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Alexandrine Guyard-Nedelec

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*Equality and Human Rights Commission and Equality Act 2010: Trying to Map the Margins?*¹

Alexandrine Guyard-Nedelec

1. Introduction

In Britain, multiple discrimination and intersectional issues seemed high on the agenda in the period between the Equality Act 2006² and the Equality Act 2010³. The Equality Act 2006 provided for the creation of an umbrella body, the Equality and Human Rights Commission (Ehrc), which was meant to gather the three separate pre-existing equality bodies (Commission for Racial Equalities, Disability Rights Commission and Equal Opportunities Commission) and widen the scope of the protection offered by adding human rights to the protected characteristics. At the time of its creation, the Ehrc website used to include a page entitled «Why a single commission» and justified the merging of equality bodies for «tackling discrimination on multiple levels – some people may face more than one type of discrimination». One of the interviewees I met during the fieldwork I carried out for my PhD thesis even perceived intersectional inequalities as one of the key concerns of the then new body: «The new commission is actually very focused on what it calls multi-faceted discrimination. It is particularly looking for issues which are demonstrating multi-faceted discrimination. It is going through a thinking process, a learning process even, to understand exactly what that means»⁴. Yet, in its report «Is Britain fairer? The state of equality and human rights 2018», the term «intersectional» is hardly ever used: there are only three

¹ An earlier version of this paper was given at the conference organized by Vincent Latour and Catherine Pozzo at Université Toulouse Jean Jaurès (France) on October 26th 2018, titled *Rethinking Intersectionality in the UK: Theoretical, Contemporary and Comparative Perspectives*.

² <http://www.legislation.gov.uk/ukpga/2006/3/pdfs/ukpga_20060003_en.pdf> (accessed 1-8-2021).

³ <http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf> (accessed 1-8-2021).

⁴ A. Guyard-Nedelec, *Les Discriminations croisées à l'encontre des femmes juges et avocates en Angleterre et au pays de Galles (1970-2010): étude de l'intersectionnalité*, unpublished PhD Thesis, 2010, pp. 79-80.

occurrences of the term in a report verging on 300 pages⁵. To boot, those occurrences only refer to the limitations of the review and the difficulties encountered to gather intersectional data⁶. Britain may have been slowly mapping its margins, at least as far as anti-discrimination law was concerned, but the process seems to have stalled.

Similarly, during the consultation stage before the adoption of the Equality Act 2010, a number of associations and academics pushed for the introduction of a clause allowing for multiple claims, away from the traditional segmented approach to discrimination claims. The broader aim of this piece of legislation was to put together all the various anti-discrimination legal instruments (Race Relations Act, Sex Discrimination Act, Disability Discrimination Act, etc.), in the wake of the de-clustering move started with the creation of the Ehrc. In the end, the then New Labour government opted for the American solution, i.e. allowing for dual discrimination claims to be pursued (section 14), so as not to open Pandora's box⁷. The May 2010 general election resulted in a Conservative-Liberal Democrat coalition government led by Prime Minister David Cameron, less than a month after the new piece of legislation received royal assent. The coalition government immediately announced that the text would be put under review, that some clauses would not come into force right away, and that some may even be taken down, leading campaigners to lament that the text had been rendered «virtually toothless»⁸. This was the case with clause 14, the government making a decision «not to bring this into force as a way of reducing the cost of regulation to business»⁹.

Institutional and governmental resistance to the adoption of an intersectional approach to discrimination may be seen as following on the academic and activist critiques targeting the concept. Such critiques have surged since the concept gained popularity and its use expanded far beyond the context of its creation – Critical Race Theory and the US legal system¹⁰. Indeed, intersectionality has attracted so much attention that it is now being used in a wide array of disciplinary fields, ranging from sociology to literature or pedagogy, leading its detractors to describe it

⁵ Ehrc, *Is Britain Fairer? The State of Equality and Human Rights*, 2018, in <<https://www.equalityhumanrights.com/en/publication-download/britain-fairer-2018>> (accessed 1-8-2021).

⁶ *Ibidem*, pp. 119, 274, 276.

⁷ S. Fredman, *Double Trouble: Multiple Discrimination and EU Law*, in «Revue du droit européen relatif à la non-discrimination», no. 2 (2005), p. 19.

⁸ A. Hill, *Equality Law Rendered «Toothless» by Coalition Review*, in «The Guardian», 30 September 2010.

⁹ Cf. Ehrc website.

¹⁰ K. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in «Stanford Law Review», 43 (1991), no. 6, pp. 1241-1299.

disparagingly as a mere «buzzword», a term that has also been re-appropriated by feminists¹¹. Some academics, among them Patricia Hill Collins and Sirma Bilge, have condemned the depoliticizing and the «whitening» of the concept due to the neoliberal culture of diversity that has developed and that is sometimes more preoccupied with window-dressing than with substantial stakes¹². However, even though these concerns are shared by a number of academics, intersectionality remains a heuristically powerful concept; the «range of positions» it encompasses may be perceived as inspirational more than restricting¹³ and these concerns have not been the basis for the governmental rhetoric regarding the introduction of intersectional provisions in social policy.

Indeed, the cost issue seems to be of paramount importance in the debate on inequalities and the apparent decrease in the interest in equality and diversity issues. The fight against intersectional forms of discrimination has to be envisaged in the context of the aftermath of the financial crisis that hit the Western world in 2008 and led to drastic austerity measures and budgetary cuts in the UK. Budgetary concerns may thus appear as one of the practical difficulties linked to a de-segmentation of the fight against discrimination. In such context, I will look at the track record of these two anti-discrimination instruments, twelve years after the creation of the Ehrc and nine years after the enactment of the Equality Act 2010.

2. *The Ehrc: A Promising Start – An Ambivalent Appraisal*

The Equality and Human Rights Commission, an umbrella statutory body, was set up in 2006-2007 so as to fight against discrimination in a way that was meant to be less segmented than when the three previous equality bodies, the Commission for Racial Equalities, Disability Rights Commission and Equal Opportunities Commission, worked independently. Its aim was also to go beyond the reach of these three bodies by widening the scope, adding human rights to the protected characteristics and focusing on good relations between communities as well. It was conferred the «A»-rated status of National Human Rights Institution (Nhri). Intersectional discrimination was one of the areas that had been identified as one of the areas where the single equality body could make a difference.

The specific stakes of multiple and intersectional discrimination had already been explored at EU level. Indeed, the enactment of the Treaty

¹¹ K. Davis, *Intersectionality as Buzzword. A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, in «Feminist Theory», 9 (2008), no. 1, pp. 67-85.

¹² S. Bilge, *Intersectionality Undone. Saving Intersectionality from Feminist Intersectional Studies*, in «Du Bois Review», 10 (2013), no. 2, pp. 405, 407.

¹³ F. Anthias, *Intersectional what? Social Divisions, Intersectionality and Levels of Analysis*, in «Ethnicities», 13 (2012), no. 1, p. 4.

of Amsterdam (1997)¹⁴ allowed for EU anti-discrimination law to move beyond member-state nationality and sex only, and include gender, race and ethnicity, religion and belief, age, disability and sexual orientation¹⁵. Furthermore, Article 13 of the Treaty of Amsterdam included a commitment to tackle discrimination across inequalities instead of combating it along the lines of the separate categories¹⁶. Sandra Fredman's article, *Double trouble: multiple discrimination and EU Law* (2005), points to the thinking process that was going on within the sphere of EU law on how to incorporate an intersectional framework at policy level and within the organization chart of institutions. In such a context, there were high expectations concerning what the Ehcr could deliver in terms of tackling these complex forms of discrimination, both in Britain and at the level of the European Commission, which commented positively on the establishment of single equality bodies and promoted an «integrated equalities agenda» in the 2004 Green Paper *Equality and non-discrimination in an enlarged European Union*¹⁷.

When I completed my PhD thesis in 2010, I was therefore surprised to note that little had been achieved: no publications dealt with intersectionality or intersectional discrimination, and the terms were not listed in the categories helping people navigate the Ehrc website. On the contrary, the organization of the equality body and its website was along very traditional lines, reproducing the usual categories used in the field of anti-discrimination (sex/gender, race/ethnicity, disability, age, sexual orientation, etc.), seemingly oblivious of the intersections, margins and overlaps. It has to be acknowledged that it may not be very easy for the structure of an organization to reflect its intersectional preoccupations. Suzanne Goldberg has shown for instance, in the context of the United-States, that even within the broad-ranging American Civil Liberties Union, which is among the few American organizations not to focus on one specific category of people, «fields are divided by identity»¹⁸. Indeed, many people may share an identity trait and many people have plural identities; however, fewer people share the same combination of identity traits¹⁹. The observations she made ten years ago are still valid in 2019, although the organization now makes it clear it has incorporated intersectionality in its approach. A

¹⁴ <<http://europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>> (accessed 1-8-2021).

¹⁵ J. Kantola and K. Nousiainen, *Institutionalizing Intersectionality in Europe*, in «International Feminist Journal of Politics», 11 (2009), no. 4, p. 465

¹⁶ *Ibidem*, pp. 466-467.

¹⁷ *Ibidem*, p. 467.

¹⁸ S.B. Goldberg, *Intersectionality in Theory and Practice*, in *Intersectionality and Beyond*, edited by E. Grabham, D. Cooper, J. Krishnadas and D. Herman, London, Routledge, 2009, p. 129.

¹⁹ *Ibidem*, pp. 131-133.

keyword search on their website with the adjective «intersectional» provided with over 600 matches in February 2019, a good example of which may be their own description of the Aclu vision of gender justice: «Each goal is meant to address gender inequity in all its intersecting forms of discrimination. Gender justice is not possible if racism, transphobia, ableism, xenophobia, and other forms of injustice remain (Aclu)».

Nine years later, the remarks I formulated when completing my PhD are still valid: the structure of the Ehrc has not moved towards a more intersectional approach, not has its website, and though it has published over 100 reports, all of them available online, none explicitly focuses on intersectional or multiple forms of discrimination. It should be underlined of course that the absence of the term itself doesn't necessarily mean that such an approach is never adopted, but a more thorough search in the equality body's publications was enough to cast doubt on the will of the Ehrc to actually pursue an intersectional method. As I was not able to find studies, reports or academic articles assessing the work of the commission 10 years on – especially in terms of its successes or failures insofar as the de-segmentation of the fight for equality was concerned – I contacted the Ehrc research department in spring 2018 to ask whether they had carried out such work or were aware of the existence of such work. They answered negatively but mentioned that they would be interested in the results of my own enquiry. My disappointment was exacerbated when finding out that the latest triennial review of equality and human rights released by the Ehrc, *Is Britain fairer? 2018*, was not relying on an intersectional approach either and only mentioned intersectionality to underline the lack of intersectional data²⁰.

How to collect reliable intersectional data is of course a key issue and has been acknowledged as one of the major hurdles for a methodological use of intersectionality. In her landmark article *The Complexity of Intersectionality*, Leslie McCall²¹ had underlined the difficulties tied with the use of the concept as a research paradigm, which are inherent to the very idea of a holistic approach. Yet, if Britain's equality body does not try to implement ways of gathering intersectional data, it is to be feared that other institutions will prove even more reluctant.

The use or non-use of the terms «intersectional» and «intersectionality» may not be enough to assess whether or not an intersectional approach is carried out by an institution. Yet, the dearth of occurrences of the terms is very telling. As was analyzed by Kantola and Nousiainen, soft law documents «show the centrality of the language of “multiple discrimination”

²⁰ Ehrc, *Is Britain Fairer? The State of Equality and Human Rights*.

²¹ L. McCall, *The Complexity of Intersectionality*, in «Signs: Journal of Women in Culture and Society», 30 (2005), no. 3, pp. 1771-1799.

in the EU as opposed to “intersectionality”²² and the definition given to «multiple discrimination» in the 2007 European Commission report titled *Tackling Multiple Discrimination* opposes it to compound or intersectional discrimination. Indeed, it reads «A situation where discrimination takes places on the basis of several grounds operating *separately*» (my emphasis), whereas compound discrimination is additive and intersectional discrimination relies on the interlocking identity traits at stake. It might then be said that the ideas presiding over the establishment of the Ehrc as a single equality body contained the seeds of its failure to fully address the complex situations of discrimination faced by people whose identity is plural and thus combine several of the protected characteristics. And what of the Equality Act 2010?

3. *The Equality Act 2010, Section 14: Chronicle of an Announced Death*

The Equality Act 2010 was supported by the New Labour government and aimed at doing away with the piecemeal approach to anti-discrimination that had been gradually put in place since the 1970s. Even though the Equal Pay Act 1970 was enacted before Britain joined the European Economic Community in 1972, EU law very much buttressed the anti-discrimination legislation voted at Westminster²³. British legal protection against discrimination combined nine pieces of primary legislation (Acts of Parliament), over 100 regulations that did not have the same scope and did not apply to the same sectors, thus making it very difficult for people suffering from discrimination to identify clearly what the law protected them against, especially as those various texts had triggered more than 2,500 pages of guidance and codes of practice (Hansard, 2 Dec. 2009, col. 1228). This legal arsenal included the Sex Discrimination Act 1975²⁴, Race Relations Act 1976²⁵, Disability Discrimination Act 1995²⁶, which were all amended a number of times.

Legal protection was also provided for by the controversial Human Rights Act 1998, which is potentially extremely far-reaching²⁷. According

²² J. Kantola and K. Nousiainen, *Institutionalizing Intersectionality in Europe*, p. 468.

²³ S. Fredman, *Discrimination Law*, Oxford, Oxford University Press, 2002, p. 32.

²⁴ <<https://www.legislation.gov.uk/ukpga/1975/65>> (accessed 1-8-2021).

²⁵ <<http://www.legislation.gov.uk/ukpga/1976/74>> (accessed 1-8-2021).

²⁶ <<http://www.legislation.gov.uk/ukpga/1995/50/contents>> (accessed 1-8-2021).

²⁷ <<http://www.legislation.gov.uk/ukpga/1998/42/contents>> (accessed 1-8-2021). Although the European Convention on Human Rights and the European Court of Human Rights are not EU institutions, some confusion has been maintained, by Eurosceptics in particular, and the Hra (which integrates the principles of the Convention into British domestic legislation) has often been described as contributing to the loss of sovereignty of the UK, including in the Brexit referendum campaign in 2016.

to the Hra, any piece of domestic legislation breaching the provisions of the European Convention on Human Rights may be declared incompatible by judges when they cannot make a rights-consistent interpretation and sent back to Parliament so as to be amended (§ 4). Such declarations have no binding legal effect but the protection of human rights is further enhanced by an interpretive duty placed on judges to read and give effect to primary and subordinate legislation in a way that is compatible with the principles of the Convention (§ 3), and by specific obligations imposed on parliamentary procedure when introducing new legislation (§119)²⁸.

In the early 2000s, a number of texts complemented the protection against discrimination, notably the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003, resulting from the 2000/78/EC Directive, as well as the Sex Discrimination (Gender Reassignment) Regulations 1999 and the subsequent Gender Recognition Act 2004, together with the Employment Equality (Age) Regulations 2006 and Equality Act 2006, the latter notably introducing a gender equality duty applying to the public sector, similar to the race duty and disability duty already in force.

In 2007, the Labour Government issued a Discrimination Law Review titled *A Framework for fairness: proposals for a Single Equality Bill for Great Britain*²⁹, following up on a Governmental commitment that had been part of the Labour party manifesto for the 2005 general election to harmonize and simplify existing legislation and make it more effective³⁰. Even though the Discrimination Law Review failed to address the issue of multiple or intersectional discrimination and the related issue of the comparative approach to discrimination³¹, the responses received in the consultation period allowed for the introduction of a dual discrimination clause. It fell short from a complete victory for the organizations and academics that had tried to underline the importance of allowing for intersectional claims, but this concession was perceived as a compromise that could be a first step towards the legal recognition of intersectional discrimination.

Hence, once the review was over, Harriet Harman MP, Minister for Women and Equality, introduced the Single Equality Bill in April 2009.

²⁸ A. Kavanagh, *What's so Weak About «Weak-Form Review? The Case of the UK Human Rights Act 1998*, in «International Journal of Constitutional Law», 13 (2015), no. 4, pp. 1014.

²⁹ Department for Communities and Local Government, *Discrimination Law Review – a Framework for Fairness: proposals for a Single Equality Bill for Great Britain*, 2007.

³⁰ M. Malik, «Modernising Discrimination Law»: *Proposals for a Single Equality Act for Great Britain*, in «International Journal of Discrimination and the Law», 9 (2007), no. 2, pp. 74.

³¹ *Ibidem*, pp. 82-84.

After nine months in the House of Commons, the Bill reached the House of Lords in December 2009, was sent back to the Commons in April 2010 in what is known as «ping pong», and eventually received royal assent in April 2010 to become the Equality Act 2010³², barely a month before the general election took place which led to the Conservative-Liberal Democrat coalition.

The new Equality Act 2010 (section 4) established a list of nine protected characteristics deemed «intrinsic to an individual's dignity and autonomy»³³ – age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation. It was designed to apply in the workplace but also in the wider society and thus encompasses the provision of goods, services and facilities, public authorities and functions. Examples of the wide-ranging areas where discrimination falls in the remit of the Act include shops and restaurants, banks, local public services – such as libraries –, churches, schools and universities, medical services, housing, the police, the legal profession, etc.

Regrettably, the change in government quickly led to postponing the commencement date of some provisions, notably section 14, the dual discrimination clause, initially coming into force in April 2011, to alleviate the «cost of regulation for businesses»³⁴. In May 2012, Theresa May, who was then Home Secretary and Minister for Women and Equalities announced the result of the one-year review carried out by the coalition government of existing equality legislation. She expressed the view that «bureaucracy and prescription are not routes to equality. Overburdening businesses benefits no one, and real change doesn't come from telling people what to do» and that the new measures put forward struck «the right balance between protecting people from discrimination and letting businesses get on with the job»³⁵. For human rights and equality legislation specialists like Bob Hepple QC, although the Home Secretary had said a year before that «it [was] not the intention of the Government to abolish the Equality Act»³⁶, the coalition government

³² UK Parliament, *Equality Act 2010*, 7 October 2018, in <<https://services.parliament.uk/bills/2008-09/equality.html>> (accessed 1-8-2021).

³³ Judicial College, *Equal Treatment Bench Book*, 2013, 8 February 2019, in <<https://www.sentencingcouncil.org.uk/wp-content/uploads/equal-treatment-bench-book-2013-with-2015-amendment.pdf>> (accessed 1-8-2021), p. 2.

³⁴ Cf. Ehrc website.

³⁵ Home Office, *Bureaucracy scrapped under new approach to equality*, Press release, 15 May 2012, in <<https://www.gov.uk/government/news/bureaucracy-scrapped-under-new-approach-to-equality>> (accessed 1-8-2021).

³⁶ Hansard, 5 May 2011, col. 778.

was leading the Act to «death by a thousand cuts»³⁷, which was most preoccupying at a time when the financial crisis and austerity were hitting hard, as will be shown in the next section of the article.

Even though clause 14 was not entirely satisfactory, its rejection by the coalition government appears detrimental to people suffering from discrimination on more than one ground, who still have to compartmentalize their identity so as to fit in the boxes³⁸ of the nine protected characteristics, in a single axis approach, while this fails to encompass their lived experiences³⁹. Without embarking on extensive case law analysis, there is evidence that a number of discrimination cases are improperly dealt with by the legal system because of the formal impossibility to bring intersectional claims. Malik refers to two British cases involving overlap and intersections in her analysis of the Discrimination Law Review, namely *Bahl v. The Law Society* [2003] IRLR 799 (CA), and *Burton and Rhule v. De Vere Hotels* [1997] 1 I.C.R. 1 (EA 1); the list could be continued with more recent cases such as *O'Reilly v BBC & Anor* 2200423/2010 (ET) where a journalist who hosted the BBC TV show *Countryfile* was removed from the team when the show was moved to a primetime Sunday evening slot because she was an «older» woman (then 51), whereas her male co-presenter, John Craven (then 68) was kept on. Her claim on the grounds of sex was unsuccessful; the BBC was found to have acted in an ageist way but the intertwined dimension of the discrimination she had gone through was bypassed.

In some cases, though, judges have acknowledged that discrimination had occurred on the grounds of *both* race *and* sex, as in *De Bique v. Ministry of Defence* [2010]. In this case, the claimant argued that the disadvantage she was subjected to arose *both* because she was a female single parent soldier, required to be available for deployment 24/7, *and* because she was a Vincentian woman who was prevented from having a Vincentian relative live with her to help with childcare. The Employment Tribunal recognized that this *double* disadvantage reflected the reality of the situation and the Tribunal's view was confirmed by the Employment Appeal Tribunal (my emphases). Indeed, the EAT did underline that the Tribunal had not erred in the selection of the comparison pool, in its conclusions based on this comparison, and not erred in

³⁷ B. Hepple, *Why is the British Coalition Government Undermining the Equality Act and What Can be Done?*, in «Oxford Human Rights Hub», 10 January 2019, in <<http://ohrh.law.ox.ac.uk/why-is-the-british-coalition-government-undermining-the-equality-act-and-what-can-be-done/>> (accessed 1-8-2021).

³⁸ A. Guyard-Nedelec, «*Dans quelle case rentrez-vous?*» *Identité et intersectionnalité*, in «Revue   Interrogations  », *Penser l'intersectionnalité*, no. 20 (2015).

³⁹ M. Malik, «*Modernising Discrimination Law*»: *Proposals for a Single Equality Act for Great Britain*, pp. 82-83.

law either. The intersectional nature of the discrimination, in its intertwined dimension, may not be properly acknowledged by the judges but its double dimension certainly is, which is in line with what the legislator had in mind with the dual discrimination clause originally included in the Equality Act 2010.

The Fawcett Society, which focuses on gender equality, has tried to start the conversation on intersectional discrimination again, in the report it published in January 2018, where one of its recommendations is to allow claims on three grounds⁴⁰. As was the case with the dual discrimination clause, such a limitation can arguably appear like a trap for people with a plural identity, even if it may also be seen as a temporary solution aiming at a more comprehensive incorporation of intersectionality in the future. There is no doubt it would permit more satisfactory legal decisions, for instance in the *O'Reilly v. BBC* case aforementioned, which I believe is the very tip of an iceberg of similar cases that remain extremely hard to identify in the absence of specific search criteria in legal databases. Here again, mapping the margins proves a complex task and the practical application of intersectional principles is deeply flawed.

Unquestionably, neither the Equality Act 2010, nor the recommendation made by the Fawcett Society question the legal principle that underpins discrimination law in Britain, i.e. the comparative approach. Such an approach fails to take into account the structural dimension of discrimination, «in some cases [it] perpetuate[s] the exact harms – of hierarchy and stigma – that discrimination law and policy seek to address»⁴¹, it is unable to account for occupational segregation and the lesser value attributed to women's work in equal pay cases and, last but not least, it completely misses the point in intersectional cases. So as to adopt a fully intersectional approach, which should not be segmented but holistic, there is widespread consensus that it is necessary to move away from the comparator⁴² and find more flexible alternatives. Therefore, it may be argued that even if clause 14 had been implemented, or if the recommendation of the Fawcett Society ever came into effect, the Equality Act 2010 would still be a long way from being intersectional.

⁴⁰ Fawcett Society, *Sex Discrimination Law Review Final Report*, 8 October 2018, p. 11, in <<https://www.fawcettsociety.org.uk/sex-discrimination-law-review-final-report>> (accessed 1-8-2021).

⁴¹ M. Malik, «*Modernising Discrimination Law*»: *Proposals for a Single Equality Act for Great Britain*, p. 79.

⁴² S. Fredman, *Double Trouble: Multiple Discrimination and EU Law*; J. Kantola and K. Nousiainen, *Institutionalizing Intersectionality in Europe*, p. 466.

4. Austerity and Brexit: Making for Stark Disparities?

As I have argued, there may have been an initial flaw in the framing of the tasks of the British single equality body and the Equality Act 2010, in particular considering the focus on multiple as opposed to intersectional discrimination and the perception that the issue was peripheral, of secondary importance. Beyond these conceptual and legal considerations, and probably more importantly, the dislocation of both instruments was aggravated by the impact of the 2008 financial crisis that led to drastic austerity measures put in place by the Conservative-Liberal Democrat coalition government elected in 2010. Such deep budgetary cuts to public spending had not occurred since World War II⁴³ and they impacted all public services, from education to health to the legal system, etc., adding to the adversary consequences of the recession. Some have even shown that these austerity measures consisted in the largest welfare spending cuts since 1921-1924⁴⁴.

The consequences of this economic and political conjuncture were at least twofold. First, it had «a disproportionate impact on women, working families, jobseekers, Black ethnic minorities, the elderly, and disabled peoples»⁴⁵. Second, the budget of the Ehrc was slashed, from £70m when it was launched in 2007 – of which £62m were used, down to £55m in 2010⁴⁶, down to £21m for 2016-17, after the 2015 spending review which resulted in a decision to reduce the Ehrc budget by a further 25% over four years⁴⁷. Not only were Britons faced with major socio-economic challenges due to the financial crisis and austerity measures, but the watchdog meant to foster their rights became forced to operate on a shrinking budget that led to a stark reduction in staff numbers (from 465 employees in 2010 to 203 in 2016, i.e. a 56% reduction)⁴⁸. In particular, the Ehrc has had to close its regional offices and outsource its helpline, which comprised 70 employees and helped inform its strategic priorities. Ironically enough, the Commission was accused of targeting BAME and disabled staff for redundancies, while there were no visible minorities among the

⁴³ Oxfam, *The True Cost of Austerity and Inequality*, UK Case Study, 2013, p. 2, in <<https://www.oxfam.org/sites/www.oxfam.org/files/cs-true-cost-austerity-inequality-uk-120913-en.pdf>> (accessed 1-8-2021).

⁴⁴ A. Ishkanian, *Social Movements, Brexit and Social Policy*, in «Social Policy and Society», 18 (2018), no. 1, p. 152.

⁴⁵ B. Hepple, *Why is the British Coalition Government Undermining the Equality Act and What Can be Done?*

⁴⁶ Government Equalities Office, *Comprehensive budget review of the Equality and Human Rights Commission*, 2013, pp. 2-3.

⁴⁷ National Audit Office, *Briefing for the Women and Equalities Committee: The Equality and Human Rights Commission*, 2017, p. 8.

⁴⁸ *Ibidem*, p. 11.

senior management team, which further undermined the watchdog's credibility and legitimacy⁴⁹.

The cuts were in line with the requirements of the Treasury, which sought budget reductions of one third from all Departments as part of the coalition government spending review 2010. It should also be acknowledged that audits revealed some anomalies in budget management, with a reliance on expensive interim staff for instance⁵⁰. Yet, the extent of the cuts and the organizational transformation that ensued «have impacted the type and amount of work the Commission is able to do», as is underlined by the National Audit Office, which also highlights the uncertainty over future funding allocation as part of the key challenges the equality body is facing. Moreover, the independence of the Ehrc has been in jeopardy as funding was transferred from the Ehrc to the Government Equalities Office, prompting the UN accreditation body to express concern over the Secretary of State's discretion over the appointment of Board members and the allocation of funds⁵¹.

This sheds a crude light on the reasons why it has been so difficult for the Ehrc to collect intersectional data for its triennial review of equality and human rights: deprived of the possibility of using discretionary grants to fund specific research projects and with a shrunk workforce, the Commission has had to rely on existing data that is very rarely intersectional. Similarly, it has been required to «operate more strategically», which further reduces the incentive to put intersectional discrimination higher on the agenda. Indeed, the Ehrc must be more selective in the legal cases it takes on, taking on cases with the potential for the most impact and offering only limited assistance «where the law is unclear and the outcomes uncertain»⁵², whereas this is precisely the case with intersectional discrimination issues.

At the same time, the coalition government introduced a number of deregulatory employment law measures, under conditions of recession and accelerated globalization, and kept undermining the legal provisions set up to promote equality and fight discrimination. On top of clause 14 which was analyzed in the previous section, the Coalition removed the proposed introduction of a «socio-economic duty» to eliminate discrimination on grounds of social origin, employers' liability for harassment of staff by third parties, requirement for English public sector employers to carry out equality impact assessments, etc.⁵³.

⁴⁹ R. Syal, *Equalities Body Accused of Targeting BAME Staff For Redundancies*, in «The Guardian», 5 March 2017 (web).

⁵⁰ Government Equalities Office, *Comprehensive budget review of the Equality and Human Rights Commission*, p. 3.

⁵¹ National Audit Office, *Briefing for the Women and Equalities Committee*, p. 14.

⁵² *Ibidem*, p. 15.

⁵³ P. Scott and S. Williams, *The Coalition Government and Employment Relations*:

In the midst of this unravelling of equality and employment rights, Prime Minister David Cameron, who became the head of a Conservative-only government after the May 2015 general election, organized a referendum so as to know whether a majority of Britons wanted to withdraw from the European Union, as announced in the Conservative Manifesto 2015. The referendum took place in June 2016 after a campaign dominated by issues of sovereignty and the cost of EU membership on the Leave camp, whereas Remainers focused on the dire consequences of exiting the EU in a very negative tone, attracting criticism of scaremongering⁵⁴. 51.9% of voters opted to leave, which precipitated the country into an ongoing political crisis. David Cameron stepped down and Theresa May became Prime Minister in a tense context involving feuds and rivalry between a number of Conservative politicians. Theresa May, who had campaigned to remain in the EU, promised to «deliver on Brexit» but fluctuated between a «hard» and a «soft» exit. So as to bolster her parliamentary majority, she organized a snap general election in June 2017 which turned into a serious snub as the Conservative party lost 13 seats and she had to secure an alliance with the Northern-Irish Democratic Unionist Party so as to be able to govern the country⁵⁵. Ten days later, the first round of talks with the EU was launched, initiating the formal negotiations to trigger Article 50 of the Treaty on European Union, which states that «Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements». Since then, the British government has been engrossed in negotiations that seem to have carried off everything on their path and social issues have been neglected by MPs who are caught up in a seemingly never-ending saga. Media as diverse as «The Independent», «The Guardian», «The Evening Standard» or «The Belfast Telegraph» have published articles reflecting the lack of progress made on a series of pressing social issues such as housing, health, adult social care, etc., employing terms such «Brexit noise» and describing Brexit as distracting Theresa May from pressing problems.

Equality and discrimination are no exception to this observation. Additionally, there is no denying that from a legal standpoint, the perspective of Brexit is further damaging the intersectional potential of the Ehrc and Equality Act 2010. As Guerrina and Masselot warned, «exiting the EU

Accelerated Neo-liberalism and the Rise of Employer-Dominated Voluntarism, in «Observatoire de la société britannique», 15 (2014).

⁵⁴ H.D. Clarke, M. Goodwin and P. Whiteley, *Why Britain Voted for Brexit: An Individual-Level Analysis of the 2016 Referendum Vote*, in «Parliamentary Affairs», 70 (2017), p. 440.

⁵⁵ J. Elgot, *Tories Weren't Ready for Snap General Election, Theresa May says*, in «The Guardian», 28 September 2017 <<https://www.theguardian.com/politics/2017/sep/28/tories-werent-ready-snap-general-election-theresa-may>> (accessed 1.08.2021).

carries a substantial risk to the interests of traditionally marginal groups (including women) who have hitherto been covered by the EU legal framework»⁵⁶. The erosion of the safety net against discrimination has already started: the authors underline that in November 2017 the House of Commons voted against the amendments to the Bill aimed at safeguarding the rights established under the Equality Act 2010, which according to them «highlights the direction of travel under the May government».

Thus, the toxic combinatory succession of austerity and Brexit seems to have dealt a fatal blow to the deployment of an intersectional framework for equality and against discrimination.

5. Conclusion

To try and understand the state of limbo Britain has appeared to be in since the Brexit referendum, Ishkanian resorts to Gramsci's notion of «interregnum», a notion which describes a period of uncertainty during which an old system or order is dying and a new has yet to emerge⁵⁷. In Gramsci's words, «[t]he crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear»⁵⁸. Could it be the case that the setbacks of both the Ehrc and Equality Act 2010 are one of these morbid symptoms? The two equality instruments could have helped mapping the margins and certainly had intersectional potential, but appear to have been deprived of it by a combination of factors including lack of political will, vast budgetary cuts, and the unfathomable web of issues and repercussions raised by Britain's departure from the EU.

Devil's advocates may contend, though, that the narrow neo-liberal perspective that was interwoven in the framing of the Ehrc and Equality Act 2010, which derived from EU equality law with its focus on employment and its business-case approach⁵⁹, twisted the intersectional project from the very beginning, and that the rhetoric adopted by Theresa May as minister for Women and Equalities was simply lifting the veil on the darker side of both equality instruments. In her foreword to her proposed reform for the Ehrc in 2011, the language she used made it clear that economic interests came before any ethical consideration – «Equality and human rights are fundamental to building a *strong economy* and a free and

⁵⁶ R. Guerrina and A. Masselot, *Walking into the Footprint of EU Law: Unpacking the Gendered Consequences of Brexit*, in «Social Policy and Society», 17 (2018), no. 2, p. 319.

⁵⁷ A. Ishkanian, *Social Movements, Brexit and Social Policy*, p. 155.

⁵⁸ A. Gramsci, *Selections from Political Writings 1921-1926*, London, Laurence and Wishart, 1978, p. 276.

⁵⁹ J. Kantola and K. Nousiainen, *Institutionalizing Intersectionality in Europe*, pp. 467-468.

fair society»; «we need to work with all sectors of society, including *businesses*, the voluntary sector and wider civil society»; «the Commission has struggled to deliver against its remit and *provide value for money*»; «the Ehrc has not been *cost effective* for the taxpayer»⁶⁰. Is there no alternative?

Equality and Human Rights Commission and Equality Act 2010: Trying to Map the Margins?

This article intends to question the impact of two British anti-discrimination legal instruments, namely the Equality and Human Rights Commission (Ehrc), provided for by the Equality Act 2006, and the Equality Act 2010. Has their implementation allowed for a change in perspective in the fight against discrimination, and more specifically intersectional discrimination, in Great-Britain? Have they helped mapping the margins? Answers to these questions must take into account the social and political instability of the country, which was first hit by the financial crisis, triggering austerity measures, and then by the lengthy Brexit process. The article thus intends to shed light on some of the difficulties the concept is faced with when put into practice.

Keywords: Intersectionality, Margins, Austerity, Anti-discrimination Law, Brexit.

Alexandrine Guyard-Nedelec, Institut des sciences juridique et philosophique de la Sorbonne, Université Paris 1 Panthéon-Sorbonne, 37 Boulevard Port-Royal, 75013 Paris, alexandrine.guyard-nedelec@univ-paris1.fr.

⁶⁰ Government Equalities Office, *Building a fairer Britain: Reform of the Equality and Human Rights Commission*, 2011, p. 1 (my emphases).

