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Women's Intersectionality in International Human Rights Law: the European Perspective

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ABSTRACT

Intersectionality, as a critical framework for understanding how overlapping systems of oppression shape lived experiences, has gained substantial traction in feminist and legal scholarship. Yet, within the realm of International Human Rights Law, particularly in the European context, its integration remains limited, fragmented, and often misunderstood. Focusing on the unique discrimination faced by women at the intersection of multiple identities and contexts, this thesis investigates how European legal frameworks and judicial mechanisms respond to such complexity.

Through a theoretical analysis and comparative examination of the Council of Europe, the European Union, and national jurisdictions, this study exposes the inadequacy of existing human rights frameworks and anti-discrimination laws, grounded in single-axis reasoning. These legal structures fail to capture the unique nature of intersectional harm, thereby reinforcing the invisibility of marginalised women. By drawing on legal theory, international norms, and case law, the thesis calls for a shift toward a more context-sensitive, impact-based understanding of discrimination, offering recommendations to align European human rights protections with intersectional realities.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
AComHPR	African Commission on Human and People's Rights
ACtHPR	African Court on Human and People's Rights
ADRIP	American Declaration on the Rights of Indigenous Peoples
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	(United Nations) Committee on the Elimination of Racial Discrimination
CESCR	(United Nations) Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	(United Nations) Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EGC	European General Court
ERRC	European Roma Rights Centre
ESC	European Social Charter
EU	European Union
GREVIO	Group of experts on action against violence against women and domestic violence
HRC	(United Nations) Human Rights Council
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
NCCD	Romanian National Council for Combating Discrimination
NGO	Non-governmental organisation
NIHR	Netherlands Institute for Human Rights
OAS	Organisation of American States
RED	Racial Equality Directive
SAC	Supreme Administrative Court of Portugal
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
VAWG	Violence against women and girls

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1. INTRODUCTION

1.1. Background and Rationale

Within legal texts and courtroom narratives, stories of women often arrive fractured, told through narrow prisms of gender, race, socioeconomic status, sexual orientation, age, but rarely all at once. Yet, lives are not lived in fragments. The experiences of many women resist such neat categorisations, shaped instead by the intersections of identities, history, and power.

It was not always evident that women's experiences differ. Intersectionality emerged as a catalyst to change our views of how discrimination is shaped by the synergistic effects of multiple subjectivities, with the ultimate aim of challenging and reconstructing systems of oppression. Beginning with the recognition of differences among women, intersectionality does not seek to erase these differences, but rather to disqualify their perception as 'disadvantages', along with the oppression that accompanies it.

Its significance in the fight against discrimination is now widely understood: intersectionality has become the 'buzzword of our time'.[1] It dominates feminist discourses, informs equality policymaking, and shapes academic inquiry across disciplines. As an 'ever-expanding and expansive field',[2] there is no single definition, no limited categories, no single geographical axis or socio-political and economic context to which it pertains. Much has been written, yet intersectionality remains a developing framework and resists approval in some legal, political or institutional spaces.

The multidimensionality of intersectionality has led to its translation in various disciplines, and International Human Rights Law (IHRL) progressively assumes a place in the discussion. With universality at the core of IHRL's genesis, dictating that we are all the same and equal, intersectionality is hailed today as 'the only method by which universality can be realised'.[3] Nonetheless, some might say that we have already created an effective international system, with the task to diagnose human rights violations and situations of discrimination on any

[1] Kathy Davis, 'Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful' in Helma Lutz, Maria Teresa Herrera Vivar and Linda Supik (eds), *Framing Intersectionality: debates on a multi-faceted concept in gender studies* (Ashgate 2011).
[2] Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Hart Publishing 2021) 5.
[3] Rita Raj and others (eds), *Women at the Intersection: Indivisible Rights, Identities, and Oppressions* (Center for Women's Global Leadership, Rutgers 2002) 114.

possible ground. So, the question is: what does intersectionality have to offer to the field of IHRL?

1.1.1. Blending intersectionality and International Human Rights Law

The theory of intersectionality revealed that while we have acknowledged that structures of disadvantage do exist, we tend to examine each of the structures separately, thus excluding from the analysis individuals pertaining to multiple systems of oppression, whose experiences are construed on precisely this multidimensionality. In the field of IHRL, Shreya Atrey highlights the novelty of intersectionality, which is 'in contrast to both the universality as commonality and non-discrimination as irrelevance paradigms'.[4]

The concept of universality, central to earlier human rights law, has been criticised by feminist discourse for decades, and goes principally against the aims of intersectionality – without rejecting it altogether. And, at the same time, the non-discrimination principle is considered limited in some aspects. Intersectionality enters the human rights discourse as a tool for understanding the complexity of human rights violations, ensuring proper recognition of victims and effective remediation of violations. It identifies the position of individuals in relation to human rights and at the same time aims at transforming the structures that lead to violations.

When examining specific violations of rights, intersectionality highlights how overlapping forms of discrimination create distinct experiences of human rights violations that cannot be addressed through a one-size-fits-all approach. Traditional legal frameworks often fail to capture how race, disability, poverty, or migration status can interplay with each other, leaving certain groups of women without adequate protection. In the context of gender-based violence, for instance, women of colour experience both domestic violence and systemic racism – eg, in the carceral system –, migrant women may fear seeking support due to immigration-related repercussions, and those living in poverty may struggle to access medical care and legal remedies after abuse.[5] An intersectional approach in IHRL ensures that legal protection and

[4] Atrey and Dunne (n 2) 34.
[5] Johanna Bond, *Global Intersectionality and Contemporary Human Rights* (Oxford University Press 2021) 31.

policies account for these overlapping inequalities, leading to a more inclusive and effective human rights framework.

Intersectional analysis also permits to better understand the interconnection of human rights. As human rights are indivisible and interrelated, how these are affected in a person's life is dependent on the totality of disadvantages that this person experiences and should not each be dealt with separately. In other words, the intersectional perspective is connected with theories about the indivisibility of rights: realising the complexity of identities and contexts permits to understand how all human rights interact – not only among 'first generation' civil and political rights, but also with the less privileged social, economic and cultural rights. For example, within the dominant framework today, the case of a human rights violation of a Black woman would be approached either from the gender or the race perspective, rather than through an intersecting one. Even if both of these perspectives were to be applied in a specific case they would usually be applied as 'addition problems' and not as mutually reinforcing. The indivisibility of rights further implies that her unique experiences as a Black woman might affect the full spectrum of her rights (civil, political, social, economic and cultural) and the ways in which these are violated.

IHRL, in turn, 'serves' intersectionality, as an alternative, more effective ground to anti-discrimination law.[6] Anti-discrimination laws were on the one hand developed by privileged groups that cannot capture the interrelation of intersecting identities, and on the other hand are based on the system of 'grounds'; that means that a person can base a claim on multiple grounds, which are nonetheless separate from each other, following the additive approach instead of intersectionality's multiple-axis framework.[7] What the theory of intersectionality teaches us is that discrimination is a complex process, where multiple subjectivities interplay in each situation differently, to a point where we cannot really delineate which grounds exactly can be applied. And for anti-discrimination provisions to be applied, we have to invoke specific grounds, which can be rejected by courts due to the uniqueness of an intersectional situation where the boundaries of each 'ground' are blurry, as it will be further explained (2.2 below). Moreover, in order to prove indirect discrimination, it is essential to provide statistics, but

[6] Sarah Schoentjes, '"Doing Intersectionality" through International Human Rights Law: Substantive International Human Rights Law as an Effective Avenue towards Implementing Intersectionality to Counter Structural Oppression?' (2022) 11 AG AboutGender - International Journal of Gender Studies 360, 363.

[7] Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination' (2016) 2 Oxford University Working Paper 8.

authorities have been resistant to gather data regarding intersectional situations; statistical samples for intersectional discrimination are in fact scarce.[8] Ultimately, these shortcomings lead to the victims invoking one ground to simplify their case and increase their chances to win, which of course erases their true experiences.[9] IHRL offers a space for overcoming these shortcomings. It strives for substantive equality *in leu* of the formal one typical for anti-discrimination laws.[10] The logic of substantive equality is close to intersectional theory, which seeks social justice and transformation and not the simple fact of equal treatment (eg, giving the right to vote to both men and women). IHRL, as we understand it today, recognises that people *are* different and its aim is to guarantee human rights to everyone, but not necessarily in the same way.

To sum, intersectionality and IHRL are closely related. Intersectionality offers a more holistic approach to understanding, preventing and redressing human rights violations. It aims to dismantle the structures of disadvantage that often lead to human rights violations, just as IHRL ultimately seeks to do. Despite this realisation, an analysis of intersectionality in the framework of IHRL reveals that there is a long way to go before international human rights bodies really adopt an intersectional lens. In Europe, notably, this process has been particularly slow, and women with intersecting identities remain widely unseen by European legal frameworks and courts. That is why, despite intersectionality's broad theorisation by scholars, a constant scholar engagement and reaffirmation is necessary in the European stage.

1.1.2. The significance of a 'European perspective'

As a theory originating in the United States, intersectionality tentatively travelled to Europe and was deformed to fit the political, racial-blind narrative that reigned after the experiences of the Second World War and the accelerating globalisation. A concept familiar to British Black feminists but foreign to the rest of Europe, intersectionality is still trying to find its way into the European human rights framework. However, due to its 'migration' to Europe, it is often challenged and, in some countries, stays almost entirely unknown.

[8] Schoentjes (n 6) 365.
[9] ibid.
[10] ibid 367.

Despite this, intersectionality is needed in Europe. The reality is that a significant proportion of women's human rights violations result not solely from gender discrimination, but from the synergistic disadvantages arising from intersecting grounds of discrimination. According to a 2022 Resolution of the European Parliament, 91% of Black women are overqualified for their jobs, compared to 48% of white women,[11] but their employment rate is still lower;[12] only 16% of Roma women are employed, with 28% carrying unpaid domestic duties;[13] one third of women not born in the EU work in precarious jobs and 18% of migrant women are at risk of poverty;[14] only 20% of women with disabilities work full-time in the EU, and those working have significantly lower incomes, with 22% being at risk of poverty; one in six lesbian or bisexual women have faced discrimination when accessing healthcare or social services.[15]

Regarding gender-based violence specifically, statistics with intersectional indicators are scarce. The European Parliament noted, for example, that women with disabilities are ten times more likely to experience violence compared to women without disabilities.[16] While it is widely accepted by researchers that women from minority communities in Europe (eg, Roma, LGBTI+, Muslim, African, Asian) face a high risk of hate-motivated attacks or domestic violence,[17] they still stay under-represented in surveys, as they are usually in greater fear of reporting these incidents.[18] This is due to their particular difficulties stemming from their intersecting identities: they fear of being stigmatised by their communities or do not receive the appropriate support by the authorities.

In view of this, it is evident that Europe must not evade the crucible of intersectionality. As it happened with Black women in the US, women with intersecting identities in Europe do not receive the appropriate recognition from European courts and their discrimination claims get rejected. By putting the European legal frameworks under the lens of intersectionality, it might

[11] European Parliament, 'Resolution of 6 July 2022 on Intersectional Discrimination in the EU: Socio-Economic Situation of Women of African, Middle-Eastern, Latin American and Asian Descent' (2022) 2021/2243(INI) para I <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0289_EN.html> accessed 17 May 2025.

[12] For an extensive comparative analysis of the employment rates according to race/ethnicity between France, Germany and the UK see Shirin Mohammadi, 'Racial Inequality and Discrimination in European Labor Markets: A Comparative Study of France, Germany and the UK, 2005-2021' (Research study, Paris School of Economics - Ecole des Hautes Etudes en Sciences Sociales 2024).

[13] European Parliament (n 11) para Q.

[14] ibid L.

[15] ibid P.

[16] ibid AC.

[17] ibid AC-AG.

[18] EIGE, 'Gender Equality Index 2024 - Tackling Violence against Women, Tackling Gender Inequalities' (Publications Office of the European Union 2025) 43.

be possible to diagnose the level of protection and the possible alternatives to achieving substantive equality in this continent.

1.2. Research Questions and Objectives

Considering that intersectionality as a concept was solidified in the US and found its roots in critical race feminism, namely in the field of anti-discrimination law, I found it interesting to explore its application in the European human rights framework. This research thus focuses on examining this theory's legal translation to the European continent, as well as its potential uses and contributions to preventing and redressing women's rights violations. The objective is to approach with a critical lens the protection provided so far by human rights bodies, such as the European Court of Human Rights (ECtHR) and the European Union's institutions, and to explore how intersectionality can offer solutions to the shortcomings of the current anti-discrimination frameworks in Europe. I argue that every human rights violation case with a discrimination claim can potentially be approached with an intersectional perspective given the context, and as a result intersectionality should actively be part of the discussion in anti-discrimination claims and human rights violations in general. The ultimate question of this thesis is how intersectionality can contribute to an improved adjudication of human rights violations in Europe, in order to achieve primary prevention, ensure the protection of victims, and provide appropriate redress, all in the context of advancing a truly effective, victim-centred approach.

1.3. Methodology and Scope

Before diving into this Master's thesis research question, a few remarks should be made as regards its scope. While intersectionality is present in any possible combination of structures of disadvantage, this thesis will focus on women who face multiple discriminations based on several characteristics interplaying with their gender. This does not mean that intersectionality concerns only women – although the original development of this concept indeed focused on

women.[19] Rather its value to the feminist movement is of great importance, as it was developed along with the understanding that women's rights are human rights.

More specifically, women's distinct experiences were initially overlooked in the construction of international human rights systems. When they were finally acknowledged, they were largely examined through the lens of white, privileged, middle- and upper-class women. In this sense, intersectionality emerged as a response to early feminist movements, incorporating the perspectives of countless women whose experiences were shaped not only by gender but also by race, ethnicity, class, sexual orientation, disability or other systems of oppression. Rather than arguing that women are indispensable to intersectional theory, it is intersectional analysis that must be integrated into feminist discourse. That is the aim of the present thesis, and not to affirm gender as the centre of intersectionality's analysis. It is not a coincidence that intersectional theorists repeat in their work Leslie McCall's words that intersectionality might be considered 'the most important theoretical contribution that women's studies, in conjunction with other fields, has made so far'.[20] The focus on women is thus an effort to, on the one hand, limit this thesis' scope, and on the other hand, hail intersectionality's contribution to the feminist discourses.

When women are put as victims at the centre of the analysis, let alone women with intersecting identities, it is important to avoid over-victimisation and reinforcement of normative gender stereotypes. Intersectionality explains a reality of multiple discriminations; sometimes, however, disadvantages co-exist with privileges. Recognising this complexity ensures that women are not portrayed solely through a lens of vulnerability, but as agents whose experiences are shaped by both oppression and resilience. A good example of this can be understood through the income figures presented by Deborah King: in 1980s US, black women were not consistently in the lowest status, as they received, eg, more income than white women if they obtained higher education, and their education status was equal to that of black men.[21] This can

[19] When referring to women, I will follow the gender approach, with gender referring to 'socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences in hierarchical relationships between women and men in the distribution of power and rights favouring men and disadvantaging women', according to the definition followed by the CEDAW Committee. CEDAW, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28 para 5 <https://www.refworld.org/legal/general/cedaw/2010/en/77255> accessed 13 March 2025.

[20] Leslie McCall, 'The Complexity of Intersectionality' (2005) 30 The University of Chicago Press 1771, 1771.

[21] Deborah K King, 'Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology' (1988) 14 Signs: Journal of Women in Culture and Society 48–49

be explained by the particular experiences of Black women: according to King, higher labour force participation, driven by *economic necessity* rather than privilege, granted them relative self-reliance but confined them to low-status jobs, preventing economic advancement while distinguishing them from white women, who historically had lower workforce participation.[22]

This goes to show that intersectionality exposes the realities of discrimination without diminishing the experiences of all women with intersecting identities. In fact, it aims to dismantle narratives that women are inherently in need of protection or perpetually oppressed and lacking agency. It is also worth mentioning that, although this thesis focuses on women as rights-holders and victims of intersecting forms of discrimination, it acknowledges that women can also exercise power in ways that may contribute to harm or exclusion.

In addition, it should be noted that the use of some identities in some parts while excluding others (by including them in the generalisations of 'and others' or 'etc') does not aim to denote the hegemony of certain categories; this is an important disclaimer, because, as it will be shown below (2.2), the focalisation on certain categories is object to polemics surrounding intersectionality. Similarly, the word 'identities' used throughout the text does not signify an inherent and stable characteristic, and that is why it is used interchangeably with 'systems of oppression', 'structures of disadvantage', 'subjectivities' etc.

Regarding the methodology, and particularly what approaches were followed in the drafting of this thesis, I tried to incorporate a literature review with different perspectives sourcing from authors from various disciplines and different parts of the world. Intersectionality was conceptualised and developed in the Global North (namely the US), and as such it has been criticised for imposing a northern doctrine to southern and colonised subjects. At the same time, simply rejecting the universalised northern theories, engaging in a 'mosaic epistemology', also leads to the perception of the world as a mosaic of unique cultures where 'only the colonizing power [has] the integrating view'.[23]

Taking into consideration that IHRL consists of a universalised and normative framework, this thesis primarily follows a doctrinal legal methodology with a combination of comparative analysis. However, it also engages critically with decolonial perspectives, recognising that many intersectionally marginalised individuals are themselves the product of histories of

<https://digitalcommons.dartmouth.edu/facoa/2073?utm_source=digitalcommons.dartmouth.edu%2Ffacoa%2F2073&utm_medium=PDF&utm_campaign=PDFCoverPages>.

[22] ibid 50.

[23] Raewyn Connell, 'Rethinking Gender from the South' (2014) 40 Feminist Studies 518, 522.

colonial domination.[24] These perspectives are essential for interrogating the structural limitations of human rights law and for enriching the normative analysis with more inclusive, context-sensitive insights.

1.4. Structure of the Thesis

To achieve a holistic investigation of the subject of this research, the thesis begins by grounding the theoretical foundations of intersectionality, from the origins of the theory in the US (2.1.1.) and the varying feminist discourses around the world that culminated in its elaboration (2.1.2), to its travels to the European context (2.1.3). At the same time, intersectionality should not be approached as a dogma: several critiques surrounding the theory will be included (2.2.1), as well as discussions regarding its scope (2.2.2) and methodological framework (2.2.3). The latter points are essential in order to be able to apply the theory in practice in the later chapters. The contextualisation of intersectionality historically and theoretically will be concluded with an analysis of its legal transposition into IHRL (2.3). This will include an examination of how intersectionality challenges the universal framework of IHRL (2.3.1), where it can be traced in IHRL texts (2.3.2), as well as its application by the CEDAW Committee in its case law (2.3.3). Lastly, an investigation of intersectionality's treatment by regional human rights systems, particularly the Inter-American and African ones, will follow (2.3.4), before turning to the European system, so as to uncover the potential of intersectionality in comparison to Europe's more elliptical approach.

Chapter 3 of the thesis incorporates the European human rights framework of intersectionality. An analysis of the Council of Europe's instruments, such as the European Convention for Human Rights (ECHR), the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) and the European Social Charter (ESC), will reveal a general absence of intersectionality (3.1.1). The application of intersectionality in praxis will be examined through the European Court for Human Right's (ECtHR) case law spanning domestic violence cases, the forced sterilisation of Roma women and the headscarf

[24] One of the most important contributors to decolonial feminism, Maria Lugones, indicated how gender is socially constructed in the context of colonialism, which includes the subordination of women and a hegemonic patriarchal family system. See María Lugones, 'Toward a Decolonial Feminism' (2010) 25 Hypatia 742. What we can particularly take away from her work is the realisation that 'imperialism and capitalism now have to be understood as profoundly gender processes from the start to finish', which has an impact on how we must treat intersectionality as well (infra n 80). Connell (n 23) 518, 522.

bans affecting Muslim women (3.1.2.1). Specific attention will be given to the dissenting opinions of more recent judgments that engage explicitly with intersectionality (3.1.2.2) and the ECtHR's judgment in *BS v Spain*, where the Court took an official step towards intersectionality (3.1.2.3). The ECHR analysis will conclude with an exploration of the shortcomings and potential uses of Article 14 and Protocol 12 to the ECHR (3.1.2.4), with the aim of delineating the practical integration of intersectionality into the ECtHR's case law.

The second part of Chapter 3 will focus on the European Union framework (3.2). More specifically, I will describe the course of intersectionality's emergence in the EU, from the first equality Directives in 2000 where we encounter provisions of multiple discrimination (3.2.1), to the recent measures taken following the European Commission's Gender Equality Strategy of 2020-2025 (3.2.2) – namely, the accession of the EU to the Istanbul Convention and the new gender equality Directives of 2023 and 2024. While the Court of Justice of the European Union's case law on this subject is non-existent, there will be an analysis of its shortcomings regarding the intersectional cases of headscarf bans (3.2.3). Lastly, the European framework will be concluded with a comparative analysis of EU Member States' current protection of intersectional discrimination through legislation and case law (3.3).

Overall, the aim of this structure is to follow a 'top-down' approach: to understand how a theory developed within women's studies and conceptualised through the anti-discrimination framework of the US was gradually transposed to IHRL and to Europe specifically, and to draw lessons from its various applications (in feminism, anti-discrimination law, UN treaty system) so as to better apply it within the multifaceted landscape of Europe.

2. INTERSECTIONALITY IN CONTEXT

2.1. Theoretical Foundations of Intersectionality

2.1.1. Origins and formulation in the United States

The term *intersectionality* was famously coined by Professor Kimberlé Crenshaw in her 1989 article 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', as a tool to analyse the multidimensionality of Black women's experience.[25] She argued that Black women are usually marginalised in the process of identification of race and sex discrimination cases, as these focus primarily either on sex- or class-privileged Blacks[26], or race- and class-privileged women. By bringing as examples specific litigation cases where Black women tried to bring claims about discrimination in the workplace, she demonstrated that they could not fall into neither the sex nor the race categories of anti-discrimination doctrine, and thus their claims were dismissed. US Courts erased Black women's unique discrimination through comparisons to white women, refused to recognise their sex-based claims because they were Black, or denied them the ability to represent broader racial discrimination cases as class representatives due to presumed class conflicts with Black men.[27] She compared this reality to traffic in an intersection:

> Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.[28]

In other words, intersectionality suggests that Black women may experience sex or racial discrimination similar to that faced by others of the same sex (white women) or the same race

[25] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 139.

[26] I follow Crenshaw's capitalisation of 'Blacks' and 'Black women' to respect her choice of wording, which denotes that they constitute a 'specific cultural group'. The term 'Black women' is used interchangeably with 'women of colour' throughout this text. It should be noted that this use of words does not imply that all women of colour share the same experiences irrespective of geographical and historical location. Crenshaw mainly refers to African American women and that is why she uses this term as well. Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, n 6.

[27] Crenshaw (n 25) 148.

[28] ibid 149.

(Black men), but also a distinct form of discrimination that is not merely the sum of these two forms. Discrimination operates along multiple axes, and each category it is based on is not homogeneous, nor is their combination (race + gender + class) simply additive. These are not separate identity realms but interconnected, mutually constitutive systems.

Examining the interplay of race and gender – such as through statistical analyses – was feared to undermine the perceived progress made in combating discrimination within each individual group. Simply put, issuing statistics showing, for example, higher rates of domestic violence against Black women, was seen as a risk of reinforcing racist stereotypes. However, in this equation, Black women were overlooked in an attempt to advance the fight against racism and/or sexism, leaving their unique intersectional experiences unrecognised. As Crenshaw acutely observes, the issue with identity politics is not that it fails to go beyond differences, but rather that it often treats groups as if everyone within them has the same experience.[29]

Crenshaw identifies two expressions of intersectionality: structural and political. *Structural* intersectionality refers to how social structures and institutions, such as the legal system and social services, fail to address the specific ways in which multiple forms of oppression intersect to shape the experiences of Black women. *Political* intersectionality refers to the way women of colour navigate conflicting political agendas within both feminist and antiracist movements, as these movements often centre the experiences of white women and men of colour respectively, without fully addressing the unique challenges faced by women of colour.[30]

Another important distinction is that sourcing from Timo Makkonen, who distinguished intersectional, multiple and compound discrimination: *multiple discrimination* refers to an 'accumulation of distinct discrimination experiences', ie when a person experiences discrimination on multiple grounds and in *different* social contexts, while *compound discrimination* limits this multiplicity of disadvantages in a *single* context or occasion.[31] For example, a Black woman can be discriminated on the grounds of her gender at work and her race at a hospital (multiple discrimination), or her gender and race at work in the same way that individuals of the same gender *or* race are generally treated in that context, due to reasons commonly associated with each category (compound discrimination). In the case of compound

[29] Crenshaw (n 26) 1242.
[30] ibid 1252.
[31] Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Institute for Human Rights - Åbo Akademi University 2002) 9.

discrimination, the claim can be based on each ground separately, although the context may be one.[32] However, *intersectional discrimination* unveils how the various grounds interplay to create a distinct experience of disadvantage that cannot be understood by looking at each identity separately.

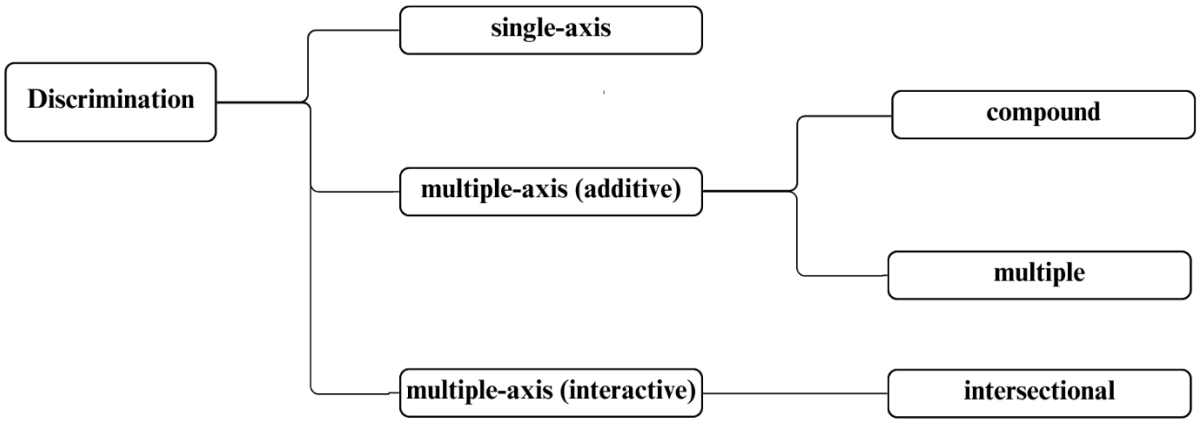

Figure 1: *Schematic representation of types of discrimination by axis of grounds*

This distinction is particularly important in the field of IHRL, where, as we will see further below, these forms of discrimination are confused. Makkonen himself, however, considers that all these forms of discrimination should ultimately be called intersectional discrimination for practical reasons,[33] - an assertion that has been criticised by Chow for risking the conflation of intersectionality with other forms of discrimination, despite its offering a distinct and unique approach compared to multiple or compound discrimination.[34]

Overall, Crenshaw's and subsequent scholars' work was integral to the development of this much-needed approach in gender studies. Mentioning and examining only her work, however, is not sufficient to understand the development of the ideas surrounding intersectionality and how Crenshaw went a step further in its solidification as the theory we know today. Notably, the concept of intersectionality developed side-by-side with anti-essentialist feminist theories. In an analysis focused on the European – thus Western – perspective and the universalism-oriented IHRL system, works of gender essentialism should not be omitted. That is why this

[32] Erica Howard, 'Intersectional Discrimination and EU Law: Time to Revisit Parris' 24 International Journal of Discrimination and the Law 292, 295.
[33] Makkonen (n 31) 12.
[34] Pork Yin S Chow, '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, n 104.

analysis will begin with a theoretical background of the development of feminist theories surrounding women's rights: from gender essentialism to cultural essentialism and anti-essentialism, before culminating in the intersectional theory as we know it today.

2.1.2. Fracturing the Centre: Global Feminist Lineages of Intersectional Thought

At the outset of the movement for the recognition of women's rights as human rights, feminists partly centred their claims on universalism – not in the sense of an atomised, decontextualised subject, but following the belief that all women share common experiences of discrimination and violations based on their gender. Feminists advocated for a 'global sisterhood', declaring that women's oppression is a common worldwide phenomenon.[35] In other words, they considered that women form a unitary category, regardless of cultural, national, racial or other background, oppressed by the universal patriarchy.

Alongside the common notion of women's shared experiences, feminism evolved in multiple directions. Liberal feminism advocated for equal rights and the abolition of formal inequalities, such as laws permitting pregnancy discrimination in the workplace. Radical feminism identified patriarchy and the subordination of women as the root causes of discrimination. Relational feminism argued that girls and boys develop fundamentally distinct moral systems.[36] Eventually, dominance feminism emerged, placing sexualised subordination of women at the centre of gender inequality. According to this theory, male power forcefully shapes women's sexuality, and thus it has to be restricted by law.[37]

None of these waves, however, acknowledged the differences between women themselves, but rather reflected the experiences of privileged women – white, heterosexual, upper-middle class.[38] What united these theories is gender essentialism, which Angela Harris defines as 'the notion that a unitary, "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience'.[39] Little by

[35] See, eg, Robin Morgan, *Sisterhood Is Global: The International Women's Movement Anthology* (Doubleday & Co, Anchor Books 1984).
[36] Bond (n 5) 16.
[37] Maxine Eichner and Clare Huntington, 'Introduction, Special Issue: Feminist Legal Theory' (2016) 9 Studies in Law, Politics and Society 2 <https://ir.lawnet.fordham.edu/faculty_scholarship/697> accessed 19 May 2025.
[38] Bond (n 5) 107.
[39] Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581, 585.

little, this was countered with cultural essentialism, portraying women of the South as the 'others', victims of the cultural reality in their countries. In Europe, we can notice that for years reigned – and sometimes still reigns – what Megal O'Dowd calls 'secular gender essentialism', meaning that although we have departed from the idea that all women share the same experiences, we define religious women's struggles by exactly their religion;[40] we consider that it is their religion that suppresses them as women.

For a long time, feminists argued that women are not only suppressed by the sovereign power (the state, the law etc.), but also by their culture, through relational dynamics.[41] However, cultural relativists implied that morals are often not exactly universal, but are shaped by cultures.[42] They criticised the imposition of external western standards on different cultures. Anti-essentialist feminists took this model to explore how gender particularly is shaped by culture, how power operates *within* cultures.[43] More generally, Charlotte Witt describes the core idea of anti-essentialists through the following hypothesis: 'As a woman, I am not *necessarily* anything at all, and supposing that I am *necessarily* one way or the other is taken to be a symptom of theoretical incorrectness, a sign of lingering maleness'.[44] Starting from the affirmation that gender is socially constructed, anti-essentialist feminists realised that the fact that the essence of women is not only defined by their biological characteristics – a premise already accepted by feminists such as Simone de Beauvoir – but mainly by social constructs, implies that women's experiences are not so common and unitary after all.[45]

Throughout this entire scholarly process, discussions about the role of multiple identities were already a background noise suppressed by gender essentialists. The struggles of Black women resulting from their 'double jeopardy' had been expressed centuries ago, dating back to the 19th century.[46] Sojourner Truth, particularly, advocate for the abolitionist movement and women's rights, turned the attention towards the connection between racism and sexism Black women experience during her famous speech titled 'Ain't I a Woman?', which she delivered at a 1851

[40] Megan O'Dowd, 'Secular Gender Essentialism: A Modern Feminist Dilemma' (2010) 3 The Crit: A Critical Studies Journal 104, 106.
[41] Tracy E Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 Harvard Women's Law Journal 89, 115.
[42] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400.
[43] Higgins (n 41) 114.
[44] Charlotte Witt, 'Anti-Essentialism in Feminist Theory' (1995) 23 Philosophical Topics 321, 322.
[45] ibid 324.
[46] King (n 21) 42 (referencing Anna Julia Cooper, initially a slave and later a PhD holder, who wrote about the double enslavement of black women).

women's conference on universal suffrage.[47] As a response to the claim that women are weaker than men and thus cannot bear the responsibilities of political activities, she pointed out that Black women's experience as hard workers whose womanhood is undervalued are not taken into account in this equation.

While intersectionality was developed as the concept it is understood today by Black feminists in the late 20th century to put in the forefront the uniqueness of Black women's experiences, we can also trace intersectional ideas elsewhere, notably in the Global South. Gloria Anzaldúa, for instance, described her experience as a Chicana[48] lesbian woman in her 1987 autobiographical work titled *Borderlands/La Frontera: The New Mestiza.*[49] Her experience as a Chicana lesbian woman is also described by Cherríe Moraga in her work *Loving in the War Years: Lo Que Nunca Pasó por Sus Labios* published in 1983.[50] Rammanohar Lohia, an Indian political activist, already in the 1950s and 1960s had formulated an intersectional approach regarding the power system of India, as he emphasised the connection between caste, class, gender and language.[51] The integration of caste and class into the discussion of intersectionality is of great importance, considering that they are often considered less rigid and are more 'political' to the states' eyes.[52] These questions were central in the post-colonial context of India and other parts of the Global South.[53]

Class was also introduced as a factor of discrimination by feminists such as Deborah King, who referred to the interconnectedness of gender, race and class as 'multiple jeopardy' and condemned the additive approach that had prevailed until then.[54] Another contribution to the

[47] Angela Y Davis, *Women, Race, and Class* (Vintage Books 1983) 38.
[48] Chicana is defined as 'a woman or a girl who was born in the US and whose family comes from Mexico'. Definition from 'Chicana' <https://dictionary.cambridge.org/dictionary/english/chicana> accessed 18 March 2025.
[49] Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (Aunt Lute Book 1987).
[50] Cherríe Moraga, *Loving in the War Years: Lo Que Nunca Pasó Por Sus Labious* (South End Press 1983).
[51] Anand Kumar, 'Understanding Lohia's Political Sociology: Intersectionality of Caste, Class, Gender and Language' (2010) 45 Economic and Political Weekly 64, 64.
[52] This becomes more evident by the fact that during discussions of major human rights treaties, such as the CEDAW, incorporating statements about the impact of economic inequalities on gender inequality was heavily contested by western states. See Lydia Candeleria González Orta, 'The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): From Its Radical Preamble to Its Contemporary Intersectional Approach' (2025) 34 Women's History Review 79, 82.
[53] In India, social inequality was more prevalent than racial inequality; this shows the importance of the context in intersectionality theory, which was highlighted by Indian scholars. See Kumar (n 51) 66. For a discussion of the intersectionality of gender and castes in South Asia, see also Sunaina Arya, 'Theorising Gender in South Asia: Dalit Feminist Perspective' (2020) 1 CASTE: A Global Journal on Social Exclusion.
[54] King (n 21) 47. Johanna Bond, however, notably considers the 'double' and 'triple jeopardy' analyses insufficient in following a relational, rather than additive, approach. Bond (n 5) 11.

development of intersectional theory can be traced in a 1977 publication written by the Combahee River Collective, a collective of black feminists established in 1974, where it was explicitly declared that major systems of oppression, ie racial, sexual, heterosexual and class systems, are 'interlocking'.[55] Intersectional theorists to this day use this expression of 'interlocking systems of oppression' to describe exactly what intersectionality examines.

While Crenshaw herself mentions earlier work, namely Gloria T Hull, Patricia Bell Scott and Barbara Smith's *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women's Studies,*[56] the conceptualisation of intersectionality is not 'old wine in new bottles'; these ideas did indeed contribute to the shaping of intersectionality, but did not offer an intersectional perspective per se.[57] That is why Crenshaw's work is considered the genesis of the theory of intersectionality as such. Her contribution consists in the consolidation of intersectionality as the theory that recognises the 'simultaneous operation of structures of oppression', which makes some experiences 'qualitatively different'.[58]

2.1.3. Reception and Development of Intersectionality in Europe

In Europe, Black British feminism emerged in the 1970s as a collective response to the marginalisation of women of colour in Great Britain, who inhabit a 'third space', in the intersections of race, gender and class.[59] Its aim was to 'reveal *other ways of knowing* that challenge the normative discourse'.[60] Migration from post-colonial Africa, Caribbean and South Asia is a central context of British Black women's experiences.[61] The work of Black British feminists laid the groundwork for intersectional analysis by delineating how migration, colonialism and systemic racism in the United Kingdom shaped Black women's experiences.

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[55] The Combahee River Collective, 'A Black Feminist Statement of 1977' (2014) 42 Women's Studies Quarterly 271, 271 (originally appeared in *Capitalist Patriarchy and the Case for Socialist Feminism*, published by the Monthly Review Press in 1978).

[56] Gloria T Hull, Patricia Bell Scott and Barbara Smith (eds), *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women's Studies* (Feminist Press 1982). Cited in Crenshaw (n 25) 139.

[57] Helma Lutz, Maria Teresa Herrera Vivar and Linda Supik (eds), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011) 2.

[58] Mary E John, 'Intersectionality: Rejection or Critical Dialogue?' (2015) 50 Economic and Political Weekly 72, 72.

[59] Heidi Safia Mirza (ed), *Black British Feminism: A Reader* (Routledge 1997) 4.

[60] ibid 5.

[61] ibid 6.

This important contribution of Black British feminists went unseen in Europe. Jasbir Puar points out that the European interest for intersectionality grew after its wide theorisation in the US, in an effort to not stay behind, and not as a response to a social movement.[62] In other words, since intersectionality in Europe was incorporated into policy initiatives based on the US model rather than through organic intellectual development rooted in local experiences – such as those of migrant women – engagement with the theory can appear superficial, overlooking local histories, post-colonial perspectives, and ultimately limiting the analysis of 'nation' as a power structure.

The relative resistance of Europe in developing an intersectional analysis in its own contexts finds its roots in several academic and policy tendencies: besides post-racialism, dictating that the category 'race' has been transcended and no longer constitutes an organising principle of society, colour-blindness has also found its ground, calling for the irrelevance of race in laws, policies and society at large.[63] Erasure of minorities, particularly race, was a result of the reigning republicanism in France and historical reasons in Germany.[64] Categories such as ethnicity, culture, and religion are therefore favoured in the European context,[65] a tendency that fails to properly acknowledge intersectionality's roots in race studies.

Marx Ferree likewise describes intersectionality in Europe as a concept that has been widely adopted in feminist and policy discussions, yet is often stripped of its original racial critique.[66] Instead of challenging power structures, it is frequently used as a tool for 'giving voice' to marginalised groups, reinforcing an 'Us-Them' binary where dominant groups remain out of epistemic focus.[67] According to Ferree, European applications of intersectionality tend to erase racialisation processes, particularly in the framing of Muslim women – considered as a single, undifferentiated category stamped by religion – and focus on categorising differences rather than addressing power relations dynamically. The exclusion of race from discourses as

[62] Jasbir K Puar, '"I Would Rather Be a Cyborg than a Goddess": Becoming-Intersectional in Assemblage Theory' (2012) 2 philoSOPHIA 49.
[63] Center for Intersectional Justice, 'Intersectional Discrimination in Europe: Relevance, Challenges and Ways Forward' (European Network Against Racism 2019).
[64] Lutz, Herrera Vivar and Supik (n 57) 11. In Germany the term *Rasse* is considered a taboo and is not used, as it is linked to the country's history of racist identity politics.
[65] Gail Lewis, 'Celebrating Intersectionality? Debates on a Multi-Faceted Concept in Gender Studies: Themes from a Conference' (2009) 16 European Journal of Women's Studies 207.
[66] Myra Marx Ferree, 'Beyond the Us-Them Binary: Power and Exclusion in Intersectional Analysis' (2015) 2 DiGeSt. Journal of Diversity and Gender Studies 33.
[67] This is linked to the criticism that will be analysed in 2.2.1 below, ie that intersectionality seemingly perpetuates the ideas of the 'mainstream' and the 'other', putting the former at the centre and the latter at the margins.

'irrelevant' in the context of Europe is considered to lead to the 'whitening' of intersectionality, precluding a large number of subjects from its analysis.[68] When examining the intersectional academic exercise in Europe, particularly in Germany and France, Sirma Bilge notes that:

> [A] tool elaborated by women of color to confront the racism and heterosexism of White-dominated feminism, as well as the sexism and heterosexism of antiracist movements, becomes, in another time and place, a field of expertise overwhelmingly dominated by White disciplinary feminists who keep race and racialized women at bay.[69]

In the Mediterranean, intersectionality entered the academic discussion quite late. In Italy and Spain, for instance, two countries receiving influence mostly from the French academia, references of *intersezionalità* (in Italy) or *interseccionalidad* (in Spain) appeared around 2010.[70] In other countries, for instance Greece, intersectionality only recently was taken into account in the academic world, and is particularly linked to the queer feminist movement as well as the anti-authoritarian autonomous space.[71] Again, there is still the fear of an additive approach, although Crenshaw explicitly explained that the essence of intersectionality is to overcome such approaches.[72]

Overall, Gudrun-Axeli Knapp underlines that intersectionality offers a comprehensive framework to analyse how modern European societies have simultaneously developed through interwoven structures of patriarchy, capitalism, nationalism, and modernity. This requires a non-Eurocentric, transnational perspective to fully grasp their historical and contemporary transformations.[73]

2.2. Critical Approaches and Methodological Debates

The above analysis gave an outline of the genesis and the development of intersectionality as a concept. While its contribution to the feminist academia is generally hailed, it has not evaded criticism, or rather, 'reservations'. From its 'northern' roots to its definitional and

[68] Sirma Bilge, 'Intersectionality Undone: Saving Intersectionality from Feminist Intersectionality Studies' (2013) 10 Du Bois Review 405, 414.
[69] ibid 418.
[70] Lutz, Herrera Vivar and Supik (n 57) 5.
[71] Niovi Emmanouil and Lisa Roussou, *Διαθεματικότητα; Καλές Κορίτσια Τι Είναι Αυτό; [Intersectionality? Good Girls, What Is This?]* (National Technical University of Athens: School of Architecture 2018) 67 [in Greek].
[72] ibid 70.
[73] Gudrun-Axeli Knapp, 'Race, Class, Gender' (2005) 12 European Journal of Women's Studies 249, 263.

methodological challenges, intersectionality has brought waves of debates across various disciplines. These critiques, far from dismissing the value of the framework altogether, often aim to refine its scope, question its universality and interrogate the risks of conceptual overextension or depoliticisation. This chapter explores the main strands of critique, including concerns over intersectionality's phenomenal paradox of reduction and diffusion of categories, its institutionalisation and its practical applicability, particularly in the contested realm of law. It further examines how intersectionality can diffuse its transformative potential through a more structured methodology.

Understanding these critical perspectives is particularly important in the context of this thesis, which seeks to examine the role and potential of intersectionality within international human rights law. Given IHRL's normative, universalist foundations and traditionally formal approaches to discrimination, integrating a fluid and context-sensitive framework, such as intersectionality, poses both theoretical and methodological challenges. By engaging with the existing critiques, this chapter lays the groundwork for assessing how intersectionality can be meaningfully translated into legal reasoning and institutional practice without missing its core transformative essence.

2.2.1. Interrogating Intersectionality's Shortcomings

Initial criticisms towards intersectionality surrounded around the idea that it is mostly race-centred, overlooking other categories of subordination. They argued that in Crenshaw's conceptualisation work Black women were examined only from the perspectives of their gender and race, while little attention was given to class, sexuality and other categories. In other words, intersectionality has been criticised for treating black women's race and gender as 'trans-historical constants that mark all women in similar ways'.[74] It has even been considered to lead to 'racial essentialisation', in the sense that scholars rarely approach it from the point of view of white subjects experiencing other disadvantages.[75] The exclusion of whiteness and maleness from the intersectional lens can lead to 'corralling and policing theoretical boundaries rather than pushing them'.[76] As previously outlined, however, intersectionality's roots are indeed

[74] Jennifer C Nash, 'Re-Thinking Intersectionality' (2008) 89 Feminist Review 7.
[75] Puar (n 62).
[76] Alpa Parmar, 'Intersectionality, British Criminology and Race: Are We There Yet?' (2017) 21 Theoretical Criminology 35, 40.

traced back to critical race feminism, which should be acknowledged rather than dismissed as too narrowly focused. In any case, initial worries for intersectionality's 'narrow' scope have been mostly surpassed by scholars. Crenshaw herself noted that, although her analysis focuses on race and gender, this concept can be expanded to other factors of discrimination, such as class, sexual orientation, age and colour.[77]

Moreover, as a concept developed in the Global North, intersectionality understandably faced critique from scholars in the Global South. Nivedita Menon condemns the universality of intersectionality, arguing that it does not fully capture the complexities of feminist struggles, particularly in India.[78] Intersectionality was used to describe what was already known in India as 'double and triple burdens', meaning that women's experiences are shaped by caste, religion and class, besides gender.[79] From the beginning, women's subordination in India was linked to their other group identities, in contrast to the West, where, as it was analysed above, women's struggles were considered uniform.[80] Menon thus considers intersectionality as one more concept developed in the Global North that travelled to the South to explain what was already understood in the specific post-colonial context of the latter, and 'concepts emerging from Western (Euro-American) social philosophy necessarily contain within them the possibility of universalisation – the reverse is never assumed'.[81]

Indeed, while extensive material from the Global South explores alternative perspectives on feminist and intersectional theories, it still revolves around a framework originally conceptualised in the Global North, as is often the case in academic research.[82] Similarly, critics acutely pinpoint the focalisation of such theories on the 'privileged' as the 'normative', always

[77] She explicitly mentions that 'I see my own work as part of a broader collective effort among feminists of color to expand feminism to include analyses of race and other factors such as class' and that '[w]hile the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientations, age, and color'. Crenshaw (n 26) nn 8–9.

[78] Nivedita Menon, 'Is Feminism about "Women"? A Critical View on Intersectionality from India' (2015) 50 Economic and Political Weekly 37.

[79] ibid 38.

[80] The perception of the category 'woman' differed between the North and the South, as in the latter gender was from the start approached in a contextual manner: in India, its connection to language, cast and class was intrinsic, while in Latin America it was argued that colonialism imposed a new gender system. In other words, theorists from these parts of the world already understood the 'differential construction of gender along racial lines'. María Lugones, 'Heterosexualism and the Colonial / Modern Gender System' (2007) 22 Hypatia 186, 206.

[81] Menon (n 78) 37.

[82] Connell (n 23) 520.

producing an 'Other'. According to them, intersectionality continuously generates new marginalised subjects without fully destabilising existing power structures.[83]

Besides that, Menon argues that intersectionality's globalisation inevitably led to its institutionalisation, transforming it from a radical concept to an institutional, depoliticised and governmental tool.[84] It got incorporated into neoliberal frameworks that emphasise 'diversity' in order to achieve ideological and institutional objectives; this neutralises intersectionality's transformative potential.[85] What Sirma Bilge calls *disciplinary feminism*, ie a form of feminism that prioritises academic legitimacy and institutional recognition over challenging power structures and advocating for social change, converts intersectionality into an institutionalised concept rather than a reforming instrument for social justice.[86]

While this analysis offers a welcomed different point of view, notably from the perspective of India, one could say that Menon goes as far as nullifying intersectionality's multiple facets and contributions (even though she acknowledges in the end the relevance of the term[87]). Intersectionality is a flexible analytical tool that can be adapted to different contexts, and certainly does not erase local feminist movements – instead, it enhances them by providing a framework to analyse multiple oppressions (eg caste, religion, gender, and class). Indian feminist movements have long recognised intersecting oppressions, even if they did not use the actual term 'intersectionality'. The concept can complement rather than override indigenous feminist theories. From the perspective of another Indian scholar and Dalit feminist, Sunaina Arya argues that Menon overlooks Dalit feminist theory,[88] which 'celebrate[s] intersectionality as a crucial tool for advancing gender justice'.[89] Mary John, in turn, when examining Menon's arguments, concludes that this US theory has spoken to many marginalised women around the

[83] Puar (n 58); Myra Marx Ferree, 'Beyond the Us-Them Binary: Power and Exclusion in Intersectional Analysis' (2015) 2 DiGeSt. Journal of Diversity and Gender Studies 33; Heidi Safia Mirza (ed), *Black British Feminism: A Reader* (Routledge 1997) 13 (noting that 'difference is plagued by some central philosophical problems', meaning that the concept of difference risks depoliticising feminism and centering whiteness).
[84] Menon (n 78) 42.
[85] Bilge (n 68).
[86] ibid 409.
[87] Menon (n 78) 44.
[88] Dalit feminism examines the intersection between caste and gender from the experience of Dalit women; it recognises that the oppression based on caste exacerbates discrimination against women, leading to the exploitation of Dalit women. See Rudraksh Singh Sisodia, Anshumaan Tandon and Rishab Jain, 'Dalit Feminism: Historical Context and Impact' (2024) 6 International Journal for Multidisciplinary Research.
[89] Arya (n 53) xix.

world and it has sparked a much-needed global critical dialogue between the centre and the margins.[90]

Moreover, as regards the supposed 'governmentalisation' and 'institutionalisation' of identity categories, while this is not entirely contested, it should be noted that intersectionality does not essentialise identities – on the contrary, it seeks to deconstruct rigid identity categories and highlight how social structures, rather than inherent differences, create oppression. The fact that this theory has been utilised as identity politics for market purposes should not invalidate the theory itself. A constant reminder of its roots in conjunction with the necessary reinterpretation rather than its nullification should be the driving point in order to achieve a broad acknowledgment of women's varied experiences.

Another criticism surrounding this concept involves its association to law and the shortcomings of law in general.[91] Legal feminism critiques how the law often fails to capture the realities of individuals, especially those affected by intersecting forms of discrimination.[92] This disconnection stems from the law's rigid categories, which can distort or erase real experiences. In addition to that, we have to take into consideration that legal systems often mirror the dominant group's values and are used to marginalise outsiders.[93] As Carol Smart argues, law does not reshape social reality but instead reinforces power structures, often silencing women's experiences through a framework embedded in masculine culture.[94] In this context, intersectionality struggles to find meaningful space within legal structures. If law is structurally resistant to capturing complex realities, and reform efforts risk becoming tokenistic, we are left to question the efficacy of pursuing legal reform as a strategy for genuine intersectional justice.[95] The law's recognition is, nonetheless, essential in today's societies, and intersectional subjects might not be able to find justice without this step.

In addition, some scholars even consider that intersectionality does not help remedy the shortcomings of anti-discrimination law, but rather reinforces them. More specifically, the

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[90] John (n 58) 76.

[91] Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Emily Grabham and others (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2008) 2.

[92] ibid 7.

[93] Grace Ajele and Jena McGill, *Intersectionality in Law and Legal Contexts* (Women's Legal Education & Action Fund (LEAF) 2020) 36.

[94] Carol Smart, *Feminism and the Power of Law* (Carol Smart and Maureen Cain eds, Routledge 1989).

[95] Nonetheless, some scholars argue that intersectionality *can* be used to overcome the shortcomings of formal legal equality or rights strategies used to mask the perpetuation of harmful systems. See Dean Spade, 'Intersectional Resistance and Law Reform' (2013) 38 Signs 1031.

theory of intersectionality was developed, as we saw, to address the limitations of anti-discrimination law, which often operates on single-axis categories. However, this categorical approach – of intersectionality itself – has been criticised for perpetuating the very problem it seeks to overcome.[96] By focusing on group-based rights, intersectionality may inadvertently reinforce the idea that individuals can be neatly categorised into predefined groups, ignoring the fluid and context-dependent nature of identity. Nina Lykke notices that intersectionality often loses its analytical depth, as scholars focus on listing categories, distancing from meaningful engagement with how power and identities actually interact.[97] Focusing on legal reforms, ie those related to anti-discrimination laws, shifts the attention from analysing the broader structural and systemic factors that perpetuate inequality and leads to the entrapment of this theory within legal compartmentalisation.

On the other end, criticism meets criticism. According to Vivian May, 'epistemic resistance' – with the exception of that sourcing from scholars of the Global South – often manifests in three ways: people from privileged backgrounds may misunderstand or misrepresent intersectionality, unintentionally reinforcing the same power imbalances that marginalised scholars aim to dismantle; material and social privilege can make it harder for those in dominant positions to fully grasp the lived realities of marginalised groups; discussions about liberation and equality often fall back on simplified, one-dimensional approaches (eg, focusing only on gender without considering race or class), creating false universal claims that ignore the specific struggles of marginalised women.[98] Moreover, she argues that many critiques of intersectionality fail to engage with its core principles. Instead of acknowledging intersectionality as a fluid, multi-dimensional framework, critics try to force it into rigid categories, apply binary logic, or impose hierarchies of oppression – all of which intersectionality was designed to challenge.[99]

At the end of the day, the fluidity and multi-dimensionality of intersectionality is what makes this theory resistant to any criticism. Intersectionality was developed to offer marginalised women a space to voice their unique experiences, regardless of identities, status or context. It

[96] Nash (n 74) 6; Nina Lykke, 'Intersectional Analysis: Black Box or Useful Critical Feminist Thinking Technology?', *Framing Intersectionality: debates on a multi-faceted concept in gender studies* (Routledge 2011) 210.
[97] Lykke (n 96) 211.
[98] Vivian M May, '"Speaking into the Void"? Intersectionality Critiques and Epistemic Backlash' (2014) 29 Hypatia 94, 98.
[99] ibid 102.

does not impose a specific scope, application or method, but rather implies a continual attentiveness to context, power relations, and the lived realities of those in the margins. While this might seem chaotic, one might say that 'successful theories thrive on ambiguity and incompleteness'.[100] Nonetheless, discussions on identity politics and the boundaries of intersectionality offer valuable insights into why there is no scope to this theory and why this does not equate to a weak framework, as it will be outlined in the following subchapter.

2.2.2. On the Politics of Recognition and Exclusion

The above analysis revealed that in the beginning critics were afraid that intersectionality's scope is too narrowly focused, revolving almost exclusively around race and gender. Nevertheless, with the interest in this concept growing, more categories were added to its analysis, reaching at times endless lists of discrimination grounds. As a result, we can see a number of different grounds each time enumerated in official IHRL documents and usually in a non-exhaustive manner.

In view of this multiplication and endlessness of categories, scholars are afraid that intersectionality 'risks theoretical collapse'.[101] They estimate that as intersectionality attempts to account for an increasing number of identities, it risks becoming overly complex and theoretically unstable. Each individual has a unique matrix of identities that can shift over time, making it difficult to create a coherent framework that encompasses all experiences of privilege and oppression.

Nira Yuval-Davis, on the other hand, does not see boundaries in intersectional analysis, as it 'should encompass all members of society and … should be seen as the right theoretical framework for analysing social stratification'.[102] This does not strip intersectionality of its political essence simply because one might argue that everyone is affected one way or another; Yuval-Davis suggests that social divisions are not writ in stone, but are shaped by historical contexts, political struggles, and human interpretation, with some divisions like gender and class affecting most people, while others, such as disability or statelessness, impact fewer but

[100] Davis (n 1) 44 (referencing Murray S. Davis).
[101] Peter Kwan, 'Jeffrey Dahmer and the Cosynthesis of Categories' (1997) 48 Hastings Law Journal 1277.
[102] Nira Yuval-Davis, 'Beyond the Recognition and Re-Distribution Dichotomy: Intersectionality and Stratification' in Helma Lutz, Maria Teresa Herrera Vivar and Linda Supik (eds), *Framing Intersectionality: debates on a multi-faceted concept in gender studies* (Ashgate 2011) 159.

remain important for those affected.[103] Recognising power structures, rather than merely social identities, is politically significant, as the categorisation of social divisions is both an analytical process and a product of creative human agency. This does not mean that every possible ground of discrimination must be included in every analysis, but rather that our analytical framework should remain flexible and responsive to context-specific power dynamics, as anyone can potentially be an intersectional subject given the specific circumstances.

At the same time, intersectionality's boundlessness is counteracted by the frequent exclusion from its analysis of wholly or partially privileged subjects, even though 'those identities, like all identities, are always constituted by the intersections of multiple vectors of power', as Jennifer Nash points out.[104] If we take as an example white, heterosexual women, does it mean that because of intersectionality's roots in anti-essentialist discourse they should be excluded from an intersectional analysis? What if they are poor or underage girls or elderly women? Nash references Zack's work suggesting that all women are intersectional subjects, 'precisely because of the possibility that their womanhood (already a socially disadvantaged position) will intersect with other social positions to multiply disadvantage them'.[105] Peter Kwan suggests that intersectionality does not include all multiple identities, as white heterosexual males, for example, possess in fact multiple identities, but are excluded from scholars' intersectional analysis.[106] Sumi Cho, on the other hand, notably challenges this approach, arguing that centring the most marginalised does not equal the burdening of the 'singularly disadvantaged'; intersectionality's aim is justice for all who face oppression, whether this is due to a singular subjectivity or multiple ones.[107]

It should be noted that identity itself has been the subject of criticism, as scholars are afraid that it can lead to essentialism but also conflict. This means that putting emphasis on groups can create the idea that these groups are internally homogenous and can foster internal coalitions leading to conflicts with other groups.[108] In this lies the importance of contextual analysis: we cannot essentialise social categories; intersectionality works in multiple directions and an important component of its method consists in analysing the power relations in a specific

[103] ibid 160.
[104] Nash (n 74) 10.
[105] ibid.
[106] Kwan (n 101) 1275.
[107] Sumi Cho, 'Post-Intersectionality: The Curious Reception of Intersectionality in Legal Scholarship' (2013) 10 Du Bois Review 385, 392.
[108] Robert Chang and Jerome Culp, 'After Intersectionality' (2002) 71 UMKC Law Review 485, 487.

situation, as it will be shown next (2.2.3.). As Robert Chang and Jerome Culp note 'Differences…by themselves cannot be assigned fixed values': it is the synergy of the different subjectivities in a particular context that leads to an intersectional discrimination.[109] For this reason, I argue that defining the scope of intersectionality in terms of 'including' or 'excluding' particular categories or individuals is not crucial. What matters is preserving its core principle – the need to examine every instance of discrimination or subordination from all possible angles.

2.2.3. Intersectionality as a Methodological Framework

The broad scope of intersectionality and the challenges in defining it make it difficult to imagine a methodology to accompany this theory. This is the case for any complex theory and goes hand-in-hand with what Nash calls 'Intersectionality's relative attention to methodology',[110] meaning that scholars have given little attention to actually developing methods that can achieve intersectionality's aims.

While some scholars propose already-known methods, such as the 'Qualitative Comparative Analysis', to facilitate intersectionality's application in the legal praxis,[111] other scholars consider intersectionality a 'method' or a 'heuristic device' itself.[112] As a method, intersectionality is applied in line with its core idea: examining one category in relation to others within a specific context. This involves both how the subject perceives their experience – potentially revealing intersectional dimensions – and the analyst's role in asking the 'right'

[109] ibid 489.
[110] Nash (n 74) 5.
[111] Pablo Castillo-Ortiz, Amal Ali and Navajyoti Samanta, 'Gender, Intersectionality, and Religious Manifestation before the European Court of Human Rights' (2019) 18 Journal of Human Rights 76 (arguing that Qualitative Comparative Analysis [QCA] as a method that examines how different factors combine and interact within specific cases to produce outcomes is particularly suitable for analysing intersectional categories).
[112] Helma Lutz, 'Intersectionality as Method' (2015) 2 DiGeSt. Journal of Diversity and Gender Studies 39, 39. Intersectionality is at times a theory or a field of study or a method itself. That does not mean that the one negates the other; it can be used in a variety of ways and in different disciplines (women's studies, sociology, history, international law and others). That is why it is widely considered a travelling theory. See Jens T Theilen, 'Intersectionality's Travels to International Human Rights Law' (2024) 45 Michigan Journal of International Law 233, 237. Some scholars oppose, however, to the characterisation of intersectionality as a methodology, and call it rather a 'framework', 'within which different methods and methodologies can be developed'. See Maria Rodó-De-Zárate and Marta Jorba, 'Review of the The Complexity of Intersectionality (McCall)' (*ResearchGate*, 29 May 2024)<https://www.researchgate.net/publication/331047794_Review_of_the_The_Complexity_of_Intersectionality_McCall> accessed 22 May 2025.

questions and applying an intersectional lens.[113] In this sense, Helma Lutz observes three levels of intersectional analysis: the level of the narrator, the level of the analyst and the level of power relations.[114] As regards the second, Mari Matsuda introduced the famous 'other question' as a method for applying an intersectional lens: this involves asking an additional question in situations that initially appear to involve a single form of discrimination (eg, when something seems racist, asking 'where is the patriarchy in this?').[115]

Another interesting contribution to this discussion is that of Leslie McCall, who indicates three approaches (which she calls 'complexities') that we can follow when applying intersectionality: the *anticategorical complexity*, which rejects fixed social categories, viewing them as oversimplifications that create rather than reflect social differences and inequalities; the *intercategorical complexity*, which uses existing social categories strategically to analyse and compare patterns of inequality across groups; and lastly, the *intracategorical complexity*, which focuses on individuals at neglected intersections of identity to explore the complexity within social groups, while remaining critical of fixed categories.[116] The first (anticategorical) seems incompatible with the other two, as it deeply deconstructs categories, while the inter- and intracategorical approaches can be applied together.[117] Moreover, intercatergorical's distinction from the intracategorical consists in the fact that the former moves along multiple social groups: the subject is 'multigroup' and the method is 'systematically comparative'.[118] Overall, the categorical approaches compare multiple social groups between them, within them and in their own essence. This analysis could, however, be considered a *petitio principii* or 'begging the question', as these approaches allow to unveil the complexities but fail to explain them and provide a methodology to redress them.[119]

In practical terms, for intersectionality to be applied we need specialised data collection which describe the experiences of intersectional subjects.[120] This, in combination with women's own storytelling, which has been the driving point in realising women's rights in the first place, can operate as a first step to reveal and understand intersectionality in practice. In this process, the

[113] Lutz (n 112) 41.
[114] ibid.
[115] Mari J Matsuda, 'Beside My Sister, Facing the Enemy: Legal Theory out of Coalition' (1991) 43 Stanford Law Review 1183, 1189.
[116] McCall (n 20) 1773–1774.
[117] ibid 1786.
[118] Rodó-De-Zárate and Jorba (n 112).
[119] ibid.
[120] Raj and others (n 3) 115.

role of the analyst is catalytic, as they can guide the discussion towards 'invisible' dimensions of intersectional experiences. At a second stage comes the review of existing policies and the construction and implementation of intersectional ones.[121] In short, intersectionality as a methodology offers the proper recognition to the victims of discrimination and unveils its root causes, which in turn allows to find the appropriate measures to prevent and redress it.

The process can be similar in IHRL: it is accepted that in IHRL intersectionality as a method can offer valuable tools to better identify, understand, and address complex and overlapping forms of discrimination. Intersectionality could also be linked to the emotional and experiential dimensions of justice, particularly in cases where judges acknowledge the psychological burden or vulnerability of victims. In such instances, extra-legal factors, like the emotional urgency to 'render justice', are taken into account, suggesting a more human-centred and context-sensitive approach that resonates with intersectional reasoning.

Overall, this theory/method allows to assess harm more accurately and ensure remedies that reflect the full scope of the injustice suffered. This improves the responsiveness and fairness of human rights law.[122] In the analysis that follows, I will examine exactly how this much debated theory 'travelled' to international law and how it is incorporated into IHRL frameworks and case law.

2.3. Transposing Intersectionality: A New Paradigm for International Human Rights Law?

2.3.1. Challenging Universality

International human rights law was built on the notion of universality, which assumes a 'genderless, neutral and abstract human being' as its subject.[123] The Universal Declaration of Human Rights first and foremost proclaimed in 1948 that '[a]ll human beings are born free and equal in dignity and rights'.[124] Human rights, of course, as implied by the term, are rights that

[121] ibid 127.
[122] Patricia Hill Collins, 'Intersectionality's Definitional Dilemmas' (2015) 41 Annual Review of Sociology 1, 16.
[123] Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill Nijhoff 2018) 48–49.
[124] Article 1 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UNDHR).

one possesses simply because of their humanity. And they are enjoyed equally by all human beings. This is the core idea of 'universality'. However, feminists revealed that this portrayal of the abstract rights-holder is in reality not universal but implicitly assumes a masculine perspective.[125] It also fails to account for the differences noticed between the rights-holders, which are often the actual source of rights violations. As it was outlined above (2.1.2), cultural relativism offered a valuable perspective to understand that the identity, experiences and morals of individuals are culturally shaped; there is an 'undeniable social side to human nature', which requires 'significance allowance for crosscultural variations in human rights'.[126] These two elements (ie, the masculine perspective and the differences between rights-holders) reveal that universality affects women in two directions: first, regarding their gender, and second, regarding the role of other identities to which they pertain and that intersect with their gender.

Indeed, human rights were in fact conceptualised in a gendered manner, as they were based on an abstract, autonomous rights-bearer that ignores the relational nature of individuals and fails to account for the structural and social conditions shaping women's experiences and autonomy.[127] And this generalisation extends beyond gender, to exclude experiences and contexts that significantly shape the enjoyment of human rights. This reveals a single-axis approach to equality that overlooks how oppression is redefined at the intersections. While human rights instruments advocate for protection 'without distinction of any kind',[128] intersectionality shifts the focus to how those very distinctions are integral to understanding why rights are denied in practice. This is particularly evident in the case of women, whose rights were not always conceived as human rights but were later incorporated into international conventions.[129] As Shreya Atrey notes, the universality of human rights must reflect 'the equality of difference',[130] a claim that intersectionality helps illuminate and operationalise. Johanna Bond's call for a 'qualified universalism' also resonates here, suggesting that

[125] Ivana Radicic, 'Feminism and Human Rights: The Inclusive Approach To Interpreting International Human Rights Law' (2008) 14 UCL Jurisprudence Review 238, 240.
[126] Donnelly (n 42) 403.
[127] Radicic (n 125) 243.
[128] Article 2 of the UNDHR.
[129] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486.
[130] Atrey and Dunne (n 2) 22.

meaningful universality is only possible through human rights frameworks capable of responding to difference not as deviation, but as a central legal and political concern. [131]

After the realisation that the so-called 'first generation' rights did not respond to the issues of marginalised groups, frameworks for the protection of their specific rights followed two routes: that of the existing rights with the added application of the non-discrimination principle, or that of the acknowledgment of specific rights in separate conventions. The first one is followed, for instance, in the UN's principal human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)[132] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[133] As regards the second one, there have been a number of group-specific human rights treaties in the international scene. In the case of women specifically, the primary international instrument for the protection of their rights, often described as 'international bill of rights for women', is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 by the United Nations General Assembly and ratified by 189 States.[134] Both routes, however, reveal limitations and are often not capable of offering protection to intersectional subjects. From the single-axis framework of the non-discrimination principle securing mainly formal and not substantive equality, to the fragmented nature of a multiple-convention system for separate grounds of discrimination, the development of the IHRL framework for a long time did not manage to escape the shortcomings of universality and embrace intersectionality, at least in a practical, effective manner.

2.3.2. Intersectionality and the UN Treaty System: A Tentative Engagement

Intersectionality entered IHRL discussions quite late. The United Nations, by adopting separate treaties for different types of oppression, showcased a 'fractured understanding of the nature of discrimination' within its system[135]. When it comes to the CEDAW specifically, there was no

[131] Johanna E Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 Emory Law Journal 76.
[132] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 26.
[133] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3 (ICESCR) art 2(2).
[134] United Nations Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[135] Bond (n 131) 93.

mentioning of intersectionality, or at least multiple discrimination, in the adopted text.[136] There was only a reference to rural women in Article 14 and to pregnant and breast-feeding women in Article 12(2), while in the – non-binding – preamble it is declared that the '…eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination…' is essential to the enjoyment of women's rights, thereby acknowledging a connection between race and gender. González Orta considers that the CEDAW's preamble generally reflects a global perspective by addressing economic inequalities, foreign occupation, and international tensions, incorporating concerns of socialist and developing countries rather than adhering to a Western-centric, liberal feminist framework.[137]

The first significant step towards the recognition of an intersection between gender and race in the UN system was through the Committee's on the Elimination of Racial Discrimination (CERD) General Recommendation No 25, issued in 2000.[138] Nonetheless, CERD followed an additive approach, as it called for the possibility of double discrimination based on gender and race, and that some forms of racial discrimination 'have a unique and specific impact on women',[139] but did not recognise the fundamentally different nature of violations in such cases.

Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No 20 only addressed 'multiple discrimination', calling it 'cumulative', but then confused it with elements of intersectionality, as it stated that this cumulative discrimination 'has a unique and specific impact on individuals and merits particular consideration'.[140] In the same Comment the CESCR mentions intersectionality and refers to paragraph 27 where there is only a mentioning of 'intersection of two prohibited grounds of discrimination', without giving another definition.[141] This was not the first time the CESCR mentioned intersectionality, as in its General Comment No 16, it had underlined that the *intersection* of different factors

[136] Other group-specific conventions, however, were more inclusive. In Articles 22 and 23 of the Convention on the Rights of the Child there are provisions for refugee and disabled children respectively, while in Article 38 there is a reference to children in armed conflicts. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts 22, 23, 38. See also Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 arts 6, 7, 11.
[137] González Orta (n 52) 82.
[138] CERD, 'General Recommendation No. 25 on Gender Related Dimensions of Racial Discrimination' (2000).
[139] ibid para 3.
[140] CESCR, 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20 para 17.
[141] ibid para 27.

result in '*compounded* disadvantage'.[142] Chow notices this misunderstanding of intersectionality by UN Treaty bodies as an 'additive exercise' resulting in squaring women's experiences.[143] Makkonen's important distinction between multiple, compound and intersectional discrimination (2.1.1) can be used here to understand why terms such as 'multiple', 'double', or 'compound' discrimination/disadvantages, without more concrete definitions, do not depict intersectionality's essence.

On the other hand, the UN Special Rapporteur of the Commission on Human Rights, Radhika Coomaraswamy, referenced explicitly the intersection of gender-based discrimination with other forms of discrimination in her report for the preparation of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, in 2001, highlighting the different ways in which this can affect women.[144] In the framework of the same Conference, an NGO Declaration provided the first definition of intersectionality at the international level:

> An intersectional approach to discrimination acknowledges that every person be it man or woman exists in a framework of multiple identities, with factors such as race, class, ethnicity, religion, sexual orientation, gender identity, age, disability, citizenship, national identity, geo-political context, health, including HIV/AIDS status and any other status are all determinants in one's experiences of racism, racial discrimination, xenophobia and related intolerances. An intersectional approach highlights the way in which there is a simultaneous interaction of discrimination as a result of multiple identities.[145]

Considering that it was written in the context of a conference against racism, this declaration focuses on the intersection of race with other identities determining a person's experience with racial discrimination.

As regards the CEDAW, intersectionality was explicitly introduced in 2010, through the CEDAW Committee's General Recommendation No 28, declaring that:

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[142] CESCR, 'General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)' (2005) E/C.12/2005/4 para 5.
[143] Chow (n 34) 473.
[144] Radhika Coomaraswamy (Special Rapporteur of the Commission on Human Rights), 'Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference [against Racism, Racial Discrimination, Xenophobia and Related Intolerance]' (United Nations 2001) A/CONF.189/PC.3/5.
[145] 'NGO Forum Declaration at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance' (2001) para 116.

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is *inextricably linked* with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their *compounded negative impact* on the women concerned and prohibit them.[146]

For some critics the initial ellipsis of intersectionality in CEDAW's text is not incidental and 'has real consequences for women'.[147] Indeed, the homogenous representation of women fails to account for the different manifestations of discrimination against women depending on the interplay of various factors not mentioned in the CEDAW. This can have an impact on how the states themselves shape their anti-discrimination policies, perpetuating a distorted approach to tackling discrimination against women. Not adopting an intersectional lens in any major UN human rights treaty, particularly the CEDAW, sends a strong – negative – message to the states about the importance of this approach when preventing and redressing human rights violations. On the other hand, as Chow observes, through its Recommendation No 28, CEDAW Committee follows the *compound* version of discrimination, meaning that it perceives intersectional forms of discrimination to have a 'compounded negative impact' on women and thereby does not take into consideration instances where intersecting identities might not express the same way in all subjects.[148]

Nevertheless, for other scholars, the Committee is said to be 'transcending the discontinuities between intersectional theory and discrimination law'.[149] According to Campbell, by broadly addressing gender discrimination, the CEDAW Committee leaves room for intersectional approach not on multiple grounds – as would be in an anti-discrimination law approach – but on women's different experiences. This is corroborated also by its commitment to eliminate discrimination against women in 'all its forms' and in different fields.[150] This is a generous interpretation to overlook CEDAW's initial 'weakness' of excluding intersectionality from its

[146] CEDAW, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (n 19) para 18.
[147] Buthaina Mohammed Alkuwari, 'Human Rights of Women: Intersectionality and the CEDAW' (2022) 11 International Review of Law.
[148] Chow (n 34) 472.
[149] Campbell (n 7) 10.
[150] ibid 19. See also González Orta (n 59) 83 (highlighting the CEDAW's 'relevance in promoting an intersectional perspective that addresses all forms of discrimination against all groups of women').

framework. And it might not be too far-fetched; in its decisions that followed – although not binding –, the CEDAW Committee adopted an intersectional lens in a number of cases brought to its attention.

2.3.3. The CEDAW Committee's Application of Intersectionality

The CEDAW Committee receives Individual Communications and issues decisions on the merits of the cases, which gives it the opportunity to evolve the Convention's interpretation. There have been several cases with an intersectional dimension brought before the Committee, where it had the chance to fill the aforementioned gaps of the CEDAW's text.

For instance, in the case of *Maria de Lourdes da Silva Pimentel v Brazil*, the applicant's daughter passed away after giving birth to a stillborn and not receiving the proper emergency care by the State. The Committee found that Brazil violated the right to non-discrimination 'based on gender, race and socio-economic background'.[151] It continued by noting:

> [T]he Committee recalls its concluding observations on Brazil, adopted on 15 August 2007, where it noted the existence of de facto discrimination against women, *especially women from the most vulnerable sectors of society such as women of African descent*. It also noted that such discrimination was *exacerbated by regional, economic and social disparities*. The Committee also recalls its general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, recognizing that discrimination against women based on sex and gender *is inextricably linked to other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, cast, and sexual orientation and gender identity*.[152]

In this way, the CEDAW Committee explicitly recognised the interconnectedness of the various systems of disadvantage that coexist with gender and how these create unique experiences of discrimination. While at first glance it may appear that the Committee follows the anti-discrimination law approach, where different grounds can be simply added one to another, and does not reference intersectionality per se, the use of the expression 'inextricably linked' points towards the intersectional way. The confusion of compound and intersectional discrimination is, however, still persistent; as seen in the above abstract, the Committee merges expressions such as 'especially women from most vulnerable sectors' and 'exacerbated discrimination',

[151] *Maria de Lourdes da Silva Pimentel v Brazil*, Communication No. 17/2008 (CEDAW, 25 October 2011) CEDAW/C/49/D/17/2008, para 7(2).
[152] ibid para 7(7).

which imply that the addition of several factors merely increases vulnerability, with the expression 'inextricably linked' referring to intersectionality.

Similarly, in *Cecilia Kell v Canada*, the applicant, an Aboriginal woman, applied for housing through a program for *Aboriginal* people with her abusive – non-Aboriginal – husband after being rejected when applying alone.[153] They were granted housing, but her partner later removed her name from the lease as he was a director of the Housing Authority Board, and no one objected to this action; when she sought employment independently, he denied her access to their house. While she was normally the one entitled to this housing opportunity, her partner, who was not a member of the aboriginal community, was finally the one to take possession of the house. After a short time, her partner passed away but she was still not granted ownership of the house. In its decision, the Committee – except for one of its members, Ms Patricia Schulz, who issued a dissenting opinion[154] – recalled the text of its Recommendation no 28, which references intersectionality, and stated that:

> The discrimination of women based on sex and gender is *inextricably linked* with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. States parties must legally recognize and prohibit such intersecting forms of discrimination and their *compounded negative impact* on the women concerned (para. 18). Accordingly, the Committee finds that an act of intersectional discrimination has taken place against the author.[155]

Through this statement and the general recommendations addressed to Canada, namely to 'recruit and train more aboriginal women to provide legal aid to women from their communities' and to 'Review its legal aid system to ensure that aboriginal women who are victims of domestic violence have effective access to justice', the CEDAW Committee

[153] *Cecilia Kell v Canada*, Communication No 19/2008 (CEDAW, 28 February 2012) CEDAW/C/51/D/19/2008.
[154] Committee Member Schulz considered that the application should have been declared inadmissible as manifestly ill-founded, and even if it were to be considered admissible, it should be dismissed on its merits because 'no evidence was provided of the alleged discrimination against the author or against women in Canada, including aboriginal women, rural women, women living in the Rae-Edzo community and women who are victims of domestic violence.'. ibid para 1(2) (Individual opinion of Committee member, Ms. Patricia Schulz [dissenting]). This opinion reflects one the one hand the evidentiary hurdles in discrimination claims, and on the other hand the misconception – or rather rejection – of intersectionality, as statistics often do not reveal intersectional discrimination; they usually focus on a specific category and thus cannot depict the uniqueness of intersectional experiences.
[155] ibid para 10(2).

demonstrated an understanding of the difficulties women face in that area due to their intersecting identities and the unique discrimination they experience.[156]

The CEDAW Committee's case law is not consistent. In another case regarding the performance of a forced sterilisation on a Roma woman at a Hungarian public hospital, despite the clear existence of overlapping factors leading to her discrimination, the CEDAW Committee failed to provide an intersectional analysis. The woman underlined her extremely vulnerable position as a member of a marginalised group – Roma – and that she would have never given consent had she known the object of the consent, especially considering her strict Catholic religious beliefs and the procreation being an essential part of her culture.[157] The Committee condemned the State for violating the right to information, to non-discrimination in the healthcare sector and the right to reproductive choices, but did not make any reference to the specific circumstances of the victim as a Roma Catholic woman.

The CEDAW Committee also failed to adopt an explicitly intersectional lens in its decision on the case of *R P B v the Philippines*, where the applicant, a deaf and mute 17-year-old woman, was raped by a neighbour in her residence.[158] When she reported the incident to the police, she was interviewed by a male police officer without an interpreter, and only her sister assisted in the interpretation. Moreover, the police officer wrote the affidavit in Filipino although the applicant could only understand written English due to her special education as a deaf person; she was nonetheless not provided with an interpretation in English. The applicant claimed that she was discriminated against by authorities as a deaf Philippina girl. More specifically, she pointed out that:

> [D]eaf women, especially girls, occupy a difficult position in Philippine society because they are disadvantaged both to men (men with or without disability, including deafness) and women (women without or with disability other than deafness). In addition, deaf women and girls, who are victims of sexual violence, often suffer from poverty and lack access to formal education.[159]

The Committee did not elaborate on the applicant's situation, and simply referenced its Recommendation No 18 where it classified disabled women as a 'vulnerable group' that face

[156] ibid para 11.
[157] *A S v Hungary*, Communication No 4/2004 (CEDAW, 29 August 2006) CEDAW/C/36/D/4/2004, paras 2(4), 9(4).
[158] *R P B v the Philippines*, Communication No 34/2011 (CEDAW, 21 February 2014) CEDAW/C/57/D/34/2011.
[159] ibid para 3(8).

'double discrimination'. It emphasised that women with disabilities should enjoy protection against *sex* and *gender-based* discrimination.[160] In this way, not only did the CEDAW Committee adopt an additive approach by calling this situation a 'double discrimination', but also considered this discrimination only on the bases of sex/gender. It appears that it considers disabled women as a more vulnerable sub-category of the more general category of women; it did not capture intersectionality's core idea of the overlapping impact of these different structures of disadvantage. Moreover, it did not take into consideration the age of the applicant, who was underage.[161]

In the framework of the Inquiry Procedure – under which the CEDAW Committee carries out an examination when there are indicators of violations under the Convention – the Committee has pointed out the intersectional discrimination that aboriginal women in Canada face, whose experiences are shaped by the simultaneous reification of multiple systems of oppression (race, gender, socioeconomic status).[162] Regarding its Concluding Observations on State parties' periodic reports, however, Campbell notes that the Committee is inconsistent in incorporating intersectionality in the situations of women which it monitors.[163]

A clearer analysis of intersectionality can be found in recommendations, which, although a useful tool, are not always referenced in practice – especially those containing an intersectional approach – when addressing individual communications brought before the CEDAW Committee. The Committee's limited case law shows its resistance to really integrating an intersectional approach in its analysis. Even in the cases where it mentions intersectionality, this is done in a limited degree and the Committee does not engage in a more robust application of this theory in the facts of the cases and the recommendations addressed to the violating state. Overall, UN Treaty bodies fail to incorporate a contextual analysis and follow a so-called 'positivist approach', in the sense that they focus on identities and categories instead of the processes that surround them (ie colonialism, capitalism).[164] Besides, depoliticisation is a central problem in IHRL.

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[160] ibid para 8(3).

[161] Ivona Truscan and Joanna Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 The Equal Rights Review 119.

[162] CEDAW, 'Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (2015) C/OP.8/CAN/1.

[163] Campbell (n 7) 38.

[164] Theilen (n 112) 249.

In sum, the fragmentation of the IHRL system, ie the creation of different conventions and monitoring bodies for different forms of discrimination, can disorientate intersectional subjects. Chow observes that Muslim women, for instance, receive different reaction from international human rights bodies when it comes to claims about headscarf bans: while the CEDAW and the ECtHR dismiss such claims, the HRC and the CRC are more accepting, as they understand the intersectional issues arising from headscarf bans.[165] In addition, the UN Treaty bodies do not appear to engage in meaningful dialogue or influence each other's interpretations, limiting the development of a cohesive and consistent approach to human rights protections. Exceptions do exist, like the joint recommendation by the CEDAW and the CRC, where the Committees acknowledged that 'sex- and gender-based discrimination intersects with other factors that affect women and girls, in particular those who belong to, or are perceived as belonging to, disadvantaged groups'.[166] The expression intersecting factors/forms of discrimination is actually used multiple times throughout the text.[167] However, this reference is not merely enough to consider intersectionality incorporated in the IHRL framework. Theilen understandably calls this tendency of UN bodies to speak of 'intersections' and 'intersecting factors' instead of embracing explicitly the concept of intersectionality as the 'grey zones'.[168] One must therefore place their hopes in regional human rights systems, which, after all, provide courts capable of issuing binding judgments against States.

2.3.4. Regional Approaches to Intersectionality: The Inter-American and African Human Rights Systems

Regional human rights systems operate only in a specific region and offer the opportunity for the submission of individual complaints and the immediate application of remedies against human rights violations. In the Inter-American system – which includes the 38 member States of the Organisation of American States (OAS) – the main instrument protecting women's rights is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence

[165] Chow (n 34) 476.
[166] CEDAW and CRC, '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) CEDAW/C/GC/31-CRC/C/GC/18 para 6.
[167] ibid 15, 16(c,) 55(e).
[168] Theilen (n 112) 243.

Against Women (Belém do Pará Convention), adopted by the OAS in 1994.[169] This Convention was actually the first binding treaty to recognise violence against women and girls (VAWG) as a human rights violation, considering that VAWG was not included in the CEDAW and was only introduced later through the Committee's General Recommendations.[170] Additionally, the Belém do Pará Convention implicitly refers to the principle of intersectionality in Article 9, stating that:

> With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.[171]

We can observe a reference to multiple structures of disadvantage, such as race, ethnicity, place of origin, disability, age and socioeconomic status, which contribute to the special 'vulnerability of women'. Despite intersectionality not being mentioned per se, the inclusion of such a consideration is definitely a significant step towards the recognition of intersectionality in IHRL. Additionally, the OAS has adopted the American Declaration on the Rights of Indigenous Peoples (ADRIP), which in Article 7 provides for the protection of Indigenous women's rights.[172]

Responsible for monitoring the implementation of these Conventions are the Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights (IACtHR). The former has widely accepted intersectionality by including it in its reports, such as the one related to gender equality and women's rights[173] and the one recognising the rights of LGBTI people.[174] Throughout the case law of both bodies of the Inter-American System, scholars argue that they have developed the formal principle of non-discrimination to

[169] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (adopted 9 June 1994, entered into force 5 March 1995) OAS Treaty Series No A-61.
[170] CEDAW, 'General Recommendation No. 19: Violence against Women' (1992) 19; CEDAW, 'General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19' (2017) CEDAW/C/GC/35 35.
[171] Belém do Pará Convention (n 169) art 9.
[172] American Declaration on the Rights of Indigenous Peoples (adopted 15 June 2016) AG/RES. 2888 (XLVI-O/16) art 7.
[173] IACHR, 'Legal Standards: Gender Equality and Women's Rights in the InterAmerican Human Rights System: Development and Application' (2011) OEA/Ser.L/V/II. 143 Doc. 60.
[174] IACHR, 'Recognition of the Rights of LGBTI Persons' (2018) OEA/Ser.L/V/II.170 Doc. 184 paras 21, 24, 93, 185, 189.

incorporate interpretations of structural disadvantage and vulnerability, eventually leading to an intersectional approach.[175] In the judgment of *Gonzalez Lluy v Ecuador,* for instance, concerning a girl who was infected with HIV through a negligent blood transfusion and subsequently faced discrimination, including denial of education and social exclusion, the IACtHR noted that:

> [N]umerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a *specific form of discrimination that resulted from the intersection of those factors*; in other words, if one of those factors had not existed, the discrimination would have been different.[176]

What is more, Judge Eduardo Ferrer Mac-Gregor Poisot issued a concurring opinion analysing the concept of intersectionality and pointing out that, for it to apply, the interacting factors must create 'a unique and distinct burden or risk of discrimination'.[177]

According to Cecilia Gebruers, the IACtHR's judgment and subsequent case law on intersectionality illustrate how intersectional discrimination is shaped by overlapping factors like racism and patriarchy, with economic precarity playing a central role in deepening exclusion and limiting access to rights such as education and justice.[178] However, she considers the Court's analysis limited, as it does not delineate the scope of intersectionality and leaves room for 'fixation in essentialist categories', meaning that it adopts at times a 'homogenous notion of women' in specific contexts, such as in the healthcare system.[179]

In Africa, the equivalent to the OAS body is the African Union (AU), composed of 55 member States. The African Charter on Human and People's Rights (ACHPR),[180] ie the main regional human rights treaty ratified by these States, offers protection of human rights spanning from

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[175] Cecilia Gebruers, 'From Structural Discrimination to Intersectionality in the Inter-American System of Human Rights: Unravelling Categorical Framings' (2023) The Age of Human Rights Journal <https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/7629> accessed 2 April 2025.

[176] *Gonzales Lluy et al v Ecuador* [2015] Inter-American Court of Human Rights Series C No 298, para 290.

[177] ibid para 11 (Judge Eduardo Ferrer Mac-Gregor Poisot, concurring joined by Judges Roberto F. Caldas and Manuel E. Ventura Robles).

[178] Gebruers (n 175).

[179] ibid (bringing as an example the IACtHR's judgment in the case of *IV v Bolivia*, where the Court did not consider that poverty distinguishes a woman's experience in facing discrimination from reproductive healthcare services, but argued that women have a unified experience in this context).

[180] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

civil and political, to economic, social and cultural. The AU also adopted an additional protocol to the African Charter, protecting specifically women's rights (Maputo Protocol or Women's Rights Protocol).[181] Neither the Charter nor the Maputo Protocol mention intersectionality; nonetheless, the latter makes references to women with intersecting identities or in specific contexts, mainly women in armed conflicts,[182] girls-children,[183] women in rural areas,[184] pregnant and breast-feeding women,[185] elderly women,[186] women with disabilities[187] and women in distress – ie poor, marginalised, pregnant, nursing women or women in detention[188]. This approach demonstrates a rather broad understanding of women's rights touching upon intersectionality's idea that 'different subgroups of women experience inequality differently depending on intersecting markers of identity'.[189]

The African Commission on Human and People's Rights (AComHPR) later included intersectionality in its – non-binding – Guidelines on the implementation of the African Charter by clarifying that '*Intersectional or multiple discrimination* occurs when a person is subjected to discrimination on more than one ground at the same time, e.g. race and gender'[190] and calling States to:

> [R]ecognise and take steps to combat intersectional discrimination based on a combination of (but not limited to) the following grounds: sex/gender, race, ethnicity, language, religion, political and other opinion, sexuality, national or social origin, property, birth, age, disability, marital, refugee, migrant and/or other status.[191]

This marks an important understanding of intersectionality in the human rights system, urging States to incorporate it in their policies and actions. However, the jurisprudence of the African Court on Human and Peoples' Rights (ACtHPR) on women's rights and intersectionality is in

[181] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (Maputo Protocol).
[182] ibid art 11.
[183] ibid art 12(b).
[184] ibid art 14(2)(a).
[185] ibid art 14(2)(b).
[186] ibid art 22 (titled 'Special Protection of Elderly Women').
[187] ibid art 23 (titled 'Special Protection of Women with Disabilities').
[188] ibid art 24 (titled 'Special Protection of Women in Distress').
[189] Bond (n 5) 82.
[190] AComHPR, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights,' (2011) para 1(l).
[191] ibid para 38.

fact limited,[192] despite being the only regional human rights court to have jurisdiction to apply *all* relevant human rights instruments ratified by the States concerned and not only the regional ones (thus including the CEDAW, CERD etc).[193] In 2020, the ACtHR issued an advisory opinion on the compatibility of vagrancy laws – ie laws criminalising poor, homeless, unemployed people – with the African Charter and the Women's Rights Protocol, stating that they violate Article 24 of the Protocol protecting poor women, women heads of families and other women from marginalised populations, who are particularly affected by these laws.[194] In this regard, the ACtHPR has been praised for recognising 'intersectional vulnerability', 'bringing to light how laws historically inflict and exacerbate forms of vulnerability'.[195]

From the three regional human rights frameworks included in this thesis (Inter-American, African, European), it seems that the most protective and open to intersectionality is the Inter-American one, as the IACtHR has embraced the concept in more than one case. And it is not only a quantitative observation, but the Inter-American system is in fact closer to understanding the essence of intersectionality; it uses it to explain the human rights violations that women face and identify the appropriate measures to redress them. Of course, the history of Latin America regarding identities is distinct, necessitating in reality this approach,[196] and therefore cannot be compared to the European framework. However, this does not mean that the regional systems cannot take lessons from each other and engage in meaningful exchanges of ideas; besides, they often make references to the other's findings, particularly when examining novel cases. In this sense, the European Court of Human Rights, reluctant to incorporate intersectional analyses as it will be shown below (3.1.2), could be inspired by the IACtHR's approach and create an intersectional paradigm adapted to the European reality.

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[192] Lilian Chenwi, 'Women's Representation and Rights in the African Court' (2022) The Age of Human Rights Journal <https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/6896/6787#info>.

[193] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) art 3(1).

[194] ACtHPR, 'Advisory Opinion No. 001/2018 on the Compatibility of Vagrancy Laws with the African Charter on Human and People's Rights and Other Human Rights Instruments Applicable in Africa' (2020) paras 138–140.

[195] Chenwi (n 192).

[196] Mara Viveros-Vigoya observes that 'intersectionality became popular in Latin America during a period in which national identities were being redefined as multicultural, intercultural, or plurinational', which 'allowed intersectionality to resist attempts of appropriation by elements of the neoliberal philosophy that it has experienced in other regions'. Mara Viveros-Vigoya, 'The Travels of Intersectionality in Latin America: Bringing the Desks Out onto the Streets' in Kathy Davis and Helma Lutz (eds), *The Routledge International Handbook of Intersectionality Studies* (Routledge 2024) 56.

3. EUROPEAN LEGAL FRAMEWORK AND CASE LAW

3.1. Council of Europe

3.1.1. Intersectionality's Absence in the Council of Europe's Instruments

The Council of Europe (CoE) is a regional human rights organisation founded in 1949, which consists today of 46 member states. Its primary treaty is the European Convention on Human Rights (ECHR) signed in 1950, one of the first binding instruments protecting – civil and political – human rights and fundamental freedoms in Europe. Through Article 19 of the Convention, the European Court of Human Rights was established in 1959. Since the abolition of the European Commission of Human Rights in 1998, the Court directly accepts individual and inter-state applications claiming that any of the contracted States has violated one or more of the human rights envisaged in the Convention[197] and issues binding judgments. Additionally, the highest national courts can request non-binding advisory opinions from the ECtHR.[198]

Considering that the ECHR contained only civil and political rights, the Council of Europe adopted in 1961 the European Social Charter (ESC),[199] which was revised in 1996,[200] protecting a wide array of social, economic and cultural rights. The adherence of the contracted States to their obligations under the ESC is monitored by the European Committee of Social Rights (ESCR), which receives collective complaints[201] – contrary to the ECtHR – and issues non-binding decisions. The Charter includes the principle of non-discrimination,[202] but not any provisions that touch on intersectionality. It makes reference to employed pregnant women and young mothers,[203] but the rest of the provisions protect all persons regardless of gender or other characteristics. In addition, the initial 1961 Charter, still followed by the 8 states that have not ratified the Revised one, is considered to adopt quite a 'paternalistic' view towards women,[204] notably in Article 8 titled 'the right of employed women to protection', which urges States to

[197] Article 33 for inter-state and Article 34 ECHR for individual applications.
[198] Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 2 October 2013, entered into force 1 August 2018) CETS No 214 2013.
[199] European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) 529 UNTS 89.
[200] Revised European Social Charter (adopted 3 May 1996, entered into force 1 July 1999) ETS No 163.
[201] ibid art D (applies for the 16 states that have ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints [ETS No 158]).
[202] ibid art E.
[203] ibid art 8.
[204] Karin Lukas and Colm O'Cinneide, 'Gender Equality within the Framework of the European Social Charter' in Rebecca J Cook (ed), *Frontiers of Gender Equality: Transnational Legal Perspectives* (University of Pennsylvania Press 2023) 226.

'prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature'.[205]

Despite the absence of intersectionality in the Charter's text, the ESCR has developed a case law dealing with intersectional issues. For instance, in *IPPF EN v Italy*, the ESCR recognised that the different forms of discrimination based on territorial, socioeconomic, gender, or health status affect unequal access to abortion compared to other medical procedures, and that they constitute a 'claim of "overlapping", "intersectional" or "multiple" discrimination'.[206] Moreover, in *EDF and Inclusion Europe v France*, it mentioned the intersectional discrimination women and children with disabilities are exposed to.[207] Again, the ESCR does not actually elaborate on what intersectional discrimination entails. Nonetheless, its approach demonstrates a relatively greater sensitivity to the core principles of intersectionality compared to other European bodies, as it will be revealed below.

The incorporation of intersectionality into social rights adjudication holds considerable importance. Intersectional discrimination is particularly prominent in the context of social and economic rights and thus many cases concern individuals affected by intersecting forms of disadvantage. As Colm O'Cinneide notes, the enjoyment of social rights depends on multiple factors, particularly the interaction between material inequality and other structural forms of disadvantage.[208] Considering that material inequality and poverty are often overlooked in discussions of intersectionality or vulnerability, which tend to focus primarily on fixed identities such as race, gender, or disability, and given that these factors are not directly protected under the ECHR, the adjudication of social rights through the case law of the ECSR provides an important complementary lens for understanding intersectionality within the IHRL framework.[209] Additionally, the collective complaints mechanism, available only before the ECSR at the regional European level, provides the opportunity to focus on general, structural and context-related deficiencies, which is not usually the main goal in individual cases.[210] This,

[205] European Social Charter (n 199) art 8(4).
[206] *International Planned Parenthood Federation - European Network (IPPF EN) v Italy*, Decision on the Merits [2013] ECSR Complaint no. 87/2012, para 190.
[207] *European Disability Forum (EDF) and Inclusion Europe v France*, Decision on the Merits [2022] ECSR Complaint No. 168/2018, para 118.
[208] Colm O'Cinneide, 'The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication', *Intersectionality and Human Rights Law* (Hart 2020) 74 (citing Conaghan (n 46) 42).
[209] O'Cinneide (n 208) 75–76.
[210] Lukas and O'Cinneide (n 204) 235.

in turn, aligns with intersectionality's purpose of unravelling the structural roots of oppression and discrimination and the contexts that reproduce these phenomena, without risking the homogenisation of categories.

As already mentioned, there are no specific provisions in the ECHR or the ESC regarding specific women's rights or VAWG particularly. The main convention addressing gender-based violence in the Council of Europe framework is the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention),[211] although not subject to the jurisdiction of the ECtHR. It is considered the 'most far-reaching international treaty to tackle violence against women',[212] providing ground-breaking definitions to gender-related issues and requesting contracted States to take relevant legislative and political action. The Istanbul Convention talks about 'historically unequal power relations between women and men' and the 'structural nature of violence against women', but does not mention intersectionality or even the differences between women. It provides only for the principle of non-discrimination.[213] It does, nonetheless, urge contracted States to collect data and support research 'in order to study [the violence's] root causes and effects, incidents and conviction rates', which could leave room for wide interpretation to include intersectional data and research allowing to better understand the root causes of VAWG.[214] In addition, it recognises that the measures taken by States to prevent and combat VAWG should factor in 'the specific needs of persons made vulnerable by particular circumstances', thus admitting that particular vulnerabilities and situations create different needs.[215] Language is also taken into a consideration as a factor necessitating specific measures to ensure that everyone has access to information;[216] this is particularly important in the domestic violence cases that the ECtHR has handled, as we will see further below (3.1.2.1). Lastly, the Istanbul Convention contains a Chapter on migration and asylum that aims to protect migrant or refugee women who are put in an increasingly vulnerable position in cases of domestic violence, as they are often dependent on their spouse or partner.[217]

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[211] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 (Istanbul Convention).
[212] Organization of American States and Council of Europe, 'Regional Tools to Fight Violence against Women: The Belém Do Pará and Istanbul Conventions' (2014) 88.
[213] Istanbul Convention (n 211) art 4.
[214] ibid art 11.
[215] ibid art 12. See also art 18(3), where there is again a reference to 'the specific needs of vulnerable persons'.
[216] ibid art 19.
[217] ibid art 59–61.

Besides intersectionality's absence in the Istanbul Convention's text, its monitoring body, the Group of experts on action against violence against women and domestic violence (GREVIO) established through Article 66 of the Convention, has made a reference to intersectionality in its reports and recommendations. In its General Recommendation No 1 on the digital dimension of violence against women, GREVIO mentions women and girls with 'intersecting forms of discrimination' that factors 'such as disability, sexual orientation, political affiliation, religion, social origin, migration status or celebrity status, among others' may exacerbate digital forms of VAWG.[218] The Group continues by referencing the CEDAW Committee's relevant recommendations and by noting that:

> [S]ince women experience varying and intersecting forms of discrimination that have an aggravating negative impact, gender-based violence may affect some women to different degrees, *or in different ways*, so appropriate legal and policy responses are needed. GREVIO's … evaluation reports highlight that victims of violence against women who belong to *vulnerable groups* (women with disabilities, women from national minorities including the Roma community, LBTI (Lesbian, Bisexual, Transgender, Intersex) women, women from rural areas, migrant, asylum-seeking and refugee women, women without a residence permit, women with addiction, and women in prostitution) frequently face specific barriers with regard to the application of the convention and experience *intersectional discrimination* in their access to protection and assistance.[219]

It is clear from this statement that GREVIO acknowledges intersectionality in the framework of the Istanbul Convention. At the same time, it can be concluded that its understanding of intersecting identities does not fully align with the scholarly concept of intersectionality. Like many international human rights bodies, GREVIO tends to adopt an additive and categorical approach. This is evident in its framing of women with intersecting identities as being in a particularly 'vulnerable' position. However, this framing treats identities as isolated categories rather than recognising how they interact to form unique experiences shaped by both privilege and oppression. In other words, GREVIO tends to view these intersections primarily as compounding vulnerability, rather than as producing distinct lived realities that challenge structural power in more complex ways. This is supported also by its subsequent statement in the same document that women with intersectional identities 'may be *more* exposed to violence'.[220] By focusing primarily on vulnerability and using fixed identity categories,

[218] GREVIO, 'General Recommendation No. 1 on the Digital Dimension of Violence against Women' (Council of Europe 2021) GREVIO(2021)20 para 12.
[219] ibid n 4.
[220] ibid para 45.

GREVIO risks reinforcing a static view of these groups and overlooks the heterogeneity within them. Overall, it seems that intersectionality is referenced descriptively rather than being employed as a transformative, structural tool for systemic change (which is, at the end of the day, this theory's purpose). A similar approach – namely, a focus on women belonging to 'vulnerable groups' – can be observed in GREVIO's other reports.[221] While the inclusion of this vulnerability perspective in its evaluation reports is certainly a positive step, it also shows the limitations in efforts to adopt a truly intersectional lens within the field of IHRL.

The consequences of this intersectional gap in the Istanbul Convention are far from negligible. According to Costanza Nardocci, the Convention fails to capture the full spectrum of potential victims and the diverse forms of violence that women may experience.[222] Victims with intersecting identities are treated as if they were identical to all women, despite the fact that both the sources and manifestations of violence can differ significantly. Without acknowledging these particularities, any measures taken to prevent violence, protect victims, prosecute perpetrators, or adopt integrated policies – the four pillars of the Istanbul Convention – are unlikely to achieve the desired outcomes. Considering the already increased development and acceptance of intersectionality at the time of the Istanbul Convention's drafting, its gap in this regard may have been deliberate and/or political; besides, it was already a highly controversial instrument, considering that 39 out of 46 members of the CoE have signed and ratified it, 26 have made reservations, and Türkiye withdrew in 2021.

The ECHR is even further from any intersectional approach compared to the ESC and the Istanbul Convention. Its potential, however, can be promising. More specifically, it provides for the principle of non-discrimination through Article 14, which is applied in conjunction with other articles in instances where a human rights violation finds its roots in discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.[223] As Article 14 can only be used in combination with other articles of the ECHR, it is considered a subsidiary provision. Nevertheless, it can be applicable in cases where the Court found no violation of the substantive right itself but the facts at issue fall within the ambit of the right, making Article 14

[221] GREVIO, 'Thematic Perspectives on the Implementation of the Istanbul Convention (from June 2015 to December 2023)' (Council of Europe 2025).
[222] Costanza Nardocci, 'The Istanbul Convention: Yes and Nos' (2025) 26 ERA Forum 127, 129.
[223] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 14.

to this extent autonomous.[224] In addition to Article 14, the Protocol No 12 to the ECHR, ratified by 20 member states of the CoE, extends the prohibition of discrimination to the enjoyment of 'any right set forth by law' besides the rights provided by the Convention.[225] This means that it can be applied to any right protected under national law, even if it is not protected under the ECHR.

This Master thesis will focus mainly on the ECtHR's case law involving various intersectional subjects, which paints a stark picture of, on the one hand, how intersectional discrimination manifests in the European context, and on the other hand, how it is approached by one of the most significant human rights Courts in this region. The following analysis will commence with an overview of the most frequent cases involving women facing intersectional discrimination (victims of domestic violence, Roma and Muslim women), before reviewing the appearance of intersectionality in some fragmented dissenting opinions and judgments. In addition, the following chapter is organised thematically rather than chronologically, in order to highlight patterns in the Court's reasoning and more clearly illustrate the recurring challenges and limitations in its intersectional approach.

3.1.2. Intersectionality in the European Court of Human Right's Case Law

3.1.2.1. Eluding Intersectionality

The ECtHR's case law regarding domestic violence is rather rich. In such cases the articles typically applicable are Article 2 (right to life), Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) and Article 8 (right to private and family life). As regards Article 2, the Court has in some cases found a violation of its substantive limb – that is, the State's obligation to establish effective criminal law provisions supported by enforcement mechanisms to prevent, suppress, and punish breaches of these provisions, or when state actors directly violate the right to life. In other cases, the violation concerned only the procedural aspect, which requires a proper investigation into an individual's death.[226] Scholars notice that

[224] ECtHR, *Sidabras and Džiautas v. Lithuania* nos 55480/00 and 59330/00, para 38, ECHR 2004-VIII.
[225] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS No 177 art 1.
[226] ECtHR, *Tërshana v Albania*, no 48756/14, 4 August 2020; *Durmaz v Turkey*, no 3621/07, 13 November 2014.

the ECtHR is more willing to accept an Article 14 claim in conjunction with Article 2's procedural limb, as discrimination sourcing from the legal framework itself is harder to prove; the State's obligation to prevent is more abstract, unless the relative provision entails clear discrimination.[227]

The landmark reference case related to domestic violence is *Opuz v Turkey*.[228] The Court for the first time declared the discriminatory nature of VAWG and found a violation of Article 14 in conjunction with Articles 2 and 3 ECHR. In this case, the applicant had been subjected to repeated assaults by her husband, culminating in a violent attack during which she sustained seven stab wounds, resulting in serious bodily harm. Shortly afterwards, her husband murdered her mother while attempting to discover his wife's whereabouts. The Turkish authorities' response was inadequate and showed clear discrimination. It was also proven that women in their area of residence are disproportionally affected by domestic violence and that perpetrators were often left unpunished.[229] The Court further acknowledged that the applicant belonged to a group of 'vulnerable individuals' on account of her gender, which placed her in a particularly precarious situation in south-east Turkey.[230] Moreover, reports in that region showed that women 'of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income' are particularly affected by domestic violence.'.[231] It was also was noted that 'Women from vulnerable groups, such as those from low-income families or who are fleeing conflict or natural disasters, are particularly at risk'.[232] Although the Court acknowledged this, it did not analyse how these interlocking factors contribute to women being discriminated against by authorities. In other words, it did not go as far as following an intersectional approach in this case, despite the clear presence of an intersectional subject.

Similarly, in *Tapis v Italy*, the applicant, whose son was killed by her husband while trying to protect her from an attack after a long time of (reported) abuse, was of Romanian origin, married

[227] Nardocci (n 222) 140.
[228] ECtHR, *Opuz v Turkey*, no 33401/02, ECHR 2009.
[229] ibid para 200.
[230] ibid para 160. What is important to note at this point is that when the Court calls women 'vulnerable', it should not be understood as this being an intrinsic characteristic of women; their vulnerability stems from the specific context of domestic violence, compounded by the structural discrimination they encounter. For further analysis on the vulnerability of victims in domestic violence cases, see Lisa Grens, 'The Impact of Vulnerability on State Obligations in Criminal Proceedings on Domestic Violence: Interpreting the Istanbul Convention and the European Convention on Human Rights' (2023) 35 Women & Criminal Justice 157.
[231] ibid para 194.
[232] ibid para 99.

to a Moldovan man, and struggled with the Italian language, which initially prevented her from seeking help from the police.[233] This was, however, never examined by the ECtHR. The Court found a violation of Article 14 in conjunction with Articles 2 and 3, affirming that the Italian authorities failed to protect the applicant and allowed the perpetrator to act with impunity, thereby condoning the violence and discriminating against her as a woman. The other aspects of the applicant's situation – namely, her origins and struggles with the language – were not taken into consideration as regards the discrimination against her.

While in these cases the ellipsis of an intersectional lens did not impede the application of Article 14 (at least on one ground), in a more recent domestic violence judgment, *Kurt v Austria*, the outcome was different.[234] In this case, concerning the killing of an 8-year-old boy by his father, following a prolonged pattern of abuse directed at the applicant – at the time the perpetrator's wife – and their two children, the Grand Chamber of the ECtHR found, by ten votes to seven, no violation of Articles 2 and 14. More specifically, the perpetrator had been barred from returning to the family's apartment and the surrounding areas, but he managed to enter the children's school and shoot his son. The Court considered that the authorities' response was adequate and that they carried out a risk assessment, as required.[235] The authorities determined that, based on the information they had, the escalation could not have been predicted, and thus their decision not to detain him pre-trial was deemed reasonable.[236]

Several points were overlooked by the majority's judgment: the failure of the authorities to consider that the child might be at risk in other environments; the presence of ongoing biases within the police and judicial systems throughout the assessment procedure;[237] and the fact that the assessment did not adhere to international standards.[238] In addition to all this, an intersectional lens would have offered a different insight into the particularity of this case. Authorities should have considered the social and cultural background of the family. This included their disadvantaged socioeconomic status, and the 'cultural patterns associated with the country of origin of the perpetrator'.[239] The applicant had migrated from Turkey to Germany

[233] ECtHR, *Talpis v Italy*, no 41237/14, 2 March 2017.
[234] ECtHR, *Kurt v Austria* [GC], no 62903/15, 15 June 2021.
[235] ibid para 191.
[236] ibid para 207.
[237] See, eg, the prosecutor's note regarding the applicant's report suggesting an 'outdated conception of rape'. ibid para 19 (Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli, Yüksel, joint dissenting).
[238] The authorities did not use standardised checklists developed by criminological research. ibid paras 140, 171.
[239] ibid paras 2, 6 (Judge Elósegui, dissenting).

at the age of fourteen and did not finish her secondary education, nor learned German at a sufficient level. The interview with the police, however, was carried out in German.[240] In addition to that, at the time of the escalation of violence, she was unemployed, and her husband had a gambling addiction.

An intersectional approach reveals that domestic violence is not a homogenous phenomenon: its escalation truly depends on the specificities of each case, particularly the different structures of disadvantage to which the victims and perpetrators are subjected, influencing not only the dynamics of the abuse but also the accessibility and effectiveness of protection mechanisms available to the victim. The authorities relied on the victim's own assessment of the risks, which is subjected to barriers (ie, language, economic situation, cultural background) that prevent her from expressing or even recognising the danger she faces.[241]

On an even more critical note, the ECtHR's case law on headscarf bans falls significantly short of an intersectional approach to adjudication. A notable example is the Grand Chamber's judgment in *SAS v France*.[242] In this case, the applicant was a Muslim woman wearing, by her own choice, the burqa and niqab following her religious beliefs, who complained that the French blanket ban on covering faces in public spaces, in force since 2011, violated Articles 3 (prohibition of degrading treatment), 11 (freedom of association), 8 (right to respect private life), 9 (freedom to manifest her religion or beliefs) and 10 (freedom of expression), taken separately and together with Article 14 ECHR. The Court rejected the Article 3 claim as manifestly ill-founded, considering that the necessary threshold was not met, as well as article 11.[243] For the rest of the Articles, the Court, with fifteen votes to two, found no violation, while regarding Article 14 the non-violation decision was unanimous.

The applicant described her background, namely her Pakistani origins and her connection to Sunni cultural tradition, which involves women wearing a full-face veil in public.[244] She accused the chauvinist logic behind such bans, which appear as salvational to the gender inequality and attack on human dignity that covering the face entails.[245] We can notice an important connection of these claims with intersectional theory, which was developed as a

[240] ibid para 8 (Judge Elósegui, dissenting).
[241] ibid paras 14-17 (Judge Elósegui, dissenting).
[242] ECtHR, *SAS v France* [GC], no 43835/11, ECHR 2014 (extracts).
[243] ibid para 70.
[244] ibid para 76.
[245] ibid para 77.

response to (cultural) essentialist feminism. Shaping the laws on account of what is considered 'right' through Western eyes is a common manifestation of epistemic dominance, which risks excluding diverse lived experiences and reinforcing existing global power imbalances. Besides, the applicant underlined that she was prepared to not always wear the burqa and niqab publicly, especially when security demands against it (eg, at airports). In this context, she alleged that the ban constituted (indirect) discrimination 'on grounds of sex, religion and ethnic origin, to the detriment of Muslim women who, like her, wore the full-face veil'.[246] She claimed that the discrimination was not only in favour of Christians – who, under the law, were permitted to wear such clothing during 'festivities or artistic or traditional events', while Muslim women were prohibited from wearing a veil in public even during Ramadan – but also against Muslim men and Muslim women whose beliefs did not require them to wear a veil.[247]

The third-party interveners referenced intersecting discrimination[248] and the ECtHR recognised that the ban 'mainly affects Muslim women who wish to wear the full-face veil' and that the applicant 'belongs to a category of individuals who are particularly exposed to the ban'.[249] However, the Court considered the ban to be proportionate to the aim pursued, ie making 'living together' easier, especially considering the wide margin of appreciation accorded to the States, and as such did not violate the rights alleged by the applicant or the principle of non-discrimination.[250] The same was upheld in subsequent judgments against the blanket ban in Belgium.[251]

It is significant that when it comes to a prohibition of religious clothing in public spaces in general the Court considers that it constitutes a violation of Article 9, unless it is covering the face. Indeed, in *Ahmet Arslan v Turkey*, the conviction of the applicants (male members of a religious group) for wearing religious clothes (not covering the face) was found by the ECtHR to violate Article 9.[252] Muslim women, however, are left with the choice between going outside but refraining from expressing their religious beliefs as they wish, or staying indoors in order

[246] ibid para 80.
[247] ibid. It is well-known that Christians are called to wear body- and face-covering clothing only during festivities, which creates an imbalance with Muslim women, whose religion requires them to wear such clothing at all times in public.
[248] ibid paras 90, 93, 97.
[249] ibid paras 151, 160.
[250] ibid paras 157, 162.
[251] ECtHR, *Dakir v Belgium*, no 4619/12, 11 July 2017; *Belcacemi and Oussar v Belgium*, no 37798/13, 11 July 2017.
[252] ECtHR, *Ahmet Arslan and Others v Turkey*, no 41135/98, 23 February 2010.

to express themselves freely. As a result, many feel oppressed in public spaces and ultimately become alienated from society, as they are indirectly compelled to confine themselves.

The Court not only shows resistance to acknowledging the intersectional dimension of headscarf bans, but also appears dismissive of claims brought by intersectionally positioned individuals altogether. According to data presented by Castillo Ortiz, Ali and Samanta, female Muslim nationals of the country addressed by the complaint have seen higher numbers of 'litigation defeat' compared to Muslim and Christian men; when comparing these complaints, their usual common denominator was an intersectional claim, related to religious clothing.[253] An exception is that of *Lachiri v Belgium,* where the Court found that the exclusion from a courtroom of a woman wearing the hijab constituted a violation of Article 9, as contrary to *SAS v France*, the face was not entirely covered.[254] In any case, this judgment only focused on the specificities of the case in question and failed to provide a solid precedent for headscarf bans.[255] It also did not include any intersectional analysis.

In the continent of post-racialism, secularism, and dominance of white Christians, Muslim women are racialised and othered through stereotypes that portray them as dangerous or oppressed, reinforcing exclusion.[256] Arguments such as gender equality and public safety have for long escorted justifications for headscarf bans. The ECtHR dismissed these claims in *SAS*, only to conclude that the wide margin of appreciation of States and the claim of 'living together harmoniously' may justify prohibiting Muslim women from covering their faces for religious purposes. Perhaps an intersectional approach would have led to a different outcome, as seen in the case law of the HRC, which found that France violated the freedom of religion by fining Muslim women for wearing the niqab.[257] Even if it is too far-fetched for the ECtHR to consider the bans to violate Article 9 of the Convention, incorporating an intersectional analysis is not.

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[253] Castillo-Ortiz, Ali and Samanta (n 111).

[254] ECtHR, *Lachiri v Belgium*, no 3413/09, 18 September 2018.

[255] Julie Ringelheim, 'Lachiri v. Belgium: Headscarf Ban Imposed on a Civil Party in a Courtroom in Violation of Religious Freedom' (*Strasbourg Observers*, 23 November 2018) <https://strasbourgobservers.com/2018/11/23/lachiri-v-belgium-headscarf-ban-imposed-on-a-civil-party-in-a-courtroom-in-violation-of-religious-freedom/> accessed 21 April 2025.

[256] Elsa Mescoli, 'Intersectionality and Muslim Women in Belgium' in Katie Nelson and Nadine T Fernandez (eds), *Gendered Lives: Global Issues* (SUNY Press 2021).

[257] For an intersectional analysis (and critique) of the HRC's case law on the matter, see Monika Zalnieriute and Catherine Weiss, 'Reconceptualizing Intersectionality in Judicial Interpretation: Moving beyond Formalistic Accounts of Discrimination on Islamic Covering Prohibitions' (2020) 35 Berkeley Journal of Gender, Law & Justice 71.

Another group whose clear intersectionality is neglected is that of Roma women. Roma women face discrimination at the intersections of gender, ethnicity, race, socioeconomic status, and at times disability and sexuality, which has been manifesting in Europe in many ways. Forced sterilisation particularly started as a state sanctioned measure in the former Czechoslovakia considering the Roma community as 'culturally substandard',[258] and continued to plague Roma women for decades in central European states, such as the Czech Republic, Slovakia and Hungary.[259] Roma women have given 'consent' to sterilisation while in a dazed state during labour or without being properly informed about what they were signing.[260] The ECtHR has had the chance to examine relevant cases, without following a particularly intersectional approach.

In its 2011 judgment in the case of *VC v Slovakia*, concerning the sterilisation of a Roma woman without her informed consent, the Court found a violation of Articles 3 and 8 ECHR, recognising the State's positive obligation to provide appropriate safeguards to secure the right to respect for her private and family life.[261] Besides the fact that she signed the consent form in a hazy state, the hospital included in her medical records the following statement: 'Patient is of Roma origin'.[262] The applicant also mentioned that the hospital put her in a separate room designated exclusively for Roma women and was not allowed to use the same bathrooms as non-Roma women.[263] After the sterilisation, she was cast out from her Roma community and abandoned by her family due to her infertility.[264]

The fact that the sterilisation was carried out specifically on the basis of her ethnic origin and gender was not acknowledged by the ECtHR, whose majority found no violation of Article 14, citing insufficient evidence and deeming it unnecessary to examine. It nonetheless affirmed that:

> [T]he respondent State failed to comply with its positive obligation under Article 8 of the Convention to secure to the applicant a sufficient measure of protection enabling

[258] David Hutt, 'The Story of Roma Women's Forced Sterilisation in Central Europe' (*euronews*, 2 August 2021) <https://www.euronews.com/2021/08/02/the-shameful-story-of-roma-women-s-forced-sterilisation-in-central-europe> accessed 23 April 2025.
[259] Bond (n 5) 41.
[260] Siobhan Curran, 'Intersectionality and Human Rights Law: An Examination of the Coercive Sterilisations of Romani Women' (2016) 16 Equal Rights Review 132, 140.
[261] ECtHR, *VC v Slovakia*, no 18968/07, ECHR 2011 (extracts).
[262] ibid para 17.
[263] ibid para 18.
[264] ibid para 20.

her, *as a member of the vulnerable Roma community*, to effectively enjoy her right to respect for her private and family life in the context of her sterilisation.[265]

The Court again adopts the vulnerability approach, affirming that the Roma community is a vulnerable group particularly affected by this practice, but failed to consider a violation of the principle of non-discrimination. This constituted a disregard to the general discrimination experienced by Roma women, as it was highlighted by Judge Mijovic in his dissenting opinion. In the almost identical cases of *NB v Slovakia* and *IG v Slovakia,* Judge Mijovic's opinion went unheard and the Court unanimously reiterated the same as regards Article 14.[266] Despite the fact that the number of relevant cases was alarmingly high – especially compared to non-Roma women and men – and that Roma women faced historically social exclusion, the ECtHR overlooked the discriminatory nature and the structural inequality roots of these forced sterilisations. The physical and mental toll that Roma women face due to the attack on their reproductive rights was left untouched.

What is even more surprising is the fact that the Court did not shift the burden of proof to the State. According to its previous case law, when applicants allege a difference in treatment, the Government has the burden to prove otherwise.[267] In the aforementioned cases, the applicants provided several affirmations and reports pointing towards discriminatory treatment, but the ECtHR never mentioned that this should have been counterproved by the Government. On the contrary, it recognised that 'the documents before it indicate that the issue of sterilisation and its improper use affected vulnerable individuals belonging to various ethnic groups' and 'the Council of Europe Commissioner for Human Rights was convinced that the Roma population of eastern Slovakia had been at particular risk.'.[268] As noted by Siobhan Curran, even if the policy itself on sterilisation may not be discriminatory directly, it can indirectly affect certain ethnic groups, which constitutes an indirect discrimination violating the ECHR.[269] In addition, gender discrimination was never even referenced by the Court even though this practice mainly affects Roma women. It is not only that women often suffer violations of their reproductive

[265] ibid para 179.
[266] ECtHR, *NB v Slovakia*, no 29518/10, 12 June 2012; *IG and Others v Slovakia*, no 15966/04, 13 November 2012.
[267] Curran (n 260) 153.
[268] *VC v Slovakia* (n 261) para 146.
[269] Curran (n 247) 153 (referencing the case of *DH and Others v the Czech Republic*, where the Court found *de facto* discrimination in the general functioning of the special education system as Roma children were disproportionally put into special schools). See ECtHR, *DH and others v The Czech Republic* [GC], no 57325/00, 13 November 2007.

rights and have their autonomy undermined, but they are also frequently ostracised by their communities, leading to serious psychological harm.

Domestic violence against Roma women is also a harsh reality that persists and stays under wraps due to cultural reasons, fear of stigmatisation, as well as disconnection from the institutions that provide relevant assistance.[270] As a result, several particularities can be observed: increased resistance to report incidents of violence and a reduced response from authorities, due to the structural discrimination against the Roma community and the perception of such incidents as part of their culture. This was pointed out by the European Roma Rights Centre (ERRC) in its third-party intervention in the case of *JI v Croatia*, brought before the ECtHR, noting that 'Ascribing abuse against girls and women to "Roma culture" or "Roma tradition" was common'.[271] In this case, Croatia was condemned for failing to effectively investigate death threats against the applicant, a woman of Roma origin, by her father, who had abused her and had been convicted of raping her. The ERRC explained how Roma women facing gender-based violence experienced 'a specific kind of "intersectional" harm' and urged the Court to use the term intersectionality.[272] While the Court found a violation of Article 3 of the Convention, it noted that 'neither the circumstances as submitted nor any relevant evidence such as statistical data substantiate the allegation of discrimination on grounds of the applicant's Roma origin'.[273] As regards the Article 14 complaint specifically the ECtHR stated, similarly to the sterilisation cases above, the following:

> The Court notes that in its examination of the applicant's complaints under Article 3 of the Convention, it has already had regard to the applicant's particular vulnerability as a Roma woman and as a victim of serious sexual offences… In view of the foregoing, it considers that no separate issue under Article 14 of the Convention arises in the present case.[274]

Again, the Court acknowledges the particular vulnerability of the applicant as a 'Roma woman' and 'a victim of serious sexual offences', but does not consider that this merits a separate analysis under Article 14. The fact that the police did not manifest direct discrimination – such as in the case of *BS v Spain* which will be analysed below (3.1.2.3) – does not mean that their

[270] Maja Munivrana and Darija Željko Mrljak, 'Fighting Intersectional Violence Against Roma Women and Girls – The Case of Croatia' (2025) 24 Journal on Ethnopolitics and Minority Issues in Europe 30, 38.
[271] ECtHR, *JI v Croatia*, no 35898/16, para 74, 8 September 2022.
[272] ibid paras 75, 79.
[273] ibid para 97.
[274] ibid para 108.

attitude did not stem from preconceptions of the Roma community. The circumstances showed clear indifference in a case where all the evidence – namely the multiple convictions of the perpetrator, the change of the appearance of the victim in order to be unrecognisable by her abuser and the death threats she received – pinpointed towards a threatening situation. The applicant painted a stark picture of the authorities' dismissive attitude towards her situation, which finds its roots in structural inequality. At the same time, the available data does not offer any clarity, as rarely do authorities disaggregate statistics by ethnicity.[275]

3.1.2.2. A dissenting opinions tool

As it was shown, in all of the above cases intersectionality eluded the ECtHR's analysis, even when it actually found a violation of Article 14 (for instance, in *Opuz* and *Talpis*). In reality, intersectionality has been explicitly mentioned only some Judges' dissenting opinions.

More specifically, intersectionality was first referenced by Judge Pinto de Albuquerque in his dissenting opinion (joined by Judge Vehabović) in the Grand Chamber judgment of *Garib v the Netherlands*.[276] This case concerned the alleged violation of the applicant's freedom to choose residence protected under Article 2 of Protocol No 4 to the Convention, due to a policy imposing specific criteria based on length of stay and income on persons who wished to settle in the inner-city area of Rotterdam. The majority of the Court found no violation of the alleged right, while it also refused to examine the Article 14 claim on the basis that it was not submitted before the Chamber.[277] The dissenting Judge, however, highlighted the need to acknowledge and incorporate intersectional discrimination into the European human rights law system, providing a detailed explanation of the concept in theory and in IHRL legal praxis.[278] In the case concerned, the applicant was a woman in poverty, single mother of two children, who as such was particularly affected by the policy in question. As Judge Pinto de Albuquerque noted:

> To treat Ms Garib as any other citizen or to see her through the prism of her poverty, or that of her status as a woman, would not enable a holistic analysis of the negative effects for her personal life of the decision to deny her a housing permit. It was indispensible, in the circumstances at issue, to assess the aggregate effect of the whole body of factors

[275] Munivrana and Željko Mrljak (n 270) 43.
[276] ECtHR, *Garib v the Netherlands* [GC], no 43494/09, 6 November 2017.
[277] ibid para 102.
[278] ibid paras 34-38 (Judge Pinto de Albuquerque, dissenting joined by Judge Vehabović).

> and thus to reach the indisputable finding that the measure in question could not have been proportionate.[279]

An intersectional analysis in this case would have led to the much-needed narrowness of the State's margin of appreciation, as the specific circumstances of the applicant called for a specific consideration of how a general measure can affect differently vulnerable groups.[280]

Judge Elósegui also incorporated intersectionality into her dissenting opinion in the case of *Kurt v Austria* analysed above. As already mentioned, the Grand Chamber found no violation of Articles 2 and 14 ECHR, but the outcome could have been different had the Court considered an intersectional approach. Judge Elósegui pointed out that the assessment carried out by the authorities should have factored in the social and cultural background of the family. The ethnicity, socioeconomic and migratory status, the language barriers and the previous manifestation of domestic violence are risk factors that need to be taken into consideration during the authorities' assessment.[281] Judge Elósegui acutely described how culture affects the distribution of roles in the family, without implying that women are victims of their culture in a cultural-essentialist way. She also described how migrant women have distinct experiences regarding domestic violence, as they usually do not have relatives to turn to at their place of residence, face language barriers and disregard by authorities, and their precarious economic situation does not allow them to leave their house to escape this violence.[282]

One could argue that having to take all of these factors into consideration puts a disproportionate burden on States, and that is why the Grand Chamber ruled a non-violation. However, VAWG is not a simple phenomenon, where only gender plays a role. Understanding how women's experiences vary depending on other factors will help ensure proper recognition, encourage them to report incidents – a major issue for intersectional subjects – enable appropriate protection, and ultimately contribute to the prevention of violence. This was taken into consideration by the ECtHR in other judgments, where intersectional discrimination was more 'obvious'.

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[279] ibid para 39 (Judge Pinto de Albuquerque joined by Judge Vehabović, dissenting).

[280] Valeska David and Sarah Ganty, 'Strasbourg Fails to Protect the Rights of People Living in or at Risk of Poverty: The Disappointing Grand Chamber Judgment in Garib v the Netherlands' (*Strasbourg Observers*, 16 November 2017) <https://strasbourgobservers.com/2017/11/16/strasbourg-fails-to-protect-the-rights-of-people-living-in-or-at-risk-of-poverty-the-disappointing-grand-chamber-judgment-in-garib-v-the-netherlands/> accessed 25 April 2025.

[281] *Kurt v Austria* (n 234) para 6 (Judge Elósegui, dissenting).

[282] ibid para 12 (Judge Elósegui, dissenting).

3.1.2.3. A step towards intersectionality: *BS v Spain* and recent developments

It is evident that the ECtHR's overall case law is rather resistant to intersectional analysis. However, in the context of VAWG, the ECtHR finally followed an intersectional approach – without mentioning intersectionality per se – in *BS v Spain*, decided upon on 24 July 2012.[283] The applicant, a woman of Nigerian origin that had migrated in Spain and worked legally as a sex worker, claimed to have been physically and verbally assaulted by police officers. More specifically, one of the officers insulted her by saying 'get out of here you black whore'.[284] She was held at the police station, and after being released she was assaulted again twice some days later. This was apparently not a single occasion: foreign female residents working in the same area had similar complaints towards the patrolling officers.[285] The police officers in question were never identified, and the ones that stood on trial, considering that they were apparently not the ones identified by the applicant, were acquitted. Similarly, the process for the third incident was discontinued for lack of evidence.

Notably, the applicant alleged that women sex workers with a 'European phenotype' did not experience harassment by the police[286] and that her position as a black woman working as a sex worker made her 'particularly vulnerable to discriminatory attacks'. She brought forward the idea of intersectionality, namely that 'these factors could not be considered separately but should be taken into account in their entirety, their interaction being essential for an examination of the facts of the case'.[287] In fact, the third-party interveners (European Social Research Unit, AIRE Centre) referred explicitly to intersectional discrimination.[288]

The ECtHR found a violation of the procedural limb of Article 3 ECHR, considering that the investigations initiated were not 'effective',[289] as well as of Article 14 in conjunction with Article 3. The Court, however, throughout its – inadequate – analysis, focused mainly on the racial part of the discrimination, and only in the end it stated that the authorities failed to take into account the applicant's 'particular vulnerability inherent in her position as an African

[283] ECtHR, *BS v Spain*, no 47159/08, 24 July 2012.
[284] ibid para 8.
[285] ibid para 11.
[286] ibid para 29.
[287] ibid para 52.
[288] ibid paras 56-57.
[289] ibid para 47.

woman working as a prostitute'.[290] While this affirmation has been hailed for finally marking a development in considering intersecting forms of discrimination,[291] there are several points that indicate how this approach was not entirely intersectional. Besides, the ECtHR never named it as such. Therefore, it is worth examining how the Court failed to incorporate an (explicit) intersectional analysis in a case that so clearly called for it.

On the one hand, the ECtHR did not adopt an additive approach; this is evident from the fact that it did not base the Article 14 violation on a specific ground or distinguish between different grounds of discrimination. Instead, it recognised the applicant as an 'African woman working as a prostitute' and acknowledged that she faced discrimination in that specific context. In other words, the discrimination she experienced was not due to her gender *or* her origin *or* her occupation taken individually, nor even a simple sum of the three. Rather, it resulted from the overlapping and mutually reinforcing effects of these factors, which shaped both the police mistreatment she endured and the subsequent disregard by the judicial system. The Court also took a positive step by shifting the burden of proof to the government, requiring it to refute the facts presented by the applicant.[292] This is an important affirmation, considering how difficult it is to prove discrimination, particularly an intersectional one.[293]

On the other hand, the focus on 'inherent vulnerability' does not adequately reflect the structural causes of disadvantage, nor does it account for how these disadvantages manifest differently depending on specific contexts and their interaction with other forms of oppression. The vulnerability approach itself has certain limitations,[294] and by adding the qualifier 'inherent', we risk losing the core of intersectionality, which is to analyse how systems of disadvantage emerge, persist, and intersect, producing complex, multi-layered experiences. Moreover, the

[290] ibid para 62.

[291] Bond (n 5) 122; Keina Yoshida, 'Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain' (2013) 21 Feminist Legal Studies 195; MariaCaterina La Barbera and Marta Cruells Lopez, 'Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B.S. v. Spain' (2019) 53 Law & Society Review 1167. Indeed, one cannot deny that the Court delivered justice to the applicant and acknowledged her specific situation. However, its analysis can be considered inadequate.

[292] *BS v Spain* (n 283) para 58.

[293] La Barbera and Cruells Lopez (n 291) 23.

[294] Some points that can be raised regarding the vulnerability approach are that it can reinforce stereotypes when it relies on fixed categories rather than individual context, and that it may lead to inconsistent legal protection when not applied carefully. It risks overgeneralising or stigmatising groups instead of empowering them. The difference with intersectionality is that, while vulnerability can highlight risk, intersectionality explains why and how that risk occurs, based on intersecting systems of oppression, without reducing individuals to stereotypes. See Mariavittoria Catanzariti, 'The Juridification of Vulnerability in the European Legal Culture' (2022) 12 Oñati Socio-Legal Series 1391, 1398.

ECtHR merely references terms like ‘racial motives’, ‘racial motivation ‘racist overtones’, ‘racially induced violence’, racist attitudes’, ‘racist remarks’,[295] before abruptly concluding that the applicant’s vulnerability stemmed from compounded factors, ie her origin, gender and occupation, summed up in the single phrase: ‘vulnerability inherent in her position as an African woman working as a prostitute’, without further elaboration.

Scholars La Barbera and Cruells Lopez do not condemn the choice of the ECtHR to follow the familiar road of the ‘vulnerability’ scheme, instead of the more complicated one of ‘intersectionality’, as it is backed up by a consolidated case law and is more easily understandable, while noting at the same time the multiplicity of discrimination.[296] In reality, vulnerability is used as a ‘placeholder’ for intersectionality, and is ‘naturalised’ as inherent in the applicant,[297] obscuring the structural roots of it. In this sense, the vulnerability construct should not be used in order to facilitate understanding and intersectionality should not be simplified on the altar of conceptual convenience and legitimacy.[298]

A similar approach was followed in a recent judgment, *FM and Others v Russia*, concerning the violation of Article 4(2) of the Convention, as Russia failed to protect irregular female migrant workers from trafficking and servitude, and to investigate the crimes perpetrated against them.[299] Again, there was a reference to the CEDAW Committee’s recommendations that included an intersectional approach to human trafficking,[300] and the applicants pointed out that they were victims of ‘intersectional discrimination on the grounds of their gender, ethnicity and social position’.[301] They continued by analysing their particular situation, namely that:

> [T]hey were vulnerable indigent women who had been trafficked into Russia from Kazakhstan and Uzbekistan, held in conditions of servitude, and subjected to repeated and extreme forms of violence. They had been treated by the police as illegal migrants instead of (potential) victims of human trafficking, owing to stereotypes relating to female migrant workers from Central Asia, and they had faced inaction and the downplaying of the seriousness of their complaints by the prosecutor’s office and the investigative authorities, together with a lack of protection by the authorities, despite

[295] *BS v Spain* (n 283) paras 58-61.
[296] La Barbera and Cruells Lopez (n 291) 24.
[297] Theilen (n 112) 258.
[298] ibid 261 (observing that the tendency for simplification is connected to the legitimacy desired by the ECtHR and other human rights bodies, who prefer to leave more complex matters at the discretion of the states).
[299] ECtHR, *FM and Others v Russia*, nos 71671/16 and 40190/18, 10 December 2024.
[300] ibid paras 204-205 (referencing General Recommendations No 35 on gender-based violence against women (2017) and No 38 on trafficking in women and girls in the context of global migration (2020)).
[301] ibid para 340.

> the fact that violence against women and labour migrants, especially those belonging to ethnic minorities, was a major systemic problem affecting Russian society.[302]

In this way, the applicants showed how their specific situation as illegal migrants and indigent victims of human trafficking from Central Asia, had created a unique experience of discrimination from the authorities. In other words, all of these elements contributed to their complaints being ignored and 'dehumanised'.[303] The ECtHR's Chamber acknowledged that:

> While the respondent State's poor anti-trafficking efforts reflected a general situation, inevitably this mostly hit those disproportionately affected by trafficking, labour exploitation and related violence, notably female foreign migrant workers in an irregular situation.[304]

The Court concluded that there had been a violation of Article 14, as the respondent State showed a 'discriminatory attitude towards the applicants as women who were foreign workers with an irregular immigration status'.[305] In contrast to the previously analysed judgment of *BS v Spain*, the Court here did not talk about 'inherent vulnerability', and went on to analyse how the different elements of the applicants – ie, their gender, ethnicity and migration status – contribute to them being disproportionately affected by trafficking and discriminated against by authorities on account of their simultaneous identities and social status. Intersectionality was not explicitly mentioned, which once again reveals the Court's discomfort with using this concept; however, we can say that the core idea of intersectionality is reflected in the Court's more advanced analysis.

Another very interesting case involving intersectional discrimination on the grounds of age and gender that should not be omitted from the present analysis is that of *Carvalho Pinto de Sousa Morais v Portugal*.[306] This case concerned the reduction of a compensation awarded by domestic courts to a 50-year-old woman, following the impact of a negligent operation on her sexual life. The reduction was the result of discrimination against her by the courts on the grounds of gender and age. More specifically, the Supreme Administrative Court (SAC), after appeal, reduced the amount of damages awarded at first instance, and upheld that 'it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance

[302] ibid.
[303] ibid.
[304] ibid para 344.
[305] ibid para 346.
[306] ECtHR, *Carvalho Pinto de Sousa Morais v Portugal*, no 17484/15, 25 July 2017.

diminishing with age.'.[307] At the same time, in another judgment delivered by the Supreme Court of Justice regarding the prostatectomy of a 59-year-old man, the Portuguese Court followed an entirely different approach to how this affected the plaintiff's sexual life, awarding him double the non-pecuniary damage and stating that:

> [T]he plaintiff, who at the time was almost 59 years old, underwent a radical change in his social, family and personal life as he is impotent and incontinent and will never again be able to live life as he used to. He is now a person whose life is physically and psychologically painful, and has therefore suffered irreversible consequences. It is not unreasonable to assert that his self-esteem has suffered a tremendous blow.[308]

It is thus clear that the SAC's statement – that the importance of sexual life diminishes with age – together with previous domestic case law showing different treatment toward a man in a similar situation, whose sexual life was considered very important despite being of the same age, reflects stereotypes portraying older women as having fulfilled their reproductive 'obligations' and no longer needing a sexual life. The sexism of the judgment lies not only in this comparison with other judgments involving male plaintiffs, but also in its reference to the fact that the applicant already 'had two children'. This was reiterated by the ECtHR's majority, noting that 'That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people.'.[309] As 'the applicant's age and sex appear to have been the decisive factors in the final decision',[310] and a relevant pattern had been noticed by international reports on the judiciary of Portugal,[311] the Court concluded that there had been a violation of Article 14 of the Convention in conjunction with Article 8 of the Convention.

Although the ECtHR did not characterise this discrimination as 'intersectional', it is evident from the facts of the case and the majority's reasoning that the two factors, age and gender, interplayed to lead to this particular discrimination in the context of sexual life, in the sense that if there had not been one of the two factors the result could have been different. It is the amalgam of sexism and ageism that led to the applicant's sexual life being devalued, as case law showed a different approach towards older men, and a young woman's reproductive capacities would

[307] ibid para 16.
[308] ibid para 23.
[309] ibid para 52.
[310] ibid para 53.
[311] ibid para 54.

have been regarded as highly important. As if only men in older ages are seen as needing to fulfil themselves through sexual activities, while women's purpose is reduced to reproduction.

It is noteworthy that two Judges dissented from the majority's decision, considering the comparable domestic case law to be limited and originating from different courts than the one that issued the contentious decision.[312] They also observed that gender, as a ground of discrimination, was absent from the contentious decision's reasoning, while age was not addressed in the comparator cases (which involved male subjects of similar age to that of the applicant). However, I believe, in agreement with the Court's majority, that the SAC's reasoning was targeting the applicant as a 50-year-old woman, ie due to her age and sex cumulatively. This may not be evident at first glance, as the SAC insists on the age factor, but can be implicitly deduced from the fact that it mentions her two children, and from the comparator cases presented by the applicant involving male plaintiffs (although the dissenting Judges consider two judgments to not be enough to establish a solid case law[313]). It is not an unjustified assumption and a logical leap to deduce from the SAC's statement and the other courts' case law that its decision was influenced and based on gender stereotyping. The need to identify and condone stereotypes embedded – sometimes subtly – in state practices has been recognised by the Court and is crucial to 'achieving transformative equality', as Judge Motoc pointed out in her concurring opinion.[314] Judge Yudkivska in her own concurring opinion also acutely underlines that: 'the more equality is provided for by law, the more subtle gender discrimination becomes, precisely because stereotypes about the "traditional" roles of men and women are so deeply rooted.'.[315] This does not mean that legislative reforms of formal equality are deprived of any essence; the Judge simply reminds us that stereotypes are so deeply rooted in societies that they can hardly be overcome with formal equality.

In addition, the existence of comparator cases, whose number was deemed not enough by the dissenting Judges, should not be considered necessary in order to establish discrimination. As Judge Yudkivska emphasises, the language of the domestic decision was discriminatory in itself, and in any case stereotyping in general is not comparative in nature.[316] The comparator approach is problematic generally, as it is anchored to a 'sameness/difference ideology' and

[312] ibid (joint dissenting of Judges Ravarani and Bošnjak).
[313] ibid, para 26 (joint dissenting opinion of Judges Ravarani and Bošnjak).
[314] ibid (concurring opinion of Judge Motoc).
[315] ibid (concurring opinion of Judge Yudkivska).
[316] ibid (concurring opinion of Judge Yudkivska).

does not lead to substantive equality.[317] This observation goes hand-in-hand with intersectionality's criticism to anti-discrimination law: comparator cases based on single grounds of discrimination cannot and should not be applied to situations of intersectional discrimination. The latter is in itself a unique experience of discrimination that cannot be compared to others. In this sense, even the cases regarding male plaintiffs of the same age that the applicant provided were not necessary to prove that the SAC's wording and reasoning was discriminatory to the applicant as a 50-year-old woman. Overall, the majority's conclusion, along with the different opinions expressed by the Judges, represents a significant contribution to discussions on intersectional discrimination.

Following the steps of this more positive case law, a woman living in poverty and experiencing domestic violence found justice in *JD and A v the United Kingdom*, where the Court concluded that there had been a violation of Article 14 in conjunction with Article 1 of Protocol No 1 to the ECHR.[318] The case concerned a measure in the social housing sector that reduced rental subsidies for occupants deemed to have more bedrooms than permitted by law, with the aim of encouraging them to relocate. Regarding Article 14, the Court noted that:

> Article 14 does not preclude States from treating groups differently even on otherwise prohibited grounds in order to correct "factual inequalities" between them. Moreover, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.[319]

This is a case where differentiated treatment was necessary, so as to achieve substantive equality. In other words, a general measure put in place homogeneously for all persons had resulted in 'disproportionately prejudicial effects' on certain groups of people.[320] An intersectional analysis in such circumstances permits to understand how different treatment is stipulated for a more equal enjoyment of rights – something that was overlooked in the *Garib* judgment. The Court accepted that the applicants:

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[317] Lourdes Peroni, 'Age and Gender Discrimination: Laudable Anti-Stereotyping Reasoning in Carvalho Pinto v. Portugal' (*Strasbourg Observers*, 28 September 2017) <https://strasbourgobservers.com/2017/09/28/age-and-gender-discrimination-laudable-anti-stereotyping-reasoning-in-carvalho-pinto-v-portugal/> accessed 27 April 2025.

[318] ECtHR, *JD and A v the United Kingdom*, nos 32949/17 and 34614/17, 24 October 2019.

[319] ibid para 86.

[320] ibid para 91.

> [W]ere in a significantly different situation and particularly prejudiced by the policy because they demonstrated they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their status.[321]

The Court concluded that the first applicant, who lived with her disabled child, was in a position to move to another house using the alternative benefit she received. In contrast, the second applicant, a victim of domestic violence, required the 'extra' bedroom and was therefore wrongly treated in the same manner as any other Housing Benefit recipient, in violation of Article 14 of the ECHR.

On the other hand, in *GM and Others v the Republic of Moldova*, involving the maltreatment of intellectually disabled women in psychiatric institutions, including their forced abortion and contraception, while finding a violation of Article 3, the Court missed the opportunity to discuss the (intersectionally) discriminatory nature of this treatment.[322]

3.1.2.4. Concluding remarks: the potential uses of Article 14 ECHR and Protocol 12 to the ECHR

Intersectionality is evidently absent in the ECtHR's case law. Called a 'legal heterotopia' in the ECHR system, intersectionality seems to be part of the more imaginative and alternative ideas that find space only in peripheral legal spaces – such as the dissenting opinions of Judges Pinto de Albuquerque and Elósegui – where traditional legal constraints are relaxed.[323] At the same time, the Court employs the concept of 'vulnerability' to describe intersectional situations, but it does so through a different logic – one that emphasises inherent disadvantage, thereby overlooking the overlapping and mutually reinforcing effects of structural and contextual factors. As Lorena Sosa has accurately points out:

> The vulnerability approach challenges formal equality models by incorporating the idea of unequal positioning and the need for positive measures to rebalance the situation. However, this vulnerability is not always 'socially constructed', and often relates to bodily limitations due to age, disability, pregnancy, illness, etc. This suggests that in

[321] ibid para 92.
[322] ECtHR, *GM and Others v the Republic of Moldova*, no 44394/15, 22 November 2022.
[323] Theilen (n 112) 251–252.

> order to approximate vulnerability perspectives to the intersectionality perspective, those must pay attention to the socio-structural construction of vulnerability.[324]

This does not mean that the Court fails to recognise patterns of social exclusion embedded in systems of disadvantage, or that it entirely overlooks the structural roots of these disadvantages. This awareness is especially important in cases involving social and economic rights, which often concern vulnerable or marginalised individuals and are not explicitly protected under the ECHR (particularly due to the exclusion of social and economic rights in the ECHR system). However, as seen in various judgments, the Court's case-by-case approach can result in inconsistent reasoning; this is evident when comparing, for instance, the *Garib* and *JD and A* judgments. It often focuses narrowly on the specific circumstances of individual applicants, rather than addressing how broader structures of disadvantage shape qualitatively different experiences of discrimination – particularly in cases involving general measures or systemic state actions. This was somehow understood in the case of the second applicant in *JD and A*, but was overlooked in *Garib*.

But even when it comes to cases not necessarily involving material inequality, as it was shown in the sterilisation of Roma women and the headscarf bans, the ECtHR is just reluctant to apply Article 14 and imply that States are systematically discriminating against intersectional subjects. The concept of intersectionality is already too 'alternative' for the Court to acknowledge it, let alone imply that structural discrimination operates through neutral or ostensibly objective laws and policies. At the same time, it recognises the particular vulnerability of Roma or Muslim women in practices and legislation that affect them disproportionately; it simply refuses to characterise this as discrimination on the part of the States concerned.

To understand better how intersectional subjects can practically find justice before the ECtHR, it is necessary to examine the applicability of the only article and protocol that can allow the acknowledgment of intersectional discrimination: Article 14 ECHR and Protocol 12 to the ECHR. We can first notice the broad scope of Article 14 through the non-exhaustive list of grounds of discrimination, leaving room for a wide scope of application. The ECtHR has stated that the words 'other status' can be interpreted broadly and do not refer only to innate or inherent

[324] Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge University Press 2017) 17.

characteristics.[325] However, this flexibility is constrained by the Court's traditional comparator-based model, which requires the applicant to demonstrate that they were treated less favourably than another person in a 'relevantly similar situation'.[326] In cases of intersectional discrimination, finding an appropriate comparator becomes not only difficult but often impossible. This reveals the shortcomings of the grounds, single-axis approach of Article 14.

The evidentiary burden also presents a major obstacle for applicants. The ECtHR examines Article 14 when the case showcases a 'clear inequality of treatment',[327] and thus applicants have to provide sufficient data, which in the case of intersectional discrimination is particularly under-developed.[328] The Strasbourg Court already in single-ground discrimination claims is not easily satisfied, declaring Article 14 claims inadmissible or manifestly ill-founded. Practical discrimination is thus often exempted due to data deficiency, while discriminatory intent in specific cases is difficult to prove due to the indirect expression of discrimination and the lack of tangible evidence. What is more, the Court's case law on the matter could be considered inconsistent. Shifting the burden of proof in some cases of discrimination (eg, *BS v Spain*), while in others not (eg, *VC v Slovakia, NB v Slovakia* and *IG v Slovakia*), intersectional subjects are often left unprotected in situations of indirect discrimination.

As it was shown above, the ECtHR often uses the term 'vulnerability' to describe discrimination cases. It assigns vulnerability to historically disadvantaged groups (eg, women, Roma community, migrants) and recognises systemic patterns, but does not always find a violation of the principle of non-discrimination. For example, in *Opuz*, this worked in favour of the applicant, who as a woman of low-income family living in south-east Turkey was discriminated against by authorities, but not in the forced sterilisation cases of Roma women (although their vulnerability was indeed acknowledged). Vulnerability is frequently applied in cases of intersectional discrimination – and usually as a 'particular' or 'increased' vulnerability – and the Court views intersectional subjects as disadvantaged sub-groups within the larger group.[329] While at times this vulnerability approach can be considered to add a social context to the identity-centred Article 14,[330] it is criticised for reinforcing normative stereotypes, such as those

[325] ECtHR, *Clift v the United Kingdom*, no 7205/07, para 56, 13 July 2010.
[326] ECtHR, *Konstantin Markin v Russia* [GC], no. 30078/06, para 125, ECHR 2012 (extracts)
[327] ECtHR, *Airey v Ireland*, 9 October 1979, para 30, Series A no. 32.
[328] EIGE (n 18).
[329] Oddny Mjoll Arnardottir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review 150, 169.
[330] ibid 170.

equating vulnerability with passivity or victimhood.[331] In this sense, the vulnerability approach often accompanying Article 14 does not serve intersectionality's purpose. As it was seen in *BS* or *Carvalho Pinto de Sousa Morais*, the Court can apply this Article on multiple grounds, even if it does not name it as intersectional discrimination. And in the latter case it did not even use the vulnerability construct, as it understood that women of an older age face discrimination in the concerned context (sexual life) due to the synergy of age and gender. Again, it followed the comparator approach, which as it was already outlined is insufficient in cases of intersectional discrimination, and only the concurring judges – in the context again of the 'legal heterotopia' described above – recognised that stereotypes are discriminatory in nature and no comparison needs to be done.[332]

It should be noted that, in an ideal scenario, Article 13 of the Convention, providing for the right to an effective remedy, could also be regarded in cases of intersectional discrimination. This would be the case when the national authorities have not remedied the violation with regard to the applicant's intersecting identities, and thus the remedy is considered insufficient.[333] Article 13 can serve as a procedural tool to demand recognition of intersectional harm within national legal systems, especially where the fragmentation of anti-discrimination laws or a narrow understanding of identity prevents justice. It can push the ECtHR to look beyond whether *there is* a remedy toward whether that remedy is *truly effective* for the particular, intersectional nature of the rights violation.

In summary, there is evidently an evolving better understanding of intersectional subjects' unique experiences by the ECtHR, even if it calls it 'particular vulnerability' most of the times. There is probably a need to surpass this vulnerability tendency for the reasons outlined above, and focus on how Article 14 and Protocol 12 to the ECHR, and potentially Article 13, can be applied to render proper justice to the victims concerned. Of course, the Court handles individual cases and for this reason its case law regarding intersectionality may be inconsistent. Nonetheless, it has proven that the potential uses of Article 14 are not limited, and this provision

[331] Katrin Wladasch, 'Is There Any Room for Vulnerability in Article 14 Cases? The Case Law of the European Court of Human Rights' (*LBI of Fundamental and Human Rights*) <https://gmr.lbg.ac.at/is-there-any-room-for-vulnerability-in-article-14-cases-the-case-law-of-the-european-court-of-human-rights/> accessed 26 May 2025.
[332] *Carvalho Pinto de Sousa Morais v Portugal* (n 306) (Judge Yudkivska and Judge Motoc, concurring opinions).
[333] Rosana Garciandia, 'Intersectionality in Strasbourg: Ensuring an Effective Protection of Convention Rights' (*Intersectional Rewrites*, 8 February 2024) <https://intersectionalrewrites.org/intersectionality-in-strasbourg-ensuring-an-effective-protection-of-convention-rights/> accessed 26 May 2025.

can help the Court advocate how stereotyping, different rights violations and everyday experiences of intersectional subjects can be discriminatory in nature.

3.2. European Union Law

When conducting an analysis from the European perspective, it is hard to leave out the praxis of the European Union (EU). Multiple discrimination was introduced into national legislations through EU's anti-discrimination directives,[334] and the European Commission had made a reference to 'intersectional discrimination' since 2007.[335] Remarkably, the Commission in this text distinguishes multiple, compound and intersectional discrimination, following Makkonen's analysis (2.1 above).[336] It is also noteworthy that although class and socio-economic status are excluded from the Commission's analysis, they are in fact referenced and recognised as having 'a significant bearing on the lives of individuals vulnerable to discrimination'.[337]

While the CoE and the ECtHR's judgments can have an influential impact on the European states' legislation, policies and practices, the power of the EU can be considered even greater. With legislative tools such as the directly applicable regulations and the binding as to the result directives, along with judicial oversight by the Court of Justice of the EU (CJEU), and the conditionality attached to the EU budget, the political influence of the EU is unquestionable. As a result, EU's initiatives in the area of equality are of great importance, often showcasing intersectional sensitivity.

In the foundational and subsequent treaties of the EU we can find a strong engagement for equality: according to Article 2 of the Treaty on EU (TEU), equality and non-discrimination are core EU values,[338] and in Article 10 of the Treaty on the Functioning of the EU (TFEU) it is declared that 'the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', while Article 19 gives the EU power to take action to combat discrimination on these grounds.[339] Non-discrimination and gender

[334] Lutz, Herrera Vivar and Supik (n 57) 7.
[335] European Commission, 'Tackling Multiple Discrimination: Practices, Policies and Laws' (Publications Office 2007) 16.
[336] ibid 16–17.
[337] ibid 15.
[338] Consolidated Version of the Treaty on European Union [2016] OJ C202/13 art 2.
[339] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 arts 10, 19.

equality are protected in the Charter of Fundamental Rights of the EU (EU Charter) under Articles 21 and 23 respectively,[340] expanding the scope of Article 10 of the TFEU. The principle of non-discrimination of Article 21 is, contrary to Article 14 ECHR, 'freestanding', meaning that it does not need to be applied in conjunction with other rights of the Charter;[341] however, the treatment should always be linked to EU law,[342] and thus the scope can be limited. Children, the elderly and disabled persons are also protected explicitly (Articles 24-26 of the Charter), while Article 22 provides for the protection of cultural, religious and linguistic diversity.[343] Evidently, intersectionality was missing from these treaties, but emerged through the subsequent EU legislative initiatives.

3.2.1. Multiple Discrimination in the First Equality Directives

The EU legal framework regarding discrimination can be considered fragmented, as there are distinct directives for different grounds of discrimination, which in the beginning did not include an intersectionality clause, but only referenced multiple discrimination. More specifically, multiple discrimination first entered into EU legislation in 2000, through the Racial Equality Directive 2000/43/EC (RED), stating that:

> In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.[344]

There are certain limitations as regards the scope of this Directive: first, it does not apply to differential treatment based on nationality, and second, it applies only in contexts of employment, vocational training, social protection and advantages, education, and access to and supply of goods and services available to the public, including housing.[345] As the CJEU has

[340] Charter of Fundamental Rights of the European Union [2016] OJ C202/389 arts 21, 23 (EU Charter).
[341] European Union Agency for Fundamental Rights and Council of Europe, 'Handbook on European Non-Discrimination Law' (2018) 35.
[342] Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-07245.
[343] EU Charter (n 340) arts 22, 24–26.
[344] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 recital 14.
[345] ibid art 3.

confirmed, third-country nationals are excluded from the protection of difference in treatment.[346]

Following and complementing the RED, the EU adopted the Employment Equality Directive 2000/78/EC, which reiterated the RED's statement regarding multiple discrimination[347] and expanded the protection of non-discrimination in the fields of employment and occupation to the grounds of 'religion or belief, disability, age or sexual orientation'.[348] Again, this Directive excludes third country nationals,[349] and its scope is even more limited than the one of RED, as it concerns only employment and occupation.

Gender equality was promoted through various directives: the Gender Goods and Services Directive 2004/113/EC concerning access to and supply of goods and services available to the public and excluding media content, advertisement, education and employment;[350] the Gender Equality Directive 2006/54/EC, created in an effort to regroup or EU provisions establishing equal treatment in matters of employment and occupation and includes persons whose gender has been reassigned;[351] and the Directive 2010/41/EU regarding gender equality in self-employed activities.[352]

Barbara Giovanna Bello observes that even if we argue that these directives, each based on a distinct ground, could be applied parallelly to cases of multiple discrimination, in practice this would be particularly difficult as their scopes are different:[353] the RED refers to the welfare, employment, education sectors, while the Directives regarding gender discrimination refer only to the employment or to access to goods and services; moreover, sexual orientation, disability,

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[346] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233.

[347] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/22 recital 3.

[348] ibid art 1.

[349] ibid art 3(2).

[350] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 art 3.

[351] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 recital 3.

[352] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L180/1.

[353] Barbara Giovanna Bello, 'Multiple Discrimination Between the EU Agenda and Civic Engagement: The Long Road of Intersectional Perspective' (2009) 2 Roma Rights Quarterly 11, 16.

religion, beliefs and age as grounds are protected only in the context of employment.[354] As a result, for a long time multiple discrimination was not applied in principle, and it was reduced to a simple proclamation. This is also evident by the fact that only a few EU Member States incorporated a provision of multiple discrimination in the anti-discrimination laws that they adopted in view of these Directives (3.3 below).

3.2.2. Application of the European Commission's Gender Equality Strategy

In 2020, the European Commission published the Gender Equality Strategy 2020–2025 and took various positive steps to implement it. In this Strategy, the Commission notably defines intersectionality as 'the combination of gender with other personal characteristics or identities, and how these intersections contribute to unique experiences of discrimination', and names it a 'cross-cutting principle' in the implementation of the Strategy.[355] It also refers to the EIGE's definition of intersectionality as an 'Analytical tool for studying, understanding and responding to the ways in which sex and gender intersect with other personal characteristics/identities, and how these intersections contribute to unique experiences of discrimination.'.[356] It incorporates intersectionality into data collection for VAWG, employment, and all gender equality policies more broadly.[357] This was the first step toward a number of measures in the direction of intersectionality.

3.2.2.1. Accession of the EU to the Istanbul Convention

In view of this Gender Equality Strategy, the EU finally concluded its accession to the Istanbul Convention on October 2023.[358] This was in progress for years, as the EU had already signed the Convention on 13 June 2017. Its eventual accession can certainly be characterised as a 'bold

[354] European Union Agency for Fundamental Rights and Council of Europe (n 341) 34.
[355] European Commission, 'A Union of Equality: Gender Equality Strategy 2020-2025' (2020) COM(2020) 152 final 2.
[356] European Institute for Gender Equality, 'Intersectionality' <https://eige.europa.eu/publications-resources/thesaurus/terms/1050?language_content_entity=en> accessed 12 May 2025.
[357] European Commission (n 355) 5, 7, 16.
[358] European Parliament, 'EU Accession to the Council of Europe Convention on Preventing and Combating Violence against Women ('Istanbul Convention')' (*Legislative Train Schedule*, 15 December 2024) <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-eu-accession-to-the-istanbul-convention> accessed 9 May 2025.

move', considering that a number of EU Member States have not ratified the Convention (Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania and the Slovak Republic)[359] and the Polish government had filed a petition for its constitutional review in 2020, although this was later withdrawn.[360] After the accession, the agreement became an integral part of EU law and is binding to Member States.[361] In this sense, even if some Member States are not parties to the Convention or withdraw from it, the EU has still competence to legislate through Directives and Regulations and monitor them, in order to implement the Convention's provisions. This competence concerns particularly criminal and migration matters.[362]

Of course, intersectionality is not present in the Istanbul Convention, as it was analysed above (3.1.1.). Nonetheless, it contains some definitions and ideas regarding gender discrimination and VAWG that needed to be integrated into EU law. As it will be described below, the EU adopted a Directive in this regard, although some limitations and inconsistencies with the Istanbul Convention can be traced in the final text of the relevant Directive.

3.2.2.2. Intersectionality in the new gender equality Directives

Intersectional discrimination was finally, explicitly integrated into EU law through the Pay Transparency Directive 2023/970, establishing transparent equal pay between men and women.[363] Notably, the preamble makes reference to the 'intersection of various axes of discrimination or inequality' between sex and other grounds, while at the same time mentioning specifically 'women with disabilities, women of diverse racial and ethnic origin including Roma women, and young or elderly women' as victims of intersectional discrimination.[364] It is remarkable how the Directive further elaborates on how this parameter should be taken into consideration for 'substantive and procedural purposes', in order to unveil the discrimination,

[359] ibid.
[360] Laurenz Gehrke, 'Polish Court to "Examine" Istanbul Convention on Violence against Women' (*POLITICO*, 30 July 2020) <https://www.politico.eu/article/poland-court-violence-against-women-istanbul-convention/> accessed 12 January 2025.
[361] Karolina Kaja Kubacka, 'The EU Accession to the Istanbul Convention: The Argument from the "Common Accord" Practice' (2022) 12 Wroclaw Review of Law, Administration & Economics 72, 77.
[362] ibid 79.
[363] Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms [2023] OJ L132/21.
[364] ibid recital 25.

find the appropriate comparator, and assess the proportionality and penalty. According to Articles 16 and 23, intersectional discrimination should be weighed in as a factor when compensation, reparation or penalties are calculated.[365] However, the Directive releases employers from gathering data for other grounds besides sex; it can be concluded that this is stated because the Directive creates obligations for equal pay particularly between women and men.[366]

Moreover, intersectional discrimination is included for in the definitions of the main text and is defined as 'discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC'.[367] It is also an essential part of the awareness that needs to be raised by the monitoring body assigned with the implementation of national measures related to the Directive.[368]

In the context of VAWG, the EU even more recently adopted the landmark Directive 2024/1385 on combating violence against women and domestic violence, which provides a broad framework protecting women.[369] Some positive developments that this Directive introduces include the shared responsibility among EU Member States in ending VAWG and domestic violence, establishing obligations of prevention, protection, support of victims and prosecution in a gender-sensitive manner, as well as the condemnation of online violence. These obligations are aligned with the pillars that the Istanbul Convention follows (prevention, protection, prosecution, policies), but go even beyond to adapt into the new reality of the extensive cyber-crimes against women.

In its text, we can see intersectionality making an appearance: in the preamble of the Directive there is, first of all, a connection between violence against women and structural discrimination, before stating that:

> Violence against women and domestic violence can be exacerbated where it intersects with discrimination based on a combination of sex and any other ground or grounds of discrimination as referred to in Article 21 of the Charter, namely race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation

[365] ibid arts 16(3), 23(3).
[366] ibid recital 25. This is reiterated in art 3(3).
[367] ibid art 3(2)(e).
[368] ibid art 29(3)(a).
[369] Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence [2024].

> *('intersectional discrimination')*. Member States should therefore pay due regard to victims affected by such intersectional discrimination by taking specific measures. Persons affected by intersectional discrimination are at a heightened risk of experiencing gender-based violence. Consequently, Member States should take that heightened level of risk into consideration when implementing the measures provided for by this Directive, especially regarding the individual assessment to identify victims' protection needs, specialist support to victims and training and information for professionals likely to come into contact with victims.[370]

Every element of this declaration is of great importance. First, intersectional discrimination is explicitly named and is acknowledged to create a 'heightened risk' of gender-based violence. What was never named by the ECtHR or any international treaties was at last included in a multinational binding legal document. Second, Member States are urged to particularly consider intersectional discrimination when adopting and applying measures, as well as when assessing each case of gender-based and domestic violence individually. This last part might be at the end of the day the most important: intersectionality aims to offer a perspective that allows the best protection and reparation for the victims themselves. It should be noted that the Directive provides a wide non-exhaustive list of grounds of discrimination, expanding the one of Article 21 of the Charter.

In addition to the preamble, intersectionality is explicitly incorporated into the main text of the Directive, namely in Article 33, which encourages Member States to provide specific support to 'victims with intersectional needs and groups at risk'.[371] The same Article also makes a specific reference to victims with disabilities and third-country nationals. Similarly, Article 16 provides that the victims' individual circumstances should be taken into account during the assessment of the situation, including whether they experience discrimination 'based on a combination of sex and any other ground or grounds of discrimination as referred to in Article 21 of the Charter ('intersectional discrimination')'.[372] Moreover, it is stated that intersectional discrimination should be taken into consideration as regards the training of professionals, in order to be able to identify and address the specific protection and support needs of intersectional victims.[373] Lastly, if the criminal offences outlined in the Directive, such as female genital mutilation, forced marriage or cyber stalking, are committed with the intention to 'punish the victim for the victim's sexual orientation, gender, colour, religion, social origin

[370] ibid recital 6.
[371] ibid art 33.
[372] ibid art 16(4).
[373] ibid art 36(10).

or political beliefs', such motivation should be treated as an aggravating circumstance.[374] In this way, the Directive encourages Member States to incorporate the model of aggravated circumstances based on discriminatory grounds into their criminal legislation.

Despite these important advancements, the Directive has not evaded criticism. UN Special Rapporteur on VAWG, Reem Alsalem, questioned the Directive's not consent-based definition of rape and sexual assault, the insufficient protection of migrant women, the inconsistency of the use of the terms 'sex' and 'gender', as well as some provisions regulating cyberviolence.[375] With regard to terminology, the Directive does not define 'gender' and appears to use the term interchangeably with 'sex', despite the importance of distinguishing between the two, which refer to distinct characteristics. Treating them as synonyms undermines the Directive's stated commitment to addressing the structural and societal dimensions of discrimination against women and adopting a gender-sensitive approach.[376] According to Kasım Ceren, gender highlights the societal context of violence, a nuance the EU legislator could have clarified given the persistent conflation of gender and sex by the European Court of Justice (ECJ).[377]

All of these advancements represent significant progress in the field of international law. For the first time States are formally obliged to adopt an intersectional approach to a human rights issue. And it is not made in an implicit way; every time intersectional discrimination is described in the text, it is named expressly. The Directive presents an elaborate project to combat structural inequality in practice, with a great understanding of the victims' needs. Even if the scope is limited, given that it addresses only gender-based and domestic violence, it prompts States to familiarise with this concept and it may pave the way for future reforms in other contexts. Member States have a three-year period to implement the Directive, so it is left

[374] ibid art 11(p).

[375] 'European Directive on Combating Violence against Women and Domestic Violence Welcome but Falls Short of Full Potential, Says UN Expert' (*OHCHR*, 13 May 2024) <https://www.ohchr.org/en/press-releases/2024/05/european-directive-combating-violence-against-women-and-domestic-violence> accessed 10 May 2025.

[376] See, for instance, the preamble's recital 10 highlighting that 'Violence against women is a persisting manifestation of structural discrimination against women, resulting from historically unequal power relations between women and men. It is a form of gender-based violence inflicted primarily on women and girls by men. It is rooted in socially constructed roles, behaviour, activities and attributes that a given society considers appropriate for women and men. Consequently, a gender-sensitive perspective should be taken into account in the implementation of this Directive.'.

[377] Kasım Ceren, 'Advancing Gender Equality: The EU`s Landmark Directive 2024/1385 on Violence Against Women' (*EU Law Analysis*, 21 June 2024) <https://eulawanalysis.blogspot.com/2024/06/advancing-gender-equality-eus-landmark.html?m=1>.

to see how formally framing intersectionality at the EU level will have a positive impact in national legislation and practices.

3.2.3. The Case Law of the Court of Justice on Headscarf Bans

The Court of Justice of the European Union (CJEU) was established in 1952 (originally called Court of Justice of the European Coal and Steel Communities) and is responsible for interpreting EU law to ensure that it is applied harmoniously in all Member States, settling disputes between national governments and EU institutions and, in some cases, ruling on actions brought by individuals who consider their rights to be violated. It is divided into two courts: the Court of Justice (ECJ) and the General Court (EGC); the latter was only created in 1989 as a 'Court of First Instance' to relieve the heavy burden on the ECJ. While the two courts have different scopes of jurisdiction, the primary function of the CJEU consists in overseeing the application and interpretation of EU law.

As already mentioned, the principle of non-discrimination is provided under 21 of the EU Charter, containing a non-exhaustive list of grounds. Nevertheless, the CJEU has ruled that it cannot extend protection on 'new' categories of discrimination, ie based on a combination of grounds.[378] Therefore, in most cases where intersectional discrimination was present, the Court stayed silent or refused to invoke Article 21 and 20 (on the equality before the Law) of the Charter.

A very aggrieved category bringing intersectional cases in the employment sector before the CJEU is Muslim women. Research shows that Muslim women wearing a headscarf and of a

[378] Center for Intersectional Justice (n 63) 24. See, for instance, the 2016 judgment of *Parris v Trinity College Dublin and Others*, where the ECJ affirmed that: 'while discrimination may indeed be based on several of the grounds…, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.'. Case C-443/15 *David L Parris v Trinity College Dublin and Others* [2016] ECLI:EU:C:2016:897, para 80.
Therefore, intersectional cases are excluded, as they are based on a combination of grounds, particularly in situations where if we take each of the grounds separately (eg, age and sexual orientation) there might not be discrimination based on age *or* sexual orientation. This is an excellent example of how intersectionality provides an additional framework protecting categories of individuals, who under the existing anti-discrimination law framework are neglected.

different ethnic origin have a remarkably lower chance to get callbacks after job applications.[379] Islamophobia is quite prominent in Europe, and women are particularly affected, as their faith requires them to wear visible signs, in contrast to men who mainly wear a beard.

In a case brought by the Belgian Court of Cassation to the ECJ for a preliminary ruling, Ms Achbita was required to abstain from wearing a headscarf during her work at a company providing reception services, in accordance to an 'unwritten rule' of the company.[380] This 'rule' was amended into company regulation after the insistence of Ms Achbita to wear the headscarf. She was subsequently dismissed. The national first instance and appeal courts considered that there was no direct or indirect discrimination, as the regulation was of general scope (a 'blanket ban'), prohibiting any visible manifestation of faith during workhours. In this context, the Court of Cassation queried the ECJ whether such a prohibition constitutes a direct discrimination in meaning of Article 2(2)(a) of the Employment Equality Directive 2000/78, providing that 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.

As regards the direct discrimination the ECJ found that this provision did not fall into its definition,[381] but went on to examine whether it constituted indirect discrimination, even though this was not part of the preliminary question. When examining the legitimate aim of this discrimination the Court noted that 'An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognising in Article 16 of the Charter and is, in principle, legitimate',[382] while the appropriateness of the internal rule is covered by the need to properly, consistently and systematically apply a neutral policy.[383] Only as regards the necessity of the measure the Court concluded that the company could have assigned her to a post where no contact with clients was needed instead of dismissing her.

The ECJ seems to be a stranger to the concept of intersectional discrimination in this ruling. Of course, this form of discrimination was not included in the Employment Equality Directive,

[379] Raphaële Xenidis, 'Intersectionality from Critique to Practice: Towards An Intersectional Discrimination Test in the Context of "Neutral Dress Codes"' (2022) 2022 European Equality Law Review (referencing Weichselbaumer's 2020 study).
[380] Case C-157/15 *Achbita v G4S Secure Solutions NV* [2017] ECLI:EU:C:2017:203.
[381] ibid para 32.
[382] ibid para 38.
[383] ibid para 40.

only in the form of 'multiple discrimination'. Nevertheless, we are faced with a case where there was clearly intersectional discrimination towards a Muslim woman. As it was underlined by the ECtHR in the case law analysed above (3.1.2.2), Muslim women 'are particularly exposed to the ban'; it is a combination of religion and gender, and how Muslim women are mainly required by their faith to wear a very visible religious sign, that makes them particularly affected by such prohibitions. The ECJ, however, did not make any reference whatsoever to their distinct situation, and only focused on the religion as ground of discrimination. The Advocate General Kokott in her opinion for this case mentioned that the ban puts at a particular disadvantage employees of a particular 'sex, colour or ethnic background', but a general company rule such as the one examined can equally affect men and women.[384]

A similar omission of intersectional analysis can be observed in another headscarf case, *Bougnaoui v Micropole SA*, where the outcome was nevertheless in the claimant's favor.[385] The preliminary question concerned Article 4(1) of the Directive and whether a customer's wish for a consulting company's employee not to wear an Islamic headscarf could constitute a genuine and determining occupational requirement, which the ECJ answered in the negative. Subsequent judgments on the same subject include the cases of *IX and Müller*,[386] *LH*[387] and *OP*.[388] Gender or race and ethnicity were not taken into account by the CJEU, despite these women being a 'paradigmatic example of intersectionality analysis'.[389]

More specifically, in *IX and Müller* the Court recognised that the contested rule 'concerns, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith',[390] without however acknowledging gender discrimination, as the Court considers it to be outside the scope of the Directive in place.[391] Notably, the preliminary question demanded whether this prohibition constitutes discrimination on the grounds of religion *and/or* gender, but the ECJ decided not to examine the latter ground for the reason mentioned above.[392]

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[384] ibid, Opinion of AG Kokott, para 121.

[385] Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* [2017] ECLI:EU:C:2017:204.

[386] Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ* [2021] ECLI:EU:C:2021:594.

[387] Case C-344/20 *LH v SCRL* [2022] ECLI:EU:C:2022:49.

[388] Case C-148/22 *OP v Commune d'Ans* [2023] ECLI:EU:C:2023:801.

[389] Howard (n 32) 305.

[390] *IX and Müller* (n 386) para 59.

[391] ibid para 58.

[392] The preliminary question was the following: 'Does a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute indirect discrimination on the

Similarly, in *OP*, the referring tribunal queried whether the neutral prohibition is allowed even if it 'appears mostly to affect women and may thus constitute disguised discrimination on grounds of gender'[393], but the ECJ considered this matter to be regulated by Directive 2006/54/EC instead.

One analysis offering some recognition to Muslim women was provided in the opinion of Advocate General Medina in the case of *LH*, highlighting that:

> [I]f employers impose internal neutrality rules as a recognizing policy, Muslim women may in reality not only experience '*particular inconveniences*', but a deep disadvantage to becoming employees. That may lead in turn to setting them apart from the labour market – a source of personal development and social integration – resulting then in discrimination going beyond religion and extending also to *gender*...I find it important to highlight that double discrimination is a real possibility…[394]

Advocate General Sharpston in her Shadow Opinion[395] regarding *IX and Müller* went a step further by considering that a blanket ban does not discriminate in the same way all religious groups but a more 'nuanced' discrimination is produced: intra-group discrimination.[396] Sharpston thus moved away from the typical inter-group comparison to diagnose discrimination, and recognised that some actions create discrimination within a specific group, ie intersectional discrimination. She added that this might constitute direct discrimination – a finding that is consistently rejected by the ECJ – as members of non-Christian religions that are obliged by their faith to wear visible elements, are in essence not free to choose between their faith's rules and those established by their employer.[397]

To sum, the reason presented by the Court in *IX and Müller* as regards the ground of gender not falling within the scope of the Employment Equality Directive demonstrates the weakness of a fragmented system where different grounds of discrimination are protected under different Directives. Some scholars have tried to find a legal leeway in interpreting the EU anti-

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grounds of religion and/or gender, within the meaning of Article 2(1) and Article 2(2)(b) of Directive [2000/78], against a female employee who, due to her Muslim faith, wears a headscarf?'.

[393] *OP* (n 388) para 20.

[394] Case C-344/20 *LH v SCRL* [2022] ECLI:EU:C:2022:328, Opinion of AG Medina, para 66.

[395] The Opinion is called 'Shadow' because Sharpston was assigned to the cases in the beginning, but left office in 2020, and thus at the time of the judgment was not the responsible AG. However, as she had already great knowledge of this case, she wrote this Shadow Opinion to express her views. Howard (n 32) 306.

[396] *Joined Cases C-804/18 and C-341/19 IX v WABE eV and MH Müller Handels GmbH v MJ* [2021] ECLI:EU:C:2021:594, Shadow Opinion of AG Sharpston, para 122.

[397] ibid para 123.

discrimination Directives 'purposively', to include discrimination on 'combined grounds' through the interrelation of the distinct directives.[398] But it is evident that the CJEU will not accept this.

3.2.4. Concluding Remarks

The principle of non-discrimination is considered 'part of the DNA of European integration'.[399] Indeed, this is reflected in the (then) European Economic Community's founding treaties, and later in the Directives adopted mainly in the employment sector. Although initially masked in the form of multiple discrimination, intersectionality is now an integral part of EU's recent gender quality Directives. This institutionalisation of intersectionality allows to advance from simply political or administrative protection of inequalities, to legal and judicially significant protection.[400] It provides a platform for both the appropriate recognition and the effective protection of the often-considered inadequate anti-discrimination law framework and assessment procedures.

As it was outlined in the introduction, this thesis starts from gender as a ground of discrimination and how this interacts with other grounds. It was, nonetheless, disclaimed that race remains in the roots of intersectional theory and should not be overlooked. In this context, the EU has been criticised for 'doing' intersectionality only through the lens of gender: Iyiola Solanke observes that 'the new Gender Equality Strategy of the European Commission, which is a current example of how the EU has multiplied its vision (what it sees) without changing the way it sees', referring to Europe's racial-blindness.[401] This can explain the ECJ's (and accordingly the ECtHR's) reluctance to defend Muslim women. The ethnicisation of sexism implying that gender equality and Islam are contradicting, in combination with the prevailing secularism, has resulted in the deprioritisation of Muslim women's beliefs and autonomy.[402]

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[398] Bello (n 353) 15.

[399] Iyiola Solanke, 'The EU Approach to Intersectional Discrimination in Law' in Gabriele Abels and others (eds), *The Routledge Handbook of Gender and EU Politics* (Routledge 2021) 93.

[400] Andrea Krizsán, Hege Skjeie and Judith Squires (eds), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes* (Palgrave Macmillan 2012) 4.

[401] Solanke (n 399) 102.

[402] Dolores Morondo Taramundi, 'Between Islamophobia and Post-Feminist Agency: Intersectional Trouble in the European Face-Veil Bans' (2015) 110 Feminist Review 55.

Despite these shortcomings, it is positive that (intersectional) applicants have started to include in their claims multiple grounds of discrimination, for instance in the cases of *IX and Müller* and *LH*, bringing intersectional discrimination to the attention of national courts and the CJEU. In turn, national tribunals are also beginning to incorporate intersectional suggestions into their preliminary questions, eg in the case of *IX and Müller.* Other cases, such as *Parris*,[403] *Odar*[404] and *Bedi*,[405] which do not include female applicants and thus were excluded from the above case law analysis, demonstrated a possibility of recognising discrimination on more than one grounds: gender (male) and sexual orientation in *Parris*, age and disability in *Odar* and *Bedi*.

Intersectional litigation before the ECJ is not an easy task. As Xenidis argues, litigants have to convince national courts to consider an intersectional claim and to refer a question to the ECJ, which has been faced with a lot of reluctance on the part of national judges, particularly when intersectionality is not backed by a specific law.[406] The general ignorance of the EU towards intersectionality – at least before the adoption of the Gender Equality Strategy of 2020-2025 – shaped accordingly national legislations and case law. In the subsequent chapter, I will present a comparative analysis of European states' anti-discrimination frameworks and case law concerning intersectional discrimination, in order to assess the current level of protection. This analysis will focus only on EU Member States, given the greater availability of data and their binding obligations under the EU law discussed above.

3.3. Comparative analysis of the European States' anti-discrimination frameworks

The experiences of European states differ not only from those in other parts of the world, but also between them, making intersectionality a concept which takes different meanings and utilities depending on the part of Europe. In this sense, it was already outlined (2.1.3 above) that British Black feminism and intersectionality in Great Britain took a different trajectory compared to post-racial Germany and the Netherlands or republican France. In Central and

[403] *Parris* (n 378).
[404] Case C-152/11 *Johann Odar v Baxter Deutschland GmbH* [2012] ECLI:EU:C:2012:772.
[405] Case C-312/17 S*urjit Singh Bedi v Bundesrepublik Deutschland and Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland* [2018] ECLI:EU:C:2018:734.
[406] Xenidis (n 379).

Eastern Europe, largely composed by former totalitarian socialist states, the legacy of communist universalism often sidelined gender issues.[407] This context exacerbated social divisions and inequalities, leading to intensified forms of intersectional discrimination, which, nonetheless, remain largely unrecognised in the region. And with a large Roma community present, intersectionality plays an essential role in understanding the interplay between gender, ethnicity and socioeconomic situation experienced by the Roma.[408]

In the vast majority of European states, in line with the EU's traditional approach, relevant provisions – when they exist – tend to use the terms 'multiple discrimination' or 'discrimination based on multiple grounds' rather than 'intersectionality'.[409] This is the case for example in Greece and Portugal, where specific legislation establishes the prohibition of discrimination on multiple grounds.[410] In other states, multiple discrimination can constitute an aggravated circumstance in establishing responsibility for an offence (Romania), or it can be taken into account when calculating immaterial damages (Austria) or sanctions in general (Croatia, Slovenia).[411] In Bulgaria, the anti-discrimination act poses a statutory duty on authorities to prioritise positive measures for victims of multiple discrimination.[412] In France, the Netherlands, Poland and Slovakia multiple discrimination is not established by law but only through judicial interpretation.[413] In Hungary, multiple grounds have been taken into consideration when assessing the compensation, although multiple discrimination is not expressly prohibited by law.[414]

[407] Kornelia Slavova and Rumiana Stoilova, 'Intersectionality: Perspectives from Central and Eastern Europe' in Kathy Davis and Helma Lutz (eds), *The Routledge International Handbook of Intersectionality Studies* (Routledge 2024) 28.
[408] ibid 32.
[409] Emanuela Ignățoiu-Sora and others, 'The European Union-Intersectionality Framework: Unpacking Intersectionality in the "Union of Equality" Agenda' (European Union's Fundamental Rights, Equality and Citizenship Programme 2020) 15.
[410] Isabelle Chopin, Catharina Germaine, and European network of legal experts in gender equality and non-discrimination, 'A Comparative Analysis of Non-Discrimination Law in Europe 2024' (European Commission 2025) 37.
[411] ibid.
[412] Dilyana Giteva, 'Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Bulgaria' (Publications Office of the European Union 2023) 18.
[413] Ignățoiu-Sora and others (n 409) 15.
[414] András Kádár, 'Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Hungary' (Publications Office of the European Union 2024) 20.

Intersectional discrimination is explicitly provided only in Belgium's and Spain's anti-discrimination laws.[415] The Spanish law distinguishes intersectional from multiple discrimination and provides that the former occurs 'when several of the causes foreseen therein concur or interact, generating a specific form of discrimination'.[416] However, it provides specific sanctions only for multiple discrimination. In Portugal, intersectionality has theoretically entered the country's policymaking through resolutions, national strategies and even a decree regarding migration and asylum, but it is still only a part of theoretical proclamations.[417]

Multiple/intersectional discrimination is typically diagnosed by the Ombudsman or specific equality bodies, besides courts. For instance, in Romania there is the National Council for Combating Discrimination (NCCD), in Hungary the Equal Treatment Authority, in Bulgaria the Commission for Protection against Discrimination (see **TABLE 1** below).[418] However, without the proper legal framework, even these bodies cannot diagnose intersectional discrimination.

When it comes to domestic case law, this is particularly scarce everywhere in Europe. In Slovenia, the Advocate of the Principle of Equality has ruled cases of intersectional discrimination, stating that this is legally prohibited, while in Austria, a court found discrimination on the ground of religion 'connected with sex or gender' in a headscarf case, without, nonetheless, mentioning multiple or intersectional discrimination.[419] In Cyprus, where there is no provision of multiple or intersectional discrimination, the multiplicity of grounds has only been acknowledged in very few cases by the Ombudsperson.[420] In France, courts have accepted multiple discrimination claims in the domains of health, disability, and trade union membership. In fact, France has quite a rich case law acknowledging intersectional discrimination, compared to other European states.[421] In a landmark case dating to 2011, the

[415] Chopin, Germaine, and European network of legal experts in gender equality and non-discrimination (n 410) 37; Ferran Camas Roda, 'Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Spain' (Publications Office of the European Union 2024) 27.
[416] Camas Roda (n 415) 27.
[417] Dulce Lopes and Joana Vicente, 'Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Portugal' (Publications Office of the European Union 2024) 24.
[418] Slavova and Stoilova (n 407) n 15.
[419] Chopin, Germaine, and European network of legal experts in gender equality and non-discrimination (n 410) 37–38.
[420] Corina Demetriou, 'Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Cyprus' (Publications Office of the European Union 2023) 22–23.
[421] Sophie Latraverse, 'Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: France' (Publications Office of the European Union 2024) 25.

Court of Cassation held that the discrimination faced by an undocumented domestic worker who was not paid by her employer could not be assessed through comparison with other workers, as her mistreatment stemmed from her unique situation, marked by the intersection of gender, origin, class, and precarious legal status.[422]

In Poland, there have also been rulings regarding multiple discrimination, although the tendency remains to focus on a single ground.[423] Similarly in Germany, where, although multiple discrimination is in fact prohibited by law, courts do not recognise it as such and usually focus on one ground.[424] Besides, lawyers tend to base their clients' claims on the ground most likely to succeed, as the concepts of multiple or intersectional discrimination remain unfamiliar to many national judges and present evidentiary challenges, as Crenshaw insightfully analysed in intersectionality's conceptualisation text. At the same time, where law does not provide for recognition of multiple or intersectional discrimination, judicial interpretation remains limited, offering no practical grounds for special compensation, aggravated sanctions, or any practical redress that reflects the compounded nature of the harm suffered by victims. For instance, the Netherlands Institute for Human Rights (NIHR) lacks the authority to impose sanctions and, since multiple or intersectional discrimination are not legally recognised, rulings based on a combination of grounds do not lead to differentiated compensation.[425] As a result, headscarf-related cases, for example, are treated almost exclusively on the basis of religion. There have been, nevertheless, recent developments in interpreting cases as constituting multiple or intersectional discrimination by the NIHR.

Similarly, in Romania, the former President of the National Council for Combating Discrimination (NCCD), Istvan Haller, underlined that intersectional discrimination cannot be declared, considering that it is not recognised by law, and courts could annul the NCCD's decisions for the wrong legal framing.[426] In this context, the discrimination against a Roma female journalist by the then President Traian Basescu calling her 'pussycat' ('păsărică') – a degrading characterisation for women – and 'dirty gypsy woman', was only based on the

[422] Cour de Cassation, Chambre sociale, 3 November 2011, No 10-20765.
[423] Ignățoiu-Sora and others (n 409) 16.
[424] Matthias Mahlmann, 'Country Report: Non-Discrimination : Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78 : Germany' (Publications Office of the European Union 2024) 24.
[425] Karin de Vries, 'Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Netherlands' (Publications Office of the European Union 2024) 23.
[426] Ignățoiu-Sora and others (n 409) 32–33.

ground of ethnicity, disregarding the fact that her gender was also a present factor in this discriminatory behavior.[427]

TABLE 1

Comparing the legal recognition of multiple/intersectional discrimination, equality bodies responsible for discrimination claims and relevant case law of EU Member States

Country	Recognition of discrimination	Equality Body	Case law
Austria	Multiple discrimination for the assessment of immaterial damages	Ombud for Equal Treatment, Equality Commission	Gender and ethnicity/ gender and religion
Belgium	Intersectional discrimination	Centre interfédéral pour l'égalité des chances, Flemish Human Rights Institute (Unia)	Sex and age / sex and disability / sex and religion / sex and sexual behavior
Bulgaria	Multiple discrimination	Commission for Protection against Discrimination	Simple mentioning of multiple discrimination
Croatia	Multiple discrimination	Ombudswoman	Muslim women / age and gender of television presenters
Cyprus	Not provided	The Office of the Commissioner for Administration, Equality Body	Age and disability / migrants with intellectual disabilities / women asylum seekers
Czechia	Not provided	Public Defender of Rights	No case law
Denmark	Not provided	Board of Equal Treatment	Gender and ethnic origin, disability or age
Estonia	Not provided	Gender Equality and Equal Treatment Commissioner	Gender or family obligations and disability, nationality or sexual orientation

[427] ibid 31.

Country	Recognition of discrimination	Equality Body	Case law
Finland	Not provided	Office of the Ombudsman for Non-Discrimination, National Non-Discrimination and Equality Tribunal, Ombudsman for Equality	Gender and disability (application of separate laws) / gender, language, age and place of residence
France	Not provided	Défenseur des droits	Age and nationality / age and sex for access to university education or employment / Muslim women / female illegal worker
Germany	Multiple discrimination	Federal Anti-Discrimination Agency	No case law
Greece	Multiple discrimination	Office of the Greek Ombudsman	No case law
Hungary	Not provided	Office of the Commissioner for Fundamental Rights, Equal Treatment Authority	Roma women / explicit reference to intersectional discrimination
Ireland	Not provided	The Irish Human Rights and Equality Commission	Gender and age or race
Italy	Not provided	Office against Racial Discrimination	No case law
Latvia	Not provided	Office of the Ombudsman of the Republic of Latvia	No case law
Lithuania	Not provided	Office of the Equal Opportunities Ombudsperson	No case law
Luxembourg	Not provided	Centre pour l'égalité de traitement	No case law
Malta	Multiple discrimination	National Commission for the Promotion of Equality	No case law
Netherlands	Not provided	Netherlands Institute for Human Rights, Equal Treatment Commission	Disabled Turkish woman in employment / male nurse of colour / unequal

Country	Recognition of discrimination	Equality Body	Case law
			pay of a woman of Aruban origin
Poland	Not provided	Commissioner for Human Rights (Ombud)	Sexual orientation and obesity
Portugal	Multiple discrimination	Commission for Citizenship and Gender Equality, Portuguese Ombudsman	No case law
Romania	Multiple discrimination as aggravating circ-umstance	National Council for Combating Discrimination	Mostly gender with other factors
Slovakia	Not provided	Slovak National Centre for Human Rights, Public Defender of Rights	Limited case law
Slovenia	Multiple discrimination	Human Rights Ombudsman of Slovenia, Advocate of the Principle of Equality	No case law
Spain	Multiple and inter-sectional discrimination	Defensor del Pueblo	Disability and age / sex and ethnic origin and /or immigrant status
Sweden	Not provided	Equality Ombudsman	Multiple discrimination of age and sex / ethnicity and sex in employment[428]

Source: *Country reports on non-discrimination published by the European network of legal experts in gender equality and non-discrimination in the years 2022-2023-2024.*[429]

As it can be seen in **TABLE 1**, the great majority of EU states do not include provisions of multiple or intersectional discrimination in their legislation, were it anti-discrimination law, criminal law or the constitution. Accordingly, courts do not examine different grounds of discrimination together, but usually take each ground separately or examine each ground and add them cumulatively. Most equality bodies have handled intersectional cases, but remain

[428] 'Multiple discrimination' is used here, because these cases concerned discrimination in two different contexts based on a separate ground each time (eg, age in job interview – sex in failure to hire).

[429] For the analytical reports list see the **BIBLIOGRAPHY** below.

limited by the law. They often choose to not declare discrimination on multiple grounds as there are no specific sanctions provided by law or they do not even have the jurisdiction to impose sanctions in general.

Indeed, when the law does not provide for different sanctions, compensation or other measures, one can be left to wonder whether even the acknowledgment of multiple or intersectional discrimination can have a practical impact, or whether it simply complicates the case for the victims. This concern is closely linked to the limitations of anti-discrimination law in general, which seem to not have been overcome by European legal frameworks. Considering that anti-discrimination laws are based on the notion of 'grounds', incorporating intersectionality seems unfit: a discrimination claim can only be based on the 'compound' version of discrimination, ie when there is a multiplicity of disadvantages in a single context or occasion (see 2.1.1 above).[430] Even so, the difficulties put forward by Crenshaw arise: claimants have to prove that they experienced different treatment compared to individuals pertaining to each 'group' separately. In other words, if they are Black women, they have to submit evidence of different treatment from white people and men separately in a specific context, although their experiences are shaped by exactly the synergy of race and gender. That is why claimants and lawyers prefer to choose one ground, which will be easier to prove and more possible to make the claim successful.

At the same time, the comparison of intersectional subjects with subjects of one group may be proven infertile, and that is what Crenshaw explained. As Sarah Hannett observes, each discrete ground can be 'over-broad' or 'under-inclusive', in the sense that the single ground can be used to explain the whole discriminatory treatment of a claimant, even if it was not solely based on this ground, and that when another ground is unprotected by law, the multiple discrimination claim (based, inter alia, on an unprotected ground) can affect the outcome of the protected ground as well.[431] For example, in Portugal, where multiple discrimination is in fact prohibited expressly, if the claim includes factors outside the scope of the relevant law, for this part the complaint is declared inadmissible.[432]

[430] This is exacerbated in frameworks where each ground is protected under a separate legal act, like for example in Finland or in the EU anti-discrimination framework. In this way, grounds of discrimination stay completely detached from each other, impeding an intersectional approach.
[431] Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 Oxford Journal of Legal Studies 72.
[432] Lopes and Vicente (n 417) 23.

In this lies the need to change the paradigm. The recognition of intersectionality, even if there are no legal consequences (ie, increased compensation), allows to describe the reality of intersectional experiences, give the victims the proper acknowledgment – an essential component of justice. Mary Eaton stressed that 'more than symbolic damage is done by reducing an account of "what happened" to unidimensional terms': when the law simplifies these experiences, it avoids confronting the deeper harm caused by multiple, interacting inequalities, and at the same time, the legal system positions itself as the ultimate authority on how discrimination is defined – often at the expense of the realities of those who are most marginalised.[433] In short, forcing people's experiences into one narrow legal category can be a form of discrimination itself.

In sum, this analysis was essential to understand how inconsistencies across European national legal systems persist and how uneven the protection of intersectional subjects is. National authorities and courts play an integral role in applying international law and standards within their jurisdictions. And as European human rights bodies, such as the ECtHR and EU institutions, long overlooked the importance of recognising intersectional discrimination, European states have likewise remained largely silent. The brief overview provided in this chapter revealed that their understanding of intersectionality is limited, and where it is addressed in anti-discrimination laws, it is done so in a fragmented and inconsistent manner. Given the diverse historical and legal backgrounds of European states, it may indeed be challenging for international bodies to impose a uniform approach to intersectionality. Nonetheless, even its formal acknowledgment and integration into human rights analysis can set important precedents, encouraging states to adopt and apply this essential framework within their own legal and policy contexts. At the end of the day, after an international norm is formally adopted domestically, the responsibility for shaping and implementing related policies falls to the local governments.[434] In Europe, particularly in the Central and Eastern parts, a lot of initiatives for combating discrimination have taken place vis-à-vis the process of EU integration,[435] which goes to show how the Union can effectively push towards a more intersectional approach – even if the states' action is driven by an integration/political agenda.

[433] Mary Eaton, 'At the Intersection of Gender and Sexual Orientation: Towards a Lesbian Jurisprudence' (1994) 3 Southern California Review of Law and Women's Studies 183.
[434] See Martha F Davis, '(G)Local Intersectionality' (2022) 79 Washington and Lee Law Review 1021, 1028 (stressing the importance of the 'government side of intersectionality implementation').
[435] Slavova and Stoilova (n 407) 36.

4. CONCLUSION AND RECOMMENDATIONS

Martha Davis notes that 'ideas know no borders' and 'the path between the local and the international runs in both directions.'.[436] That is the journey of intersectionality. Born in the United States, intersectionality has gradually crossed borders, weaving its way into the fabric of international discourse and slowly finding its place within the local folds of Europe. At the same time, although intersectionality may appear to have been absent from the European scene, scholarly discussions in Europe, particularly in the area of British Black feminism, reveal that it was not unfamiliar, but was in reality sidelined by design, to protect the dominance of white, middle-class feminist agendas.[437]

In this context, this thesis set out to explore the integration of intersectionality into International Human Rights Law, with a particular focus in the European area and its application to the protection of women's rights. While intersectionality has become a widely discussed concept in feminist and academic discourses, its legal institutionalisation, especially within European frameworks, remains fragmented, inconsistent, and often superficial.

Through a critical examination of the Council of Europe (3.1), the European Union (3.2), and national legal systems (3.3), it becomes clear that the prevailing approach to discrimination continues to follow a single-axis logic. Intersectionality in the European context, when it is not ignored, is frequently misunderstood or misapplied, reduced to a rhetorical and political device or equated with 'multiple discrimination'. 'Particular vulnerability' is also extensively used by the ECtHR to describe intersectional subjects, although failing to capture intersectionality's essence (3.1.2.4). Of course, one should not rely solely on wording, as Makkonen pointed out in his analysis regarding the difference between intersectional, multiple and compound discrimination (see 2.1.1 above). The most important is to provide marginalised individuals the recognition and protection that best fits their experiences, regardless the terminology used.

However, the stigma of 'multiple' discrimination exceeds the theoretical debate, and follows the legal praxis as well. This is evident in both IHRL and national case law, where each ground is typically examined in isolation, even if multiple grounds are presented, effectively forcing intersectional claimants to base their cases on a single ground – or risk having their discrimination claims dismissed entirely. Therefore, the present European legal architecture not

[436] Davis, '(G)Local Intersectionality' (n 434) 1026.

[437] Ashlee Christoffersen, 'Developments in the Appropriation of Intersectionality by White Feminism in European Policy' (2022) 5 European Journal of Politics and Gender 267.

only obscures the lived realities of women experiencing intersecting inequalities, but also practically impedes the proper prevention and redress of human rights violations.

Still, one might wonder what intersectionality has to offer in an already complex framework, and whether it is only part of a 'wishful thinking' and 'political correctness' agenda. Indeed, today's political discourses are flooded with accusations of 'wokism' and the 'pandemic of political correctness', fearing that this concept mainly leads to the constriction of what is considered acceptable thought, and thus to censorship.[438] In reality, such claims show that marginalised groups are the first victims of visible regressions in many states around the world. A concept that was developed and widely acknowledged decades ago still constitutes, at the eyes of many, an extra step, as even the most basic ideas of equality are being attacked.

Nevertheless, intersectionality does not limit the voices of the privileged; on the contrary, it dismisses the additive approach that the more disadvantages one collects, the more disadvantaged they are. It demonstrates that discrimination is not that simple, that maybe we should look at it from another perspective. This perspective should not exclude people with characteristics pertaining to certain privileges. It allows, nonetheless, to put the peripheral subjects at the centre of the analysis. As Trina Grillo points out:

> In the end, the antiessentialism and intersectionality critiques ask only this: that we define complex experiences as closely to their full complexity as possible and that we do not ignore voices at the margin.[439]

Ultimately, it is this thesis' conclusion that the adoption of an intersectional lens is not just a theoretical improvement. In practical terms, it was shown through the analysis of the CEDAW Committee's (2.3.3), the ECtHR's (3.1.2) and the CJEU's (3.2.3) case law that, by ignoring the intersectional dimension of women's rights violations, courts can arrive to the conclusion that there was no violation whatsoever. This is particularly evident in the application of the non-discrimination principle of Article 14 ECHR, but also in the context of the 'main' rights, such as in the case of *Kurt v Austria*, where the ECtHR found no violation. It is evident in the case of Muslim women, who have found no justice before the European courts, and whose religious beliefs are sacrificed at the altar of secularism and the facilitation of 'living together'. It is also evident in the case of Roma women, whose forced sterilisation was never acknowledged as an

[438] Matthew Continetti, 'The Battle of Woke Island' (*National Review*, 7 April 2018) <https://www.nationalreview.com/2018/04/the-battle-of-woke-island/> accessed 5 April 2025.

[439] Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 Berkeley Women's Law Journal 22.

act of discrimination by the ECtHR, dismissing Article 14 claims either because it deemed this analysis unnecessary or because it found the evidence insufficient. All of this, despite recognising these women's 'vulnerability'. Moreover, it was shown through the domestic violence case law that the specific disadvantages of the victims influence the dynamics of the abuse and the effectiveness of protection mechanisms. Intersectionality thus appears as a necessary evolution for legal systems that claim to uphold human dignity, prevent discrimination, and deliver justice to all individuals.

To achieve intersectionality's aim in practice, it seems that the first step is its explicit legal recognition. In that way, individuals can base their claims on this specific type of discrimination, and equality bodies or courts can declare the proper sanctions. Judicial reasoning could evolve to reflect the relational and context-dependent nature of discrimination and provide victims the declaratory relief they need, as well as a solid legal precedent. In addition, enhanced data collection and monitoring in various areas (healthcare, employment, gender-based violence) are of equal importance, as victims of intersectional discrimination cannot provide the appropriate data to support their claims. At the same time, even if data becomes more disaggregated, courts (including the ECtHR) should distance themselves from the strict comparator approach they follow in discrimination cases. Each intersectional experience is unique and should not be rigidly compared to others. Instead, it can be assessed through various elements, such as the narrative of the victim combined with the questions and guidance by the analyst as Helma Lutz suggested (see 2.2.3 above), as well as the broader patterns to which each case pertains, the positionality of the claimant within social hierarchies, the disproportionate effect of a policy/measure/practice on intersectional individuals, and, where available, relevant intersectional data. It is also essential to establish a shift of the burden of proof once the claimant has presented a difference in treatment. Lastly, intersectionality should be mainstreamed into education and professional training of legal practitioners, judges, public officials and policymakers. In this process, the experiences of marginalised women should play an integral role.

In this regard, the EU's recent Directives (Pay Transparency Directive and Directive on Combating Violence Against Women and Domestic Violence) introduced explicitly intersectionality as a factor that should be weighed in as regards the calculation of compensation, reparation or penalties, the detection of the appropriate comparator and the individual assessment. It was established as an integral part of the awareness that needs to be raised, the measures taken, the design of the specialist support and the training of professionals.

Additionally, in the context of VAWG, the relevant Directive frames the presence of intersectional discrimination as an aggravating circumstance. These are very important provisions that might urge European states to incorporate intersectionality into their law, policymaking and professional training, something that is generally absent today, as it was shown through the comparative analysis of their frameworks (3.3).

Overall, it became clear from this analysis that adopting an intersectional approach would allow human rights violations to be more accurately prevented, detected, acknowledged and redressed. To revisit Crenshaw's words 'without frames that allow us to see how social problems impact all the members of a targeted group, many will fall through the cracks of our movements, left to suffer in virtual isolation'.[440] The law and its practitioners should learn to see every impact – no matter how many shadows it overlaps. In other words, to protect all women, the law should finally learn to see them all.

[440] Kimberlé Crenshaw, 'The Urgency of Intersectionality' (2016) <https://www.youtube.com/watch?v=akOe5-UsQ2o> accessed 7 June 2025.

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