

Intersectionality

I. Introduction

[1] The concept of intersectionality has emerged from a criticism of traditional approaches of anti-discrimination and equality law and policies, which usually focus on disadvantage, exclusion and oppression ‘along a single categorical axis’ (Crenshaw [1989] at 140; → Discrimination, Prohibition of). The concentration on single categories – in the case of gender discrimination on the category of gender, in the case of racial discrimination on the category of race – was criticized for neglecting the diversity and complexity of different experiences and positions within these categories as well as focusing on specific privileged group members and disregarding the experiences and situations of marginalized members of

the group. Kimberlé Crenshaw, a black feminist who introduced the term ‘intersectionality’ in a seminal paper in 1989, pointed out that:

this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.

(Crenshaw [1989] at 140)

[2] Intersectionality was therefore introduced not only to challenge the marginalization of black women in anti-discrimination law, it was also supposed to uncover the suppression of black women in feminist and anti-racist theory and politics (Carbado *et al* [2013]).

[3] Since then, intersectionality has had a major impact in the academic field as well as in political discussions and practice. Some scholars call it ‘the most visible and enduring contribution that feminism, and in particular black feminism, has made to critical social theory’ (Cooper [2016]) and emphasize that the consideration of intersectional discrimination ‘allows the law to begin to respond to the full depth of discrimination as it is experienced’ (Smith [2016] at 98).

[4] Yet, despite the fact that intersectionality has become a buzzword in academic theory and political and legal practice, several critical issues remain. To begin with, there seems to be a lack of agreement on what the concept of intersectionality means exactly and whether the complexity, which is embraced by the concept, also contributes to its definitional elusiveness. Several authors have pointed out various challenges of the concept such as ‘a lack of defined intersectional methodology’ (Nash [2008]) and ‘unsolved theoretical dilemmas’ (Walby, Armstrong and Strid [2012] at 227), including the existence of a ‘definitional dilemma’ (Collins [2015]). Some even wondered whether the concept has now reached ‘the limits of its potential’ (Conaghan [2009]) or has ‘outlived its analytic usefulness’ (Cooper [2016]).

[5] This contribution will discuss the most important conceptual starting points as well as points of criticism and conceptual implications of the concept of intersectionality. It will also outline the application of intersectionality in the human rights context, in particular within the → United Nations (UN), the → European Union (EU) and the → European Court of Human Rights (ECtHR),

and discuss some of its most crucial challenges concerning the practical implications of the concept.

II. Conceptual implications

[6] As indicated above, the concept of intersectionality was coined by Kimberlé Crenshaw in two ground-breaking publications: *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989) and *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color* (1991). The starting point of Crenshaw is the observation that the exclusion and marginalization of black women can neither be exclusively reduced to the category of gender nor to the category of race: ‘Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated’ (Crenshaw [1989] at 140).

[7] The concept of intersectionality as outlined by Crenshaw raises questions concerning traditional identity politics, which ‘frequently conflates or ignores intragroup differences’ (Crenshaw [1991] at 1242). Intersectionality rejects the idea that the identity of individuals can be reduced to one stable social category and that persons belonging to a group labelled with the same category necessarily share the same experiences, interests and positions. Intersectionality thus profoundly challenges the idea of group uniformity and underlying essentialist assumptions, which seek ‘to fix the characteristics of a specific identity such as race or gender’ (Hancock [2007] at 65). Instead, the term ‘intersectionality’ refers to the notion that individuals are positioned at the intersection of multiple social categories. The focus on only one category creates an invisible hierarchy of privileges and disadvantages among people labelled with the same identity category. Intersectionality embraces the notion of multidimensional and multifaceted social structures and stratifications in which an individual is positioned. ‘At its root, intersectionality posits that different dimensions of social life (hierarchies, axes of differentiation, axes of oppression, social structures, normativities) are intersecting, mutually modifying and inseparable’ (Sigle-Rushton and Lindström [2013] at 131).

[8] Thus a crucial point of the concept is that it draws the attention to the interaction of different

dimensions of social inequality. The experiences and positions along different social axes are not just added but are conceptualized as creating specific disadvantaging circumstances and positions that shape experiences and scope for action in a unique way. Crenshaw illustrates this point by discussing the dimension of structural intersectionality, on the one hand, and political intersectionality, on the other. With the example of domestic violence against black women Crenshaw highlights that structural intersectionality, which refers to ‘multilayered and routinized forms of domination that often converge in these women’s lives’ (Crenshaw [1991] at 1245), means that ‘intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles’ (ibid. at 1246). The dimension of political intersectionality points at the fact ‘that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas’ (ibid. at 1251-2). Denying the recognition of intersectional experiences leads not only to inadequate policy interventions but also to inadequate political representation.

[9] There are several topics which played a significant role in the debate on the concept of intersectionality and which are, firstly, the role of categories, secondly, the importance of the issue of power and, thirdly, the question of identity. As already mentioned above, the concept of intersectionality challenges essentialist assumptions that are often apparent in notions of supposedly stable categories, such as the categories of woman and man. Crenshaw indicates this issue when she emphasizes the social meaning and political relevance of categories and categorization (ibid. at 1296). In her seminal contribution, *The Complexity of Intersectionality*, Leslie McCall has identified three methodological approaches concerning the usage and understanding of analytical categories to explore the complexity of intersectionality in social life. The first approach, *anticategorical complexity*, aims at deconstructing categories as they are assumed to be ‘simplifying social fictions that produce inequalities in the process of producing differences’ (McCall [2005] at 1773). As categories are too complex to be able to reflect social realities, the deconstruction of categories ‘is understood as part and parcel of the deconstruction of inequality itself’ (ibid.). The second approach, *intracategorical complexity*, was the starting point of the development of

research on intersectionality. Although this approach avoids the complete deconstruction of categories, there is awareness of the problematic role of categories and their inability to incorporate the diversity and heterogeneity of human experiences and positions: ‘The point is not to deny the importance – both material and discursive – of categories but to focus on the process by which they are produced, experienced, reproduced, and resisted in everyday life’ (ibid. at 1783). Researchers belonging to the third approach, *intercategorical complexity*, provisionally adopt existing analytical categories in order to document and analyse the complexity of ‘relationships of inequality among social groups and changing configurations of inequality along multiple and conflicting dimensions’ (ibid. at 1773).

[10] The issue of power plays a crucial role in the conceptualization of intersectionality in general and concerning the significance of categories in particular. Already Crenshaw pointed at the complex ways in which power is interlinked with categories as the ‘process of categorization is itself an exercise of power’ (Crenshaw [1991] at 1297) or, as Sigle-Rushton and Lindström put it, ‘the act of categorization itself is part of the workings of power, producing policing and stratifying subjects’ (Sigle-Rushton and Lindström [2013] at 132). The power of categories also becomes apparent in the fact that categorization has social and material consequences. Intersectionality requires paying close attention to processes and the organization of complex hierarchies of power. Intersectional analysis puts the focus not only on how power relations interact and shape each other at the intersection of different inequality dimensions, such as racism and sexism; it also concentrates on the analysis of power ‘*across domains of power*, namely structural, disciplinary, cultural, and interpersonal’ (Collins and Bilge [2016] at 27; italics in the original).

[11] As indicated above, the concept of intersectionality originally aimed at questioning ‘traditional’ identity politics that failed to consider ‘intersectional identities such as women of color’ (Crenshaw [1991] at 1243). However, it is disputed whether intersectionality approaches are able to successfully challenge traditional identity approaches or are rather perpetuating essentialist understandings of identity by simply multiplying identities rather than subverting them. As Conaghan observes, intersectionality studies have taken an ‘identity turn’: ‘Although intersectionality purports to be a critique of identity politics, the concept of identity for the most part retains its

centrality as a core unit of analysis, with gender, race and other inequality 'grounds' being repositioned as 'dimensions' of identity which law fails adequately to capture and reflect' (Conaghan [2009] at 30).

[12] Yet, some counter that intersectionality should be understood as 'a formative step that allowed for the recognition of the black female subject within juridical structures of power' and that the concept never claimed to be 'an effective tool of accounting for identities at any level beyond the structural'. Intersectionality was not supposed to be 'an account of personal identity'; instead, it is one of power (Cooper [2016]).

[13] Other questions have been raised regarding the theoretical foundations and the epistemological and methodological implications of intersectionality. Concerning the latter, Nash criticized that there is a lack of a defined intersectional methodology and the use of black women as quintessential intersectional subjects would repeat the practices that the approach of intersectionality tries to subvert, as it implicitly treats black women as a 'unitary and monolithic entity' (Nash [2008] at 4, 8). In addition, she emphasizes the vague definition of intersectionality and raises questions concerning the empirical validity of intersectionality (ibid.). Walby, Armstrong and Strid refer to several dilemmas, including the unresolved tension between structural and political intersectionality, the focus on the disadvantaged that leaves the powerful unaddressed, the silence on class in the literature on intersectionality and the tension between the fluidity of categories and the necessity for a certain degree of categorical stability in order to undertake research (Walby, Armstrong and Strid [2012]).

[14] Some suggest that intersectionality should be seen as 'a work-in-progress' and that to understand 'what intersectionality *is* is to assess what intersectionality *does*' (Carbado *et al* [2013]). Patricia Hill Collins claims that intersectionality can be understood as a 'broad-based knowledge project', which is not only a field of study but also an analytical strategy and a critical praxis (Collins [2015]).

III. Practical implications

[15] What practical legal and political implications does the concept of intersectionality entail? Crenshaw's initial focus concentrated particularly on discrimination cases, which she claimed neglected the experiences of black women (→ Persons of Colour (PoC)). She criticized that 'the law has historically defined the contours of sex

and race discrimination through prototypical representatives, i.e., white women and African American men, respectively' (Carbado *et al* [2013] at 304). Furthermore, she pointed out 'how this antidiscrimination approach narrowed the scope of institutional transformation, truncated both the understanding of and advocacy around racism and patriarchy, and undermined possibilities for sustaining meaningful solidarity by placing resistance movements at odds with each other' (ibid. at 304).

[16] Intersectionality analysis has revealed that the seemingly neutral and abstract identity categories used in equality and anti-discrimination law contain biases and might be of limited ability to address the complexity of social and political disadvantages and marginalization.

[17] Thus, intersectionality profoundly challenged anti-discrimination analysis, law and legal practice, which traditionally focused on one axis of inequality. Anti-discrimination law was criticized for being reductionist (Quinn [2016] at 69), for not being able to enhance substantive equality and, as indicated above, for essentializing the experiences of so-called 'identity groups' (Smith [2016] at 81).

[18] However, a single axis approach to anti-discrimination was and still is the preferred approach in the context of the UN human rights framework. The three Conventions adopted before the popularization of the intersectionality concept, the 1969 → International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the 1979 → Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as the 1989 → Convention on the Rights of the Child (CRC), rely on separate and distinct categories of inequality. The UN has not abolished this approach in more recent human rights treaties, in particular the 2006 → Convention on the Rights of Persons with Disabilities (CRPD). Also the institutional arrangement laid down in the Conventions in the form of the treaty monitoring committees continue to follow the single-axis logic.

[19] However, scholars have argued that, for example, CEDAW 'does not regard "women" as an undifferentiated category, but recognizes the ways in which different aspects of different women's identity interact to produce disadvantage' (Fredman [2016] at 35). For example, the CEDAW Committee in its *General Recommendation No 37 on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change* (2018) refers in paragraph 2 to:

intersecting forms of discrimination against, among others, women living in poverty, indigenous women, women belonging to ethnic, racial, religious and sexual minority groups, women with disabilities, refugee and asylum-seeking women, internally displaced, stateless and migrant women, rural women, unmarried women, adolescents and older women, who are often disproportionately affected compared with men or other women.

Also the CRC and, to a greater extent, the CRPD refer to other social inequality categories such as age and gender, or emphasize the importance of different social positions. It has to be mentioned, furthermore, that the concept of intersectionality has been increasingly incorporated by → General Comments and Recommendations published by the treaty monitoring bodies as well as in their case law. For example, the CRPD Committee in its *General Comment No 6 on Equality and Non-discrimination* (2018) explicitly determines that intersectional discrimination – which is defined as occurring ‘when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status’ (ibid. para 19) – is included in the concept of discrimination. Decisions on several individual communications (→ Individual and Collective Communication or Complaint Procedures) brought before the CEDAW Committee indicate that the concept of intersectionality is increasingly a factor when considering individual communications (see, for example, *R.P.B. v the Philippines* [2014]; *S.N. and E.R. v North Macedonia* [2020]; *O.N. and D.P. v Russian Federation* [2020]). However, an analysis of CEDAW cases over the course of ten years demonstrates ‘both the progress that the treaty body has made, as well as its reluctance to forge ahead with the substantive application of an intersectional approach’ (Truscan and Bourke-Martignoni [2016] at 130). Intersectional approaches are also apparent in institutional collaboration between treaty bodies, such as the publication of the *Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination against Women/General Comment No 18 of the Committee on the Rights of the Child on harmful practices* (2014).

[20] In the context of the → European Union (EU), the concept of multiple discrimination has gained in importance over the last decades. The topic has not only surfaced in case law of the → Court of Justice of the EU (CJEU) (Burri and Schiek [2009] at 7), it is also mentioned in para 3 of the Preamble to *Council Directive 2000/78/EC*

establishing a general framework for equal treatment in employment and occupation (2000) and it is widely used in EU policy documents. Some scholars argue that this multiple anti-discrimination agenda reflects ‘a new equality paradigm’, which is ‘characterised by multidimensional equality considerations and horizontal equality measures’ (Kantola and Squires [2010] at 88). Kantola and Nousiainen, however, point out that the multiple discrimination approach of the EU differs qualitatively from the intersectional approach in the following ways: the multiple discrimination approach assumes that the different inequality axes follow a similar logic and matter to the same extent, whereas an intersectionality approach emphasizes the differences of inequality dimensions. Furthermore, ‘a multiple approach implies that categories matter equally in a pre-determined relationship to each other’ (Kantola and Nousiainen [2009] at 468). Intersectional approaches understand this issue as an open empirical question. Finally, the two scholars claim that the multiple anti-discrimination agenda is based on a ‘narrow antidiscrimination frame and makes it more difficult to explore other, perhaps more appropriate measures, to tackle intersecting inequalities’ (ibid. at 469).

[21] Although the → European Court of Human Rights (ECtHR) has so far never used the term ‘intersectional discrimination’, scholars have discussed whether and how the Court has already used and applied the concept. While some academics appeal to the Court to recognize intersectional discrimination (Rubio-Marín and Möschel [2016] at 881), others argue that the Court already bases its decision in particular cases – such as *B.S. v Spain* (2012) – on a number of intersecting factors (Yoshida [2013]). Using the concept of intersectionality as an analytical tool, another study pointed out that the case law of the ECtHR reveals patterns of ‘loser’ and ‘winner’ intersectional categories. For example, cases on religious manifestation before the ECtHR which are presented as gender-neutral are usually decided for the claimant whereas claims made by Muslim women on gendered religious clothing are frequently defeated (Castillo-Ortiz, Ali and Samanta [2019]).

[22] These examples of practical applications indicate that the concept of intersectionality faces many challenges when applied in practice. One of the main challenges is rooted in the openness and/or elusiveness of the concept, which leads to different interpretations, ambiguities and inconsistencies in implementation. This is also the conclusion of a study, mentioned above, that

examined the application of the concept of intersectionality by UN human rights treaty bodies:

The inconsistency and hesitation shown by the treaty bodies in the application of intersectionality may be explained by the fact that they have yet to develop a comprehensive or uniform methodology for assessing inequality. There are no clear or common definitions of the notions of multiple and intersectional discrimination.

(Truscan and Bourke-Martignoni [2016] at 130)

[23] A second challenge is the claim that the intersection of different inequality dimensions results in unique forms of marginalization and discrimination. This raises, for example, questions of comparability of discrimination cases, which are traditionally a crucial point in assessing such cases (Atrey [2018]). The question refers to determining and weighing the intersections of different inequality dimensions in a certain case, and the tension between additive and intersectional assessments of discrimination cases (Smith [2016] at 80). For example, concerning the application of the concept of intersectionality by UN human rights treaty bodies, Chow has observed that although the concept has contributed to transform substantially the practice of assessing gender discrimination, the current application of intersectionality ‘may be reduced to a form of “additive exercise” owing to a misperception that multiple identities necessarily contribute to an accumulative form of oppression’ (Chow [2016] at 480-1). Thus, through lack of a thorough understanding of the concept and its application legal actors may fail to grasp the specific intersecting dynamics of inequality categories and rather treat them as multiple but separated discrimination experiences.

[24] Closely related to the former is the third challenge of how to use (identity) categories in practice. There is a tension between using very flexible and case-specific categories in order to reflect and address the unique situation of individuals and the necessity for a certain stability of categories for grasping structural forms of discrimination, as well as for guaranteeing the reliability of law and legal processes.

[25] A fourth practical challenge is related to the concept of political intersectionality, which refers to the importance of addressing the question of who gets a chance to raise their voice and articulate their interests in the political process. With regard to the juridical process such a concept refers not only to the issue of who has → access to justice but also who has a voice in interpreting the law.

IV. Conclusions

[26] Intersectionality is a concept ‘on the move’ which still inspires academic discussions and political and legal actors across disciplines. The concept ‘emerged as a theoretical and political response to individual, experiential complexity and to the essentialising tendencies of law with respect to it’ (Conaghan [2009] at 27). In this regard intersectionality has had a major influence and has profoundly challenged academic, political and legal thinking about differences and inequality. It has helped to reveal discriminating biases and distortions of the law, of legal and political processes and institutions. Intersectionality is not only ‘a way of understanding and analysing the complexity in the world’ (Collins and Bilge [2016] at 29); it is also a crucial element in advancing towards substantive equality. To this end, further discussions of the conceptual foundations of intersectionality and their (methodological) implications in legal and political practice are still needed in the context of international and regional human rights institutions.

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Bibliography

Literature: Atrey S, ‘Comparison in Intersectional Discrimination’ (2018) 38 *Legal Studies* 379; Burri S and Schiek D, ‘Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?’ (EU Commission 2009); Carbado DW and others, ‘Intersectionality: Mapping the Movements of a Theory’ (2013) 10 *Du Bois Review* 303; Castillo-Ortiz P, Ali A and Samanta N, ‘Gender, Intersectionality, and Religious Manifestation before the European Court of Human Rights’ (2019) 18 *Journal of Human Rights* 76; Chow PYS, ‘Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence’ (2016) 16 *Human Rights Law Review* 453; Collins PH, ‘Intersectionality’s Definitional Dilemmas’ (2015) 41 *Annual Review of Sociology* 1; id. and Bilge S, *Intersectionality* (Polity 2016); Conaghan J, ‘Intersectionality and the Feminist Project in Law’ in Grabham E and others (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge 2009); Cooper B, ‘Intersectionality’ in Disch L and Hawkesworth M (eds), *The Oxford Handbook of Feminist Theory* (OUP 2016); Crenshaw K, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 4 *University of Chicago Legal Forum* 139; id., ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991)

MONIKA MAYRHOFFER

43 *Stanford Law Review* 1241; Fredman S, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (EU Commission 2016); Hancock A, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersection as a Research Paradigm' (2007) 5 *Perspectives on Politics* 63; Kantola J and Nousiainen K, 'Institutionalizing Intersectionality in Europe' (2009) 11 *International Feminist Journal of Politics* 459; Kantola J and Squires J, 'The New Politics of Equality' in Hay C (ed), *New Directions in Political Science: Responding to the Challenges of an Interdependent World* (Palgrave 2010); McCall L, 'The Complexity of Intersectionality' (2005) 30 *Signs* 1771; Nash JC, 'Re-Thinking Intersectionality' (2008) 89 *Feminist Review* 1; Quinn G, 'Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law' (2016) 16 *Equal Rights Review* 63; Rubio-Marín R and Möschel M, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism' (2016) 26 *European Journal of International Law* 881; Sigle-Rushton W and Lindström E, 'Intersectionality' in Evans M and Williams C (eds), *Gender: The Key Concepts* (Routledge 2013); Smith B, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 16 *Equal Rights Review* 73; Truscan I and Bourke-Martignoni J, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 *Equal Rights Review* 103; Walby S, Armstrong J and Strid S, 'Intersectionality: Multiple Inequalities in Social Theory' (2012) 46 *Sociology* 224; Yoshida K, 'Towards Intersectionality in the European Court of Human Rights: The Case of *B.S. v Spain*' (2013) 21 *Feminist Legal Studies* 195.

Case law, International: *O.N. and D.P. v Russian Federation*, CEDAW Committee (3 April 2020) UN Doc CEDAW/C/75/D/119/2017; *R.P.B. v the Philippines*, CEDAW Committee (12 March 2014) UN Doc CEDAW/C/57/D/34/2011; *S.N. and E.R. v North Macedonia*, CEDAW Committee (19 March 2020) UN Doc CEDAW/C/75/D/107/2016. **Regional:** *B.S. v Spain* App no 47159/08 (ECtHR, 24 July 2012).

UN Documents: CEDAW Committee 'General Recommendation No 37: Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change' (13 March 2018) UN Doc CEDAW/C/GR/37; CEDAW Committee and CRC Committee 'Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination against Women/General Comment No 18 of the Committee on the Rights of the Child on Harmful Practices' (14 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18; CRPD Committee 'General Comment No 6: Equality and Non-Discrimination' (26 April 2018) UN Doc CRPD/C/GC/6.

Documents, Regional: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.