INTERSECTIONAL DISCRIMINATION: AN ADEQUATE HUMAN RIGHTS REGIME?

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This paper will attempt to understand whether the human rights regime account for an intersectional form of discrimination. To delve into this topic it is important to understand the different elements of the statement, especially intersectional discrimination.

Intersectional discrimination also referred to as multiple discrimination, as a concept has gained traction and recognition only recently, not without credit to the fourth wave of feminism[i]. In fact, intersectionality is a key concept of the fourth wave of feminism. Another important and critical characteristic of the fourth wave of feminism is the use of the internet as a tool to spread ideas and participate.

However, the term 'intersectional' discrimination was used in the academic circles as early as 1989. The term was coined by Kimberlé Crenshaw, an African-American woman, in the context of feminism for her paper Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics[ii]. She uses multiple American cases[iii] to demonstrate that if a black woman were to file a suit for being discriminated against as an African-Americans as well as a woman, courts would dismiss them as they would demand a singular cause of action – race or sex discrimination. Courts would deny them justice as 'black women' are not a recognized class that is discriminated against. This is where she brings up intersectionality, which is best defined by the European Institute for Gender Equality, intersectional discrimination is "*discrimination that takes place on the basis of several personal grounds or characteristics/identities, which operate and interact with each other at the same time in such a way as to be inseparable.*[iv]" These identities and characteristics can range from sexual orientation, gender and ability to race, caste and class.

Intersectionality focuses on individual experiences as each individual will have unique experiences in their own cultural and marginalized matrixes. It considers the different forms of

social stratification that are interwoven and result in unique challenges for each individual. Therefore, intersectional theories of discrimination follow the bottom up approach. The individual's experiences with discrimination cannot be restricted to isolated spheres of one form of stratification added to the that of others. Instead, a more complex approach is required that looks at their experiences as more than the sum of the existing categories.

However, it is important to note what makes intersectional discrimination different from the existing understandings of discrimination. The most major difference is that intersectional theories believe that the discrimination of someone with two or more marginalized identities cannot be understood completely within the framework of one system of inequality or another. Crenshaw applies this in her original paper where she says that the struggles of a black woman cannot be understood by black men or white women as neither perspectives have the complete understandings of the complexities that arise from intersectionality[v].

In a keynote address at the Women of the World festival organized by the South Bank Centre[vi], Crenshaw said that the "*problems of today come from the intersectional problems of yesterday"*. This is why it is important that there be an effective and functional system in place to deal with matters of intersectional discrimination.

In order to determine whether the current human rights regime adequately deals with intersectional discrimination, it is sagacious to ascertain the structure and content of the regime. Article 1 (3) United Nations Charter states the following as purpose of the United Nations,

"To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[vii]

Article 2 of the Universal Declaration of Human Rights says that *"everyone is entitled to all the rights and freedoms set forth … without distinction of any kind, such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status."*

Subsequent human rights treaties have adopted the same principles as seen with the Article 1 (1) of the Convention on the Elimination of Racial Discrimination (CERD)[viii] which prohibits

discrimination on "race, colour, descent, or national or ethnic origin". The same can be seen in multiple international covenants such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) where the list has been left more open-ended – "*sex, language, religion, political or other opinion, national or social origin, property, birth or other status*"[ix]. Most treaties leave these criteria open-ended into order to incorporate potential categories of those being oppressed. There criteria can include sexual orientation, age, disability, refugee status, etc.

While it seems natural that such an unrestricted understanding of potential discrimination and inequality would include an intersectional approach, such is not the case. In fact, most treaties take the approach taken by the courts as described by Kimberlé Crenshaw. They look at cases of discrimination in a manner that separates the form of discrimination from others and singles it out from the larger more intricate context.

However, recent times have shown a significant advancement in including intersectional discrimination in international human rights jurisprudence. Recent cases and committee recommendations can be used to illustrate the shift towards an intersectional perspective.

In 2010, the Committee on the Elimination of Discrimination Against Women laid down the General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women spoke of intersectionality directly: *"18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them*[x]*".* Such an approach is refreshing and can pave the way for a more progressive jurisprudence. However, while the CEDAW has been sensitive to the effects of multiple marginalization, the same cannot be considered the ideal approach as it is done disparately. It should not be focused on ground over the other.

The CEDAW Committee[xi] also put out General Recommendation No. 25 with specific reference to the relations of race and gender. The CCPR General Comment No 28 also spoke of the intertwining of other grounds of discrimination with discrimination against women[xii]. Multiple other committees have referenced and acknowledged that discrimination can be intersectional[xiii]. In 1998, the International Criminal Tribunal for Rwanda acknowledged that gender and racial discrimination are linked as rape was a method of perpetuating genocide in the case *Prosecution v Akayesu*[xiv].

An important case that showcases the slight shift towards intersectionality is *Alyne da Silva Pimentel Teixeira v Brazil*[xv]. In this decision, the Committee acknowledged that the plaintiff was discriminated against not only on the basis of her sex but also her African descent and socio-economic background[xvi]. Some more important cases include Kell v Canada[xvii] where the CEDAW Committee acknowledged that Ms Kell suffered from intersectional discrimination as an Aboriginal woman. Some more cases include RPB v the Philippines and AS v Hungary.

An important project carried out by the Swiss Network for International Studies in 2013[xviii] provides a lot of insight into the status of including intersectionality in the international human rights regime. With respect to the Committee and treaty body recommendations and reports, the project concluded that they currently have very low visibility and compliance levels, which make them weak. It recommends that there be a more thorough follow-up. With respect to the cases and doctrines, the project says that approach that is more inclusive must be taken up where multiple Covenants could possibly work together.

However, it is not unreasonable to expect progress as none of the existing treaties, charters or conventions explicitly exclude intersectional discrimination. Including intersectional discrimination is only a question of changing the approach in the existing framework and does not require an upheaval of the entire human rights regime.

Upon taking a narrower look at the Indian context, it is clear to see that there exists an urgent need for jurisprudence with an intersectional approach. The caste system is still very prevalent in India, as are the communal tensions between Hindus and Muslims. Such social stratifications, especially in a patriarchal society, lead to many cases of intersectional discrimination. Article 15 of the Indian constitution prohibits discrimination on *"grounds only of religion, caste, race, sex, place of birth or any of them*[xix]*".* The specific phrase "grounds only

of" can be read in such a way that it limits the possibility of finding discrimination on more than one count. This is unfortunately the current understanding of Indian jurisprudence. In her paper Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15[xx], Shreya Atrey argues that this understanding is unsupported by the way the constitution was drafted and can be interpreted differently. She suggests that the phrase "grounds only of" be read as signifying the basis of discrimination in grounds of discrimination. This could potentially be used as a legal basis for recognizing intersectional discrimination.

Thus, it is clear that intersectional discrimination is important and needs to be acknowledged in the human rights forum. This can and will hopefully be achieved through introducing a more nuanced and detailed intersectional approach into the existing human rights framework. While it is clear to see that a lot of progress has already been made, there is a lot more left for there to be a more refined outlook and understanding of discrimination in the international fora. However, such a change is necessary and has been a long time coming, if we truly want human rights to be holistic and inclusive.

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