



Human Rights Law Clinic Papers 2018

UNDERSTANDING MULTIPLE AND INTERSECTIONAL DISCRIMINATION

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1. Introduction

The understanding that discrimination can occur on more than one ground has become increasingly prevalent in the last two decades, pervading both human rights discourse and law. Multiple and intersectional discrimination (MID) describe the 'lived experience' of discrimination, as opposed to single ground discrimination which seeks to categorise the experience discretely. Given that those affected by MID are often the most disadvantaged and vulnerable in society, the recognition of MID is especially important for the United Nations (UN) Sustainable Development Goals for 2030 which pledge to 'leave no one behind'.¹ By examining how MID is approached by international, regional and national human rights law, this report will determine which systems deal well with MID, and which do not.

The report is structured as follows. The development of the concepts of MID are set out, followed by a discussion about definitions, given the often-misunderstood nature of these terms. Next, a review of the various bodies of literature on the topics of MID identifies broad trends in approaches and highlights critiques of the law's recognition of such discrimination. The report then reviews the work of six UN treaty bodies and the regional African, American and European human rights systems to ascertain if and how they have recognised MID. Finally, examples of good practice are discussed at the national level. This report finds considerable variation across international and regional human rights bodies in their recognition of MID. Some are inaccurate and inconsistent in their understanding and approach to MID, whilst others are generally effective. National examples of legal systems dealing well with MID provide the opportunity for some regional and international human rights bodies to learn how to better approach this topic.

In order to review the work of the UN treaty bodies, this report will examine General Comments and Recommendations, concluding observations on state reports, and individual communications. Under the regional human rights systems, their jurisprudence and annual, country and/or thematic reports are considered. This report differentiates between human rights bodies' explicit use of the terms 'multiple' and 'intersectional', and their implicit recognition through discussions of particular groups who may be vulnerable to MID, for example, indigenous girls, disabled refugees or elderly minority women. As this report is for Minority Rights Group International, the focus will be on MID that includes a dimension based on ethnicity (or caste), race, language, religion, or minority, indigenous or refugee status.

¹ UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1, preamble.

2. Background

The concept of intersectionality emerged in legal feminist scholarship in the United States in the late 1980s as an objection to the essentialising tendency of mainstream feminist literature to treat women as a homogenous group. The term intersectionality was coined by Kimberlé Crenshaw in 1989 in a ground-breaking study of the experiences of black women in employment.² She explained that black women experience discrimination similarly to white women and black men, but also differently, as both the sum of race and sex discrimination and as black women uniquely.³ Ideas about MID gained momentum during the 1990s. In 2001, the World Conference Against Racism (WCAR) widely acknowledged multiple discrimination, particularly based on gender and race.⁴ Since then, MID has steadily permeated human rights discourse, and the concepts have been increasingly recognised within human rights frameworks at national, regional and international levels.

However, as MID has expanded into the human rights arena, definitions have become confused. The terms are often used interchangeably, with 'intersectional discrimination' widely used in the academic field, and 'multiple discrimination' referred to by human rights discourse.⁵ Other vocabulary is also used, including 'additive', 'compound', and 'aggravated' discrimination. Given this lack of clarity, it is necessary to define the terms used in this report. Multiple discrimination occurs on two or more grounds at different times, the effects of which accumulate, for example, a disabled woman may be discriminated against on the grounds of her gender, but later she may be discriminated against on the grounds of her disability.⁶ Intersectional discrimination occurs when two or more grounds 'interact with each other at the same time, producing very specific experiences of discrimination', such as forced sterilisation which may affect indigenous women differently to indigenous men and non-indigenous women.⁷ Both multiple and intersectional discrimination involve discrimination on multiple grounds, but the difference between them lies in the way these grounds interact.

² Kimberlé Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine' (1989) University of Chicago Legal Forum 139.

³ *ibid* 149.

⁴ 'Durban Declaration and Plan of Action', World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban 31 August-8 September 2001) art 2.

⁵ Timo Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore' (2002) Report 1102 Institute for Human Rights, Åbo Akademi University, 10.

⁶ *ibid* 10-11.

⁷ *ibid* 11.

3. Literature review

Most theoretical work on MID has emerged in feminist discourses, but a small body of legal scholarship examines the ability of legal systems to deal with MID.⁸ Despite a general shortage of literature on the subject, some broad themes can be identified. The fractured structure of human rights systems,⁹ the lack of clarity and consistency in the use of terminology,¹⁰ the persistent focus on infinite combinations of identity categories,¹¹ and a lack of data disaggregation are all highlighted as impediments to recognising and addressing MID.¹² The literature also identifies features of legal systems which allow them to more easily recognise claims of discrimination on more than one ground. Hence, the literature is generally critical of human rights law, but does recognise some possibilities for implementing an approach to MID.

An initial concern highlighted by some scholars is that international human rights law cannot address MID due to its fragmented structure which 'divides responsibility for addressing human rights violations along rigid substantive lines'.¹³ In order to accommodate MID, some have called for radical reforms of the UN human rights system, including a consolidated committee structure and a single individual complaint system.¹⁴ However, these major reforms are unlikely to be realised in the near future. Calls to consolidate the UN human rights treaty bodies surfaced in the early 2000s, but no single structure has yet emerged.¹⁵ Furthermore, others have reasoned that reforms are not practically needed. Verloo claims that if existing human rights treaties can be intersectionally applied, then the current international human rights framework will suffice.¹⁶ For example, Satterthwaite argues that the intersectional problems facing women migrant workers can be feasibly addressed by applying existing human rights treaties intersectionally, negating the need for

⁸ For example, see: Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law' (European Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission 2016); Sandra Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 *European Anti-Discrimination Law Review* 13; Sandra Fredman, *Discrimination Law* (OUP 1996); and Gay Moon, 'Multiple Discrimination – Problems Compounded or Solutions Found?' (2006) *Justice Journal* 86.

⁹ Johanna E. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71.

¹⁰ Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 *European Journal of Women's Studies* 193.

¹¹ Makkonen (n 5).

¹² European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws* (2007) 48.

¹³ Bond (n 9) 74.

¹⁴ *ibid* 170-71.

¹⁵ For example, see Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (CUP 2000).

¹⁶ Mieke Verloo, 'Intersectional and Cross-Movement Politics and Policies: Reflections on Current Practices and Debates' (2013) 38 *Signs: Journal of Women in Culture and Society* 893, 902-03.

structural reforms.¹⁷ The fragmented structure of the UN human rights system does not, therefore, present an obstacle to addressing MID.

Another significant critique levelled at human rights discourse is that it is confused over the meaning of the terms 'multiple' and 'intersectional'. Yuval-Davis highlights the confused explanation of intersectionality which emerged in the preparatory work for the 2001 WCAR.¹⁸ Intersectionality was explained as 'an interaction of different forms of oppression, creating multiple layers of oppression'.¹⁹ This articulation fails to recognise the nuanced differences between multiple and intersectional discrimination. Yuval-Davis also argues that human rights discourse is methodologically confused over how to implement an intersectional discrimination approach.²⁰ Human rights policy methodology generally does not recognise the differential power positions of different identity groups in specific historical contexts, the power dynamics within these groups, or the contested nature of these groups' boundaries.²¹ Such analytical confusions, she argues, have already been dealt with by feminist scholars, and she calls for a wider dialogue between the two discourses.²²

Not only are the concepts inaccurately understood in human rights discourse, but they are also often inconsistently applied. Campbell highlights the varied application of MID across states, within states and over time in the concluding observations of the Committee on the Elimination of Discrimination Against Women (CEDAW), meaning that only a partial picture of such discrimination is painted.²³ Evidently, significant issues in understanding and applying multiple and intersectional analyses exist within human rights frameworks. Clarity and consistency are needed for human rights law to effectively address MID.

Moreover, human rights discourse is criticised for its persistent focus on infinite combinations of grounds. Makkonen has argued that this emphasis on constructing 'new essentialist and exclusionary categories creates new intersectional stereotypes'.²⁴ Such categories may create false positives whereby people are presumed to be victims due to

¹⁷ Margaret L. Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 Yale Human Rights and Development Law Journal 1, 62. Satterthwaite applies five international human rights treaties (the Convention on the Elimination of All Forms of Discrimination Against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families) to the problems typically faced by women migrant workers in order to show that these can be adequately addressed if the treaties are applied intersectionally.

¹⁸ Nira Yuval-Davis, 'Intersectionality, Citizenship and Contemporary Politics of Belonging' (2007) 10 Critical Review of International Social and Political Philosophy 561, 565.

¹⁹ *ibid.*

²⁰ Yuval-Davis (n 10) 204.

²¹ *ibid.*

²² *ibid.* 206.

²³ Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 Revista Direito GV 479, 496.

²⁴ Makkonen (n 5) 34.

their social location, when they may not be; and false negatives, whereby people are not presumed to be victims when in fact they are.²⁵ The focus on identity combinations may be misleading in terms of ascertaining those most vulnerable to discrimination. Conversely, in human rights and anti-discrimination law, it has been shown that judges and lawmakers are aware of the dangers of infinite identity combinations, and are wary of opening the so-called 'Pandora's Box' of claims.²⁶ Therefore, some courts have restricted discrimination claims to a combination of two grounds only.²⁷ This renders claims as artificial and paradoxical since they may no longer reflect the lived experience of discrimination suffered by the complainant.²⁸ The focus on infinite identity combinations is dangerous as it presumes a victim identity at certain sites. Yet, any attempt to restrict the number of identity combinations results in a very limited and artificial approach to MID.

Instead, the literature calls for a reduced focus on identity combinations and increased emphasis on power relations and patterns of inequality. Early work on MID focused on exclusionary power structures,²⁹ for example, Crenshaw defined structural intersectionality as 'intersecting patterns of subordination'.³⁰ In this way, intersectional discrimination is understood as resulting from power structures which oppress particular groups. Hence, what intersectionality calls for is not the proliferation of essentialising combinations of categories, but rather a new conceptualisation of identity grounds.³¹ Consequently, Fredman argues that discrimination law should focus on these relationships of power as opposed to specific groups.³² In practice this means that one identity ground should encompass all the relationships of power and aspects of disadvantage experienced by that group, for example, gender discrimination would recognise all the different experiences of women.³³ Human rights and anti-discrimination laws can feasibly account for the experiences of MID if they take a more holistic view of identity grounds.

Another significant issue constraining the ability of human rights law to address MID relates to a lack of data disaggregation. Campbell points out that CEDAW systematically

²⁵ *ibid.*

²⁶ Sandra Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 *European Anti-Discrimination Law Review* 13, 14.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, 'Towards a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 *Signs: Journal of Women in Culture and Society* 785, 797.

³⁰ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' (1991) 43 *Stanford Law Review* 1241, 1249.

³¹ Ange-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5 *Perspectives on Politics* 63, 66.

³² Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law' (European Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission 2016) 8.

³³ *ibid.*

requests that State Parties provide data disaggregated by gender, but states' reluctance to do so is a chronic problem.³⁴ There may be different reasons for this, for example, data on ethnic identity or sexual orientation may be particularly difficult to obtain due to historical circumstances or hostile social attitudes. Moreover, such data collection may be unreliable due to respondents misreporting their identities for fear of repercussions such as discrimination. Nevertheless, a lack of disaggregated data continues to render MID less visible, therefore lowering incentives to address them.³⁵ A lack of data also skews the picture of which groups are most vulnerable.³⁶ In this way, it has been argued that the primary focus of international human rights law on the gender-race intersection is attributable to the existence of improved data in this area and a lack of documentation elsewhere.³⁷ Poor data disaggregation is a significant obstacle to the ability of human rights law to recognise, assess and accurately address MID, but obtaining disaggregated data remains difficult.

In legal scholarship, a small body of literature highlights the features of legal systems which may make them more amenable to recognising MID. The first is the type of list of grounds in non-discrimination provisions. Under non-exhaustive lists of grounds, not all grounds on which discrimination is prohibited are stated, and this is indicated by the use of phrases such as 'including', 'in particular' or 'other status'.³⁸ On the other hand, under exhaustive lists of grounds, all grounds are explicitly stated, leaving little room for judicial interpretation.³⁹ Therefore, non-exhaustive lists, which allow courts to examine two or more grounds of discrimination simultaneously, are most amenable to accommodating MID claims.⁴⁰ Second, Moon shows how decreased emphasis in establishing a comparator in cases of discrimination and increased emphasis on 'but for' and 'reason why' questions would allow for more intersectional analysis.⁴¹ By removing the need to establish comparative experiences, the multiple or intersectional experience of discrimination can be more effectively examined. Lastly, it has been shown that, in national settings, single equality bodies are better able to deal with claims of multiple or intersectional discrimination than separate ground-specific bodies.⁴² The existence of ground-specific bodies may lead to the division of claims on separate grounds which would render experiences of MID

³⁴ Campbell (n 23) 497.

³⁵ European Commission (n 12) 48.

³⁶ *ibid.*

³⁷ Makkonen (n 5) 57.

³⁸ Sandra Fredman, *Discrimination Law* (OUP 1996) 111.

³⁹ *ibid.*

⁴⁰ Fredman (n 26) 16.

⁴¹ Gay Moon, 'Multiple Discrimination – Problems Compounded or Solutions Found?' (2006) *Justice Journal* 86, 100. A 'but for' question would ask whether the discrimination would have occurred but for the prohibited grounds. A 'reason why' question would ask why the treatment was afforded to the complainant.

⁴² Fredman (n 32) 60.

invisible.⁴³ Therefore, legal systems can best deal with claims of MID when they have non-exhaustive lists of grounds, seek to examine the experience of discrimination as opposed to establishing a comparative example, and, at the domestic level, have one single-equality body to accommodate multiple or intersectional experiences of discrimination. As discussed above, they should also focus on conceptualising identity categories as relationships of power and on improving data disaggregation.

4. Evaluation of key international and regional standards

4.1. Committee on the Elimination of Discrimination Against Women (CEDAW)⁴⁴

The monitoring body for the Convention on the Elimination of All Forms of Discrimination Against Women⁴⁵ has explicitly recognised MID in many of its General Recommendations. For example, in relation to asylum, CEDAW discusses how claims assessed through the lens of male experiences may render invisible women's intersectional asylum claims.⁴⁶ Elsewhere, CEDAW has highlighted that MID affects women and girls in education, particularly those from ethnic minority or indigenous groups, refugees, asylum seekers and migrants, and lesbian, bisexual, transgender and intersex students.⁴⁷ CEDAW's discussions of MID also, therefore, frequently consider more than two grounds of discrimination.⁴⁸ Other General Recommendations are by nature implicitly intersectional, for example, on women

⁴³ *ibid.*

⁴⁴ For discussions of multiple and intersectional discrimination under CEDAW, see: Shreya Atrey, 'Lifting as We Climb: Recognising Intersectional Gender Violence in Law' (2015) 5 *Oñati Socio-Legal Series* 1512; Johanna E. Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights' (2004) 5 *Georgetown Journal of Gender and the Law* 897; Meghan Campbell, 'Women's Rights and the Convention on the Elimination of All Forms of Discrimination Against Women: Unlocking the Potential of the Optional Protocol' (2016) 34 *Nordic Journal of Human Rights* 247; Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 *Revista Direito GV* 479; Beth Goldblatt, 'Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity' (2015) 21 *Australian Journal of Human Rights* 47, 54-55; and Timo Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore' (2002) Report 1102 Institute for Human Rights, Åbo Akademi University, 42-45.

⁴⁵ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 1 March 1980, entered into force 3 September 1981) 1249 UNTS 13.

⁴⁶ Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 32' (14 November 2014) UN Doc CEDAW/C/GC/32 [16].

⁴⁷ Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 36' (27 November 2017) UN Doc CEDAW/C/GC/36 [41], [42], [45].

⁴⁸ For example, lesbian girls may be subject to MID on the three grounds of gender, age and sexual orientation.

migrant workers,⁴⁹ on 'gender-related dimensions of refugee status, asylum, nationality and statelessness of women',⁵⁰ and on rural women.⁵¹ Most significantly though, in 2010, General Recommendation No.28 called on State Parties to 'legally recognise intersecting forms of discrimination',⁵² expanding article 2 of the Convention to include the elimination of intersectional discrimination. General Recommendations have been the forum in which the Committee has primarily advanced its recognition of multiple and, particularly, intersectional discrimination.

Elsewhere in CEDAW's work, a multiple and intersectional approach to discrimination has been varied. In some concluding observations on state reports, MID is explicitly discussed. CEDAW developed a detailed intersectional discussion on the situation of Roma women in Romania, calling for improved data disaggregation to better address the needs of this group.⁵³ The Committee has also called on some states to legally recognise MID.⁵⁴ Additionally, CEDAW implicitly applies a multiple and intersectional approach in concluding observations, for example, it routinely examines the situations of women migrant workers,⁵⁵ rural women,⁵⁶ and refugees and asylum seekers,⁵⁷ although the terms MID are not explicitly used. In some concluding observations, however, the cursory phrase 'including intersecting forms of discrimination' is inserted into paragraphs where the Committee deems it

⁴⁹ Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 26' (5 December 2008) UN Doc CEDAW/C/2009/WP.1/R.

⁵⁰ Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 32' (14 November 2014) UN Doc CEDAW/C/GC/32.

⁵¹ Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 34' (7 March 2016) UN Doc CEDAW/C/GC/34.

⁵² Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 28' (16 December 2010) UN Doc CEDAW/C/GC/28 [18].

⁵³ Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined seventh and eighth periodic reports of Romania' (24 July 2017) UN Doc CEDAW/C/ROU/CO/7-8 [36]-[41].

⁵⁴ For example: Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the eighth periodic report of Denmark' (11 March 2015) UN Doc CEDAW/C/DNK/CO/8 [11]-[12]; and Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined eighth and ninth periodic reports of Sweden' (10 March 2016) UN Doc CEDAW/C/SWE/CO/8-9 [14]-[15].

⁵⁵ For example: Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined third and fourth periodic reports of Saudi Arabia' (9 March 2018) UN Doc CEDAW/C/SAU/CO/3-4 [37]-[38]; and Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the fifth periodic report of Singapore' (21 November 2017) UN Doc CEDAW/C/SGP/CO/5 [34]-[35].

⁵⁶ For example: Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the seventh periodic report of Brazil' (23 March 2012) UN Doc CEDAW/C/BRA/CO/7 [30]-[31]; and Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined fourth and fifth periodic reports of India' (24 July 2014) UN Doc CEDAW/C/IND/CO/4-5 [32]-[33].

⁵⁷ For example: Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the seventh periodic report of Italy' (24 July 2017) UN Doc CEDAW/C/ITA/CO/7 [15]-[16]; and Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined fourth and fifth periodic reports of Lebanon' (24 November 2015) UN Doc CEDAW/C/LBN/CO/4-5 [11]-[12].

appropriate to recognise discrimination on more than one ground, without further developing an analysis of MID.⁵⁸ In CEDAW's individual communications, Atrey argues that multiple dimensions of discrimination were largely ignored up until *Kell v Canada* in 2012.⁵⁹ In this communication, the author, an aboriginal woman victim of domestic violence, contended that she had been subject to discrimination in her attempts to regain property rights through the Canadian legal system.⁶⁰ The Committee found that Canada had committed an act of intersectional discrimination by prejudicing the author's property rights on the grounds of ethnicity and gender.⁶¹ Interestingly, the Committee did not separate the ethnic and gender aspects of the discrimination, suggesting an true intersectional approach, which was notably continued in a subsequent communication.⁶² CEDAW has clearly attempted to integrate an approach MID, which has been described as pioneering in terms of protecting women with multiple and intersectional identities against discrimination.⁶³

4.2. Committee on the Elimination of Racial Discrimination (CERD)⁶⁴

CERD, as the monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination,⁶⁵ and has recognised MID. In 2000, a landmark General Recommendation entitled 'gender-related dimensions of racial discrimination' recognised that 'there are circumstances in which racial discrimination only or primarily affects women,

⁵⁸ For example: Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined seventh and eighth periodic reports of Germany' (9 March 2017) UN Doc CEDAW/C/DEU/CO/7-8 [18b]; Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the sixth periodic report of the Netherlands' (24 November 2016) UN Doc CEDAW/C/NLD/CO/6 [39]; and Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined fourth and fifth periodic reports of Switzerland' (25 November 2016) UN Doc CEDAW/C/CHE/CO/4-5 [19b].

⁵⁹ Shreya Atrey, 'Lifting as We Climb: Recognising Intersectional Gender Violence in Law' (2015) 5 *Oñati Socio-Legal Series* 1512, 1523-24. Communications in which the Committee ignored multiple dimensions of discrimination notably include: Committee on the Elimination of Discrimination Against Women, *AS v Hungary* (2006) UN Doc CEDAW/C/36/D/4/2004; and Committee on the Elimination of Discrimination Against Women, *NSF v United Kingdom of Great Britain and Northern Ireland* (2007) UN Doc CEDAW/C/38/D/10/2005.

⁶⁰ Committee on the Elimination of Discrimination Against Women, *Kell v Canada* (2012) UN Doc CEDAW/C/51/D/19/2008 [9.3].

⁶¹ *ibid* [10.2].

⁶² Atrey (n 59) 1524. The subsequent communication concerned the rape of a deaf and mute girl who alleged she experienced discrimination on the grounds of gender and disability in her attempt to access justice: Committee on the Elimination of Discrimination Against Women, *RPB v Philippines* (2014) UN Doc CEDAW/C/57/D/34/2011.

⁶³ Campbell (n 23) 480.

⁶⁴ For discussions of multiple and intersectional discrimination under CERD, see: Lisa A. Crooms, 'Indivisible Rights and Intersectional Identities or, What Do Women's Human Rights Have to Do with the Race Convention?' (1997) 40 *Howard Law Journal* 619; and Timo Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore' (2002) Report 1102 Institute for Human Rights, Åbo Akademi University, 40-42.

⁶⁵ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

or affects women in a different way, or to a different degree than men'.⁶⁶ Although CERD refrained from using the terms multiple or intersectional,⁶⁷ it committed itself to take into account gender factors linked with racial discrimination.⁶⁸ Despite this, a number of concluding observations do not mention the words 'women', 'gender' or 'sex'.⁶⁹ In other General Recommendations, the Committee has routinely and explicitly mentioned MID, particularly in relation to women and children in the context of discrimination against Roma,⁷⁰ discrimination based on descent,⁷¹ and discrimination against non-citizens.⁷² CERD regularly highlights these issues in concluding observations, for example, discrimination against Roma children in Slovakia and Romania,⁷³ and descent-based discrimination against women in India.⁷⁴ However, CERD has missed opportunities to take an intersectional approach, such as in General Recommendation No.23 on the rights of indigenous people which fails to recognise any other grounds on which indigenous people may face discrimination.⁷⁵ Interestingly, this has not prevented CERD from highlighting MID issues facing indigenous people in recent concluding observations on Canada and Australia.⁷⁶

However, some aspects of CERD's approach are problematic. In 2009, General Recommendation No.32 stated that 'the grounds of discrimination are extended in practice

⁶⁶ Committee on the Elimination of Racial Discrimination, 'General Recommendation No 25' (20 March 2000) UN Doc A/55/18 annex V at 152 [1].

⁶⁷ Makkonen (n 5) 40.

⁶⁸ Committee on the Elimination of Racial Discrimination, 'General Recommendation No 25' (20 March 2000) UN Doc A/55/18 annex V at 152 [3].

⁶⁹ For example: Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand' (22 September 2017) UN Doc CERD/C/NZL/CO/21-22; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined sixth and seventh periodic reports of Slovenia' (20 September 2010) UN Doc CERD/C/SVN/CO/6-7; and Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland' (3 October 2016) UN Doc CERD/C/GBR/CO/21-23.

⁷⁰ Committee on the Elimination of Racial Discrimination, 'General Recommendation No 27' (16 August 2000) UN Doc A/55/18 annex V at 154 [6].

⁷¹ Committee on the Elimination of Racial Discrimination, 'General Recommendation No 29' (19 March 2002) UN Doc A/57/18 ch XI at 111 [k]-[l].

⁷² Committee on the Elimination of Racial Discrimination, 'General Recommendation No 30' (19 August 2004) UN Doc A/59/18 ch VII at 93 [8].

⁷³ Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined sixteenth to nineteenth periodic reports of Romania' (13 September 2010) UN Doc CERD/C/ROU/CO/16-19 [14]; and Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined eleventh to twelfth periodic reports of Slovakia' (12 January 2018) UN Doc CERD/C/SVK/CO/11-12 [25]. CERD's Concluding Observations on Slovakia also examine the MID faced by Roma women in exercising their right to health, at [23].

⁷⁴ Committee on the Elimination of Racial Discrimination, 'Concluding observations on the nineteenth periodic report of India' (5 May 2007) UN Doc CERD/C/IND/CO/19 [15].

⁷⁵ Committee on the Elimination of Racial Discrimination, 'General Recommendation No 23' (18 August 1997) UN Doc A/52/18 annex V at 122.

⁷⁶ Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined eighteenth to twentieth periodic reports of Australia' (26 December 2017) UN Doc CERD/C/AUS/CO/18-20 [23]-[27]; and Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada' (13 September 2017) UN Doc CERD/C/CAN/CO/21-23 [23]-[27].

by the notion of intersectionality whereby the Committee addresses situations of double or multiple discrimination'.⁷⁷ This importantly extends the scope of article 1 on non-discrimination to include instances of discrimination on multiple grounds. However, the reference to situations of multiple discrimination under the notion of intersectionality is confused, since multiple discrimination is not considered a type of intersectional discrimination. Elsewhere, addressing the race-religion intersection has been problematic for CERD. In 2007, in two individual communications against Denmark alleging discrimination as a result of racist statements against Muslims, the Committee declared itself competent to 'consider claims of double discrimination on the basis of religion and another ground'.⁷⁸ Yet CERD stated that these were not the communications in which to consider such claims, given that 'no specific national or ethnic groups were directly targeted' since Muslims in Denmark are of heterogeneous origin.⁷⁹ However, it has been argued that CERD has misunderstood the racial aspect at this intersection by denying that religious discrimination may 'disproportionately affect a particular ethnic group, thereby constituting racial discrimination'.⁸⁰ Consequently, the Committee has not accurately addressed MID on the grounds of race and religion. Generally though, CERD has made significant attempts to recognise MID, although confusion over definitions and the race-religion intersection remain, and it is yet to fully implement a gender-perspective in its concluding observations.

4.3. Committee on the Rights of Persons with Disabilities (CRPD)

Although not strictly within the scope of this report, CRPD is in an exceptional position, since the treaty it monitors makes explicit reference to multiple discrimination in its preamble.⁸¹ Furthermore, article 6 obligates State Parties to take measures to ensure the rights of women and girls with disabilities, given that they may be subject to multiple discrimination.⁸² This recognition has influenced CRPD's work, and in fact, all six of its General Comments to

⁷⁷ Committee on the Elimination of Racial Discrimination, 'General Recommendation No 32' (24 September 2009) UN Doc CERD/C/GC/32 [7].

⁷⁸ Committee on the Elimination of Racial Discrimination, *PSN v Denmark* (2007) UN Doc CERD/C/71/D/36/2006 [6.3]; and Committee on the Elimination of Racial Discrimination, *AWRAP v Denmark* (2007) UN Doc CERD/C/71/D/37/2006 [6.3].

⁷⁹ Committee on the Elimination of Racial Discrimination, *PSN v Denmark* (2007) UN Doc CERD/C/71/D/36/2006 [6.2].

⁸⁰ Stephanie E. Berry, 'Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination – Square Peg in a Round Hole' (2011) 11 Human Rights Law Review 423, 435.

⁸¹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, preamble.

⁸² *ibid* art 6.

date take an explicitly intersectional approach to their respective themes.⁸³ The Committee's most recent General Comment clearly elaborates its understanding of MID in the context of equality and non-discrimination.⁸⁴ Moreover, in concluding observations, CRPD routinely picks up on MID issues, such as the vulnerabilities faced by women and children with disabilities.⁸⁵ It also regularly calls on states to recognise MID by including it within their national non-discrimination laws.⁸⁶ However, there have been no individual communications concerning MID, although this may result from the recent adoption of the Convention, rather than unwillingness on the part of the Committee. The CRPD appears to be quietly forging an approach to MID, possibly advantaged by the fact multiple discrimination is explicitly included within its mandate. However, this is not to suggest that other bodies cannot successfully adopt similar approaches.

4.4. Human Rights Committee (HRC)⁸⁷

The HRC monitors the International Covenant on Civil and Political Rights,⁸⁸ which, despite being the largest body of non-discrimination jurisprudence in international law, has poorly addressed MID.⁸⁹ In its General Comments, there are virtually no references to the concepts, except in General Comment No.28 from 2000 which briefly mentions that

⁸³ Committee on the Rights of Persons with Disabilities, 'General Comment No 1' (19 May 2014) UN Doc CRPD/C/GC/1; Committee on the Rights of Persons with Disabilities, 'General Comment No 2' (22 May 2014) UN Doc CRPD/C/GC/2; Committee on the Rights of Persons with Disabilities, 'General Comment No 3' (25 November 2016) UN Doc CRPD/C/GC/3; Committee on the Rights of Persons with Disabilities, 'General Comment No 4' (25 November 2016) UN Doc CRPD/C/GC/4; Committee on the Rights of Persons with Disabilities, 'General Comment No 5' (27 October 2017) UN Doc CRPD/C/GC/5; and Committee on the Rights of Persons with Disabilities, 'General Comment No 6' (26 April 2018) UN Doc CRPD/C/GC/6.

⁸⁴ Committee on the Rights of Persons with Disabilities, 'General Comment No 6' (26 April 2018) UN Doc CRPD/C/GC/6 [19].

⁸⁵ Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Spain' (19 October 2011) UN Doc CRPD/C/ESP/CO/1 [21]-[24]; Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Australia' (21 October 2013) UN Doc CRPD/C/AUS/CO/1 [16]-[19]; and Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of the United Arab Emirates' (3 October 2016) UN Doc CRPD/C/ARE/CO/1 [13]-[16].

⁸⁶ For example: Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Canada' (3 May 2017) UN Doc CRPD/C/CAN/CO/1 [13]; and Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Morocco' (25 September 2017) UN Doc CRPD/C/MAR/CO/1 [12b].

⁸⁷ For discussions of multiple and intersectional discrimination under the HRC, see: Shreya Atrey, 'Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR' (2017) 35 Nordic Journal of Human Rights 220; and Timo Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore' (2002) Report 1102 Institute for Human Rights, Åbo Akademi University, 38-40.

⁸⁸ International Covenant on Civil and Political Rights, (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁸⁹ Shreya Atrey, 'Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR' (2017) 35 Nordic Journal of Human Rights 220, 220.

'discrimination against women is often intertwined with discrimination on other grounds'.⁹⁰ Similarly in its concluding observations on state reports, there is almost no explicit recognition of MID, suggesting a lack of conceptual awareness. However, in 2011, *LNP v Argentina* signified a momentous break in this trend. The communication concerned the rape of an indigenous woman who alleged she suffered discrimination on the grounds of her ethnicity and gender in her attempts to access justice.⁹¹ Interestingly, the Committee concluded that the author had indeed suffered discrimination on the grounds of her ethnicity and gender, which had been aggravated by the fact she was a minor.⁹² This case suggests that the HRC is willing to recognise claims of MID, however it seems unusually reluctant to explicitly refer to MID in any areas of its work.

4.5 Committee on the Rights of the Child (CRC)⁹³

As the monitoring body of the Convention on the Rights of the Child,⁹⁴ the CRC's attempts to incorporate recognition of MID have been varied. The majority of its General Comments discuss vulnerable situations for children whose disadvantage can be exacerbated by MID, although it is not always explicitly framed in these terms.⁹⁵ General Comment No.9 on children with disabilities is noteworthy in that it recognises the increased vulnerability of some children, such as disabled children living in rural areas and indigenous girls with disabilities, therefore recognising the potential for discrimination on three and four grounds respectively.⁹⁶ The CRC's joint General Comments are those which most comprehensively seek to integrate an intersectional approach. A joint General Comment with the Committee on Migrant Workers calls on State Parties to 'protect children from MID throughout the

⁹⁰ Human Rights Committee, 'General Comment No 28' (29 March 2000) UN Doc HRI/GEN/1/Rev.9 section II at 228 [30].

⁹¹ Human Rights Committee, *LNP v Argentina* (2011) UN Doc CCPR/C/102/D/1610/2007 [3.2].

⁹² *ibid* [13.3], [13.6].

⁹³ For discussions of multiple and intersectional discrimination under the CRC, see: Beth Goldblatt, 'Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity' (2015) 21 *Australian Journal of Human Rights* 47, 53-54; and Camilla Ida Ravnbøl, 'Intersectional Discrimination Against Children: Discrimination Against Romani Children and Anti-Discrimination Measures to Address Child Trafficking' (UNICEF Innocenti Research Centre 2009).

⁹⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁹⁵ For example: Committee on the Rights of the Child, 'General Comment No 10' (25 April 2007) UN Doc CRC/C/GC/10 [6]; and Committee on the Rights of the Child, 'General Comment No 17' (17 April 2013) UN Doc CRC/C/GC/17 [48]-[53].

⁹⁶ Committee on the Rights of the Child, 'General Comment No 9' (27 February 2007) UN Doc CRC/C/GC/9 [8]. 'Disabled children living in rural areas' recognises the three grounds of age, disability and rural location, whilst 'indigenous girls with disabilities' recognises the four grounds of age, disability, gender and indigenous status.

migration process'.⁹⁷ In cooperation with CEDAW, a General Comment on harmful practices states that they are 'grounded in discrimination on the basis of sex, gender and age, in addition to multiple and/or intersecting forms of discrimination'.⁹⁸ Issues relating to harmful practices are highlighted in concluding observations, although the CRC does not always explicitly recognise the MID underlying this.⁹⁹ The CRC also appears to miss opportunities to discuss the additional vulnerabilities of some children in its concluding observations, for example, it has sometimes overlooked gender discrimination in the contexts of indigenous children¹⁰⁰ and children in the migration process.¹⁰¹ Overall, the CRC undoubtedly recognises MID in its General Comments, but it sometimes fails to highlight these issues in concluding observations.

4.5. Committee on Economic, Social and Cultural Rights (CESCR)¹⁰²

CESCR has done little work on MID through its monitoring of the International Covenant on Economic, Social and Cultural Rights.¹⁰³ In 2005, a General Comment on the equal rights of men and women attempted to articulate an understanding of intersectional discrimination with confused terminology which seemed to suggest that intersectional discrimination results in compounded disadvantage.¹⁰⁴ This is misleading, since the literature would suggest that intersectional discrimination results in a specific experience of discrimination. A General Comment adopted in 2009 expanded the meaning of the ground 'other status' to include the intersection of two prohibited grounds of discrimination.¹⁰⁵ However, the limitation of two grounds only may serve to distort more complex experiences of discrimination. CESCR's

⁹⁷ Committee on the Rights of the Child, 'Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Their Families and No 22 of the Committee on the Rights of the Child' (16 November 2017) UN Doc CMW/C/GC/3-CRC/C/GC/22 [23].

⁹⁸ Committee on the Rights of the Child, 'Joint General Comment No 31 of the Committee on the Elimination of All Forms of Discrimination Against Women and No 18 of the Committee on the Rights of the Child' (14 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18 [15].

⁹⁹ For example: Committee on the Rights of the Child, 'Concluding observations on the third periodic report of Eritrea' (23 June 2008) UN Doc CRC/C/ERI/CO/3 [60]-[61]; and Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of India' (7 July 2014) UN Doc CRC/C/IND/CO/3-4 [51].

¹⁰⁰ Committee on the Rights of the Child, 'Concluding observations on the fifth periodic report of New Zealand' (21 October 2016) UN Doc CRC/C/NZL/CO/5 [41].

¹⁰¹ Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Italy' (31 October 2011) UN Doc CRC/C/ITA/CO/3-4 [62]-[69].

¹⁰² For discussions of multiple and intersectional discrimination under CESCR, see: Beth Goldblatt, 'Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity' (2015) 21 Australian Journal of Human Rights 47, 52-53.

¹⁰³ International Covenant on Economic, Social and Cultural Rights (adopted 19 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹⁰⁴ Committee on Economic, Social and Cultural Rights, 'General Comment No 16' (11 August 2005) UN Doc E/C.12/2005/4 [5].

¹⁰⁵ Committee on Economic, Social and Cultural Rights, 'General Comment No 20' (2 July 2009) UN Doc E/C.12/GC/20 [27].

attempts at recognising MID are evidently confused and restrictive. Elsewhere, the Committee has refrained from explicitly highlighting MID in concluding observations on state reports, meaning it overlooks MID issues in practice.

4.6. Africa

The African human rights system has so far addressed MID rarely, although a few instances are noteworthy. The Women's Protocol to the African Charter on Human and People's Rights contains articles addressing the situation of elderly women, disabled women and women in distress, recognising that special measures may be required to ensure their equal enjoyment of rights.¹⁰⁶ Although this is not explicitly framed in terms of MID, it recognises that women's multiple identities may cause disadvantage. Furthermore, the draft protocol on persons with disabilities requires State Parties to ensure that they are 'not discriminated against on one or more grounds'.¹⁰⁷ These examples suggest multiple discrimination is recognised, highlighting that there is potential for the monitoring mechanisms to address the issue. However, an analysis of the African Commission on Human and People's Rights' concluding observations on state reports finds no explicit references to the concepts. Furthermore, a communication brought to the Commission in 2013 alleged discrimination against Egypt on the grounds of gender and political opinion, yet the Commission focused its analysis of discrimination solely on the ground of gender and ignored the existence of the complainants' political opinions.¹⁰⁸ No cases in the African Court on Human and People's Rights have raised issues of multiple or intersectional discrimination. This suggests the African human rights system is yet to implement an approach to MID.

4.7. Americas

The Inter-American Commission on Human Rights (IACHR) has made considerable efforts to incorporate multiple and intersectional approaches to discrimination. The Inter-American Convention Against Racism states in its preamble that 'certain persons and groups experience multiple or extreme forms of racism, discrimination and intolerance, driven by a

¹⁰⁶ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6, arts 22-24.

¹⁰⁷ Draft Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa <http://www.achpr.org/files/news/2016/04/d216/disability_protocol.pdf> accessed 19 March 2018, preamble, art 3(2).

¹⁰⁸ African Commission on Human and People's Rights, *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013) Communication 334/06 [75], [142], [153].

combination of factors'.¹⁰⁹ Article 1.3 defines multiple discrimination as a form of racial discrimination, meaning it falls within the scope of the Convention.¹¹⁰ The Convention Against Discrimination equally includes multiple discrimination within its scope, although it has not yet entered into force.¹¹¹ Similarly, the Convention on Older Persons calls on State Parties to develop policies with specific approaches for older victims of multiple discrimination.¹¹² Hence multiple discrimination has a significant legal basis within the Inter-American system.

This is reflected in several cases in the Inter-American Court of Human Rights. In 2007, the Court recognised that discrimination does not always affect all women equally.¹¹³ In two similar cases in 2009 concerning the rape and torture of indigenous women, the Court noted that some women face a combination of forms of discrimination, for example, on the grounds of gender, race and socio-economic status.¹¹⁴ In the 2014 case of *IV v Bolivia* concerning forced sterilisation, the Court explicitly stated that it was an example of multiple discrimination on the grounds of sex, immigrant status and economic position.¹¹⁵ Clearly, the Court has analysed discrimination on multiple grounds in several cases. This is also evident in the IACHR's work. A report on the situation of people of African descent in the Americas develops an explicitly intersectional approach based on sex, extreme poverty and race to discuss the situation of afro-descendant women.¹¹⁶ The IACHR is notable for its recognition of multiple discrimination in several legal instruments and its corresponding approach to MID issues in other work. It appears to have easily adopted an approach to MID which may be a result of its non-ground-specific nature, in contrast with other bodies such as CERD or CRC.

¹⁰⁹ Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance (adopted 5 June 2013, entered into force 11 November 2017) AG/RES.2805 XLIII-O/13, preamble.

¹¹⁰ *ibid* art 1(3).

¹¹¹ Inter-American Convention Against All Forms of Discrimination and Intolerance (adopted 5 June 2013, not yet entered into force) AG/RES.2804 XLIII-O/13, art 1(3).

¹¹² Inter-American Convention on Protecting the Human Rights of Older Persons (adopted 15 June 2015, entered into force 11 January 2017) AG/RES.2875 XLV-O/15, art 5.

¹¹³ Inter-American Court of Human Rights, *Campo Algodonero ('Cotton Fields'): Claudia Ivette González, Esmerelda Herrera Monreal and Laura Berenice Ramos Monárrez v Mexico* (2007) case no 12.496, 12.497 and 12.498 [232].

¹¹⁴ Inter-American Court of Human Rights, *Inés Fernández Ortega v Mexico* (2009) case no 12.580 [179]; and Inter-American Court of Human Rights, *Valentina Rosendo Cantú et al. v Mexico* (2009) case no 12.579 [150].

¹¹⁵ Inter-American Court of Human Rights, *IV v Bolivia* (2014) case no 12.655 [161].

¹¹⁶ Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas* (2011) [13]-[14], [60]-[61].

4.8. Europe¹¹⁷

MID remains virtually unrecognised within the European human rights framework. Article 14 of the European Convention on Human Rights contains a non-exhaustive list of prohibited grounds of discrimination,¹¹⁸ suggesting potential to include MID. However, in 2011 and 2012, the European Court of Human Rights (ECtHR) heard a series of cases concerning the forced sterilisation of Roma women in Slovakia, in which the claimants explicitly alleged discrimination on the grounds of race and sex.¹¹⁹ Despite this, and the clearly intersectional nature of the discrimination underlying such practices, the Court failed to examine the claims of discrimination.¹²⁰ Moreover, when compared with the analogous case of *IV v Bolivia*, in which the Inter-American Court found discrimination on multiple grounds, the unwillingness of the ECtHR to engage with intersectional or multiple approaches to discrimination is highlighted. Outside of the Court, the Sexual Orientation and Gender Identity Unit, under the Council of Europe, has explicitly recognised MID, but only specifically in relation to young Roma. A report documenting young Roma speaking about multiple discrimination reflects a clear understanding of MID that is consistent with the literature.¹²¹ The ECtHR therefore seems exceptionally unwilling to recognise MID.

¹¹⁷ Little academic literature examining multiple and intersectional discrimination under the Council of Europe exists, although for a specific discussion in the context of the freedom to manifest one's religion, see Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183. Although outside the scope of this report, a large body of literature exists that examines multiple and intersectional discrimination within the European Union (EU), for example, see: European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws* (2007); Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law' (European Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission 2016); Sandra Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 *European Anti-Discrimination Law Review* 13; Johanna Kantola and Kevät Nousiainen, 'Institutionalising Intersectionality in Europe' (2009) 11 *International Feminist Journal of Politics* 459; Emanuela Lombardo and Mieke Verloo, 'Institutionalising Intersectionality in the European Union? Policy Developments and Contestations' (2009) 11 *International Feminist Journal of Politics* 478; and Mieke Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13 *European Journal of Women's Studies* 211.

¹¹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (European Convention on Human Rights) art 14.

¹¹⁹ *VC v Slovakia*, App no 18968/07 (ECtHR, 8 November 2011); *NB v Slovakia*, App no 29518/10 (ECtHR, 12 June 2012); and *IG and Others v Slovakia*, App no 15966/04 (ECtHR, 13 November 2012).

¹²⁰ Ronli Sifris, 'Involuntary Sterilisation of HIV-Positive Women: An Example of Intersectional Discrimination' (2015) 37 *Human Rights Quarterly* 464, 490-91.

¹²¹ Lucie Fremlova et al., 'Baribaripen: Young Roma Speak About Multiple Discrimination' (Council of Europe 2014) 9.

5. National good practice

At the national level, Canada has arguably best dealt with MID. Section 15 of the Canadian Charter of Rights and Freedoms contains a non-exhaustive list of grounds and this has allowed for the recognition of MID.¹²² As early as 1993, Justice L'Heureux-Dubé's dissenting opinion in *Mossop v Canada* recognised that categories of discrimination may overlap.¹²³ In 1995, Justice L'Heureux-Dubé stated in *Egan v Canada*:

We will never address the problem of discrimination completely if we continue to focus on abstract categories and generalisations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitised from real people's real experiences.¹²⁴

Concurrent with the literature, this recognises the paradox of focusing on discrete identity categories when addressing MID claims. In *Law v Canada* in 1999, the Supreme Court stated that discrimination claims positing an intersection of grounds can be understood as analogous to the grounds enumerated in section 15 of the Charter.¹²⁵ Effectively, this prohibits MID by law, authorising courts to address such claims. Canada represents a good example of a legal system that has recognised MID, but also acknowledged the need to focus on analysing the impact of discrimination and its underlying inequalities, as opposed to categorising it according to discrete identity grounds.

A handful of other states have legally recognised MID. The South African Constitution explicitly prohibits discrimination on more than one ground, contains a non-exhaustive list of grounds, and enumerates an unusually extensive list of grounds.¹²⁶ These three features allow South African courts to address MID claims. In *Hassam v Jacobs NO and Others*, the Constitutional Court found discrimination on the grounds of religion, marital status and gender.¹²⁷ Although this judgment was not framed in terms of MID, it shows that the Court can respond to situations of multiple disadvantage.¹²⁸ Serbia's Law on the

¹²² *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act 1982, s 15.

¹²³ *Mossop v Canada AG* [1993] 1 SCR 554, 645-46.

¹²⁴ *Egan v Canada* [1995] 2 SCR 513, 551.

¹²⁵ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 555.

¹²⁶ Constitution of the Republic of South Africa 1996 <<http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>> accessed 3 April 2018, s 9(3).

¹²⁷ *Hassam v Jacobs NO and Others* (CCT83/08) [2009] ZACC 19 [34].

¹²⁸ Sandra Fredman, 'A Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India' (European Network of Experts in the Non-Discrimination Field, European Commission 2012) 40.

Prohibition of Discrimination is also significant since it contains a non-exhaustive list of grounds and it explicitly prohibits MID.¹²⁹ However, it is not clear whether this has been upheld in its courts.¹³⁰

6. Conclusion

The literature on MID is largely critical of human rights law for its inaccurate understanding and inconsistent application of these concepts, a lack of data disaggregation, and its incessant focus on discrete identity categories which is not reflective of an intersectional approach to discrimination. This report has found that most of the six UN treaty bodies and three regional systems examined do recognise MID. However, there is considerable variation across these bodies in terms of the effectiveness of their approaches. Some misunderstand and misapply the concepts, and others are inconsistent in their approach. At the national level, Canada's approach to MID represents a good model. Its non-exhaustive list of grounds has allowed its non-discrimination provision to extend to MID; it has applied this understanding to numerous cases concerning such discrimination; and it has recognised the paradox of focusing on discrete, homogenous identity categories, instead calling for analysis of the impact of discrimination. Therefore, Canada closely represents in practice what the literature calls for in theory. International and regional human rights bodies could learn from Canadian jurisprudence on MID by expanding the scope of their treaties to recognise MID (where they have not already done so), applying analyses of MID consistently in their work (for example, in concluding observations, country reports, individual communications or cases), and finally, examining the impacts of discrimination as opposed to attempting to define discrimination in accordance with discrete identity grounds.

[Words: 5,152]

¹²⁹ Law on the Prohibition of Discrimination [Serbia] (2009) <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_128034.pdf> accessed 3 April 2018, arts 2(1), 13(5).

¹³⁰ Owing to the resource and language constraints of this report, a full analysis of cases concerning multiple and intersectional discrimination in Serbia has not been possible.

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