient in an intersectional claim.[2] So this account is not a complete statement of the usefulness of integrity as a value or a right in discrimination law generally. The scope is much narrower: it relates to explaining the normative appeal of the idea in an account of intersectional discrimination.

Secondly, a word about the range of materials used to cull out the core of integrity is necessary here. This chapter delineates the core of integrity from the particular instances in which it has developed. It pieces together the instances from four sources—semantics, intersectionality and identity theory, disability law, and discrimination law to arrive at a common core of integrity. The legal sources include both primary sources from legislation and case law, as well as, academic commentary. The assortment of standpoints and sources represents the ubiquity of the concept for affirming wholeness of people's identities. This treatment is in line with the discursive

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2 Waldron also posits a similar kind of relationship between dignity and the internal and external aspects of law. See Jeremy Waldron, 'Dignity, Rank and Rights' Tanner Lectures on Human Values (2009) <http://tannerlectures.utah.edu/_documents/a-to-z/w/Waldron_09.pdf> accessed 9 June 2015; Lon L Fuller, *The Morality of Law* (YUP 1964).

materials and methodology used in the thesis to appreciate the full wherewithal of intersectional discrimination.

This chapter is divided into four parts. **Part I** begins by extracting the integrity basis of identity and intersectionality theory. It then uses the meaning of integrity as wholeness of identity to confirm the natural upshot of this demand. **Part II** explores the development of integrity in disability law, especially in the development of the right to integrity in Article 17 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)[3] and confirms that the sense in which the term is invoked seeks to protect the wholeness of disabled identity. **Part III** proceeds to extrapolate the common core of integrity from these strands into discrimination law. This part explains what a breach of integrity in discrimination law could look like in intersectional claims. I argue that a breach of integrity involves both diagnostic and expressive losses of neither being able to understand the nature of intersectional discrimination when the claimants' identities are not considered as a whole, nor appreciating the kind of messages such treatment can convey about intersectional identities. These losses can ensue either through the discriminator's treatment or policies (and their effects on the claimant) or in the adjudication of intersectional claims. Finally, I address integrity's relationship with dignity as one that cannot be subsumed within the conceptual realm of latter. **Part IV** restates the emerging conceptual account of intersectional discrimination from the discussion in Part One of the thesis.

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3 Adopted by General Assembly on 24 January 2007 (A/RES/61/106).

I. INTEGRITY IN INTERSECTIONALITY

This part begins by outlining the concern with treating multiple identities in an intersectional claim in ways which are inconsistent with the demand of integrity (Section A). It then proceeds to delineate the demand for integrity in intersectionality and identity theory (Section B). The meaning of integrity from this survey is confirmed by the semantic and etymological roots of the term (Section C).

A. The Concern

If one takes apart each component of a ship and puts it back together with different components, would she revert to the original or end up creating a different version of the first ship? The philosophical puzzle of the Ship of Theseus has raised interesting questions about the nature of identity for generations after its Greek inventors. How is identity constituted? What is its relationship with its components? What kind of treatment of the components retains the original sense of identity? The reference to this ancient philosophical conundrum is a useful starting point to highlight the complexity in defining identity in relation to its constituents. Intersectionality, as a theory of identity, seeks to explain people's identities as a matter of unique and shared aspects of their personal characteristics.[4] The question that arises is how should we treat the composing units of personal identity (viz. race, caste, sex, gender, age, disability, sexual orientation

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4 This is though only one way of characterising intersectionality. Other classifications would be of intersectionality as a *theory* of disadvantage, as a *methodology* for understanding disadvantage, or as a *jurisprudential tool*. It is hard to make a case that it is *only* a theory of identity but it is safe to say that intersectionality as it developed in discrimination law worked with *identities* rather than *grounds* in discrimination law. The difference being that although both are concerned with disadvantaged identities, intersectionality would be more generous in its consideration of identities which qualify than the grounds recognised under discrimination law.

etc) so as not to disintegrate the sense of whole? This chapter seeks to test the premise of this line of inquiry, i.e. the emphasis on treating something as a whole in order to appreciate its identity.

The Theseus paradox emerges in intersectionality theory because of its concern over how to treat claimants with multiple group-identities in an intersectional claim. As seen in the previous chapter, the concern seems to arise from the treatment of intersectional claims which seems to be visibly short of speaking to the whole identity of the claimant. The distortion of the claimant's identity can be attributed to forms of conceptualising intersectional claims as a matter of additive, multiple, combination, overlapping, compound or substantially single-ground discrimination. None of these approaches, popularly pursued in discrimination law in responding to claims based on more than one ground, resemble intersectionality. One of the reasons for this conceptual casualty is the foundational misunderstanding in approaching these claims in ways which are inconsistent with the demand of integrity. These erroneous or inadequate approaches look thus.

Additive discrimination relies on the idea that multiple identities in a discrimination claim be added together to understand the resulting nature of disadvantage—such that the net discrimination suffered, say, as a Dalit woman is a sum of discrimination suffered as a woman and as a Dalit. It is evident why this approach is at odds with intersectionality. Its mathematical rendition of multiple identities is qualitatively different from the result of considering intersectionality as a Venn diagram, i.e. as unique and shared patterns of group disadvantage.[5] In the same vein, other multiplicative understandings invoked by dual, double, or triple (and so on)

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5 For a critique of additive discrimination, see Sandra Fredman and Erika Szyszczak, 'The Interaction of Race and Gender' in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of the Law* (Mansell 1992); Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 OJLS 65.

discrimination are unhelpful in unravelling the nature of intersectional claims.[6] Similarly, the idea of combination discrimination is used to convey some concoction of discrimination based on two or more grounds (but often confined to two grounds only).[7] The formula is not mathematical but it is still imprecise in explaining in what way the identities come together to produce the intersectional disadvantage complained of.

On the other hand, the term 'overlapping discrimination' is often used in the same breath as intersectional discrimination but there are evident differences between the two.[8] The idea of an overlap means that discrimination could be described as one *or* the other such that a claim of race and sex discrimination could be imagined as spheres of race and sex discrimination separately and relating to one another as moving tectonic plates, lying on top of one another or colliding and coming apart.[9] Such a treatment of an intersectional claim would ostensibly fail in appreciating the unique and shared characteristics between race and sex discrimination because it would consider claimant's race and sex separately rather than together. The terminology of 'multiple discrimination' is used in the same sense where discrimination is based on more than one ground, but

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6 Though it is important to note that everyone who uses this terminology may not be employing a mathematical formula for understanding the intersections of group-identities. For example, see Peter Blanck et al, 'Defying Double Discrimination' (2007) 8 Georgetown Journal of International Affairs 95; Bernard Duhaime and Josee-Anne Riverin, 'Double Discrimination and Equality Rights of Indigenous Women in Quebec' (2011) 65 University of Miami Law Review 903.

7 This approach is characteristic of the US discrimination jurisprudence which limited intersectional discrimination to 'sex-plus' and 'race-plus' categories. See *Judge v Marsh* (1986) 649 F Supp 770. The Equality Act in Section 14 also limits combination discrimination to two grounds.

8 *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (SCC) 582 (Lamer CJ); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) [34] (Nkabinde J), discussed in Chapter Three, III.A.2. This is different from discrimination being based on one *or* the other ground exclusively (which is not combination then) but that discrimination is seen as being possibly based on *either* of the grounds. A typical case of this kind would be *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC), in which the majority judgment of the South African Constitutional Court sees the failure of a school uniform policy in accommodating a young girl wearing a nose ring to be a matter either of her religion or culture without a strict demarcation of the boundaries between the two.

9 Mary Eaton, 'Patently Confused: Complex Inequality and *Canada v. Mossop*' (1994) 1 RCS 203, 231.

individually. Thus, it has to be proved in succession based on each ground one after the other.[10]

The terminology of compound discrimination, although used rather broadly, is mainly used for claims where two or more grounds combine together to form a compound ground.[11] The *DeGraffenreid* Court's interpretation of the claim based on race and sex discrimination to be a demand for recognition of a 'super category' of Black women per se is characteristic of this.[12] While some intersectional claims may indeed be responded to by conceiving a compound ground like 'aboriginality-residence' comprising of aboriginal status and residence,[13] this may not be necessary in all cases. This category would be overly restrictive in responding to other claims where two group-identities do not necessarily reflect a new *category* of identity or ground per se.

Finally, two other forms of discrimination have emerged in discrimination doctrine: substantially single-ground discrimination and synergistic discrimination. If we imagine a spectrum of responses of the treatment of claims based on multiple identities, then these two forms lie at opposite ends. The first of these, discrimination being considered as based substantially on a single-ground is but a version of single-axis discrimination. This is a typical way of seeing a claim which involves two or more grounds, especially in South African discrimination law.[14] The difference lies in the fact that there is some acknowledgement of the fact that another group-identity is relevant in

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10 For example, see *Bahl v The Law Society* [2004] EWCA Civ 1070 (UK Court of Appeal), discussed in Chapter Three, III.A.1.

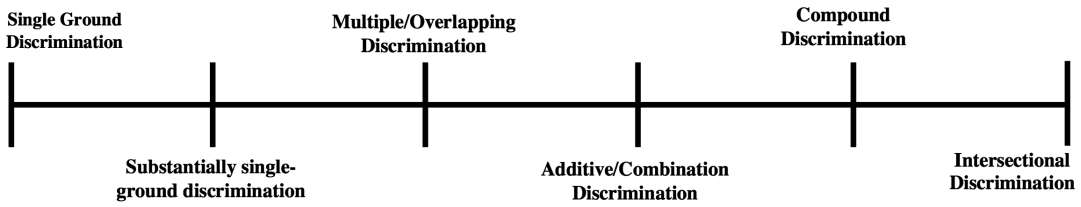
11 Elaine W Shoben, 'Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination' (1980) 55 NYU Law Review 793.

12 Though it is useful to note that the Court disagreed that race and sex could be the basis of a single claim at all.

13 *Corbiere v Canada* [1999] 2 SCR 203 (SCC), discussed in Chapter Three, III.A.3.

14 Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397, 420.

the experience of discrimination but it is still seen as being *substantially* a product of a single ground only.[15] On the other hand, synergistic discrimination is just another name for intersectional discrimination.[16] A spectrum of these responses looks thus:



[Figure 1: Spectrum of Judicial Choice in Multi-Ground Claims]

The furthest right represents intersectional discrimination while each response to the left moves away from this category in different degrees.[17] Two things are important to note here: first, each jurisdiction may choose to call these categories by different names. For example, multiple discrimination may actually refer to intersectional discrimination or combination discrimination. But the difference being highlighted here is more than just of phraseology and the typology should then refer to the actual meaning of discrimination being conveyed by that category rather than the name. Secondly, each form represents treatment of multiple-identities which is not on all fours with intersectional discrimination, albeit in varying degrees. But what does the discomfort with treating multiple group-identities as distinct from one another, or related to one another in a mathematical sense or being wholly unrelated to one another convey about the treatment of such identities? In other words, what is it per se about the

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15 See esp *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), discussed in Chapter Three, III.B.1.i.a.

16 Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) UCLF 139; Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 140.

17 The comparative doctrine is traced along this spectrum in Chapter Three.

treatment of identities in intersectionality that represents the normatively accurate standpoint of working with multiple group-identities? A careful perusal of intersectionality theory shows that the justification lies in its insistence on the treatment of claimant's identities as a whole, i.e. an emphasis on individual integrity in a claim of intersectional discrimination, which remains absent in other approaches to multi-ground claims.

B. The Demand

> I have a similar reaction as a woman with disability (visual impairment due to Albinism). I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me. I do not fit into discrete boxes of grounds of discrimination. Even when only one ground of discrimination seems to be relevant, it affects me as a *whole* person.[18]

Pothier is insisting on the indivisibility of her group-identities in explaining her experience of discrimination. This idea of 'integrity' of identity, though not always referred as such, is widely dispersed throughout intersectionality literature. A common articulation of integrity of identity is 'the state of being "undivided, an integral whole"'[19] and treating the individual as a 'single-unified agent'.[20] In explaining the integrity of identity, Eileen Hanson has remarked: 'Integrity of the whole preserves personal identity when a reductionist view, resting on particular characteristics of a person, might not achieve as easily.'[21] She continues further:

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18 Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 CJWL 39, 59 (emphasis supplied).

19 Lynne McFall, 'Integrity' (1987) 98(1) Ethics 5, 7.

20 Christine M Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (OUP 2009) 7.

21 Eileen Hanson, 'Integrity and Identity' (1996) 6 Macalester Journal of Philosophy 19, 28 (emphasis supplied).

> A proper conception of persons, and one which will be helpful in determining identity, cannot be held if the interconnection of experiences is ignored. To remove or displace one aspect of experience brings with it many connections within a person. An "integrity" view of personal identity best captures the complexity of persons.[22]

Hanson's view on integrity might seem presumptively double-edged at first blush. In one way it asks us to be nuanced and complex in our view of identities. This essentially requires us to study aspects of identities and their interactions closely and perhaps also disparately, analysing the constituent group-identities for their individual and associated impact. In another way, it asks for a holistic view of identities by pressing on integrity. But it is exactly this double-edged character of integrity which is meant to be underscored in intersectionality theory. It emphasises both a view which is complex and complete at the same time. As Hanson remarks: "'[i]ntegrity" recognizes the nature of personal experiences as interconnected and interrelated events.'[23] Integrity supports complexity by providing the lens of completeness for viewing it—of individual, shared and unique features of constituting group-identities and as a whole. This prevents intersectional identities from being fractured or lumped together and ultimately distorted.

It is in this way that the writings on intersectionality refer to integrity as a centrepiece which enjoins the otherwise discursive treatment of identity within the theory. Intersectionalists are aware of the possibility that the multiple and intersecting identities of individuals may create an impression that identities can be viewed in a fragmented way. Accordingly, integrity is relied upon to emphasise the importance of viewing the discursive nature of intersectional identities *as a whole*. This simultaneous emphasis on intersections and integrity marks the distinctive viewpoint of intersectionality. Both these understandings then serve as pillars for constructing the conceptual edifice of intersectional discrimination.

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22 ibid 29.

23 ibid 19.

Thinking in terms of a Venn diagram helps us understand that intersectionality does not function as isolated individual sets but views the result of intersecting sets of identity as a composite whole. For example, a Black woman can only be seen in her complete self as a whole person even though she shares experiences of racism and sexism with Black men and white women respectively. Singular, additive or multiplicative reasoning can unfairly and artificially fragment complex identities, allowing people to only be either one or all at a time—neither of which represents their real position. As Grillo remarks: '[t]his fragmenting of identity by legal analysis, a fragmenting entirely at odds with the concrete life of [a] woman, is the subject of the intersectionality critique.'[24] Thus, any mathematical rendering which distorts the qualitative significance of wholeness of intersectional identities will not correspond with the theory. Wing explains this eloquently: '[T]he experiences of black women…might reflect the basic mathematical equation that one times one truly does equal one…[Their] experiences…must be seen as multiplicative, multi-layered, *indivisible whole*.'[25] So even as a single discriminatory act may impact a claimant based on many personal characteristics—of gender, race, sexual orientation, class, disability or age, intersectionality insists on accounting for individual group-identities *within* the composite identity of the claimant. The sense of an indivisible whole grounds the intersectional perspective which insists on tracing multiple identities along these multi-faceted lines.

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24 Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (2013) 10 BWLJ 16, 17.

25 Adrien Katherine Wing, 'Brief Reflections toward a Multiplicative Theory and Praxis of Being' (1990-1) 6 BWLJ 181, 182, 200 (emphasis supplied).

C. Linguistic Corroboration

The impression of integrity as wholeness of identity can be corroborated with a semantic and etymological survey of the word 'integrity.' This is useful because the meaning of integrity I seek to import in intersectional discrimination is essentially the popular semantic sense of using the term to refer to completeness or wholeness of the identity of an object or person.

The first listed meaning of 'integrity' in Oxford English Dictionary defines it as: 'a. The condition of having no part or element taken away or wanting; undivided or unbroken state; material wholeness, completeness, entirety; b. Something undivided; an integral whole.'[26] The second and third meanings denote material and moral impressions of the term referring to the condition of being uncorrupted or unimpaired in form, and to soundness of moral character.[27] It is the first sense in which I invoke the term. In the present context of discrimination against persons with multiple and intersecting identities, I take integrity to denote a sense of wholeness of identity despite its complex makeup.

The etymology of the word suggests that its first meaning circa 1400 was in relation to moral integrity of a person's blamelessness, innocence and purity. The more popular sense of 'wholeness' seems to have appeared later from the word 'integer' (whole) in mid-15 century which conveyed a sense of 'wholeness, perfect condition'.[28] The idea of integrity as conveying the entire, undivided form of something has since

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26 Oxford English Dictionary, 'Integrity' <http://www.oed.com/view/Entry/97366?redirectedFrom=integrity#eid> accessed 9 June 2015.

27 ibid.

28 ibid.

been an established semantic impression of integrity. Integrity thus represents the idea of undiminished wholeness and completeness of identity of a particular object. This popular meaning is what is central to intersectionality theory and thus needs to be translated into the conceptual framework of intersectional discrimination.

II. INTEGRITY IN DISABILITY

In human rights law, especially within international law, integrity had been traditionally recognised as a value underpinning the right against violence, torture and inhuman or degrading treatment and the right to privacy.[29] It is explicitly recognised as a right itself in Article 4 of the African Charter on Human and Peoples' Rights which combines the right to life with the right to personal integrity; Article 5(1) of the American Convention on Human Rights which grants to every person the right to have his physical, mental, and moral integrity respected; and the European Union Charter of Fundamental Rights which recognises in Article 3 the general right to integrity of the person. The right to personal integrity in these instruments represents a 'fairly broad right'[30] which may not be exhausted within the specific instances in which it has been traditionally invoked. Take for example Article 3 of the EU Charter. While the text provides specific instances of violation of the right in the medical sciences context (viz. eugenic practices, cloning etc), it does not expand on the general guarantee beyond the affirmation that: 'Everyone has the right to respect for his or her physical and mental integrity.' The explanatory notes on

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29 Universal Declaration of Human Rights (1948) GA Res 217A (III), UN Doc A/810, 71, art 5; International Covenant on Civil and Political Rights, 999 UNTS 171, art 7; European Union Charter of Fundamental Rights, 2000/C 364/01, art 3 (EU Charter); American Convention on Human Rights (1969) 1144 UNTS 143, art 5.1 (American Convention); African [Banjul] Charter of Human and People's Rights (1982) 21 ILM 58, art 4.

30 Commentary of the Charter of Fundamental Rights of the European Union (2006) 36–37 <http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf> accessed 9 June 2015.

draft Article 3 specifically relate to eugenic practices and compliance with Convention on Human Rights and Biomedicine, and in particular possible situations of violations like sterilisation, forced pregnancy, compulsory ethnic marriage etc.[31] The focus of the provision seems very much on bodily integrity. However, the general guarantee of integrity is taken to be 'phrased in very broad and inclusive terms…and it applies to a much wider range of cases than the very specific ones listed [therein].'[32] The justification of the universal appeal to integrity in human rights thus remains buried within the general formulation. It is then useful to explore the full wherewithal of integrity to confirm its expansive foothold.

Disability law offers an apposite testing ground for this purpose. The CRPD in Article 17 guarantees persons with disabilities 'the right to respect for his or her physical and mental integrity on an equal basis with others.' In line with the ordinary meaning of the term and its invocation in identity and intersectionality theory, the right to integrity for disabled persons conforms to the conceptual appeal of integrity as being about complete or whole identity.[33] However, Article 17, just like other guarantees of integrity, is itself textually sparse in highlighting this generalist meaning. There is also lack of specific commentary and legal developments elucidating its meaning. The drafting history of Article 17 does not indicate a conclusive agreement on the meaning of integrity. But it does provide some indication as to the widening of the scope of integrity from its context-specific application to torture, forced treatment and institutionalisation,

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31 Draft Charter of Fundamental Rights of The European Union (2000) Charte 4473/00 Convent 49.

32 Gabor Attila Toth, *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEUP 2012) 164.

33 I will use the term disabled persons instead of persons with disabilities since it is considered consistent with the social model of disability which sees disability as produced in interaction with social barriers, and not as something inherent in people themselves. See Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34 Syracuse Journal of International Law and Commerce 563.

to an appeal to a broader value of integrity as such. This appeal to protecting the identity and personhood of disabled people can be inferred from the evolution of the proposed draft text on right to integrity under the CRPD.

The preparatory materials in the form of discussions of the Ad Hoc Committee ('the Committee') which was appointed for drafting the CRPD, indicate a delicate shift in the form and content of the right from protecting only physical and psychic integrity to protecting the disabled identity. An initial conceptualisation of integrity in the first session of the Committee was found in the draft Article 9 which related to different forms of violence like torture, cruel, inhumane or degrading treatment.[34] The participants vehemently argued for the inclusion of prohibition against forced medical intervention (viz. treatment or institutionalisation without consent) since it was also seen as a violation of integrity. Draft Articles 11 on freedom from torture and 12 on the freedom from violence and abuse were also described as alluding to the value of integrity, but did not refer to integrity explicitly in their text. Integrity was also seen as one of the founding values of the instrument, along with autonomy, self-determination and dignity.[35] As a general value, integrity was understood as protecting the diversity of disabled persons and the right to be different without prejudice.[36] An early enunciation of personal

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34 'Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities' Working Paper by Mexico (2002) <http://www.un.org/esa/socdev/enable/rights/adhocmeetaac265w1e.htm> accessed 21 July 2015.

35 'Bangkok Draft: Proposed Elements of A Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities' (2004) <http://www.un.org/esa/socdev/enable/rights/bangkokdraft.htm> accessed 21 July 2015; 'Compilation of Proposals for Elements of a Convention' (2004) <http://www.un.org/esa/socdev/enable/rights/comp-element2.htm> accessed 21 July 2015.

36 Robert Martin and Klaus Lachwitz, 'Some Reflections regarding the Preparation of a Comprehensive and Integral Convention on the Promotion and Protection of the Rights and Dignity of Persons with Disabilities' Inclusion International (2003) <http://www.un.org/esa/socdev/enable/rights/wgcontrib-inclintl.htm> accessed 21 July 2015; Contribution by World Network of Users and Survivors of Psychiatry (2003-2004) <http://www.un.org/esa/socdev/enable/rights/wgcontrib-wnusp.htm> accessed 21 July 2015.

integrity was also specifically linked to non-discrimination with respect to sexual relationships, marriage and parenthood.[37] This discursive engagement with integrity continued until the fourth session, when the Committee concluded a first reading of the draft text of the CRPD.

At the fifth session, following consultation with other delegations, Liechtenstein 'proposed inserting more generic language, dealing with the integrity of a person, which [was] also a general principle.'[38] This was done in appreciation of the fact that while torture and violence now had provisions dedicated to them, the instance of forced medical interventions was too specific to be made the entire content of integrity and was also too related to right to health which had a separate provision as well.[39] This suggestion seems to have been inspired by the EU Charter and the American Convention.[40] Thus, the language of 'mental and physical integrity' was proposed with a sense of embodying a broader, more general content of integrity. However, now that torture, violence and forced interventions had found independent articulations, there was considerable interest in demystifying the contours of integrity. The Committee flagged this 'conceptual issue' which it intended to take up later in the course of deliberations but did not in fact return to it. It was simply referred to the translators for clarification.[41] The conceptual content of integrity was thus never truly settled upon beyond the splintered remarks which indicate that the reliance on the value of integrity and the specific right

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37 'Equal Rights for All', Coalition of Individuals, Organisations and Agencies of the People, for the People and by the People with Disabilities in Eastern Europe (Ukraine, Russia, Belarus, Moldova and Poland) (2004) <http://www.un.org/esa/socdev/enable/rights/wgcontrib-EastEurope.htm> accessed 21 July 2015.

38 CRPD Ad Hoc Committee, Fifth Session (2005) <http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm> accessed 6 June 2015.

39 ibid.

40 EU Charter, art 3; American Convention, art 5.1.

41 CRPD Ad Hoc Committee, Fifth Session (2005) <http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm> accessed 9 June 2015.

itself conveyed a much broader understanding than the specific examples which hitherto were defined by reference to integrity (torture, violence and forced interventions).

By the end of seventh session, the Committee had settled on this text: 'Every person with a disability has a right to respect for his or her physical and mental integrity on an equal basis with others.'[42] The shortening of the provision seems to have been widely supported and indicates that there was a residual meaning of integrity which was being alluded to in this right after siphoning of torture, violence and medical interventions to other provisions. In fact, the underlying premise for protecting disabled people against forced treatments, violence and torture too was of protecting the disabled identity.[43] The fear that forced interventions seek to change the disabled identity by imposing a standard of the non-disabled can be seen as a serious violation of integrity. Thus, integrity asserts the importance of seeing the disabled life as complete and fulfilling and conversely, confronts the negative stereotypes of disability as abnormal and deficient. So even as bodily and mental integrity remain at the forefront of integrity, the material sense in protecting a person's whole identity lies well within the generalist formulation of this right. The trajectory of deliberations over Article 17 of CRPD point to a general and broad appeal to integrity without necessary reference to other related values and rights. This residual content is of affirming the disabled life and identity. This is confirmed in the UK Equality and Human Rights Commission's interpretation of Article 17 as: '[integrity] means that disabled people's minds and bodies are their own.

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42 CRPD Ad Hoc Committee, Eighth Session (2006) <http://www.un.org/esa/socdev/enable/rights/ahc8gpcart17.htm> accessed 9 June 2015.

43 International Disability Caucus Draft Proposal on 'Article 11: Freedom from Torture or Cruel, Inhuman or degrading Treatment or Punishment', CRPD Ad Hoc Committee, Fifth Session (2005) <http://www.un.org/esa/socdev/enable/rights/art11draft.htm> accessed 21 July 2015.

No one should ever treat a disabled person as less of a person or interfere with their minds and bodies. People have the right to be respected by others *just as they are*.'[44]

The recognition of identities for what they really are is significant. Viewed as insufficient and lacking, disabled people seek to fight the negative portrayal of their identities by substituting it with a positive assertion of the disabled body and life as complete. The language and meaning of integrity undercuts the notions of disabled life as incomplete, abnormal, or deficient. It allows a disabled person to affirm her identity as a whole person. Thus, integrity guarantees the space for asserting respect for bodies and lives dissimilar to your own.[45] It undercuts the pejorative and patronising way of looking at others and gives voice to the richness in human condition and experience, specifically by valuing disability and disabled life. At its core, it allows for breaking through the essentialist prism of 'normal' and provides a lens for respecting identities which are complex and diverse. The reliance on integrity to affirm the wholeness of people's identities in the context of disability law illuminates the importance of extending its appeal to other personal characteristics, especially when they intersect.

III. INTEGRITY IN INTERSECTIONAL DISCRIMINATION

This part extends the demand of integrity from the contexts considered above to the domain of discrimination law. I have delineated a generalist meaning of integrity from its specific instances of development in semantics, identity and intersectionality theory, and disability law. The common claim in all this literature is the emphasis on considering

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44 'A Guide to the UN Disability Convention', Equality and Human Rights Commission <www.equalityhumanrights.com/human-rights/human-rights-practical-guidance/guidance-from-the-commission/a-guide-to-the-un-disability-convention/part-2-know-your-rights/article-17-protecting-the-integrity-of-the-person/> accessed 21 July 2015.

45 See Leslie Fiedler, *Freaks: Myths and Images of the Secret Self* (Anchor 1993).

people's identities as a whole. It is this generalist claim of integrity that provides the foothold for the edifice of intersectional discrimination.

Juxtaposed against the right to non-discrimination, the demand for integrity can be translated as the requirement for treating claimants' identities as a whole in an intersectional claim. The breach of integrity in intersectional discrimination can thus be imagined in two broad ways—first, a discriminator who draws an unfair distinction or whose policies yield unfair impact may violate integrity when claimants' identities are not considered as a whole; secondly, it may be violated in adjudication by failing to consider the claimant and those in her position as whole persons in evaluating their intersectional claim. Both these instances of breach of integrity lead to diagnostic and expressive losses in discrimination law. I take them each in turn.

A. Integrity in Wrongful Discrimination

If a component of the right to non-discrimination involves protection from breach of integrity of a person, what would the breach actually entail? If an employer or legislature fail to consider all the relevant characteristics of individuals as a whole in distributing a benefit or burden, one dimension of the accruing wrongful discrimination may be described as the breach of integrity. For example, if the legislature fails to account for the specific vulnerability of Dalit women when enacting laws on sexual harassment, the failure may be one of ignoring the identities (viz. caste, religion, age, disability, sexual orientation etc) which actually inform the experiences of sexual harassment against women. The discussion in the previous chapter in relation to *Mathura* and *Bhanwari Devi's* cases is a useful reminder of this.[46] To recall, the issue of sexual violence in both cases

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46 See Chapter One, Part III.B and text accompanying nn 122–130.

was specifically genderised in seeking redress at the courts and in legislative reform. The reality of the two cases was that the women had suffered forms of sexual violence and harassment *because of* their caste and not *just* because they were women. The fact that the legislative and judicial response to Dalit women's issues was devoid of any reference to caste is then a loss which resonates with integrity in its failure to consider the full identity of the protectorate it seeks to cater.

Taking another example, in distributing social assistance, the legislature may consider only age as the relevant distributive criterion and may thus exclude those in need of social assistance not just on the basis of age but also for their gender, disability and poverty. The case of *Gosselin* represents such a claim which challenged the distributive criterion for social assistance based solely on age (above 30 years) on the basis that it did not squarely represent the nature of disadvantage associated with unemployment and socio-economic need which did not *just* devolve on age but also gender and disability.[47] The Claimant's position in *Gosselin*, that of being an unemployed poor woman who had suffered a spate of mental illness and depression, shows how gender and disability informed her experience of poverty and the consequent need for social support even though she was below 30 years of age. Thus, Louise Gosselin's personal circumstances revealed how gender and disability interacted with her age to produce patterns of disadvantage which were equally devastating but not mirrored in the disadvantage suffered by those over 30 years of age. In this case, the absence of accurate indicia for identifying those most in need of social assistance and thereby excluding them, especially those who have multiple disadvantaging personal characteristics, may be classified as the breach of integrity. It may equally qualify as a distributive injustice which perpetuates socio-economic disadvantage or a breach of dignity and equal moral worth

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47 *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 (SCC).

of individuals; but the distinctive quality of the disadvantage suffered on multiple bases because of the operation of a single-axis legislative criterion, may be specifically identified as a breach of integrity.

Moreau gives another relevant example of indirect discrimination breaching the claimant's right 'to be considered for who she is'.[48] In a challenge by deaf people to the removal of closed-captioning from parliamentary debates and the retention of sign language interpretation, Moreau explains the substance of the claim as:

> It would, I think, be that when the government was considering the impact that its decision would have on deaf people, it ought to have looked at the oral deaf *as the people they really are*, with the needs and aspirations that they really have, rather than assuming that they were 'just like' other deaf people.[49]

Following Moreau's cue, the failure to consider the totality and particularity of people's circumstances in identifying a more just and equitable criterion for making distinctions or enacting neutral policies can be classified as the breach of integrity in cases where the claimant suffers an adverse impact based on her multiple personal characteristics. It takes away the right to be treated *as you are*.[50] The criterion for identifying disadvantage should then account for intersectional disadvantage: which is produced by unique and shared patterns of multiple personal characteristics. Thus, the failure is in considering how personal characteristics interact to produce disadvantage which is shared between multiple groups but also a crosssection of disadvantage which is unique to the group defined by all the relevant personal characteristics.

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48 Sophia Reibetanz Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 JLE 81, 90.

49 ibid 89 (emphasis supplied).

50 Denise G Réaume makes a similar point in relation to 'legislative pigeonholes' in 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40 OHLJ 113.

Eidelson alludes to this particular strand of wrongful discrimination in his essay on 'Treating People as Individuals.'[51] He explains that one dimension of discrimination harm involves failing to treat people as individuals in two senses—first, in a way which recognises that they *share* their individual-ness in being human; and second in that they are both distinct and *unique* as individuals.[52] He recognises that other paradigmatic forms of wrongful discrimination include: 'those [which] express a kind of disrespect or contempt for the equal worth of those who are disfavoured'; (ii) those 'allocat[ing] opportunities unfairly, and, in doing so, entrench[ing] status hierarchies that warp our social structures'; (iii) that which can 'humiliate, stigmatize and demean.'[53] But Eidelson chooses to focus instead on what he believes is a hitherto neglected aspect in the moral case against discrimination. Eidelson explains the meaning of treating individuals as they are as:

> to treat something as an X is usually a requirement to treat it in a way that *befits* or *shows appropriate respect for* an object with that feature…the putative obligation to treat people as individuals has a familiar character. It is not a simple injunction against the use of group generalizations, but rather a norm that directs us to structure our judgments and actions in ways that appropriately recognize a morally salient fact about the people involved.[54]

This characterisation would support giving due attention to the personal characteristics of individual claimants. Neglecting those personal characteristics which are causally related to claimants' experience of discrimination is to fail in treating them as they are. The loss of this causal connection between discrimination and multiple grounds is explored in relation to comparative doctrine in Chapter Three. At this point, it is important to understand that the loss is one of failing to consider intersectional claimants

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51 Benjamin Eidelson, 'Treating People as Individuals' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 203.

52 ibid 215.

53 ibid 203, 205.

54 ibid 204.

as a whole. Eidelson describes this distinctive obligation as not just an 'injunction against the use of group generalizations, but rather a norm that directs us to structure our judgments and actions in ways that *appropriately recognize a morally salient fact about the people involved*.'[55] Intersectionality is morally significant because it transforms the nature of disadvantage suffered by the interaction of multiple grounds. While intersectionality explains the distinctive nature of such disadvantage, integrity grounds the claim for treating such disadvantage for what it is, considering it as a whole. Eidelson's account thus resonates with the idea of integrity, even as he calls it the right to be treated as an individual. In fact, his account is far broader, explaining what is wrong about single-ground claims generally. But his emphasis on unique and shared aspects of intersecting personal characteristics is a useful one in grounding multi-ground claims in intersectionality.

Thus, the right to non-discrimination, especially for those belonging to multiple disadvantaging groups or with intersectional identities, involves a duty to treat people as they are. It may involve other duties as well, viz. to not demean, disrespect, stereotype, prejudice or disadvantage others.[56] But this duty to treat people as individuals explains some cases which cannot otherwise be explained in any other paradigm, or at least not wholly so. Intersectional cases fall in this bracket, which can be particularly explained in terms of the wrong of failing to treat people as individuals with integrity, as who they are and as a whole.[57]

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55 ibid.

56 For an exposition of a broad conception of wrongful intersectional discrimination, see Chapter Five, Part I.

57 For examples in case law, see Chapter Three.

B. Integrity in Adjudication of Intersectional Claims

As Gardner observes, 'justice has a special link with adjudication, such that, while legislators, bureaucrats and government officials ought to be just *inter alia*, courts ought to be just above all,'[58] and that adjudication of discrimination claims is of particular significance in matters of justice.[59] It is then useful to consider what role integrity plays in informing judicial handling of intersectional claims. I argue that integrity's distinct contribution in adjudication of intersectional claims is its insistence on considering claimant's identities as a whole within the discrimination inquiry. Thus, another way in which integrity may be violated is when courts fail to consider the claimant as a whole by ignoring a holistic view of all the relevant personal characteristics which inform the experience of intersectional discrimination. Thus, the judicial approaches of additive, multiple, combination, overlapping or compound discrimination which distort, aggregate or disintegrate claimant's identities instead of considering them as a whole may be classified as in breach of integrity.[60]

The anxiety with fragmenting complex identities of claimants for 'fitting' a discrimination claim has troubled discrimination lawyers greatly. For example, Kropp describes this worry as: 'The tendency of the "categorical" [single-axis] approach to caricaturize members of the various categories reinforces the kind of harmful stereotyping that anti-discrimination laws are designed to work against.'[61] Similarly, according to Iyer: 'the categorical structure of equality rights requires those injured

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58 John Gardner, 'Discrimination as Injustice' (1996) 16 OJLS 353.

59 ibid 354–355.

60 For discussion of the examples in relation to these approaches, see Chapters Three and Four.

61 Douglas Kropp, '"Categorical" Failure: Canada's Equality Jurisprudence—Changing Notions of Identity and the Legal Subject' (1997) 23 QLJ 201, 229.

through relations of inequality to caricaturize both themselves and their experiences of inequality, in order to succeed with a legal claim.'[62] Réaume makes a similar point in that: 'focusing on only one of two interacting grounds of discrimination extends the pigeonholing approach beyond the drafting style of the statute to our understanding of the harm of discrimination, preventing adjudicators from seeing the whole wrong and its impact on the whole person.' [63] For example, a typical way of caricaturising/pigeonholing/fragmenting the claimant's identity is by abstracting each aspect of the identity and considering them in turn, just as a single-axis claim. As noted previously, this approach of delineating each personal characteristic of the claimant to analyse it separately and individually is characteristic of multiple discrimination rather than intersectionality. Such a fragmentation is then a breach of integrity since it 'splits' the constituting personal characteristics, rather than considering the claimant's identity as a whole.[64] Such misunderstanding of the nature of a multi-ground claim defeats a crucial purpose of discrimination law: that of appreciating and redressing disadvantage, stereotypes and prejudices *as based on* people's personal characteristics.[65] If we have to understand in what way multiple personal characteristics are linked to experiences of discrimination, we would have to consider how they transpire together as a whole in engendering discrimination, i.e. by applying intersectionality for appreciating the unique and shared patterns of intersecting group disadvantage.

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62 Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 QLJ 179, 181.

63 Réaume (n 50) 133.

64 Aileen McColgan, 'Reconfiguring Discrimination Law' (2007) PL 74, 79.

65 Several other authors have alluded to this dimension in discrimination law. For example, Macklem makes a case for 'the importance of being understood' *as a woman* in Timothy Macklem, *Beyond Comparison* (CUP 2003) 10, 192.

C. Integrity as Serving Diagnostic and Expressive Aims

The interest in culling out the demand for integrity in supporting intersectional discrimination has both diagnostic and expressive aims. The forthcoming chapters discuss in detail how these aims transpire in intersectional claims but it is useful to briefly note here the specific dimension of integrity in pursuing these aims.

A central purpose of enforcing the right to non-discrimination is to determine the nature of harm based on group-identities of the claimants.[66] This diagnostic purpose in intersectionality is served by revealing the unique and shared patterns of group disadvantage based on multiple identities. Integrity furthers the diagnostic aim in insisting that it is only when we consider claimants' identities as a whole that we will be able to identify and redress these patterns.[67] Furthermore, since expressive concerns are the gravamen of guarantees of equality and non-discrimination,[68] it is also important to note the expressive dimension of the demand of integrity in intersectional discrimination. As Sunstein opines, 'the expressive function of law does not concern itself with effects on norms…Instead, its grounding is connected with the individual interest in integrity.'[69] An expressive harm ensues when a person is treated 'according to principles that express negative or inappropriate attitudes toward her.'[70] Not to be treated *as one is* entails a

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66 For further discussion on this, see Chapter Six, III.B.

67 See Chapter Four for a discussion on *Falkiner v Ontario* (2002) 59 OR (3d) 481 (Ontario Court of Appeal).

68 Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 UPLR 1503, 1527; Deborah Hellman, 'The Expressive Dimension of Equal Protection' (2000) 85 Minnesota Law Review 1, 38–39.

69 Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 UPLR 2021, 2026; Alan Strudler, 'The Power of Expressive Theories of Law' (2001) 60 Maryland Law Review 492, 493; Matthew D Adler, 'Expressive Theories of Law: A Skeptical Overview' (2000) 148 UPLR 1363, 1364–1373.

70 Anderson and Pildes (n 68) 1527.

misunderstanding of the complete identity of the individual which informs the experience of discrimination. It can mean a discounting or ignoring of such disadvantage or at worst justification or rationalising of invidious forms of intersectional discrimination.[71] For example, multiple identities can be wholly disconsidered in the allocation of benefits which can have a direct bearing on the denial of rights.[72] In as much as justices also end up *conveying* certain inappropriate messages about those with intersecting identities, they will constitute a breach of their integrity in failing to consider their identities as a whole.[73] As judicial decisions, especially those of apex courts, are one way in which law expresses its attitude towards people's identities and disadvantage associated with them, it is important that its handling and expression of intersectional cases is befitting of people's lived experiences.[74]

D. Integrity and Dignity

One immediate concern with this account of integrity is how it relates to the much more prevalent value in discrimination law, viz. dignity, which stands for the equal moral worth of individuals.[75]At first blush integrity seems deceptively similar to dignity. They seem to overlap in their emphasis on respect for persons and their identities in discrimination law. In this sense, they don't seem to be mutually exclusive. While this seems true, I argue that the substantive content of integrity cannot all be subsumed within dignity. At

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71 For examples, see Chapter Three, esp *Volks v Robinson* 2005 (5) BCLR 446 (CC), discussed at III.B.1.ii.a.

72 For example, see *Gosselin* (n 47), discussed in Chapter Three, III.B.1.ii.b.

73 ibid.

74 Richard H McAdams, 'The Expressive Power of Adjudication' (2005) 5 University of Illinois Law Review 1043.

75 See generally Michael Rosen, *Dignity: Its History and Meaning* (HUP 2012).

best, they are related concepts and if they are, it is important to clarify the points at which they cooperate or collide.

It is useful to begin with a basic impression of dignity. Accounts of dignity have been developed extensively in theology, philosophy, political theory and law.[76] It has been particularly relevant in human rights law, in international instruments and State constitutions for providing a basis or justification of rights.[77] It has also been interpreted as underpinning people's demand for justice and to be treated as 'normative agents'.[78] In the specific context of discrimination law, dignity is invoked not just in its 'ontological' sense of insisting on the equal moral value of all individuals but also in a 'relational' sense for claiming specific kinds of treatment akin to that value.[79] Thus, it debars treating people as violable,[80] inferior,[81] less worthy,[82] second class citizens,[83] lacking self-worth,[84] or to stigmatise,[85] stereotype,[86] or disrespect them.[87] The common claim of dignity in all these formulations is dignity's moral appeal that people are owed a baseline of respect as

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76 For an overview, see Chris McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 656–663.

77 David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 2.

78 James Griffin, *On Human Rights* (OUP 2009) 152.

79 McCrudden (n 76) 679.

80 Denise G Réaume, 'Discrimination and Dignity' (2004) 63 LLR 1, 23–26.

81 Leslie Green, 'Two Worries about Respect for Persons' (2010) 120 Ethics 212, 214.

82 *Egan v Canada* [1995] 2 SCR 513 (SCC) [90] (*Egan*).

83 *Re Marriage Cases* 183 P 3d 384 (Cal 2008) 763.

84 *Egan* (n 82) [161].

85 ibid [170]; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) [48]; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [41].

86 *Harksen v Lane NO* 1998 (1) SA 300 (CC) [121]–[123].

87 Deborah Hellman, *When is Discrimination Wrong?* (HUP 2011) 27.

individuals.[88] Thus, dignity-based harm can ensue from an array of violations, viz. violence, death penalty, forced treatment etc.[89] Within discrimination law itself, dignity-based harm of not respecting people's personal characteristics may be very extensive. However, some commentators posit that dignity's contribution is primarily one of illuminating expressive rather than material harms in discrimination law.[90] Others deny that dignity is of consequence at all in discrimination law, given its indeterminate nature.[91] Whether or not its sweeping wherewithal is useful as a 'legal test' for identifying wrong discrimination,[92] it is not unreasonable to admit its wide-ranging moral appeal in discrimination law.[93]

On the other hand, the claim of being treated as a whole relates to a far more specific harm in discrimination law. Integrity means to have all disadvantaging personal characteristics to be considered together and completely rather than separately or in another fragmented or accumulated way. A typical example is of disintegrating the identity of a Black woman into being Black and female, rather than considering her as a whole in terms of her unique and shared experiences of racism and sexism. Integrity speaks to a specific set of instances relating to people who are disadvantaged based on multiple personal characteristics and how they must be treated. Dignity may relate to the Black woman's claim in that her equal moral worth may be impaired when she is treated differently from others like white women and Black men, but may not still explain what

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88 Waldron (n 2) 233–34.

89 *R v Kapp* [2008] 2 SCR 483 (SCC) [21], [22].

90 Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous nor a Panacea' (2012) 32 OJLS 1, 5.

91 Mirko Bagaric and James Allan, 'The Vacuous Concept of Dignity' (2006) 5 JHR 257, 265.

92 Donna Greschner, 'The Purpose of Canadian Equality Rights' (2002) 6 RCS 291, 316–317; Sophia R Moreau, 'The Promise of *Law v Canada*' (2007) 57 UTLJ 415, 423.

93 See Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (JUTA 2012).

is distinctive about its intersectional character. The fact that her claim can only be analysed when both her disadvantaging personal characteristics of being Black and female are considered *together* in an *intersectional* way (to appreciate the unique and shared characteristics), does a more precise diagnostic job in understanding wrongful discrimination here. It then serves to enforce the diagnostic clarity for addressing intersectional discrimination. This is in direct contrast with dignity as an account of wrongful discrimination which may not always be analytically accurate in pointing out what is wrong about discrimination in a particular instance.[94]

In another way, while dignity is accorded to individuals *despite* their personal characteristics (of race, caste, religion, gender, disability, age, sexual orientation etc) and demands for their moral irrelevance, integrity has a more positive core. Its thrust is on actually *accounting* for multiple disadvantaging personal characteristics in a way which respects their integrity. This is alluded to in Sachs J's proclamation:

> The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on *recognising and accepting people as they are.*[95]

It may well be that dignity is capable of subsuming this idea of integrity in its emphasis on protecting baseline respect for persons.[96] But so long as we are clear about the appeal of integrity defined in this way, its formal position and nomenclature in relation to dignity is negotiable. For the sake of normative clarity about the contribution of integrity in intersectional claims, it is then referred to as separate from (even if covered within) the broader concept of dignity.

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94 Chris McConnachie, 'What is Unfair Discrimination? A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence' (2014) DPhil Thesis (University of Oxford) ch 3.

95 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [134] (emphasis supplied).

96 Catherine Dupré, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 EHRLR 190, 194.

E. Summary: A Conceptual Framework of Intersectional Integrity

The discussion in the previous and the present chapter has sought to identify some necessary conceptual underpinnings for an account of intersectional discrimination, which translates intersectionality theory into discrimination law. The two key learnings of intersectionality and integrity are offered as the bipartite conceptual framework for supporting intersectional discrimination. The core of intersectionality theory can be translated into discrimination law by mapping unique and shared patterns of group disadvantage. This in turn is made possible when people's identities are considered as a whole. The conceptual offerings thus respond to Crenshaw's dissonance with the 'dominant ways of thinking about discrimination' by exploring alternate ways of thinking about discrimination law involving intersecting identities. The framework supports both diagnostic and expressive aims of discrimination law and is distinct from other values and concepts (viz. dignity) and explains what is salient about intersectional discrimination in particular.

There are two further things to note about this conceptual account. First, the identities which can be considered under intersectional discrimination will necessarily have to be related to those groups or based on grounds in a way which is characteristic of disadvantage suffered on that basis. This corresponds with the way discrimination law is structured to reflect the reality of those who suffer disadvantage associated with particular kinds of identities. While this may be considered too restrictive in responding to all kinds of status-based disadvantage and injustices people suffer, given the roots of intersectionality in discrimination law itself, the delimitation is appropriate within the project of addressing intersectionality in discrimination law. Chapter Six offers a defence

of this approach.[97] At this point, it is useful to note that not all personal *identities* (good character, taste in music, ownership of pet animals) are relevant to this account, but only those which relate to particular disadvantages associated with people's group-status (Black, woman, Muslim, disabled, young, gay etc) based on grounds of discrimination (race, gender, religion, disability, age, sexual orientation etc).[98] A second related point to emphasise is that in claims of intersectional discrimination claimants exercise a group-based individual right—that individuals are targeted or affected because of the group characteristics they possess. The discrimination is felt personally by the claimant in the first place (it may be felt by others in a similar position). But the lens through which individual claims maybe approached is one of people's group-identities. This fine balance between the individual right and its group basis is also revisited in Chapter Six, but has been generously relied upon in conceptualising the framework and in assessing comparative law in Part Two of the thesis.

CONCLUSION

This chapter identified the idea of integrity to be central to intersectionality in supporting its key purpose in discrimination law for understanding and redressing the experiences of disadvantage based on people's multiple personal characteristics. The key purpose is furthered when claimants are considered as a whole. This understanding of integrity is confirmed in intersectionality theory, disability law and in considering its semantic precinct.

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97 See Chapter Six, Part III.

98 See Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 32.

We thus return to the Theseus paradox. Responding to it from the standpoint of intersectionality theory one thing is clear: that the only way to consider the identity of the Ship is by considering it as a whole and that each distinct combination of individual parts will yield a qualitatively distinct rendering of the whole. That is the chief takeaway from intersectionality theory—that people's position of disadvantage is understood when they're considered as a whole and when all their identities are traced along unique and shared patterns of group disadvantage. This is the conceptual nucleus of intersectional integrity to be realised in discrimination law.

PART TWO

DOCTRINE

CHAPTER THREE

INTERSECTIONAL DISCRIMINATION IN COMPARATIVE LAW

INTRODUCTION

Part Two of the thesis seeks to understand how the framework of intersectional integrity transpires within the discrimination laws of three jurisdictions: South Africa, Canada and the United Kingdom. It asks two conjoint questions: how has discrimination law responded to intersectionality and how can it realise the framework of 'intersectional integrity' in cases of intersectional discrimination?

Part One sketched the conceptual framework of 'intersectional integrity' to be realised in discrimination law. This framework consists of two strands: **(i)** in the first instance, it demands an incisive explanation of the way in which multiple identities intersect with one another to create *unique and shared patterns of group disadvantage*. The resulting disadvantage or harm is imagined as a Venn diagram which reflects the nature of the intersecting patterns. This is the core insight developed from intersectionality theory which needs to be translated in an intersectional claim. **(ii)** In the second instance, the framework reminds us that the standpoint for conducting this intersectional analysis has to be one which considers the claimant as a whole without fragmenting or lumping her experience into individual personal characteristics of race, caste, gender, sex, disability, sexual orientation, religion etc. The claimant then has an interest in 'integrity' for being considered *as a whole* such that the true nature of her disadvantage is appreciated in the intersectional analysis. It is this bipartite framework of 'intersectional integrity' which is argued as providing a conceptual foundation for imagining the category of intersectional discrimination. Because intersectionalists have consistently

argued against the 'dominant conceptions of discrimination' based on a single ground,[1] this framework, inspired by the central insights of intersectionality theory and discrimination law, offers a normative alternative for understanding the nature of a claim based on multiple identities. Its appreciation in case law is then central to realising intersectionality in discrimination law. This chapter is aimed at understanding how comparative law has responded to this framework and thus addressed actual or potential claims of intersectional discrimination. The central argument is that the judicial treatment reveals a spectrum of diverse responses which can be graded according to their compliance with the framework.[2] While some judicial strategies incisively reflect this framework, others miss it by a long shot.

This chapter is divided into three parts. Before embarking on the survey of comparative doctrine, **Part I** begins with some preliminary remarks which explain the organisational themes of the comparative material considered. It also consolidates the findings from the analysis of ten judicial decisions studied in this chapter. A graded spectrum is used to denote the judicial responses based on their proximity to the end of intersectional discrimination. **Part II** gives a birds-eye view of the general schema of discrimination law in South Africa, Canada and the UK, to deduce basic principles relevant for studying intersectional discrimination. **Part III** delves into comparative doctrine's treatment of intersectionality. In all, the chapter considers ten cases, which demonstrate distinctive ways in which courts reckon with intersectionality. While *Bahl*[3] signifies an approach of multiple discrimination where each ground is to be proven

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1 Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) UCLF 139, 140. See also the discussion in Chapter One, I.A and I.B.

2 See infra II.C for the consolidation of judicial responses.

3 *Bahl v The Law Society* [2004] EWCA Civ 1070 (UK Court of Appeal) (*Bahl*).

individually, *Bhe*[4] is an example of overlapping or combination discrimination where two grounds give rise to some interactive form of discrimination. *Corbiere*[5] is a unique example where two identities come together to represent a new compound ground of discrimination. The approach in *Hassam*[6] comes close to intersectional integrity, and so does the feminist rewriting of the judgment in *Gosselin*.[7] But the majority opinions in *Volks*[8] and *Gosselin*[9] as well as the decisions in *Brink*,[10] *Gumede*,[11] *Moseneke*[12] and *Hugo*[13] exemplify different ways through which the courts land at the single-axis approach and end up tuning out the framework of intersectional integrity by sidelining the multiple identities relevant to the claims.

I. PRELIMINARIES

Three preliminary issues must be addressed at the outset: first, the sense behind organising the comparative material under the themes of causation (this chapter) and comparison (next chapter); secondly, the organisation and selection of case law; and thirdly, a consolidation of the judicial responses studied in this chapter.

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4 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) (*Bhe*).

5 *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (SCC) (*Corbiere*).

6 *Hassam v Jacobs* 2009 (5) SA 572 (CC) (*Hassam*).

7 Gwen Brodsky, Rachel Cox, Shelagh Day and Kate Stephenson, 'Gosselin v. Quebec (Attorney General) (Women's Court of Canada)' (2006) 18 CJWL 193.

8 *Volks v Robinson* 2005 (5) BCLR 446 (CC) (*Volks*).

9 *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 (SCC) (*Gosselin*).

10 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) (*Brink*).

11 *Gumede v President* 2009 (3) SA 152 (CC) (*Gumede*).

12 *Moseneke v The Master of High Court* 2001 (2) SA 18 (CC) (*Moseneke*).

13 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (*Hugo*).

A. Two Strands: Causation and Comparison

It is useful to begin with Conaghan's insight into the way intersectionality is met with in comparative discrimination law to situate the present discussion:

> [T]he conclusion to be drawn from extensive doctrinal surveys across a range of jurisdictions is that while current law can, and in some contexts does, encompass claims which are additive, it cannot even in its most radical manifestations easily accommodate genuine intersectional claims, that is, claims which are a unique blend rather than an accumulation of separate grounds…courts still seem reluctant to engage with complexities of intersectional claims, with problems of *comparison* and *causation* accentuated as soon as more than one ground comes into play.[14]

The analysis in this chapter and the next can be imagined as broadly related to the two highlighted concerns of causation and comparison respectively. The comparative doctrine fine-combs through the judicial interpretation in relation to—**(i)** acknowledging the basis of multiple and intersecting dimensions in producing discrimination and; **(ii)** employing the comparator test to establish an intersectional claim. This chapter is concerned with the first issue while the next chapter deals with the comparator test specifically. Both the strands are examined in light of the framework of intersectional integrity developed in Part One.

This chapter is broadly interested in the idea of causation in intersectional discrimination. Causation in legal parlance refers to the idea that a particular 'harm' complained of by the claimant was the 'consequence of' or 'caused by' or the 'effect of' a wrongful act.[15] In discrimination law, causation is modified in that the harm of discrimination is due to a wrongful act which is 'based on' (whether directly or indirectly) particular grounds or personal characteristics of the claimant.[16] Thus, to prove

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14 Joanne Conaghan, 'Intersectionality and UK Equality Initiatives' (2007) 23 SAJHR 317, 323 (emphasis supplied).

15 HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, 1985) 4.

16 It is important to note that this should not be immediately equated with the model of direct discrimination based on discriminator's intention or animus but to be connected with the idea that the effect or impact of discrimination is suffered because of people's personal characteristics, whether or not the defendant actually so intended and whether the legal test requires the presence

discrimination it is not only necessary to show a causal link between the wrongful act and its discriminatory consequence but that the act and consequence flow from certain kinds of identities recognised as 'grounds' or 'personal characteristics'.[17] For example, I may be denied admission into a school because: **(i)** I could not complete the admission test in the time allotted and hence received a mark below the qualifying mark; or **(ii)** although I received a good mark, the qualifying mark for women was unreasonably high; or **(iii)** I could not appear in the qualifying examination because it excluded me as a Muslim woman from making an application; or **(iv)** the school's uniform policy ended up excluding me as a Muslim woman who wore a jilbab. While **(i)** may not necessarily devolve into a discrimination claim per se since the causal basis is not anchored in a ground (like race, caste, religion, disability, gender etc), **(ii)** can be easily framed as a discrimination issue based on sex or gender. This chapter is particularly interested in claims like **(iii)** and **(iv)**, wherein the causality is directly or indirectly linked to multiple dimensions of the claimant's identity (in this case gender and religion). When multiple identities inform the claimant's experience of discrimination, how are they factored in the discrimination analysis? It is in this loose sense of diagnosing discrimination to be based on certain identities that I refer as causation in the present analysis. Establishing causation also raises complex issues of burden of proof, evidentiary requirements, standard of judicial scrutiny, substantive test for discrimination etc. All of these specific issues are vital in establishing discrimination in a case and are considered in Chapter Five and Six. This chapter is concerned with the overarching conceptual issue of causation—which is used as a placeholder for referring to the broad purpose of locating multiple

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of defendant's intention to discriminate on a ground. The US and early UK discrimination jurisprudence both developed on these lines but have gradually moved away from complete reliance on intention or motive-based models of discrimination. Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 159–162.

17 The causal link can be either direct or correlative. See ibid 165–167.

identities in the discrimination inquiry: whether the discriminator's act or omission (law, rule, criterion, policy, practice, decision) disadvantaged the claimant adversely *based on* (whether directly or indirectly) certain kinds of identities (referred to as grounds or personal characteristics in discrimination law). The next chapter specifically considers whether the comparator test used to assist this purpose is actually helpful in intersectional claims.

One concern which arises is the principled basis on which the two strands of causation and comparison are distinguished. The two are inevitably related[18] and in some cases may even be inextricably interlinked.[19] After all, the comparator test is a heuristic employed to assist in establishing causation—i.e. to ascertain the grounds of discrimination and/or to prove unfavourable treatment or impact. What then could be the principled basis of treating these two separately? There are three responses to this. First, the fact that the two issues are 'organised' in different chapters does not necessarily indicate a position that they can be normatively delimited in a neat way or that this is the only tenable organisation of the comparative material. Secondly, the immediate practical reason for presenting the issues separately is that the two are relatively bulky and substantial and become unwieldy if dealt together. In fact, as the next chapter shows, the comparator test raises its own set of unique issues. Thirdly, on a normative plane, the separate treatment alludes to the distinct conceptual breadth of the two strands. Causation, as defined for the present purposes, refers to the diagnostic aim of understanding the nature of intersectional discrimination as based on multiple grounds

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18 For example, see *Bahl* (n 3). While the two issues flow into one another, the *Bahl* Court's understanding of the claim based on race and sex is not *wholly* dictated by its view on appropriate comparator for the claim.

19 *Falkiner v Ontario* (2002) 59 OR (3d) 481 (Ontario Court of Appeal) (*Falkiner*) is an excellent example of a claim being argued on multiple grounds to be adjudicated primarily through the lens of multiple comparisons and hence is discussed separately in the next chapter.

and reflecting the framework of intersectional integrity. Then follows the analysis of whether comparison necessarily aids this inquiry. As we will see, comparison has not been key to all cases but understanding the nature of discrimination claim as based on certain identities ('grounds') cannot be treated as optional. This chapter then pitches the aim quite broadly—to understand how courts have conceptualised and addressed intersectional discrimination in terms of appreciating the unique and shared patterns of group disadvantage and in treating the claimant as a whole. The next chapter is concerned with whether this can be done through comparison.

B. Organisation of Comparative Doctrine

The inquiry in this chapter is made in reference to the South African, Canadian and the UK discrimination jurisprudence. The three jurisdictions share common features of discrimination law such as the salience of grounds, the acceptance of both direct and indirect discrimination, use of comparison, allowing justification analysis etc. In so far as they are dissimilar, it is only a matter of degree so that even when their approaches differ they have never completely abandoned allegiance to these central features. These jurisdictions have all attempted to grapple with discrimination on more than one ground and their attempts are telling. The choice of jurisdictions is in appreciation of isolating jurisprudence which is particularly illuminating in the present context. But the selection of cases from these jurisdictions is not meant to be catholic. I take only salient examples which are illustrative of the diversity of judicial responses to intersectionality.

A justification of the comparative methodology in this thesis has been provided in the Introduction. It is useful to add that, comparative doctrine is not pursued here

with the purpose of law reform or transplantation,[20] but as a method of legal research which helps us shine a spotlight on the concept of intersectional discrimination and its treatment by appellate courts. I am cognizant of its limitations given that the doctrinal analysis herein is mainly concerned with the text of appellate level court decisions and does not peruse case briefs or litigation strategies.[21] There is no effort to establish a 'true' approach which was/could be taken in intersectional discrimination, as these influential cases have been equally celebrated and critiqued for myriad reasons, not just intersectionality. Thus, it is important to stress that this is not an exhaustive statement of the impediments to or achievement of intersectionality in discrimination law. A more fine grained survey is presented in Chapters Five and Six which consider particular matters like—admitting indirect intersectional claims; the test for identifying analogous grounds; the preferred touchstone for identifying discrimination harms, i.e. dignity, autonomy, fairness, prejudice, stereotyping, marginalisation etc; setting the standard of scrutiny and burden of proof; and framing the justification analysis in intersectional claims. In contrast, the focus of this chapter is much more macrocosmic. The interest is in understanding the *conceptual framing* of claims which were or could potentially be claims of intersectional discrimination against the framework of intersectional integrity.

I examine three sets of cases against this framework: **(i)** those which were argued on multiple grounds; **(ii)** those which made reference to other intersectional dimensions but were decided on a single ground; **(iii)** those which were decided on a single ground and even though other intersectional dimensions may have been relevant, they were not

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20 Otto Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 MLR 1; Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79.

21 See generally Patricia Hughes, 'Supreme Court of Canada Equality Jurisprudence and "Everyday Life"' (2012) 58 SCLR 245; Suzanne B Goldberg, 'Intersectionality in Theory and Practice' in Davina Cooper, Didi Herman, Emily Grabham and Jane Krishnadas (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009).

mentioned. I examine ten cases in particular—*Bahl*, *Bhe*, *Corbiere*, *Hassam*, *Brink*, *Gumede*, *Moseneke*, *Volks*, *Gosselin* and *Hugo*. The cases are all appellate level decisions and demonstrate distinct ways of relating to intersectionality. While they may not be the only examples of their kind, they provide rich fodder for capturing the range of judicial responses and explaining their engagement with the framework in sufficient detail.

The most obvious cases serving the present purpose will be those which were argued on two or more grounds of discrimination. However, there could be other intersectional identities which were not captured in the traditional construct of 'grounds'.[22] A brief word is necessary here to understand what these identities can be. Intersectionality theory did not exclusively develop as a theory of discrimination law. As the first chapter showed, it was developed by Black feminists in many contexts (literature, social policy, philosophy, anthropology etc) and not exclusively in discrimination law. Consequently, it uses *identities* not *grounds* in explaining people's experience of discrimination. However, since only certain types of identities count as grounds under discrimination law, intersectional discrimination inevitably had to refer to grounds within this framework. Crenshaw's initial response too was framed in this way. This does not mean that the approach is a correct or preferred one. It only means that because discrimination law was responding to intersectionality specifically in relation to Black women's position, it was axiomatic to refer to race and sex, both of which were recognised grounds of discrimination in the US law under Title VII. But as shown in Part One, there is no difficulty in imagining that intersectionality relates to people's group identities beyond recognised grounds. So there may be some irreducible aspects of

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22 Excellent analyses on the nature of grounds and their categorical application appear in: Daphne Gilbert, 'Time to Regroup: Rethinking Section 15 of the Charter' (2003) 48 McGill Law Journal 627; Denise G Réaume, 'Of Pigeon Holes OHLJ 113; Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 CJWL 37; Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 QLJ 179.

people's intersectional identities which do not get captured within the legal framework, for example, socio-economic status or obesity.[23] It is this broad range which includes not only some obvious grounds like gender, race, religion, disability, age but also socio-economic status, place of residence, employment-status, physical appearance etc which constitute people's intersectional identities and contexts of a case. Thus, while the themes are arranged based on 'grounds', they are not the only identities relevant to the forthcoming analysis. Which identities should be used in the discrimination analysis and how they should be identified and admitted as 'grounds' or 'context' is examined dialectically (in the light of the present comparative analysis and analysis in Part One) and the approach is consolidated in Chapter Six. This chapter picks up from the point where certain identities have become relevant as evident from the claimant's case; and proceeds to consider how they are to be marshalled in discrimination analysis to reflect intersectional integrity.

Finally, it is important to note that the troubling aspects of these three sets of cases (whether they were successful or unsuccessful) can also be responded to in ways other than intersectionality. The traction of intersectionality may be heavier in some cases than others. So in addition to the more direct diagnostic and expressive losses traced in this chapter, I also intend to show likely possibilities of *reading in* intersectionality in comparative doctrine. Thus, the absence of intersectionality may not in every case be objectionable but could still provide a plausible alternative paradigm for hard cases in discrimination law.

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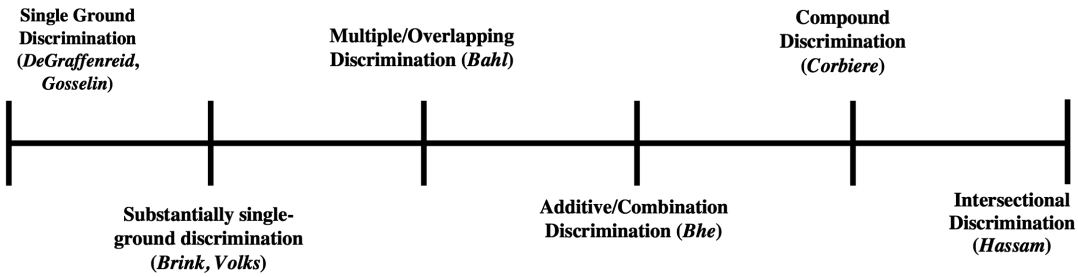
23 Chapter Five, II.B and Chapter Six, IV.A examine the arguments for recognising these as grounds as such.

C. Consolidation of Judicial Responses

This thesis argues that intersectional discrimination is a particular way of looking at claims involving multiple identities which embodies the framework of intersectional integrity. At the crux of its conceptual footing is the concern with accurately identifying and admitting multiple identities that dictate the experience of discrimination. This represents the concern with finding the basis of discrimination. It relates to not just how (through which act or policies) discrimination came about but also how it comes about 'on the basis of' or 'because of' or 'on grounds of' certain kinds of identities. The fact that the harm of discrimination flows as a consequence of certain kinds of identities (recognised as grounds of discrimination) represents a distinctive understanding of causation. While single-axis discrimination implicates only one identity in the discrimination inquiry, intersectional discrimination would involve two or more. The framework of intersectional integrity assists in furthering a key purpose of discrimination law, i.e. to understand and address how discrimination is causally based on two or more grounds in producing unique and shared patterns of disadvantage. This chapter will illustrate a range of responses to actual or potential intersectional claims and how they fare within the framework of intersectional integrity. These responses can be consolidated by imagining a spectrum of possibilities with single-axis discrimination on the left end and intersectional discrimination on the right. The right end representing intersectional discrimination is characteristic of the realisation of intersectional integrity and thus represents the most advanced conceptualisation of a multi-ground claim. The South African Constitutional Court's decision in *Hassam* and the feminist rewriting of the Supreme Court of Canada's decision in *Gosselin* represent this approach. The further one is from the end of intersectional discrimination, the further is the approach from the framework of intersectional integrity. As argued in Chapter One, the furthest approach

of single-axis discrimination followed by the *DeGraffenreid* Court is most hostile to intersectionality, and in whose response the theory actually developed. But comparative jurisprudence has progressed from this narrow conception of discrimination to comprehend claims involving more than one personal characteristic of claimants. Each of these strategies responds to intersectional integrity in a unique way and in varying degrees.



[Figure 2: Spectrum of Judicial Choice in Multi-Ground Claims]

The judicial responses can be summarised thus: the first option of single-ground discrimination was pursued by the *DeGraffenreid* Court in that it denied that there could be multiple basis of a claim in both race and sex. It is clear why this approach does not even enter the framework of intersectional integrity because it dismisses any possibility of multiple identities constituting discrimination, a prerequisite for applying the framework. The South African Constitutional Court's approach of discrimination to be 'substantially' based on a single ground, as illustrated in *Brink*, appears close to this single-axis approach especially in claims where multiple identities seem to be implicated. The option of multiple discrimination is what the UK Court of Appeal pursued in *Bahl* in that it asked the claimant to prove a claim brought on sex and gender separately on each ground, one after the other. This approach thus begins to open up the possibility of reading in more than a single identity in the discrimination analysis. It does not, however, wholly

represent the framework because of its categorical approach towards grounds as operating in isolation of one another. Further, the approach of the South African Constitutional Court in *Bhe* characterises combination discrimination because it considers both race and sex to be relevant in the claim but is not analytically clear about what 'combination' means in explaining the basis of disadvantage which accrues on multiple bases. But it fares better than the first three approaches to its left because it not only admits to considering more than a single identity but also their *interaction*. In addition, additive or combination discrimination may refer not just to grounds but also to other identities of the claimant as the relevant 'context'. The two minority decisions in *Volks* are laudable for this reason. Compound discrimination considers how the multiple identities of a claimant come together in the form of a single analogous ground of discrimination as was the case in *Corbiere*. Finally, at the right end of the spectrum lies intersectional discrimination. The South African Constitutional Court's treatment of the claim in *Hassam* represents real conformity with the framework of intersectional integrity in that it causally connects the multiple grounds relevant in the claim to trace unique and shared patterns of group disadvantage by considering the claimant's identity as a whole. These responses are very much a product of the individual circumstances of the claims which informed the judicial choice. This chapter pores over comparative doctrine to discern what dictated these choices.

II. DISCRIMINATION LAW FRAMEWORK

Before addressing the central issue of comparative doctrine's treatment of intersectionality, it is useful to reflect on the basic structure of discrimination law in the chosen jurisdictions. A quick recap of the text of the discrimination guarantees and the trajectory of their developments will provide the relevant foundation for testing them

against the framework of intersectional integrity. The appraisal is inevitably selective, emphasising only a few salient aspects which are relevant to this chapter.[24] A rudimentary sketch of the scheme of discrimination law in relation to intersectionality will be able to serve as an adequate base for the forthcoming analysis.

A. Text of Non-discrimination Guarantees

There are three key aspects to note in the text of non-discrimination guarantees: first, whether they explicitly refer to the possibility of multi-ground discrimination (for example, with use of a phrase like 'one or more'); secondly, whether they contain an open or closed list of grounds; and thirdly, whether they recognise both direct and indirect discrimination. Together, this means that a formulation which recognises direct and indirect forms of multi-ground claims based on enumerated or analogous grounds would represent the highpoint of development in admitting intersectionality. The constitutional right to equality contained in Section 9 of the South African Constitution marks this point. It provides in part:

> (3) The state may not unfairly discriminate directly or indirectly against anyone on *one or more* grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth…
> (5) Discrimination on *one or more* of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9(3) is an explicit recognition of multi-ground claims being within the ambit of the general non-discrimination guarantee. Subsection (3) prohibits discrimination on a non-exhaustive list of grounds recognising that direct or indirect discrimination can take place on 'one or more' of the enumerated or analogous grounds.

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24 Exhaustive and excellent reviews of discrimination law in South Africa, Canada and United Kingdom appear in: Catherine Albertyn and Beth Goldblatt, 'Equality' in Stuart Woolman et al (eds), *Constitutional Law of South Africa* (2nd edn, JUTA 2008); Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (5th edn, 2013); and Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) respectively.

Discrimination on one or more of the enumerated grounds is presumed to be unfair under subsection (5). Conversely, this presumption does not apply for unenumerated grounds. Given the wide breadth of the provision, the Constitutional Court has had the opportunity to adjudicate some seminal multi-ground cases.[25]

The Canadian counterpart is found in Section 15 of the Canadian Charter of Rights and Freedoms ('Canadian Charter') which provides for 'equality before and under law and equal protection and benefit of law' as follows:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Further, the Canadian Human Rights Act ('CHRA') under the heading 'multiple grounds of discrimination' provides that:[26]

> 3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

Although not as clear as the CHRA language of 'multiple grounds' and 'one or more prohibited grounds of discrimination', Section 15 of the Canadian Charter seems general and broad enough to embody multi-ground discrimination. However, the Canadian Supreme Court has never adjudicated a discrimination claim based on multiple grounds, although it has alluded to the possibility flowing from Section 15.[27] It is interesting to note that neither Section 9 of the South African Constitution nor Section 15 of the Canadian Charter recognises 'intersectional' discrimination but merely leave open the possibility of bringing multi-ground claims. In this sense, the succeeding case law analysis seeks to understand how multi-ground claims themselves can be adjudicated

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25 *Bhe* (n 4) and *Hassam* (n 6) see infra III.A.2 and III.A.4 for analysis.

26 The CHRA protects people from discrimination when they are employed by or receive services from the federal government, First Nations governments or private companies that are regulated by the federal government such as banks, trucking companies, broadcasters and telecommunications companies. <http://www.chrc-ccdp.ca/eng/content/how-are-human-rights-protected-canada> accessed 18 April 2015.

27 *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (SCC) (*Mossop*) 582 (Lamer CJ).

as a matter of intersectional discrimination and not other possible forms of multiple, additive, combination or overlapping discrimination.[28]

Lastly, the Equality Act has a specific provision in Section 14 on 'combined discrimination: dual characteristics' and provides in part:

> 14 Combined discrimination: dual characteristics
> (1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.
> (2) The relevant protected characteristics are—
> (a) age;
> (b) disability;
> (c) gender reassignment;
> (d) race
> (e) religion or belief;
> (f) sex;
> (g) sexual orientation.
> (3) For the purposes of establishing a contravention of this Act by virtue of subsection (1), B need not show that A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).

There are three things to note about Section 14. First, it has never been brought into force. Secondly, while Section 14(3) clarifies that it is not necessary to prove discrimination to be based separately on each of the two characteristics as was required in *Bahl*, it is still not entirely clear the sense which 'combination' seeks to convey in this provision. It could mean: discrimination which is possibly based on *either* of the two grounds implicated in the claim;[29] discrimination to be based *substantially* on one of the two grounds, such that even as two grounds are implicated, one of them is substantially relevant;[30] additive discrimination; overlapping or even intersectional discrimination.

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28 The difference between these forms of discrimination is explained in Chapter Two, Part I.A.

29 This is different from discrimination being based on one *or* the other ground exclusively (which is not combination then) but that discrimination is seen as being possibly based on *either* of the grounds. A typical case of this kind would be *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC), in which the majority judgment of the South African Constitutional Court sees the failure of a school uniform policy in accommodating a young girl wearing a nose ring to be a matter either of her religion or culture without a strict demarcation of the boundaries between the two. This case was not directly decided under the constitutional guarantee of non-discrimination but under the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 which was enacted to give effect to the constitutional guarantee.

30 This is a typical way of seeing a claim which involves two or more grounds, especially in South African discrimination law. As Pieterse describes: 'While acknowledging the phenomenon of

Thus, it remains to be seen what import the word 'combination' has in adjudicating a multi-ground claim under this provision, when brought into force. Finally, Section 14 is limited to direct discrimination on just two grounds, that too a closed list of seven grounds in clause (2) which excludes pregnancy and civil partnership (otherwise included in the Equality Act in relation to single-ground direct discrimination).[31] The denial of indirect discrimination, possibility of using more than two grounds and the exclusion of analogous grounds makes Section 14 much narrower than Section 9 of the South African Constitution and Section 15 of the Canadian Charter.[32] The forthcoming analysis in Part III is useful in imagining the possible interpretative hurdles which may arise if and when Section 14 comes into effect. But without Section 14 being in force, the Equality Act does not expressly provide for direct discrimination to be based on multiple personal characteristics.

To sum up, it is not the case that the bare text of the non-discrimination guarantees in the UK, South Africa and Canada exclude intersectional discrimination. So either directly (Section 9 of the South African Constitution and the unenforced Section 14 of the Equality Act) or with reasonable textual interpretation (Section 15 of the

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intersectionality, the Court has often proceeded with its inquiry in relation to only the 'main' ground of discrimination alleged, or has dealt with claims of intersectional discrimination by separately considering discrimination on each of the grounds alleged, rather than by inquiring into their conglomerate effect.' Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397, 420. See *Brink* (n 10) and discussion infra III.B.1.i.a.

31 The list of enumerated grounds under Section 14 comprises of age, disability, gender reassignment, race, religion or belief, sex, sexual orientation.

32 The Equality Act has a promising provision on the 'public sector equality duty' under Section 149 which legislates a duty upon a public authority to exercise its functions with due regard to the need to: (a) eliminating forms of discrimination; (b) advancing equality of opportunity; and (c) fostering good relations. This duty is not limited to one or two grounds but towards everyone having protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation (excluding 'marriage and civil partnership' otherwise included in Sections 13 and 19 on direct and indirect discrimination). The new equality legislation thus has some innovative and encouraging cues for intersectionality. See Sandra Fredman, 'Positive Rights and Duties: Addressing Intersectionality' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2008).

Canadian Charter) it is possible to read in prohibition of intersectional discrimination (or at least multi-ground discrimination) into these general provisions. Further, an appreciation of how direct and indirect forms of intersectional discrimination pan out is necessary for understanding the diversity of situations involving intersectionality. It is particularly important because intersectional discrimination may often be indirect in that a neutral policy may end up adversely impacting persons based on more than one personal characteristic.[33] Finally, all three jurisdictions have an enumerated list of grounds or personal characteristics. If the list (as in South Africa and Canada) is an open one, that is, capable of being expanded for accommodating analogous grounds, it is theoretically possible and hence easier for intersectional identities to be recognised in discrimination qua grounds. But if the list is a closed one (as in the UK) and one of the grounds in a claim is an unlisted one, the courts may be far more reluctant to expand the list on a principled basis.[34] In some cases courts recognise the possibility of factoring in identities through the judicial device of 'context' rather than the recognised grounds.[35] As the spectrum of judicial responses shows, this expands the opportunity to read in multiple identities of claimants in intersectional cases.

B. Discrimination Inquiry

The test for examining a discrimination claim or the 'discrimination inquiry' so-called has basic similarities across jurisdictions even as the specifics may differ. There are two

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33 For further discussion on this, see Chapter Five, III.A and Chapter Six IV.B.

34 For example of claims based on at least one unenumerated ground but decided on the enumerated ground, see *Gumede* (n 11); *Moseneke* (n 12); discussed infra III.B.1.i.b. Cf *Corbiere* (n 5), discussed infra III.A.3.

35 *Volks* (n 8), discussed infra III.B.1.ii.a; *Gosselin* (n 9), discussed infra III.B.1.ii.b. See further Chapter Six, III.D.

aspects to note about the respective tests: first, their form and structure; and secondly, their substantive content. The South African Constitutional Court's test for unfair discrimination test was devised in *Harksen v Lane.*[36] The two-part test asks first whether there was discrimination on listed or analogous grounds and secondly, whether it was unfair.[37] Unfair discrimination is what has an unfair impact.[38] The substantive touchstone for determining such an impact is whether it violates 'dignity' which in turn entrenches 'patterns of group disadvantage.'[39] These patterns represent serious disadvantage to members of disfavoured groups over a period of time.[40] This in turn seems to be inspired by Canadian discrimination jurisprudence. The leading test reformulated in *Kapp*[41] emphasised the importance of human dignity as a central value in Section 15 and the two-part legal test asks: first, whether there is adverse distinction or impact suffered based on enumerated or analogous ground; and secondly, if it is discriminatory in that it either has the 'effect of perpetuating group disadvantage and prejudice' or 'impose[s] disadvantage on the basis of stereotyping.'[42] The UK test is similar such that the inquiry asks: first, if there was differentiation or unfavourable impact and secondly, if its reason

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36 *Harksen v Lane NO* 1998 (1) SA 300 (CC) (*Harksen*).

37 ibid [54] (Goldstone J).

38 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) [41] (Ackermann J) (*Immigration Case*).

39 *Brink* (n 10) [42]. This touchstone has been applied and affirmed in *Harksen* (n 36) [50] (Goldstone J), [92] (O'Regan J); *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) [153] (Mokgoro and Sachs JJ); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [27] (Moseneke J); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [132] (Sachs J) (*Sodomy Case*); *Hugo* (n 13) [41].

40 *Harksen* (n 36) [51].

41 *R v Kapp* [2008] 2 SCR 483 (SCC).

42 ibid [17], [25], [37]; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) (*Law v Canada*) [30], [51].

is a protected characteristic.[43] What is particularly interesting in the UK jurisprudence is the emphasis on causation by pressing on 'the reason why' discrimination occurred.[44] This emphasis is particularly useful for locating multiple identities at the centre of why discrimination occurred. [45] This chapter is concerned with examining how intersectionality is factored within the discrimination inquiry—was the discriminatory treatment or impact based on multiple identities of the claimant? Was intersectionality accounted for qua grounds or can it be addressed outside of this construct? What are the ways of appreciating the framework of intersectional integrity in intersectional claims and what is the loss when this is missed? It is in relation to these questions that I undertake the central inquiry in this chapter: how are actual and potential intersectional claims treated in comparative discrimination law?

III. TREATMENT OF INTERSECTIONAL CLAIMS

Crenshaw identified the dominant conception of discrimination as conditioning us to think of disadvantage as occurring along a single categorical axis.[46] This normative vision of discrimination as a 'single-axis framework' has been the greatest challenge to intersectionality. As the first chapter discussed, *DeGraffenreid* exemplifies this challenge precisely. However since this initial failure, courts have been far more aware of intersectionality and have innovatively responded to it. It is these judicial attempts which provide germane material for examining how intersectionality has been or can be realised

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43 *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [8] (*Shamoon*).

44 ibid [8]–[10]; *Chief Constable of the West Yorkshire Police v Khan* [2001] UKHL 48 [29]–[30].

45 However, this does not perforce mean subscribing to an intention or motive-based model of discrimination, as has been the case in the US and the UK. See Fredman (n 24) 204–214.

46 Crenshaw (n 1) 140.

in discrimination law. The framework of intersectional integrity is proposed as providing an alternate normative vision for understanding what is at play when people experience discrimination based on their multiple identities. In this sense, it helps us identify *how* multiple identities cause discrimination. This inquiry, taken to be loosely but centrally related to the idea of causation in intersectional discrimination, is answered in multifarious ways by the courts—all of which show varying degrees of compliance with the proposed framework. As highlighted in the previous section, this is captured in the form of a graded spectrum and is elaborated upon in the forthcoming analysis.

As emphasised in the Introduction to this thesis, it is useful to reiterate the sense behind the terminology employed here. The term intersectionality is used to refer to the theory itself while intersectional discrimination is used to denote discrimination which is experienced as a result of multiple intersecting identities. Intersectional discrimination is supposed to reflect the framework of intersectional integrity. To the extent that the judicial meanderings have been unable to do this, intersectional discrimination remains aspirational within the judicial discourse. This does not mean that intersectional discrimination does not itself exist. It only means that courts have been unable to translate intersectionality into a clear perspective on intersectional discrimination. This chapter uses comparative law to reveal how. It is divided into two sections. Section A deals with claims which were argued on multiple grounds: *Bahl*, *Bhe*, *Corbiere* and *Hassam*. Section B considers cases which were argued on a single ground but: **(i)** considered multiple identities as well: *Brink*, *Gumede*, *Moseneke*, *Volks*, *Gosselin*; or **(ii)** ignored multiple identities which were otherwise relevant to the claim: *Hugo*. The analysis seeks to understand if and how judicial approaches keep stride with the framework of intersectional integrity. This schema does not sequentially map onto the spectrum from one end to the other. The logic of arrangement corresponds to whether the courts were

considering single or multiple grounds in the claim while the spectrum depicts a consolidated version of the discursive treatment which follows.

A. Multi-Ground Claims

The intersectional framework proposed in Part One of the thesis is meant for understanding a discrimination claim devolving on multiple identities. A straightforward case for its purposes will then be one which is argued on multiple grounds itself. It provides a ready opportunity for the courts to account for intersectional identities qua grounds. When a case is argued on multiple grounds, the judicial approach may signal compliance with the framework or it may completely contradict it. The approach of the Missouri District Court in *DeGraffenreid* was to splinter the race and sex discrimination claim brought by Black women into individual race and sex discrimination inquiries. As Chapter One showed, this is both an incorrect and unhelpful characterisation of the claim which fails to reckon with the nature of intersectional disadvantage suffered by Black women. But this is only one way of responding to a claim argued explicitly on multiple grounds. Courts may choose to factor multiple grounds individually (*Bahl*) or in some additive combination (*Bhe*), or they could combine multiple identities into a single composite ground *(Corbiere*) or they may even treat it as true case of intersectional discrimination (*Hassam*). This section shows how each of these judicial strategies has been pursued. The subset of cases in this section is in contrast with the next section because these cases were brought and considered on more than one ground of discrimination.

A.1 Multiple/Overlapping Discrimination: Bahl

Bahl mirrors the analysis in *DeGraffenreid* in that the claim based on two grounds is split into independent claims to be proved separately. The difference between the two claims is that while the *DeGraffenreid* Court insisted that the claimant could only argue on a single ground and so must choose between race and sex, the *Bahl* Court allowed two grounds to be the basis of the claim, provided they were argued separately. The *Bahl* reasoning thus signifies an understanding based on multiple rather than intersectional discrimination. This is the first way in which claims actually argued on multiple grounds can fail to be adjudicated as claims of intersectional discrimination, but simply as single-axis claims argued in succession. Arguably, even though the *Bahl* claim itself was unmeritorious and could not possibly succeed, what can be legitimately critiqued is the Court's conceptualisation of the multi-ground claim. It is then the Court's myopic normative vision of a possible intersectional claim which must be closely considered.

The UK Court of Appeal was dealing with a challenge to unfair dismissal on grounds of race and sex by the appellant, Dr Kamlesh Bahl, who was a Black Asian woman. Dr Bahl was the Vice President of the Law Society and alleged that she had been discriminated against by its members, especially its President and Secretary General in the determination of staff complaints against her behaviour. In analysing the copious evidence presented before the courts below, Peter Gibson LJ at the Court of Appeal found that the Employment Tribunal had omitted to 'identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination' and that it would have been 'surprising if the evidence for each form of discrimination was the same.'[47] He insisted that for a claim of race and sex

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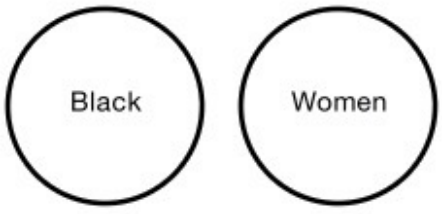
47 *Bahl* (n 3) [137].

discrimination to succeed the claimant should be able to prove both sex and race discrimination *separately* such that discrimination was based on 'either race or sex'.[48] This route to examining a multi-ground claim may have resulted from the atomised nature of the UK discrimination law at the time where sex was a protected ground under Sex Discrimination Act 1975 and racial discrimination was prohibited separately under the Race Relations Act 1976. But aside from this technical delimitation, it is difficult to agree with the Court of Appeal's final ruling dismissing Dr Bahl's appeal by treating her claim as one of multiple rather than intersectional discrimination. As explained in Chapter Two, the tendency to treat grounds of discrimination as mutually exclusive and operating in isolation of other grounds and identities characterises the approach of multiple discrimination. In multiple discrimination, each ground is taken in turn and churned through the discrimination inquiry one after the other to establish discrimination. It thus represents nothing more than multiple single-ground claims treated successively. In sum, the understanding that the causal basis of discrimination needs to be explained differently than simply as a matter of multiple claims of single-axis discrimination is amiss here. Mapping this approach onto the framework of intersectional integrity, we can imagine the Court considering the two spheres of disadvantage associated with being Black and female as separate and uninteractive categories in Figure 2:



[Figure 2: Multiple Discrimination in *Bahl*]

48 ibid [115]–[137].

Once this is the case, the approach fails to: **(i)** reveal unique and shared patterns of disadvantage which accrue both on the basis of claimant's race and sex; **(ii)** treat claimant's intersectional identity as a whole without fragmenting it on the basis of race and sex. Duclos fittingly explains this result of treating grounds as isolated categories and the claimant's identity as severable in this way:

> One reason why the race and gender characteristics of racial minority women who actually assert claims of race or sex discrimination seems to disappear is that the cases are presented without considering the *whole person of the complainant*….There is virtually no consideration of the complex interactions of race, sex, and the various other grounds of discrimination that are so much a part of the lived experience (as opposed to the legal analysis) of discrimination.[49]

Having decided that the claim was to be decided as a matter of multiple discrimination, the Court employed the comparator test to assist its discrimination inquiry.[50] It asked the claimant to show how her disadvantage as a Black woman was so unique and different from a white man.[51] Leaving the choice of comparison aside (which is discussed in the next chapter), it is useful to note that it reflects an approach which obscures the nature of discrimination yielded by the intersection of dual grounds. First, by pitching the 'uniqueness' of the claim so high and distant by comparing the claimant's experience with a white male, the Court is unable to appreciate the distinctive disadvantage accruing to the claimant as a Black woman on its own terms. The standard against which the claimant is measured is so removed from her own claim that the purpose of understanding the unique disadvantage as suffered by *her* transforms into search for difference with an unrelated standard. Secondly, the Court also debars any 'shared' patterns of disadvantage based on race and sex. That the claimant's experiences of racism and sexism may potentially coincide with that of Black men and white women

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49 Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 CJWL 25, 40 (emphasis supplied).

50 The use of the comparator test in *Bahl* is considered in the next chapter.

51 *Bahl* (n 3) [103].

respectively was left unexamined.[52] Thus, thirdly, this approach undermines the claimant's integrity by insisting on treating disadvantage flowing from different aspects of her identity in a fragmented way. In fact, the Court specifically rejects the Employment Tribunal's approach, which had affirmed integrity by refusing to isolate the sexist and racist aspects of alleged discrimination, calling this approach 'puzzling' and erroneous.[53] The Employment Tribunal had found that:

> We do not distinguish between the race or sex of the Applicant in reaching this conclusion. Our reason for that is simple. The claim was advanced on the basis that Kamlesh Bahl was treated in the way she was *because she is a black woman*. Kamlesh Bahl was the first office holder that the Law Society had ever had who was not both white and male. There was no basis in the evidence for comparing her treatment with that of a white female, or a black male, office holder. We can only draw inferences…It is sufficient for our purposes to find, where appropriate, that in each case they would not have treated a white person or a man less favourably.[54]

Besides what the Court was actually saying in *Bahl*, it is interesting to note what it was doing in fact. The Court of Appeal maintained a constant focus on 'the reason why'[55] for finding an explanation for the detrimental treatment and whether the conduct was motivated by 'discriminatory reasons'.[56] The consideration of evidence was lengthy and thorough in deciphering any discriminatory treatment and its basis. The Court thus remarked: 'A charge of discrimination is a very serious matter to find established against anyone, let alone the President and the Secretary General of the Law Society. Fairness demanded that the finding of discrimination be adequately explained and shown to have a proper evidential basis.'[57] This focus on the reason why discrimination occurred is right—while the intensive set of facts in this case failed to reveal the basis of

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52 Aileen McColgan, 'Reconfiguring Discrimination Law' [2007] PL 74, 81.

53 *Bahl* (n 3) [136]–[137].

54 ibid [135] (emphasis supplied).

55 ibid [126]; *Shamoon* (n 43) [7]–[10].

56 ibid [101], [134], [147].

57 ibid [134].

discriminatory treatment in race and/or sex, it is arguable that a case with a more sympathetic claimant would have been licit. And if a court does not insist on answering the 'why' question in a splintered way, it may even find discriminatory reasons to be causally based on multiple grounds on which the claim devolves.[58]

This seems to be the line pursued in Section 14 of the Equality Act which provides that it is not necessary to show that the treatment complained of was direct discrimination 'because of each of the characteristics in the combination (taken separately).' If Section 14 were brought into effect, the *Bahl* approach would lose ground. But it remains to be seen whether a claim brought on two grounds will comply with intersectional integrity under Section 14. While Section 14 remains unenforced, the prevailing law on direct and indirect discrimination under Sections 13 and 19 respectively will not benefit from the framework since they relate only to single-axis discrimination. In fact, there may even have been a step backwards. To recall, the atomised nature of the earlier UK discrimination law in the form of separate statutes on each ground allowed for the possibility to claim under two statutes separately, as imagined by the *Bahl* Court. But the presence of a single integrated law (Equality Act) may not allow claiming under two grounds, even as a matter of multiple discrimination given that Section 14 remains unenforced and Sections 13 and 19 protect only single-axis discrimination. However, a court can still decide to treat a multi-ground claim as multiple discrimination by taking each ground separately and running them by Sections 13 and 19 in succession. In that sense, the current position under the Equality Act would remain the same as after *Bahl*. As Fredman opines: 'although [Equality Act] is an important breakthrough, it

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58 It is useful to note again that discriminatory reasons in cases of direct intersectional discrimination do not necessarily mean the presence of animus, motive or intention to discriminate. So long as discriminatory effects or impact *flow from* or are *based on* multiple grounds in some way, the discrimination inquiry should be satisfied in its search for the reason why discrimination occurred. See Chapter Six, IV.C. Khaitan (n 16) 165–171. Cf John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167.

remains the case that the more a person differs from the norm [single-axis discrimination], the less likely she is to gain protection.'[59] That causation in multi-ground claims (and hence the nature of such claims) is not simply a matter of isolated patterns of racism, sexism, homophobia etc, yielding discreet packets of disadvantage but something which requires a different lens (such as intersectional integrity) to be detected, thus remains aspirational in UK discrimination law.

A.2 Additive/Combination Discrimination: Bhe

Just as courts in the UK and the US, the South African Constitutional Court too 'has not always been clear of the difference between multiple and intersectional discrimination.'[60] The confusion over different forms of discrimination is visible in the case of *Bhe*. In *Bhe*, one of the constitutional challenges involved the rule of male primogeniture[61] which governed succession in customary law. The rule was found to be discriminatory because it excluded: (a) widows from inheriting from their late husbands; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents; and (d) extra-marital children from inheriting from their fathers. In the specific case brought by Nontupheko Maretha Bhe which sought relief for the exclusion of all female heirs,[62]

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59 Fredman (n 24) 143.

60 Cathi Albertyn, 'Equality' in Cathi Albertyn and Elsje Bonthuys (eds), *Gender, Law and Justice* (JUTA 2007) [35—53].

61 *Bhe* (n 4) [77] ('The general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir').

62 While the rule of primogeniture was also challenged on the basis of age and birth since it excluded younger heirs and those conceived outside of the wedlock, the specific case of Bhe on behalf of her daughters being unable to claim from the estate of her deceased husband was examined only in relation to gender. Thus, I am only considering the claim of gender discrimination and its intersection with race. Another claim in *Bhe* involved a challenge to the official version of the customary law incorporated in Section 23 of the Black Administration Act 1927 for discriminating on the basis of race by instating specific consequences to intestacy for African people. As noted by Albertyn and Fredman, the examination of this claim based on race also

Langa DCJ, writing for the majority, considered the gender discrimination challenge to the rule of male primogeniture at paragraphs [75]-[78] and [88]-[91] of the judgment. The judgment first considered the importance of the background in which customary law operated—one of preserving familial relations, and then remarked on the gender discriminatory aspect to find that:

> The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.[63]

It then returned to discuss how customary law had not kept pace with changing social conditions and values.[64] In sum, the Court concluded by opining that:

> The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.[65]

It is useful to remember that the rule of primogeniture applied only to Black women (as opposed to other races) and thus carried relics of the racist past of South Africa. But the discussion on gender discrimination speaks little to the racism of the customary regime even when the claim specifically related to Black women. The gender discrimination analysis located in the excerpts reproduced above, is generalist, piecemeal and too brief to be challenging and appreciating the intersectional nature of discrimination experienced by African women affected by the said rule.[66] The fact that

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lacked a gendered perspective. Catherine Albertyn and Sandra Fredman, 'Equality Beyond Dignity: Multi-dimensional Equality and Justice Langa's Judgments' (2015) Acta Juridica 430. Thus, the claims of race, age and birth discrimination against the legislative scheme and customary rule all seem to have been examined quite independently of one another. This aspect of the *Bhe* claim raising many claims of discrimination within itself is described as 'overlapping discrimination' by Pieterse (n 30) 407.

63 *Bhe* (n 4) [78].

64 ibid [80]–[87].

65 ibid [91].

66 ibid [78], [89]–[92].

their exclusion from inheritance may not mirror white women's experiences of inheritance (because they are not excluded) and thus was not simply a matter of 'gender' discrimination is left unexamined. The generalist tone of sexism engulfs the specific disadvantage suffered by Black women under the racist law. The points at which the Court considers racism, it does so in isolation and not in appreciation of the sexist aspects. Thus, the approach of the Court is to consider the effect of the rule of primogeniture on Black women to be produced specifically by patterns of sexism, with piecemeal references to the racist injustice of a separate regime of succession. The result is that the analysis reflects some combination of racism and sexism against African women's rights of inheritance but there is no analytic precision in explaining what this relationship is. So it is not that the Court is unaware of the interaction between race and sex in Bhe's claim but the nature of such interaction is considered in a disparate and confused combination or 'overlap'. Wholly absent from consideration is the claimant's situation of extreme poverty and destitution whether as context of the claim or as an analogous ground of discrimination.[67] The fact that Bhe and her daughters lived in poverty and the severance from the contentious property would have rendered them homeless does not factor in the Court's process of reasoning, even though it was initially set out as the background of the claim.[68] Because the intersectional integrity framework is not limited to the construct of grounds and requires all relevant aspects of the claimant's identities to be factored in understanding the nature of discrimination, disregard of the direct material consequences of the present claim would be untenable within the framework. In fact, an approach which averts an incisive analysis of how all relevant identities of a claimant (integrity) inform her experience of discrimination, in this case as

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67 For a discussion on how context can be factored outside of the construct of grounds, see Chapter Six, III.D; and for a case of poverty as a ground of discrimination, Chapter Five, II.B.

68 ibid [14]–[19].

a poor Black woman, to produce unique and shared patterns of disadvantage based on racism, sexism and poverty (intersectionality) is unintelligible within the framework. As Albertyn and Fredman helpfully remark: 'a proper consideration of the multiple dimensions of equality and their impact on black women [in *Bhe*] might have been a better legal approach and would have better reflected the nature of inequality on the ground.'[69]

In conclusion the Court agrees with the claimants that the rule constituted unfair discrimination under Section 9(3) which could not be justified under Section 36 of the Constitution. But the route to this result looks like a discrete discrimination analysis based on gender or some combination of gender and race rather than identifying patterns of disadvantage causally linked to all grounds considered together, at the same time. As *Bhe* makes clear, the South African Constitutional Court is generally good at spotting discrimination where it exists on more than one ground. However, there may still be a gap in appreciating the nature of discrimination which accrues on more than one ground when the Court fails to match the particularity of alleged disadvantage to the claimant's multiple identities. Thus, even though the Court reaches a favourable outcome, the reasoning leaves something to be desired in how it treats a claim involving multiple identities of the claimant.

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[69] Albertyn and Fredman (n 62) 18.

A.3 Compound Discrimination: Corbiere

Corbiere is an apt example of a claim based on multiple identities being consolidated into a single compound ground analogous to the enumerated grounds, and hence represents the category of 'compound discrimination' on the spectrum.

In *Corbiere*, off-reserve Indian band members challenged the constitutionality of the law which excluded them from voting in band elections as violating Section 15(1) of the Canadian Charter. Both the majority and the minority agreed that the disenfranchisement was discriminatory under Section 15(1) and could not be justified under Section 1.[70] In pursuing the discrimination inquiry, both the judgments found that the distinction was one made on a new analogous ground of 'aboriginal residence' or 'off reserve status' of band members. They went on to find that the distinction based on this ground was discriminatory because it undermined the cultural identity of off-reserve band members in a stereotypical way. It perpetuated the message that off-reserve band members were uninterested in and undeserving of participating in band governance.[71]

The key to the constitutional challenge lay in reading in aboriginal residence as an analogous ground within Section 15. As L'Heureux-Dubé J rightly observes in her judgment: 'The differential treatment in this case is based on the status of holding membership in an Indian Act band, but living off that band's reserve. This combination of traits does not fall under one of the enumerated or already recognized analogous grounds.'[72] While race is an enumerated ground under Section 15, residence has not been recognised as a stand-alone analogous ground. However, for off-reserve band members,

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70 As the majority judgment by McLachlin and Bastarache JJ describes, the two points of departure with the minority were: '1) the suggestion by some that the same ground may or may not be analogous depending on the circumstances; and (2) the criteria that identify an analogous ground.' *Corbiere* (n 5) [6].

71 ibid [18] (McLachlin and Bastarache JJ).

72 ibid [58] (L'Heureux-Dubé J).

the combination of the two status-identities reflected a position of 'immutability'—identified by the Court as the underlying logic of enumerated and analogous grounds under Section 15.[73] Thus, the identities of aboriginality and off-reserve residence together create a single analogous ground of aboriginal residence because it signifies a choice of off-status residence which involves an unacceptable personal cost in being changed.[74] The Court found the fact that aboriginal residence related only to a 'sub-set' of aboriginals was no impediment to recognising it as an analogous ground. It held that: '[i]ts demographic limitation is no different from, for example, pregnancy, which was a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.'[75] Thus the claim was understood as dealing with the case of aboriginal band members and within this group, the sub-set of those who lived off-reserve. The Court noted the shared history of racism against all aboriginals but found that the unique situation of those living off-reserve warranted specific recognition. In L'Heureux-Dubé J's words, this approach worked because:

> the nature of the decisions band members make about whether to live on or off a reserve are different from those made by many other Canadians in relation to their place of residence. So are other factors related to the analogous grounds analysis that still affect them. The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may *overlap or intersect* (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of

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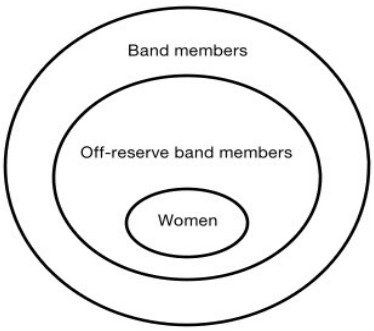
73 The Court identifies the ideas of both 'actual' and 'constructive' immutability as underpinning grounds. While actual immutability signifies the degree of control over a personal characteristic, constructive immutability relates to the cost of changing such personal characteristic. *Corbiere* (n 5) [13] (McLachlin and Bastarache JJ). Although L'Heureux-Dubé J's criteria for identifying analogous grounds is broader, both the majority and minority judgments are criticised for either their ambiguity or narrowness in laying down the criteria for identifying analogous grounds of discrimination. See Joshua Sealy-Harrington, 'Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach' (2013) 10 JLE 37, 40–44.

74 See also *Miron v Trudel* [1995] 2 SCR 418 (SCC) [148] (*Miron*); *Vriend v Alberta* [1998] 1 SCR 493 (SCC) [90].

75 *Corbiere* (n 5) [15] (McLachlin and Bastarache JJ).

> stereotyping or prejudice. As this Court unanimously held in [*Law*] "The possibility of *new forms of discrimination* denying essential human worth cannot be foreclosed."[76]

In fact, the judgments also made brief remarks about the disadvantage suffered by aboriginal women who lived off-reserve and emphasised their unique and exacerbated position of disadvantage within the sub-subset of aboriginal band members.[77]



[Figure 3: Compound Discrimination in *Corbiere*]

Corbiere is a relevant example of an approach which reckons with multiple identities and seeks to synthesise them into a single compound ground as shown in Figure 3. If we consider the approach of the *Corbiere* Court against the framework of intersectional integrity: **(i)** it traces patterns of disadvantage which are shared by all aboriginals but also contrasts the situation of off-reserve band members with those on-reserve to point out the uniquely disadvantageous position of the former; and **(ii)** considers the identity of the claimants (off-reserve band members) as a whole without breaking their experiences into racial and residential dimensions separately. Thus, even as it reads multiple identities into a single analogous ground, it still complies with the framework in a suitable way. The difference between this approach and a single-axis approach is that it works bottom up to identify the specific point of intervention (the

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76 ibid [61] (L'Heureux-Dubé J).

77 ibid [30], [32] (McLachlin and Bastarache JJ); [84], [86] (L'Heureux-Dubé J).

analogous ground which synthesises the multiple identities) rather than imposing single-axis framework from the very outset and marginalising other identities relevant to the discrimination inquiry.[78] It is important to note that not every case will need a compound analogous ground to be read in for recognising intersectionality, in contrast with the fear expressed by the *DeGraffenreid* Court against endless 'combinations and permutations.'[79] The case for treating pregnancy as a separate ground even as it relates to a specific subset of women or the broader ground of sex or gender discrimination is a common example.[80] Another example can be the case of discrimination against sex workers as a matter of both sex/gender and employment-status, even as employment status may not itself be a ground of discrimination.[81] Thus, *Corbiere* only indicates a strategy which may work for certain cases wherein its reasoning applies—i.e. where certain kinds of identities integrally matter when they interact with a ground of discrimination to create a separate ground.

A.4 Intersectional Discrimination: Hassam

The approach of the South African Constitutional Court in *Hassam* maps closely onto the framework of intersectional discrimination and thus represents that category at the right end of the spectrum befittingly. *Hassam* involved a challenge to legislative

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78 Cf *Brink* (n 10), *Bhe* (n 4).

79 *DeGraffenreid v General Motors* 413 F Supp 142 (ED Mo 1976) 143.

80 The Equality Act and Section 9(3) of the South African Constitution both recognise pregnancy as a separate ground.

81 This approach is related to the criteria for identifying analogous grounds as such and is considered in Chapter Five, Part II. At this stage, it is relevant to note what the normative implications of the choice for reading in a compound analogous ground. Thus, certain cases, like the present example based on *S v Jordan* 2002 (6) SA 642 (CC) can benefit from the *Corbiere* approach. For further discussion of how the indirect discrimination *in Jordan* can be understood as a matter of sex/gender and employment-status both, see Chapter Five, III.A.

provisions which excluded widows of Muslim polygynous marriages from intestate succession. At the outset, the claimant compared her situation to three sets of people whose proprietary interests were protected under the legislative provisions: widows married in terms of the Marriage Act; widows in monogamous Muslim marriages; and widows in polygynous customary marriages.[82] By drawing these comparisons, the claimant argued that her exclusion from intestate succession constituted unfair discrimination on the listed grounds of gender, marital status and religion.[83] The claimant pressed for recognition of shared patterns of group disadvantage based on grounds of gender,[84] marital status[85] and religion.[86]

On the question whether the differentiation was on grounds listed under Section 9(3), Nkabinde J affirmed that the analysis must be done 'contextually and in the light of our history.'[87] Thus, although Muslim men were not discriminated against, discrimination in the present context was still religion-based as 'in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today.'[88] In examining the effects of discrimination from the particular standpoint of widows in Muslim polygnous marriages, Nkabinde J found that:

> The grounds of discrimination can thus be understood to be overlapping on the grounds of, religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect; marital status, because polygynous Muslim marriages are not afforded the

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82 The approach to comparators in *Hassam* is considered in the next chapter. See Chapter Four, Part II.

83 *Hassam* (n 6) [9].

84 ibid [10].

85 ibid [11]

86 ibid [12].

87 ibid [33].

88 ibid.

> protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriage that are affect[ed] by the Act's exclusion.[89]

Despite the use of the word 'overlapping', Nkabinde J's analysis mirrors the framework of intersectional integrity in that she examines the 'overlap' or 'intersection' of grounds as defined by the claimant's unique and shared position of disadvantage. The focus is on the claimant, and those in her position and the Court is careful to respect her integrity in considering her claim as a whole and in treating the nature of her disadvantage in a way which considers her complete identity as a Muslim woman in a polygynous marriage. Keeping her perspective at the heart of the inquiry, the Court traces the patterns of disadvantage as defined by grounds of discrimination as:

> women in polygynous Muslim marriages still suffer serious effects of non-recognition. The distinction between spouses in polygynous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups.[90] [Marital Status]

> By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve.[91] [Gender]

> The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion.[92] [Religion]

In sum, the analysis can be depicted in terms of a Venn diagram as representing intersectional integrity framework with the claimant's own position at the centre and defined by both unique and shared features of group disadvantage:

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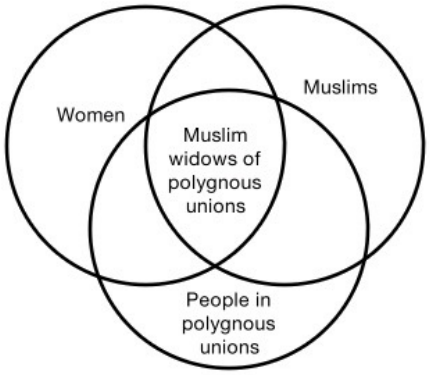
89 ibid [34].

90 ibid [36].

91 ibid [37].

92 ibid [38].



[Figure 4: Intersectional Discrimination in *Hassam*]

B. Single-Axis Discrimination

An actual or potential intersectional claim may be argued along a single-axis in two scenarios—one, where multiple identities were not mentioned in the claim at all and another, where they were mentioned as an aside but the claimant/court proceed primarily on a single ground. When discrimination is not argued on multiple grounds per se, the court cannot ex post implicate another ground in the discrimination inquiry. Courts can now either turn a blind eye or try to reckon with multiple identities outside of the construct of grounds. Justices seem to have done both. This section explores the two scenarios to understand how the framework of intersectional discrimination may be realised or lost here. B.1 considers those cases where multiple identities were mentioned and the court either: **(i)** considered the case to be based 'substantially' on a single ground (*Brink*); or **(ii)** considered the multiple identities to be factored in as 'context' of the claim (minorities in *Volks* and *Gosselin*). B.2 considers the case of *Hugo* as an example where although the case shows relevance of multiple identities, the Court proceeds only on the single ground of sex.

The phraseology of 'single-axis' is borrowed from Crenshaw.[93] She identified this as the dominant conception of discrimination which inhibits our imagination in thinking how multiple identities make a difference to experiences of discrimination. This subset of single-axis cases is in contrast with those in the previous section which were argued and considered under more than one ground of discrimination.

B.1 When Multiple Identities are Mentioned

This section reckons with single-axis claims which referred to multiple identities even when they were not directly admitted as grounds. The claims were then essentially based on a single ground but there were other grounds and identities considered in capturing the nature of discrimination in the claim. Courts are able to do an intersectional analysis in these otherwise single-axis claims by reading in multiple identities qua context as done by the minorities in *Volks* and *Gosselin*. But as the majority judgments in these cases show there is still unfettered attachment to analysing claims on 'substantially' a single ground, the approach suggested by O'Regan J in *Brink*.

i. 'Substantially' based on Single-Ground

When a claim is argued as devolving on a single ground of discrimination, courts may consider that ground to be the central axis for viewing the disadvantage in the claim. It may thus put aside other axes which may be relevant. When a single ground becomes paradigmatic of the disadvantage to be addressed in discrimination law, it excludes from protection those whose experiences are not *exclusively* defined by that ground. This legal

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93 Crenshaw (n 1) 139.

logic essentialises the experiences sought to be addressed in discrimination law and marginalises those who do not squarely identify with it.[94] Even if this approach is expedient for the single claimant before the court and seems to succeed, there will still result the diagnostic loss of determining the basis of discrimination when multiple identities are involved in a claim. *Brink*, *Gumede* and *Moseneke* are relevant examples of this.

a. Brink

The South African discrimination jurisprudence shows earliest signs of adopting the single-axis approach. The Constitutional Court has sustained a line of reasoning which finds discrimination to be based 'substantially' on one listed ground even where other identities seem causally relevant to the experience of discrimination. Bonthuys explains this categorical approach to a single ground examined in isolation as: '[w]hen faced with intersectional grounds of discrimination, the [Constitutional Court] tends to focus on one of the grounds or to separate the grounds from one another, rather than examining the disadvantage caused by the interaction between them.'[95] This result can be attributed to *Brink* which was the first case brought under the non-discrimination guarantee of the interim constitution.[96] The discussion on intersectional dimensions by O'Regan J was a remarkable feat for a new court. The debutant jurisprudence in *Brink* demonstrates the

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94 Elsje Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 CJWL 1, 27.

95 ibid 26.

96 Section 8 on 'Equality' under the interim constitution provided in part: '(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.'

easy possibility of tracing multiple identities to be relevant in discrimination claims. But at the same time, the discrimination analysis ends up prioritising a single ground where the experience of discrimination seems to be based on more than one identity. The question before the court was whether a provision under the Insurance Act 1943 discriminated against married women by depriving them, in certain circumstances, of all or some of the benefits of life insurance policies made in their favour by their husbands. O'Regan J observed that: (a) the impugned provision implied two grounds of discrimination—sex and marital status; (b) the fact that one of them (marital status) was an unenumerated ground did not affect the nature of protection since the non-discrimination guarantee provided for the possibility of discrimination being based on 'one or more' grounds; and hence reaffirmed that (c) the enumerated list of grounds 'should not be used to derogate from the generality of the prohibition on discrimination'.[97] However, in going on to find that the impugned provision was discriminatory, O'Regan J did not explore these possibilities, but instead found discrimination to be 'substantially' based on the single ground of sex, without reading in marital status as an analogous ground and extending the general non-discrimination guarantee to intersectional discrimination:

> It is not necessary to consider whether the other ground of discrimination, marital status, would be a ground which would constitute unfair discrimination for the purposes of section 8. It is sufficient that the disadvantageous treatment is *substantially based on one of the listed prohibited grounds*, namely, sex.[98]

The relative effort in reading in an analogous ground to find for intersectional discrimination when the claim could succeed on the single ground of sex seems a plausible reason for the Court to choose a single ground as the operative basis of

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97 *Brink* (n 10) [43].

98 ibid (emphasis supplied).

discrimination.[99] From the claimant's perspective, it is also pragmatic to resort to a listed ground rather than an analogous one since Section 9(5) offers a presumption of unfairness when discrimination is based on one or more of the grounds listed in subsection (3).[100] But it is questionable whether these immediate benefits yield a justifiable approach to finding discrimination. The expediency of finding discrimination to be 'substantially' based on a single ground fails to reach the heart of the discrimination problem—that something is discriminatory *because* of the wrongful conduct or effects being *based* on certain identities or grounds. The approach may thus be 'accused of failing to perceive an applicant's "true" experience of disadvantage.'[101] On a normative level, it is plain that such a characterisation of the claim as accruing only on the single ground of sex may not represent the accurate nature of discrimination which was based on *both* sex and marital status. It affects married women in particular, not only because they are women but because they are married as well. By taking sex to be 'substantially' relevant, the analysis ultimately discounts the relevance of the marital status. As Iyer explains, what is problematic in this approach is that: 'one social characteristic assumes gigantic proportions while other aspects of social identity are rendered indistinguishable from the background norm.'[102]

The specific claim in *Brink* was against 'married women'[103] and not just women per se. The impugned provision concerned 'spouses married in community of property

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99 Although there may also be important institutional reasons for this. See discussion in Chapter Six, Part V.

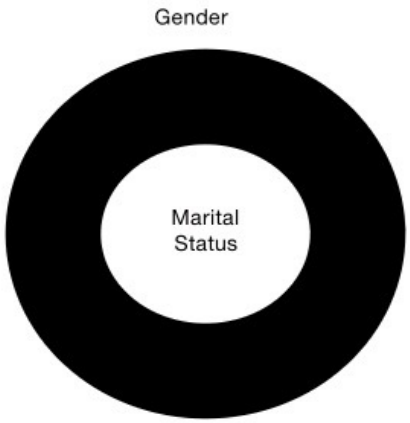
100 Marius Pieterse, 'Discrimination Through the Eye of the Beholder' (2000) SAJHR 121, 125–126. Nevertheless, the Constitutional Court has found unfair discrimination based on the unlisted ground of citizenship in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

101 Pieterse (n 30) 407 (noting that the Court has been criticised for this in other cases like *Volks*, *Hugo*, *Bhe* and *Harksen*).

102 Iyer (n 22) 192.

103 *Brink* (n 10) [19], [43], [47], [50] (O'Regan J).

and protect[ed] life insurance policies owned by a wife from attachment in certain circumstances.'[104] Characterising this as mainly or substantially a claim of gender or sex discrimination reduces the specificity of the claim and thus fails to be on all fours with the demand for integrity. By this sleight of hand, the nature of discrimination becomes generic and essential, thereby speaking not of *all* women but mainly those who are disadvantaged *only* on the basis of one axis of disadvantage (sex) but privileged in other ways (like marital status in this case).[105] In terms of discrimination law, essentialism misunderstands the very causal basis of the claim by ousting multiple identities and makes the discrimination inquiry diagnostically imprecise in appreciating the nature of an intersectional claim.[106] The essentialist charge then is that by eclipsing marital status with sex, we ignore unique and shared patterns of group disadvantage produced by their interaction. In terms of a Venn diagram, the sphere for sex discrimination consumes the impact of marital status as depicted in Figure 5.



[Figure 5: Substantially Based on Single-Ground Approach in *Brink*]

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104 ibid [21].

105 See also the discussion on essentialism in Chapter One, Part I.A.

106 Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 SLR 581, 585; Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (2013) 10 BWLJ 16, 19; Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press 1990) 136.

As Choudhry explains, this overshadowing has two effects:

> On the one hand, placing 'elements in a category tends to suppress differences and emphasize similarities among those elements.' Conversely, it 'heightens differences between members and non-members of a category, while suppressing any similarities that some members might share with non-members.'[107]

In other words, a 'substantial' focus on one ground runs the danger of essentialising the group disadvantage associated with individual grounds and at the same time also marginalising the unique and shared patterns of group disadvantage produced by intersecting grounds. This in turn may undermine an accurate inquiry into the causal basis of discrimination as based on people's multiple identities. It means that: **(i)** differences between people who share a characteristic may be suppressed even when their experiences differ based on other identities and we may fail to appreciate the unique nature of disadvantage associated with multiple identities; or **(ii)** differences may be accentuated such that we fail to appreciate the shared patters of disadvantage between members of different groups. These losses resemble the drawbacks of the single-axis approach in *DeGraffenried* discussed in Chapter One. Although *Brink* itself succeeded and may not reflect these losses, its approach can still be critiqued within the framework of intersectional integrity which asks for: **(i)** respecting claimants' integrity by appreciating their identities as a whole; and **(ii)** considering the unique and shared patterns of group disadvantage based on their multiple identities in understanding the nature of discrimination. It is arguable that a holistic approach to sex or gender which incorporates all other experiences (like those associated with marital status, sexual orientation, disability etc) can respond to the critique above. This is acceptable and in fact Black feminists and intersectionalists have long argued for an inclusive approach to

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107 Sujit Choudhry, 'Distribution vs. Recognition: The Case of Antidiscrimination Laws' (2000) 9 GMLR 145, 167 (quoting Iyer (n 22)) (references omitted).

feminism.[108] But as Albertyn and Goldbatt explain, it is difficult to do so in complex cases where the basis of disadvantage cannot simply be contained within sex or gender.[109] The critique of *Brink* is thus primarily in relation to its approach of 'substantially' making only gender relevant in a case of discrimination which *cannot* be explained unidimensionally. The challenge is to relegating marital status to subordinate significance in the discrimination inquiry rather than a challenge to the holistic approach to single ground discrimination which in fact may take into account other related identities. It is in this specific way that the framework of intersectional integrity may be undermined by this approach.

b. Gumede and Moseneke

It is useful to briefly mention another possibility for a court brought upon to consider a multi-ground claim—to specifically reduce the claim to a single-axis.[110] Like *Brink*, this is especially so where the claim seems to succeed on the single ground itself. The harm again is one of failing to grasp 'the whole wrong and its impact on the whole person'.[111] For example, *Gumede* was identified as 'a claim of unfair discrimination on the grounds of gender and race in relation to women who are married under customary law.'[112] The challenge involved issues of ownership, including access to and control of family

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108 Grillo (n 106) 20.

109 Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 248, 253.

110 In this way, these cases could well be examined under the previous set of cases in Section A based on their initial characterisation. But because they devolve primarily on a single-axis, it is appropriate to discuss them here.

111 Réaume (n 22) 133.

112 *Gumede* (n 11) [1].

property that affected women during and upon dissolution of their customary marriages. There were piecemeal observations about patriarchy and inequality in customary practices but the thrust of the analysis devolved upon the 'self-evident discrimination on at least one listed ground: gender'.[113] The analysis of the South African Constitutional Court was carried out primarily on the basis of entrenched patterns of patriarchy in marriages, while making some sporadic observations about women's inequality in customary marriages. However, the buck stopped at gender and any structured intersectional analysis of discrimination on both the grounds of race and gender was bypassed. Similarly in *Moseneke*, the claimant argued that it was discriminatory in intestate succession that white people's estates were administered by the Master of the High Court, while Black people's were administered by Magistrate. The case was argued as a matter of race discrimination but the Women's Legal Centre (amicus) pleaded another dimension into the case. They contended that in the case of intestate estates of deceased Africans, race, gender and culture interacted in a way which discriminated directly and indirectly against African widows.[114] Despite the amicus' contribution, the Court's discrimination analysis did not attend to the case of Black women for examining the qualitative distinction of discrimination based solely on race vis-à-vis both race and gender. Racism consumed the impact of discrimination on Black people, no matter their gender. It is also clear that since an unlisted ground like ownership will not benefit from the presumption of unconstitutionality afforded to listed grounds under Section 9(5), the Court has often proceeded on a single listed ground. So the accuracy of discrimination inquiry gives way to the convenience of finding for the claimant without an analysis of what actually underlies the cause of discrimination. This belies both the strands of

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113 ibid [34].

114 *Moseneke* (n 12) [17].

intersectional integrity in failing to consider the claimant as a whole and to make all identities relevant in describing and addressing the causal basis of discrimination which produces unique and shared patterns of group disadvantage. It mirrors the losses related to the *Brink* approach of deciding a claim of multiple identities to be 'substantially' based on a single ground.

ii. Single-Axis in 'Context' Discrimination

Duclos has insightfully remarked that: 'While the doctrine does not allow for a consideration of characteristics other than those described by the alleged grounds of discrimination, there are spaces in the application of the doctrine to the case where these "extraneous" considerations may creep in.'[115] 'Context' is one such space.

Despite reference to multiple grounds, the approach to discrimination inquiry may remain motivated by the single-axis framework especially where the claim involves unenumerated grounds. But in contrast to a 'substantial' focus on a single ground as in *Brink*, *Gumede* and *Moseneke*, judges may try to see discrimination as flowing from other identities (other the single ground which is taken to be the basis of the claim) to be relevant as the 'context' of the claim. Contextual analysis has been pursued by the South African Constitutional Court and the Canadian Supreme Court, and has been especially invoked for addressing multiple identities in claims. The approach thus remains an important one to be examined against the framework of intersectional integrity.

The South African Constitutional Court has outlined its contextual approach as follows:

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115 Duclos (n 49) 41.

> Discrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. *Discrimination must be understood in the context of the experience of those on whom it impacts.*[116]
>
> One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.[117]

According to Albertyn and Goldblatt, there are four strands of the South African contextual approach: **(i)** analysis of the socio-economic situation of claimant; **(ii)** impact on the claimant as flowing from systemic patterns of group disadvantage; **(iii)** relevance of examining complex forms of discrimination yielded by multiple identities in an intersectional way; and finally **(iv)** an appreciation of the historical context of the claim.[118] Similarly, in the Canadian context, Iacobucci J in *Law* enlisted four non-cumulative and non-exhaustive 'contextual' factors for the analysis of the discrimination claim as: **(i)** pre-existing disadvantage vulnerability, stereotyping, or prejudice experienced by the individual or group; **(ii)** relationship between grounds and the claimant's characteristics or circumstances; **(iii)** ameliorative purpose or effects; and **(iv)** nature of the interest affected.[119]

It is clear that what constitutes 'context' is framed very broadly in Canada and South Africa such that a whole host of statuses and surrounding environment can be made relevant through 'context' in examining a discrimination claim. Thus, 'context' can be taken to reflect all such identities, situations and circumstances which are relevant in the experience of discrimination. This section is primarily concerned with the strand of context as identity or personal characteristics and not the broader socio-cultural or geo-

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116 *Immigration Case* (n 38) [35].

117 *Sodomy Case* (n 39) [113].

118 Albertyn and Goldblatt (n 109) 260–261.

119 *Law v Canada* (n 42) [59], [87].

political context (which though remains relevant). Identities which are not captured as grounds have the potential to be factored in the discrimination inquiry via context. As the previous sections argued, a 'substantial' focus on one ground or treating multiple grounds as a matter of multiple discrimination can ignore unique and shared patterns of disadvantage and breach claimant's integrity. The possibility of addressing identities qua context instead of grounds then seems to intuitively overcome the categorical approaches to grounds. As I seek to show in this section, while contextual analysis is a step in the right direction for realising intersectionality, it may not itself and in all circumstances be sufficient in supporting intersectional discrimination. It is then important to examine those cases where context is resorted to for factoring in multiple identities/grounds and to see how they fare. The most interesting and relevant cases are of indirect discrimination—where the criteria for discrimination does not itself invoke multiple personal characteristics but the impact is suffered on multiple bases. *Volks* and *Gosselin* are both telling examples and I take them each in turn.

a. Volks

Volks was argued on the single ground of marital status discrimination. But as the case reveals, gender or sex were relevant grounds which were either dismissed *ab initio* by the majority, or reckoned with outside the construct of grounds as the 'context' by the minority. As the succeeding analysis makes clear, the reasoning in the two minority judgments is more sustainable, with Sachs J's opinion faring better than that of Mokgoro and O'Regan JJ when examined against the framework of intersectional integrity.

The legal controversy in *Volks* revolved around the Maintenance of Surviving Spouses Act 1990 which conferred on married surviving spouses the right to claim maintenance from the estates of their deceased spouses if they were unable to support

themselves. It was challenged as discriminating against survivors of stable permanent cohabitation relationships. The claimant, Mrs Robinson, was destitute and wanted to claim from the estate of her deceased partner with whom she had shared a sixteen-year relationship very similar to marriage. The claim was characterised as based on the ground of marital status since the legislative criterion drew a distinction between married people and unmarried people.[120] The majority and the two minority judgments concur in finding that the distinction was discriminatory and presumed to be unfair under Section 9(5) of the Constitution. But only the minority goes on to find that it constituted 'unfair discrimination' under Section 9(3) which could not be justified under Section 36 of the Constitution.

Skweyiya J, writing for the majority, found fairness in the fact that while the dignity of cohabiting partners was not *meant to be* impaired by the distinction,[121] the dignity of the deceased partners *would have been* impaired if their life choices were not respected beyond their lifetimes.[122] The majority was thus motivated to protect people's choices in terms of freedom of testation[123] and freedom not to marry.[124] In treating this claim as one of direct discrimination where the legislature did not *intend* to impair their dignity by drawing the impugned distinction, the majority also fails to examine the impact of the provision on Mrs Robinson and those in her position. Skweyiya J expresses in passing his 'sympathy' and 'genuine concern' for female surviving partners whose deceased male partners had refused to marry them and found that the 'conduct of the

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120 *Volks* (n 8) [49]–[50].

121 ibid [62].

122 ibid [17].

123 ibid [60].

124 ibid [94].

male partner is unconscionable in these cases.'[125] But the situation of female surviving partners receives no further attention from the majority because of the assumption that it was a product of social reality not law.[126] Because this case alone would not have changed the existing power structures which disadvantage and subordinate women, the Court exempted an equitable application of this provision as well. Since the Court does not delve into the actual impact of the provision, it does not find the possible palliative impact of making it inclusive to be significant either. Despite its reminder that: '[i]n the final analysis, it is the impact of discrimination on the survivors of permanent life partnerships'[127] which is determinative in the discrimination inquiry, the majority was concerned with the protection of the institution of marriage, freedom for testation and freedom not to marry.[128] The analysis of impact, especially in indirect discrimination, which was supposed to be the epicentre of the unfairness inquiry,[129] is thrown by the wayside—in that exclusion from inheritance disadvantaged not just those in marriage-like relationships but indirectly affected women in these relationships because it entrenched their position of economic dependence and lack of control over the form of their relationships.

To the extent that the impact of the impugned provisions was gender-based, the evasion seems to flow from two reasons: first, the claim having been initially approached as direct discrimination based on a single ground; and secondly, the exclusion of additional evidence to the point. The first reason is straightforward: if a personal characteristic is not identified as the basis of discrimination qua grounds, the impact

125 ibid [59], [68].

126 ibid [66].

127 ibid [79].

128 ibid [60], [81], [82], [85], [87], [94].

129 *Harksen* (n 36) 38 (Goldstone J).

flowing from that may also go undetected because there would be nothing steering the detection of patterns of disadvantage on that basis.[130] Even when the court is directed towards such impact, it may be discounted when not argued as linked to the ground on which the claim is based. Thus, the majority debars the additional evidence brought by the amicus curie which showed the vulnerability of women in cohabitation relationships.[131] According to the Court, the evidence was based on qualitative research from 'only eight poor communities'[132] relating primarily to 'African' and 'Coloured' women.[133] Contrasted with 'statistical or scientific evidence capable of easy verification', the evidence brought by the amicus curie was seen as 'non-representative' 'controversial' and not relating to the 'direct case before the court.'[134] Thus, proceeding exclusively on marital status discrimination, the majority ends up ignoring the formative gender and race dimensions which could have explained the unfairness of discrimination in this claim. Even within marital status, the court worked with an unreal and overly simplistic explanation of power relations by concluding that Mrs Robinson's 'relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities.'[135] However, the reality of women like Mrs Robinson is that they are often not the ones who are free to *choose* the form of their relationships due to economic dependence and structural subordination in cohabitation relationships. It was worth considering for the

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130 This point is also argued in relation to indirect discrimination in Chapter Five, III.A and Chapter Six, IV.B.

131 *Volks* (n 8) [30], [31].

132 ibid [34].

133 ibid [33].

134 ibid [31]–[35].

135 ibid [55].

majority, that if the claimant was instead a male partner in a cohabitation relationship rather than a female partner, perhaps there would have been no actionable claim because he would not have been similarly disadvantaged at all.

The dissent of Mokgoro and O'Regan JJ also proceeds on the single ground of marital status but ends up finding unfair discrimination against survivors of permanent and intimate life partnerships which were 'socially and functionally' similar to marriage.[136] Their primary thrust was on clarifying the purpose of the prohibition of discrimination based on marital status and why Mrs Robinson's case was in fact the central case of marital status discrimination.[137]

They considered how 'rules of marriage [were] discriminatory on the grounds of gender and sex,'[138] but their analysis of unfairness was thoroughly devoted to setting straight the purpose of prohibiting marital status discrimination. Keeping this focus, they considered how gender inequalities associated with marriage reproduced themselves in marriage-like relationships.[139] Their perspective is still a step ahead of the popular approach in *Brink*, for tracing discrimination to be 'substantially' based on not just one ground but admitting the relevance of other identities as well.

On the other hand, the dissent by Sachs J, reckoned with the gender dimensions of the claim in a more substantive way, even though he too characterised the claim as devolving on the single ground of marital status.[140] He explained thus:

> The source of the complexity appears to lie elsewhere. In my view this is one of those cases in which however forceful the reasoned text might be, it is the largely unstated subtext which will be determinative of the outcome. The formal legal issue before us is embedded in an elusive,

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136 ibid [108] (Mokgoro and O'Regan JJ), [164] (Sachs J).

137 ibid [118] (Mokgoro and O'Regan JJ), [200] (Sachs J).

138 ibid [109]–[111].

139 ibid [121].

140 ibid [189].

> evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.[141]

Sachs J's acknowledgement of the issue as being multi-layered is a useful one. His sense is that the legal or formal characterisation at hand often camouflages the complexity of the problem under determination.[142] He finds the majority's logic to be 'impeccable within the legal framework adopted'[143] because it locates the issue in a 'completely different legal landscape.'[144] In response, Sachs J begins by situating the inquiry differently within the 'socio-legal context: patriarchy and poverty'.[145]

While Sachs J too describes the 'legal issue' as confined to discrimination on the basis of a single ground of marital status,[146] he undertakes the analysis of impact within a 'framework of reference that goes beyond the classificatory landscape established by the impugned measure itself.'[147] He does this in appreciation of the socio-legal context of the case, especially that which related to patterns of disadvantage which are defined by the intersection of gender and marital status. Thus, he notes:

> it is women rather than men who suffered disadvantage because of their status of being married or unmarried. Any investigation of unfairness resulting from marital status would accordingly have to take into account the manner in which patriarchy dictated the advantage or disadvantage associated with the status of being married or not being married.[148]

He further quotes with approval, the view of L'Heureux-Dubé J, that certain 'subgroups within the ground of marital status [have] typically suffered the most

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141 ibid [149].

142 ibid [147]–[148].

143 ibid [151].

144 ibid.

145 ibid [163].

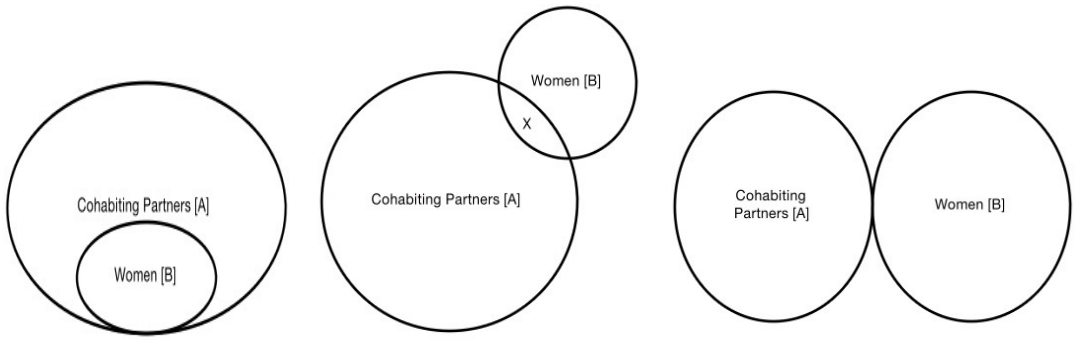
146 ibid [189]–[190].

147 ibid [191].

148 ibid [199].

historical disadvantage and marginalisation are individuals who are single parents, or are divorced or separated.'[149] To this, he particularly adds the sub-group of women.[150] Thus, for Sachs J, the context of gender-based subordination becomes a specific pattern within the larger pattern of marital status discrimination. It is in reference to this pattern of disadvantage that he finds the exclusion of surviving spouses from the impugned benefits to be unfair discrimination.[151]

The three judicial strategies in *Volks* can be imagined as:



[Figure 6: Approaches of the Minorities and Majority in *Volks*]

Despite formally devolving on a single ground, Sachs J's contextual approach takes into account other relevant identities to proffer a complete account of patterns of disadvantage and thus resembles compound or intersectional discrimination on the spectrum rather than the first two approaches based on single-axis. He particularises his analysis to the context of female cohabiting partners who survived their male partners by identifying the specific vulnerability of women and at the same time examining the broader pattern of disadvantage associated with marital status. This context based

149 ibid [202] (quoting *Miron* (n 74)).

150 ibid [203].

151 ibid [219]–[220].

ground approach seems appreciative of intersectional integrity in its ability to map patterns between multiple identities without disintegrating the identity of the claimant and those in her position and in explaining how different identities (as grounds and as context) yield the disadvantage complained of. It is different from the approach in *Brink* (compare Figure 5) which eclipsed or subsumed the dimension of marital status discrimination by taking sex or gender to be substantially relevant in explaining the nature of discrimination. In fact, Sachs J's Approach in Figure 6 is closer to the compound ground approach of the *Corbiere* Court depicted in Figure 3. Even as the approaches take substantially different analytic paths, they both reach the point of appreciating the unique and shared group disadvantages based on considering the claimant's position as a whole. This reaffirms the relevance of 'context' as a device for realising the framework of intersectional integrity.

On the other hand, while Mokgoro and O'Regan JJ recognise the possibility of shared and unique patterns of disadvantage based on marital status and gender, they focus primarily on marital status. Thus, the gender dimension is deflated and the intersecting portion [X] is merely noted. Though Mokgoro and O'Regan JJ reach the same result as Sachs J and find for unfair discrimination which is not justified under Section 36, their approach does not squarely correspond with intersectional integrity for the same reasons as those against the approach followed in *Bhe* because even though they agree that the identities interacted and combined in producing patterns of disadvantage there is little detail in which this suggestion is pursued. That does not necessarily mean that the approach is not well-conceived in supporting a successful claim. The assertion here is that it is not wholly commensurate with the framework of intersectional integrity per se. To that extent, even though the combination/overlapping approach to discrimination may reach the same result as an intersectional analysis in this case, there

will be a loss of understanding the causal basis of discrimination as it relates to multiple identities.

Finally, it is plain why the majority's approach does not complement the framework. Skweyiya J's decision does not delve into the relationship between gender and marital status discrimination flowing from the impugned provisions, despite his awareness of it. The compensatory remarks towards female survivors of cohabitation relationships are too unsatisfying in acknowledging systemic patterns of intersecting disadvantage.[152]

b. Gosselin

As highlighted above in relation to *Volks*, when the criterion of distinction is based on a single ground but its impact is suffered on multiple bases, claimants and courts may either ignore other aspects of discrimination or resort to the device of 'context' rather than appreciating multiple identities as grounds per se. This approach is also illustrated in the case of *Gosselin*. Louise Gosselin was young, female, poor, unemployed and battling with mental health issues. She challenged the Quebec government's social assistance scheme where the base amount payable to welfare recipients under 30 was a third of the amount payable to those 30 and over. To receive an amount comparable to that received

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152 Similar approach comes through in the decision of the Supreme Court of Canada in *Quebec v A* which involved a challenge to the provisions of Civil Code of Quebec which excluded cohabiting partners from the scope of patrimonial provisions relating to marriage. The majority, like in *Volks*, found that the exclusion was not discriminatory under Section 15(1) of the Canadian Charter. But the Court was split variously. The majority (lead by Abella J) of five judges initially finds that there is discrimination while the minority (lead by LeBel J) find that there was no discrimination; but in the final analysis, one of the minority judges (McLachlin CJ) joins the minority to find that the discrimination was ultimately justified under Section 1 of the Charter. Like *Volks*, the majority decision concerned itself with the choice of the de facto spouses in formalising their relationship into marriage. The Court applies its touchstone for finding discrimination by noting the absence of government's *intention* to perpetuate prejudice or stereotype in drawing the impugned distinction. It thereby spends little time on exploring the impact or effect of the impugned provisions on the claimant or those in her position, much as Skweyiya J's majority opinion in *Volks*. See *Quebec v A* [2013] 1 SCR 61 (SCC).

by older people, recipients under 30 had to participate in a designated work activity or educational program. This legislative scheme was argued to be in violation of Section 15(1) of the Canadian Charter on the ground of age. Given that the claimant chose a single ground of discrimination, the Court proceeded to examine the claim accordingly.[153]

In determining the discriminatory impact, the majority judgment by McLachlin CJ found that 'unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege,'[154] and thus those under 30 had better employment prospects than older beneficiaries.[155] Thus, she dismissed the claim that the distinction perpetuated a stereotype or reinforced prejudice on the basis of age and thereby violated Section 15(1).[156]

The majority judgment does not consider the possibility that the nature of disadvantage complained of was suffered not *solely* on the basis of age but also on the basis of socio-economic deprivation or poverty; and in the specific case of Louise

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153 It is useful to note that the scheme implicated at least one other criterion for distribution of social assistance: for those certified as 'disabled' the scheme made separate provisions. Louise Gosselin was certified disabled at times but at other times she was considered able bodied. A straightjacket legislative criteria for identifying disability as well as its inflexible application is criticised by Gwen Brodsky et al (n 7) 206–207.

154 *Gosselin* (n 9) [31].

155 ibid [56].

156 The failure of the claim in *Gosselin* is linked to many lapses by the Court and they are taken up further in Chapters Five and Six. For example, Sheila McIntyre has critiqued the application of a very low and deferential standard of review in 'The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review' (2006) 31 QLJ 731; Gwen Brodsky has criticised the Court's justification analysis under Section 1 of the Canadian Charter in 'Gosselin v Quebec (Attorney General): Autonomy with a Vengeance' (2003) 15 CJWL 194; Jennifer Koshan and Jonnette Watson Hamilton have criticised the acontextual discrimination analysis of the Court in 'The Continual Reinvention of Section 15 of the Charter' (2013) 64 UNBLJ 19. However, the present critique is mainly concerned with the acontextual and isolated view of the disadvantage resulting from the operation of legislative criterion based on age. The Court's approach discarded the reality of the claimant before the Court and thus bypassed a searching inquiry of the impact of the impugned legislation which exacerbated the patterns of disadvantage based on age and other identities of the claimant.

Gosselin on disability and gender as well.[157] But given that the Court had to consider the four contextual factors enumerated in *Law*,[158] the one where it had the clearest possibility of reckoning with multiple identities was under the second one: 'Relationship Between Grounds and the Claimant Group's Characteristics or Circumstances'. The inquiry here involves asking if a law is 'closely tailored to the *reality of the affected group* is unlikely to discriminate within the meaning of s. 15(1).'[159] The majority opinion justifies the government's choice of criterion (30 years of age) for a lower rate of social assistance as based on legitimate long term and short term purposes which affirmed the dignity and potential of those below 30.[160] On matching the ostensible governmental purpose against the actual need of the claimant, the Court disregarded the claimant's individual circumstances, especially deeming it dangerous to extrapolate it to 75,000 other individuals implicated in the class action.[161] Louise Gosselin's individual circumstances were thus dismissed as her own 'personal problems' which allowed the Court to justify her 'falling through the cracks'.[162] Thus, the points at which the majority comes close to making a reference beyond age, it does so with a pejorative predisposition towards viewing intersectionality as either an individual's natural circumstance (hence their burden) or simply personal fault. Thus, McLachlin CJ describes the impugned provisions and Louise Gosselin's situation as:

> [Louise Gosselin] ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits.[163]

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157 Brodsky et al made intersectionality the basis of their analysis in the feminist rewriting of *Gosselin*. For analysis, see text accompanying nn 175–180.

158 *Law v Canada* (n 42) [59], [87].

159 *Gosselin* (n 9) [37]; *Law v Canada* (n 42) [17] (emphasis supplied).

160 *Gosselin* (n 9) [41]–[44].

161 ibid [46].

162 ibid [55].

163 ibid [7]–[8].

> [W]hen Ms. Gosselin dropped out of programs, the record indicates that this was due to personal problems, which included psychological and substance abuse components, rather than to flaws in the programs themselves.[164]

The majority's rationale for letting 'some people' fall through the cracks effectively leaves the wellbeing of the most vulnerable individuals (those belonging to multiple disadvantage groups) to be sacrificed in the operation of social programmes.[165] Even though the Court accepts that some people have indeed been 'pushed well below the poverty line', the inconvenience in gauging exactly who they are makes the majority find in the government's favour.[166] In this way, even the claimant's experience of disadvantage was ignored because she could not prove a wholesale misconceiving of the programme.[167] Duclos' remark usefully captures Louise Gosselin's plight:

> As a complainant departs from the dominant group norm in an increasing number of directions, it is less and less likely that the conduct complained of will be held to constitute discrimination in law. If the complainant straddles too many categories, she is increasingly likely to lose her balance and fall through the cracks: it is no longer discrimination, it is "just her". There are two aspects to the problem. First, such a complainant must somehow decide which of several characteristics that she experiences as inextricably intertwined in her was the characteristic that precipitated the discrimination. The more ways in which she differs from the norm, the harder this decision will be. Second, she must convince the tribunal that this characteristic caused the discrimination. Again, the more ways in which she differs from the norm, the less likely it is that the tribunal will consider that this one characteristic was the cause of the discrimination.[168]

Louise Gosselin is afflicted in both ways—her claim is reduced to the single ground of age because it directly attacks the government's criterion for social assistance but she struggles to substantiate her case solely through the lens of age because of her multiple identities of disadvantage. The crux of the claim here is that Louise Gosselin was excluded from the operation of the welfare statute which identified a single criterion of age for distributing benefit but it excluded those with intersectional identities who

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164 ibid [48].

165 ibid [72].

166 ibid [65].

167 ibid [44], [57]–[58].

168 Duclos (n 49) 44.

equally required social assistance. While the statute sought to address socio-economic disadvantage based on age, Louise Gosselin seemed to have indirectly suffered also on the basis of her gender, mental health and need for social assistance—spheres of disadvantage which existed but discarded as eventually irrelevant. The result, as shown in Figure 7 is that other identities though present in the experience of discrimination, were eclipsed and hence disregarded by the single-axis focus on the ground of age in considering the position of people who were below 30 years of age.

[Figure 7: Single-Ground Discrimination]

While the majority found age discrimination 'counter-intuitive' [169] because '[y]oung people do not have a similar history of being undervalued,'[170] it may have found a different situation in relation to poor young women who were significantly more vulnerable and disadvantaged. If this inquiry was conducted in appreciation of the patterns of group disadvantage based on age, socio-economic disadvantage, gender and disability, the Court may not have so easily dismissed the finding of disadvantage. The claim then asks the Court to find correspondence between actual vulnerability and the criterion chosen to alleviate it. But the fact that the stated aim of the statute (to provide benefits to unemployed) might not have been served because the chosen criterion was

169 *Gosselin* (n 9) [33].

170 ibid [32].

not wholly accurate does not seem to have perturbed the *Gosselin* majority.[171] In a complex case like *Gosselin*, the discrimination inquiry should instead show real interest in looking further than the government's chosen criterion for distinction to identify what *really* were the personal characteristics which shaped the experience of discrimination and the *impact* of such discrimination rather than simply making the government's criterion the ground of discrimination. *Gosselin* seems to have significantly suffered with the monotone of age because the majority's analysis focuses solely on the legislative criterion rather than matching up the impact on the claimant to the her identities, qua grounds and context. As the forthcoming discussion on the feminist judgment shows, it is not a matter of treating a claim as direct or indirect discrimination, but the focus on impact which carries the potential for excavating the intersectional nature of discrimination.[172]

On the other hand, Bastarache J's dissent found that Louise Gosselin's situation was illustrative of the manner in which the social assistance scheme violated the basic human dignity of those below 30; and hence there was 'no necessity for her to bring evidence of actual deprivation of other named welfare recipients under the age of 30.'[173]

Similarly, L'Heureux-Dubé J in her dissenting opinion focuses on the particular claimant and her experience of the law rather than the exclusive viewpoint of the legislature.[174] She warns against abstract generalisations and categorisations based on grounds and insists on evaluating the effects of the impugned distinction.[175] In this vein, the contextual analysis pursued in the dissenting opinions looked very different in its sensibility from the majority's approach. Going beyond government's stated purpose and

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171 ibid [55]–[57].

172 See further for this argument Chapter Six, IV.C.

173 *Gosselin* (n 9) [255].

174 ibid [103], [112]–[113].

175 ibid [110]–[111].

turning the focus specifically on the impact on the claimant, they find a whole set of surrounding circumstances as accentuating Louise Gosselin's vulnerable position including the 'imminent and severe threat of poverty' from the disparate operation of the training programmes; possibilities of malnutrition and turning to prostitution in dire situations, and wholesale exclusion from participation in Canadian society.[176] Although L'Heureux-Dubé J goes on to find discrimination to be the *sole consequence* of the claimant's age, her reliance on the context of Louise Gosselin's gender, poverty and disability fares better than the majority within the framework of intersectional integrity.[177] It is difficult to say precisely how the minority factors in multiple identities as context (in comparison to *Volks* where the opinions are clear) but what can be stated firmly is that they were concerned with context far beyond the single ground of age on which the case was argued. Thus, despite precise analytic clarity, this approach is still preferable within the framework of intersectional integrity as compared to the straightjacket and acontextual single ground approach of the majority.

The feminist rewriting of the *Gosselin* judgment by Gwen Brodsky, Rachel Cox, Shelagh Day and Kate Stephenson[178] pursues a path similar to intersectional integrity. The overall approach of the authors was to trace the patterns of disadvantage associated with the position of welfare recipients below 30 as closely as possible and in appreciation of the effects of intersecting forms of disadvantage based on race, gender, disability, marital and child-care status, etc. They were particularly concerned with giving space and consideration to Louise Gosselin's particular situation and her experience of extreme deprivation. Thus, although the Supreme Court of Canada's decision became 'the official

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176 ibid [132].

177 ibid.

178 Brodsky et al (n 7).

version of Louise Gosselin's story', the authors noted that: '[i]t seemed important to us to tell the story differently.'[179] In this way, the strands of integrity and intersectionality are keenly reflected in how the authors chose to respond to the claim.

The feminist judgment's approach to determining the causal link of grounds with impact marks a vital departure from the Supreme Court's majority judgment and is key to the intersectional analysis. The authors began by emphasising four contiguous points: first, that the discrimination inquiry needed a 'contextualised' rather than an isolated view of grounds—whether for a single ground or for multiple grounds involved in the claim;[180] secondly, in this way, a contextualised view of age *was* sufficient in responding to Louise Gosselin's claim for finding discrimination under Section 15(1);[181] thirdly, the claim could also be understood as based on 'intersecting grounds of age and reliance on social assistance or destitution';[182] or finally, like *Corbiere*, the claim could be understood as a matter of combined analogous ground of age and receipt of social assistance.[183] While reaffirming the soundness of all these approaches, the feminist judgment chose to proceed with the last option of the hybrid ground of age and reliance on social assistance. The reason, as the authors explained was that: '[c]onsidering fully the grounds at play, and their interaction, helps to illuminate the character of the discrimination.'[184] Thus, the authors went on to consider how other intersecting patterns of group disadvantage like racism, sexism and disability discrimination intersected with the compound analogous ground of age-social assistance in exacerbating the experience of

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179 ibid 190.

180 ibid [30], [31].

181 ibid [32], [46].

182 ibid [33].

183 ibid [33], [36].

184 ibid 204.

disadvantage.[185] They affirmed the indispensability of taking an intersectional view of disadvantage (via a contextual view of grounds) in strong terms:

> The danger of ignoring the particular effects on disadvantaged groups is that the nature and extent of the harm of poverty-producing measures and their potential to reinforce pre-existing disadvantage and compromise fundamental interests may not be fully appreciated. Purely individualistic and gender-, race-, and disability-neutral explanations of poverty are too simplistic. Taking into account group-based effects tells more of the truth of what is happening. It can show that there are qualitatively different impacts on certain groups.[186]

The normative approach of the feminist judgment exemplifies accord with the bipartite demands of intersectional integrity. The approach is one which considers the grounds of destitution/need for social assistance and age to signify a hybrid ground which adequately captured the disadvantage associated with young age, unemployed-status and destitution, just as the approach in *Corbiere*. But they go on to find that this disadvantage operated in the 'context' of and interaction with other forms of disadvantage associated with gender, disability and race etc. Thus, the position of women, aboriginals, pregnant women, single women with children and disabled who were also below 30 and destitute was qualitatively distinct but exacerbated the deprivation sought to be addressed through Section 15(1) of the Canadian Charter. The analysis considers in tandem the broader condition of those below 30 and in need of social assistance as well as the specific forms of disadvantage suffered by someone in the position of Louise Gosselin who also experienced sexism and disability discrimination. The depiction of this approach as a Venn Diagram appears thus:

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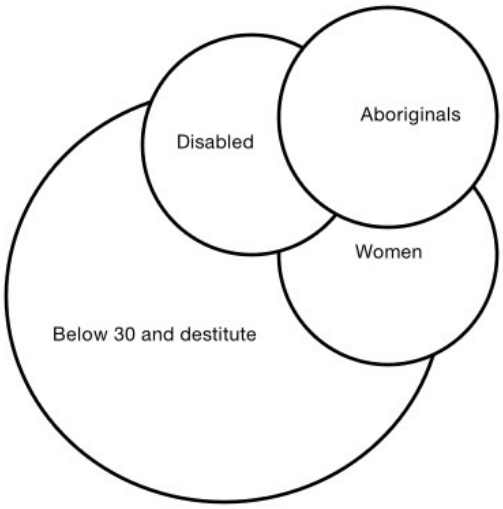
185 ibid 200, 206–207, 211–212.

186 ibid 211.



[Figure 8: Intersectional Discrimination in Feminist Rewriting of *Gosselin*]

B.2 When Multiple Grounds are not Mentioned: Hugo

There are some cases where the criteria of distinction as well as its impact may devolve on multiple bases but the court may focus only on a single axis. The difference between such claims and *Brink*, *Gumede* and *Moseneke* is that multiple identities are not made relevant at any point and the single-axis focus is determined from the outset. The discrimination inquiry may then be misguided in tuning out intersectional integrity by excluding multiple identities at all. The final outcome may thus be unfavourable—in failing to detect the patterns of discrimination created by multiple identities and in treating claimant as a whole; and thus resulting in an unsuccessful claim. The South African Constitutional Court's decision in *Hugo* exemplifies this situation.

Hugo concerned President Mandela's decision to grant clemency to all women prisoners with children below twelve years of age. The claimant, a single father of a child below twelve, was excluded from pardon and he challenged the President's decision as being unfair sex discrimination. In deciding the ground of discrimination, Goldstone J, writing for the majority found that:

> The Presidential Act, in fact, discriminates on a combined basis, sex coupled with parenthood of children below the age of twelve. Only women who are parents of such children were released: women without children were not. In [*Brink*] this Court held that it is sufficient if the discrimination is substantially based on one of the listed grounds in section 8(2). Accordingly, it is clear that the Presidential Act prima facie discriminates on one of the grounds listed in section 8(2).[187]

This indicates that the Court seems to have initially acknowledged an intersectional basis of discrimination in marital status, childcare status and sex. But since the claim was primarily argued as a matter of sex discrimination, the Court proceeded on a single ground only.[188] The assumption, as in *Brink*, being that it is sufficient to examine the claim in this way. The inarticulate premise also being that it would be harder to admit an analogous ground like single parenthood of young children than to proceed on the listed ground of sex. At this point, it should be apparent that the courts often choose expediency over accuracy in ascertaining how (and which of) people's personal characteristics yields discrimination.

In looking for actual disadvantage, the Court relies on 'a generalisation' rather than any 'statistical or survey evidence' to find that 'mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers.'[189] It thus concludes that it was not unfair to discriminate against fathers on the basis of sex. In upholding the validity of the Presidential Act, the majority reminds us that: 'Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.'[190] But the impact analysis, as it relates to the claimant and those in his position, remains wanting. While the

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187 *Hugo* (n 13) [33].

188 It is useful to note that *Hugo* predates both *Bhe* and *Hassam* and its approach is then closer to *Brink* than to later jurisprudence of the Constitutional Court.

189 *Hugo* (n 13) [37].

190 ibid [41].

generalisation/stereotype may have been an accurate starting premise, to make it the final basis of decision without interrogating the actual situation of single parents, especially single fathers, the Court avoids any exploration of impact from the perspective of the claimant.[191] In this way, both the strands of intersectional integrity are foregone as: **(i)** the Court fails to trace patterns of disadvantage which are unique to single fathers of young children as well as those patterns of disadvantage which they share with single mothers; and **(ii)** to consider the claimant as a whole by focussing not only on his sex/gender but also on his status as a single parent of a young child. An appreciation of these two strands, could have brought the Court to reckon with the true nature of the discrimination claim. As Albertyn and Goldblatt explain:

> The major flaw [in *Hugo*] is that they are unable to locate the complainant, as a single father, within his social context… There is no recognition of the complexities of the issues where fathers are primary care-givers. The Court seems unable to see Hugo as both part of an advantaged group of fathers, and as distinct from that group, because of his location within the sub-group of disadvantaged fathers or the group of primary care-giver parents. The problems of application faced by the Court arise where the Court tries to relate the complainant to a particular group but loses sight of the overlapping nature of social groups.[192]

Albertyn and Goldblatt are right in that the situatedness of the claimant 'within the disadvantaged group of primary care-taker parents' should have mattered in analysing the impact of the exclusion of single fathers.[193] The criteria for Presidential pardon ran along two axes of gender and single-parenthood. In its reliance on generalisations, the Court ignores patterns of disadvantage associated uniquely with single parents irrespective of their gender. At the same time, the fact that single fathers may share the nature of disadvantage suffered by single mothers reveals shared patterns of disadvantage based on single parenthood. To the Court, single mothers created a unique uninteractive

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191 Pieterse makes a similar point: 'the finding that discrimination in Hugo did not affront the dignity of men failed to appreciate the indignity of the challenged proclamation's unwillingness to acknowledge men as parents (since the impact-analysis was not conducted in relation to the plaintiff's particular experience as a single parent).' Pieterse (n 30) 422.

192 Albertyn and Goldblatt (n 109) 264–65.

193 ibid 266.

category who shared nothing with other disadvantaged groups. The dimension of disadvantage based on single parenthood was simply left unexamined.

In this way, the decision validated the very stereotypes which disadvantage women; however, it also validated stereotypes against men, especially those which are just as detrimental. While it is true that women 'as a matter of fact'[194] may bear more child-care responsibility, it is also true that single fathers would bear as much responsibility as women. Such a limited understanding of gender not only defeats the protection from gender discrimination but also, blinkers us to other dimensions of people's identities which contribute to generating unique and shared patterns of disadvantage which lead to unfair discrimination.[195] *Hugo* is a complex example of how a narrow understanding of a single ground can oust not just complex forms of discrimination (against single fathers) but also reinforce the stereotypes associated with that ground and hence fails to remedy discrimination associated with it (against single mothers).

It can certainly be argued that this case could have simply benefited from a better perspective on gender discrimination proper. The stereotype relied upon by the Court that women *were in fact* the primary child carers also assumed that men were not. A nuanced perspective on gender discrimination would discourage relying upon this stereotype because it could be dangerous from the perspective of fathers who *were in fact* the primary carers for their children *and* also entrench the disadvantage associated with women's status as primary carers. But one way of approaching the claimant's case in *Hugo* is also to see the specific disadvantage in being a single parent and how it

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194 *Hugo* (n 13) [37].

195 Albertyn (n 60) [4-45—4-46]. See also Sandra Fredman, 'Reversing Roles: Bringing men into the frame' Oxford Human Rights Hub Blog (9 March 2013) <http://ohrh.law.ox.ac.uk/reversing-roles-'bringing-men-into-the-frame/> accessed 15 April 2015.

intersected with gender in a way which did not eliminate the disadvantage of single-fathers (because they were male) but coincided with the pattern of disadvantage associated with the position of single mothers. As Chapter One argued, it is important in such cases to take a universal view of intersectionality by exploring all relevant identities along both the axes of privilege and disadvantage.[196] This is because intersectionality is not limited to illuminating the intersections of group disadvantage but can be equally useful in complex cases of intersections of forms of group privilege and disadvantage both. It is then valuable to consider how identities interact in producing discrimination rather than thinking that the privilege (of being a man) negates any disadvantage accruing from other identities (of being a single father of a young child), or even to assume that certain groups (men) will never experience disadvantage and impose a rigid symmetrical view of protection in discrimination law.[197] In complex cases involving multiple identities it is not the focus on symmetry or asymmetry which is key to the discrimination inquiry. What is important is a nuanced and holistic view of discrimination produced by those identities without dismissing or overemphasising some identities simply because they are associated with privilege or disadvantage respectively.

Thus, even as intersectionality is not the only response to the failure of the claim in *Hugo*, it is one way to approach a claim which devolves not just on a listed ground but also potentially on an unlisted ground/identity. The outright dismissal of other identities relevant in a claim in favour of proceeding along a single axis not just undermines intersectionality but also leads to an unsuccessful claim with inequitable results.

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196 See Chapter One, IV.D.

197 It is useful to note that a wholly symmetric outlook can also be problematic. For example in *James v Eastleigh* [1990] 2 AC 751 (HL), the House of Lords found a council policy for allowing free swimming pool access to those of pensionable age to be discriminatory on the basis of sex since the retirement age for men was higher (65 years) than that of women (60 years). See analysis by Joanne Conaghan and a feminist rewriting of the judgment by Aileen McColgan in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010) 414–424; Fredman (n 24) 237–40.

CONCLUSION

People bear badges of multiple identities wherever they are located. We all have a race, ethnicity, place of origin, nationality, sexual orientation, sex, gender, age, disability status, marital status and maybe even caste and a religion. That the combination of these identities may carry disadvantages is also conceivable. But that disadvantage associated with more than one of these identities has often gone undetected and unaddressed is strange and disconcerting at the same time. Thus, the need for a nuanced approach to complex forms of discrimination is simple: to detect and address such discrimination. The dominant vision of discrimination running along a single-axis has not been able to accommodate this need. But courts have been thoughtful in devising strategies to navigate and innovate within the frontiers of existing jurisprudence. This thesis has advanced an alternative normative vision of intersectional integrity which assists in adequately responding to claims based on multiple identities of claimants. The perusal of comparative doctrine has sought to understand the judicial attempts in responding to these claims, to see how far or close courts come along in keeping stride with the framework of intersectional discrimination. The analysis from the lens of intersectional integrity aimed to demonstrate why its appreciation is crucial in not just reaching a favourable outcome but also in understanding *how* multiple identities form the causal basis of intersectional discrimination.

The sample of cases in this chapter highlights distinct ways in which justices have reckoned with actual or potential claims of intersectional discrimination. The focus of the analysis was not merely the different factual scenarios implicated in these cases but in discerning the normative approaches justices were relying on. A large subset of cases emulated the single-axis approach (albeit in very different ways)—*Brink*, *Gumede*, *Moseneke*, *Gosselin*, *Volks*, and *Hugo*. The case of *Bahl* signifies the approach of multiple

discrimination and *Bhe* can be taken as depicting an example of combination discrimination. The minority judgments in *Volks and Gosselin* as well as the judgment in *Hassam* show greatest allegiance to the framework of intersectional integrity. They do a worthwhile job in explaining how multiple identities together become the basis of discrimination suffered in that instance. *Corbiere* is a unique instance where a court has combined identities to reflect a single composite analogous ground of discrimination. As its analysis showed, this approach too can be supportive of the framework. Together these cases have hoped to demonstrate that there are contrasting ways of engaging with intersectional claims. Each of them needs to show an appreciation of the unique and shared patterns of disadvantage which emerge from intersecting identities by considering the claimant as a whole. It is their appreciation of this bipartite framework which sharpens the diagnosis of which identities cause discrimination and how.

CHAPTER FOUR

COMPARATORS IN INTERSECTIONAL DISCRIMINATION

INTRODUCTION

As the previous chapter showed, the relationship between discriminatory treatment or effects and multiple identities of claimants is not usually immediately apparent in intersectional claims. The comparator analysis is supposed to alleviate the difficulties in ascertaining the causal link between discriminatory treatment or impact and its basis in grounds. The claimant has to show that an actual or hypothetical individual or group, which does not share the claimant's personal characteristic, but is similar in every other way, is better off. The court can then conclude that there was *actually* less favourable treatment or adverse impact and that it was *based on* the claimant's personal characteristic. The ostensible simplicity of this approach, what I call 'strict' comparison, can be deceptive. Identification of an appropriate comparator may neither be obvious nor relevant in cases of intersectional discrimination. There may be no comparator available or none which explicates the basis of discrimination, or there may be too many comparators pointing to disparate conclusions. Instead of being helpful, comparison can thus turn out to be onerous, superfluous and even unprincipled. Cases of pregnancy, disability, harassment and victimisation confirm how these apprehensions render the comparator test as 'one of the most problematic aspects' of discrimination law[1] and is

1 Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 168–175, 183–189.

severely criticised for its conceptual and functional limitations.[2] This chapter seeks to test the endemic nature of these limitations in the context of intersectional discrimination.

Chapter Three surveyed the conceptual treatment of actual or potential intersectional claims in comparative discrimination law. This chapter explores whether the conceptual hurdles in single-axis, multiple, additive or combination discrimination can be overcome with the heuristic of comparison. The purpose is to examine whether the comparator test, which is a popular tool employed in the discrimination inquiry, assists in establishing intersectional discrimination. The chapter concludes that it is not too helpful in its popular form of strict comparison or its more liberal form of flexible comparison. This is because the comparator test is neither a normative fit nor an operationally straightforward approach for proving intersectional discrimination. Its application thus lacks a principled basis courts seem to allude to in applying the comparator test. Comparative case law also reveals that the comparator test is inconsistent with the framework of intersectional integrity. I suggest that a possible alternative is to use a range of relevant comparisons made contextually, based on the probative value of available evidence. This approach, what I call 'contextual comparison', will be particularly helpful in establishing the unique and shared patterns of group disadvantage and in giving due regard to the claimant's integrity. It will also promote judicial transparency in and justification for choosing comparisons without simply referring to a formal test.

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2 Denise G Réaume, 'Dignity, Equality, and Comparison' in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013); Suzanne B Goldberg, 'Discrimination by Comparison' (2011) 120 YLJ 728; Daphne Gilbert and Diana Majury, 'Critical Comparisons: The Supreme Court of Canada Dooms Section 15' (2006) 24 WYBAJ 111; Sophia Reibetanz Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 JLE 81; Aileen McColgan, 'Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons' (2006) EHRLR 650; Daphne Gilbert, 'Time to Regroup: Rethinking Section 15 of the Charter' (2003) 48 McGill Law Journal 627; Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 OJLS 65.

A few caveats are necessary here. This chapter bypasses larger debates about whether comparison entrenches formal over substantive equality[3] or whether it is based on a purely egalitarian value or consistent with other values protected in discrimination like dignity, autonomy or protection of substantive freedoms.[4] While these theoretical debates remain relevant in the context of intersectionality and I refer to them where pertinent, I cannot do complete justice in exploring them here given the present focus: to test whether the comparator test can explicate the nature of discrimination in an intersectional claim.

Further, just as in the previous chapter, the analysis here is undertaken primarily with reference to discrimination laws in the United Kingdom, Canada and South Africa, with the exception of *DeGraffenreid v General Motors*.[5] The coverage is not comprehensive but the selection of cases seeks to bring out the nuances in employing comparison in intersectional cases. It is also important to recognise that the prominence, form and substance of comparator analysis vary between different discrimination law regimes. I am primarily drawing upon the UK and Canadian understanding of the comparator test to identify its limitations in multi-ground claims and the South African alternative in responding to them.

The analysis in this chapter proceeds in two stages. **Part I** considers the strict and flexible approaches to comparison in the context of intersectional discrimination. It begins by noting the textual and doctrinal approaches in the three jurisdictions in employing the comparator test.[6] By taking *DeGraffenreid* and *Bahl v Law Society*[7] as central

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3 Fredman (n 1) 11, 168; Catharine MacKinnon, *Feminism Unmodified* (HUP 1987) 34.

4 Timothy Macklem, *Beyond Comparison: Sex and Discrimination Law* (CUP 2003); Amartya Sen, *Inequality Re-Examined* (OUP 1992); Joseph Raz, *The Morality of Freedom* (Clarendon 1986).

5 413 F Supp 142 (ED Mo 1976) (*DeGraffenreid*).

6 There is particularly well-developed jurisprudence on the use of comparator test in the US Title VII discrimination cases. Because the US cases mainly relate to employer-employee relationship

examples, I argue that the strict comparator test is neither normatively fit nor operationally wieldy in establishing intersectional discrimination. The analysis confirms that the comparator test, when applied within the conceptual framework of single-axis (*DeGraffenreid*) and multiple discrimination (*Bahl*), fails to detect the intersectional nature of discrimination at play. I then consider the case of *Falkiner v Ontario*[8] to see if its flexible approach to comparison alleviates the enduring concerns. I find that though *Falkiner* has some very promising signs for intersectionality, its comparative analysis is not wholly consistent with the framework of intersectional integrity but in fact resembles additive or combination rather than intersectional discrimination. **Part II** then proceeds to offer an alternative to the strict and flexible approaches to comparators. I propose a contextual approach, visible in the South African Constitutional Court's jurisprudence.[9] This approach allows for relevant comparisons to be considered based on the probative value of the contextual evidence available. The simplicity of the approach can alleviate the arbitrariness in the use of strict and flexible comparisons and can promote judicial accountability in requiring adequate justifications for drawing comparative deductions out of available evidence.

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rather than individual-state relationships, and for the sake of consistency in the comparative analysis in this thesis, they are not explored here. For an excellent discussion on the US position, see Goldberg (n 2).

7 [2004] EWCA Civ 1070 (UK Court of Appeal Civil Division) (*Bahl*).

8 [2002] OJ No 1771 (Court of Appeal for Ontario) (*Falkiner*).

9 See esp *Hassam v Jacobs (NO)* [2009] ZACC 19 (CC) (*Hassam*), discussed infra Part II.

I. COMPARATOR TEST IN INTERSECTIONAL CLAIMS

> Not surprisingly, if finding an adequate comparator is difficult in a "simple" discrimination case, where an individual alleges that he or she was treated differently because of his or her protected trait, then the task becomes even more daunting when a claim rests on a more complex understanding of identity.[10]

Goldberg's hypothesis is an important one. She indicates that the trouble with comparators in single-ground claims seems to be mirrored and multiplied in complex cases. This part seeks to understand why intersectionality poses such a grave challenge to the comparator test. Section A sets out the doctrinal boundaries within which the comparator test has developed in the three jurisdictions. Section B considers the challenges to the strict and flexible versions of the comparator test. The analysis demonstrates that there is little purpose and principle in the doctrinal treatment of strict and flexible approaches when applied to intersectional claims.

A. The Comparator Test

It is useful to set a conspectus of the doctrinal manifestation of the comparator test for pursuing the inquiry in this chapter. There are three things to note about the development of doctrine in this area for the present purposes. First, the tests for establishing wrongful discrimination as outlined in the previous chapter indicate that *some* comparison or *relative* disadvantage is necessary in proving 'differentiation' and 'unfair discrimination' under Section 9(3) of the South African Constitution; 'less favourable treatment' or 'particular disadvantage' under Sections 13, 14 and 19 of the Equality Act; or 'discrimination' under Section 15(1) of the Canadian Charter. However, the form and content of the comparator requirement differ substantially between these jurisdictions.

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10 Goldberg (n 2) 764.

The second thing to note about the comparator test is whether it is imposed as a formal requirement or simply as a helpful heuristic which may be resorted to in appropriate cases. So while all jurisdictions compare, they may not use the comparator test itself. Thus, the South African Constitutional Court does not necessarily invoke comparison, or at least not in the way dictated by the comparator test which is popular in Canada and the United Kingdom.[11] The Canadian Supreme Court had, until recently, considered comparison central to the discrimination inquiry.[12] Responding to severe criticism over this approach,[13] the Court has now adopted a 'flexible' approach to comparison such that it is no longer necessary 'to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination.'[14] The Court though has reaffirmed the 'general usefulness' of comparator analysis in the discrimination inquiry.[15] The UK approach lies in the middle, in that even as comparators remain important, the emphasis is on 'concentrating primarily on *why the claimant was treated as she was*.'[16] Thirdly, in addition to whether comparison is necessary, it is useful to note what the content of the test is, when invoked. The Canadian Supreme Court has followed Binne J's popular iteration from

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11 *Harksen v Lane NO* 1998 (1) SA 300 (CC) [42], [53] (Goldstone J). Cf *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [42]–[44] (Langa CJ), [164]–[165] (O'Regan J) (*Pillay*). This case was decided under the Promotion of Equality and Prevention of Unfair Discrimination Act 2000, and remains the only case from the South African Constitutional Court where the Court seems to be expressly concerned about comparators even though it declined to rule whether the inquiry is absolutely necessary.

12 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (SCC) 164 (McIntyre J); *Hodge v Canada (Minister of Human Resources Development)* [2004] 3 SCR 357 (SCC) [1], [20]ff (*Hodge*).

13 See Réaume (n 2); Gilbert and Majury (n 2); Moreau (n 2); Gilbert (n 2).

14 *Withler v Canada* [2011] 1 SCR 396 (SCC) [41]ff (*Withler*).

15 *Quebec v A* [2013] 1 SCR 61 (SCC) [169].

16 *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [11] (emphasis supplied).

Hodge.[17] It is seen as a requirement for the claimant to show comparison in reference to a "'comparator group" with whom the claimant shares the characteristics relevant to qualification for the benefit or burden in question apart from the personal characteristic that is said to be the ground of the wrongful discrimination.'[18] The UK test is similar in that the comparison has to be with someone who closely resembles the claimant but-for the personal characteristic being pleaded as the ground of discrimination.[19] This close 'fit' imagined by the comparator test signifies the idea of 'strict' comparison, otherwise known as the idea of 'mirror' comparators.[20] On the other hand, since the South African Constitutional Court has never insisted on strict comparison, it has accepted contextual comparisons to establish a claim under Section 9(3).[21] All jurisdictions agree that the comparator itself may be real or hypothetical.

B. The Challenge

> A further concern is that allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many *interwoven grounds of discrimination*. Confining the analysis to a rigid comparison between the claimant and a group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination...[22]

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17 *Hodge* (n 12).

18 ibid [1], [23] (emphasis in original).

19 *Nagarajan v London Regional Transport* [2000] 1 AC 502 (HL); *James v Eastleigh Borough Council* [1990] 2 AC 75 (HL) (*James*); *R v Birmingham County Council ex p Equal Opportunities Commission* [1989] AC 1155 (HL). See also Equality Act, ss 13, 14, 19, 23.

20 It is useful to note that despite the Supreme Court of Canada's subsequent restatement of the purpose and necessity of using mirror comparators in *Withler* (n 14) the test itself has broadly remained the same when invoked. Here, I am primarily referring not to the legal status but the content of the test itself, which as I argue, resembles strict comparison, even in its flexible form. See infra I.B.2.

21 See infra Part II, esp *Hassam* (n 9).

22 *Withler* (n 14) [58] (emphasis supplied).

The Supreme Court of Canada in *Withler* suggests that the comparator test may be ill-suited to cases of intersectional discrimination. This statement gives rise to several questions: why are mirror or strict comparators necessarily problematic for intersectionality? If a formal requirement is too onerous for an intersectional claim, what options does a flexible approach bring to the table? If there is more than one comparison possible, which do we choose? If none is available, what do we do? And if no comparison reveals the basis of discrimination, why do we resort to comparison at all? The formulation of the comparator test in respect of single-ground claims speaks little to these questions from the perspective of intersectionality. It is then necessary to deconstruct the *Withler* Court's scepticism of the usefulness of comparator analysis to understand its functional limitations in multi-ground claims.

It is helpful to refer to an example here. If a disabled gay Black woman brought the *DeGraffenreid* claim on the basis of disability, sexual orientation, race and gender, who would the comparator(s) be? Would the comparator have to be someone who did not share any of their personal characteristics, heterosexual non-disabled white man, or could it be any or all of these: disabled gay Black men, disabled gay Black men, disabled gay white women, disabled straight Black women, non-disabled gay Black women, disabled gay white men, non-disabled straight Black women, non-disabled gay white women, disabled straight Black men, non-disabled gay Black men, disabled straight white women, non-disabled straight white men and so on? Could we also consider comparators beyond these binaries of disabled/non-disabled, white/Black, women/men, gay/straight to see comparator groups more closely based on their nature of disabilities, sexualities, genders, and ethnicities?

The forthcoming analysis shows that the comparative jurisprudence does not demonstrate a principled approach in navigating these choices for identifying appropriate comparator(s). With the lack of guidance, the search for comparators in complex

intersectional claims seems fantastical and arbitrary. The point that this analysis makes is ultimately a conceptual one, that comparison, whether in its strict or flexible form, doesn't quite speak to the idea of intersectionality. Goldberg puts this succinctly: 'when comparators are treated as definitional [as part of the very definition of discrimination], these theories [like intersectionality] cannot gain jurisprudential traction because the problems they identify cannot, in effect, be seen by courts.'[23] I argue that intersectionality is not captured by the heuristic of the comparator test because: **(i)** the selection of comparators is too unprincipled and complicated; **(ii)** the use of comparators identified by the test fails to explicate the unique and shared patterns of disadvantage; **(iii)** it fails to treat claimant's identities as a whole and hence violate integrity; and ultimately, **(iv)** the approaches resemble the categories of single, multiple, combination or at best, compound discrimination rather than intersectional discrimination.

B.1 Strict Approach

In 'strict' form, the comparator test requires the claimant to draw a comparison with a person or a group who shares neither her personal characteristic nor her disadvantage to prove that discrimination is on the basis of that said personal characteristic. As highlighted above, there is no neat translation of this test in the context of intersectional discrimination. One conceivable option for a claimant who seeks to establish two or more personal characteristics as the basis of the claim is to find a comparator who shares none of her personal characteristics. This often translates into a search for a comparator who does not suffer any disadvantage based on any personal characteristic. Thus, a standard comparator becomes someone who belongs to advantaged groups across all

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23 Goldberg (n 2) 735.

personal characteristics; i.e., a white able-bodied heterosexual middle-class male. The UK Court of Appeal decision in *Bahl* followed this trajectory to employ a white male comparator in the multi-ground claim of race and sex discrimination.

To recall, the claim was brought by Kamlesh Bahl, who served as the Vice-President of the Law Society. There was no other position comparable to that of the Vice-President, with the same responsibilities and profile. The Court examined the claim of race and sex discrimination separately by choosing a single hypothetical comparator of a white male since no mirror comparator was available. It found that: 'In a unique case such as that of Dr Bahl it is essential to ensure that the hypothetical comparator is a Vice-President who is on the receiving end of serious allegations of bullying but who is a white male.'[24]

The choice of a white male as the hypothetical comparator is analytically indefensible for three reasons. First, when the Court decides to analyse race and sex discrimination separately, as a matter of multiple discrimination,[25] it is not normatively clear why a white woman and a Black man could not serve as appropriate comparators for race and sex discrimination respectively. It is particularly surprising that the Court chooses a single comparator (white male) to prove both forms of discrimination (based on race and sex), given its ultimate reasoning—'[i]It would be surprising if the evidence for each form of discrimination was the same.'[26] Secondly, testing against the framework of intersectional integrity, even if the single comparator were able to assist the claimant's case, it would only speak to the unique nature of the claim, dismissing the possibility of shared patterns of group disadvantage suffered by Black women and also other women

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24 *Bahl* (n 7) [103].

25 See discussion on *Bahl* in Chapter Three, III.A.1.

26 *Bahl* (n 7) [137].

and Blacks as such. The fact that intersectional claims *can* be appreciated in reference to what the claimant shares with other groups who are disadvantaged based on one or two of the grounds in a multi-ground claim is then thrown by the wayside. Thirdly, the hypothetical choice reveals the underlying judicial assumption that grounds like race and sex are defined by binaries of Black-white and female-male, comparing disadvantaged groups to *a single* paradigmatic dominant group based on a ground.[27] It does not tell us why in principle the comparator cannot be a Black transsexual instead of a white male. As Fredman remarks, the assumption here is that the abstract comparator be 'clothed with the attributes of the dominant gender, culture, religion, ethnicity, or sexuality.'[28] By formulating comparators this way, in a claim of race and sex discrimination, courts assume other characteristics of privilege in being a (middle-class non-disabled heterosexual) white male. If the comparator test assumes a comparator to be privileged in most ways *but for* the claimant's personal characteristic, the perfect comparator for an intersectional claim will then inevitably be a middle-class heterosexual non-disabled white male, i.e. someone whose personal characteristics are defined only by privilege. Such a comparator would fit any intersectional case, whether of a Muslim gay man or a disabled Sikh woman, because the hypothetical comparator will never share *any* of the disadvantaging characteristics with the intersectional claimant. Insistence on a comparator who does not share *any* of the disadvantaging identities of the claimant marks an unrepresentative norm which creates 'powerful conformist pressures' for claimants in discrimination law.[29] Since claimants with multiple disadvantaging identities

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27 Diana Majury, 'The Charter, Equality Rights, and Women: Equivocation and Celebration' (2002) 40 OHLJ 297, 306; Radha Jhappan, 'The Equality Pit or the Rehabilitation of Justice' (1998) 10 CJWL 60, 79.

28 Fredman (n 1) 11.

29 ibid 11, 168.

will find it difficult to show difference in treatment or adverse impact as compared to this gold standard of a dominant comparator, the discrimination inquiry would both be too burdensome and possibly inaccurate in pinning down the basis of intersectional discrimination. It would possibly only favour relatively privileged claimants like Dr Bahl to be compared with a privileged comparator (white male) but for her race and sex. These difficulties make the comparator test too far-removed from the close fit it promises in linking the precise nature of disadvantage suffered on particular grounds.

Even where courts have adopted multiple comparisons, the categorical approach of using one comparator per ground resembles single or multiple discrimination rather than intersectional discrimination. The locus classicus of *DeGraffenreid* demonstrates this aptly. In *DeGraffenreid*, the Court had to determine whether the 'last hired-first fired' policy discriminated against Black women on the basis of sex and/or race. The Court used the statistics of favourable hiring of 'female employees' to dismiss the claim of sex-based discrimination.[30] By comparing the claimants to those who are better off within this broader group of female employees, the Court dismisses the possibility of sex discrimination rather than factoring in the claimants' race for understanding their comparative disadvantage. Instead of deducing that the favourable treatment of white women pointed towards the uniqueness of Black women's claim, the Court dismissed the experience of Black women as being a part of sex discrimination at all or as showing racial discrimination between Black women and white women. The Court compares the claimants (Black women) to those who share their personal characteristic of sex (white women) and yet are better off. Such a comparison works to defeat an intersectional claim because it compares claimants not with people who *don't* share their personal characteristic but those who do and are still not disadvantaged. Instead of looking across

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30 *DeGraffenreid* (n 5) 144.

groups by comparing claimants to white women and Black men to see that the latter two groups were better-off and hence deduce a basis for race and sex discrimination respectively, the Court's reliance on comparison with the broader group (white women) ends up occluding the basis of discrimination based on that ground (sex). The Court's inability to make appropriate use of the comparator test stems from its initial premise of searching for either race or sex discrimination separately as a matter of single-ground discrimination rather than recognising the possibility that it could be both. Once grounds are treated as uninteractive categories representing segregated groups of disadvantage, the comparator test also uses only one disadvantaging characteristic to establish disadvantage on *that* ground rather than looking for relative disadvantage across groups. Besides the difficulties with the single ground approach in *DeGraffenreid* which runs afoul of intersectional integrity because it looks for discrimination on *either* sex *or* race, the use of multiple comparisons for the two impugned grounds to deny discrimination on both is also vulnerable to similar critique. This is because once the Court decides to treat the claim as a matter of a single ground only, its use of multiple comparisons also speaks to a single ground at a time, instead of appreciating unique and shared patterns of group disadvantage formed by the intersection of grounds. In addition, the construction of comparators on a single ground each is directly opposed to the value of integrity in treating claimants' identities as a whole. The approach is flawed in that it assumes that discrimination can be detected when comparison is made *only* in relation to a single ground by fragmenting and isolating a claimant's personal characteristics.

It is clear that the inability to make comparisons across groups for unearthing the unique and shared patterns of group disadvantage and framing comparisons in a way which does not violate the integrity of the claimant by compartmentalising her personal characteristics stems from the very structure of the comparator test. The way it is formulated and used in single-ground claims inhibits its normative foundations to be

extended to multi-ground claims in an easy and principled way. It thus remains an unhelpful heuristic in proving intersectional discrimination. In fact, complex cases of intersectional discrimination may relate little to the way comparator test is framed and used. Carbado and Gulati's example of 'the fifth Black woman' illustrates such a case of unstated direct intersectional discrimination which might not be caught by the comparator test.[31] In their example of identity performance, when four Black women have been promoted as partners in a law firm, the case of the fifth Black woman, Mary, cannot simply be explained by referring to treatment of other white women, Black men or white men but mainly by reference to how Black women chose to 'perform' their identities. While the four Black women partners choose to 'cover' their identities by wearing non-ethnic clothes, having straight hair and playing golf; Mary wears her traditional clothing, participates in minorities and diversity committees within and outside work, and lives in a Black neighbourhood. The problem here is not that Mary has been treated differently from white males, Black males or white women but that she is also treated differently from other Black women, on the very same basis of her race and sex. The substance of her claim is about challenging the essentialist understanding of what it is to be a Black woman. A useful comparison here would then be of comparing Mary to the four other Black women to closely extract the reasons for difference in treatment. But the comparator analysis, framed in a way in which it looks for comparators who do *not* share the claimant's personal characteristics, would yield little in this situation by insisting on comparison with white males, Black males or white women.

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31 Devon W Carbado and Mitu Gulati, 'The Fifth Black Woman' (2001) 11 JCLI 701. While it is plausible to argue, as the authors do, that intersectionality itself only covers status-identity discrimination and not performance-identity discrimination, it is important to see that the comparator analysis would be at a loss even if intersectionality accurately explained such discrimination. However, performance based discrimination should not be treated too differently from discrimination which perpetuates negative stereotypes and prejudices and the understanding of intersectionality as unique and shared patterns of group disadvantage traced by considering claimants as a whole is well capable of explaining complex cases of identity performance.

The race and sex discrimination challenge in Mary's claim is not that she has been treated differently from others but how her own status-identities have been disregarded.[32] Comparison, qua comparator test, seems superfluous in such a setting.

In summary, the analysis has revealed three principal critiques in relation to the selection of comparators. First, there is a lack of a background principle governing the selection of comparators which exposes a gap in judicial guidance, legal certainty and justification in mediating the comparator test in intersectional claims. Neither the *DeGraffenreid* approach of choosing separate comparator groups nor the *Bahl* approach of a single dominant comparator group seem fully satisfactory in navigating the choice of comparators in a multi-ground claim. It is not that an explanatory principle is absolutely necessary, but that the courts seem to be alluding to such a thing when invoking the comparator test. If comparison is treated as important in establishing a claim, judicial accountability in using the test is but appropriate. Secondly, the comparator test reinforces conformist pressures when comparison is made with dominant groups and along stereotypical binaries of grounds like Black-white, able-disabled, heterosexual-homosexual, male-female etc. Thirdly, as a result, when made, the choice of comparators reflects an understanding of single or multiple discrimination rather than intersectional discrimination. So the comparator analysis ends up reflecting a treatment of grounds as abstract and isolated rather than intersecting in producing unique and shared patterns of group disadvantage when considered as a whole. Thus, just as the courts conceptual approaches of single and multiple discrimination fail to be in accord with intersectional integrity, the use of the comparator test within these approaches too belies the framework.

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32 Indeed this challenge may equally apply to single ground claims, say of sexual orientation where the people's choices of 'covering' their identities may determine their treatment. Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006).

B.2 Flexible Approach

As indicated before, the 'flexible' approach was proposed by the Canadian Supreme Court in appreciation of the fact that it may fit an intersectional claim better than the strict approach of mirror comparators. Two things characterise the flexible approach: first, that it may not *always* be necessary to point to a 'proper' comparator: the court could choose to employ single, multiple or no comparator(s); secondly, comparison should be in context, taking into account the relevant circumstances of the case, with its focus on the actual impact on the claimants. But as the forthcoming discussion on *Falkiner* shows, even under this 'flexible' approach, to the extent that comparison is actually made, it takes the shape of strict comparison and resembles multiple or additive/combination rather than intersectional discrimination.

The Ontario Court of Appeal in *Falkiner* evaluated the multi-ground claim primarily through the lens of flexible comparison even before it became the official word of the Canadian Supreme Court in *Withler*. It is then useful to consider the notable efforts of the *Falkiner* Court. As this section concludes, the efforts are admirable, but ultimately dissatisfying in responding to both the concerns of: **(i)** identifying a background principle which governs the choice of comparators in intersectional claims; and **(ii)** supporting the framework of intersectional integrity.

In *Falkiner*, the claimants (single mothers on social assistance) challenged the 'spouse in the house rule' under the Ontario's social assistance legislation which deemed claimants to be spouses as soon as they started cohabiting with their partners and thus excluded them from social assistance. The claimants were single women, with dependent children and in need of social assistance. Their case was that the rule caught casual and try-on relationships which were not actually 'spousal'. In being over-inclusive, it perpetuated the pre-existing disadvantage of single mothers on social assistance by

excluding them from the beneficial legislation. This challenge was framed by the claimants as being either based on sex, or on some combination of grounds of marital status, receipt of social assistance and sex. The Court found that the impugned definition violated Section 15(1) of the Canadian Charter on 'the combined grounds of sex, marital status and receipt of social assistance'[33] and the discrimination was unjustifiable under Section 1.

The overall approach of the *Falkiner* Court seems to be inspired by intersectionality, and I identify the Court's framing of the claim as a particularly helpful contribution to intersectional analysis. Despite this, I go on to show that it is in fact the Court's approach to comparators that is inconsistent with intersectionality. While the Court appears to pursue a 'flexible comparative approach'[34] for a claim which represents 'interlocking set of personal characteristics',[35] its analysis ironically mirrors strict comparison and the approaches of multiple or additive/combination discrimination.

i. Framing of the *Falkiner* Claim: An Intersectional Approach

It is useful to begin with the *Falkiner* Court's framing of the claimants' case:

> The constitutional issue centres on whether the definition of spouse violates the respondents' equality rights either on the enumerated ground of sex or on one or more analogous grounds. The parties have raised four possible analogous grounds: marital status, receipt of social assistance, single mothers and single mothers on social assistance.[36]

There are two noticeable aspects of this framing. The first thing to note here is the openness in allowing the claimants to advance the claim on a flexible basis. This is laudable. To fixate the claim to a *single* permutation of multiple grounds at the beginning

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33 *Falkiner* (n 8) [105].

34 ibid [81].

35 ibid [72].

36 ibid [40].

is to place the cart before the horse. It prejudges the real grounds of discrimination even before a court begins the discrimination analysis. To analogise with criminal law, it is as if when the prosecution chooses to prosecute for murder, murder becomes the only charge which the court can adjudicate on, precluding a finding of culpable homicide or death by negligence or murder in addition to robbery. This is why charges are often argued together or in the alternative, allowing the possibility of claiming on the second charge failing first, the third falling second or first coupled with third etc. This flexibility is particularly useful in discrimination law for arguing intersectional claims because it allows the courts to see that discrimination could be described in multifarious ways based on grounds and it is the task of courts to recognise which permutation best represents the nature of discrimination complained of.[37] The claimants in *Falkiner* argued mainly on the basis of their own identity as 'single mothers on social assistance' and advanced the basis of discrimination on grounds only so that it fit their experience and not vice versa.[38] Thus, the Court describes the claim as:

> The respondents contend that they have been subjected to differential treatment on the basis that they are single mothers on social assistance. That is the group with which they identify themselves. Put another way, the respondents share three relevant characteristics: they are women, they are single mothers solely responsible for the support of their children and they are social assistance recipients.[39]

This formulation balances the individualistic nature of the claim with the group-based focus of grounds. It uses the centrepiece of grounds to respond to the individuals' experience as a function of their group-identities based on grounds of discrimination.[40]

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37 The narrow claim here is for the case of intersectional discrimination only. I cannot assert or prove whether this is plausible for single-axis claims as well given the scope of the present thesis.

38 Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 CJWL 37.

39 *Falkiner* (n 8) [70].

40 It would particularly help the Court in not being inhibited by a categorical approach to grounds but reflecting upon grounds as they relate to the claimant's identity. A loose rather than dispositive framing of grounds can thus avoid the self-imposed inhibition like: 'a court cannot, ex proprio motu, evaluate a ground of discrimination not pleaded by the parties.' *Law v Canada*

The focus is neither exclusively on individuals nor groups but on group-based disadvantage of individual claimants based on grounds.[41] In this way, the Court saw the claimants arguing *as* single mothers *on* the basis of their multiple grounds. It uses the device of grounds to understand the claimant's position as defined by the disadvantage associated with intersecting identities. Thus, the *Falkiner* Court does not use grounds categorically but in a fluid and interactive way for ascertaining the basis of the claim.

Secondly, the Court's framing of the claim resists the legislative 'criteria' from automatically becoming the 'grounds' of discrimination. As the next chapter argues, this is particularly helpful for direct claims devolving on a single ground but affecting claimants on the basis of their multiple identities (per *Volks*) and indirect claims where the government's criteria is neutral (per *Jordan*).[42] Courts may simply look at the legislative distinction to decide on the grounds of discrimination rather than looking beyond the official prose to see what personal characteristics actually lead to discriminatory impact.[43] As Réaume points out, this leads to a 'de facto ratification of [the legislature's] standard without subjecting it to any scrutiny at all.'[44] Because it is often the criteria of differentiation that are under challenge, an a priori acceptance of the legislature's criteria as *the* personal characteristics or grounds relevant in the claim can possibly defeat the purpose of the challenge. For example, the prima facie acceptance of the legislative criterion of age as the automatic ground of discrimination in *Gosselin* made the Canadian Supreme Court view the claim simply as a matter of direct age

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(Minister of Employment and Immigration) [1999] 1 SCR 497 (SCC) [58]. For a discussion on the propriety of this limitation, see Chapter Six, Part V.

41 For a defence of this argument, see Chapter Six, III.C.

42 See Chapter Five, I.B and III.A.

43 For further discussion on indirect intersectional discrimination, see Chapter Five, III.A and Chapter Six, III.B.

44 Réaume (n 2) 14.

discrimination and thus ignored how other grounds like receipt of social assistance, gender or disability determined the claimant's experience of discrimination.[45] As the next chapter argues, an open and perceptive approach to indirect intersectional discrimination is key to addressing complex cases like *Gosselin*;[46] at this point, it is important to stress that the Court's a priori translation of legislative criteria as grounds of the claim can defeat an intersectional inquiry at the very outset. The comparator test will also then simply be a mechanical exercise aimed at approving the impugned criteria rather than subjecting it to meaningful scrutiny for determining the nature of discrimination, which may be distinct from the official criteria themselves.[47] The *Falkiner* Court avoids this by neither accepting the claimants' nor the government's choice of grounds as final in constituting the discriminatory basis. Had the government argued that the impugned definition of spouse made a distinction based on marital status only and the Court accepted it without much, the Court may not have found discrimination because marital status alone would not have uncovered the discriminatory aspects of the definition which devolved on need for social assistance, gender and child-care status as well. On the contrary, the Court found marital status as a relevant ground of discrimination even as 'the respondents did not frame their claim quite this way.'[48] The Court is lead by its focus on impact of disadvantage to see on what grounds it befalls rather than vice versa.

The *Falkiner* approach to grounds in framing the claim shows promising signs for intersectionality. However, the Court's approach to comparators is not equally

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45 See discussion on *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 (SCC) in Chapter Three, III.B.1.ii.b. Cf feminist rewriting of the judgment which takes into account other grounds: Gwen Brodsky, Rachel Cox, Shelagh Day and Kate Stephenson, 'Gosselin v. Quebec (Attorney General) (Women's Court of Canada)' (2006) 18 CJWL 193.

46 See Chapter Five, III.A.

47 Réaume (n 2) 16–19, for analysis of *Auton (Guardian ad litem of) v British Columbia (Attorney General)* [2004] 2 SCR 657 (SCC) and *Withler* (n 14).

48 *Falkiner* (n 8) [79].

convincing. As the next section shows, no matter the Court's intentions and initial philosophy, comparison even when applied in a flexible way, may still fail not just for its unwieldiness but also on principle within the framework of intersectional integrity.

ii. Comparators: Belying Intersectional Integrity

> Because the respondents [claimants] assert that they have been discriminated against on the basis of more than one personal characteristic [marital status, social assistance status, sex], no single comparator group will capture all of the differential treatment complained of in this case. Instead, the respondents urge us to undertake a set of comparisons, *each one bringing into focus a separate form of differential treatment*.[49]

The *Falkiner* Court set about the task of carrying out the discrimination inquiry in light of multiple comparisons. The comparisons offered by the claimants (single mothers on social assistance) and as revised by the Court are summarised in Table 1:[50]

Ground	Claimant's Choice	Court's Substitution
Sex	Men on social assistance	Single men on social assistance
Marital Status	Social assistance recipients who are not single mothers	Married people on social assistance
Social Assistance	Persons not on social assistance	Single persons not on social assistance

[Table 1: Comparators in *Falkiner*]

In preferring multiple comparisons, Laskin JA, writing for the Court, stated that the 'flexible comparative approach reflect[ed] the complexity and context of the respondents' claim...'[51] Two questions are pertinent here: first, what governed the Court's flexibility in choosing comparators? Secondly, does the approach resonate with the framework of intersectional integrity? If the reasoning in *Falkiner* can offer clear guidance

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49 ibid [71] (emphasis supplied).

50 It is useful to note that unlike other claims, it was not the government which offered revised comparators but the Court which took upon itself to find the most suitable comparators.

51 *Falkiner* (n 8) [81].

in these two respects, it can indeed be said to reflect the complexity and context of the intersectional claim and reaffirm the avowed usefulness of the comparator test in intersectional claims. But as the forthcoming analysis shows, *Falkiner* neither reveals a principled approach in applying the comparator test flexibly nor does it conform to intersectional integrity in the way multiple comparisons are chosen.

The Court's approach to fine-tuning the comparators offered by the claimants remains underdeveloped in its reasoning. For example, to support a finding on the ground of social assistance the Court substitutes the claimant's choice of 'persons not on social assistance' with 'single persons not on social assistance'. Its explanation is that the comparison offered by the claimant 'does not, on its own tell us anything meaningful beyond the fact that people on social assistance are treated financially differently than people not on social assistance.'[52] The Court's terse reasoning for revising the comparator group appears thus:

> Framing the comparison in this way shows that the respondents have been treated unequally. They have suffered adverse state-imposed financial consequences because they began living in try-on relationships. By contrast, single people who are not on social assistance are free to have these relationships without attracting any kind of state-imposed financial consequences.[53]

It is worth asking why the same result wouldn't ensue from a comparator like 'single women not on social assistance', 'single men not on social assistance', or simply with the claimant's choice of 'persons not on social assistance'. The absence of gender in refining the comparator group also splinters the claim/comparators in an unnecessary and unexplained way. If we assume that the Court thought that the claimant's choice is over-inclusive, its own choice does not sufficiently delineate groups based on gender, which is significant in the present claim. What, other than the Court's belief in its own comparator, shows unequal treatment better than the contender offered by the claimant

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52 Gilbert and Majury (n 2) 135.

53 *Falkiner* (n 8) [73].

or other possible comparator groups? There is little on record which helps substantiate the Court's choice.

Similarly, to find for sex as the basis of differentiation, the Court shifts the comparator group from 'men on social assistance' to 'single men on social assistance' but finally decides not in reference to either of these but on the basis of available statistics directly relating to women and single mothers. According to Laskin JA, 'the statistics unequivocally demonstrate that both women and single mothers are disproportionately adversely affected.'[54] When the evidence on record was so obviously demonstrative of the comparative basis of discrimination, search for definitive comparator group for each ground in this avowedly 'flexible' way seems redundant.

Further, framing of comparators and the piecemeal perusal of statistics to establish a *single* ground at a time, promotes an understanding of multiple, or at best, additive/combination discrimination.[55] According to Laskin JA:

> although women accounted for only 54 per cent of those receiving social assistance and only 60 per cent of single persons receiving benefits, they accounted for nearly 90 per cent of those whose benefits were terminated by the definition of spouse. The corresponding figures for single mothers also show the definition's disproportionate impact on that group.[56]

This led him to make a partial conclusion to the point that: 'respondents [were] subjected to differential treatment on the basis of sex.'[57] If according to the statistics, single mothers on social assistance *were* in fact demonstrably worse-off, this finding could go on to support marital status as well as social assistance as markers of differential impact. The fragmented use of evidence to support separate grounds rather than seeing discrimination as a product of intersecting grounds denies the normative basis of

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54 ibid [77].

55 Majury (n 28) 334.

56 *Falkiner* (n 8) [77].

57 ibid.

intersectionality in multi-ground claims. The Court's comparator analysis thus mirrors a conceptual inclination towards multiple rather than intersectional discrimination in that a claim can be neatly broken down based on personal characteristics to prove discrimination separately.[58] As Gilbert and Majury opine: 'A single, narrow, consecutive comparator group approach is at best an unnecessary step and at worst an impediment to understanding the multi-grounded intersectional discrimination that is the section 15 claim in *Falkiner*.'[59] The presence of social and statistical evidence indicates that its reference was perhaps all that was needed for the Court to make a determination in this case rather than going down the circuitous route of comparators which consumed most of the Court's analysis.

Furthermore, it is useful to consider here the conjecture offered by Laskin JA that the claim could also be thought of as devolving only on the grounds of sex or marital status discrimination alone.[60] It is plausible to think that this was a situation of marital status discrimination proper in that the definition was simply over inclusive because it wrongly included those who were simply not in marriage-like relationships. Would this strategy have helped the claimants? Possibly not, and that is how the appreciation of intersectional integrity seems to be crucial for the claimants. Had the claimants simply argued that they were being discriminated on the basis of marital status, it would not have illuminated their specific experience of discrimination as single mothers. Not everyone who was wrongly included by the definition could have been disadvantaged *as* single mothers on social assistance. The case was particularly of single mothers on social assistance within this larger group of people who were wrongly

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58 Gilbert and Majury (n 2) 134.

59 ibid 137.

60 *Falkiner* (n 8) [78].

included, say, as two cohabiting disabled friends of different genders.[61] So even as the definition of spouse operated along the single-axis of marital status and drew a distinction on that ground, the grounds of discrimination were specifically intersectional for the claimants. That the legislation failed to qualify the definition to exclude people whose situation was substantially exacerbated because of their multiple identities was the discrimination harm to be caught by Section 15(1). The harm can be specifically classified as one of integrity, in that it fails to treat claimants with intersectional identities as a whole to appreciate their disadvantage *as* single mothers on social assistance. The failure of the definition to exclude relationships which are not functionally spousal, impacted the claimants not just because of their marital status but because of their other identity as a whole. In addition, as Gilbert and Majury show, the Court's comparator analysis also fails in respecting the claimants' integrity in that: 'The claimants are not treated as whole people and the interactive nature of the sites of oppression is rendered invisible, even negated.'[62] As argued in Chapter Two, the harm of treating claimant's identities as 'severable and unrelated'[63] can be classified as distinct from (but related to) other dignity-based harms like stereotyping, essentialising, prejudicing etc, because of its special focus on the *wholeness* of people's identities in intersectional claims. So the particular move of the *Falkiner* Court in treating comparison as operating on each ground individually disintegrates the claimants' identities and degenerates the claim into additive or multiple (rather than intersectional) discrimination.

This is paradoxical given the Court's initial framing of the claim and its final ruling. In ultimately routing the discrimination inquiry through comparison, the Court

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61 This was the other claim in *Falkiner* which challenged the exclusion from social assistance in this context.

62 Gilbert and Majury (n 2) 134.

63 ibid.

seems to have slipped off the framework of intersectional integrity. Thus, though the flexible approach in *Falkiner* fares better than the approach of strict comparators in *DeGraffenreid* and *Bahl*, it is not consistent with intersectional integrity, and does not in any case alleviate the difficulties with strict comparison for choosing comparators on a principled and justifiable basis in intersectional claims.

II. CONTEXTUAL COMPARISONS: AN ALTERNATIVE

The immediate intuitive grasp of the comparator test is what makes it so appealing in discrimination law. Its application in the discrimination inquiry can reveal both the *disadvantage* suffered and its *basis*. But as the analysis above has shown, this is exactly what it may fail to do. The normative and operational hurdles in applying the comparator test seem rather insurmountable and ultimately unhelpful in establishing intersectional claims, i.e. multi-ground claims consistent with the framework of intersectional integrity.

The flexible approach to comparators developed in Canadian discrimination law seems to be initially liberating in fashioning an appropriate use of comparators in intersectional cases.[64] In its most liberal form, the flexible approach allows comparison to be with a mirror comparator, a number of different comparators, or no comparator at all.[65] While the way the flexible approach is formulated is certainly promising, its application by the *Falkiner* Court shows a preference towards multiple strict or mirror comparisons based on each ground, highlighting an understanding similar to multiple rather than intersectional discrimination. It also lacks a background principle which guides the flexibility in choosing comparators, reinstating the concerns identified in the

64 *Quebec v A* (n 15) [167]–[169], [189]–[191] (Le Bel J).

65 Jennifer Koshan and Jonnette Hamilton, 'Meaningless Mantra: Substantive Equality after Withler' (2011) 16 RCS 31, 53.

application of strict comparator test in *DeGraffenreid* and *Bahl*. The flexible approach cannot then be supported without reservation unless the flexibility therein is navigated through articulated and justifiable principles. It is useful at this point to recall the formal iteration of the flexible approach in *Withler*:

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.[66]
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> At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.[67]

Because the flexible approach is meant to respond to intersectional cases, it is useful to explore the possibility of resurrecting it from its liberal foundations outlined in *Withler*. It is particularly useful to consider if the contextual use of comparison can bring some principle and purpose to the comparator test in the discrimination inquiry. In exploring this option, I am taking the bait offered by the *Withler* Court: 'What is required is an approach that takes account of the full context of the claimant group's situation, the actual impact of the law on that situation, and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group.'[68] A similar suggestion is made by Goldberg who proposes that contextual evaluation could be promoted to 'a new status as a legitimate analytic option in all cases'[69] in ridding the courts of 'artificial blinders imposed by the comparator jurisprudence that short-circuit the analysis of

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66 *Withler* (n 14) [63].

67 ibid [65].

68 ibid [40]. For similar suggestion in regards *Withler*, see Beverley Baines, 'Comparing Women in Canada' (2012) 20 FLS 89.

69 Goldberg (n 2) 808.

discrimination claims and produce constricted outcomes without explanation or justification.'[70] So what does the contextual approach stand for? As Goldberg suggests: 'context-focused analysis of a discrimination claim is concerned with what types of evidence will be considered.'[71] As Goldblatt and Albertyn further explain:

> Contextual analysis is at the centre of substantive equality, shifting the legal enquiry from an abstract comparison of 'similarly situated' individuals to an exploration of the actual impact of an alleged rights violation within the existing socio-economic circumstances. It also requires an examination of the individual within, and outside of, different social groups.

These assertions signify the simple but critical crux of the contextual approach to comparison, which is focussed on learning about the *impact* of discrimination as *based on* grounds or personal characteristics of the claimant.[72] There is nothing which the comparator analysis does which cannot be done by simple evidentiary analysis for making comparisons. A contextual approach to comparison can allow a range of comparative evidence which is not filtered based on whether it relates to a strict comparator but by its relevance to the context of the claim and rules of evidence itself. The focus need not be on choosing, revising, or dismissing comparators; but instead on making relevant comparative deductions from the available evidence for determining the effects of wrongful discrimination between groups. Rather than establishing differences between comparators, comparison could instead illuminate the relationships between 'excluders and excluded, stigmatizers and stigmatized, expropriator and dispossessed.'[73] The appropriateness of comparison could also be assessed by institutional structures of

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70 ibid 809.

71 ibid 810.

72 Janneke Gerards, *Judicial Review in Equal Treatment Cases* (Martinus Nijhoff 2005) 130–133; Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 HRLR 719; Merel Jonker, 'Comparators in Multiple Discrimination Cases: A Real Problem or Just a Theory?' in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt (eds), *Equality and Human Rights: Nothing But Trouble?* (Utrecht University 2015) 211.

73 Sheila McIntyre, 'Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination' in Margaret Denike, Fay Faraday and M Kate Stephenson (eds), *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Irwin Law 2009).

disadvantage and inequalities rather than on formal binary distinctions between groups for being Black-white, able-disabled, men-women etc. The focus of evidence remains on the position of the claimants themselves rather than the position of comparators, though evidence can be considered for its comparative dimensions based on the probative value. Statistics, questionnaires, testimonies, statements, history, context, may first relate to the claimants in understanding the basis on which they felt discriminated, rather than how they bear on a comparator group.[74] Thus, the probative value of comparative evidence is not solely determined by whether the comparison is with a mirror or hypothetical comparator.[75] A shift from comparators to contextual comparison can admit any relevant comparison between people who share some or no personal characteristic of the claimant to establish unique and shared patterns of group disadvantage without splintering the claimant's identity into strict compartments to be considered in a mutually exclusive way. Thus, the standard of which comparators count for relevant comparison under this approach will be determined by how comparison is made and what it reveals. Just like the requirements of admitting any other evidence for relevance, expertise, authenticity etc, deductions from evidentiary material for making comparisons would also have to meet these criteria instead of delimiting the evidence relating only to strict comparators.[76]

This approach would undercut the frequent jostling with comparators offered by the claimant and the unexplained revisions by the defendant and the courts. For an

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74 *Withler* (n 14) [64].

75 Beverley Baines, 'Equality, Comparison, Discrimination, Status' in Margaret Denike, Fay Faraday and M Kate Stephenson (eds), *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Irwin Law 2009) 79.

76 Fredman supports a similar point about courts taking a more common sense view of obvious facts for taking judicial notice. Fredman (n 1) 188. Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide also agree that comparators can limit the scope of evidence in multiple ground claims in *Discrimination Law: Theory and Context* (1st edn, Sweet & Maxwell 2008) 1199.

intersectional claim, this means that the array of choice between those who do not share *any* characteristics and are yet better off and those who share some but not all characteristics and are both better off and worse off may be equally relevant, as long as they go on to reveal the unique and shared aspects of disadvantage respectively, the crux of an intersectional claim. Thus, comparative deductions from admissible evidence may be useful in illuminating the basis of intersectional claims, but to subject such comparisons to be made via the comparator test would reify the impracticality and disorder associated with strict and flexible approaches.

The South African Constitutional Court's use of comparison resembles this contextual approach. The Court has never shown fastidious interest in identifying a mirror or hypothetical comparator to establish discrimination claims under Section 9(3) of the Constitution.[77] But it has nevertheless used comparison in finding for discrimination. For example, it took little effort of the Court to find that the rule of male primogeniture under the customary law differentiated against women on the basis of race and gender in reference to the 'racist and painful past'[78] and 'past patterns of disadvantage [which were] exacerbated by old notions of patriarchy and male domination.'[79] The Court found the distinction between an estate devolving on the basis of Black law and custom and the European regulations to be 'overtly racist'.[80] To use historical and social evidence to establish comparative disadvantage based on the relevant grounds of discrimination seems like a straightforward approach to comparison.[81] The Court seems to have adopted a similar approach in *Hassam* to find the exclusion of

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77 Cf *Pillay* (n 11) and text accompanying footnote.

78 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) [68].

79 ibid [91].

80 ibid [67].

81 See also *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC).

Muslim widows of polygamous marriages from intestate succession to be unconstitutional on the basis of gender, religion and marital status.[82] The Court made several kinds of comparisons with widows in monogamous Muslim marriages, women in polygamous marriages under customary law, and women married under a different legislation like the Marriage Act.[83] While these may not be admitted as appropriate comparators under the Canadian or UK law, they count as relevant comparisons considered for their probative value in ascertaining grounds and their discriminatory impact in South Africa.

The final word of the Canadian Supreme Court in *Withler*, reaffirmed in *Quebec v A*,[84] seems to be consistent with this evidence-based contextual approach to comparison. While it is debatable whether the *Withler* Court actually walked its talk,[85] the Court's opening proposition is a relevant one to close with here:

> To determine whether the law violates [section 15], the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong…Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?[86]

The same is true for the UK courts which affirm that the discrimination inquiry should 'avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was

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82 *Hassam* (n 9).

83 ibid [31]–[32].

84 *Quebec v A* (n 15) [168]–[169].

85 While the Court rejected the mirror comparator approach by finding that it may be 'unnecessary to pinpoint a particular group that precisely corresponds to the claimant group,' the Court still jostled with the appropriate choice of comparator, to determine a fairly specific comparison which it could approve. The choice of comparator group is then the reason for the failure of the discrimination challenge. Réaume (n 2).

86 *Withler* (n 14) [2], [57].

it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case."[87]

These statements should be given a new lease in the context of intersectional discrimination. Rather than scuttling intersectional claims by applying the comparator test, the contextual approach to comparison can help shift the focus of the inquiry from appropriate comparators to appropriate comparisons which reveal the intersectional dimensions of a multi-ground claim.[88] If the discrimination inquiry is geared towards gathering if and why the differentiation or unfavourable impact occurred, comparison should directly speak to this purpose rather than distract from it. As the South African jurisprudence shows, comparison which helps us answer this question need not be one which is strict in its form, but contextual, relevant and probative.

CONCLUSION

Discrimination law has now seen far more complex cases than its initial reservoir of direct single-axis discrimination. Claims are rarely now of the form where pointing to a better-off individual or group can immediately reveal the discriminatory aspect of an impugned measure. The structural and complex nature of invidious forms of

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87 *Shamoon* (n 16) [11]; *Chief Constable of the West Yorkshire Police v Khan* [2001] 1 WLR 1947 (HL). See also discussion in Aileen McColgan, *Discrimination Law: Text Cases and Materials* (2nd edn, Hart 2005) 53.

88 However, it doesn't necessarily mean an automatic retreat towards intention or motive in establishing discrimination. There is no reason to assume that the courts are incapable of distinguishing impact of discrimination from other 'subjective' elements, i.e. the state of mind of the discriminator, as often feared by the UK and US courts. If the South African experience is anything to go by, this is both possible and worthwhile. Cf *R v JFS* [2009] UKSC 15 [15], [16], [19], [23], [35], [59], [78]; *James* (n 19) 756, 758.

discrimination denies such simple heuristics. Intersectionality is one such area where 'first generation' practices will be at a loss in discrimination law.[89]

I have argued that the heuristic of comparison in its popular form of strict or flexible comparator tests is unacceptable for its normative imprecision, functional unwieldiness and conceptual incompatibility with the framework of intersectional integrity. If the focus of the discrimination inquiry is to discern the causal link between discriminatory impact and grounds, it can be pursued by making relevant contextual comparisons from a range of probative evidence rather than via the comparator test. The contextual approach avoids miring the discrimination inquiry with the search for an appropriate comparator, which may be too onerous, unprincipled and ultimately unhelpful in supporting an intersectional claim.

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89 Goldberg (n 2) 751–752.

CHAPTER FIVE

CENTRAL CONCEPTS IN DISCRIMINATION LAW AND INTERSECTIONAL DISCRIMINATION

INTRODUCTION

This thesis is about examining the dissonance with the 'dominant ways of thinking about discrimination law'[1] in responding to intersectionality. The dominant conceptions in comparative doctrine need an alternative vision which accommodates intersectionality within the realm of discrimination law. In order to make normative space for the alternative vision of 'intersectional discrimination', this thesis has proposed the framework of intersectional integrity. This bipartite framework insists on finding unique and shared patterns of disadvantage based on people's multiple identities (intersectionality) considered as a whole (integrity). A crosssection of comparative case law is used to identify the key conceptual hurdles in realising these two elements in an intersectional claim. The purpose is to show how the appreciation of intersectional integrity activates the possibility of realising genuine claims of intersectional discrimination.

Thus, the thrust of the thesis has been on identifying and responding to the gap between intersectionality theory and discrimination law. The gap is both a normative and a practical one: it requires theoretical as well as doctrinal recalibration of existing discrimination law. This in turn requires a substantive restatement of discrimination law from the standpoint of intersectionality to conceive intersectional discrimination in a

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1 Kimberlé W Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) UCLF 139, 150.

comprehensive way. The task is presumably mammoth. From rethinking the legal and moral dimensions of discrimination to classifying direct and indirect discrimination, identifying analogous grounds and comparators, restating burden of proof, choosing a standard of review and applying justification analysis, a complete account of intersectional discrimination will have to be wide-ranging. This thesis cannot alone accomplish this. But what can be achieved is a definition of the contours of intersectional discrimination. The details can then be traced along the lines sketched herein. The framework of intersectional integrity along with the normative conclusions emerging in this thesis (and consolidated in the next chapter) provide such a conceptual contouring.

This conceptual foundation is necessary but not itself sufficient in solidly grounding a successful intersectional claim. So what else does it take to envision an intersectional case that is true to the roots of intersectionality theory and is an adequate 'fit' within discrimination law? Taking cue from the case law considered so far, this chapter highlights some of the doctrinal recalibrations which will need to be worked out in addition to the foregoing discussion on causation and comparison in discrimination law. While this thesis is limited in its scope and space, the aim of this chapter is to identify possible lines of argument for developing some of the key concepts in discrimination law in order to accommodate intersectionality. The suggestions for reconsidering the existing doctrine can be as useful for single-axis discrimination as they are for intersectional discrimination. But the focus is on signposting those doctrinal reconfigurations which are particularly useful for realising intersectional claims. I consider two issues in detail in **Part I** and **Part II** respectively—the nature of the wrong of intersectional discrimination and the criteria for identifying analogous grounds. I argue that both of these should be conceived broadly so as to capture the vast spectrum of disadvantage suffered on an intersectional basis (wrong) as well as the basis (grounds) on

which they occur. In addition, we need to re-examine a host of doctrinal tools for their adaptability to claims of intersectional discrimination. While a detailed exploration is beyond the scope of this thesis, future research can contribute to developing each of discrimination law's central features along the lines discussed below. For such posterity's sake, **Part III** outlines four key areas: indirect discrimination, justification inquiry and standard of review, burden of proof and expressive concerns.

I. THE WRONG OF INTERSECTIONAL DISCRIMINATION

> I do not know, when something…happens to me, when it is happening to me because I am a woman, when it is happening to me because I am an Indian, or when it is happening to me because I am an Indian woman.[2]

This statement captures the main problem for intersectional discrimination. That when a person with multiple intersecting identities experiences discrimination, how do we understand such discrimination based on those identities? The conceptual framework of looking for unique and shared patterns of disadvantage by considering the claimant as a whole (intersectional integrity) has been proffered as helping us answer the central dilemma posed by Monture: *in what way do multiple identities inform the experience of discrimination*? An appreciation of the framework will reveal the nature of discrimination at play in a particular case, i.e. what is *wrong* about the treatment or impact suffered by the claimant. For example, Monture may ultimately be complaining that: she was deprived of a job because of a stereotype like Indian women are lazy;[3] or that the clientele is

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2 Patricia A Monture, 'Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah' in The Chilly Collective (eds), *Breaking Anonymity: The Chilly Climate for Women Faculty* (Wilfrid Laurier 1995) 274.

3 Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 UPLR 149, 169.

prejudiced against being served by Indian women.[4] If her voting rights are curtailed, she may complain of social and political marginalisation[5] or denial of political participation[6] or of being treated as a second-class citizen.[7] If she was excluded from an otherwise all-white class photo of her LLM batch, she may complain of being demeaned[8] or of a loss of her dignity.[9] If she was asked to remove her headscarf for the photo she may be have been forced to 'cover' her identity.[10] If she was denied admission into an LLM programme because of her personal characteristics she could say that her 'deliberative freedoms',[11] 'capabilities'[12] or autonomy[13] were curtailed. If she received a lower rate of social assistance she could claim that she was oppressed[14] or disadvantaged.[15] Whatever the substantive conception of equality or non-discrimination in a jurisdiction—dignity, autonomy, perpetuation of stereotype or prejudices, demeaning, curtailing deliberative freedoms, marginalisation etc.; the application of the framework of intersectional integrity should reveal the specific disadvantage that is suffered by the claimant in

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4 Sophia R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 UTLJ 291, 297–303.

5 Henk Botha, 'Equality, Plurality and Structural Power' (2009) 25 SAJHR 1, 10–16; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16, 22.

6 Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2010) 32.

7 Cass R Sunstein, 'The Anticaste Principle' (1994) 92 MhLR 2410, 2411.

8 Deborah Hellman, *When is Discrimination Wrong?* (HUP 2008) ch 2.

9 Denise G Réaume, 'Discrimination and Dignity' (2003) 63 LLR 1.

10 Kenji Yoshino, 'Covering' (2002) 111 YLJ 769; Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006).

11 Sophia Moreau, 'What is Discrimination' (2010) 38 PPA 143, 147.

12 Amartya Sen, *Development as Freedom* (OUP 1999); Martha Nussbaum, *Women and Human Development* (CUP 2001).

13 Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) chs 4–5.

14 Iris Marion Young, *Justice and the Politics of Difference* (PUP 1990) ch 2.

15 Owen Fiss, 'Groups and the Equal Protection Clause' (1976) PPA 107, 108.

reference to the substantive conceptions (denial of job/voting rights/admission into college/receipt of social assistance). This determination lies at the heart of the explanation of the nature of discrimination suffered and is discussed in Section A below. I argue that in cases where the framework of intersectional integrity was appreciated, the courts also reached a solid explanatory account of discrimination (Section B.1). Other cases demonstrate a dyadic failure of both failing to appreciate intersectional integrity as well as consequently failing to uncover the nature of discrimination (Section B.2). What becomes clear is that in the first set of cases, the nature of disadvantage was interpreted broadly while the conceptions of discrimination remained overly narrow in the second set. Thus, in realising the commitment to addressing intersectional discrimination, one would, when applying the framework of intersectional integrity, have to appreciate the diversity of disadvantage which can result when multiple identities interact (Section C).

A. Accounts of Wrongful Discrimination

Amartya Sen's famed question: 'equality of what?'[16] begets a vast spectrum of responses. Commentators and courts have both yielded multiple and rich accounts of what is meant by equality and non-discrimination. There has been extensive effort in delineating the human interests protected in the general guarantees of equality and non-discrimination and in defining what their breach entails. This section outlines some of the prominent accounts, each of which seeks to proffer a distinctive understanding of wrongful discrimination. The purpose of referencing these accounts is to show the variety of explanations of discrimination which intersectionality can plug into. They provide precise cues and descriptions for what is wrong about a certain kind of treatment or impact. The

16 Amartya Sen, *Inequality Reexamined* (HUP 1992) 12.

analytic strength and breadth of these accounts is immediately useful in explaining the wrong of intersectional discrimination, just as it is in single-axis claims.

Conceptions of discrimination have been advanced either as embedded in a single value or as comprehensive theories explaining a wide range of breaches of the right to equality and non-discrimination. An example of the first kind is the justification of equality as human dignity. Denise Réaume and Deborah Hellman have offered trenchant dignity-based accounts.[17] Réaume argues that: 'The central insight in a dignity-based account is that valuing human dignity means acknowledging the inherent worth of human beings; therefore violating dignity involves conveying the message that some are of lesser worth than others.'[18] Similarly, Hellman considers wrongful discrimination to be one which *demeans* by treating another as not fully human or not of equal moral worth.[19] Others too have offered such linear accounts, underpinning harms of inequality and discrimination to a single value. For example, Sen and Nussbaum would classify disadvantage as deprivation of genuine choices for pursuing a life which one considers valuable.[20] This rendition is typical of autonomy-based justifications of protection from discrimination. [21] According to Sophia Moreau, 'the interest that is injured by discrimination is our interest in a set of…deliberative freedoms: that is, freedoms to have our decisions about how to live insulated from the effects of normatively extraneous

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17 Réaume (n 9); Hellman (n 8). See also Susie Cowen, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 SAJHR 34; Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1; Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (JUTA 2012).

18 Réaume (n 9) 22.

19 Hellman (n 8) 35.

20 Sen (n 12) 5; Nussbaum (n 12) 90–91.

21 Khaitan (n 13).

features of us, such as our skin color or gender."[22] While these accounts appear individual centric in nature, other theories have social goals at their centre for enabling not just individual choices but also integration, inclusion and solidarity in the society.[23] Ely relies on a similar representation-reinforcing justification for equality and non-discrimination which strengthens the political participation of 'discrete and insular minorities."[24] Group-based justifications are also found in the accounts of Fiss and Sunstein. For Sunstein, equality prohibits 'caste like' distinctions based on group characteristics of individuals.[25] Similarly, Fiss describes the 'group-disadvantaging principle' as prohibiting actions which render certain people worse off based on their group characteristics.[26] Fiss and Sunstein are specifically concerned about the status-harm of being treated in a manner which disadvantages persons of particular groups. While they are drawing from the experience of race discrimination against Blacks under the US equal protection clause, their accounts are generalist in nature. Equally, explanations of wrongful discrimination can exist for specific grounds as well. For example, MacKinnon proffers a 'dominance' view of sex discrimination such that inequality between sexes is seen as a consequence of power and subordination.[27] Similarly, Brodsky and Day have argued for the specific recognition of socio-economic disadvantage as a distinctive wrong in discrimination law.[28]

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22 Moreau (n 11).

23 Catherine Barnard, Simon Deakin and Gillian S Morris (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* (Hart 2004); Collins (n 5) 24.

24 John Hart Ely, *Democracy and Distrust* (HUP 1980) 77–88.

25 Sunstein (n 7) 241–242.

26 Fiss (n 15).

27 Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (HUP 1987) 42.

28 Gwen Brodsky and Shelagh Day, 'Denial of the Means of Subsistence as an Equality Violation' [2005] Acta Juridica 149. See also Réaume (n 9) 37–38.

In contrast, comprehensive theories seek to consolidate a range of values and goals furthered in equality and non-discrimination. Young[29] and Fraser[30] have devoted their accounts of group-based injustices to the dimensions of redistribution and recognition. While redistribution is about material benefits or burden; recognition has to do with the positive affirmation and valuation of groups, giving space to individuals and groups to define themselves and to be valued and respected for it. Thus, devaluation, disparagement, disrespect, demeaning, stereotyping, maligning, ignoring, disconsidering and deprecating may all be classified as recognition harms. Young further classifies redistributive and recognition harms as occurring in the forms of domination and oppression, going on to identify 'five faces of oppression'[31] as: exploitation,[32] marginalisation,[33] powerlessness,[34] cultural imperialism[35] and violence.[36] Each speaks to a distinct harm which may be caused by discriminatory practices against particular social groups.

Each of these accounts, whether based on a single value or a range of values may represent a set of wrongs which can be classified as discrimination but they may be individually stretched to include all wrongs imagined in other accounts. For example, noticeably absent from Fraser and Young's account is the representative dimension

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29 Iris Marion Young, 'Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory' (1997) I/222 New Left Review.

30 Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1997) I/222 New Left Review; Nancy Fraser, 'A Rejoinder to Iris Young' (1997) I/223 New Left Review.

31 Young (n 14) ch 2.

32 ibid 49.

33 ibid 53.

34 ibid 58–59.

35 ibid 61.

36 ibid 76.

argued for by Ely, while Ely's own account shows little appreciation of redistributive dimension. An all-encompassing account which seeks to incorporate these individual accounts is Fredman's multi-dimensional framework of substantive equality.[37] Fredman posits four overlapping dimensions of substantive equality—redistribution, recognition, participation and transformation. The injustices associated with inequality or discrimination can be classified as running along these axes as:

> First, it aims to break the cycle of disadvantage associated with status or out-groups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participative dimension.[38]

Likewise, judicial accounts of equality and non-discrimination are expansive in nature. The Canadian Supreme Court frequently refers to human dignity as the fundamental value underpinning the guarantee of equality in broad terms.[39] Violation of dignity may typically occur with 'imposition of disadvantage, stereotyping, or political or social prejudice.'[40] Prejudice is broadly understood as being treated as inferior to others because of a group characteristic and stereotyping may result from irrelevant and misplaced biases against persons from a certain group.[41] While other justifications like autonomy and self-determination have also appeared in judicial reasoning, they have not been centrally relied upon in finding discrimination under Section 15(1) of the Canadian Charter.[42] Similarly, the South African Constitutional Court uses violation of human

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37 Fredman (n 6) 25–33.

38 ibid 25.

39 *Egan v Canada* [1995] 2 SCR 513 (SCC) [36] (L'Heureux-Dubé J).

40 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) 451.

41 Moreau (n 4) 302–303; Alexander (n 3) 158–59, 192.

42 *Law v Canada* (n 46) 53 (Iacobucci J).

dignity as the touchstone of identifying unfair discrimination which perpetuates patterns of group disadvantage.[43] These patterns are often related to some kind of prejudice and stereotyping.[44] In the case of UK, according to Bob Hepple, the Equality Act refers to no less than nine theories of discrimination: consistent treatment; the removal of barriers to equal treatment; respect for equal worth or dignity of the individual; recognition of identity, difference, and diversity; equal opportunity; redistribution; individual choice or freedom; equality of capabilities; and fairness.[45] But it is mainly a comparative concept with the court analysis seldom going beyond the idea that a claimant is put at a 'particular disadvantage' based on the personal characteristic.[46] The explanation of specific disadvantage is not necessarily developed once it is established that it exists on a comparative basis.

As Fredman has remarked: '[t]he choice between different conceptions of equality is not one of logic but of values or policy.'[47] The purpose of this part is thus not to resolve the philosophical differences between these various conceptions or to choose a single justification for wrongful discrimination or the relationship between equality and non-discrimination. In addition to the distinctive dimension of integrity harms in intersectional discrimination posited in Chapter Two, I seek to point towards the spectrum of choice for understanding broader discrimination harms in intersectional claims. So long as each conception of wrongful discrimination shows *some* analytically distinct and precise way of explaining what is wrong in a particular case, it will be able to

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43 *Harksen v Lane NO* 1998 (1) SA 300 (CC) (*Harksen*).

44 *President of the Republic of South Africa v Hugo* [1997] ZACC (CC) 4, 73 (Kriegler J) (*Hugo*); *S v Jordan* [2002] ZACC 22 (CC) [60] (O'Regan and Sachs JJ) (*Jordan*).

45 Bob Hepple, 'The Aims of Equality Law' (2012) 61 CLP 1, 2.

46 *Preddy v Bull* [2013] UKSC 73; R *v JFS* [2009] UKSC 15.

47 Fredman (n 6) 2.

explain *some* cases of intersectional discrimination as well. Thus, I am relying on the general explanatory power of each conception in being able to stand as a placeholder for describing the harm or disadvantage suffered in intersectional discrimination. It is this explanation that the courts should uncover and elucidate in intersectional cases. The next section explores comparative law's reference to these conceptions of 'discrimination' in intersectional cases.

B. Explicating Intersectional Wrongs

A useful starting point is O'Regan J's statement in *Brink*: '[Section 9 was adopted] in the recognition that discrimination against people who are members of disfavoured groups can lead to *patterns of group disadvantage and harm*. Such discrimination is unfair: it builds and entrenches *inequality* amongst different groups in our society.'[48] This thesis has built upon the idea of 'patterns of group disadvantage' to emphasise its central significance in understanding cases of intersectional discrimination. An inquiry into finding these patterns may reveal consequent inequalities based on group characteristics. What is the nature of these inequalities which result from multiple group characteristics in intersectional cases?

As Part One argued, the nature of intersectional discrimination or inequality lies in the explanation of unique and shared patterns of disadvantage by considering the claimant as a whole. It is this distinctive explanation of otherwise discrete categories of disadvantage like sexism, racism, casteism, ageism, homophobia, disablism etc which needs to be uncovered via intersectional integrity. Nedelsky describes the complexity of this exercise suitably:

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48 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) [42] (O'Regan J).

> Saying that black women suffer racism and sexism is true but misleading because it suggests that the racism they suffer is the same racism black men suffer and the sexism they suffer is the same sexism white women suffer. Black women suffer not only doubly, but differently. So when we try to take seriously the way class and race shape each other, and shape and are shaped by sexism, we see a problem of ever-increasing complexity unfolding before us.[49]

One response to unfolding such complexity is by perusing explanatory evidence to identify disadvantage in as much specificity as possible. As the previous section highlighted, each jurisdiction uses one or two chief concepts which serve as its mainstay for the right to equality and non-discrimination. These central concepts can either be interpreted broadly to embody a range of discrimination wrongs or they can be interpreted narrowly to reflect a limited understanding of protection from discrimination. The courts seem to have moved in both directions when it comes to adjudicating actual or potential intersectional claims. An incisive and broad understanding of discrimination is visible in the successful claims of *Hassam* and *Corbiere*. On the other hand, a narrow conception of harm is visible in cases which were possibly intersectional but argued on single-axis and hence eventually failed, viz. *Volks* and *Gosselin*. A comparison between the approaches in these two sets of cases reveals why it is important for the courts to broaden their compass for detecting the inequalities associated with patterns of disadvantage in intersectional claims.

Before embarking on this survey, it is important to highlight one further element in the discrimination inquiry which reveals the nature of wrong: the focus on impact. As the South African Constitutional Court remarked in *Harksen*: 'In the final analysis it is the impact of the discrimination on the complainant that is the determining factor [in finding for] discrimination.'[50] This seems equally apposite for intersectional claims. In looking for unique and shared patterns of group disadvantage by considering the claimant as a whole in an intersectional claim, the focus should be on reckoning with the *impact* of the

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49 Jennifer Nedelsky, 'The Challenges of Multiplicity' (1991) 89 MhLR 1591, 1597–1598.

50 *Harksen* (n 49) [50].

impugned measure. The emphasis of the discrimination inquiry is on understanding what adverse effects flow from the discriminatory act complained of and on what basis (grounds) they accrue. What is important to underscore here is that the focus on impact or effects gives real meaning to the search for the basis of discrimination in explicating the discrimination wrong. As the sections below seek to show, it is the investment in understanding and appreciating the impact on the claimant that reveals the true nature of wrong suffered in discrimination law, especially in intersectional discrimination.[51]

B.1 Broad Approach

It is useful to begin with *Hassam* which is located at the far end of the graded spectrum, reflecting a paradigm case of intersectional discrimination. As the analysis in Chapter Three showed, the South African Constitutional Court in *Hassam* was committed to tracing unique and shared patterns of disadvantage associated with the position of poor Muslim women in polygynous marriages.[52] Through this focus, it arrived at a thorough explanation of the kind of harms reflected by these patterns. Writing for the Court, Nkabinde J described the 'nature of discrimination' both in terms of the 'deprivation of legal recognition of their marriage'[53] as well as causing 'significant and material disadvantage' and 'denial of benefits.'[54] The exclusion from benefits which were afforded to other people entrenched the economically vulnerable position of Muslim women in polygynous marriages as well as reinforced harmful stereotypes and 'patriarchal practices

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51 As the next chapter argues, this impact is best examined as a matter of 'subjective-objective' perspective. See Chapter Six, III.C.

52 See discussion in Chapter Three, III.A.4.

53 *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) [14], [33], [36].

54 ibid [34].

that relegate[d] women in these marriages to being unworthy of protection.'[55] Thus, both redistributive and recognition harms were keenly detected and described in making a finding of unfair discrimination. So even though the Court uses the placeholder of 'dignity' to refer to the Section 9(3) violation in broad terms, its explanation for that breach involved was both expansive and precise at the same time. Had the Court explored further, it could also have traced participatory and transformative harms especially those associated with polygamy per se. But given the limited question before the Court, its exploration of intersectional wrong suffices in feeding explanatory fodder into the framework of intersectional integrity.

Similarly in *Corbiere*, the Canadian Supreme Court was governed by the central purpose of Section 15(1) to: 'prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice'.[56] Its explanation of the harm suffered by non-resident band members is specific and detailed. The disenfranchisement of off-reserve band members is seen as taking away the right to participate in the band governance and thus signifying that they were less worthy and entitled than other Canadians.[57] Like the Constitutional Court in *Hassam*, the Supreme Court in *Corbiere* is also concerned about both the denial of benefits and material deprivation as well as what it conveys about the claimants. It finds that the disenfranchisement reaches the cultural identity of the claimants in a stereotypical way.[58] The fact that their political participation was curtailed because they were a 'discrete and

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55 ibid [37].

56 *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (SCC) [5], [66].

57 ibid [17], [19].

58 ibid [18].

insular minority',[59] their historical disadvantage was exacerbated and they were thus seen as 'less aboriginal'[60] reflects an appreciation of the redistributive, participative and recognition dimensions in Fredman's substantive equality framework and specifically resonates with Ely's representation-reinforcing justification of protection from discrimination. Thus, the appreciation of unique and shared patterns of disadvantage represented by considering the claimant's position as a whole needs to be supplemented with a robust understanding of what constitutes discrimination. The two processes work together to yield a sufficiently explanatory account of the wrong in intersectional discrimination.

B.2 Narrow Approach

In contrast with relying on a broad conception of what constitutes discrimination, the majority decisions in *Volks* and *Gosselin* show that courts can also define discrimination harms quite narrowly to defeat possible intersectional claims. As argued in Chapter Three, both *Volks* and *Gosselin* are claims which devolved on more than one identity and thus would have benefited from the appreciation of intersectional integrity in the discrimination inquiry. This appreciation would ultimately have revealed the particular nature of disadvantage being complained of.

The majority opinion in *Gosselin* exposes the gap in the reasoning of single-ground analysis coupled with a narrow understanding of discrimination based on that ground. *Gosselin* relies on a particularly limited understanding of human dignity, considered to be the touchstone of equality under Section 15(1) of the Canadian

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59 ibid [71].

60 ibid [92].

Charter.[61] The Court began by citing that: 'Discrimination occurs when people are marginalized or treated as less worthy on the basis of irrelevant personal characteristics, without regard to their actual circumstances.'[62] But in determining whether this was actually the case, it applied the perspective of the legislature to hold that the distinction was not discriminatory since it was not *meant* to treat the claimant and those in her position 'as less worthy and less deserving of concern, respect and consideration than others.'[63] The discriminator's intention, according to the Court, was to affirm young people's potential rather than demeaning them or denying them dignity.[64] The Court took judicial notice of this legislative purpose on the basis that it considered 'counter-intuitive' for people below 30 to have suffered any historical disadvantage, vulnerability, stereotyping, or prejudice based on age (unlike race or gender).[65] Reliance on the stereotype of young people's self-sufficiency and capability justified their exclusion from higher rate of social-assistance. In serving a measure of judicial 'tough love'[66] the Court ignored the economic vulnerability of those on social assistance and how their disadvantage was exacerbated by other identities of race, gender, disability etc, something keenly explored in the feminist rewriting of the judgment discussed in Chapter Three. What this discussion seeks to show is that often a quantitatively limited understanding of discrimination confined to a single ground will go hand in hand with a narrow conception of discrimination harms sought to be addressed in law. In defeating claims

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61 *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 (SCC).

62 ibid [21].

63 ibid [26].

64 ibid [42].

65 ibid [33]. For discussion on limits of taking judicial notice, see infra III.C and III.D.

66 Gwen Brodsky, Rachel Cox, Shelagh Day and Kate Stephenson, 'Gosselin v. Quebec (Attorney General) (Women's Court of Canada)' (2006) 18 CJWL 193 [69].

which are not simply a matter of single-axis, the Court draws on both a limited understanding of discrimination and ignores the perspective of the claimant in illuminating what is wrong in reference to their position.

Hugo reinforces this conclusion. The majority's decision can be found deficient in both these ways: **(i)** it focuses only on sex and stereotypes based on sex, while ignoring the claimant's status as a single parent and how it reinforced the same stereotypes associated with mothers being primary care-givers to young children, an onerous, subservient and occupationally inferior role.[67] **(ii)** It thus ends up ignoring the injustice in excluding single fathers from the presidential pardon. The recognition harm of not seeing the reality of single fathers as primary care givers of their children and the material harm of being unable to provide this care (which female prisoners could) is left unidentified in both a limited understanding of intersectionality and its impact. The claim then is, that had the Court observed the framework of intersectional integrity it would have been easier to explicate and express the nature of harm. But sidelining the framework also misdirects the discrimination inquiry into a narrower cove of discrimination wrongs.

Volks also demonstrates this dyadic failure by—first, conceiving discrimination purely as a matter of 'choice' and secondly, in not viewing discrimination from the perspective of the impact upon the claimant. *Volks* considered the constitutional validity of a provision which excluded survivors of stable permanent relationships, the right to claim maintenance from their deceased partner's estate. While the claim of direct discrimination on marital status failed, the Constitutional Court also failed to see the impact of gender and poverty on the nature of discrimination. Consequently, it failed to

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67 *Hugo* (n 50) [80] (Kreigler J).

appreciate the actual harm suffered by the claimant which devolved on multiple bases including gender, and not just marital status.

As highlighted previously in Chapter Three, Skweyiya J's majority decision in *Volks* fails to consider the claimant as a whole (an economically-dependant female survivor of a cohabitation relationship) by ignoring her gender and economic vulnerability and focussing solely on her marital status. In addition, it fails to conduct the discrimination inquiry from her perspective at all. Instead of seeing the impact of the alleged discrimination on the claimant, the question to be answered became: 'whether it was unfair for the legislature not to qualify freedom of testation further, by creating a posthumous duty to maintain on cohabitants.'[68] The defining focus remained on upholding the freedom of testament and choice to marry of the deceased male partner. Consequently, the Court discounted the lack of 'free will' of female partners like Mrs Robinson in effectuating their choices.[69] The result is that the majority decision ensures respect for the deceased's choice after his lifetime but an inquiry into the impact on surviving partners is thrown by the wayside. Consideration of a situation where 'deceased male partner refused to marry the woman who cared for him, put everything into the relationship and gave her heart and soul to it, bringing up a number of children born of the relationship between them in the process,' was dispensed with 'sympathy', deeming the conduct of the male partner 'unconscionable'.[70] But that did not assist a finding of discrimination given that the Court found that 'it is entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the

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68 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) [57], [60].

69 ibid [55], [93].

70 ibid [59].

deceased.'[71] So even when the Court noted that the vulnerability of women in such situations is unfortunate, it denied that their exclusion from maintenance claims could help their situation of poverty and alleviate structural dependence and vulnerability in any meaningful way.[72] Thus, the focus on a single-axis, coupled with a particularly narrow view of discrimination wrongs eliminated the possibility of recognising intersectional wrongs implicated in the claim.

C. Wrongful Intersectional Discrimination

The genesis and development of intersectionality theory has been with the purpose of redressing the disadvantage which attaches to people because of their multiple identities. The nature of this disadvantage is distinct from the disadvantage suffered based on individual identities, i.e. of racism, sexism, homophobia, able-bodiedism etc. Thus, the effects of being a poor woman in a cohabitation relationship cannot simply be explained in reference to patterns of group disadvantage associated with being poor, unmarried or female separately. The nature of disadvantage will have to be explicated by tracing unique and shared patterns of group disadvantage based on all the identities together (intersectional integrity). This disadvantage will then have to speak to a broad category of redistributive, recognition, participative and transformative conceptions which explain what is wrong about those patterns in terms of stereotyping, prejudicing, demeaning, marginalising, exploiting etc. The framework of intersectional integrity thus would disclose an explanation of discriminatory treatment or impact in substantive terms. There are three takeaways from the principal case being made here.

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71 ibid [60].

72 ibid [66], [68]. See also discussion in Chapter Three, text accompanying nn 125–129.

First, the proposal is that the appreciation of the framework of intersectional integrity is necessary to get to the bottom of what the resulting harm is. In this sense the conceptual framework of intersectional integrity is a prerequisite step. Once the framework is adopted, it will need to be supported with a rich understanding of discrimination. As discussed in the previous sections, these two elements reinforce one another so where the court leads with the principles of intersectional integrity, it often also applies a broad understanding of discrimination (*Corbiere* and *Hassam*). Where it misses the conceptual backdrop of intersectional integrity it may also miss the nature of discrimination at work (*Volks*, *Hugo*, *Gosselin*). Thus, the framework of intersectional integrity and the courts' conception of discrimination operate in a helical way.

Secondly, once courts have invested in detecting and redressing patterns of disadvantage by applying the framework of intersectional integrity, it should draw from a wide range of values in identifying the harm of intersectional discrimination. Otherwise, in failing to identify certain forms of disadvantage yielded by the intersections of identities, discrimination law will be defeated in its goal of addressing invidious forms of discrimination.

Thirdly, it should be apparent in the discussion that there is no new *category* of intersectional harm which is needed to address an intersectional claim. But what *is* required is a recognition of a distinctive explanation of the particular harm in each case based on the relevant conception of discrimination. Judicial purpose in intersectional claims should then be to extend clear and comprehensive explanations of the harm suffered by the claimants apropos of the diverse theories of equality and non-discrimination. This coincides with the underlying principle of intersectionality that the interaction of people's personal characteristics creates a *qualitatively* distinct nature of disadvantage which is *not* explained in the same way as the disadvantage associated with those personal characteristics taken individually. For example, Chapter One explored the

qualitative meaning of intersectional disadvantage suffered by Dalit women owing to their caste and sex.[73] The nature of disadvantage suffered by Dalit women is quite different from the sexism and casteism suffered by women of upper castes and Dalit men. While the nature of sexism against upper caste women may relate to unequal pay, unequal access to opportunities in the job market, household responsibilities and child care duties, Dalit women (in addition to all these) suffer sexism from upper caste women in whose homes they work as maids or servants. Their ill treatment spanning from verbal, psychological smears to violence may not appear in sexism complained of by upper caste women at all. Thus, the explanations of the nature of sexism suffered by them can be called by the name of sexism but will still need a distinctive explanation.

II. IDENTIFYING ANALOGOUS GROUNDS

The possibility of claiming on multiple grounds remains central to realising intersectional discrimination. This possibility is in turn enhanced by the prospect of claiming on not just enumerated but also analogous grounds.[74] In jurisdictions like the UK where the general non-discrimination guarantees operate with closed lists under the Equality Act, this may not be immediately possible unless the courts are willing to make some ambitious interpretive strides.[75] However, where there is explicit allowance of reading in

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73 See Chapter One, Part III.

74 In either case, grounds remain key to discrimination law and the defence of this central tool is offered in Chapter Six, III.C, III.D and III.E.

75 *Chandhok v Tirkey* [2015] ICR 527 (UKEAT) (interpreting 'caste' within the ground of 'ethnic origin' for the purposes of Equality Act). See also Meena Dhanda et al, 'Caste in Britain-Socio-Legal Review' EHRC (2014) <http://www.equalityhumanrights.com/sites/default/files/publication_pdf/91.%20Caste%20socio-legal%20review.pdf> accessed 26 April 2015.

analogous grounds, like in South Africa and Canada, the possibility improves instantly.[76] So in theory, claiming on multiple grounds, one or few of which are analogous, seems plausible. But as the jurisprudence reveals, this has been a rather elusive possibility in fact, especially in multi-ground claims. Other than *Corbiere*, where the court read in a new compound analogous ground of aboriginality-residence, courts in *Brink*, *Hugo*, *Gosselin* or *Jordan* did not attempt to recognise analogous grounds of marital status (*Brink*), childcare status/single parenthood (*Hugo*), socio-economic disadvantage/dependence on social assistance (*Gosselin*) and employment status (*Jordan*) for analysing the sex (*Brink*, *Hugo*, *Jordan*) and age (*Gosselin*) claims as a matter of multi-ground intersectional discrimination.

This section argues that in order to support the framework of intersectional integrity it is necessary to streamline the criteria for admitting analogous grounds such that they reflect an inclusive understanding of discrimination wrongs protected in law. It is useful to recognise a 'constellation of factors', none of which are alone necessary but independently or in combination sufficient for underpinning the justification of existing and analogous grounds. The discussion in the previous section and this section thus reinforce each other and also enhance the prospects of a successful intersectional claim.

Section A discusses the test for recognising analogous grounds in South Africa and Canada. I argue that the prevailing test, like the touchstone for wrongful discrimination, is too narrowly defined and does not cover some obvious contenders which emerge in intersectional claims. A rich constellation of factors (historical disadvantage, political powerlessness, marginalisation, exploitation, prejudice, stereotyping, personal identity and dignity, violence etc) which correspond to the inclusive understanding of discrimination argued for in the previous part, must replace linear tests like immutability and fundamental choice. Section B then proceeds to

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76 Section 15(1) of the Canadian Charter uses the words 'in particular' and Section 9(3) of the South African Constitution uses 'including' before their list of grounds.

consider the most striking absentee from the list of enumerated or analogous grounds: poverty. As seen in *Bhe*, *Hassam*, *Volks*, *Gosselin* and *Falkiner*, poverty or socio-economic status is a recurrent theme in intersectional claims. While it is impossible to make a comprehensive case for recognising poverty as a ground of discrimination in this thesis, the discussion hopes to show why its continued disqualification as a ground fails to persuade. This, as I argue, is because its intersectional or crosscutting character is a compelling reason for its recognition rather than exclusion. There are two reasons I explore in making this case: first, the intersectional nature of poverty is no different from other grounds of discrimination; secondly, like other grounds, poverty-related grounds need to be taken as reflecting a range of diverse groups within its fold rather than a single well-defined protectorate. Thus, intersectionality strengthens rather than weakens the case of poverty as a ground of discrimination.

Two clarifications are necessary before embarking on the discussion below. First, the insistence on recognising analogous grounds more easily than is currently possible should not be misconstrued as a demand for recognising intersecting grounds as new analogous ground themselves. While this worked in *Corbiere* for the compound analogous ground of aboriginality-residence, this may not be as useful or even tenable in other cases. Thus, the demand for recognition of Black women's position of disadvantage does not ordain the recognition of a new analogous ground of race-sex or racism-sexism or other such permutation. This confusion initiated by the *DeGraffenreid* Court has not carried through in other intersectional claims and thus needs to be approached with continued restraint. So the relevant case to be imagined here is a simple one—of claiming intersectional discrimination on one or more analogous grounds. This would also include cases pleaded on compound/hybrid grounds like *Corbiere*. The contours of this choice have been discussed in Chapter Three and will be further explored in Chapter

Six.[77] This section is concerned with the sheer lack of intersectional claims being argued on analogous (not compound) grounds. This is inevitably a reflection of the jurisprudential deficit in accommodating such claims. It is then useful to explore whether the current limits on identifying analogous grounds can be legitimately revised to enable claimants to argue and courts to admit such claims.

Secondly, the lack of intersectional cases argued on analogous grounds may have to do with understandable practical limitations. For example, Section 9(5) of the South African Constitution offers a presumption of unfairness for cases based on listed grounds. Consequently, if discrimination is argued on analogous grounds, it is the complainant who will bear the burden of proof. But given that such a formal limitation exists, there is no need to make claiming on analogous grounds more difficult than it already is. Given that intersectionality presumes genuine flexibility in recognising categories of disadvantage, a flexible but determinate standard of admitting analogous grounds will be a better ally to intersectionality than rigid formulas.

A. Identifying Analogous Grounds Through 'Constellation of Factors'

The leading test for identifying analogous grounds in Canada is one of actual or constructive immutability.[78] While the Supreme Court has hinted at other factors like 'the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against,'[79] they are taken to 'flow from the central

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77 See Chapter III, III.A.3 and Chapter Six, IV.A.

78 *Corbiere* (n 62) [13].

79 ibid.

concept of immutable or constructively immutable personal characteristics'[80] without being independently relevant. So also factors like the relevance of a personal characteristic being the basis of stereotypes and affecting the personal identity has been taken as derivative of the central construct of immutability.[81] The focus on immutability or fundamental choice has been criticised for being too narrow and only 'tangentially relevant'[82] to other indicia like political power, historical disadvantage, marginalisation, prejudice, stereotyping etc. Thus, in contrast the South African Constitutional Court has read in analogous grounds like citizenship,[83] HIV status[84] and refugee status[85] in Section 9(3) without a single-minded focus on immutability. Analogous grounds are simply taken to be those that have the *potential* to violate human dignity[86] and the Court approaches this inquiry by identifying patterns of historical group disadvantage based on the prospective analogous ground.[87] In addition, it has considered other factors like political marginalisation,[88] immutability[89] and personal choice[90] in making this determination. But

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80 ibid.

81 ibid.

82 Rosalind Dixon, 'The Supreme Court of Canada and Constitutional (Equality) Baselines' (2013) 50 OHLJ 637, 653.

83 *Larbi-Odam v Member of the Executive Council for Education* 1998 (1) SA 745 (CC) (*Larbi-Odam*).

84 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

85 *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).

86 *Harksen* (n 49) [47].

87 ibid [50] (Goldstone J); *Larbi-Odam* (n 83) [19]–[20].

88 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) [71] (Mokgoro J).

89 *Harksen* (n 49) [50] (Goldstone J).

90 *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [61]–[67] (Langa CJ).

the leading test of historical disadvantage is often seen as a 'powerful indicator' of what analogous grounds should be.[91]

As Fredman shows in her discussion of each of these factors—immutability, personal choice, dignity, autonomy, access to political power,[92] 'there is no single element which can give a definite answer to whether a characteristic should be within the inner circle of specially protected characteristics.'[93] Age may not squarely be explained through political powerlessness but citizenship can be; on the other hand, citizenship may not speak as much to personal identity as religion does; but religion and citizenship may both be explained by personal choice and autonomy and yet disability may need an explanation which shares basis in historical disadvantage, marginalisation and prejudice. Given such complexity and relativity, Fredman concludes that a 'constellation of factors'[94] should guide this determination in a contextual and dynamic way. This is an important lesson in the quest for addressing intersectional discrimination on analogous grounds. The analogy need not be drawn with a single value which forms the basis of all enumerated grounds but in fact identify what values individual enumerated grounds are based on and make analogies with appropriate grounds which reflect the value basis of the analogous ground. As the case law shows, the cumulative treatment of grounds as reflecting *a* kind of basis for protection on certain grounds is normatively untenable in identifying analogous grounds and consequently unhelpful for intersectional claims which often need to cash in the possibility of arguing on an analogous ground.

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91 Fredman (n 6) 139.

92 ibid 130–139.

93 ibid 139.

94 ibid 130. See also Joshua Sealy-Harrington, 'Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach' (2013) 10 JLE 37.

Thus, the peculiar nature of disadvantage suffered on multiple grounds will require a broad and inclusive understanding of discrimination. As the previous section argued, this involves a keen appreciation of the various forms of discrimination wrongs which include socio-economic disadvantage, political powerlessness, marginalisation, exploitation, violence, prejudice, stereotype, vulnerability etc. The identification of analogous grounds too must respond to this broad conception of disadvantage so as to account for discrimination based on said grounds. In fact, as L'Heureux Dube J remarks: 'The enumerated or analogous nature of a given ground should not be a necessary precondition to a finding of discrimination. If anything, a finding of discrimination is a precondition to the recognition of an analogous ground.'[95] Thus, the two processes should reinforce one another such that the diverse forms of discrimination wrongs relate to the justification of enumerated and analogous grounds and vice versa. For example, if a female sex worker brings a claim that the legislation cracking down on brothels leaves her homeless and destitute (while prostitution per se remains legal), she may seek to claim that her socio-economic vulnerability has been exacerbated based on her gender and her employment status as a prostitute. While employment status is not strictly immutable and may involve some level of personal choice, for examining the patterns of disadvantage associated with the group of female prostitutes, it would be illuminating to use lenses of political powerlessness, exploitation, violence, stereotype and marginalisation rather than simply the model of choice or immutability. While not all groups defined by their employment status may qualify for protection (viz. investment bankers, politicians etc), groups like sex workers and immigrant workers may find it easier to challenge the disadvantage associated with the nature of their work. Thus, a new analogous ground (of employment status or more specifically prostitution or even

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95 *Egan* (n 45) [52] (L'Heureux-Dubé J).

poverty or a combination of these) may reflect the disadvantage associated with a constellation of factors rather than having to rely on a single criterion like immutability or personal choice in admitting a new ground.[96]

This point is borne out in the South African Constitutional Court's decision of *Jordan v State*.[97] *Jordan* involved a constitutional challenge to Section 20(1)(aA) of the Sexual Offences Act (South Africa) for unfairly discriminating against women. The state contended that the provision targeted both the prostitute (as primary offender) and the customer (as an accomplice) indulging in commercial sex and hence was not discriminatory. The appellants and the *amici* contended that it only targeted the prostitute (in principle as the primary offender as well as in practice since only prostitutes were prosecuted), who are most often women, and hence discriminated on the basis of gender. The majority opinion by Ngcobo J upheld the neutral and formalistic construction of the provision to find that there was neither direct discrimination against women; nor was there any indirect discrimination in a provision which employed 'a common distinction' between a merchant and a customer for outlawing commercial sex.[98] The majority did not look beyond the pale of gender neutrality to recognise the reality that it was often a woman in the role of the 'merchant' who was penalised; and that the male customers were in fact never prosecuted. The fact that the majority of those found in violation of such a statute were women was treated with trifling importance for being the result not of law but social attitudes.[99] On the other hand, the dissenting opinion found indirect discrimination but stopped short of an extended

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96 This argument is often made in support of weight as a ground of discrimination. See Lucy Wang, 'Weight Discrimination: One Size Fits All Remedy?' (2008) 117 YLJ 1900; Marius Pieterse, 'Through Eye of Beholder' (2000) 16 SAJHR 121.

97 *Jordan* (n 50).

98 ibid [9], [10].

99 ibid [16]–[19].

analysis into the socio-economic vulnerability of the prostitutes. Neither side looked closely at why the kind of employment status and class identity of prostitutes is specifically relevant in understanding the nature of discrimination suffered by them. It was not just a matter of sex or gender—the discrimination in this case being a product of how women of certain socio-economic background found themselves vulnerable to employment as a prostitute and were hence deemed criminal under this provision. The identity of the 'merchant', comprising of her gender, poverty and employment status as a prostitute became insignificant for the majority since either individually or collectively, they were not recognised as grounds (other than gender).[100] When the majority assumes that: 'The stigma that attaches to prostitutes attaches to them not by virtue of their gender, *but by virtue of the conduct they engage in*',[101] it becomes important to investigate how this 'conduct' (flowing from the employment status as dictated by gender and poverty) can be given weight for what it is, and to see whether it needs to be accounted for qua grounds for an adequate and accurate discrimination analysis. If the Court was so inclined its repertoire of options would have included—reading in class (socio-economic status or poverty) and employment status or prostitution into the enumerated ground of gender; or treating them as possible analogous grounds;[102] or taking them as part of the claimant's context;[103] or as in *Corbiere*, treating gender-prostitution or gender-employment status or gender-poverty-prostitution etc as single compound analogous grounds. But

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100 There is a possibility of arguing that employment or occupational status is an analogous ground of discrimination. This was argued but rejected in *Baer v Alberta* [2007] 2 SCR 673 (SCC) [64]. Similarly, socio-economic status may also be a separate ground. See infra II.B.

101 *Jordan* (n 50) [16].

102 Note that either is possible, for example, pregnancy may be treated as a separate ground or maybe addressed within the grounds of sex or gender.

103 It is important to first commit to *accounting* all of claimant's identities which seem to inform the experience of discrimination and then state with precision as to *how* they produce discrimination (whether as single or multiple enumerated or analogous grounds or as context). This is emphasised in Chapter Six, III.D.

excluding the option of reading in identities as possible analogous grounds seems normatively suspicious and doctrinally untenable. The premature stifling of this possibility must be sustainable within the contours of the existing jurisprudence; but as the discussion has sought to show, it is actually found wanting. On the other hand, reference to a constellation of factors via consideration of historical patterns of disadvantage can immediately address a wide breadth of disadvantages qua grounds of discrimination. Thus, drawing analogies of enumerated grounds with new grounds in reference to a constellation of factors rather than a single value like immutability or personal choice holds greater promise for addressing intersectional disadvantage.

B. Poverty: An Intersectional Castaway

A compelling case for expanding the criteria for identifying analogous grounds, in line with an expansive understanding of discrimination, to support intersectional claims is borne out in the appeal of poverty as a ground of discrimination.

Despite proclaimed commitment that the poor not be treated as 'constitutional castaways',[104] discrimination law has done much the opposite.[105] The reason for its continued exclusion coincides with the need for its protection: the poor fail to make the protectorate of discrimination law *because* they are poor.[106] Of several reasons which contribute to its preclusion as a ground, one relates to its cross-cutting or intersectional

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104 *R v Prosper* (1994) 3 SCR 236 (SCC) 302 (McLachlin J).

105 Bruce Ryder and Taufiq Hashmani, 'Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010' (2010) 51 SCLR (2d) 505, 528. See also *San Antonio Independent School District et al v Rodriguez* (1973) 411 US 1.

106 Cf Canadian provinces that have recognised poverty related grounds like 'social condition' (Quebec Charter of Rights and Freedoms), 'social origin' (Newfoundland Human Rights Code), 'source of income' (Nova Scotia Human Rights Act), 'receipt of public assistance' (Ontario Human Rights Code).

nature.[107] The line of argument goes thus: because poverty is rampant such that it spans across race, gender, caste, religion, disability, sexual orientation, age etc, the lack of a specific and definable 'group' defeats the pursuit of poverty as a ground. This is a paradoxical situation. The yawning incidence of poverty should be a strong indicator for its acceptance, not exclusion, as a ground because it reveals invidious patterns of disadvantage associated with redistribution, recognition, participation and transformation.[108] While this thesis cannot make a comprehensive case for recognising poverty as a ground, the discussion here hopes to clarify this contradiction in terms to show that poverty's intersectional character actually strengthens the case for its recognition.

The inadequacies (and injustice) in our limited understanding of the criteria underpinning analogous grounds become apparent in the sidelining of poverty in the case of *Gosselin*.[109] As discussed in Chapter Three, the significance of extreme poverty and Louise Gosselin's consequent position of disadvantage defined by social exclusion, political powerlessness, material deprivation, including homelessness, vulnerability to prostitution and sexual abuse, prejudice and marginalisation from mainstream society, were treated with trifling importance in the discrimination inquiry as the claim proceeded on stereotypes associated with the single ground of age.[110] It is useful to recall that

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107 The two key objections to poverty as a ground are its supposedly mutable nature and its 'pure' economic character. See Marta Jackman, 'Constitutional Contact with the Disparities of the World: Poverty as a Prohibited Ground of Discrimination under the Canadian *Charter* and Human Rights Law' (1994) II RCS 76.

108 ibid 77. For similar argument for giving more berth to poverty in equality jurisprudence, see Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22 StLR 566; Gwen Brodsky and Shelagh Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 CJWL 185.

109 See also *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) (*Bhe*); *Hassam* (n 59).

110 Martha Jackman, 'Constitutional Castaways: Poverty and the McLachlin Court' (2010) 50 SCLR 297, 298.

Gosselin was never argued as devolving on any poverty-related ground. Even so, as the feminist rewriting of the judgment shows, there is no bar for the Court to recognise the reality of disadvantage associated with poverty qua grounds.[111] The feminist judgment draws on the evidence of widespread prejudice, stereotyping, social exclusion, stigmatisation and exclusion associated with destitution and finds that reliance on social assistance combined with age should be recognised as an analogous ground.[112] The feminist judgment pertinently observes:

> It is also essential to notice who is most likely to be poor in Canada. The group of people who live in poverty, and are likely to require social assistance to meet their basic needs, is disproportionately composed of Aboriginal people, women, people with disabilities, recent immigrants, people of colour, and single mothers—groups whose disadvantage is a central concern of the section 15 guarantee.[113]

In this way, it takes the intersectional nature of poverty to be a strong reason for recognition of a poverty-related ground under Section 15(1)—in this case, a combined ground of age and reliance on social assistance. It was also in recognition of this character that the Nova Scotia Supreme Court in *Dartmouth/Halifax County Regional Housing Authority v Sparks*[114] read 'public housing tenancy' as an analogous ground under Section 15(1) of the Canadian Charter because of its 'combined effect' in exacerbating the position of Black single mothers with low incomes.[115] Similarly, the Ontario Court of Appeal in *Falkiner v Ontario*[116] recognised 'receipt of social assistance' as an analogous ground by drawing upon 'significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support

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111 Brodsky et al (n 72) [41]–[45].

112 ibid [30]–[45].

113 ibid [41].

114 [1993] 101 DLR (4th) 224 (Nova Scotia Supreme Court) (*Sparks*).

115 ibid 234 ('The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1).').

116 [2002] OJ No 1771 (Court of Appeal for Ontario) (*Falkiner*).

mothers.'[117] It thus rejected the requirement of 'homogeneity' as a condition for recognising analogous grounds.[118]

The line of reasoning in these cases is clear—that the effects of poverty can be particularly devastating, and hence need attention and redressal, for those also disadvantaged on the basis of gender, race, disability, immigrant/resident status, marital and family status, age etc. This reasoning makes clear two points about the nature of poverty-related grounds: first, it is no different from other grounds in its crosscutting character; secondly, it is important to delineate the ground from the protectorate (groups) defined by it. The first point responds to the fallacy that grounds are uninteractive categories which are supposed to operate in isolation of one another—a misgiving stemming from the single-axis framework of discrimination law.[119] As this thesis has shown, using grounds (say, sex) to represent only the group which is disadvantaged based on *that* single ground (white able-bodied middle-class heterosexual women) excludes those who are also disadvantaged in other ways (disabled women, Black women, disabled lesbians, poor disabled Black women etc). Thus, race, sex, disability, sexual orientation, age etc create numerous permutations to represent positions of disadvantage. In this sense, the implications of intersections of poverty are perhaps overstated; because even as poverty does cut across other identities, it is not too different from other grounds like race, gender, sexual orientation, disability etc.[120] The overstatement also feigns a conclusive understanding of other grounds when social

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117 ibid [86].

118 ibid [84], [91].

119 For example in *Polewsky v Home Hardware Stores Ltd* (1999) 68 CRR (2d) 330 [60], the Ontario Supreme Court of Justice rejected poverty as an analogous ground because it did not represent a 'disparate and heterogeneous group'.

120 Murray Wesson, 'Social Condition and Social Rights' (2006) 69 Saskatchewan Law Review 101, 107.

constructions of race and gender are also vigorously disputed.[121] Lack of a 'settled' understanding of poverty which could define a 'single' homogenous group for protection is a requirement which few grounds fulfil. So just as everyone is taken to have a sex, gender, race, colour, marital status etc, without a final agreement on what sex, gender, race and marital status are and with the knowledge that those with sex will have a race and those with sex and race will have a marital status, we can agree that they will have a socio-economic status as well. The focus then should be on defining a ground such that it denotes specific groups for protection rather than being distressed with the possibility that *anyone* could claim based on that ground.[122] One way to overcome this dilemma would be to take cue from the asymmetric protection on the ground of disability in that it only protects disabled persons.

The second response does exactly this. Legislatures and courts which have grappled with poverty-related grounds seem to have narrowed the ambit of the ground itself to categories like 'social status',[123] 'socio-economic status',[124] 'social condition',[125] 'level of income', [126] and have focussed on specific groups and statuses like

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121 Ian F Haney López, 'The Social Construction of Race' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, TUP 1995); Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 CJWL 25, 43.

122 Though if everyone *is* poor, it is worth thinking what the cognate non-poor group for comparison would be and if the lack of a comparator would make it irrelevant in the discrimination inquiry. It may still be possible to conceive of discrimination based on relative levels of poverty.

123 Committee on Economic, Social and Cultural Rights, General Comment No 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2) (2009) UN Doc E/C12/GC/20 [24].

124 Mark J Wade and Raymond Arthur Smith, 'Discrimination Based on Socio-Economic Status', Majority Rule and Minority Rights Issue Briefs (2010) <http://hdl.handle.net/10022/AC:P:13019> accessed 26 April 2015.

125 Quebec Charter of Rights and Freedoms, s 10.

126 *Boulter v Nova Scotia Power Incorporation* (2009) NSCA 17 (level of income rejected as a ground) (*Boulter*).

'homelessness',[127] 'place of residence or birth',[128] 'housing status',[129] 'agricultural work',[130] 'reliance or receipt on social assistance',[131] and 'level of income'.[132] This is a plausible strategy. It eliminates the danger that the ground seeks to serve a slew of or entire population, depriving discrimination law of its normative force for addressing disadvantage based on certain kind of personal characteristics which distinguish between people. But it does not eliminate the possibility of recognising that certain kinds of personal characteristics like homelessness or agricultural work will be centrally defined by the disadvantages associated with poverty. Within the precincts of discrimination law, individuals belonging to groups need to claim *based* on grounds or personal characteristics. Thus, poverty-related grounds like socio-economic status or social status will open doors for disadvantaged groups to claim based on their level of income, homelessness, place of residence, employment status like prostitution or agricultural work, just as Sikhs, Dalits, Blacks, Jews, Latinos, Indian-Americans can claim under the ground of race. The relationship between grounds and groups in relation to poverty can thus neither be conflated to include any and everyone nor can it be deflated such that the ground only works for a single group defined by a particular conception of poverty.

Two further things must be noted about the cases where poverty-related grounds have been successfully pleaded as analogous: first, the courts are guided by extensive

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127 *Tanudjaja v Canada (Attorney General)* (2013) ONSC 5410 [134] (Homelessness rejected as a ground by Ontario Supreme Court because of not meeting the condition of 'definability').

128 For example, Article 15 of the Indian Constitution includes the ground 'place of birth' which may be interpreted inclusively to include poorer areas given the high incidence of rural poverty.

129 *Sparks* (n 120).

130 *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016 (SCC); *Ontario (Attorney General) v Fraser* (2011) SCC 20 [295] (rejected in both).

131 Brodsky et al (n 72); *Falkiner* (n 122).

132 *Boulter* (n 132).

historical evidence of disadvantage which serves as its mainstay for finding whether the characteristic has the potential for breaching human dignity;[133] secondly, even where the courts notice that the claim could succeed on a single ground or multiple enumerated grounds, it still reads in the poverty-related analogous ground to give space to recognising the precise nature of disadvantage which can be explained only with reference to the combined effect of intersecting grounds.[134] Both of these are laudable efforts in recognising poverty (or its species) as a ground of discrimination. Comprehensive and cogent evidence of past and existing patterns of disadvantage associated with poverty which indicate a loss of dignity and autonomy, marginalisation, political powerlessness, stigmatisation etc will be key to a successful analogy with listed grounds. This analysis should then feed directly into the discrimination inquiry for accurately determining *what* is wrong about the impugned act or measure, especially given its intersectional nature. Again, it is clear that the two elements of explicating the nature of discrimination and the identification of the basis of analogous grounds often operate helically and hence need to be appreciated together in the discrimination inquiry.

To summarise, the discussion here furthers four key points: **(i)** A limited criterion for identifying analogous grounds will inevitably exclude poverty-related grounds from protection. **(ii)** It is disingenuous to argue that for poverty to qualify as a ground it should be subject to standards not demanded of other grounds, namely that it reflects an established understanding of what it means and relates to a single homogenous group. **(iii)** The intersectional nature of poverty such that it cuts across

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133 The *Falkiner* Court remarked: 'The nature of the group and Canadian society's treatment of that group must be considered. Relevant factors arguing for recognition include the group's historical disadvantage, lack of political power and vulnerability to having its interests disregarded.' *Falkiner* (n 122) [85]–[86].

134 Similarly, even as the Court in *Falkiner* found that the claim would have succeeded on the enumerated grounds of sex and marital status, it went on to find 'receipt of social assistance' as an analogous ground. ibid [83]–[84].

other grounds is not a real hurdle in either recognising poverty-related grounds (socio-economic condition, social condition, social status, level of income) or the groups defined by it (homeless, sex workers, agricultural workers, recipients of social assistance). **(iv)** In any case, the high incidence of cases which represent exacerbated patterns of disadvantage produced by the intersection of poverty (*Bhe*, *Hassam*, *Jordan*, *Volks* and *Gosselin*) make an even stronger case for taking poverty seriously within discrimination law.

III. OTHER CONCEPTS IN DISCRIMINATION LAW

The normative and doctrinal recalibrations offered in this thesis until now are not exhaustive in realising intersectional discrimination. Other central concepts in discrimination law will also have to be reimagined for accommodating intersectionality. This part considers four such areas: indirect discrimination, justification and standard of review, burden of proof and class actions, and expressive concerns. The discussion seeks to highlight the contentious aspects in relation to intersectionality and where the scope of intervention lies in these areas. As the doctrine on intersectional discrimination continues to evolve, future research can complement it with an exploration of the specific ways in which each discrimination law concept needs to relate to an intersectional claim.

However, this section does not provide a comprehensive catalogue of such concepts. There are at least two notable omissions—affirmative action and remedies. The prohibition of wrongful discrimination is often coupled with an authorisation of legitimate affirmative action.[135] This raises the possibility of using affirmative action to

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135 See South African Constitution, s 9(2); Canadian Charter, s 15(2); Equality Act, ss 158, 159.

'dismantle'[136] patterns of group disadvantage which are intersectional in nature. Several considerations arise here: would the beneficiaries necessarily have to be defined in terms of more than a single disadvantaging personal characteristic?[137] Should affirmative measures for addressing intersectional discrimination be deemed presumptively consistent with equality?[138] What would be the appropriate test and standard of review for judging affirmative action—either that of judging wrongful discrimination or single-axis affirmative action or a different one?[139] These are important issues for discrimination lawyers committed to eliminate intersectional discrimination not just by challenging discrimination but also through positive action. But given that the thesis concentrates on the former, it is best to flag the issues pertaining to affirmative action for future research.

The thesis also does not cover remedies, enforcement measures, or the role of equality bodies. These issues are highly specific to the institutional structures of each discrimination regime to be given a substantive treatment here in general terms. For example, in the case of *Bhe*, the Constitutional Court considered a host of complex issues in designing an effective remedy:[140] the appropriateness of substituting the longstanding customary law of succession with a legislative scheme suitably adjusted by the Court; the breadth of relief to cover those in a similar position as the claimants and affected by the repeal;[141] and retrospectivity.[142] In *Hassam*, the Court was especially concerned about

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136 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [27] (Moseneke J) (*Van Heerden*).

137 This is specifically barred in India in relation to 'sub-classification' within the constitutionally recognised lists of Scheduled Castes and Scheduled Tribes for providing reservation under Articles 15 and 16 of the Constitution. See *EV Chinnaiah v State of AP* AIR 2005 SC 162.

138 See *Van Heerden* (n 142) and *R v Kapp* [2008] 2 SCR 483.

139 *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, cf opinions of Moseneke ACJ [39] and Van der Westhuizen J [132] on the standard of review to be applied in assessing the implementation of affirmative action programmes as rationality and proportionality respectively.

140 *Bhe* (n 115) [101], [109]—[119] (Langa DCJ).

141 ibid [103]—[104], [120].

extending relief to everyone in the position of the intersectional claimant as a widow of a Muslim polygynous marriage.[143] In *Gosselin*, the majority and the minority agreed that the award of damages to everyone in the claimant's position in a class action claim was an unwieldy remedy.[144] The relevance of these considerations cannot be understated and they give rise to several important issues for exploration: does intersectionality necessarily affect the outcome of the case and/or the specific remedy which is ordered? Does the appreciation of intersectionality involve granting a specific remedy which relates to the individual claimant with multiple identities or a broader one which reaches all those in the claimant's position or an ever broader one which relates to everyone with one or more identities of the claimant? i.e. should remedies be individual-based or group-based and if they are group-based which group(s) should be the focus of the award? Should the claimants and courts focus on compensation, injunctions, interdicts, or special measures in the form of positive action, reasonable accommodation and programmatic relief? Should claimants receive higher compensation when two or more grounds are involved in a discrimination claim? These are important questions for future research. The contribution of the thesis, especially the framework of intersectional integrity, is not to directly aid the fashioning of remedies for a claim but in analysing whether discrimination exists and on what basis. The work herein has thus focussed on the diagnostic role of discrimination law of detecting and understanding intersectional patterns of group disadvantage. This may in turn bear on remedies as well, such that it specifically addresses intersectional disadvantage and not just that based on single-axis, but the examination of this line of inquiry is earmarked for consideration elsewhere.

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142 ibid [126]—[129].

143 *Hassam* (n 59) [50]—[52] (Nkabinde J).

144 *Gosselin* (n 67) [95] (McLachlin CJ), [295]—[298] (Bastarache J)

A. Indirect Discrimination

As the comparative overview in Chapter Three discussed, indirect discrimination is recognised in principle in the UK, South Africa and Canada.[145] Its exact boundaries may differ; especially in the way indirect discrimination is established[146] as compared to the comparative ease of proving a claim of direct discrimination.[147] Whatever the status of indirect discrimination in a jurisdiction, it is pertinent to recognise that the challenges of making a successful case will be compounded for indirect intersectional discrimination. For example, as *Jordan* demonstrates, it is hard enough for a single-ground claim based on sex or gender to succeed when argued as a matter of indirect discrimination; to recognise that the claim was also influenced by women's poverty and employment status as sex workers is an even harder challenge. This in turn is complicated by the fact that indirect intersectional discrimination, if claimed in such a way, will not just have to be argued on listed grounds but also on new analogous grounds. As the previous section showed, this too, is not an easy task. The accumulating challenges only reveal that there is no direct path of recovery for intersectionality, but more so when it involves an indirect claim based on analogous grounds.

Nevertheless, the advantage of expanding the exploratory limits of indirect discrimination cannot be overstated in supporting intersectional discrimination. Some forms of discrimination will be overt in their use of multiple identities for making the

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145 See Chapter Three, II.A.

146 The most apparent example is under Sections 13 and 19 of the Equality Act wherein the criteria for establishing direct and indirect claims of discrimination differs substantially. On the other hand, the Canadian Supreme Court has unified the approach for establishing direct and indirect discrimination in *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (SCC).

147 For example, the South African Constitutional Court's failure in *Jordan* speaks directly to the bleak possibility of proving indirect discrimination given the Court's lack of appreciation in the matter.

wrongful distinction. *Bahl*, *Bhe*, *Hassam* and *Corbiere* all used multiple identities directly in the impugned distinction or treatment. But there are also examples where the distinction is: **(i)** neutral and its impact is suffered on a single ground as well as multiple grounds (*Jordan*); **(ii)** neutral and its impact is suffered only on multiple grounds (*DeGraffenreid*); **(iii)** formally based on a single ground but affecting intersectional claimants indirectly (*Gosselin* and *Volks*).

Jordan is a case in point for a neutral criterion indirectly affecting claimants not only on a single ground but also on multiple grounds. Ngcobo J's majority decision found that there was no indirect discrimination based on gender given that the legislature employed a 'common distinction' between a merchant and customer in penalising the sex workers.[148] The apparent neutrality of the provision wherein both men and women could be penalised in theory made the Court discount the undisputed evidence which established differential impact on female prostitutes.[149] In rejecting the basis of single-ground indirect discrimination, the Court also ended up discounting the particular impact of sex work as an employment-status and the economic disadvantage and vulnerability of female prostitutes. What is apparent is that the framework of intersectional integrity would be immediately helpful in uncovering the patterns of disadvantage yielded by the intersection of these identities (gender, employment status and poverty) to establish the specific differential impact of indirect discrimination upon the claimants. But in addition to this conceptual reorientation, it will be important for the courts to be open to explanations of indirect intersectional discrimination by not negating the entire premise of the argument—like Ngcobo J, accepting an unchallenged view of neutrality when it is exactly the point of challenge. The judicial outlook will have to accept the possibility that

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148 *Jordan* (n 50) [10].

149 ibid [11].

some insidious forms of discrimination will often *not* be direct; that systemic disadvantage *can* result from the operation of neutral criterion which has a differential impact on a single ground and also on multiple grounds. This impact will be uncovered by applying the framework of intersectional integrity in appreciating unique and shared patterns of disadvantage and taking them seriously rather than dismissing them as unintended (neural) and hence acceptable, as did the majority in *Jordan*.

The locus classicus of *DeGraffenreid* exemplifies the second instance. *DeGraffenreid* was a case of indirect intersectional discrimination where General Motors' neutral policy of 'last hired first fired' ended up disproportionately affecting Black women in particular. Needless to say, inter alia, the fact that discrimination was not overtly blameworthy and did not affect white women and Black men but specifically Black women, exacerbated the claimants' plight in establishing the claim. It was then not just the conceptual myopia of failing to see intersectionality which contributed to defeating the claim, but also the fact that the Court was disinclined to look beyond the pale of neutrality when it involved an intersectional claimant arguing on more than a single ground. The judicial failure lies in discounting the claimants as victims of indirect intersectional discrimination as such.

In the third instance, *Volks* and *Gosselin* confirm this tendency to disregard the impact on intersectional claimants when not flowing directly from intersectional criteria. They illustrate the distinctive situation where the criterion is not neutral but based on a single ground, and impacts claimants not just on that single ground but also indirectly on other grounds as well. The lack of recognition of this category whether as direct or indirect discrimination is a glaring gap in discrimination jurisprudence in accommodating intersectionality. *Volks* demonstrates this failure aptly. As discussed in Chapter Three, the exclusion from intestate succession in *Volks* was overtly based only on marital status but it had a particularly detrimental impact on female cohabiting partners. The case was argued as a matter of direct single ground discrimination based on marital status.

However, the disadvantage suffered by Mrs Robinson was due to her inability to exercise the choice to marry, economic vulnerability and the accruing disadvantage based on gender subordination. The single axis of marital status used directly in the legislation debarring her from intestate succession was insufficient in bringing to light the discrimination associated with her position. The hidden nature of indirect intersectional disadvantage beyond the single-axis (marital status) remained underappreciated in *Volks*.

Whether it is the blanket exclusion of claims of indirect intersectional discrimination, as in Section 14 of the Equality Act which covers only direct combination discrimination; or the judicial oversight in grasping the diversity of possible indirect intersectional claims, these approaches show little regard for intersectionality in discrimination law. Thus, what becomes clear from these examples is that the application of the framework of intersectional integrity is the only way the nature of discrimination indirectly devolving on multiple grounds can be appreciated. A single-ground treatment of such cases will inevitably miss what is being complained of, in which case, the detrimental effect on the claimant and those in her position will only be revealed when multiple grounds are examined in an intersectional light. This is because by definition indirect discrimination requires an appreciation of the *particular disadvantage* suffered by the claimant which is *not* suffered by those who do not share the claimant's personal characteristic(s).[150] If such cases continue to be treated as a matter of single-ground direct discrimination (*Jordan*, *Volks* and *Gosselin*) or single-ground indirect discrimination (*DeGraffenreid*), courts will be unable to detect the particular disadvantage suffered by a claimant with multiple disadvantaging identities. Thus, future efforts of establishing such claims will need to supplicate much more judicial interest in deploying the framework of

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150 See the definition of indirect discrimination under Section 19 of the Equality Act; although it is important to note that the unenforced provision on combination discrimination based on dual characteristics (Section 14) is limited to direct discrimination only.

intersectional integrity with the awareness that it will assist in recognising the specific category of indirect intersectional discrimination.

B. Justification Analysis and Standard of Review

The discussion on comparative doctrine has focussed on the purpose of the discrimination inquiry for determining whether people's experiences of disadvantage are based on multiple and intersecting grounds of discrimination. But once an impugned action is found to be discriminatory, the next question that arises is whether such discrimination can still be *justified*. Section 1 of the Canadian Charter and Section 36 of the South African Constitution provide the general limitation clauses laying down the basis on which infringements of rights can be justified. Claims of intersectional discrimination if proven may then have to pass what is called the 'justification analysis' in order to ultimately succeed.[151] The tenor of the justification clauses which emphasise that, 'rights and freedoms [are] subject *only* to such *reasonable limits* prescribed by law as can be *demonstrably justified* in a *free and democratic society*' (Section 1) and that 'limitation [should be] *reasonable and justifiable* in an *open and democratic society* based on *human dignity, equality and freedom*' (Section 36), indicates a formidable standard for justifiable limitations. But as the perusal of comparative case law reveals, justification analysis often enervates the discrimination inquiry. In relation to intersectional discrimination, this analysis is rather underdeveloped in both case law and commentary. Despite this, some observations are made pertinent in light of the cases discussed in this thesis. This section

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151 In contrast, under the unenforced Section 14 on combination discrimination under the Equality Act, there is no provision for justifying direct discrimination based on dual characteristics. This is in line with the rest of the UK jurisprudence where direct discrimination cannot be justified like indirect discrimination, unless the protected characteristic is either age or disability. See Equality Act, ss 13, 15, 19.

lays out some of the tentative conclusions which can be deduced from *Gosselin*, *Volks* and *Hugo* in their treatment of justifications. The analysis shows that: **(i)** the impact analysis is often laden with justificatory considerations even when the case does not reach the stage of justification analysis; **(ii)** in cases which are actually argued on a multiple basis, intersectionality seems to be used in *justifying* rather than *constituting* discrimination; **(iii)** courts can be lenient in taking judicial notice of disputed facts; and **(iv)** accordingly, they apply a rather low standard of review for sustaining justifications.

A quick recap of the justificatory considerations in *Gosselin*, *Volks* and *Hugo* will be useful here. As Chapter Three argued, the majority in *Gosselin* simply bypassed any analysis of impact in favour of consideration of justifications offered by the government. It accepted without questioning the generalisations relied upon by the legislature in assuming that those under 30 did not suffer from any historic disadvantage, stereotyping or prejudice and ratified the beneficent purpose of enabling the young adults by offering less social assistance.[152] Government's good intentions of enabling young adults to be self-sufficient was the leading justification the Court relied upon in finding that there was in fact no discrimination in that case.[153] The majority in *Hugo* went a step further in reading in justificatory arguments on behalf of the President by not only accepting the stereotype that mothers are the primary caregivers for children but also assuming that it would have been inconvenient to move on any other premise for granting clemency.[154] However, on record there was no evidence to suggest that had the intersectional criteria of distinction based on children's age and the sex of the parent been abandoned in favour of a gender-neutral criterion of single-parents of children below 12, it would have

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152 *Gosselin* (n 67) [59]–[66].

153 ibid [65].

154 *Hugo* (n 50) [88] (Goldstone J), [106] (Mokgoro J).

been unwieldy as the Court predicted.[155] Similarly, in *Volks*, the majority plainly accepted justifications like upholding freedom of testation and choice to marry in excluding cohabitating partners for intestate succession and to find that these considerations discounted a possibility of unfair discrimination in the first place.[156]

The lines of reasoning invoked in these cases demonstrate at least four crucial points. First, impact analysis often gives way to justificatory considerations. The majorities in all three cases invoked justification *within* the discrimination analysis to defeat a finding of (unfair) discrimination rather than saving them for Section 1 or Section 36. The result was that the Courts barely considered the impact of discrimination suffered by the claimants and the exacerbation of patterns of group disadvantage but instead focussed on justifying any prima facie argument of impact which could have been made. The point here is not one of *location* of justificatory considerations whether in the discrimination analysis or in limitation clauses but the way justifications are used to deny impact at all.[157] Impact and justification analysis may well be done simultaneously but to let justifications defeat impact analysis by abandoning the former is forsaking the commitment to adjudicate upon discrimination as such.[158] Thus, it becomes important to press that the presence of justifications should not divert the court from the focus of the discrimination inquiry which is the impact of the impugned measure upon the claimant

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155 ibid.

156 *Volks* (n 74) [60], [81], [82], [85], [87], [94].

157 Although courts and commentators maintain that the two must be delineated: ibid [209] (Sachs J); *Harksen* (n 49) [51]–[52] (Goldstone J); *Law v Canada* (n 46) [81]. See also Titia Loenen, 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 SAJHR 401, 410–411.

158 See Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 SAJHR 149, 175.

and those in her position. In this sense, even if impact analysis is conducted alongside justification analysis, they both must be carried out thoroughly and transparently.[159]

Secondly, courts seem to readily accept justifications which are intersectional in their character such that intersectionality becomes something which can be excused rather than be treated as discriminatory per se. Thus, any intersectional impact even where detected is justified as mere happenstance or misfortune. In *Gosselin*, the impact on the claimant of being female and homeless, the vulnerability to sexual and substance abuse and psychological conditions, all contributed to viewing her situation as exceptional and hence ignorable.[160] Thus, the justificatory use of intersecting group identities in a single-ground claim sanctioned some people to 'fall through the cracks'[161] of the social programme. Similarly, in *Hugo*, the 'general' or 'wholesale' use of Presidential power was a reason to justify impact upon the claimant which was suffered on an intersectional basis of sex and single-parent status.[162] According to Goldstone J: '[t]he line has to be drawn somewhere, and there will always be people on one side of the line who do not benefit and whose positions are not significantly different to those of persons on the other side of the line who do benefit.'[163] The fact that those on the disadvantaged side are those with intersectional identities is treated as simply a matter of chance and thus acceptable. The *Volks* Court too lamented the intersectional impact upon Mrs Robinson because she was female,[164] but that impact was justifiable given the

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159 Rósaan Krüger, 'Equality and Unfair Discrimination: Refining the *Harksen* Test' (2011) 128 SALJ 479, 504–505.

160 *Gosselin* (n 67) [46]–[48].

161 ibid [54].

162 *Hugo* (n 50) [30]–[31].

163 ibid [31].

164 *Volks* (n 74) [59], [66], [68].

neutral framing of the provision based on marital status. As pointed out in the last section, besides failing to detect indirect intersectional discrimination, what is regrettable is that the Court is acknowledging but ultimately justifying intersectional impact suffered by the claimant. This spin on intersectionality points to the need for resisting the acceptance of intersectional impact as a justification because it is unintended and hence excusable. Such a convoluted interpretation of intersectionality is plainly against the text and spirit of non-discrimination provisions which include the prohibition of intersectional discrimination within their ambit. It is also against the plain language of limitation clauses which do not suggest that limitations which are *general* and lead to *unintended* impact will perforce be sustainable.

Thirdly, the courts seem predisposed to taking judicial notice of justifications rather than demanding their proof. The mere offering of a justification by the state seems to convince courts of its plausibility in mitigating discrimination. Thus, in *Gosselin*, the Court disagreed with the claimant to 'take judicial notice of the counter-intuitive proposition'[165] of discrimination against people below 30, and readily agreed with the state that 'as a general matter…young adults as a class simply do not seem especially vulnerable or undervalued.'[166] The widespread disadvantage and impact drawn upon in the dissenting judgments and in the feminist judgment seems to have been disregarded by the majority, which was guided by the government's unsubstantiated assumptions underlying the social programme.[167] Similarly, Goldstone J's leading decision in *Hugo*

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165 *Gosselin* (n 67) [33].

166 ibid.

167 ibid 132; Brodsky et al (n 72) 211.

readily accepted the President's case which was considered 'manifestly inadequate' by Kreigler J in his dissenting opinion.[168]

Fourthly, the inevitable conclusion from this treatment of justifications is that courts are imposing a rather low standard of review in assessing justifications. Kriegler J expressed this dissonance in his dissent in *Hugo* as:

> I must emphasise that I am not suggesting that gender or sex discrimination of any kind must always and inevitably be found to be irrevocably unfair. There is no question that gender or sex discrimination can be shown to be fair. All I am contending is that the evidence must be persuasive. In cases such as these the United States Supreme Court requires 'exceedingly persuasive justification'—a rigorous test in the context of their equality provision, which makes no express mention of discrimination and contains no deemed unfairness. We should do no less.[169]

Whether one agrees with Kreigler J's conceptualisation of sex discrimination and equality,[170] his insistence on a stricter standard of review for justifications is an understandable one. The majority in *Hugo assumed* justification suo moto on behalf of the President and relieved the government of the burden of *presenting* and *proving* why reliance on stereotypes about mother's role in childcare was not an exclusionary criterion for granting reprieve.[171] There was no evidence called on record to understand the role of single-fathers in child rearing. The absence of interrogating the basis of justifications in the majority's reasoning was rightly called out by Kreigler J.[172] In the same vein, the *Volks* Court accepted the government's purpose of ensuring freedom of succession and to marry in excluding cohabitating partners from intestate succession without subjecting these justifications to any searching scrutiny. The governmental purpose of enabling

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168 *Hugo* (n 50) [85] (Kreigler J).

169 ibid.

170 Cf ibid [113] (O'Regan J).

171 Sandra Fredman, 'Gender and Transformation in the South African Constitutional Court' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013) 259.

172 *Hugo* (n 50) [75]–[76].

young adults with a lower rate of social assistance was similarly ratified by the Court in *Gosselin* without more. The standard of review in these cases seems to be one of mere rationality or reasonableness or a loose and unstructured form of proportionality, concerned only with the legitimacy of the governmental aim being pursued.[173] What is also interesting to note is that the standard of review seems to drop when the majorities in these cases are considering justifications in response to intersectional impact suffered on grounds of poverty or gender. It is counter-intuitive that the presence of heightened vulnerability of an intersectional claimant dips the standard of review of justifications. The rationale for this is clearly amiss. As Fredman explains:

> Requiring the state to provide a reasoned explanation does not require the judges to substitute their own opinions for those of policy makers on resource allocation questions. The judicial role in applying substantive equality remains a supervisory one, to guard against stereotypical assumptions and unwarranted generalisations which can cause or perpetuate disadvantage. This role is not easy to define. However, by protecting the state from having to explain an allocation in the first place, courts circumvent the need to develop an appropriate judicial standard of scrutiny.[174]

It is evident then that a searching and structured standard of review is required for giving the justification analysis a more meaningful role consistent with the semantic framing of the limitation clauses and a commitment to address intersectional discrimination.[175] Commentators have argued that the appropriate standard of review is one of proportionality.[176] In addition to asking about the legitimacy of the impugned measure, proportionality is concerned with the *necessity*, *suitability* and any *excessive burdens*

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173 Chris McConnachie, 'Human Dignity, 'Unfair Discrimination' and Guidance' (2014) 34 OJLS 609, 622–626; Max du Plessis and Stuart Scott, 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 SALJ 597.

174 Fredman (n 177) 261.

175 Murray Wesson, 'Discrimination Law and Social Rights: Intersections and Possibilities' (2007) 13 Juridica International 74, 81.

176 Sheldon Leader, 'Proportionality and the Justification of Discrimination' in Janet Dine and Bob Watt, *Discrimination Law: Concepts, Limitations and Justifications* (Longman 1996) 110, 114; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012); Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174; Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1. See also *Brink* (n 48) [46]. Although note that the intensity of proportionality review may vary.

imposed upon the claimant.[177] The tripartite test is meant to inherently respect the framework of rights by not taking infringements lightly and thus strengthening the democratic basis of rights enforcement in seeking justifications from the government which are then scrutinised in a fair and organised way.[178] Since the lack of a critical assessment of justifications feeds into and back from the imposition of a very low standard of scrutiny, it is important for the courts to adopt a higher standard of review like proportionality and to apply it consistently in adjudicating cases of intersectional discrimination.[179] This demand also means that in jurisdictions where different standards of scrutiny apply to different grounds, a claim brought on multiple grounds should not inevitably receive the lowest possible scrutiny associated with one of the grounds or simply because it is an intersectional claim.

As the doctrine continues to develop and the judicial use of justification, standard of review and judicial notice are critiqued,[180] the connection with intersectionality will also have to be studied thoroughly. The analysis herein highlights intersectionality's initial rendezvous with these concepts and points to the descriptive position and normative direction in which these questions can be answered: what should be the standard of judicial review in intersectional cases? Should it be rationality, reasonableness or proportionality review? Should there be varying standards of review for different sets of

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177 Paul Craig, *Administrative Law* (5th edn, Sweet & Maxwell 2003) 622.

178 Mattias Kumm, 'Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review' (2009) New York University Law School, Public Law Research Paper No 09-10.

179 Fredman (n 6) 182; However, it is important to note that the South African standard of reasonableness does more than its Wednesbury counterpart and may resemble a less structured form of proportionality analysis when applied fairly. To the extent that reasonableness resembles proportionality in action, it may in fact be an acceptable standard. Carol Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 SALJ 264.

180 Fredman (n 177); Sheila McIntyre, 'The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review' (2006) 31 QLJ 731; Denise G Réaume, 'The Relevance of Relevance to Equality Rights' (2006) 31 QLJ 696.

intersectional grounds? What should be the standard of review for cases with analogous intersecting grounds? What are the principles to be applied for taking judicial notice? Should the justification analysis be carried out within or after the impact analysis? Who should bear the burden of proving that the infringement is (un)justified? While these questions cannot be explored here in more depth given the dearth of judicial fodder and the lack of space for an exhaustive normative analysis, the present discussion will serve as a cautionary tale to prevent some adverse responses to these pertinent questions in stressing that: **(i)** impact analysis should not be forsaken in the light of justificatory considerations; **(ii)** justifications should not perforce be taken to mitigate intersectionality; **(iii)** courts should be slow in presuming justifications on behalf of the state unless they are presented and proven, and thus should be cautious in taking judicial notice of justifications which are clearly under contest; and **(iv)** to thus subject justifications to a higher and consistent standard of review like proportionality.

C. Burden of Proof

Chapter One drew upon Crenshaw's critique of intersectional class action claims in *Travenol* and *Hughes* which denied Black women the right to claim on behalf of Black men and white women respectively.[181] The approach in either case seems to be on shaky grounds for disallowing representation in class action claims. But even if individual or class action intersectional claims are prima facie admitted, the question arises as to what the burden of proving a claim based on unique and shared patterns of group disadvantage should be. Given that most potential claims of intersectional discrimination considered in this thesis have not actually been argued as such or even on multiple

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181 See Chapter One, I.B.

grounds, the issue of burden of proof has not been judicially considered in any considerable depth to be responded to firmly here. But in the light of the fact that the courts are applying a low standard of scrutiny in sustaining discrimination, it is useful to note the trend towards a higher burden of proof, which is a worrying combination for intersectional claimants.

The issue in regards burden of proof in intersectional claims can be explained in reference to South Africa and Canada. Under the South African Constitution, discrimination is presumed to be unfair if it is on listed grounds as provided under Section 9(5). Thus, the claimant bears the burden of proof for claims which are brought on unlisted or analogous grounds. This means that the claimant will bear the burden of proof for intersectional claims where at least one ground is analogous; while discrimination on one or more listed grounds will be presumed to be unfair per se. *Bhe* and *Hassam* fall in the second category whereas it is not completely surprising that examples of the first instance remain wanting. The denial of presumption of unfairness for claims brought on analogous grounds is then an understandable barrier to choosing the route of claiming intersectional discrimination on at least one analogous ground. On the other hand, the burden of proof is always on the claimant for proving discrimination claims under Section 15(1) of the Canadian Charter. There is no difference if the claim is brought on listed/analogous grounds or single/multiple grounds. The point to be stressed here is: whatever be the distribution of burden of proof in a jurisdiction, given that these restraints already exist, the claimants in intersectional cases should not bear any more burden of proof than what is required of a claimant in a single-ground claim in an otherwise similar position. This is important because claimants with intersectional identities seem to be fraught with an insurmountable burden like proving not their own experience of discrimination but proving for: **(i)** an entire class of persons in a class action claim; or **(ii)** the new group defined by the intersection in an individual claim.

In relation to class actions, the variable burden of proof set by the majority and minority judgments in *Gosselin* serves as case in point. The majority in *Gosselin* ignored the claimant's own particularity of experience and disadvantage since Louise Gosselin could not prove a wholesale misconceiving of the social programme for the entire class for whom she was claiming.[182] Even though the Court accepts that some people have indeed been 'pushed well below the poverty line,'[183] the inconvenience in gauging exactly who they are makes the majority find in the government's favour. On the other hand, L'Heureux-Dubé J's dissent follows the approach that: 'a disadvantage need not be shared by all members of a group for there to be a finding of discrimination, if it can be shown that only members of that group suffered the disadvantage'[184] and finds that based on evidence before the court, the claimant's case stood proven. Bastarache J's dissent moved along further to hold that Louise Gosselin's situation was itself illustrative of the manner in which the social assistance scheme operated and affected her basic human dignity; and hence there was 'no necessity for her to bring evidence of actual deprivation of other named welfare recipients under the age of 30.'[185] The line taken by L'Heureux-Dubé and Bastarache JJ will be immensely helpful for intersectional claimants who may fall within a unique group, but will also fall into other groups as well. To require proof that everyone in the unique group is similarly disadvantaged will perforce deny the patterns of shared disadvantages between other groups and also limit the possibility of claiming on their behalf.[186] That proof of a claimant's disadvantage *based on*

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182 Jackman (n 116) 312–313.

183 *Gosselin* (n 67) [64].

184 ibid [138] (L'Heureux-Dubé J).

185 ibid [255] (Bastarache J).

186 This hypothetical requirement is similar to Section 19(2)(b) on indirect discrimination under the Equality Act which provides that: 'it puts, or would put, persons with whom B shares the

grounds should be treated as *representative* of discrimination based on those grounds for people in similar position as the claimant (whether uniquely or in a shared way) is a possibility which should remain open and exploitable for intersectional claimants.

Furthermore, the denial of extending the claimant's experience based on her unique position at the intersection of group-identities to others in similar position assumes that only a single individual is located at the intersection of group-identities. That the intersection of groups like persons below 30, women and poor persons will denote the position of poor women below 30 and not just *one* such claimant and also the position of disadvantage of *some* persons below 30, women and poor is to reject the unique and shared basis of an intersectional claim. The imposition of burden of proof which is fundamentally in disagreement with this framework principle, will neither serve individual nor class action claimants in intersectional discrimination. Once it is clear that the claimant belongs to two or more disadvantaged groups (Blacks, women, Dalits, Latinos etc), it is fatuous to require that those belonging to two or more disadvantaged groups (Black women/Dalit women/Latina women) will need to bring separate evidence to prove disadvantage relating specifically to their unique group. The insistence of Courts in *Bahl* and *DeGraffenreid* seems misplaced and unfair in this regard. It is unfair because, as Crenshaw points out, in no claim brought by white men have they been asked to prove their *distinctive* group disadvantage based on both race (white) and sex (men):

> Interestingly, courts decline to lecture these plaintiffs about the risks of opening Pandora's Box; nor do they worry about white males becoming a superclass of plaintiffs that will inevitably leap over all others simply by combining race and gender claims. Indeed, to date it is difficult to find a single case where a court has discounted a white male claim by declaring that a white male is not claiming to be discriminated against as a male, but only as a white male. In contrast to the court's perceptions of Black female complaints, the notion that discrimination against a white male is something lesser than, and completely distinct from, discrimination against whites as a whole, or males as a whole is almost unthinkable.[187]

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characteristic at a particular disadvantage when compared with persons with whom B does not share it.'

187 Kimberlé W Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 TLR 151, 168.

If single-ground claimants are relieved of this burden to draw upon every single personal characteristic and to choose between their group-identities on which they claim, intersectional claimants should be similarly treated in the kind of evidence they can bring to establish their claim. This is in line with the position in favour of making contextual comparisons which can be based on unique and shared personal characteristics of the claimant.[188]

D. Expressive Concerns

Another project which requires greater attention is the expressive dimension of intersectional discrimination. Expressive dimensions address what messages are conveyed by discrimination.[189] The general proscription of discrimination also prohibits conveying wrongful messages based on people's personal characteristics.[190] Typical framings of expressive concerns appear in the court's reasoning in this manner:

> [*Jordan*] In the present case, the stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of section 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced…The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak.[191]

> [*Bhe*] The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.[192]

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188 See Chapter Four, Part II.

189 Réaume (n 9) 672.

190 See Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1, 6–9; Hellman (n 8) 51–54.

191 *Jordan* (n 50) [65] (O'Regan and Sachs JJ).

192 *Bhe* (n 115) [92] (Langa DCJ).

> [*Volks*] In direct terms it treats the unmarried claimants in a way that disrespects the actual commitment they have shown to their families through a lifetime of endeavour, while excluding them from being potential beneficiaries under the Act. Furthermore, it tells the world that there is something unworthy and not respectable about them because they had a family without getting married. Indirectly, it impacts on all persons living in permanent intimate life partnerships outside of marriage. It reinforces the stereotype that, irrespective of the actual character of their relationship and the reality of their commitment to each other, they are all irresponsible and unconcerned about the need to live in a good family relationship that is infused with love, concern and mutual support.[193]

> [*Corbiere*] Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.[194]

The excerpts from the dissenting judgments in *Jordan* and *Volks* do not demonstrate that the expressive dimensions were explored in relation to intersectional identities. The Courts' conception of messages conveyed are in relation to women and cohabiting partners respectively, excluding references to any possible messages that would have been conveyed in relation to other relevant dimensions of poverty and prostitution in *Jordan* and in regards gender in *Volks*. The immediate reason for this limited insight into expressive concerns seems to be that the claims were argued and evaluated on a single-axis so that discrimination analysis also speaks of expressive harm related to that axis only. Similarly, the majority judgment in *Bhe* does not particularise the expressive concern for poor women in customary marriages—the particular situation of the claimant before the Court; it speaks only of the harmful messages of sexism. We then return to the point that unless the framework of intersectional integrity is centrally appreciated, it will be difficult to mobilise the many interconnected cogwheels of

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193 *Volks* (n 74) [226] (Sachs J).

194 *Corbiere* (n 62) [18] (McLachlin and Bastarache JJ).

discrimination law, in the present case, of appreciating the wrongful messages conveyed by intersectional discrimination.

In contrast, *Corbiere*'s analysis of expressive wrongs is integrated in that it considers both aboriginal identity and residential status in determining what disenfranchisement conveyed about the claimants. This seems to be a direct result of reading in the two identities as a compound analogous ground. What is evident in the Court's analysis is that expressive concerns seem to flow from the discrimination analysis itself: it is from the nature of harm or disadvantage that the Court deduces what is being *conveyed* by such treatment or impact. Thus, the plain assertion here is—if courts are able to appreciate the patterns of disadvantage when considering the claimant as a whole, its analysis will reveal the nature of wrong complained of and what it conveys about the claimant and those in her position. Since intersectional discrimination is qualitatively different from other forms of discrimination,[195] its expressive concerns will also be distinct and will come alive only with the appreciation of intersectional integrity. Despite the dearth of doctrinal material on expressive wrongs in intersectional discrimination, some normative work can be done along these lines: what kind of 'messages' are expressed in intersectional discrimination? Are they different from cases of single-axis discrimination? How should courts identify such messages? Does it include intended or perceived messages or is there something objective about the content of certain kinds of expressions? And finally, what is the value in this exercise and does it matter? As the dossier of intersectional cases expands in different jurisdictions, there will be both critical mass and need for considering these specific issues in depth for development.

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195 See Chapter Two, I.A for differences between various forms of discrimination based on multiple grounds.

CONCLUSION

The central and preliminary problem for admitting, understanding and responding to intersectional claims is conceptual—that we lack a framework for conceptualising it in discrimination law. The framework of intersectional integrity seeks to provide such a conceptual foothold to translating intersectionality into discrimination law. Once this framework is appreciated, it will need other recalibrations in discrimination law for realising a successful intersectional claim. This chapter has explored how some key concepts like—definition of discrimination, criteria for identifying analogous grounds, indirect discrimination, justification analysis, standard of review, burden of proof, class action claims and expressive concerns, need to be reimagined in relation to multi-ground claims. As regards defining discrimination wrongs and identifying analogous grounds, I argued that they are related in a helical way and reinforce one another: this means that a rich and inclusive understanding of discrimination supports a wide-ranging criteria for identifying analogous grounds and vice versa. A combined effort in broadening the horizons of what constitutes discrimination and what count as analogous grounds will support the realisation of an intersectional claim. The example of recognising the disadvantages associated with poverty as an analogous ground clarifies that the claim for an inclusive interpretation of discrimination wrongs and analogous grounds is well within the normative and doctrinal precincts of discrimination law. I have also explained how the intersectional roots of poverty provide a strong claim for recognising it as a ground, rather than for its rejection. In addition, I have identified four other central concepts which will need to be restated from the standpoint of intersectionality. These include—indirect discrimination, justifications analysis and standard of review, burden of proof and class actions, and expressive concerns. The brief overview of these concepts seeks to highlight the tension points with intersectionality and identifies scope for development

of future research. The overarching assertion here is that the key concepts in discrimination law will need to be reworked for facilitating the accession of intersectionality into discrimination law. Thus, if we imagine the apparatus of discrimination law as connected cogwheels, each of the cogs will have to independently and together work towards processing a claim of intersectional discrimination.

PART THREE

CONSOLIDATION

CHAPTER SIX

FINDING FOR INTERSECTIONAL DISCRIMINATION

INTRODUCTION

The project for realising intersectionality in discrimination law has been ongoing since Crenshaw's first conceptualisation in 1989. This thesis aims to contribute to that project by providing conceptual force and doctrinal clarity in responding to claims of intersectional discrimination. It integrates learnings from intersectionality theory with discrimination law practice to reach a reflective equilibrium representing an account of intersectional discrimination.[1] The final chapter consolidates the chief conclusions emerging from the thesis and forming the core of this account. The account is a foundational one. It seeks to identify what lies at the core of the category of intersectional discrimination and how some of the key features of discrimination law need to be recalibrated in relation to this core. The account is also a partial one. It does not, for example, speak to how affirmative action or remedies have to be crafted for intersectional discrimination. Its main focus is in helping a lawyer walk through the labyrinth of discrimination law in conceptualising a claim based on multiple identities.

This chapter is organised around Lord Phillip's hypothetical in *R v JFS*.[2] Its brief exposition goes thus:

> A fat black man goes into a shop to make a purchase. The shop-keeper says "I do not serve people like you". To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was.[3]

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1 See Introduction, text accompanying nn 15-16.

2 *R v JFS* [2009] UKSC 15 (*JFS*).

3 ibid [21].

Taking this central example, the chapter seeks to consolidate and restate the learnings appearing discursively in the previous chapters to establish how Lord Phillips could realise this hypothetical as a case of intersectional discrimination. For the purposes of discussion in this chapter, it is assumed that weight (or physical appearance/obesity) is a recognised ground, as well as race, and that the shopkeeper is bound by the duty to not discriminate based on the said grounds. The discussion will further consider the possibility where weight is not a recognised ground and the claim is one of indirect discrimination in Part IV.

The issues arising in the course of realising intersectionality in discrimination law can be organised in two broad themes: conceptual and doctrinal. The conceptual dimension was broadly considered in Part One of the thesis, which discussed the following questions in Chapters One and Two: **(i)** Can a claimant plead on more than a single ground of discrimination? **(ii)** What is the essence of seeing a claim as a matter of intersectional discrimination? **(iii)** What other options exist in conceptualising such claims? **(iv)** What aims does intersectionality serve in discrimination law? **(v)** What is the nature of intersectional wrong and how does one detect it in the discrimination inquiry? **(vi)** What is the relationship between the claimant's individual identity, multiple group-identities, context and grounds of discrimination? Part Two of the thesis considered how the legal doctrine relates to the conceptual framework outlined in Part One and discussed these issues in Chapters Three, Four and Five: **(vii)** Do all multiple grounds need to be enumerated? **(viii)** How would one establish an analogous ground in an intersectional claim? **(ix)** Does it matter if the discrimination complained of is direct or indirect? **(x)** Does an intersectional claim need to be established using the comparator test? **(xi)** Who bears the burden of proof for establishing an intersectional claim? **(xii)** What is the standard of review in justification analysis? **(xiii)** What are the practical limitations to this account? **(xiv)** Can courts alone ensure the realisation of intersectional

claims? Because the methodological motivation for responding to these key questions was an exercise in reflective equilibrium, the two themes have flowed into one another discursively. The consolidation offered in this chapter has thus rearranged the responses to these issues around five central arguments. In the quest for realising intersectionality in discrimination law, I argue for: first, emphasising the need for a conceptual shift in the legislative prose and judicial mindset to admit the possibility of bringing multi-ground claims (**Part I**); secondly, reckoning with the spectrum of possibilities in responding to such claims (**Part II**); thirdly, understanding what is distinct about responding to them from the perspective of intersectional integrity, i.e. tracing unique and shared patterns of group disadvantage by considering a claimant as a whole; and recognising the theoretical principles which support this basic framework which include a critical adoption of identity categories and an allegiance to grounds of discrimination (**Part III**); fourthly, recalibrating the doctrinal tools of discrimination law in relation to analogous grounds, indirect discrimination, impact analysis, burden of proof, justification inquiry and standard of review (**Part IV**); and finally, admitting the practical institutional limitations to realising an intersectional claim (**Part V**).

Two riders are useful here in appreciating the boundaries of the proposed account. First, the normative account is inspired by the three main jurisdictions considered in this thesis: South Africa, Canada and the United Kingdom. But the account is meant to be generalist and relevant to other jurisdictions which share the central features of discrimination law.[4] Accordingly, a close translation into the vernacular of specific discrimination laws will be required in realising intersectional discrimination within other jurisdictions. I hope the specific references to the South African, Canadian and the UK position will help imagine the recalibrations required in

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4 See Introduction, text accompanying nn 22–34ff.

these, as well as, other jurisdictions. The comparative methodology has thus been significant in enriching the normative account and at the same time, in addressing the on-ground materialisation of intersectional discrimination within the practice of discrimination law. So if Lord Phillips is to work with the principles outlined here, he may not only be able to realise the claim as a matter of intersectional discrimination under the UK law, but also, with appropriate modification, under any other similar version of discrimination law. Secondly, the effort of realising an intersectional claim requires coordination between several moving cogwheels of the discrimination law machinery. The theoretical and doctrinal recalibrations reinforce one another in supporting an intersectional claim. Although they may not alone or together be wholly sufficient, each of the aspects touched upon in this chapter and thesis provides a rehabilitative space necessary for the construction of the category of intersectional discrimination within the contours of discrimination law.

I. ADMITTING INTERSECTIONAL DISCRIMINATION

It is useful to begin by restating the aim of discrimination inquiry in relation to intersectional discrimination. In the general version relied upon in Chapter Three, there were two broadly connected parts to the discrimination inquiry—whether there was disadvantage suffered on grounds and whether such disadvantage constituted discrimination.[5] These questions were aimed at establishing the claim of discrimination, i.e. whether there was discrimination in the alleged case or not. This is a diagnostic aim. It seeks to *understand* what transpired in a given fact situation through the lens of discrimination. The lens is peculiar in that it requires that the diagnosis be based on not

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5 See Chapter Three, II.B.

just the detection of certain disadvantageous effects flowing from a particular act or omission (causation) but also certain 'grounds' of discrimination like race, sex, disability, sexual orientation, caste, religion, age etc. Thus, the specialty of discrimination law is in forging a link between actions and their effects via grounds.[6] In relation to intersectional discrimination, this link gets extended to not just a single ground but to multiple grounds. It is this extension that is sought to be explained in the account of intersectional discrimination. That there *could be* multiple grounds implicated in the equation and that it yields a *different* experience of discrimination which cannot be identified by reference to single-axis (of racism, sexism, able-bodism, homophobia, ageism etc) alone is the first principle discrimination law needs to accept in order to make claims of intersectional discrimination possible. This thesis has been devoted to the aim of finding for intersectional discrimination in reference to contemporary intersectionality literature and comparative doctrine. Since the thesis shows that discrimination law in South Africa, Canada and the UK has often missed this aim, it is a useful starting point to restate that aim: of establishing a successful intersectional claim in discrimination law.

In the case at hand, Lord Phillips begins by indicating that there are two possible identities which could have led to discrimination in this case—the claimant's weight and his race. But he swiftly moves beyond the possibility that this could be a case of intersectional discrimination in fact. He frames the aim of the inquiry as concerned with finding whether discrimination was exclusively based on the claimant's race. Two immediate lessons can be drawn in response to Lord Phillips' framing of the hypothetical claim. First, he is motivated from the standpoint of single-axis discrimination. Lord Phillips eschews the interpretation that discrimination *can* be based on more than one

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6 Equality Act, ss 13–14, 19; Canadian Charter, s 15(1); South African Constitution, s 9(3). See infra IV.C for discussion on this link being with the effects or impact of discrimination (rather than the defendant's state of mind).

ground even where it appears so on the face of it. A preliminary requirement therefore is to achieve a normative shift in this judicial (accompanied by legislative) standpoint towards recognising intersectional discrimination as a possible form of discrimination.[7] Secondly, it may be that since weight is not a recognised ground in the UK, Lord Phillips seems to reject its significance in the experience of discrimination. A second requirement is therefore an open-ended list of grounds which provides at least a theoretical possibility of pleading analogous grounds. In this regard, a closed list will inevitably diminish the possibility of claiming on a wide range of multiple-grounds. If such is the case, an inclusive interpretation of existing grounds provides a possibility of reading in an analogous ground *within* existing grounds.[8] For example, the ECJ has recently held that severe forms of obesity would be included for protection within the ground of disability.[9] Both these preliminary points challenge the quantitative view of discrimination being limited to a *single* ground and only those specifically *enumerated.*[10] A change in this normative stance needs to be reflected in the official prose of non-discrimination guarantees framed in an inclusive way. Thus, Section 9(3) of the South African Constitution in its use of the phrase 'one or more grounds' and the neutral framing of Section 15(1) of the Canadian Charter, along with their open list of grounds, admit prima facie possibility of reading in intersectional discrimination. On the other hand, the

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7 The thesis has not touched upon measures for broader legislative reform to address intersectionality holistically and beyond discrimination law. The reference to legislative principles here is confined to the drafting of general non-discrimination guarantees only.

8 For example, given that Article 15 (1) of the Indian Constitution is a closed list which does not include sexual orientation, the Delhi High Court read in sexual orientation as covered within the ground of sex. *Naz Foundation v Government of NCT* (2009) 160 DLT 277 (*Naz Foundation*).

9 *Fag og Arbejde v Kommunernes Landsforening* [2014] Case C-354/13 (ECJ) (*Landsforening*).

10 This seems to be the position under Article 15(1) of the Indian Constitution which guarantees the right to non-discrimination in these words: 'The State shall not discriminate against any citizen *on grounds only of* religion, race, caste, sex, place of birth *or any of them*.' Despite the concluding phrase 'or any of them' the operative phrase of 'on grounds only of' is seen as limiting discrimination to *one enumerated* ground only. Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 30. Cf *Naz Foundation* (n 8).

unenforced Section 14 of the Equality Act is limiting in its admittance of only two enumerated grounds in a claim of combination discrimination.[11] Besides bringing Section 14 into force, the formal recognition of multi-ground discrimination needs to be supported by the judicial acceptance of the restated aim of the discrimination inquiry, which admits that discrimination *can* be based on multiple grounds, some of which may not be enumerated.[12] It is after overcoming this initial quantitative view of single-axis discrimination that we proceed to consider the conceptual and doctrinal recalibrations required for realising a successful claim of intersectional discrimination.

II. NAVIGATING THE SPECTRUM

At this point, it would be clear from the preceding chapters in Part Two that the restatement of discrimination inquiry with the aim of detecting multi-ground discrimination does not itself ensure the realisation of a claim as a matter of intersectional discrimination, i.e. one that is conceptually disposed to the framework of intersectional integrity outlined in Part One. The focus of this thesis has been in explaining the conceptual routes necessary to be undertaken for accomplishing this journey. But as comparative doctrine reveals, the starting point of multi-ground discrimination does not always end at the destination of intersectional discrimination. The distance between the quantitative admission and the qualitative understanding of intersectional discrimination is a rather long one. There are other possible routes in responding to a multi-ground claim as consolidated in the spectrum emerging from the

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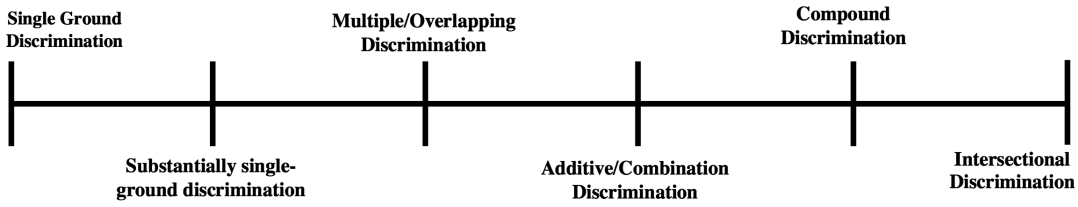
11 This is also the position under the US discrimination law which limits discrimination to two grounds as a 'sex plus' or 'race plus' approach. *Jefferies v Harris County Community Action Association* 615 F2d 1025, 1033 (5th Cir 1980); *Judge v Marsh* 649 F Supp 770, 780 (DDC 1986).

12 Cf discussion on *Bahl v The Law Society* [2004] EWCA Civ 1070 (UK Court of Appeal) (*Bahl*) in Chapter Three, III.A.1.

discussion in Chapter Three (reproduced below in Figure 1). Each option brings a different perspective to the discrimination inquiry. Even if Lord Phillips admits the multi-ground claim in principle, he would have a wide array of choice in conceptualising the claim, namely, as a matter of: single-ground, substantially single-ground, multiple/overlapping, additive/combination, compound or intersectional discrimination. As Chapter Three argued, no single option is best suited for all multi-ground claims. The choice has to be made in appreciation of the framework of intersectional integrity, within the context of specific discrimination law regimes and the particular circumstances of cases. Each option interacts in a different way with the framework. For example, recognising a compound ground may be unnecessary in a case like *DeGraffenreid* but makes sense in *Corbiere*.[13] Similarly, a single ground framework will not necessarily fail in addressing discrimination as we saw in *Brink*, though the result will not be wholly consistent with intersectional integrity.[14] Assuming that Lord Phillips has to work with the two grounds of race and weight/obesity/physical appearance/obesity as disability,[15] how can he navigate the spectrum of choice in the present claim?



[Figure 1: Spectrum of Judicial Choice in Multi-Ground Claims]

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13 *DeGraffenreid v General Motors* 413 F Supp 142 (ED Mo 1976) (*DeGraffenreid*); *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (SCC) (*Corbiere*). See discussion, infra III.A.

14 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) (*Brink*), see discussion in Chapter Three, III.B.1.i.a.

15 Lord Phillips could consider weight *as* disability like the ECJ in *Landsforening* (n 9). This will have implications on the treatment of the claim as it relates to disability discrimination specifically, but the broad characterisation of the permutations on the spectrum will remain the same.

According to Lord Phillips' original conception of the claim, the complaint of the fat Black man can only be a matter of single ground discrimination based on race. This mirrors the judicial thinking in *DeGraffenreid*. The approach basically reduces a multi-ground claim to a single-ground by denying the premise that discrimination *could* in fact be based on multiple identities. In another way, a multi-ground claim would not even be argued as such, with the claimant and the court focussing only on a single-axis, as it happened in *Gosselin*.[16] Thus, whether or not the fat Black man brings his claim on the basis of a single ground (weight or race) or two grounds, under this approach, the court will *only* focus on a single identity in the discrimination inquiry. We may assume for a moment that Lord Phillips is not stifling the conceptual possibility of multi-ground discrimination but simply accepting the fact that weight/obesity/physical appearance is not a recognised ground and hence is irrelevant. But the fact that this is left unarticulated, along with the possibility that the claim *may* involve an analogous ground, indicates a conceptual predisposition to single-axis discrimination. The approach is in direct contrast to intersectional discrimination because it does not even admit two grounds into the discrimination inquiry to begin applying the framework of intersectional integrity.

In the second circumstance, Lord Phillips may observe that although both weight and race may have been relevant in informing the experience of discrimination, one of them (say, race) is *substantially* sufficient in examining the claim at hand. This was characteristic of the approach of the South African Constitutional Court in *Brink* and *Volks* where despite admitting the relevance of other disadvantaging identities, the majority focussed on claimants as merely women and unmarried partners respectively, and chose to bypass disadvantage based on marital status in *Brink* and gender in *Volks*.[17]

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16 *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 (SCC) (*Gosselin*), see discussion in Chapter Three, III.B.1.ii.b.

17 *Volks v Robinson* 2005 (5) BCLR 446 (CC) (*Volks*), see discussion in Chapter Three, III.B.1.ii.a.

Applied to the hypothetical, this approach will neglect the unique patterns of disadvantage which may result from the interaction of race and weight and also the shared experiences of disadvantage based on both of them individually. It would also undermine the claimant's integrity in examining his complaint by considering him as a whole. The approach is therefore incompatible with the bipartite framework of intersectional integrity.

In the third instance, Lord Phillips may agree that both the identities of race and weight *are* relevant in the discrimination inquiry but decide to treat them wholly separately.[18] In this case, he may run the discrimination inquiry first with one ground and then with the second as an iterative process. The UK Court of Appeal's approach in *Bahl* mirrors this treatment of a claim brought on two grounds.[19] It is closer to the single-ground approach in that even though the court may agree that the claim is one based on multiple grounds, it treats those grounds as isolated from one another just as multiple claims of single-ground discrimination being adjudicated in succession. This fragmented treatment is at odds with the claimant's interest in integrity for being considered as a whole and in finding the nature of intersecting patterns of disadvantage. As Spelman remarks, this splintering of the claimant's case represents a brand of 'tootsie roll metaphysics'[20] rather than a cohesive understanding of identities in intersectional claims.

If Lord Phillips takes a step further to the right of the spectrum, he may choose to treat this claim as a matter of additive or combination discrimination. In this choice, he would agree that patterns of disadvantage do indeed interact and do so as cumulating

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18 This depends upon whether both race and weight are already recognised as enumerated or analogous grounds in a jurisdiction. While race is a recognised ground in the UK, the discussion until infra IV.A, assumes that weight is also a recognised ground.

19 *Bahl* (n 12), see discussion in Chapter Three, III.A.1.

20 Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press 1990) 136.

in some mathematical or exacerbated combination to yield the discrimination complained of. The treatment of the claim in *Bhe* depicted this approach.[21] As Fredman and Szyszczak state, the problem with this approach is in conceptualising the claimants' position 'as the *sum* of two parts…rather than as whole persons.'[22] The approach stops short of explaining in *what* way the patterns of disadvantage are intersecting and what it means for the discrimination to be a 'sum', 'combination' or 'cumulative' effect of intersecting grounds. There is then a resulting lack of diagnostic clarity in detecting and describing unique and shared patterns of group disadvantage and considering claimants as a whole without lumping their identities into a hotchpotch. Despite being several steps ahead of the single-ground approach, the additive/combination discrimination may not necessarily hit the standard of intersectional discrimination when devoid of this explanation.

Lord Phillips may move a step further to discover that he could respond to the claim by creating a new ground of discrimination by amalgamating the two intersecting grounds of race and weight into one. Where a distinct ground seems to emerge, this may indeed be a plausible strategy; for example, if fat Black men have a particular history of disadvantage, having suffered negative stereotypes and prejudice based on being both Black and fat, they may be considered as disadvantaged on the basis of a compound ground of weight-racism or physical appearance-racism and the like.[23] The ground would then reflect the disadvantage of the particular group (fat Blacks) which is substantially more disadvantaged than members of other groups defined by that ground (lean white

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21 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) (*Bhe*), see discussion in Chapter Three, III.A.2.

22 Sandra Fredman and Erika Szyszczak, 'The Interaction of Race and Gender' in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell Publishing 1992) 223.

23 I have argued for recognising a 'constellation of factors' in reading in analogous grounds in Chapter Five, II.A.

people). This option is largely compliant with the framework of intersectional discrimination but it may not fit the need of every intersectional claim, i.e. not every multi-ground claim requires being amalgamated into a new compound ground as was the case in *Corbiere*.[24]

Finally, at the end of the spectrum Lord Phillips could decide to treat this claim as a matter of intersectional discrimination as the South African Constitutional Court did in *Hassam*.[25] The approach is characteristic of intersectional discrimination in that he would be invested in finding unique and shared patterns of group disadvantage based on weight and race by considering the claimant as a whole. As this thesis has shown in Part Two in reference to comparative doctrine, there is a gap in the judicial imagination in actually viewing multi-ground claims in this light. The framework of intersectional integrity provided in Part One seeks to correct this conceptual myopia. If Lord Phillips decides to adopt this conceptual framing of the multi-ground claim, how will it actually transpire within the framework of intersectional integrity in the discrimination inquiry?

III. EMPLOYING THE CONCEPTUAL FRAMEWORK

What does the conceptual framework of intersectional discrimination aspire to? This thesis has argued for an understanding of intersectional discrimination which is constructed on the bipartite framework of intersectional integrity. The framework distils the key insights from intersectionality theory which need to be reflected in discrimination law. It can be envisioned as placing a demand on judges to look for unique and shared patterns of group disadvantage while considering claimants as a whole.

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24 *Corbiere* (n 13), see discussion in Chapter Three, III.A.3.

25 *Hassam v Jacobs* 2009 (5) SA 572 (CC) (*Hassam*), see discussion in Chapter Three, III.A.4.

The framework of intersectional integrity seeks to explore these specific explanations of patterns of group disadvantage being 'articulated through one another.'[26] The explanatory account in relation to Dalit women's position of disadvantage defined by both caste and gender in Chapter One demonstrates how descriptive accounts of unique and shared patterns of group disadvantage embedded in the relevant socio-economic, legal and political context need to be marshalled to give depth and meaning to the intersectional framework. The historical, sociological, anthropological, political, economic or journalistic accounts, coupled with testimonials, lawyer's briefs and strategies, and claimants' interviews are all reservoirs to search for intersecting patterns of group disadvantage which are sought to be addressed in discrimination law. The interest is in learning *what* patterns lead to exacerbation of people's positions of disadvantage defined by their multiple group identities. This feeds into the diagnostic purpose of discrimination law for determining how people suffer disadvantage based on grounds. Whether this link is direct or merely correlative,[27] at the heart of the inquiry into intersectional discrimination is the desire for recognition of the causal connection between disadvantage (less favourable treatment,[28] a particular disadvantage not suffered by those without the personal characteristic,[29] unfair discrimination,[30] denial of equal protection and equal benefit of the law[31]) and grounds of discrimination.[32] The claim

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26 Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (Routledge 1993) 182.

27 As Khaitan argues, the link could be correlative and does not need to be causal in the sense of linking discrimination to the discriminator's reasoning and its direct use of grounds in making the distinction. Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 165–171. Cf John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167.

28 Equality Act, ss 13–14.

29 ibid, s 19.

30 South African Constitution, s 9(3).

31 Canadian Charter, s 15.

denying service to a fat Black person is one for recognising that the treatment was meted out because of or that the discriminatory effects were suffered on the basis of unique and shared patterns of group disadvantage based on claimant's weight and race when considered as a whole. This is the bipartite framework of intersectional integrity often missing in discrimination law. The thesis responds to this epistemic gap by explaining what transpires in multi-ground claims of intersectional discrimination.

In the context of Lord Phillip's hypothetical, this explanatory aim of intersectional integrity can be imagined with the help of a Venn diagram (see Figure 2 below). In relation to the position of fat Blacks, one would have to consider their qualitative position *as a whole* [FuB], which includes the *unique* position of fat Blacks at the intersection [FnB] and their *shared* disadvantage with fat people who are not Blacks (F-[FnB]) and Blacks who are not fat (B-[FnB]) but also simply *as* fat people [F] and Blacks [B] per se. The intersecting portion FnB would have some unique forms of disadvantages associated with them, for example, stereotypes against fat Blacks such that they are considered incompetent, which may not be associated with other Blacks (B-[FnB]) or fat people (F-[FnB]). But they may also show some shared experiences of disadvantage with Black [B] and fat people [F]. For example, if Blacks are considered unreliable and that corpulent people are considered lazy, the claimant too may suffer from those stereotypes.

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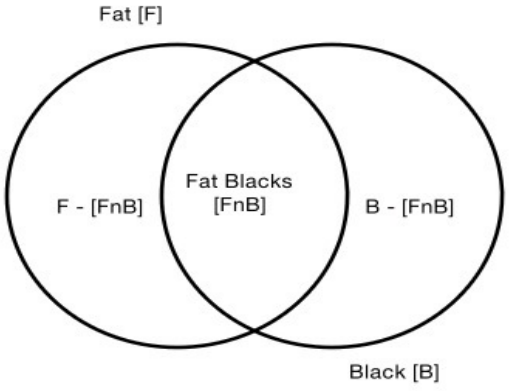
[32] The non-discrimination guarantees in the UK, Canadian and South African are crafted in a manner which represents this link clearly. See nn 27–31.



[Figure 2: Venn diagram for Lord Phillips' hypothetical of a fat Black claimant]

Dalit feminist discourse was elaborated in Chapter One to elucidate the unique and shared patterns of group disadvantage which feed into the framework of intersectional integrity. The aim was to illuminate the kind of explanations which would be persuasive in establishing that they suffered both on the basis of their gender and caste if they were to plead a case of intersectional discrimination. The discussion of the practice of discrimination law in Part Two of the thesis clarified five further conceptual points which are key to this basic framework: **(i)** it provides a counterweight to the dominant 'single-axis' conception of discrimination law; **(ii)** it achieves both diagnostic and expressive clarity in responding to intersectional claims; **(iii)** the right perspective for evaluating an intersectional claim is 'subjective-objective', focussing both on the individual claimant's experience as well as the impact on the broader social groups she is part of; **(iv)** appreciating the analytic boundaries in choosing which identities count as grounds and which constitute the context of the claim in intersectional discrimination; **(v)** the framework neither abandons identity politics and discrimination law because of their allegiance to predetermined categories, nor does it adopt these categories uncritically but instead represents a mediating account of intersectional discrimination., The following sections elaborate on these claims. Keeping stride with the methodology

of reflective equilibrium, these claims were tested and confirmed in relation to the doctrine, but further clarified the nature of the framework in turn. Thus, the discussion below consolidates this reverse process in reference to the central example of Dalit women pursued in Part One and then extending it to the hypothetical of fat Blacks explored in this Chapter.

A. Counterweight to Dominant Conception

> At the heart of anything that can coherently be called a "women's movement" is the shared experience of being oppressed as women. The movement is, as it has to be, grounded in and justified by the fact of this shared experience.[33]
>
> Any attempt to talk about all women in terms of something we have in common undermines attempts to talk about the differences amongst us, and vice versa. It is possible to give the things women have in common their full significance without thereby implying that the differences among us are less important? How can we describe those things that differ without eclipsing what we share in common?[34]

As argued in Chapter One, framing intersectionality as a matter of unique and shared patterns of group disadvantage responds to Spelman's paradox at the heart of identity politics as highlighted in the excerpts above. The fact that sameness and difference *can* be asserted at the same time in an analytically comprehensible and accurate way marks the breakaway point from essentialism and also post-structural critiques.[35] But when discrimination law fails to walk this fine line, it remains entrapped in the dominant conception of single-axis discrimination.[36] This means that only experiences which are

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33 Spelman (n 20) 15.

34 ibid 3.

35 See Chapter One, II.B and infra II.D. For a response in particular to the post-structural critique, see infra II.E. This position is also recently restated in Sumi Cho, Kimberlé W Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 Signs 785.

36 Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) UCLF 139, 150.

exclusively defined along a single-axis of disadvantage (but privileged in every other way) will be protected. Thus, gender discrimination would only protect those whose experiences are paradigmatic of gender alone, and thus do not suffer from racism, casteism, homophobia, able-bodism. In this way, a single-axis account of gender discrimination marginalises the experiences of Dalit women, lesbian Dalit women, disabled Dalit women or lesbian disabled Dalit women. This dominant conception then implicitly endorses only the experiences of upper-caste women as counting for sex discrimination. It then: **(i)** masks Dalit women's experiences and recognises them only when they coincide with the dominant paradigm, i.e. experiences of sexism by upper-caste women; and/or **(ii)** denies that there is anything in common between their experiences at all because they are also disadvantaged by caste. As Chapter One showed, sexism is not a monolithic or solipsistic model of disadvantage operating along the single-axis of sex or gender alone, so any conceptualisation of gender discrimination as *exclusively* defined by sex or gender is then fundamentally misplaced. This holds true for each category of discrimination.[37] The denial of unique and shared experiences is then at the heart of intersectional critique of discrimination law. The danger for discrimination law is in becoming exclusive and unresponsive to the vast spectrum of disadvantage which is suffered not *just* on a single identity-ground. Intersectionality provides the counterweight to the essentialist tendencies of discrimination law which has hitherto operated within a single-axis framework. As Grillo and Wildman remark: 'Essentialism could be avoided if each oppression were examined in its fullness.'[38] It is intersectionality's interest in a *complete* view of people's identities and experiences that it

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37 See Michael Albert et al, *Liberating Theory* (South End Press 1986) 6.

38 Trina Grillo and Stephanie M Wildman, 'Obscuring the Importance of Race: Implications of Making Comparison Between Racism and Sexism (or Other Isms)' in Stephanie M Wildman, *Privilege Revealed: How Invisible Preference Undermines America* (NYU Press 1996) 100.

insists on tracing *unique and shared patterns of group disadvantage by considering the claimant as a whole*; thus forming the bipartite demands of intersectional integrity. This conceptual foundation sets intersectional discrimination apart from other options in the spectrum presented in Figure 1. It marks a normative preference for choosing intersectional discrimination over other options of dealing with multi-ground claims because it provides the most accurate and comprehensive understanding of the claimant's experience in discrimination law.

In this way, just as the conceptualisation of Dalit women's position was inadequately represented in the independent caste and feminist movements because neither was able to accurately capture the complexity of their experience, the claim of a fat Black man, too will fail in the way framed by Lord Phillips. The single-axis paradigm of either race or weight will be insufficient in explaining the discriminatory effects as they accrue on a fat Black person.

B. Diagnostic and Expressive Aims

Discrimination law is concerned with a certain category of distinctions or adverse effects based on people's identities that are known as grounds. Grounds of discrimination feature in the common causal language in non-discrimination guarantees like 'on the basis of'; 'on the ground of' or 'because of' for connecting the discriminator's reasons or adverse effects to people's group identities.[39] The connection with grounds helps identify the *basis* of discrimination. Thus, the search for the basis remains at the heart of discrimination inquiry. This immediate and primary analytic purpose of discrimination law is forgone when the judicial analysis overlooks intersectionality. This is because

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[39] Gardner (n 27) 179. See US Civil Rights Act 1964, s 703a; Equality Act, ss 13, 19; Canadian Charter, s 15(1); South African Constitution, s 9(3); Constitution of India, art 15(1).

intersectionality aids the identification of the basis of discrimination devolving upon more than one ground. Moreover, courts also perform an expressive function of accurately describing what is wrong about a discriminatory act or provision, not only because of the actual disadvantage it results in but also because of the discriminatory 'messages' it conveys based on people's identities.[40] From the lessons on causation in Chapter Three, what emerged was that in failing to see and explain what is wrong with intersectional discrimination, the courts fail in performing both the diagnostic and expressive function of discrimination law for dismantling the systemic disadvantages associated with grounds. Chapter Two posited that the framework of intersectional integrity feeds into both these aims of achieving a diagnostically precise account and an expressively clear statement of discrimination in multi-ground claims. This is illustrated by the examples of *Vishaka* and *Mathura* which showed that the lack of finding the causal basis of Dalit women's claims in both caste and gender not only defeats their claims but also conveys wrongful messages about their identity and ends up legitimising violence against them. The chief takeaway from this discussion is the necessity of employing the framework because it explains how violence against Dalit women both resembles and differs from violence against Dalit men and upper-caste women. This then reveals the causal basis of such violence in caste and gender and explains what is wrong about it rather than diluting, dismissing or endorsing such violence.

Returning to the hypothetical of the fat Black man, employing the framework of intersectional integrity to yield explanative accounts of discrimination will allow Lord Phillips to *diagnose* the causal basis of intersectional discrimination in multiple grounds (race and weight/physical appearance). It will also provide an explanation of what a statement like 'I do not serve people like you' *conveys* about the claimant and the

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40 See Chapter Two, III.C and Chapter Five, III.D.

expressive effects of perpetuating disabling stereotypes and prejudices against fat Blacks or fat people or Black people per se.

C. A Group-based Individual Right

In the hypothetical case, Lord Phillips may ask whose perspective matters in evaluating the claim at hand? Is it that of the individual groups which intersect (Blacks and fat people), or the unique group (fat Blacks) or the specific claimant before the court who is a fat Black man? L'Heureux-Dubé J's subjective-objective approach provides a useful cue for Lord Phillips:

> the focus of the discrimination inquiry is both subjective and objective: subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances.[41]

This stance is also confirmed in the jurisprudence of the South African Constitutional Court which focuses on both the impact on the victim/complainant and the broader patterns of group disadvantage at the same time.[42] The subjective-objective perspective is particularly apposite for intersectional claims. Within the framework of intersectional integrity, integrity demands treating the claimant's identity as a whole. This coincides with the demand to reckon with the claimant's perspective in the subjective sense because that forms the foundation of individual justice in the discrimination claim. The demand to trace unique and shared patterns of group disadvantage is one with objective significance in viewing the claim as a matter of claimant's group-identities and how they interact to produce her position of disadvantage. The subjective-objective

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41 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) [59].

42 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (*Hugo*) [43]; *Harksen v Lane NO* 1998 (1) SA 300 (CC) [50].

perspective thus matches the holistic view of intersectional claims which is hoped to be achieved within the framework of intersectional integrity.

The subjective-objective perspective clarifies that the right to non-discrimination operates as a group based individual right—this means that while the right is based on group identities for remedying disadvantages and stereotypes in the objective sense, it still operates as an individual right for claimants to argue based on their individual experience of discrimination in the subjective sense.[43] The focus is neither on groups nor individuals exclusively but on how individuals belonging to certain groups experience disadvantage associated with those group-identities.[44] This responds to the concerns of overly individual-centric discrimination analysis[45] or an analysis focussed entirely on groups and thus removed from individual victims' experiences.[46] The demand is to personalise discrimination analysis to reflect the experiences of the claimants, whether as individuals or as a class.[47] Having followed the tort law model of discrimination in this thesis which echoes the essence of the common law tradition for localised justice in the dispute at hand while continuing to develop principles of general applicability, it seems appropriate to focus on the impact on the individual while considering the individual's group identities and the extended impact on others in those groups and those at the intersections. In the final analysis, Pieterse's compromise is a healthy one to remember in intersectional discrimination:

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43 See Denise G Réaume, 'Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law' (2002) 40 OHLJ 113.

44 Catherine O'Regan, 'Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-discrimination Legislation' (1994) Acta Juridica 64, 72–73.

45 Nicola Lacey, 'From Individual to Group' in Hepple and Szyszczak (n 23) 99–122; Sandra Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 ILJ 119, 132–133.

46 Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397.

47 Warren Freedman, 'Understanding the Right to Equality' (1998) 115 SAJHR 243, 251.

> It would appear that a less formalistic approach to grounds of discrimination, that is more open to particular experiences of intersectional discrimination is required. By allowing themselves to perceive the multidimensional particularity of individual disadvantage, courts would also expose themselves to a more nuanced and representative picture of group disadvantage.[48]

Such dualistic focus in the hypothetical claim will help Lord Phillips in not only reckoning with the claimant's experience of being denied service but also its impact on entrenching past and present patterns of group disadvantage for multiple and intersecting groups defined by grounds of weight/physical appearance and race. This in turn will yield individual justice in the present case and also feed into broader aims of discrimination law as combating group-based disadvantages.

D. Identities in Intersectional Discrimination: Groups, Grounds and Contexts

With an emphasis on the claimants' perspective and their interest in integrity for being treated as *who they are*, Lord Phillips may worry that the treatment of intersectional claims may ultimately undermine the traditional basis of discrimination based on grounds with an excessive focus on individual and her position. It may lead to a demand for recognising every identity as a ground, divesting the category of any normative significance.[49] It is then necessary to confirm the relationship between the many categories relied upon in this thesis, namely—individual, identity, groups, grounds and context. The analytic boundaries between these will clarify what work they perform in supporting intersectional discrimination.

First, at the centre of the claim is the individual whom we need to be concerned with in examining the treatment as meted out *to* her and its discriminatory effects *on* her.

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48 Pieterse (n 46) 420.

49 The tension between individual versus ground/group centric focus is not just a problem for intersectionality, but for discrimination law as such. See Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 109.

As argued in this thesis, the individual focus alerts us to three things in particular: interest in *integrity*, i.e. being treated as a whole without splintering the identity into individual group-identities alone;[50] a perspective of discrimination complained of from the individual's *subjective* position;[51] and the ultimate focus on *impact* suffered by the claimant.[52] Secondly, the focus on the individual is in relation to the individual's personal characteristics or grounds. I have argued that these personal characteristics or grounds are the centrepiece of discrimination law in the jurisdictions considered. Grounds are of a particular kind like race, gender, caste, disability, sexual orientation etc and do not thus relate to other characteristics which individuals possess, like character, preferences, morality etc. The difference lies in the fact that grounds are capable of defining patterns of disadvantage like racism, sexism, casteism, able-bodism, homophobia etc associated with people's group-identities of being Black, Dalit, women, transgender, disabled, gays etc. Individual grounds are capable of reflecting people's positions of disadvantage associated with a single-axis of disadvantage, as well as multiple axes of disadvantage. For example, gender reflects the position of not only white women but also Latina or Dalit women in conjunction with race and caste. This is the insight intersectionality offers to use grounds as interactive, rather than isolated categories, capable of reflecting intersecting forms of disadvantage.

The immediate question which emerges from this view of grounds is whether claimants in intersectional cases need to establish not just *intersections* with disadvantaged groups but a separate intersectionally disadvantaged group itself. So would the claimant in our case have to show that fat Blacks are a cohesive group themselves or is it enough

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50 See Chapter Two, esp Part III for the account of integrity in intersectional discrimination.

51 See infra III.C.

52 See infra IV.C.

for him to show unique and shared patterns of group disadvantage with fat people and Blacks? What if the claimant was a disabled fat Black or old disabled fat gay Black person? Would his position have to be argued *as* representing a group of people similarly situated and disadvantaged? Lacey describes this problem as:

> A recognition of this kind of diversity, and a commitment to recognition of a plurality of oppression, experiences and interest, seems to bring with it a nightmarish vision of the potential explosion of overlapping groups defined along different lines all competing with each other (and implicitly with parts of themselves).[53]

Groups formed by intersection of other groups can be recognised for protection when it is clear that it is more than a mere collection of individuals with similar characteristics and the nature of disadvantage suffered can be exclusively explained in reference to their unique intersectional position.[54] In some circumstances, like in the case of Black women or Dalit women, recognition of the group *as* a discrete category may be important because they satisfy conditions like 'solidarity with other group members', membership being a source of 'personal identity' and 'significant social and cultural meaning.'[55] In fact, in some cases, recognition of a wholly new analogous ground of discrimination may also be deemed appropriate, as was the case of compound ground aboriginality-residence in *Corbiere*.[56] But in other circumstances, it may not be necessary to establish the discrete significance of a ground or a sub-group for reckoning with intersectionality where the 'expressive salience' of a group is missing.[57] What will be sufficient for the purposes of intersectionality is the appreciation of the position of those who belong to more than one group in terms of unique and shared patterns of group

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53 Lacey (n 45) 119.

54 Herein I draw from Iris Marion Young's notion of what constitutes a social group in *Justice and the Politics of Difference* (PUP 1990) 43–45. For a similar exposition, see Khaitan (n 27) 35–36.

55 Khaitan (n 27) 172.

56 The issue of recognising compound grounds as analogous is considered infra IV.A.

57 Khaitan (n 27) 171–172.

disadvantage which does not necessarily denote a position of a group per se. Thus, while expressive salience and recognition of sub-groups may be necessary in some cases like that of Black women and Dalit women, it may not be so in every circumstance of intersectional discrimination. For example, a challenge to the exclusion of children suffering from the rare and incurable disease adrenoleukodystrophy (ALD), when adults with the same disease and children with other severe disabilities are covered for free medical treatment by the state, may not involve establishing that children with ALD form a specific sub-group for protection when it is clear that they have been disadvantaged in a unique way and also in some comparable way in relation to disabled children and persons with disabilities as such.

With such interaction of individual identity, disadvantaged groups and grounds of discrimination, Lord Phillips may ask what the relevance of the device of 'context' is in intersectional claims. For example, if the shop, where the fat Black man is refused service, is situated in a predominantly white and wealthy part of the town, will the location of the shop have any significance in this matter? The location of the shop in the affluent and largely white part of town may not be relevant as an *identity* given that it may be hard to prove how it translates as a personal characteristic/ground capable of being possessed by the claimant. Nevertheless, Chapter Three showed how courts have used the device of 'context' in a way that is broader than this. It can be used to give a holistic treatment to the discrimination analysis by considering all surrounding circumstances which shape the experience of discrimination.[58] Residential status, its association with wealth and diversity of demographic, could then be considered influential in yielding the

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58 Consider the discussion of the judgments of the minorities in *Volks* and *Gosselin* in Chapter Three at III.B.1.ii.a and III.B.1.ii.b respectively.

experience of discrimination.[59] This strikes as particularly important in historically segregated societies, such as apartheid South Africa or southern United States.[60] What then emerges is that identities that would not otherwise count as groups per se, and yet appear to be informing the experience of discrimination in some way, can be taken into account as the context of the claim. In fact, as Chapter Three showed, the minority judgments in *Volks* and *Gosselin* have also used *identities as context* by referring to the claimant's gender as the context of the single-ground claims argued on marital status and age respectively. What logic serves such an approach? One way to respond to the use of identities or simply grounds as context is to reckon with the practical limitation that the claimant may have chosen to argue the case on a single-axis.[61] Once the claim is argued as such, it may be inapt for the court to read in another ground into the discrimination claim. For claims challenging general legislative provisions, it may also be the case that the provision (criterion) is directly discriminating on a single ground but ends up adversely affecting the claimants on multiple grounds. In such cases, 'context' becomes relevant as the device for recognising intersectional discrimination without reference to multiple grounds per se. Thus, a provision excluding survivors of cohabitation relationships can be found discriminatory on the basis of marital status but for a female claimant, it may be apposite for the court to note her intersectional disadvantage accruing not just on the basis of marital status but also gender via context. This was the approach adopted in the dissenting judgment of Sachs J in *Volks*. Because the nature of these

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59 This should not be taken to mean that residential status could never be a standalone ground. In cases where a plausible situation presents itself which shows how this identity maps on to the criteria for recognising grounds, it may well be considered so. See Chapter Five, II.A and II.B.

60 At the same time, context will also be relevant in determining whether certain groups qualify for protection at all. For example, in Nigeria or Kenya, being a fat African man would denote a position of wealth and affluence unlike in western countries like the UK, the context of this hypothetical. Thus, even if race is a protected ground in Nigeria and Kenya, it may not denote a position of disadvantage for some groups which have not been historically discriminated against.

61 For a discussion on this, see infra Part V.

claims is generalist, i.e. challenging state policy or provision, and not necessarily an individual case of discrimination alone, the approach of treating the claim as devolving on a single ground but contextualising grounds to respond to the claimant's situation at hand, seems acceptable. As Chapter Three argued, this approach, even though primarily proceeding on a single-axis, is still in accord with the framework of intersectional integrity given its contextual analysis. As Duclos remarks, it gives an opportunity to the courts to consider the *whole* picture in a discrimination claim:

> A complaint alleging discrimination on one ground should not immediately focus the attentions of investigator, counsel, and tribunal exclusively on that particular characteristic of the complainant. Instead it should provide an occasion for considering the whole picture, a picture which includes not only individual complainant and respondent, and all their attributes, but others (co-workers, tenants, customers), their various relationships, and the environment in which the situation arose.[62]

For example, in the present hypothetical, if non-residents of the area were charged a higher rate of service tax, such a policy would work to the exclusion of non-white people and those in economically poorer neighbourhoods.[63] Residential status will immediately inform the background of the case as context even if the claim itself is argued as a matter of race.[64]

In the final analysis, Lord Phillips may find the Einsteinian guidance relevant: 'Not everything that counts can be counted, and not everything that can be counted counts.' This holds true in accounting for intersectional identities in discrimination law. Not every kind of identity category can legitimately be a part of the equation of intersectional discrimination. While the individual claimant has an interest in being considered as a whole taking into account his perspective of the impact of

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62 Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 CJWL 25, 50.

63 See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), where the differential rates scheme and debt collection policy of the city applied differently to different suburbs of Pretoria and affected white residents disproportionately as compared to black residents.

64 For example of where an equality claim would have benefitted from focusing on residence as a status-ground, see *San Antonio Independent School District et al v Rodriguez* (1973) 411 US 1.

discrimination, it is not necessary for his claim to also be representing a separate group or sub-group of people as such. Further, the context in which his claim arises will be significant in giving the case a holistic assessment. Ultimately, grounds will serve as constant markers or reminders of why discrimination itself is prohibited by keeping the focus of the inquiry on the disadvantage suffered by their intersection.[65]

E. A Mediating Account

The spectrum of choice available to Lord Phillips goes from single ground discrimination on the one end to variations of multi-ground discrimination on the other (Figure 1). The options on the menu work centrally with grounds of discrimination, whether single or multiple, and with different theories of deploying them in the discrimination analysis. The spectrum thus reflects the locus of discrimination law around which the schema operates. Grounds, which define people's disadvantage associated with certain kinds of group identities, form the centrepiece of the architectural set up of discrimination law.[66] As emphasised in the sections above, the explanatory link to grounds is key to understanding the legal wrong of discrimination.[67] This thesis has worked with this central premise in mind. But sceptics worry that this premise is too limiting in responding to disadvantage associated with multiple identities.[68] To remind, Part One of

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65 *Corbiere* (n 13) [8], [11] (McLachlin and Bastarache JJ); Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences'" (2001) 13 CJWL 37, 41.

66 Sujit Choudhry, 'Distribution vs. Recognition: The Case of Antidiscrimination Laws' (2000) 9 GMLR 145, 148–149. See also Robert Post, 'Prejudicial Appearances: The Logic of American Antidiscrimination Law' (2000) 88 CLR 1.

67 Khaitan (n 27); Pothier (n 65).

68 For a collection of critiques from this standpoint, see Davina Cooper, Didi Herman, Emily Grabham and Jane Krishnadas (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009).

the thesis highlighted the post-intersectionality and post-structural critique of intersectionality theory that it fails to adequately challenge the centrality of grounds in discrimination law.[69] The challenge is that in relying on grounds, intersectionality ends up valorising groups and fails to appreciate complex forms of discrimination at their intersections. This may especially be the case in three types of cases—where there is little basis for shared experiences between groups defined by a single ground because of the yawning differences based on other grounds; or where it is difficult to explain disadvantage solely or mainly on the basis of a new group per se; and at the same time, it would also be too specific to simply harp on individual experience without refereeing to group disadvantage at all. Thus, if a governmental policy for allocating social assistance on the basis of age ends up impacting a claimant who is a young disabled homeless woman her claim of indirect discrimination based on age, gender, disability, socio-economic status or attendant poverty, may not be a straightforward one for intersectionality. It may be hard for the claimant to draw convincing comparisons with disabled persons or women alone; or to refer to the unique disadvantage suffered by all young disabled homeless women; or at the same time, simply succeed by focussing on her own situation. The case of *Gosselin* exemplified this complexity aptly.[70] Lord Phillips may thus be sceptical of adopting the framework of intersectional integrity where none of the three dimensions of unique, shared and whole identities of the claimant seem to immediately come handy in responding to the claim.

This is the concern with intersectionality and discrimination law both working with 'prefabricated categories' and hence failing to address discrimination which is not

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69 See esp Chapter One, II.B.

70 For discussion, see Chapter Three, III.B.1.ii.b.

purely categorical (single-axis) or inter-categorical (intersectionality) in nature.[71] But as Crenshaw suggests: 'Identity politics do not need to be abandoned because of their reliance on categories but rather need to recognize the multiplicity of identities and the ways categories intersect at specific sites.'[72] The account of intersectional discrimination argued for in this thesis adopts this line. The approach of the South African Constitutional Court in *Hassam* and the feminist rewriting of the *Gosselin* judgment discussed in Chapter Three corroborate the effectiveness of the framework for addressing complex forms of discrimination. In this account, while intersectionality assumes a level of stability in defining categories of groups for protection through which unique and shared patterns of disadvantage may be charted,[73] integrity reminds us of the importance of treating the individual claimant as a whole in considering all identities together in context—i.e., the demand for treating claimants *as they are*. The bipartite framework is thus offered as a mediating principle which neither valorises groups so as to exclude the specific experiences of individuals within the group, nor does it abandon allegiance to groups so as to dismantle all basis of identity politics. The focus thus, is on the *impact* of discrimination yielded by these categories and not on categories per se.[74]

This mediating line is not ill-conceived within the discourse of discrimination law. First, it seeks to reform the current approaches to discrimination law by framing

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71 See esp Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 QLJ 179; Leslie McCall, 'The Complexity of Intersectionality' (2005) 30 Signs 1771.

72 Kimberlé W Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 SLR 1241, 1297–1299.

73 Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice' (1996) 6 AFLJ 135, 142.

74 Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 BWLJ 16, 17; Darren Hutchinson, 'Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination' (2001) MJRL 285, 312–313; Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 EJWS 193, 200.

intersectional discrimination in a responsive and critical way rather than rejecting the discourse completely.[75] Other developments of reading in indirect discrimination, analogous grounds, variable standards of scrutiny, harassment and victimisation as forms of discrimination, too seemed to have tread a fine line between challenging the existing contours and accepting the central premise in addressing certain types of injustices within the discourse of discrimination law. Secondly, this need not be an exclusionary enterprise in that intersectional discrimination is considered the *only* way of addressing intersectional disadvantage but simply as reckoning with discrimination law as an apposite site for realising intersectionality. Thirdly, complexity should *not* be a reason for abandoning the project of intersectional discrimination but to formulate it in a way which critically engages with intersectionality theory and discrimination law both. Thus, no matter the complexity of the case before him, Lord Phillips may find himself assisted by the account relied upon in this thesis.

In the final analysis, it is important to acknowledge the nature and limitations of working with law and its regulatory power in organising social life, but also vice versa.[76] Neither is social life constructed in isolation from legal categories nor did legal categories arise wholly devoid of social context.[77] This dialectical relationship of identity formation, its influence in dictating experiences of disadvantage and its redress in law, needs to be appreciated in critiquing either law or society.[78] The account of intersectional discrimination proffered here accepts this inherent limitation in working with discrimination law. The attempt has been at deconstructing complex experiences of

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75 Ange-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5 PP 63, 64.

76 Hunter (n 73) 160.

77 Grabham (n 68) 190.

78 Davina Cooper, *Challenging Diversity, Challenging Diversity: Rethinking Equality and the Value of Difference* (CUP 2004) 48.

discrimination based on multiple identities by both adopting and critiquing the contours of existing discrimination law in accommodating the category of intersectional discrimination. A final suggestion in this regard has been of conceiving intersectionality as a universal condition. As argued in Chapter One, since every experience is capable of being expressed in intersectional terms, making intersectionality the central case of discrimination will allow us to understand complex interactions of identities, as a matter of privilege and subordination both.[79] As seen in the case of *Hugo*, seeing discrimination as composed both of privilege and subordination helps reveal a more accurate and comprehensive picture of disadvantage.[80] In the present hypothetical, Lord Phillips may take into account the claimant's gender to note, for example, the specific position of disadvantage which may be associated with fat Black men, if it is the case that they are more likely to be discriminated against in employment; or he may note the relative privilege associated with being a fat Black men over fat women or fat Black women.[81] In either case, the claimant's gender explains something vital about the nature of discrimination being complained of. Therefore, in being located centrally within the precincts of discrimination law rather than in its opposition, the mediating account of intersectional discrimination takes advantage of discrimination law's central tools and principles, while at the same time critiquing and refining them for its purposes.

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79 See Chapter One, IV.D.

80 For discussion on *Hugo* (n 42), see Chapter Three, III.B.2.

81 See Janna L Fikkan and Esther D Rothblum, 'Is Fat a Feminist Issue? Exploring the Gendered Nature of Weight Bias' (2011) 66 Sex Roles 575; Iyiola Solanke, 'A Legal Remedy for Corpulent Women of Colour' in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011).

IV. RECALIBRATING THE DOCTRINE

I have argued that the conceptual account outlined above is necessary but not alone sufficient in realising a claim of intersectional discrimination. This part considers how the theoretical principles pan out against some of the doctrinal tools of discrimination law. I consider five issues broadly: **(i)** how Lord Phillips would respond to the demand for recognising weight as an analogous ground (or the compound ground of weight-racism); **(ii)** responding to the present claim as if it were a case of indirect intersectional discrimination instead of direct discrimination; **(iii)** the importance of focussing on the impact analysis in the discrimination inquiry without relying on strict comparison; **(iv)** imposing a burden of proof which is no greater than that on claimants in single-axis cases and that is consonant with the demands of intersectionality; and **(v)** taking justification analysis seriously and separate from impact analysis by imposing a higher standard of review like proportionality instead of mere rationality or reasonableness for intersectional claims.

A. Analogous Grounds

Lord Phillips may raise two concerns in relation to analogous grounds. First, is there a realistic possibility that multi-ground claims be based on an unenumerated ground and to have that recognised as an analogous ground? Secondly, whether multi-ground claims themselves need to be interpreted as compound claims based on a new analogous ground per se as the Canadian Supreme Court did in *Corbiere*?

Until now the discussion has assumed that in the fat Black man's claim, both race and weight/physical appearance are enumerated grounds of discrimination. But in fact,

despite increasing demand for recognising weight as a ground,[82] it has not been recognised as such in any of the jurisdictions considered in this thesis. If then the claimant has to argue on both the grounds, he has to plead one as an analogous ground. As the previous chapter has shown, the prevailing criteria for reading in analogous grounds is a narrow one in that judges seldom go beyond immutability or fundamental choice as the basis of grounds. I have argued in Chapter Five that Fredman's suggestion for broadening the criteria to include a 'constellation of factors' for identifying analogous grounds is an important one especially for intersectional discrimination which has reasonable chances of being argued on analogous grounds like poverty and weight. In the hypothetical case, instead of relying on a single criterion like immutability or personal choice, a perusal of historic patterns of disadvantage along with reference to negative stereotypes and prejudices against overweight and obese people may be helpful in appreciating the systemic disadvantage associated with the physical appearance of fatness.[83] At least a prima facie possibility of arguing under analogous grounds coupled with inclusive criteria for identifying grounds which reflect a wide understanding of group disadvantage is the baseline requirement for intersectional claims which cannot be argued under unenumerated grounds.[84]

In addition to this, there remains the conceptual query of whether intersectional claims are necessarily a demand for recognising a compound analogous ground of discrimination, as was the case with aboriginality-residence in *Corbiere*. Lord Phillips may decide to treat our claimant's case as reflecting discrimination based on a new compound ground of weight-racism especially affecting fat, overweight or obese Blacks in particular.

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82 Lucy Wang, 'Weight Discrimination: One Size Fits All Remedy?' (2008) 117 YLJ 1900; Elizabeth Kristen, 'Addressing the Problem of Weight Discrimination in Employment' (2002) 90 CLR 57.

83 ibid.

84 For this discussion, see Chapter Five, Parts I and II.

This approach, according to Grabham, is apparent in both South African and Canadian case law where intersectionality seems to be construed as a form of discrimination 'akin to defining it as yet another identity, instead of allowing it to question the constitution of the identity subject positions.'[85] But is this necessarily the demand in every case?

At least the *DeGraffenreid* Court seems to have thought so. It thus issued the warning that: 'The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination clearly raises the prospect of opening the hackneyed Pandora's box.'[86] But if such is *not* necessarily the desired result of intersectionality, the fear may be misconceived. As argued in Part One of this thesis, the reason why the *DeGraffenreid* logic does not hold water is that intersectionality does not necessarily require creation of 'new classes' of minorities based on mathematical principles.[87] The complexity of experiences of those with multiple identity categories cannot simply be a matter of being thrown together and presto, arriving at a new compound category. The idea is *not* to create more grounds or categories but to recognise interaction between categories already existing or the recognition of analogous categories which have hitherto been excluded (viz. age, poverty, weight etc). Construed this way, intersectionality would not yield to fears of infinite splintering of categories beyond recognition. As argued in the previous section, the logic against multiplication of sub-groups, applies to compound grounds as well. The emphasis on recognising the unique and shared disadvantages associated with people's multiple group identities is to have their positionality *as* a group or *within* groups to be recognised but not the recognition of another ground per se. For example, the demand

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85 Grabham (n 68) 193.

86 *DeGraffenreid* (n 13) 151.

87 For this discussion, see Chapter One, II.B.

to address Black women's claim is to see the unique pattern of disadvantage *as* Black women and also shared experiences of sexism and racism with other women and Blacks as such, but not necessarily to add another ground of race-gender or race-sex to the list of analogous grounds. Thus, neither should grounds be limited to protect a limited number of groups, such that, for example, race relates only to the binary of Black-white and thus excludes Dalits, Jews and Latinos from protection; nor should grounds be limited to reflect the position of those defined *only* by it and by no other ground, such that race fails to reflect the position of Dalit women or Black women.

If the promise of non-discrimination has to have meaning beyond the list of grounds, its focus should rightly be on an inclusive understanding of disadvantage which accrues based on people's personal characteristics or grounds, whether single or multiple. Analogous grounds (say weight) are necessary to the extent that they help identify who all qualify for protection (Blacks, fat Blacks, disabled women, Black disabled women) because of their disadvantage associated with grounds (race/disability/gender/body weight/physical appearance). What becomes clear is that Lord Phillips may not necessarily need a new ground for appreciating the disadvantage of the hypothetical claimant in discrimination law, but will need to adopt wide criteria for identifying analogous grounds if he has to admit weight as a ground for intersectional analysis.

B. Indirect Discrimination

The case before Lord Phillips is one of direct discrimination. In direct discrimination, grounds are used as the criterion of discriminatory treatment. But direct discrimination need not always be explicitly stated. In the hypothetical case, the defendant said that he does not serve people like the claimant. The question here is of determining whether the claimant's personal characteristics of being fat and Black have anything to do with the

treatment meted out to him. When we know that this is in fact the case, we know that the discriminator used the claimant's personal characteristics for denying him service even as he did not state it explicitly.

But what if this case was one of indirect discrimination? The case of indirect intersectional discrimination can occur when a neutral policy affects the claimant and those in his position based on more than a single personal characteristic. Let us imagine that in the hypothetical example the defendant is a public employer whose recruitment policy requires that all candidates submit references from two previous employers. The policy is motivated by ensuring standards of operation and service in the public department and serve as a background check on employees. The claimant who is a fat Black man is otherwise qualified for the advertised post but is unable to gather references because he has not held two jobs in the past. Let us also assume the case that fat Black people have very high unemployment rates.[88] The subpar unemployment rates are connected to hostile recruitment preferences and stereotypes which consider fat Blacks to be incompetent, unreliable, lazy and ugly.[89] Under the given factual matrix, if Lord Phillips has to examine the claimant's challenge to the recruitment policy as indirect discrimination based on race and weight, how would he make sense of the claim?

If the principle of indirect discrimination under Section 19 of the Equality Act is extended to combination discrimination under the unenforced Section 14, Lord Phillips can test this claim based on the four conditions enlisted in Section 19. First, the provision, criterion or practice (PCP) has to be *neutral* in that it is also applicable to those

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88 There is growing recognition of this in countries like the UK and the US. See K S O'Brien, 'Obesity Discrimination: The Role of Physical Appearance, Personal Ideology, and Anti-fat Prejudice' (2013) 37 International Journal of Obesity 455; 'Fat Chance: It's Not Easy for Obese Workers' (2007) <http://www.nbcnews.com/id/16755130/ns/business-careers/t/fat-chance-its-not-easy-obese-workers/#.Vbef5ehViko> accessed 28 July 2015.

89 See Sondra Solovay, 'Legal Remedies for Weight-Based Discrimination' in Kelly D Brownell (ed), *Weight Bias: Nature, Consequences, and Remedies* (Guilford 2005) 214–215.

who do not share the personal characteristics of the claimant. Secondly, the PCP has or can put the people with whom the claimant shares his personal characteristics *at a particular disadvantage* as *compared to* those who do not. Thirdly, the *claimant himself* has been or may be put at this disadvantage. Finally, the PCP should not be *justifiable* as a proportionate means of achieving a legitimate aim. The doctrinal principles in forthcoming sections emphasise the need for an impact analysis and the plausible limits of justification analysis for establishing the last two criteria.[90] In relation to the other conditions, Lord Phillips may begin by noting that the present case involves a neutral policy since two references are demanded of all the candidates regardless of their race or weight. As shown in Chapter Five in relation to *Jordan*, the apparent neutrality of the provision should be no reason to dismiss but a cue to recognise the possibility that the case may be one of indirect intersectional discrimination.[91]

In applying the framework of intersectional integrity, Lord Phillips may find that the second condition is satisfied by tracing an explanation of how unique and shared patterns of disadvantage based on weight and race are exacerbated, in this case, the continued marginalisation of fat Blacks from employment. At the same time, as Chapter Four argued, it would not be necessary to show the disadvantage strictly in comparison to those who are neither fat nor Black but to recognise that some Blacks and fat persons may not be similarly disadvantaged. Finally, he may rightly emphasise that the entire discrimination inquiry be conducted from the claimant's perspective to focus on the impact suffered by him specifically by considering his position as a whole. Such an analysis will then fall in line with the interest in recognising the integrity of an intersectional claimant's identity and in focussing on discriminatory impact upon the

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90 See further Chapter Five, III.A and III.B.

91 *S v Jordan* 2002 (6) SA 642 (CC), discussed in Chapter Five, III.A.

claimant and those in his position, as required by the second and the third conditions. In addition, what is key here is to bear in mind that indirect intersectional discrimination may not be immediately visible as direct intersectional discrimination or indirect single-ground discrimination. Without approaching the conditions of establishing indirect discrimination from the perspective of the framework of intersectional integrity and principles supporting it, no discrimination will be visible, as evident in the missed opportunities in *Jordan* and *Volks*.[92] So the garb of neutrality and the presence of more than a single personal characteristic of a claimant should not dissuade Lord Phillips from looking into the case as a matter of indirect intersectional discrimination. If at all, it should encourage a finding of systematic and entrenched patterns of group disadvantage which operate not in isolation but in interaction with other patterns and hence are even more invidious in their effect. In order to detect and address them, the conditions establishing indirect discrimination will have to suitably accommodate intersectionality.

C. Impact Analysis

As Chapter Five argued, the disadvantage itself should be interpreted broadly to include all dimensions of redistribution, recognition, participation, representation and transformation.[93] Thus, in the present case, it would be important not only to reckon with the denial of service to the fat Black man but also its recognition harms in depriving him of equal respect and concern in refusing to serve him. The impact would then exacerbate existing patterns of group disadvantage based on race, weight/physical appearance and socio-economic status and may entrench stereotypes like Black men get

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92 See Chapter Five, III.A.

93 See Chapter Five, Part I.

into brawls in pubs or prejudices such as Black men being unwelcome in upscale residential areas. The explanatory account of intersectional discrimination is then looking for explanations of impact which are based on a broad and inclusive understanding of discrimination harms.

But the explanation need not necessarily be strictly comparative but merely relative in nature.[94] As argued in Chapter Four, it is neither necessary nor feasible to use the strict comparator test in an intersectional claim. In the present case, the claimant would be riddled in deciding whom to compare his treatment with: should it be a white man or a fat white man or a lean Black man? Could it also be a white woman or a Black woman or a fat Black woman? The lack of a principle guiding the determination of the *exact* choice would make the comparator test not just unwieldy but also an unsuccessful heuristic in pinning down the basis of discrimination. Thus, as suggested in Chapter Four, Lord Phillips may wish to abandon the enterprise of finding a strict comparator or even to apply it flexibly when available. He may in fact find himself assisted by a set of comparisons with individuals in other groups like white women or fat white men to confirm the adverse impact of the treatment which is either similar to or different from these groups.[95] Thus, if a Black woman had been similarly denied entry, the claimant may be able to show shared disadvantage between himself and Black women on the basis of race. Similarly, if neither Black women nor Black men were denied entry but only fat Black men were excluded, he may infer the uniquely disadvantageous position associated with being fat and Black. This approach of contextual comparison will allow Lord Phillips to consider all relevant evidence before him which will demonstrate the adverse

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94 Fredman (n 49) 186; Khaitan (n 27) 31. This is consistent with South African Constitutional Court's comparative analysis of claims which is not based on strict comparison. See Chapter Four, Part II.

95 See Chapter Four, discussion on *Hassam* (n 25), in Part II.

impact on the claimant without miring him with presenting comparative evidence in an unprincipled and ultimately unhelpful way via the comparator test.

D. Justification Analysis and Standard of Review

Given the focus of the discrimination inquiry on the impact of the impugned measure upon the claimant and those who share his personal characteristics, Lord Phillips would have to formulate a standard of review for assessing justifications which does not unbalance this focus.

From the discussion in the previous chapter, it should be clear that Lord Phillips should disbar any argument which seeks to use intersectionality as a justification or inadvertent form of discrimination which is beyond the scrutiny of discrimination law. Per *Gosselin*, it becomes clear that once intersectional impact is confirmed, it should not be dismissed in the justification analysis simply because *it is* intersectional in nature.[96] Furthermore, the standard of review for justification analysis should not be wholly incommensurate with the claimant's burden of proof. If the claimant carries a high burden of proof in establishing the case of intersectional discrimination, the defendant's justification should not be passed with little or no critical scrutiny. Thus, rationality, reasonableness or non-arbitrariness standards are not a conceptual fit for intersectional discrimination claims which has to do with redressing systemic and historic patterns of group disadvantage which may indeed be rational or reasonable on some account. Forms of scrutiny like proportionality are more searching in their consideration of defence's justification and will weed out invidious forms of intersectional discrimination to a

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96 For a discussion of *Gosselin* Court's use of this argument, see Chapter Three, III.B.1.ii.b. This is also typical of the Indian Supreme Court which uses intersectionality as a justification rather than a form of discrimination per se. See *Government of Andhra Pradesh v PB Vijaykumar* AIR 1995 SC 1648 (SCI); *Air India v Nergesh Meerza* 1982 SCR (1) 438 (SCI).

greater extent.[97] So a stricter standard applied consistently will serve an intersectional claim in appropriate and fairer way.

E. Burden of Proof

One concern with focussing on an individual claimant's experience is whether it leaves them with an insurmountable burden of proof.[98] As argued in Chapter Five, it is useful to emphasise that the burden on an intersectional claimant should be no more than that on claimants in single-ground discrimination.[99] In this sense, a true claim of intersectional discrimination, which is not based on an additive understanding, will not require proof that the claimant suffers discrimination which is *more* than that suffered on a single ground. As emphasised throughout the thesis, the purpose is to explain the qualitatively distinct position of unique and shared patterns of disadvantage associated with multiple identities and not simply the exacerbation of disadvantage. Thus, asking our claimant to prove that as a fat Black man he was disadvantaged *more* than others would be misguided in a case of intersectional discrimination, in addition to being overly burdensome upon the individual claimant. So also, per *Gosselin*, it is unfair to disbar a connection between claimant's own situation and the proof of disadvantage for the class to which she belongs. To require proof from the claimant that 'all members' in her group be similarly disadvantaged is as crippling a standard for intersectional claimants as is for those

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97 See Chapter Five, III.B.

98 See Fredman and Szyszczak (n 22).

99 In the specific case of the South African Constitution, since Section 9(5) creates a presumption of unfairness for discrimination based on enumerated grounds, this translates as a demand to extend the presumption to a claim based on multiple enumerated grounds; and also on placing no higher burden of proof on a claimant arguing on a single analogous ground when the claim involves multiple grounds at least one of which is pleaded as analogous.

claiming on a single ground.[100] The accommodating principles laid down by L'Heureux-Dubé J and Bastarache J in their dissents in *Gosselin* will help Lord Phillips in setting an equitable burden of proof upon the claimant by allowing the possibility of extending from the claimant's individual experience to the circumstances of the entire class of persons.[101] This will be particularly helpful in the proof of indirect intersectional discrimination which requires that there be systematic disadvantage suffered not just by the claimant but also by those in her position, i.e. people who are in her unique position and/or share her disadvantage based on her personal characteristics. Lastly, the fact that some are *not* disadvantaged in those groups and are better off should not overthrow the claimant's case given its distinct nature that the claimant is both in a unique and shared position defined by her group-identities and her experiences might not coincide exactly with those in every relevant group. The learnings from *Bahl* and *Degraffenreid* must be kept in mind for the claimants to be able to discharge their burden of proving an intersectional claim even when they cannot point to people in the groups to which they belong (women and Blacks) who are similarly disadvantaged. Thus, in the present case, the fat Black man should be allowed to prove his claim based on race and weight even if he cannot show that Blacks and corpulent people are individually affected as well or that everyone who is fat and Black has been denied service by the defendant. The purpose of highlighting unique and shared patterns of group disadvantage will be defeated if the burden of proof does not reckon with the nature of intersectional claims and is thus set at a point too high for recognising intersectional wrongs at all. To sum up, Lord Phillips may want to impose the same burden of proof, as he will on a single-ground claimant and no more. In addition, he may allow the claimant to specifically draw upon his own

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100 *Gosselin* (n 16) [13].

101 ibid [138] (L'Heureux-Dubé J), [255] (Bastrache J).

experience of direct or indirect discrimination and prove by extension the disadvantage suffered by those in a similar position as him without requiring that every member of the group(s) be similarly disadvantaged.

V. RECKONING WITH LIMITATIONS

Before we close, it would be useful to reckon with the practical limitations to the endeavour of finding for intersectional discrimination. The theoretical and doctrinal recalibrations offered in this thesis and consolidated in this chapter in reference to the hypothetical claim presented by Lord Phillips are meant to overcome some substantial roadblocks that have remained in the way of realising intersectionality in discrimination law. Besides the fact that this generalist normative account will have to be appropriately modified within the specific contours of different discrimination law regimes, there may also be some realistic institutional limitations to acknowledge in implementing this account. The final part of this chapter seeks to briefly outline three of these.

First, it is useful to recognise that the *choice* of grounds in a discrimination claim is primarily a litigant's. Within the individual-based tort law model of discrimination claim being relied upon in this thesis, the first call to formulate an intersectional claim lies with the claimant herself. To the extent that the judicial redressal of claims argued on multiple grounds has not really been promising for claimants to bring intersectional claims on multiple grounds, the choice for claiming on single-axis has to be reconciled with this (in addition to enabling the choice of claiming on multiple grounds). Judicial fiat of introducing new grounds into the discrimination inquiry can undermine the claimant's choice and in effect, her experience of discrimination. Given that claimants' perspective of the claim should be the leading parameter for defining the claim, ex-post addition of grounds in judicial proceedings can be both improper and against the claimant's

independence.[102] But to the extent that the claimants make a mistake, i.e. because they are forced to 'categorise' discrimination which does not neatly fit into enumerated grounds; or choose multiple grounds in the alternative (per *Falkiner*), the choice of grounds is not wholly irreversible. Rejigging grounds in a discrimination claim in order to accommodate intersectional discrimination must then be approached cautiously but openly.

Secondly, in common law adversarial systems, the judicial inclination to deal with multi-ground claims as a matter of intersectional claims will also depend on litigants' briefs and their lawyers' strategies. If the claimant thus chooses to argue the claim as a matter of additive or combination discrimination because of ready signs of success (*Bhe*), courts will be ill-advised in rejecting the choice outright. The best course of action for the court then would be to try to realise the principles of intersectional integrity within the constraints imposed by the framing of the case. The approach of the South African Constitutional Court in *Bhe* and the Ontario Court of Appeal in *Falkiner* seem to adopt this strategy.

Thirdly, when faced with an argument for recognising an analogous ground of discrimination, a court may well have to take into account the implications of reading that ground in to discrimination law. One complicating factor is when a ground has been expressly considered but excluded from protection by the legislature. The relationship of the courts with the legislature and the democratic basis of the courts reading in an excluded ground would then have to be seriously considered.[103] The broader institutional point here is to consider the legal ramifications on the rest of the discrimination law to see whether the ground fits the schema. The Canadian case of *Mossop*[104] provides a useful

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102 I am grateful to Denise G Réaume for emphasising this point.

103 See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP 1980); Jeff King, *Judging Social Rights* (CUP 2012); Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 HLR 353.

104 *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (SCC) (*Mossop*).

cautionary tale here. *Mossop* involved a claimant who was denied bereavement leave for attending the funeral of his partner. The basis of the employer's decision was that same-sex partners were not covered within the impugned provision's reference to 'immediate family' as 'common law spouses'. The claimant challenged the denial of bereavement leave under the Canadian Human Rights Act (CHRA) for being discriminatory on the ground of family status. In denying the claim, Lamer CJ found that:

> In the case at bar, Mr. Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the CHRA the prohibition which Parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.

What is clear in this reasoning is that enumeration of grounds, where meant to be exhaustive (as in the CHRA), poses a definitive impediment to claiming discrimination based on an unenumerated ground or even reading in analogous grounds within enumerated grounds. Enumerated grounds are understood in isolation of other related but unenumerated grounds, so as to avoid 'back-entry' of unenumerated grounds through the enumerated ones.[105] When sexual orientation was not itself recognised, its incidents and connections with family status will also not be recognised for protection.[106] So, for example, pregnancy may not be considered an incident of sex discrimination when not covered as a separate ground itself.[107] Consequently, not only is one inhibited in bringing a claim based on unenumerated grounds but also on enumerated grounds.[108]

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105 See *Rutherford v Secretary for State and Industry* [2006] UKHL 19 (The House of Lords denied that when age discrimination was itself not recognised it could not be 'passed off' as sex discrimination).

106 *Mossop* (n 104) 35. Cf *Naz Foundation* (n 8) as an example where courts *are* inclined to read in analogous grounds (in that case sexual orientation) as part of other enumerated grounds (sex).

107 The out-dated position in *Bliss v Attorney General of Canada* [1979] 1 SCR 183 (SCC) reflects this result.

108 However, this may not always be the case. Cf *Fitzpatrick v Sterling Housing* [1999] 2 WLR 1113 (HL) where the House of Lords brought homosexual relationships into the ambit of 'family' before sexual orientation was recognised as a ground and *Ghaidan v Godin-Mendoza* [2004] UKHL 30 which extended right of partners in a homosexual relationship for inheriting statutory tenancy.

One may indeed dub this as a 'narrow and exclusionary approach'[109] but it is useful to recognise it as a formidable limitation to pleading on an unenumerated ground in an intersectional claim when the legislature has specifically chosen to exclude that ground. The schematic anomaly that would have been created had the court found for Mr Mossop would have meant that while he could avail of bereavement leave and other attendant benefits associated with family-status as a same-sex partner, he would have been left without a remedy in case he was dismissed for being gay since sexual orientation was not an enumerated ground under the CHRA. Given these implications, the claimant's insistence to proceed under 'family status' and not 'sexual orientation' seems to be a plausible strategy.

In the final analysis, what becomes clear is that the task of realising intersectionality in discrimination law is a joint enterprise. It is not only one for the justices to work out, as considered in the adjudicative perspective adopted in this thesis, but also for the claimants, their lawyers and the legislatures to work out how to collectively pursue policies and strategies which are intersectionality-friendly. Focussing on just one site in isolation, as the example of *Mossop* seeks to show, can be rather unsatisfactory in realising intersectional discrimination. On the other hand, as *Falkiner* and *Bhe* demonstrate, an appreciation of the limitations and the principles of intersectional integrity can be helpful in realising a successful claim even when not falling on all fours within the category of intersectional discrimination.

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109 *Mossop* (n 104) 107 (L'Heureux-Dubé J).

CONCLUSION

This chapter considered how the several simultaneously moving cogwheels of the discrimination law machinery need to be recalibrated to process a claim of intersectional discrimination. Taking Lord Phillips' hypothetical example in *JFS* the chapter has sought to make a normative case for a successful claim of intersectional discrimination brought by a fat Black man. I argued that the first and preliminary recalibration is in relation to admitting that multi-ground discrimination is in fact possible and that this understanding needs to be reflected in inclusive legislative provisions on non-discrimination as well as in judicial thinking. Once this possibility is opened up, multi-ground claims can be responded to in various ways (spectrum) and it remains for the claimant and the court to work out which conceptualisation fits the claim best. While some options are more consistent with the framework of intersectional integrity (combination and compound discrimination) and some are far removed (single-axis and multiple discrimination), the category of intersectional discrimination lying at the end of the spectrum is the aspirational standard vied for in this thesis. The category embodies the framework of intersectional integrity for tracing the impact of unique and shared patterns of group disadvantage when considering the claimant as a whole. The chapter further consolidated the theoretical principles which inform this foundational bipartite framework. I clarified that the framework provides a counterweight not just to essentialism but also to post-structural and post-intersectionality critiques which question allegiance to identity categories at all. It is thus a mediating account which preserves identity politics by being critical and reflective of identity categories. At the same time, it is important to be analytically precise about which identities matter in the equation of intersectional discrimination and why. Further, it is useful to keep in mind both the diagnostic and expressive aims served by the framework in discrimination law in not only detecting

wrongful discrimination based on grounds but also what messages it conveys. I also provided a restatement of doctrinal fine-tuning for responding to the intersectional claim at hand, in relation to the key tools in discrimination law: analogous grounds, indirect discrimination, impact analysis, burden of proof, justification and standard of scrutiny. The common entreaty here is to give a broad and inclusive interpretation to these central tools so that they can respond to intersectional discrimination and prove no more onerous to intersectional claimants than those claiming on a single ground. Finally, the chapter laid down some of the practical limitations which this account will have to manoeuvre including the claimant's own choice of ground(s) and formulation of the claim. In conclusion, it can be stated that all cogwheels in the machinery of discrimination law need to be synchronised for supporting the claim of intersectional discrimination. The conceptual framework of intersectional integrity is key to other theoretical and doctrinal refinements, but is alone insufficient in materialising intersectional discrimination. The cogwheel imagery does justice in explaining the complexity of realising claims of intersectional discrimination and perhaps why they have not been realised until now. But the complexity itself is no more than that of a sophisticated claim of single-ground discrimination and certainly no reason itself for abandoning the enterprise.

CONCLUSION

This thesis has been inspired by the Gandhian Talisman to keep the most disadvantaged centrestage in designing our course of actions. Assuming that discrimination law is also similarly concerned with the suffering of those severely disadvantaged by their status-identities, the thesis has considered why those with multiple identities remain at the fringes of discrimination law's protection. This central inquiry has led the project of realising intersectionality in discrimination law. Keeping in mind the key tenets of the intersectionality theory which was meant to understand the exacerbated and complex nature of disadvantage based on multiple identities, the effort has been to translate its learnings into a redressable category of intersectional discrimination within the contours of discrimination law.

As the thesis has shown, the road to this destination is a long one. The conceptual and doctrinal steps to be undertaken span the entire breadth of the practice of discrimination law. What becomes clear is that each central tool and principle of discrimination law will have to be recalibrated from the standpoint of intersectionality. This project itself has been limited to determining what the goal post of intersectional discrimination looks like and mapping the necessary, but not sufficient, directions for the course of this journey.

The goal post of intersectional discrimination is defined in reference to its conceptual nucleus outlined in Part One of the thesis. It entails the bipartite framework of 'intersectional integrity' which insists on tracing unique and shared patterns of group disadvantage (intersectionality) by considering claimants' identities as a whole (integrity). Chapter One delineated and defended this core of intersectionality theory by exploring its initial context of development, i.e. Black feminism in the United States and extending

it to the context of Dalit feminism in India. The extension sought to confirm the normative resilience of the theory in explaining the nature of disadvantage associated with multiple identities in general. Chapter Two supplemented this core with the value of 'integrity' excavated from intersectionality theory, identity theory, disability law and discrimination law. Integrity, defined as the demand to treat people's identities as a whole without splintering it into its components, is identified as a value essential for reckoning with the true and complete nature of disadvantage accrued on multiple identities. The breach of integrity is then a specific kind of harm which results in cases of intersectional discrimination and its appreciation is necessary for fulfilling both diagnostic and expressive purposes in discrimination law. Together the principles informing intersectional integrity form the conceptual backbone of the envisaged category of intersectional discrimination.

Part Two of the thesis considered whether this conceptual framework was realised in contemporary discrimination laws of South Africa, Canada and the UK. The chief takeaway from the doctrinal component was that despite promising signs, there are vital gaps in the appreciation of actual or possible intersectional claims. Chapters Three, Four and Five mapped the prevailing strategies for responding to these claims and the possible recalibrations for making them intersectionality friendly.

Chapter Three showed that there are at least six ways in which multi-ground claims have been responded to in comparative doctrine. These include—single-ground discrimination; substantially single-ground discrimination; multiple/overlapping discrimination; additive/combination discrimination; compound discrimination and intersectional discrimination. Arranged as a graded spectrum with intersectional discrimination at one end and single-ground discrimination on the other, each category showed varying levels of compliance with the framework of intersectional integrity. The chapter highlighted the preference for choosing intersectional discrimination in

responding to complex cases involving multiple identities of claimants because it explains the most comprehensive and accurate way of understanding the nature of discrimination at play. Chapter Four complemented this discussion by exploring whether the comparator test can explicate the intersectional nature of a claim. It concluded by finding that in its strict or flexible form, the comparator test is an unhelpful heuristic in establishing intersectional claims. This is because it is neither normatively principled nor functionally straightforward in its application. On the other hand, the approach of using contextual comparisons, as pursued by the South African Constitutional Court, appeared as a viable alternative which can assist in establishing the unique and shared patterns of disadvantage by considering claimants as a whole. The focus thus shifts to the contextual use of comparative evidence than the search for comparators itself.

In addition to this conceptual reorientation, key aspects of discrimination law need to be recalibrated in order to respond to intersectionality. These include—conceiving the touchstone for understanding intersectional wrongs; broadening the criteria for identifying analogous grounds; redrawing the boundaries of indirect discrimination for accommodating intersectional claims; reframing the relationship between impact and justification analysis; appreciating the expressive dimensions of intersectional claims; deciding the level of scrutiny or standard of review; and apportioning the burden of proof between the claimant and the defendant. Chapter Five examined how each of these panned out in comparative doctrine's treatment of intersectional claims. Despite the lack of an in depth consideration of these specific tools in case law, the direction of development of the doctrine was deducible. While some developments provided useful cautionary tales, others provided helpful cues for intersectionality. I argued that a broad and inclusive understanding of what constitutes discrimination would be able to respond to the range of intersectional harms—stereotyping, prejudicing, exclusion, marginalising, exploitation, demeaning etc. Similarly,

expansive criteria for admitting analogous grounds will be crucial for accommodating intersectional claims rather than being limited by linear tests like immutability and fundamental choice. Judges will have to be particularly open and incisive in finding for indirect intersectional discrimination by recognising the many ways in which it may transpire—on a neutral criteria affecting only intersectional claimants; on a neutral criteria affecting single-ground *and* intersectional claimants; and on a criteria based on some grounds but indirectly affecting intersectional claimants on different grounds. I reaffirmed that the focus of the discrimination inquiry should be the impact upon the claimant and the justification analysis should not obviate this focus even if justifications are considered alongside. At the same time, a higher standard of review like proportionality, rather than mere rationality or reasonableness, will be required in finding for intersectional discrimination. The burden of proof upon the claimants should be commensurate with the standard of review and should be no higher than that on claimants in single-ground claims in a similar position. Reckoning with expressive dimensions in terms of what the discrimination *conveys* about the claimants would also be important in responding to intersectional claims thoroughly. The list of these central precepts is non-exhaustive and each will benefit from fuller consideration in future research as the doctrine on the subject develops.

Part Three consolidated the principles emerging from the discursive discussion of theory and doctrine on intersectional discrimination in the thesis. Chapter Six took the hypothetical example of an intersectional claim offered by Lord Phillips in *JFS* and restated the necessary steps to be undertaken to respond to that claim successfully.

The central argument running through the thesis is that the realisation of intersectionality in discrimination law requires a wholesome response which touches upon all aspects of discrimination law, both conceptually and doctrinally. This is because the dominant conception of discrimination, as identified by Crenshaw, is of single-axis

and does not quite relate to the idea of intersectionality. Thus, the first and foremost step in this process is to expand the normative vision of discrimination law by conceiving of a category of intersectional discrimination. This thesis posited the framework of intersectional integrity as key to understanding intersectional discrimination. This conceptual understanding also needs to be reflected in doctrine. The thesis considered the substantive framework of discrimination law in the three jurisdictions in their approach towards accommodating intersectional claims. The normative contribution of this thesis is applicable generally to any context in order to deconstruct a claim of discrimination based on multiple grounds. The doctrinal component shows, with the examples of the three chosen jurisdictions, how this normative understanding can be translated into the vernacular of discrimination law. The broad-based comparative survey is intended for enabling us to imagine how claims of intersectional discrimination can be responded to under specific discrimination laws.

Reverting to the Gandhian Talisman, Dalit women are one of the weakest and poorest sections in India. Their compounded vulnerability due to caste, gender and class has been extensively explored in historical, anthropological and feminist accounts as shown in Chapter One. The slow pace of development of Indian discrimination law makes the possibility of an intersectional claim on their behalf wholly aspirational. But if India were to consider addressing discrimination against Dalit women *à la* discrimination law, this thesis has laid down the groundwork for reconfiguring discrimination law to make conceptual space and doctrinal adjustments for accommodating intersectional discrimination. The nitty-gritties of a successful claim of intersectional discrimination will naturally depend on the specific legal landscape. The generalist exposition offered in this thesis made by extrapolating from the specific contexts considered herein, provides a frame of reference to future projects for realising intersectionality in discrimination law anywhere.

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