CHAPTER 1

Introduction

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One of the most pressing and seemingly intractable questions of the contemporary age is how to accommodate difference. In global terms, this question has centred most prominently on differences constructed from so-called 'innate' or 'immutable' human characteristics, such as sex and race. From these contemplations have emerged a wealth of legal concepts that, in various ways and degrees, attempt to circumscribe the impulse to attach negative or positive qualities to markers of difference and to withhold from or confer on individuals public goods according to whether they possess 'desirable' or 'undesirable' differences. Thus, as a result of a proliferation of international, regional and domestic rules governing equality and non-discrimination, which began from the second half of the 20th century, the question of how to treat difference has become, fundamentally, a question of law. Such laws that exist, in form and in application, must be viewed as the outward signs of contesting stances on how differences are produced and how they should be valued.

At one end of the spectrum, formal equality perspectives pertaining to the legal regulation of discriminatory practices demand that the law views differences as elements that can be abstracted from an individual, enabling a distribution of goods between persons of, for example different races or religions equally, because—successfully dispossessed of those differences—they become 'neutral' subjects before the law, pursuing the same outcomes. At the other end, substantive equality perspectives view the task of the law as being

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to acknowledge and preserve difference, eradicating instead the processes that lead to the stigmatisation and stereotyping of differences. Against an evolving list of identifying features that typically prompt unequal treatment, such as—in addition to race and sex—age, disability, gender reassignment and marital status,[1] substantive equality perspectives also orient toward dismantling those social structures that present barriers to individuals who, precisely because of the differences between them, may legitimately pursue very different outcomes.

It is not the purpose of this introduction (or of the volume in general) to chart the fluctuating influences of these two perspectives on the development of the various legal frameworks governing equality and non-discrimination; nor do we intend, by naming formal and substantive equality, to deny the existence of more nuanced positions along the spectrum on how the law should address discriminatory practices. Instead, we begin our intervention from the standpoint that the present phase in equality and non-discrimination law is one that is more aligned to substantive equality visions. In terms of the treatment of difference, the prevailing wisdom is that, to quote Sandra Fredman, 'the problem is not the diversity of characteristics, but the detrimental treatment attached to them. Thus the aim should not be to eliminate difference, but to prohibit the detriment attached to such difference, preferably by adjusting existing norms to accommodate difference' (2016: 70).

Spanning a range of public and private institutions, including universities (Bourne & Tuitt), so-called 'magic circle' law firms (Chronopoulou & Whyte), the police (Kandelia), financial services (Vasileiadou) and immigration services (Smith), the various contributions to this volume enter and extend the extant debate from the vantage point of law's engagement with racial difference.

The re-theorising of foundational concepts like race and difference and emerging concepts like diversity and inclusion which this collection undertakes rightly entails revisiting older theories: theories that can be read anew or incorporated in different contexts. Thus, it will be seen that the chapters are inspired by some well-established theories, notably, the theory of intersectionality first articulated by Kimberlé Crenshaw (1989). Our understanding of difference as a concept that has been significantly shaped by the law brings the theory of intersectionality back to the specific site of equality legislation, as Crenshaw originally intended. Additionally, underlying several chapters is the persistence in which different property values have been ascribed to whiteness in contrast to blackness. As many chapters demonstrate, this racial schema is evident even in ostensibly progressive diversity and inclusion initiatives. Although published long before the language of diversity and inclusion began to dominate discourses on equality and non-discrimination, Cheryl Harris's (1993) article 'Whiteness as property' remains an indispensable intellectual resource.

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[1] These features are sometimes referred to as 'protected characteristics'. See, for example, section 4 of the UK Equality Act 2010.

Although critical of the law and informed by a number of interdisciplinary critiques of existing laws and legal institutions, this volume sees the law—as it is typically manifested in legislation, case law and the intervention in various legal arena of legal practitioners (broadly conceived to include academics and activists, for example)—has still a leading role to play in tackling racial discrimination, harm and violence. Moreover, as the opening lines to this introduction indicate, the volume lays emphasis on the fact that questions pertaining to how the law negotiates the differences that we highlight are, to a greater or lesser degree, of global import. In Keane's words 'discrimination is international between states, as well as national within states' (Chapter 2, pp28–29). Thus, whilst more than half of the chapters draw evidence from institutions located in the UK and the US, the volume opens with two chapters which explore how racial equality legislation is conceived and implemented at an international level.

The Particularity of Race Discrimination

The number and range of human and social features that are recognised as prompting discriminatory and violent acts from both private citizens and organs of government are growing. In the contemporary world, for example, disability, age and transgender discrimination are as prominent in the work of the courts and in public and policy discourses as is discrimination based on racial difference. Within a context of multiple and interlocking sites of discrimination, a decision to focus attention on one axis requires explanation. This volume is primarily concerned to probe how differences are mediated in law, and, in this light, it was important for the various contributors to highlight, first and foremost, that the question of racial difference has been at the heart of the earliest articulations of the concepts of equality and non-discrimination. Here, we are reminded of Derrida's provocation to scholars to carefully trace and document the ways in which 'interval, distance, *spacing* occur … actively, dynamically and with a certain perseverance in repetition' (1982: 5). Thus, the focus of the volume is, in large measure, a response to the very evident 'perseverance' in which lines are drawn between individuals and their life opportunities on the grounds of their belonging to 'undesirable' communities of colour. However, also uppermost in the minds of the contributors was the understanding that alongside the long and troubled history of racial violence and discrimination have been active forms of resistance, which have been partially captured in various academic and activist texts. This has enabled the contributors to incorporate insights from a rich archive of analysis on the various ways in which 'interval, distance … among … different elements' (Derrida 1982: 260) are constructed when markers of difference are considered undesirable. Whilst the archive which the collection draws on is undoubtedly propelled by a history of the social construction of racial difference, the chapters bring insights from the archive that exceed the particular instance of racial

difference and discrimination, and thereby offer accounts and interrogations which will also shed light on the mechanisms by which difference is conceived and operationalised in other equality spheres.

The substantive part of the volume opens with a chapter by Keane which provides an account of the contribution to continuing efforts to promote and instantiate an ethic of 'global racial equality' (Chapter 2, pp13–32) of one of the earliest legal instruments, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Keane's analysis reveals that, in spite of the Treaty's near-universal acceptance, and the 'immense symbolic and legal significance' (ibid., p28) it has acquired since its adoption in 1965, discrimination and violence directed toward racial and ethnic minorities persists. Often this emerges in the context of a clash of fundamental rights, which the chapter that follows, by Vasileiadou, highlights. Vasileiadou demonstrates that one contemporary context in which this 'clash' is evident is the global legal services market. Participation rates in the financial services markets by actual and potential entrepreneurs of Muslim origin have been compromised by regulatory measures imposed on financial services providers with the ostensible aim of combatting terrorism. Vasileiadou shows how measures designed to secure peace and security by, in part, imposing financial penalties on financial services providers for failures in monitoring the uses to which funds they hold on behalf of clients are used, has led to breaches of the equally fundamental right of non-discrimination. This is because 'major banks prefer to exclude customers than face liability, as money laundering or terrorist financing accusations can harm their reputation' (Chapter 3, p42).

Both chapters critically reflect upon how the law operates and how it can be strengthened and improved. For Keane, the absence of binding judgements and enforcement mechanisms from the Treaty's infrastructure is to be regretted. This weakness notwithstanding, Keane's chapter demonstrates how ICERD has used its power to make recommendations, issue concluding observations and activate early warning systems and measures to 'give support and strength to … international NGOs and civil society … [and to] … [provide] a voice … at the UN and communicate directly to the State signalling … the voices of those most affected by racial discrimination' (Chapter 2, p28). Vasileiadou highlights the impact that exclusion from financial markets has on an individual's access to legal institutions and therefore their access to justice, finance being 'the main and sometimes only means to exercise several fundamental rights … [a] person with no bank account cannot find an "official" job and "officially" be paid, cannot rent a house or ask for medical care. We could say that a person with no bank account does not "officially exist"' (Chapter 3, p42). Vasileiadou suggests that, in the absence of the law, the task of exposing the racially discriminatory acts and decisions of financial services providers across the globe has been left to the media.

Other chapters in the volume highlight the still pervasive nature of racial violence and discrimination from the point of view of national laws. For example,

Kandelia's exploration of UK police 'stop and search' policies and practices reminds readers of an area of state activity which has consistently made communities of colour 'hyper-visible' from the moment that they arrived in countries of settlement. Kandelia's chapter examines how UK police attitudes to racial minorities have been expressed in the operationalisation of stop and search policies from the so-called 'sus' laws emanating from the Vagrancy Act 1894 to the present-day provisions under the Police, Crime, Sentencing and Courts Act 2022. A key focus of the chapter is how—in pursuance of racial equality—the law attempts to regulate these interactions between police and minority communities. Kandelia concludes that 'every year, the statistics tell the same story: people from ethnic minority groups are overrepresented in the figures' (Chapter 8, p171) on police stop and search. In common with other contributors to the volume, Kandelia assesses the effectiveness of the law *per se* in achieving racial justice in the context of how black and brown communities are policed, noting—in similar terms to Vasileiadou—that media outlets often prove to be a better regulator of the use of stop and search than the law.

Keane, whose chapter we discussed earlier in this introduction, also addresses the question of police violence. Writing of the unlawful killing of George Floyd, Keane notes that the ICERD 'has long signalled its deep concern with the issues raised by "Black Lives Matter" in the United States' (Chapter 2, p27). Continuing the theme of how international legal instruments can be part of the beginnings of a global ethic of racial justice, Keane argues that the ICERD's interventions undoubtedly influenced the terms of what emerged as a global debate about race and racism which extended beyond the theme of police brutality to encompass the question of how communities of colour are represented in institutional settings. Kandelia documents police practices toward racial minorities—especially young black men—which have resulted in their huge over-representation in prisons. Together, these chapters highlight the fact that racial discrimination and violence has persisted throughout virtually every phase of equality legislation.

Immigration is another context in which racial difference has become a fundamental feature of its institutional ordering in Western democracies, and this is highlighted in Smith's chapter. It centres on the controversial immigration policies of the Trump administration in the US, and the 'hostile environment' policies in the UK (especially associated with the former UK Prime Minister, Theresa May's time—both in that office and before as the UK Home Secretary). Both sets of policies, to a greater or lesser extent, received the endorsement of the highest domestic courts, in spite of their racially discriminatory impacts. As Smith notes, 'the US Supreme Court's … legal interpretation … departed from both academic and popular opinion on the fundamental question of what constitutes discrimination' (Chapter 9, p180). As to the 'hostile environment' policies, they were condemned by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance for their tendency to capture and punish racial and ethnic

minorities with clear legal entitlements to be in the UK, with the right to work and seek recourse to health and housing services which accompanies such entitlements. These basic rights were found to have been wrongly withheld in defiance of the laws governing race discrimination. Referring also to the Windrush scandal, in which Caribbean migrants arriving in the UK between 1948 and 1973 as Commonwealth citizens with full rights to settle, live and work in the UK without restriction were denied these rights due to the lack of paperwork explicitly recognising these entitlements, Smith argues that both the US and UK policies are 'popularist' in that they form part of a 'political transaction with subjective individual voters [that seeks to] maximise their partial, self-interested concerns in return for their committed political support' (ibid., p195).

Being Different and Making a Difference: An Interrogation of Diversity and Inclusion Practices

In the contemporary landscape, the commitment to substantive equality requires more than that differences—whether ostensible, such as race, or non-ostensible, such as with certain forms of disability—are acknowledged as valuable personal and social attributes. It also requires that social institutions take steps to ensure that they are inhabited, in numbers proportionate to their numbers in society, by the presence of individuals who hitherto have been under-represented in those institutions precisely because of their perceived negative differences (diversity). Further, institutions are required to take steps to ensure that once in the institution, those 'marginalised' individuals are made to feel a full part of the institution—able to shape its future direction (inclusion). Thus, 'diversity' and 'inclusion' are terms that have become synonymous with equality and have been the subject of much academic analysis and criticism. Its premise is aptly and succinctly expressed by Verna Myers in a 2016 address to the Cleveland Bar Association: 'Diversity is being invited to the party; inclusion is being asked to dance.'

One way in which this volume departs from other works that address diversity and inclusion initiatives and practices is in its suggestion that whilst greater focus on inclusion initiatives would go some way to improving the institutional experiences of persons of colour, the position of these individuals is compromised and will remain so for as long as diversity is wedded to the idea that the presence of individuals of colour in institutions will lead to positive change in the racial ideologies and structures that underlie those institutions. To put it another way, it is generally and largely uncritically assumed that difference should make a difference, and it is the normative relation between *being different and making a difference* that the chapters in this part of the collection encourage us to explore. As stated earlier, whilst the collection's focus is on the treatment of racial difference, the idea that difference should make a difference to exclusionary ideologies and structures is a philosophy that extends

to other marginalised groups. In addition, then, to interrogating an assumption that, we argue, has not been sufficiently attended to in the extant literature on diversity and inclusion, the collection also offers a framework of analysis that could be utilised by those writing about non-racial markers of difference, including those markers that have not yet assumed the status of 'protected characteristics', such as class, and, to a large extent, nationality.

When we speak of 'difference making a difference', we speak of a widespread and largely accepted idea that a key justification for diversity and inclusion initiatives is that those once excluded from institutions can *and should* bring about positive institutional change. The way that this change may come about is variously articulated: their experiences of exclusion can be drawn upon by the institutions to dismantle exclusionary structures, or their presence may improve the ratio between the members of institutions with diverse characters and those individuals or groups that the institution is intended to serve. However articulated, the expectation is that those marked as different and therefore hitherto undesirable and unwanted members of an institution cannot expect to join such institutions with the ambition of simply improving their economic and professional standing and job satisfaction. Rather, they are assigned a task that arguably eclipses the personal desires that animate other organisational members who are not marked out as different because they appear to conform to the dominant norm. The additional task assigned is intimately connected to an idea that difference should impel or animate difference. We see this idea performed in action whenever black or Asian government ministers concerned with matters of immigration are publicly criticised whenever they implement, or are otherwise seen to support, racially exclusionary immigration policies. Implicit and sometimes explicit in these criticisms is that, unlike non-racialised immigration officials, black and Asian officials should not have the option to capitulate to policies they might not sympathise with because to do so would further their careers. Perhaps even more problematically, the criticism fails to recognise that the pervasive nature of racial ideas and practices—their deep embeddedness in all institutions—will inevitably result in individuals of colour struggling in equal measures with their white counterparts to disentangle their own ideas and practices from the exclusionary frameworks that may have become all too familiar, and thus may find it easier to immediately navigate than would be more desirable, inclusive frameworks.

In *Demography, Discrimination and Diversity: A New Dawn for the British Legal Profession* Donald Nicholson revealed that statistics show that 'in England and Wales the number of ethnic minorities now substantially exceeds their general social presence not just in terms of admissions but also total numbers' (2016: 207). In addition to supporting the prevalent 'inclusion lagging behind diversity' explanation for the fact that, despite their representative numbers, black, Asian and other racial minority 'trainees feel far less comfortable than whites in their work environments' (ibid.: 208), not least because many face the double discrimination of race and class, Nicholson offers a mild

but still welcome challenge to the idea that individual differences should result in positive institutional change, arguing that, 'there is no guarantee that lawyers from disadvantaged communities will accept that they owe special duties to members of their original communities' (ibid.: 219). He goes on to highlight the inequity that emerges when 'the burdens of remedying social injustice [are placed] on those who have had to struggle to overcome such injustice in order to become lawyers, leaving white, middle-class lawyers to pursue their careers and private lives unhampered by such duties' (ibid.).

In light of the many complexities explored above, the volume's authors offer different theories of race – ones that attempt to account for both the potential positive and negative outcomes of racial diversity and inclusion initiatives. Overall, they combine to create theories of difference that can interrupt what Derrida speaks of as the repetitive cycle in which distance is produced between various 'differents' (1982: 5). We do not claim to have produced such an overarching theory in this collection, but by interrupting, *whilst not absolutely repudiating*, the link between *being different* and *making a difference* we hope to begin an important conversation.

Thus, many of the chapters begin from the premise that diversity and inclusion are dominant concepts driving contemporary equality and racial justice measures. They examine how diversity initiatives have increased the presence of communities of colour in public and private institutions, including by offering empirical (Whyte, Chapter 5) or partially empirical (Bourne, Chapter 6; Chronopoulou, Chapter 4) accounts of diversity initiatives operating in various prominent public and private institutions. However, the key question underlying all chapters is that of the relation—theoretically and empirically—between diversity and inclusion and equality and justice. What the chapters highlight is that this relation is contingent and inherently problematic, and if the complexities of the relation are not well understood by those driving racial diversity and inclusion initiatives, such initiatives could/will reproduce and heighten old/existing forms of racial exclusion. In this vein, several of the chapters offer a reading of the current diversity and inclusion orientation of the general substantive equality doctrine as one that continues the racial disadvantage of communities of colour either because they remain 'invisible' in various key institutions (Bourne, Chapter 6; Chronopoulou, Chapter 4; Vasileiadou, Chapter 2) or because, conversely, they are 'hypervisible' (Kandelia, Chapter 8; Tuitt, Chapter 7).

Chronopoulou's chapter (Chapter 4) begins a series of interrogations into the way in which diversity and inclusion policies are conceived and implemented. Drawing on a sample of recruitment material from the 'upper echelons' of UK solicitors firms and barristers' chambers, Chronopoulou shows how these firms construct an image of the 'diverse' aspiring lawyer as being one who participates in certain forms of consumption: one who embraces or is willing to embrace a certain lifestyle—such as gym attendance, theatre going and

fine dining. Whilst this advertising material 'creates the appealing impression of an all-inclusive workplace and culture' (ibid., p68), this seeming cultural diversity is in practice expressive of the 'consumptions … of a … lifestyle associated with a privileged, predominantly white elite' (ibid., p61). Here, diversity and inclusion are attained through 'the portrayal of predominantly "white" aspects of lifestyles … [and] the tactful avoidance of reference to different lifestyles which would eventually challenge that "whiteness"' (Chapter 4, p69). In Chronopoulou's view, inclusion and diversity in the UK's elite law practices entails just the minimum that the law demands. Chronopoulou urges scholars concerned with the question of racial diversity in the legal profession to give more attention to how racialised persons are excluded by the emphasis, during the socialisation process, of specific 'practices of consumption'. Ultimately, Chronopoulou argues that the current conception of diversity in the legal services arena has led to a position in which race constitutes 'just another commodity in the legal services market' (ibid., p67), one in which racial difference is sometimes negatively and sometimes positively deployed.

As previously stated, the volume interrogates, but does not completely reject, the idea that being different and making a difference are constitutively linked. This is demonstrated especially in Bourne's chapter, which argues—in common with many other scholars and higher education policy specialists—that the potential for diversity initiatives to become another means through which racial discrimination is perpetrated is essentially because 'inclusion' initiatives currently lag behind 'diversity' initiatives—because, in other words, institutions recruit individuals of colour into institutions with structures that lead to their internal marginalisation, including through the implementation of directly or indirectly discriminatory policies. Writing in the context of the UK university, Bourne argues that in terms of the share of academics of colour currently employed in universities and the statistics on the progress of students of colour toward an academic career, diversity is happening, but inclusion remains a distant aspiration. Outlining the many obstacles in the way of inclusion—such as the failure of universities to take responsibility for disparities in degree outcomes of university students of colour in comparison with their white counterparts—Bourne explains why, in her view, true 'ethnic diversity is good, and worth striving for' (Chapter 6, p114). The chapter examines the role of the law in ensuring that diversity policies are matched with inclusion policies. In this regard, Bourne criticises what she sees to be the progressive weakening of the Public Sector Equality Duty (PSED) under section 149 of the Equality Act, which, if strengthened would place the onus on academic institutions to undertake the work needed to achieve inclusion—which is currently reliant on academics of colour pursuing individual complaints. However, Bourne also cautions against over-reliance on the law to resolve the problems of deep-seated discrimination that is prevalent in UK society (ibid., p130).

The chapter which precedes it, by Whyte, questions the extent to which large UK solicitors firms, especially those with a commercial clientele, can evidence a link between particular diversity and inclusion initiatives and a more racially inclusive organisational culture. Focusing on one initiative that has attracted considerable attention, the Freshfields Stephen Lawrence Scholarship (FSLS), Whyte's scrutiny of the available data draws attention to some of the ways in which diversity initiatives can reinforce exclusionary practices. For example, the eligibility criteria for the FSLS is that the male, black (African, African-Caribbean), or mixed race candidates are 'exceptionally talented' (Chapter 5, p86), recalling to mind the oft-cited claim that black (and Asian) individuals must be twice as talented as their white counterparts to gain access to the most financially lucrative opportunities in the legal services market. Whilst the FSLS and others like it have undoubtedly improved the rates of entry of those they target into the commercial law sector, progress to senior positions and partnerships remains 'quite stagnant' (ibid., p104). To ensure that diversity talk and action is matched with similar levels of energy at the inclusion level, Whyte argues that 'firms must … publicly *evidence* how their initiatives, practices and policies work on the ground and fundamentally whether their workplace culture actually supports, promotes and sustains ethnic diversity' (ibid., p105).

Concluding this theme, Tuitt's chapter is concerned with the data collection exercises that invariably accompany diversity and inclusion initiatives. Like Bourne's chapter, Tuitt's is located within the UK university setting. Drawing on a number of government-supported investigations into the experiences and academic achievements of students of colour, the chapter draws comparisons between contemporary data collection exercises and the ways and means by which a distorted 'knowledge' of racial minorities had been acquired and disseminated in earlier colonial settings. The main purpose of Tuitt's chapter is to demonstrate how these official reports paint a negative picture of students of colour as being inherently resistant to higher learning and that these portrayals are entirely compatible with institutional discourses and strategies ostensibly aimed at encouraging and supporting racial diversity.

The Limits of Racial Justice

In light of the discussion of diversity above, it is noteworthy that three of the chapters in the volume (Kandelia, Chapter 8; Smith, Chapter 9; Vasileiadou, Chapter 2) provide accounts of the *presence* of individuals and communities in which change, especially in the immigration process (Smith), has led to greater, not lesser, exclusion of black and brown communities—and greater levels of violence directed toward them—in spite of an increased representation of black, Asian and other racial minority police, immigration officials and participants in the financial services market. The question which these

chapters prompt is whether concepts like equality and justice—and relatedly the positive force that diversity and inclusion initiatives might offer—reach their limits when they encounter the non-citizen (migrant) or the compromised citizen (criminal/terrorist). Communities of colour and individuals are disproportionately exposed to being constructed according to the categories of migrant, criminal or terrorist, whether or not they inhabit them in fact.

The ease with which visible racial minorities can be constructed as unlawful immigrants was recently demonstrated by the UK Windrush scandal in which the descendants of individuals who had arrived in the UK from the Caribbean in the 1950s and 1960s, and who since had acquired indefinite leave to remain in the UK, were, following the enactment of the UK Immigration Act 2014, effectively reclassified as illegal immigrants by the UK Home Office with the consequence that they were dispossessed of jobs, homes and, in several cases, deported from the UK to countries they had not resided in since early childhood. In short, all three chapters demonstrate how far away the law is from managing differences that are seen to threaten the boundaries of the nation.

It is on the question of the limits of racial justice that the volume ends. Its concluding chapter, by Smith, prompts readers to consider whether the 'global ethic of racial justice' that was invoked in the opening chapter, by Keane, reaches its limit at the boundaries of the citizen/non-citizen distinction. In examining this question, Smith explores what philosophers such as Kant, Rawls, Dworkin and Nagel have contributed to contemplations on whether it is 'justifiable, or merely morally permissible perhaps, for nation States to grossly restrict … entitlements in pursuit of their own national self-interest before the moral duties we owe to others from outside our own political community' (Chapter 9, pp181–182). Drawing on these philosophical accounts, Smith concludes that highly restrictive immigration policies of the kind exemplified in the US and by the UK's hostile environment measures fail the test of legitimacy unless the explanations behind them—the justifications for their existence—are understood and accepted by those whose rights are to be curtailed or erased by them.

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