

# Intersectionality as a legal concept?

## Applications and implications of the notion (within and) beyond non-discrimination law

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**ABSTRACT:** The present paper deals with the concept of intersectionality and its applications in the legal realm, with special regard to human rights law. Intersectional legal approaches have traditionally been linked to non-discrimination law, while the application in human rights law is still inconsistent, but with significant potential. The article will thus focus on the theoretical and practical developments concerning these less trodden aspects of intersectionality, to unveil in which sense it can bring innovations to legal theory and practice beyond the connection to non-discrimination. To do so, it firstly deals with the origins of the concept and subsequently focuses on its legal applications. The second part of the paper focuses on the developments of the concept of intersectionality in human rights law in general and in some specific areas thereof, i.e. climate change law, migration law, emergency law, and democratic innovations.

**Keywords:** Intersectionality; law; non-discrimination law; human rights law; democratic Innovations

**SUMMARY:** 1. Introduction – 2. The origins of intersectionality as a scientific concept, its legacy and its core meaning – 3. Intersectionality in legal contexts: approaches and areas – 3.1. Non-discrimination law – 3.2. Human Rights Law in general – 3.3. Climate change, human rights, and intersectionality – 3.4. Migration, human rights, and intersectionality – 3.5. Emergency, human rights, and intersectionality – 3.6. A transversal (overlooked) issue: intersectionality, human rights, and inclusive participation/democracy – 4. Conclusive remarks: brief considerations on intersectionality in the legal realm.

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## 1. Introduction

The present paper<sup>1</sup> deals with the concept of intersectionality and its applications in the legal realm,<sup>2</sup> with special regard to human rights law.<sup>3</sup> Intersectional legal approaches have traditionally been linked to non-discrimination law, while the application in human rights law is still inconsistent, but with significant potential. The article will thus mainly focus on the theoretical and practical developments concerning these less trodden aspects of intersectionality, to unveil in which sense it can bring innovations to legal theory and practice beyond the connection to non-discrimination.

To do so, firstly it will be necessary to retrace the origins of the concept. This part of the article does not have the ambition to offer an extensive overview of the vast literature on intersectionality, but to offer an introduction to the concept and its scope of application especially in the legal realm, taking as a point of departure the work of Kimberlé Crenshaw. Since the emergence of this notion, a great deal of literature has flourished in several areas of research. As mentioned, regarding legal studies, intersectionality has initially been linked to non-discrimination law, which still constitutes the main area where it has been addressed theoretically and practically.

Nevertheless, intersectionality's theoretical and practical reach is broadening. In particular, human rights law is being enriched by intersectional perspectives, beyond considerations concerning non-discrimination. The second part of the paper focuses on the developments of the concept of intersectionality in human rights law in general.

Lastly, it provides some insights on the (actual or possible) employment of intersectionality in theory and practice in four areas, namely human rights and climate change, human rights and migration, human rights and emergencies, and democratic decision-making.<sup>4</sup> The focus on the first three domains is justified by the fact that they all concern phenomena that can be defined as crises. As it is acknowledged that emergencies and crises affect (intersectionally) disadvantaged people disproportionately, it is in these areas that one may expect the issue of intersectionality and its human rights implications to be more evident.<sup>5</sup> Consequently, these are considered as paradigmatic areas that might particularly

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<sup>2</sup> The present work thus focuses on legal literature but includes as well political science accounts that aim to propose changes in legal and constitutional structures to ensure a better inclusion of an intersectional perspective in the areas dealt with in this article.

<sup>3</sup> As regards the latter, the international legal framework and case law constitute the main focus, as most innovative developments have taken place at this level and, to different degrees, influenced the national jurisdictions; when possible, insights from domestic legal orders are offered, as is the case especially in the area of non-discrimination law.

<sup>4</sup> As regards this area, the main focus will be on the Covid-19 pandemic, a global emergency that is paradigmatic of the issues that are at stake in this area.

<sup>5</sup> In this sense, see S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, in S. ATREY, P. DUNNE (eds.), *Intersectionality and Human Rights Law*, Oxford-New York, 2020, 1-2.



help understand and explain the dynamics of the relationships between intersectionality and human rights.

The last domain is object of increasing attention by scholars and is considered an emerging field of investigation that transversally enriches all the debates and studies on intersectionality and human rights from the perspective of inclusive democratic participation. Adding this layer of analysis is supposed to offer a more complete overview of the theoretical and practical developments in these areas.

## 2. The origins of intersectionality as a scientific concept, its legacy, and its core meaning

Inspired by a long tradition of Black, Latina and indigenous feminism,<sup>6</sup> combined with postmodern thought,<sup>7</sup> Crenshaw's account is the starting point of every scientific study (as well as political mobilization) concerning intersectionality. While this paved the way to scientific endeavors in numerous fields, this concept gained salience in the realm of critical legal studies and critical race theory.<sup>8</sup>

The term was coined by Kimberlé Crenshaw in two main writings: *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989)<sup>9</sup> and *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color* (1991).<sup>10</sup> In the first article, by focusing on US case law concerning the condition of Black women in employment, the author shed light on the complexity of an individual's social identity,

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<sup>6</sup> A.J. COOPER, *A Voice from the South: By a Black Woman of the South*, Chapel Hill, 2017; F.M. BEAL, *Double Jeopardy: To be Black and Female*, in *Meridians*, 8, 2, 2008, 166-176; see also the work of the Combahee River Collective, including the 1977 Combahee River Collective Statement, described in K.-Y. TAYLOR (ed.), *How we Get Free: Black Feminism and the Combahee River Collective*, Chicago, 2017; B. Hooks, *Ain't I a Woman?*, Boston, 1981; A. LORDE, *Sister Outsider: Essays and Speeches*, Berkeley, 1984; A. DAVIS, *Women, Race and Class*, New York, 1981; P. HILL COLLINS, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment*, New York, 1991; A.P. HARRIS, *Race and Essentialism in Feminist Legal Theory*, in *Stanford Law Review*, 42, 3, 1990, 581-616; regarding Latina feminism's contribution to the emergence of this concept, see E.D. VELEZ, *Decolonial Feminism at the Intersection: A Critical Reflection on the Relationship Between Decolonial Feminism and Intersectionality*, in *Journal of Speculative Philosophy*, 33, 3, 2019, 390-406, describing specifically the work of M. LUGONES; M. LUGONES, *Pilgrimages/Peregrinajes: Theorizing Coalition Against Multiple Oppressions*, New York, 2003; as concerns indigenous women intersectionality discourse, see N. CLARK, *Red Intersectionality and Violence-Informed Witnessing Praxis with Indigenous Girls*, in *Girlhood Studies*, 9, 2, 2016, 46-64; on this, see also S. ATREY, *Intersectional Discrimination*, Oxford, 2019, 24; on the recent history of intersectionality, with special regard to the 1960s and the 1970s as important decades for the elaboration of the core ideas of intersectionality, see P. HILL COLLINS, S. BILGE, *Intersectionality*, Cambridge-Medford, 2016; for further bibliographical references, see L. SOSA, R.M. MESTRE I MESTRE, *The Istanbul Convention from an Intersectional Perspective*, in S. DE VIDO, M. FRULLI M. (eds.), *Preventing and Combating Violence against Women and Domestic Violence: A Commentary on the Istanbul Convention*, Cheltenham-Northampton, 2023, 7, footnote 15.

<sup>7</sup> On the approach underlying CRENSHAW's account, see K. CRENSHAW, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, *Stanford Law Review*, 43, 6, 1991, 1244, footnote 9.

<sup>8</sup> A.D. ANDERS, J.M. DEVITA, *Intersectionality: A Legacy from Critical Legal Studies and Critical Race Theory*, in D. MITCHELL JR., C. SIMMONS, and L.A. GREYERBIEHL (eds.), *Intersectionality and Higher Education: Theory, Research, & Praxis*, New York, 2014, 32-43.

<sup>9</sup> K. CRENSHAW, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *University of Chicago Legal Forum*, 1989, 1, 1989, 139-167.

<sup>10</sup> K. CRENSHAW, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 1241-1299.



which is shaped by different societal and political structures of power. These power relations attribute meaning to different human conditions: more precisely, they assign positions of advantage and disadvantage. The main point raised by the article is that some individuals (in this case, black women) experience various and intersecting forms of oppression or disadvantage, i.e. various, compounded and intersecting forms of discrimination. Such discrimination cannot simply be seen as a sum, but their intersection (as a consequence of the interaction of different forms of oppression, in turn determined by consolidated structures of power) implies their mutual reinforcement and, ultimately, a distinct and greater form of discrimination, which is not accurately taken into account by anti-discrimination law. Indeed, non-discrimination theoretical frameworks and their implementations are characterized by what has been referred to as a “single-axis approach”, which compartmentalizes experiences of discrimination by linking them to single discriminating grounds. According to this consolidated method, antidiscrimination law is ground-based, and the grounds upon which discrimination is conducted are seen as mutually exclusive. Consequently, the enforcement of non-discrimination law shows the tendency to consider the individuals affected by discrimination as those who are privileged *but for* their single characteristic that is at stake, with this limiting the scope of anti-discriminatory regulations.<sup>11</sup> In the same vein, the second article builds on the former by “exploring the various ways in which race and gender intersect in shaping structural, political and representational aspects of violence against women of color”.<sup>12</sup> This article showed that the concept of intersectionality in law has implications that go beyond non-discrimination law, starting from criminal law. In particular, this insight has inspired future investigations into the role of intersectionality in the area of human rights law.<sup>13</sup> In a nutshell, Crenshaw’s account has brought intersectionality to the forefront as a transformative concept<sup>14</sup> that implies a revision of the way identity-related societal dynamics are conceived. Based on this revision, intersectionality urges action to redress intersectional disadvantage (also) through law.<sup>15</sup> In this sense, intersectionality performs what could be referred as heuristic transformative function, i.e. a function that is at the same time analytical, ontologically critical of existing (sociological and) legal frameworks, and constructive as it suggests fundamental changes in the way identity and phenomena related to it are to be understood and managed, in order to close the distance between (sociological and) legal categories and lived experiences.

<sup>11</sup> K. CRENSHAW, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, cit., 151-152.

<sup>12</sup> K. CRENSHAW, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, cit., 1244; it must be noted that the author underlines the fact that her analyses are to be seen as useful as a framework and that their applications are far broader in terms of layers of intersectional condition and, consequently of individuals/groups suffering intersectional forms of oppression.

<sup>13</sup> On this, and on Crenshaw’s involvement in the preparatory work for the 2001 UN World Conference on Racism that is considered having contributed to spreading the use of intersectionality in other fields, see B.G. BELLO, *Intersezionalità: Teorie e pratiche tra diritto e società*, Milano, 2020, esp. chapter 4.

<sup>14</sup> Here “concept” is used as a term that offers a synthetical description and evaluation of a phenomenon; the use of the term concept is based on the fact that intersectionality seems to primarily describes a condition (similarly to poverty, vulnerability or other concepts), which is retrievable only by using a specific (intersectional) perspective or lens of analysis; in other words, the concept relies on a specific heuristic approach, so that it cannot be detached to it without losing its meaning.

<sup>15</sup> In which case, it also becomes a legal concept; on the “concept of legal concept”, see T. GINSBURG, N. STEPHANOPOULOS, *The Concepts of Law*, in *Chicago Law Review*, 84,1, 2017, 147-175.





After Crenshaw's articles, the concept of intersectionality has then been approached and studied from multiple perspectives,<sup>16</sup> which can be grouped in three categories:

1. Applications of the intersectional framework and investigations of intersectional dynamics: this approach encompasses all the scientific works that have used intersectionality as a lens to analyze and understand societal and political dynamics, and/or propose solutions for a better inclusion of this perspective in some areas; 2. Theoretical debates on the content and scope of the concept: undertakings in this category study the meaning of intersectionality and how it has and/or should be applied in different areas; 3. Political mobilization employing the concept: since its origins, intersectionality has been strictly tied to political mobilization and normative claims to transform societal, economic and legal systems. Intersectionality has thus a practical dimension that informs and is informed by theory.<sup>17</sup>

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<sup>16</sup> On this, see A.K. WING (ed.), *Critical Race Feminism: A Reader*, New York, 2003; see also P.R. GRZANKA (ed.), *Intersectionality: A Foundations and Frontiers Reader*, London-New York, 2014; N. LYKKE, *Feminist Studies: A Guide to Intersectional Theory, Methodology and Writing*, London-New York, 2010; Y. MURPHY, V.H. HUNT, A. ZAJICEK, A. NORRIS, L. HILTON, *Incorporating Intersectionality in Social Work Practice, Research, Policy, and Education*, Washington, 2009; R.A. HERNÁNDEZ CASTILLO, *The Emergence of Indigenous Feminism in Latin America*, in *Signs*, 35, 3, 2010, 539-545; P. MONTURE-ANGUS, *Thunder in My Soul: A Mohawk Woman Speaks*, Halifax, 1995; E.R. ARRIOLA, *Gendered Inequality: Lesbians, Gays and Feminist Legal Theory*, in *Berkeley Women's Law Journal*, 9, 1994, 103-143; M. EATON, *At the Intersection of Gender and Sexual Orientation: Towards a Lesbian Jurisprudence*, in *Southern California Review of Law and Women's Studies*, 3, 2, 1994, 183-218.

<sup>17</sup> As described by S. CHO, K. CRENSHAW, L. McCALL, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, in *Signs*, 38, 4, 2013, 785-810: the authors have upheld that intersectionality studies can be considered a field of its own today, a statement that is confirmed by recent publications of handbooks on intersectionality studies; this classification was preferred to the several others existing in literature, such as, for instance, L. McCALL, *The Complexity of Intersectionality*, in *Signs*, 30, 3, 2005, 1771-1800 who described the antategorical, intracategorical, and intercategorical approaches of intersectionality feminist studies, or N. LYKKE, *op. cit.*, who discussed intersectional theories in feminist studies proposed a classification that includes postcolonial and anti-racist feminisms, queer-feminism, and profeminist studies of men and masculinities; the reason is that this account focuses on intersectionality as a general field on its own, with this inspiring a classification that seems broad enough to embed and represent all the different theoretical and practical developments related to this concept.



The variety of angles from which intersectionality has been addressed has enriched its meaning and possible applications, with this determining the emergence and coexistence of a great variety of definitions and uses.<sup>18</sup> Intersectionality has been defined as a perspective,<sup>19</sup> a concept,<sup>20</sup> a type of analysis,<sup>21</sup> a methodological approach,<sup>22</sup> a research paradigm,<sup>23</sup> a measurable variable and type of data,<sup>24</sup> an idea,<sup>25</sup> a metaphor,<sup>26</sup> a theory and praxis,<sup>27</sup> a heuristic and analytic tool,<sup>28</sup> an epistemological stance,<sup>29</sup> an analytical and political orientation,<sup>30</sup> an analytical sensibility,<sup>31</sup> a knowledge project.<sup>32</sup> According to Hill Collins and Bilge, a working definition of intersectionality that would be widely accepted is one that focuses on its analytical function and conceives it as a heuristic tool,<sup>33</sup> which is partially in line with Crenshaw's standpoint described above. Accordingly, a common core content of intersectionality can be found in the following general description:

"Intersectionality investigates how intersecting power relations influence social relations across diverse societies as well as individual experiences in everyday life. As an analytic tool, intersectionality views categories of race, class, gender, sexuality, class, nation, ability, ethnicity, and age – among others – as inter-related and mutually shaping one another. Intersectionality is a way of understanding and explaining complexity in the world, in people, and in human experiences".<sup>34</sup>

While this minimal definition can arguably be largely accepted, compared to Crenshaw's, it seems to overlook the transformative dimension of intersectionality, which is taken into account by Atrey as

<sup>18</sup> On this, see D. CARBADO, K. CRENSHAW, V.M. MAYS, B. TOMLISON, *Intersectionality: Mapping the Movements of a Theory*, in *Du Bois Review*, 10, 2, 2013, 303-312.

<sup>19</sup> I. BROWNE, J. MISRA, *The Intersection of Gender and Race in the Labor Market*, in *Annual Review of Sociology*, 29, 2003, 487-513.

<sup>20</sup> G.-A. KNAPP, *Race, Class, Gender: Reclaiming Baggage in Fast Travelling Theories*, in *European Journal of Women's Studies*, 12, 3, 2005, 249-265; A. CARASTATHIS, *The Concept of Intersectionality in Feminist Theory*, in *Philosophy Compass*, 9, 5, 2014, 304-314.

<sup>21</sup> J.C. NASH, *Rethinking Intersectionality*, in *Feminist Review*, 89, 2008, 1-15; N. YUVAL-DAVIS, *Intersectionality and Feminist Politics*, in *European Journal of Women's Studies*, 13, 3, 2006, 193-210.

<sup>22</sup> A. STEINBUGLER, J. PRESS, J.J. DIAS, *Gender, Race and Affirmative Action: Operationalizing Intersectionality in Survey Research, Gender and Society*, 20, 6, 2006, 805-825.

<sup>23</sup> A.-M. HANCOCK, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, in *Perspectives on Politics*, 5, 1, 2007, 63-79; L. McCALL, *op. cit.*, 1771-1800.

<sup>24</sup> L. BOWLEG, *When Black + Lesbian + Woman (Does Not Equal) Black Lesbian Woman: The Methodological Challenges of Qualitative and Quantitative Intersectionality Research*, in *Sex Roles*, 59, 2008, 312-325.

<sup>25</sup> On this, see S. ATREY, *Intersectional Discrimination*, *cit.*, chapter 2.

<sup>26</sup> A. GARRY, *Intersectionality, Metaphors, and the Multiplicity of Gender*, in *Hypatia*, 26, 4, 2011, 826-850.

<sup>27</sup> P. HILL COLLINS, S. BILGE, *Intersectionality*, *cit.*; P. HILL COLLINS, *Intersectionality as Critical Social Theory*, Durham and London, 2019, defined intersectionality as a critical praxis.

<sup>28</sup> D. CARBADO, K. CRENSHAW, V.M. MAYS, B. TOMLISON, *Intersectionality: Mapping the Movements of a Theory*, *cit.*

<sup>29</sup> S. CHO, *Post-intersectionality: The Curious Reception of Intersectionality in Legal Scholarship*, in *Du Bois Review*, 10, 2, 2013, 385-404.

<sup>30</sup> V.M. MAY, *Pursuing Intersectionality: Unsettling Dominant Imaginaries*, London-New York, 2015.

<sup>31</sup> S. CHO, K. CRENSHAW, L. McCALL, *op. cit.*, 795.

<sup>32</sup> P. HILL COLLINS, *Intersectionality's Definitional Dilemmas*, in *Annual Review of Sociology*, 41, 2015, 1-20.

<sup>33</sup> J.E. BOND, *Global Intersectionality and Contemporary Human Rights*, Oxford, 2021, 22 observed that Crenshaw offered a "heuristic process, one that has been expansively and vigorously taken up by other theorists to explore a multitude of other intersectional identities".

<sup>34</sup> P. HILL COLLINS, S. BILGE, *Intersectionality*, *cit.*, 12.





follows: “[Intersectionality] helps understand the structural and dynamic consequences of interaction between multiple forms of disadvantage based on race, sex, gender, disability, class, age, caste, religion, sexual orientation, region, etc. In helping to understand this complexity, it opens up ways of addressing the disadvantage associated with it”.<sup>35</sup>

These definitions are but two among the myriads of accounts on the concept of intersectionality and its functions,<sup>36</sup> which have been selected not only for their generalizability, but also for their resonance with the function of intersectionality in the legal realm, which is the main focus of this article.

While increasingly consolidating, the concept of intersectionality has not gone free of criticisms, which have addressed every aspect of the notion both theoretically and practically within and beyond the legal realm.<sup>37</sup> These critiques have been grouped by Ajele and McGill in three categories:<sup>38</sup> 1. The accounts that argue that intersectionality theory has prioritized the intersections of race and sex to the detriment of other identity factors and systems of oppression (such as sexuality, language, coloniality, etc.);<sup>39</sup> 2. A second group challenges the reliance of intersectionality on the identity categories that

<sup>35</sup>S. ATREY, *Intersectional Discrimination*, cit., 36; notably, the author, at 51-54, specifically included transformation among the main aims of an intersectional analysis.

<sup>36</sup>The debate around what intersectionality is and does has indeed been very rich both within and beyond legal accounts: in addition to the references mentioned above, see, for instance, H. LUTZ, *Intersectionality*, in P. REBUGHINI, E. COLOMBO (eds.), *Framing Social Theory: Reassembling the Lexicon of Contemporary Social Sciences*, London, 2022, 76-93; K. DAVIS, H. LUTZ (eds.), *The Routledge International Handbook of Intersectionality Studies*, London-New York, 2024; B.G. BELLO, *op. cit.*; S. BAER, *Intersectional Discrimination and Fundamental Rights in Germany*, in *Sociologia del diritto*, 2, 2016, 65-86; D. MORONDO TARAMUNDI, *Introducing Intersectionality Into Antidiscrimination Law and Equality Policies in Spain: Competing Frameworks and Differentiated Prospects*, in *Sociologia del diritto*, 2, 2016, 169-190.

<sup>37</sup>S. ATREY, *Intersectional Discrimination*, cit., 54, and, for an overview of critiques to the concept, 54-63.

<sup>38</sup>G. AJELE, J. MCGILL, *Intersectionality in Law and Legal Contexts*, Toronto, 2020, 26-32; naturally, several other possible classifications have been proposed: on this, for instance, see J.E. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 21, who identified three primary critiques of intersectionality: “critiques problematizing a focus on race; critiques of the contexts in which intersectionality has (or has not) been applied; and critiques of the theory’s reliance on identity categories”; see also A. CARASTHATHIS, *Intersectionality: Origins, Contestations, Horizons*, Nebraska, 2016.

<sup>39</sup>S. M. FALCÓN, J.C. NASH, *Shifting Analytics and Linking Theories: A Conversation About the “Meaning-making” of Intersectionality and Transnational Feminism*, in *Women’s Studies International Forum*, 50, 2015, 1-10; S. HUNT, *Decolonizing Sex Work: Developing and Intersectional Indigenous Approach*, in E. VAN DER MEULEN, E.M. DURISIN, V. LOVE (eds.), *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada*, Vancouver, 2013, 82-100; J.C. NASH, *op. cit.*; D.L. HUTCHINSON, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, in *Buffalo Law Review*, 47, 1, 1999, 1-116; I. KATRI, *Transgender Intraintersectionality: Rethinking Anti-Discrimination Law and Litigation*, in *University of Pennsylvania Journal of Law & Society*, 20, 1, 2017, 51-79; A. BARIL, *Intersectionality, Lost in Translation? (Re)thinking Intersections Between Anglophone and Francophone Intersectionality*, in *Atlantis*, 38, 1, 2017, 125-137; G. PAGÉ, *Sur l’indivisibilité de la justice sociale ou Pourquoi le mouvement féministe québécois ne peut faire l’économie d’une analyse intersectionnelle*, in *Nouvelles pratiques sociales*, 26, 2, 2014, 200-217; V. PATIL, *From Patriarchy to Intersectionality: A Transnational Feminist Assessment of How Far We’ve Really Come*, in *Signs*, 38, 4, 2013, 847-867; S. SALEM, *Intersectionality and its Discontents: Intersectionality as Travelling Theory*, in *European Journal of Women’s Studies*, 25, 4, 2016, 403-418; E.D. VELEZ, *op. cit.*; M. LUGONES, *Methodological Notes*, in A.M. ISASI-DÍAZ, E. MENDIETA (eds.), *Decolonizing Epistemologies: Latina/o Theology and Philosophy*, New York, 2012, 68-86; N. CLARK, *op. cit.*; E. SNYDER, *Indigenous Feminist Legal Theory*, in *Canadian Journal Women and the Law*, 26, 2, 2014, 365-401.



the theory aims to contest;<sup>40</sup> 3. The third group embeds critiques to the “depoliticization” of intersectionality, i.e. the fact that it has become a vague term used in a token manner and lost its political/transformative content.<sup>41</sup>

Moving the attention to legal scholarship dealing with intersectionality, Sosa has tentatively proposed to distinguish approaches focusing on groups from those focusing on the dynamics that determine the intersectional inequalities.<sup>42</sup> The former principally aim to include and give voice and representation to marginalized groups located at the intersection of two or more axes of inequality.<sup>43</sup> Several of the early authors studying intersectionality endorsed this approach.<sup>44</sup> Examples are Crenshaw, Hull, Scott and Smith,<sup>45</sup> Collins,<sup>46</sup> King,<sup>47</sup> Brewer<sup>48</sup> and Parra.<sup>49</sup> Such a standpoint has been questioned for its excessive reliance on the notions of identity and groups, as well as for its focus on racial and sexual

<sup>40</sup> N. DHAWAN, M. DO MAR CASTRO VARELA, “What Difference Does Difference Make?”: *Diversity, Intersectionality and Transnational Feminist Politics*, in *Wagadu: A Journal of Transnational Women’s and Gender Studies*, 16, 2016, 11-39; S. SULERI, *Woman Skin Deep: Feminism and the Postcolonial Condition*, in B. ASHCROFT, G. GRIFFITHS, H. TIFFIN (eds.), *The Post-Colonial Studies Reader*, London-New York, 1995, 250-256; M. LUGONES, *Radical Multiculturalism and Women of Color Feminisms*, in *Journal for Cultural and Religious Theory*, 13, 1, 2014, 68-80; D. VALENTINE, *Imagining Transgender: An Ethnography of a Category*, Durham, 2007; McCALL, *op. cit.*; I. KATRI, *op. cit.*

<sup>41</sup> S. BILGE, *Intersectionality Undone: Saving Intersectionality from Feminist Intersectionality Studies*, in *Du Bois Review*, 10, 2, 2013, 405-424; J. PUAR, *Terrorist Assemblages: Homonationalism in Queer Times*, Durham, 2007; V.M. MAY, *op. cit.*

<sup>42</sup> L. SOSA, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?*, Cambridge, 2017, 13-39; the author took into account several other possible classifications of approaches to intersectionality research, such as B. PRINS, *Narrative Accounts of Origins: A Blind Spot in the Intersectional Approach?*, in *European Journal of Women’s Studies*, 13, 3, 2006, 277-290; N.A. NAPLES, *Teaching Intersectionality Intersectionally*, in *International Feminist Journal of Politics*, 11, 4, 2009, 566-577; McCALL, *op. cit.*; another very thorough analysis of these perspectives (in sociological studies) is H.Y. CHOO, M. MARX FERREE, *Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities*, in *Sociological Theory*, 28, 2, 2010, 129-149; the preference for this classification is justified by the fact that this was designed with a legal orientation, i.e. “in a fashion more suitable for a discussion of legal documents” (L. SOSA, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?*, cit., 20).

<sup>43</sup> L. SOSA, *op. cit.*, 21-24; this resonates with what McCALL’s defined as “intracategorical complexity approach”, which tends “to focus on particular social groups at neglected points of intersection [...] in order to reveal the complexity of lived experience within such groups” (McCALL, *op. cit.*, 1774 and 1775-1784).

<sup>44</sup> H.Y. CHOO, M. MARX FERREE, *Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities*, cit., 132-133.

<sup>45</sup> G.T. HULL, P.B. SCOTT, B. SMITH, *All the Women are White, All the Blacks are Men, but Some of Us Are Brave*, New York, 1982.

<sup>46</sup> P. HILL COLLINS, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, Boston, 1990.

<sup>47</sup> D.K. KING, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, in *Signs*, 14, 1, 1988, 42-72.

<sup>48</sup> R.M. BREWER, *Theorizing Race, Class and Gender: The New Scholarship of Black Feminist Intellectuals and Black Women’s Labor*, in S.M. JAMES, A.P.A. BUSIA (eds.), *Theorizing Black Feminisms: The Visionary Pragmatism of Black Women*, New York, 1993, 13-30.

<sup>49</sup> T.O. PARRA, *Las trabajadoras domésticas víctimas de violencia sexual en Lima, Perú*. Research report, Washington, 2007.



grounds of discrimination, which risks shadowing the relevance of other conditions of disadvantage and oppression such as economic status, gender identity, linguistic diversity or indigeneity.<sup>50</sup>

The latter perspective investigates the categories of difference and the structures that produce and consolidate them.<sup>51</sup> Within this category, one can find those authors who have followed what has been referred to as a relational approach, which take the existing social categories defined by the societal structures of power as a starting point to propose new and more egalitarian conceptualizations of them.<sup>52</sup> Other authors have instead moved the focus to the processes of creation of categories (of difference) and attribution of specific meanings to them as regards single specific forms of difference.<sup>53</sup> Lastly, a third group of scholarship extends the considerations of the latter by purporting that systems that define social categories are interconnected, thus investigating the complex dynamics of interplay among those systems.<sup>54</sup>

### **3. Intersectionality in legal contexts: approaches and areas**

Intersectionality emerged in the realm of legal doctrine to highlight the limits of non-discrimination law and the legal regulations on domestic violence in considering the complexity of human experience as shaped by the interplay of power relations that reinforce conditions of privilege and disadvantage. The initial focus on these two areas has conditioned the subsequent developments of the concept in general, and in legal literature in particular. Legal scholarship interested in intersectionality has indeed mainly focused its attention to these two domains,<sup>55</sup> while “discrimination law happens to be the mainstay for channeling intersectional concerns, with the theory and doctrine of human rights law, domestically or internationally, merely dabbling with intersectionality”.<sup>56</sup>

<sup>50</sup> See S. CHO, K. CRENSHAW, L. McCALL, *op. cit.*, 792; S. FREDMAN, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, Bruxelles, 2016; S. FREDMAN, *Discrimination Law*, Oxford, 2022; D.L. HUTCHINSON, *op. cit.*; I. KATRI, *op. cit.*, 51-79; A. BARIL, *op. cit.*; G. PAGÉ, *op. cit.*; J. CONAGHAN, *Intersectionality and the Feminist Project in Law*, in E. GRABHAM, D. COOPER, J. KRISHNADAS, D. HERMAN (eds.), *Intersectionality and Beyond: Law, Power and the Politics of Location*, Abingdon-New York, 2009, 21-48; N. CLARK, *op. cit.*, 46-64; V. PATIL, *op. cit.*; M. LUGONES, *Methodological Notes*, *cit.*, 68-86; S. SALEM, *op. cit.*, 403-418; E. SNYDER, *op. cit.*, 365-401; J.C., NASH, *op. cit.*, 1-15; S. ATREY, *Intersectional Discrimination*, *cit.*, 55-60.

<sup>51</sup> L. SOSA, *op. cit.*, 24-30.

<sup>52</sup> A.-M. HANCOCK, *op. cit.*, 63-79; McCALL, *op. cit.*, 1771-1800.

<sup>53</sup> N. YUVAL-DAVIS, *op. cit.*, 193-209; on this, see also D. STAUNÆS, *Where Have All the Subjects Gone? Bringing Together the Concepts of Intersectionality and Subjectification*, in NORA - Nordic Journal of Feminist and Gender Research, 11, 2, 2003, 101-110.

<sup>54</sup> S. WALBY, *Complexity Theory, Systems Theory, and Multiple Intersecting Social Inequalities*, in *Philosophy of the Social Sciences*, 37, 4, 2007, 449-470.

<sup>55</sup> S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, *cit.*, 3-4 and 7, where they have showed that “A combination of intersectionality and equality/discrimination/anti-discrimination/non-discrimination as keywords returns over 10,000 results on Google Scholar, while a combination of intersectionality and violence against women returns 33,000 results. In contrast, a combination of intersectionality and human rights law returns about 6,000 results”; as for intersectionality and domestic violence, see, besides K. CRENSHAW, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, *cit.*, S. ATREY, *Lifting as We Climb: Recognising Intersectional Gender Violence in Law*, in *Oñati Socio-legal Series*, 5, 6, 2015, 1512-1535; P. HILL COLLINS, *On Violence, Intersectionality and Transversal Politics*, in *Ethnic and Racial Studies*, 40, 9, 2017, 1460-1473; L. SOSA, *op. cit.*; L. SOSA, R.M. MESTRE | MESTRE, *op. cit.*, 5-21.

<sup>56</sup> S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, *cit.*, 3.



### 3.1. Non-discrimination law

As said, intersectionality as a concept having a heuristic transformative function applied to traditional non-discrimination law entails underscoring the latter's shortcomings in recognizing the interplay of multiple grounds of discrimination due to its single-axis approach.<sup>57</sup>

Based on this, scholarly endeavors in this area have then engaged not only in questioning the structure of established non-discrimination law but also in seeking solutions to integrate the consolidated non-discrimination regulatory framework by including an intersectional perspective.<sup>58</sup> Several accounts have focused on this by presenting normative arguments and legal developments (especially in case law and soft law) that support their perspectives.

As regards the area of non-discrimination law – which is of course connected to the one of human rights as instrumental to their full enjoyment – Fredman<sup>59</sup> noted that scholars and courts have applied intersectionality proposing three different possible integrations of the traditional non-discrimination scheme.

The first way to address intersectionality within anti-discrimination law is to recognize subgroups that are discriminated against based on more than one ground. This is possible only in those legal systems that provide for a non-exhaustive list of grounds of discrimination. And, even in these cases, such a method shows some problematic aspects related to the reliance on an identity perspective and the impossibility to legally recognize a subgroup for every possible combination of intersecting identities.<sup>60</sup> The second approach consists in combining the legally recognized grounds without this leading to the recognition of a new subgroup. Also in this case, such an operationalization of intersectionality shows some limitations, related to the difficulty in extending discrimination beyond enumerated grounds and the coexistence of possible different regimes of anti-discrimination regarding different grounds.

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<sup>57</sup> Also referred to as “either/or model” by S. ATREY, *Intersectional Discrimination*, cit., 10.

<sup>58</sup> For instance, see I. KATRI, *op. cit.*, 51-79; D. POTHIER, *Connecting Grounds of Discrimination to Real People’s Real Experiences*, in *Canadian Journal of Women and the Law*, 13, 2000, 1-48; B. SMITH, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, in *The Equal Rights Review*, 16, 2016, 73-102; C.A. AYLWARD, *Intersectionality: Crossing the Theoretical and Praxis Divide*, in *Journal of Critical Race Theory*, 1, 1, 2010, 1-48; I. SOLANKE, *Putting Race and Gender Together: A New Approach To Intersectionality*, in *The Modern Law Review*, 72, 5, 2009, 723-749; C. MACKINNON, *Intersectionality as Method: A Note*, in *Signs*, 38, 4, 2013, 1019-1030; S. ATREY, *Realising Intersectionality in Discrimination Law* (DPhil Thesis); A. LAWSON, D. SCHIEK, (eds.), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Farnham-Burlington, 2016; J. CONAGHAN, *op. cit.*, 21-48; S. FREDMAN, *Positive Rights and Duties: Addressing Intersectionality*, in D. SCHIEK, V. CHEGE, (eds.), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, London-New York, 2009, 73-89; D. SCHIEK, *Intersectionality and the Notion of Disability in EU Discrimination Law*, in *Common Market Law Review*, 53, 1, 2016, 35-63; S. CHO, K. CRENSHAW, L. McCALL, *op. cit.*, 785-810; E.R. ARRIOLA, *Gendered Inequality: Lesbians, Gay, and Feminist Legal Theory*, in *Berkeley Women’s Law Journal*, 9, 1, 1994, 103-143; M. EATON, *op. cit.*, 183-218; N. Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, in *Queen’s Law Journal*, 19, 1, 1993, 179-208; E. GRABHAM, *Taxonomies of Inequality: Lawyers, Maps and the Challenge of Hybridity*, in *Social and Legal Studies*, 15, 1, 2006, 5-23; T. GRILLO, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, in *Berkeley Journal of Gender, Law & Justice*, 10, 1, 1995, 16-30.

<sup>59</sup> S. FREDMAN, *Discrimination Law*, cit., 225-232.

<sup>60</sup> On this, see S. CHO, K. CRENSHAW, L. McCALL, *op. cit.*



A third possibility has been framed as a “capacious approach”, which is endorsed by the author as capable of overcoming the limitations of the previous models as it is supposed to enrich the conception of a given discriminated group by considering it as a whole, i.e. as an internally differentiated group, including innumerable conditions, as a result of the intersection of various identities.<sup>61</sup>

Atrey offered what can be seen as a specification of Fredman's classification<sup>62</sup> and focused on other possible ways to integrate intersectionality in non-discrimination law. A model that, in her opinion, moves in the right direction is the one labeled as “contextual single-axis-approach”, which captures the condition of a discriminated subject that claim a discrimination on a given ground. All the conditions that characterize a specific victim of discrimination are then interacting attributes that contribute to integrally considering her/his condition. In other words, this could be seen as a substantive reading of non-discrimination, as it implies considering the other material conditions of the victim in order to guarantee “equal equal protection” of the law against discrimination.<sup>63</sup> Another perspective that implies the recognition of intersectionality is the method based on conceptualizing discrimination as “embedded discrimination”, which describes the amalgamation of “multiple ground of discrimination into an independent ground of discrimination itself”.<sup>64</sup>

Lastly, Atrey described what she referred to as the “intersectional discrimination” method, which best takes into consideration the reality of the interplay of multiple identities and disentangles the patterns of disadvantage that are connected to them due to existing structures of power.

This approach – that has been applied by some courts especially in South Africa and Canada<sup>65</sup>, as well as by some UN treaty bodies – does not imply only recognizing the complexity of discrimination based on multiple grounds whose whole is more than the sum of the parts; it also takes into consideration the context of the discrimination and the social structures that determine the particular conditions of disadvantage with a transformative goal.

This way, the protection against discrimination appears to consider the victim as a whole and contextualizes her/his condition within the actual social and political setting where she/he lives, with this giving the possibility to legally address it. Similarly, Solanke made a case for an intersectional reading of discrimination based on the application of the “stigma principle”, which is supposed to “rectify the vision of anti-discrimination law by shedding light on the phenomenon of stigmatization, i.e. the “social imposition of a negative relationship to a personal attribute which permits the ‘doubting of the person

<sup>61</sup> See also S. FREDMAN, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, cit.

<sup>62</sup> S. ATREY, *Intersectional Discrimination*, cit., 78-139; based on current literature and jurisdictional activity, the author referred to the “multiple grounds” approach, which takes into consideration multiple discrimination by treating each ground discreetly and in isolation from one another; she also analyzed the so-called “additive” approaches: the “combination discrimination” perspective resonates with the first perspective presented by Fredman and the one referred to as “compound discrimination” coincides with Fredman's second approach; another classification is offered by I. SOLANKE, *Discrimination as Stigma: A Theory of Anti-discrimination Law*, Oxford-Portland, 2017, 143-152, who distinguished approaches that reject intersectionality, try to accommodate it by considering multiple grounds through an additive method and disrupt the single-axis perspective by successfully taking into account intersectionality.

<sup>63</sup> See also C. ALBERTYN, B. GOLDBLATT, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, in *South African Journal of Human Rights*, 14, 2, 1998, 248-276.

<sup>64</sup> S. ATREY, *Intersectional Discrimination*, cit., 124.

<sup>65</sup> See the paragraphs below.



worthiness".<sup>66</sup> Several other authors have – in various ways – followed this last normative approach with a view to purport a stable inclusion of intersectional considerations in anti-discrimination law.<sup>67</sup> As said, courts in different parts of the world and UN treaty bodies have variously followed the proposed approaches to intersectionality in non-discrimination law. The focus here will be on the decisions and soft law that have endorsed the described most promising methods to take intersectionality into consideration in the domain of non-discrimination.

At the domestic level, for instance, the South African Constitutional Court has employed the "contextual single-axis-approach" in the case *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>68</sup>; the Canada's Supreme Court decision *Corbiere v Canada*<sup>69</sup> applied the "embedded discrimination" approach; in *Mahlangu and Another v Minister of Labour and Others*,<sup>70</sup> the South African Constitutional Court's rationale resonates with the method applied in *Corbiere v Canada; Hassam v Jacobs*,<sup>71</sup> issued by the South African Constitutional Court and *Baylis-Flannery v DeWilde*,<sup>72</sup> rendered by the Human Rights Tribunal of Ontario, are two cases in which the "intersectional discrimination" model was applied.

As for the international and supranational level, several authors refer to the ECtHR's jurisprudence as moving towards the incorporation of an intersectional lens in its decisions related to the application of art. 14 ECHR, albeit without employing the term intersectionality, but rather relying on the concepts of vulnerability or stigma to this end.<sup>73</sup> This is particularly visible in the cases *B.S. v Spain*,<sup>74</sup> *Kiyutin v*

<sup>66</sup> I. SOLANKE, *Discrimination as Stigma: A Theory of Anti-discrimination Law*, cit., 151; see also G.C. LOURY, *The Anatomy of Racial Inequality*, Cambridge, 2002, 61.

<sup>67</sup> For further references, see section 2.

<sup>68</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000, 1, BCLR 39 (2 December 1999): "Discrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. Discrimination must be understood in the context of the experience of those on whom it impacts. One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention".

<sup>69</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203; contra, Fredman upholds that this case falls within her first category as the court created a new subgroup.

<sup>70</sup> *Mahlangu and Another v Minister of Labour and Others*, (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020).

<sup>71</sup> *Hassam v Jacobs NO and Others*, (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (15 July 2009).

<sup>72</sup> *Baylis-Flannery v DeWilde*, 2003 HRTO 28.

<sup>73</sup> See O.M. ARNARDÓTTIR, *Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?*, in *Oslo Law Review*, 4, 3, 2017, 150-171; K. YOSHIDA, *Towards Intersectionality in the European Court of Human Rights: the Case of B.S. v Spain*, in *Feminist Legal Studies*, 21, 2013, 195-204; L. PERONI, A. TIMMER, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, in *International Journal of Constitutional Law*, 11, 4, 2013, 1056-1085, who have referred to other ECtHR cases that have engaged with the concepts of vulnerability and stigma; on stigma in litigation at domestic and international levels, see also I. SOLANKE, *Discrimination as Stigma: A Theory of Anti-discrimination Law*, cit., 63-83.

<sup>74</sup> *BS v Spain*, application no. 47159/08, 24 July 2012.



*Russia*,<sup>75</sup> but also in *D.H. and Others v the Czech Republic*,<sup>76</sup> *Oršuš and Others v Croatia*<sup>77</sup>, *Çam v Turkey*<sup>78</sup> and *J.D. and A. v UK*.<sup>79</sup> Nevertheless, the ECtHR's path towards the inclusion of intersectionality in its case law is still uneven.<sup>80</sup> The ECtHR's "vulnerability jurisprudence" has been considered as a positive step towards the incorporation of intersectionality – in the area of non-discrimination but also, more in general, as concerns human rights – but at the same time not a resolute one. It has been pointed out that a vulnerability approach may contribute to making multiple discriminations visible but cannot be considered as a notion that is interchangeable with intersectionality. The former indeed falls short in revealing the interaction and the mutually constitutive nature of various systems of subordination (that leads to a distinct forms of discrimination).<sup>81</sup> Vulnerability leads to an additive interpretation of multiple discriminations that focuses only on the individual – as member of a vulnerable category – and naturalizes her/his condition – i.e. considers it as inherent in people – instead of shedding light on the broader systems of oppression that determine it.<sup>82</sup> Moreover, the ECtHR has employed the notion to create new protected identity categories, a reasoning that risks leading to mechanical exclusion of those that do not fit into them and shies away from the open and situational perspective implied by intersectionality.<sup>83</sup> Lastly, vulnerability depicts the individuals only in terms of victimhood and does not take into account their complex identity dynamics and their agency when it comes to assess whether a discrimination took place.<sup>84</sup>

<sup>75</sup> *Kiyutin v Russia*, application no. 2700/10, 10 March 2011.

<sup>76</sup> *D.H. and Others v the Czech Republic*, application no. 57325/00, 13 November 2007.

<sup>77</sup> *Oršuš and Others v Croatia*, application no. 15766/03, 16 March 2010.

<sup>78</sup> *Çam v Turkey*, application no. 51500/08, 23 February 2016.

<sup>79</sup> *J.D. and A. v UK*, applications nos. 32949/17 and 34614/17, 24 October 2019.

<sup>80</sup> For instance, see the case *S.A.S. v France (GC)*, application no. 43835/11, 1 July 2014; for a comment, see Nieminen, Kati, *Eroding the Protection against Discrimination: The Procedural and De-Contextualized Approach to S.A.S. v France*, in *International Journal of Discrimination and the Law*, 19, 2, 2019, 69-88.

<sup>81</sup> On this, see J.E. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 126-127.

<sup>82</sup> See J.T. THEILEN, *Intersectionality's Travels to International Human Rights Law*, in *Michigan Journal of International Law*, 45, 2, 2024; O.M. ARNARDÓTTIR, *op. cit.*, 170-171.

<sup>83</sup> V. MORENO-LAX, *Intersectionality, Forced Migration, and the Jus-generation of the Right to Flee Theorising a Composite Entitlement to Leave to Escape Irreversible Harm*, in B. ÇALI, L. BIANKU, I. MOTOC (eds.), *Migration and the European Convention on Human Rights*, Oxford, 2021, 43-84; A. TIMMER, *A Quiet Revolution: Vulnerability in the European Court of Human Rights*, in M. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, London-New York, 2013, 147-170; L. PERONI, A. TIMMER, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 1056-1085.

<sup>84</sup> P.Y.S. CHOW, *Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence*, in *Human Rights Law Review*, 16, 2016, 453-481, esp. 478-481.



As concerns the European Court of Justice (ECJ), despite some promising decisions such as *Coleman*,<sup>85</sup> *Roca Alvarez*,<sup>86</sup> *Brachner*<sup>87</sup> and *Nikolova v CHEZ*,<sup>88</sup> the court has been subject to criticism for its reticence in applying an intersectional lens,<sup>89</sup> explicitly excluded in *Parris*.<sup>90</sup> Notably, it must be mentioned that the inclusion of references to intersectionality in the 2023 Equal Pay Directive<sup>91</sup> and the 2024 Directive on Violence Against Women<sup>92</sup> may have created the conditions for its greater consideration within the European legal system.<sup>93</sup>

Within the inter-American human rights system, both the Inter-American Commission on Human Rights (IACtHR) and the Inter-American Court of Human Rights (IACtHR) have – to some extent – endorsed an intersectional perspective in their documents and decisions concerning non-discrimination.<sup>94</sup> The IACtHR has referred to intersectionality as a tool to interpret the American Convention on Human Rights in its Strategic Plan<sup>95</sup> and in several Reports, mainly focusing on LGBTQI+ rights.<sup>96</sup>

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<sup>85</sup> ECJ, *S Coleman v Attridge Law and Steve Law*, Case C-303/06, EU:C:2008:415, 17 July 2008.

<sup>86</sup> ECJ, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, Case C-104/09, EU:C:2010:561, 30 September 2010.

<sup>87</sup> ECJ, *Waltraud Brachner v Pensionsversicherungsanstalt*, Case C123/10, EU:C:2011:675, 20 October 2011; see Fredman, Sandra, *Intersectional Discrimination*, 72.

<sup>88</sup> ECJ, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, Case C-83/14, EU:C:2015:480, 16 July 2015; see Solanke, *Discrimination and Stigma*, 78-79.

<sup>89</sup> This has been the case with the so-called “veil cases” or “headscarf cases”, on the prohibition of wearing a headscarf at work: ECJ, *Achbita*, Case C-157/15, ECLI:EU:C:2017:203, 17 March 2017; ECJ, *Bougnaoui*, Case C-188/15, ECLI:EU:C:2017:204, 14 March 2017; ECJ, Joint cases *Wabe* and *Müller*, C-804/18 and C-341/19, ECLI:EU:C:2021:594, 15 July 2021; ECJ, *LF*, Case C-344/20, ECLI:EU:C:2022:774, 13 October 2022; ECJ, *OP v Commune d'Ans*, Case C-148/22, ECLI:EU:C:2023:924, 28 November 2023; on this, see E. HOWARD, *Intersectional Discrimination and EU Law: Time to Revisit Parris*, in *International Journal of Discrimination and the Law*, 24(4), 2024, 292-312; L. VICKERS, *Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace*, in *European Labour Law Journal*, 8, 3, 2017, 232-257; L. VICKERS, *Religious Discrimination, Headscarves and the CJEU: Exclusive Neutrality or Exclusionary Practice?*, in *International Labor Rights Case Law*, 10, 2, 2024, 228-233.

<sup>90</sup> On this, see D. SCHIEK, *On Uses, Mis-Uses and Non-Uses of Intersectionality before the Court of Justice (EU)*, in *International Journal of Discrimination and the Law*, 18(2-3), 2018, 82-103; S. ATREY, *Illuminating the CJEU's Blind Spot of Intersectional Discrimination in Parris v Trinity College Dublin*, in *Industrial Law Journal*, 47, 2, 2018, 278-296; K. LIU, C. O'CINNEIDE, *The Ongoing Evolution of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*, Luxembourg, 2019.

<sup>91</sup> Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023.

<sup>92</sup> Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024.

<sup>93</sup> On this, for instance, see E. HOWARD, *Intersectional Discrimination and EU Law: Time to Revisit Parris*, cit., 292-312; more in general, on intersectionality in the EU, see I. SOLANKE, *Putting Race and Gender Together: A New Approach to Intersectionality*, in *Modern Law Review*, 72, 5, 2009, 723-49.

<sup>94</sup> See J.E. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 98-106; P. JIMÉNEZ FREGOSO, *Intersectionality as a Tool to Adjudicate International Human Rights Law: A Case Study on the Inter-American System of Human Rights*, DPhil thesis, 2020, 139-145.

<sup>95</sup> IACtHR, *Strategic Plan 2017-2021*, OEA/Ser.L/V/II.161, Doc. 27/17 (2017), at 54.

<sup>96</sup> See IACtHR, *Recognition of the Rights of LGBTI Persons: Advances and Challenges Towards the Recognition of the Rights of LGBTI Persons in the Americas*, OEA/Ser.L/V/II.170, Doc. 184/18 (2018); IACtHR, *Report on Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application*, OEA/Ser.L/V/II.143, Doc. 60/11 (2011); IACtHR, *Indigenous Women and their Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 44/17 (2017); IACtHR, *Violence against Lesbian, Gay, Bisexual, Trans*



Since 2004, the IACtHR has employed an intersectional analysis in several cases, such as *Plan de Sánchez Massacre v Guatemala*,<sup>97</sup> *I.V. v Bolivia*,<sup>98</sup> *Duque v Colombia*.<sup>99</sup> Recent decisions, namely *Luy v Ecuador*<sup>100</sup> and *The Workers of the Fireworks Factory in Santo Antônio de Jesus v. Brazil*<sup>101</sup> and *Fazenda Brasil Verde v Brazil*,<sup>102</sup> have explicitly referred to structural and intersectional discrimination. In some of these cases, the court made explicit reference to the applicants' condition of immersion in "patterns of structural and intersectional discrimination", with this leading the IACtHR to order broad measures to address the existing systems of oppression that determine these patterns on some occasions.<sup>103</sup> However, the incorporation of intersectionality in the activity of the court is still deemed partial, as still often employed as a contextual element – explaining the context in which discriminations are taking place – in discrimination cases still decided based on a specific categorization of the victims.<sup>104</sup> With regard to the activity of UN treaty bodies, it has been pointed out that the CEDAW committee has developed an extensive jurisprudence on discrimination and intersectionality – both in deciding individual communications under the Optional Protocol and in its Recommendations<sup>105</sup> – which has

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*and Intersex Persons in the Americas*, OAS/Ser.L/V/II.rev.1, Doc. 36/15 (2015); IACtHR, *Violence, Children and Organized Crime in the Americas*, OEA/Ser.L/V/II., Doc. 40/15 (2015); see also, C. GEBRUERS, *From Structural Discrimination to Intersectionality in the Inter-American System of Human Rights: Unravelling Categorical Framings*, in *The Age of Human Rights Journal*, 20, 2023, 1-24.

<sup>97</sup> IACtHR, *Plan de Sánchez Massacre v Guatemala*, Series C, no. 116, 19 November 2004.

<sup>98</sup> IACtHR, *I.V. v Bolivia*, Series C, no. 329, 30 November 2016.

<sup>99</sup> IACtHR, *Ángel Alberto Duque v Colombia*, Series C, no. 310, 26 February 2016.

<sup>100</sup> IACtHR, *González Lluy v Ecuador*, Series C, no. 102/13, 1 September 2015.

<sup>101</sup> IACtHR, *The Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil*, Series C, no. 407, 15 July 2020.

<sup>102</sup> IACtHR, *Fazenda Brasil Verde v Brazil*, Series C, no. 318, 20 October 2016.

<sup>103</sup> For instance, in *The Workers of the Fireworks Factory in Santo Antônio de Jesus v Brazil*; on this, see J.T. THEILEN, *op. cit.*

<sup>104</sup> On this, see C. GEBRUERS, *op. cit.*, 20-21.

<sup>105</sup> As observed by S. ATREY, *Intersectional Discrimination*, cit., 134-135, the first consideration of intersectionality appeared in CEDAW Committee, *Alyne da Silva Pimentel Teixeira v Brazil*, Communication no. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008, 25 July 2011; in CEDAW Committee, *Kell v Canada*, Communication no. 19/2008, U.N. Doc. CEDAW/C/51/D/19/2008, 28 February 2012, the committee expressly used of the expression "intersectional discrimination"; see also CEDAW Committee, *L.C. v Peru*, Communication no. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009, 4 November 2011, and the comment in Jiménez Fregoso, *Intersectionality*, 123-124; as concerns the CEDAW Committee's Recommendations, see Jiménez Fregoso, *Intersectionality*, 116-128; see also CEDAW Committee, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, U.N. Doc. CEDAW/C/GC/30, 2013; CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1, 1999; CEDAW Committee, *General recommendation No. 27 on older women and protection of their human rights*, U.N. Doc. CEDAW/C/GC/27, 2010; CEDAW Committee, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, U.N. Doc. CEDAW/C/GC/32, 2014; CEDAW Committee, *General Recommendation No. 18: Disabled Women adopted at the Tenth Session*, U.N. Doc. A/46/38, 1991; CEDAW Committee, *General recommendation No. 25, on article 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004; CEDAW Committee, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, U.N. Doc. CEDAW/C/GC/30, 2013; CEDAW Committee, *CEDAW General recommendation no. 21: equality in marriage and family relations*, U.N. Doc. A/49/38, 1994; CEDAW Committee, *General recommendation No. 36 (2017) on the right of girls and women to education*, U.N. Doc. CEDAW/C/GC/36, 2017; CEDAW Committee, *General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change*,



been defined as a basic interpretive tool for understanding the scope of the CEDAW.<sup>106</sup> The CRPD committee has employed intersectionality in its General Comments, and, in particular in General Comment no. 6 on equality and non-discrimination.<sup>107</sup>

Their particular attention to the issue of intersectionality comes less as a surprise if one considers that their respective treaties have been seen as those most conducive to put an intersectional approach into operation.<sup>108</sup> In general, references to intersectionality in other UN treaty bodies dealing with discrimination have significantly increased in the last two decades.<sup>109</sup> For instance, the Committee on the Elimination of Racial Discrimination (CERD) endorsed an intersectional perspective in its General Recommendations Nos. 25, 30 and 32.<sup>110</sup> The Human Rights Committee (CCPR)'s General Comment No. 28 affirmed that "discrimination against women is often intertwined with discrimination on other grounds".<sup>111</sup> Similarly, the Committee on the Rights of the Child (CRC) has acknowledged that children face numerous and intersecting forms of discriminations,<sup>112</sup> and the Committee on Economic, Social

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U.N. Doc. CEDAW/C/GC/37, 2018; CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, U.N. Doc. CEDAW/C/GC/35, 2017; CEDAW Committee, *General recommendation No. 26 on women migrant workers*, U.N. Doc. CEDAW/C/2009/WP.1/R, 2009; on this, see also A.B. ALLEN DALE, *Intersectional Human Rights at CEDAW: Promises Transmissions and Impacts*, Dphil thesis, 2018; M. CAMPBELL, *CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination*, in *Revista Direito GV*, 11, 2, 2015, 479-504.

<sup>106</sup> See CEDAW Committee, *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*, U.N. Doc. CEDAW/C/GC/28, 2010, para. 18; on this see Jiménez Fregoso, *Intersectionality*, 116-128.

<sup>107</sup> CRPD Committee, *General Comment No. 6 on equality and non-discrimination*, U.N. Doc. CRPD/C/GC/6, 2018.

<sup>108</sup> S. FREDMAN, *Discrimination Law*, cit., 229-232; this is in particular the case with the CRPD: its Preamble explicitly recognizes that persons with disabilities may be subjected "to multiple or aggravated forms of discrimination"; on the CRPD emphasis on intersectionality, but also on its limitations, see for instance, G. DE BECO, *Intersectionality and Disability in International Human Rights Law*, in *The International Journal of Human Rights*, 24, 5, 593-614.

<sup>109</sup> Despite these advancements, some authors have pointed to the limited application of intersectionality in human rights bodies' jurisprudence that risks seriously limiting its potential or to the fact that their activity reinforces existing power structures instead of disrupting them; on this, see P.Y.S. CHOW, *op. cit.*, 453-481; on this, also see J.T. THEILEN, *op. cit.*

<sup>110</sup> CERD, *General Recommendation No. 25: gender related dimensions of racial discrimination*, U.N. Doc. A/55/18, 2000: "Certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers"; CERD, *General Recommendation No. 30 on the discrimination of non-citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3, 2004, which exhorts to "pay greater attention to the issue of multiple discrimination faced by non-citizens"; CERD, *General Recommendation No. 32: the meaning and scope of special measures in the International Convention on the Elimination of all Forms of Racial Discrimination*, U.N. Doc. CERD/C/GC/32, 2009: "The 'grounds' of discrimination are extended in practice by the notion of 'intersectionality' whereby the Committee addresses situations of double or multiple discrimination—such as discrimination on grounds of gender or religion—when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention".

<sup>111</sup> CCPR, *General Comment 28: Article 3 (The Equality of Rights Between Men and Women)*, U.N. Doc. CCPR/ C/21/ Rev.1/ Add.10, 2000.

<sup>112</sup> CRC, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health* (Art. 24), U.N. Doc. CRC/C/GC/15, 2013; CRC, *General Comment No. 11 on indigenous children and their*



and Cultural Rights (CESCR) has recognized the importance of analysing the cumulative effects of intersecting discriminations.<sup>113</sup> Evidence of an intersectional approach is also present in some human rights body's decisions following individual complaints.<sup>114</sup> As regards the concrete interpretations and applications of intersectionality, it has been suggested that "the treaty bodies have moved from a focus on singular, mutually exclusive grounds for discrimination to occasional references to "multiple" or "double" discrimination to a more explicit embrace of "intersectionality".<sup>115</sup>

### **3.2. Human rights law in general**

While intersectionality remains more connected to the area of non-discrimination law, some developments have been taking place in the area of human rights recently. This scholarship has extended the theoretical and practical scope of the concept and shown that intersectionality has much broader legal applications.<sup>116</sup>

However, despite increasing attention to this topic, "[t]he relationship of intersectionality with rights other than the right to equality and non-discrimination, remains unexplored and undertheorized".<sup>117</sup> According to Atrey and Dunne, intersectionality in human rights law has been object of impactful albeit solitary interventions, which are "seldom woven into the fabric of human rights law tout court",<sup>118</sup> such as, for instance, the accounts focusing on human rights related to specific intersectional groups.<sup>119</sup>

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*rights under the convention*, U.N. Doc. CRC/C/GC/ 11, 2009; CRC, *General Comment No. 3 on HIV/AIDS and the rights of the child*, U.N. Doc. CRC/GC/2003/ 3, 2003.

<sup>113</sup> CESCR, *General Comment No. 20 on non-discrimination in economic, social, and cultural rights*, U.N. Doc. E/C.12/GC/20, 2009.

<sup>114</sup> Mostly from the CEDAW, but also from the CCPR and the CERD; on this, see J.E. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 130-166.

<sup>115</sup> J.E. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 77.

<sup>116</sup> Interestingly, in S. ATREY, *Beyond Universality: Intersectionality from Equality to Human Rights*, in S. ATREY, P. DUNNE, (eds.), *Intersectionality and Human Rights Law*, cit., 28-30, suggested that the "non-discrimination model" has a "suspect" relationship with human rights: either it is considered as a human right in itself (right to equality and non-discrimination), and in this case it does not have to do with the protection of other rights; or it is instrumental to the protection of rights but from a limited perspective, one that aims to discount difference as something undesirable and that should not make a difference in the enjoyment of rights. This perspective implies a specific (homogeneous) idea of what enjoyment of rights means for all humans, which is based on the dominant models of addressees of human rights law (considered as a homogeneous category).

<sup>117</sup> S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, cit., 2.

<sup>118</sup> S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, cit., 3; for instance, see J.E. BOND, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, in *Emory Law Journal*, 52, 2003, 71-186; M.L. SATTERTHWAITE, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, in *Yale Human Rights & Development Law Journal*, 8, 2005, 1-66; A. VAKULENKO, Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective, in *Social & Legal Studies*, 16, 2, 2007, 183-200.

<sup>119</sup> J.E. BOND, *Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights*, in *Georgetown Journal of Gender and the Law*, 5, 3, 2004, 897-916; N. TAEFL, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, in *International Journal of Children's Rights*, 17, 2009, 345-376; S. HENDERSON, *The Legal Protection of Women Migrant Domestic Workers from the Philippines and Sri Lanka: An Intersectional Rights-Based Approach*, *International Journal of Care and Caring*, 5, 1, 2021, 65-83.



Few accounts have instead addressed this area with the mentioned comprehensive approach that focuses on the theoretical and practical connections between intersectionality and human rights law proposing further inclusion of an intersectional analysis.<sup>120</sup> Among them, the book *Intersectionality and Human Rights Law* goes in this direction, specifically aiming at “engaging intersectionality and human rights together and lay out some preliminary framework considerations for examining the relationships between them”.<sup>121</sup>

The work offers theoretical and practical perspectives (especially developments in soft law and international courts jurisprudence) in a bid to underscore the role of intersectionality in helping better understand how rights are actually enjoyed and, more importantly, violated.<sup>122</sup> The underlying goal is to reconnect the ideal legal reality to the concrete “multiple and cross-cutting positionalities”<sup>123</sup> that shape the experience of rights’ enjoyment and violation. Following this rationale, every chapter goes on to present general and specific accounts that deal with numerous rights and investigate their deep relationships with intersectionality in theory and in the practice of human rights institutions’ activity. Employing a similar broad perspective, Bond’s book *Global Intersectionality* analyses how and to which extent international (soft and hard) human rights law has embraced the concept of intersectionality. The book deals with numerous human rights frameworks to ultimately underline the successes and the setbacks of the current situation, ultimately claiming for further incorporation of an intersectional approach.

Both works present a systematic analysis of international courts’ case law applying intersectionality or concepts related to it. In sum, they show that besides the decisions indicated in the previous sections related to the application of intersectionality in discrimination cases through the concept of vulnerability, the ECtHR’s “responses to such cases often do not include robust intersectional analysis or the

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<sup>120</sup> A. KRIZSAN, H. SKJEIE, J. SQUIRES (eds.), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes*, Basingstoke-New York, 2012; N.A. DAVIS, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, in *Harvard Human Rights Journal*, 28, 1, 2015, 205-242; L.A. CROOMS, *Indivisible Rights and Intersectional Identities or, What Do Women’s Human Rights Have to Do with the Race Convention*, in *Howard Law Journal*, 40, 3, 1997, 619-640; G. DE BECO, *Protecting the Invisible: An Intersectional Approach to International Human Rights Law*, in *Human Rights Law Review*, 17, 4, 2017, 633-663; M.L. WOMACK, *Troubling Universalized Human Rights: The Complexities of Identity and Intersectionality*, in *Journal of Politics and Democratization*, 1, 1, 2016, 56-61; see also issue no. 3, 79 of the *Washington and Lee Law Review*, 2022; a more critical account on intersectionality and human rights, which, differently from most others, adopts a “skeptical engagement” with human rights institutions, with this meaning “recognizing their practical relevance but not assuming that they are necessarily or even primarily forces of social good” aiming at “investigating and challenging the structural forces and power relations that condition the use of intersectionality within human rights law”, see J.T. THEILEN, *op. cit.*

<sup>121</sup> S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, cit., 3-4.

<sup>122</sup> S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, cit., 3: “Intersectionality in the area of human rights “[...] has a wide import in human rights law, for example, to illuminate how particular interests in life, liberty, security, education, housing, health etc are subjectively transformed by people’s multiple identities and the disadvantages associated with them”; in the same vein, see S. SCHOENTJES, “*Doing intersectionality*” through *International Human Rights Law: Substantive International Human Rights Law as an Effective Avenue towards Implementing Intersectionality to Counter Structural Oppression?*, in *AboutGender*, 11, 22, 2022, 360-399.

<sup>123</sup> S. ATREY, *Introduction: Intersectionality from Equality to Human Rights*, cit., 4.





use of strong intersectional language".<sup>124</sup> The IACtHR has instead applied the lens of intersectionality in some landmark human rights violations cases related to violence against indigenous women, *Fernández Ortega v Mexico*<sup>125</sup> and *Rosendo Cantú v Mexico*.<sup>126</sup>

As concerns the activity of the human rights bodies, most developments concern intersectionality in the area of non-discrimination, while the employment of an intersectional approach to human rights violations are less developed.<sup>127</sup>

Several other scholarly contributions have dealt with intersectionality in more discrete areas of human rights, prominent among which is domestic violence, due to its original connection to the issue of intersectionality and the importance of the adoption of the Istanbul Convention.<sup>128</sup>

### 3.3. Climate change, human rights, and intersectionality

As mentioned in the introduction, the next sections specifically deal with human rights in the three (interconnected) areas of climate change, emergency and migration, as paradigmatic areas in which it is possible to appreciate the unfolding of the relationships between intersectionality and human rights. The first area is climate change and human rights. While the connection between human rights and climate change – leading to considering climate change as a human rights issue – is object of numerous

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<sup>124</sup> J. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 121.

<sup>125</sup> See *Fernández Ortega et al. v Mexico*, Series C, no. 215, 30 August 2010; as observed by J. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 108, the court found Mexico's failure to adequately investigate the rape of a twenty-seven-year-old Me'phaa woman by Mexican military personnel violated the American Convention and the Belém Convention, among others.

<sup>126</sup> See *Rosendo Cantú et al. v Mexico*, Series C, no. 216, 31 August 2010; as indicated by J. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 108, the court found Mexico's ambivalence regarding the rape of a seventeen-year-old Me'phaa girl by military personnel violated Article 5(2) of the American Convention and Article 7(a) of the Belém Convention.

<sup>127</sup> J. BOND, *Global Intersectionality and Contemporary Human Rights*, cit., 54-77.

<sup>128</sup> On this, see L. SOSA, R.M. MESTRE | MESTRE, *op. cit.*; J.C. ENGLE, *Sexual Violence, Intangible Harm, and the Promise of Transformative Remedies*, in *Washington and Lee Law Review*, 79, 3, 2022, 1045-1092; J. BUKAUSKAITE, *Understanding Domestic Violence as a Gender-based Human Rights Violation: National and International Contexts*, London-New York, 2023.



studies and is increasingly consolidating in legal literature,<sup>129</sup> international (soft) law<sup>130</sup> and case law,<sup>131</sup> scholarly work on and legal application of intersectionality are less developed. Research in this area has mainly advocated its employment as a lens of analysis and as a transformative approach in the application of human rights law, but there is still limited reception of this approach in hard and soft law or in case law, except for its application in the narrower area of non-discrimination law. Consequently, studies focusing on this area have mostly normatively proposed the incorporation of the concept of intersectionality to make legal frameworks and their implementations more sensitive to the variety of experiences of human rights enjoyment and violations.<sup>132</sup> In other words, these contributions have pointed to the fact that climate change “interacts with existing systems of oppression such as

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<sup>129</sup> On this, and for further references, see B. LEWIS, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Singapore, 2018; C. RODRÍGUEZ-CARAVITO (ed.), *Litigating the Climate Emergency: How Human Rights Courts and Legal Mobilization Can Bolster Climate Action*, Cambridge, 2022; B. BOER (ed.), *Environmental Law Dimensions of Human Rights*, Oxford, 2015; O. QUIRICO, M. BOUMGHAR (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective*, London-New York, 2016; S. DUYCK, S. JODOIN, A. JOHL (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, London-New York, 2018.

<sup>130</sup> On 15 November 2017 the Inter-American Court of Human Rights delivered an Advisory Opinion titled *The Environment and Human Rights* (OC-23/17, 15 November 2017) in which it derived the right to a healthy environment from Article 26 of the American Convention; in October 2021 the Human Rights Council (HRC) adopted resolution no. 48/13, recognizing the human right to a clean, healthy and sustainable environment (HRC, *Resolution adopted by the Human Rights Council: The human right to a clean, healthy and sustainable environment*, U.N. Doc. A/HRC/RES/48/13, 2021); in January 2023 a new request for an Advisory Opinion was submitted to the Inter-American Court of Human Rights by Colombia and Chile asking it to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law; in May 2024 the International Tribunal for the law of the Sea (ITLOS) delivered an Advisory Opinion on climate change and international law, which has specified the obligations of the state parties of the ITLOS regarding their obligations under the convention; a request for an advisory opinion is pending at the International Court of Justice (ICJ); several other international bodies have addressed the issue of climate change and human rights, as will be shown below.

<sup>131</sup> For instance, see Supreme Court of the Netherlands, *Urgenda Foundation v State of Netherland*, ECLI:NL:HR:2019:2006; Council of State of France, *Commune de Grande-Synthe v France*, ruling no. 42731/2021; German Constitutional Tribunal, *Neubauer et al. v Germany*, case no. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20; High Court of Lahore, *Leghari v Federation of Pakistan*, W.P. No. 25501/2015, Order Sheet, 4 September 2015; as for the international case law, see for instance IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) v Argentina*, Series C, no. 400, 6 February 2020; ECtHR, *Verein KlimaSeniorionnen and others v Switzerland*, application no. 53600/20, 9 April 2024; for an overview of case law at the domestic and international levels, see F. SINDICO, K. MCKENZIE, G. MEDICI-COLOMBO, L. WEGENER (eds.), *Research Handbook on Climate Change Litigation*, Cheltenham-Northampton, 2024; C. RODRÍGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press, Cambridge, 2023); W. KAHL, M.-P. WELLER (eds.), *Climate Change Litigation: A Handbook*, München-Oxford-Baden-Baden, 2021; I. ALOGNA, C. BAKKER, J.-P. GAUCI (eds.), *Climate Change Litigation: Global Perspectives*, Leiden-Boston, 2021; UN, *Global Climate Litigation Report: 2023 Status Review*, Nairobi, 2023).

<sup>132</sup> J. BOURKE MARTIGNONI, *Intersectionalities, Human Rights, and Climate Change: Emerging Linkages in the Practice on the UN Human Rights Monitoring System*, in S. Duyck, S. Jodoin, A. Johl (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, cit., 397-404.



racial or ethnic oppression, transphobia or discrimination against disabled persons”,<sup>133</sup> with this determining climate-related human rights violations that are not directly connected to discrimination.<sup>134</sup> Accordingly, two main strands of literature have developed. The first claims for a general recognition of the importance of intersectionality in the field of human rights and climate change.<sup>135</sup> The second deals with specific intersectional categories of people that suffer from intersectional violations of their rights.<sup>136</sup>

As regards the applications of the concept of intersectionality in case law in this area, some signs are present in the ECtHR jurisprudence and its development of the concept of vulnerability, as also the recent *Klimaseniorinnen* case<sup>137</sup> shows. Concerning this case, it seems of interest the fact intersectionality was proposed by the applicants as a lens to analyze the position of the claimants, prove the direct effect of climate change on them and eventually their victim condition.<sup>138</sup> The court partially endorsed this framing – by according *locus standi* to the association representing elderly women but not to the four individual applicants – and reconnected it to its more consolidated concept of vulnerability.<sup>139</sup>

The IACtHR case law in the area of climate change seems too more reliant to the concept of vulnerability than to the one of intersectionality. Notably, in the case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*<sup>140</sup> – the first ruling that affirmed the existence of a right to a healthy environment (and to food, water, and cultural identity) – the court recognized the vulnerable condition of indigenous (and non-indigenous) communities that justifies the broad scope of the measures of protection that were ordered.<sup>141</sup> Notably, this jurisprudence – mostly related to

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<sup>133</sup> I.J. DE JONG, *Beyond the Turn to Human Rights: A Call for an Intersectional Climate Justice Approach*, in *The International Journal of Human Rights*, 28, 5, 2024, 738-758, at 739; see also N.S. ISLAM, J. WINKEL, *Climate Change and Social Inequality*, DESA Working Paper, 152, 2017, 1-30.

<sup>134</sup> I.J. DE JONG, *op. cit.*, 746.

<sup>135</sup> H. DJOUDI, B. LOCATELLI, C. VAAST, K. ASHER, M. BROCKHAUS, B. BASNETT, *Beyond Dichotomies: Gender and Intersecting Inequalities in Climate Change Studies*, in *Ambio*, 45, 3, 2016, 248-262; I.J. DE JONG, *op. cit.*, 739; A. KAIJSER, A. KRONSELL, *Climate Change through the Lens of Intersectionality*, in *Environmental Politics*, 23, 3, 2014, 417-433; A. GUTTERMAN, *Climate Change and Older Persons*, 10 December, 2022, available at SSRN: <https://ssrn.com/abstract=4044003> or <http://dx.doi.org/10.2139/ssrn.4044003>;

<sup>136</sup> B. LEWIS, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, in *Nordic Journal of Human Rights*, 39(2), 2021, 180-203; A. GEORGE, E. FLANNERY KEITH, *Disability Rights and Dignity in Disasters*, in *Natural Resources & Environment*, 34, 2, 2019, 53-55; M. BURGER, J.A. WENTZ, *Climate Change and Human Rights*, Nairobi, 2015.

<sup>137</sup> ECtHR, *Verein KlimaSeniorinnen and Others v Switzerland*, application no. 53600/20, 9 April 2024.

<sup>138</sup> E. BREMS, M.B. DEMBOUR, N. SCHULDT, A.K. SPECK, *Third Party Intervention in the Proceeding Verein KlimaSeniorinnen and Others v Switzerland*, available at: [https://www.klimaseniorinnen.ch/wp-content/uploads/2023/01/53600\\_20\\_GC\\_OBS\\_P3\\_Ghent\\_University\\_30\\_11\\_22.pdf](https://www.klimaseniorinnen.ch/wp-content/uploads/2023/01/53600_20_GC_OBS_P3_Ghent_University_30_11_22.pdf), 9-12; on this, see also A. HEFTI, *Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation*, in *Transnational Environmental Law*, 2024 (first view article), 1-26; P. SUBNER, *The Case of KlimaSeniorinnen v. Switzerland at the ECtHR*, in *Verfassungsblog*, 20 April 2023, available at: <https://verfassungsblog.de/intersectionality-in-climate-litigation/>.

<sup>139</sup> *Verein KlimaSeniorinnen and Others v Switzerland*, in particular, paras. 509, 530, 578, 579.

<sup>140</sup> IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*.

<sup>141</sup> On this, see M.A. TIGRE, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, in *American Journal of International Law*, 115(4), 2021, 706-713; this is in line with other rulings of the IACtHR (issued before the recognition of the right to a healthy environment): see, for instance, IACtHR, *Case of the Yakye*



indigenous people's rights – strongly upholds the right of the vulnerable groups to be involved in climate-related decision-making processes.<sup>142</sup>

Lastly, international environmental law, and, above all, human rights soft law have increasingly incorporated intersectional considerations, few of them explicitly employing the concept of intersectionality. Most of the documents have instead employed the notion of vulnerability.

As concerns hard international law, it must be noticed that the Glasgow Climate Pact stipulates, in its Preamble, that states must consider their obligation on human rights, and, especially, on the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations.<sup>143</sup> Several other documents adopted in the framework of the Conferences of the Parties make reference to vulnerable groups.<sup>144</sup>

The Paris Agreement too acknowledges the needs of people in vulnerable situations in the Preamble; moreover, at art. 7(5), it affirms that "adaptation measures should take into consideration vulnerable groups, communities, and ecosystems" and be "integrat[ed] into relevant socioeconomic and environmental policies and actions".<sup>145</sup>

Moving the focus to international soft law, the recent Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change<sup>146</sup> offers an overview of the developments occurring at the international level in this area. Notably, it dedicates some specific sections to intersectionality, where it summarizes the soft law documents that have addressed this notion and its relations to the protection of human rights when it comes to mitigation, adaptation, just transition, and finance policies. The report addresses intersectionality by collecting UN treaty bodies' recommendations<sup>147</sup> that focus on one or more groups experiencing intersecting vulnerabilities, and calls for an implementation of the recommendations on intersectionality not only "to prevent further discrimination from climate change impacts and response measures", but also to improve the effectiveness of

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*Axa Indigenous Community v Paraguay*, Series C, no. 125, 17 June 2005, para. 137; IACtHR, *Case of the Saw-hoyamaxa Indigenous Community v Paraguay*, Series C, no. 146, 29 March 2006, para. 118; IACtHR, *Case of the Saramaka People v Suriname*, Series C, no. 172, 28 November 2007, paras. 121 and 122; IACtHR, *Case of the Kaliña and Lokono Peoples v Suriname*, Series C, no. 309, 25 November 2015, para. 173; IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, Series C, no. 245, 27 June 2012, para. 147; IACtHR, *Case of the Afrodescendant Communities displaced from the Rio Cacarica Basin (Operation Genesis) v Colombia*, Series C, no. 270, 20 November 2013, para. 354.

<sup>142</sup> On this, see for instance, IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador*; IACtHR, *Saramaka People v Suriname*; IACtHR, *Case of Xákmok Kásek Indigenous Community v Paraguay*; a similar stance has been taken by the IACHR: on this, see M. BOUMGHAR, *Missing Opportunities to Shed Light on Climate Change in the Inter-American Human Rights Protection System*, in O. QUIRICO, M. BOUMGHAR (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective*, cit., 270-286.

<sup>143</sup> UNFCCC COP, Adoption of the Glasgow Climate Pact, Decision –/CP.26, referred in Report of the Conference of the Parties on its twenty-sixth session, held in Glasgow from 31 October to 12 November 2021.

<sup>144</sup> On this, see the overview of the international legal framework in the area of climate change provided by the ECtHR in *Verein KlimaSeniorinnen and Others v Switzerland*.

<sup>145</sup> UNFCCC COP, Adoption of the Paris Agreement (29 January 2016), Decision 1/CP.21, referred in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, U.N. Doc. FCCC/CP/2015/10/Add.

<sup>146</sup> HRC, *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, Elisa Morgera, U.N. Doc. A/HRC/56/46, 2024.

<sup>147</sup> In particular, it collected the recommendations from the CEDAW, CESCR, CMW, CRC and CRPD.



climate actions by engaging “with the lived experiences and distinctive knowledge of the human rights holders in situations of vulnerability, as agents of change”.<sup>148</sup>

This report follows a previous one adopted in 2022, where the impacts of climate change on the rights of people in vulnerable situations and their contribution to the design of policies are addressed.<sup>149</sup>

In addition to the human rights bodies' activity, significant is also the IACtHR's Advisory Opinion on the environment and human rights,<sup>150</sup> where, once more, the concept of vulnerability is employed to describe the condition of indigenous and tribal people's intersecting disadvantage, which accounts for ordering States to take broad positive measures.<sup>151</sup>

Despite the increasing inclusion of intersectionality in the CCPR and the treaty bodies' discourses related to climate change, it has been pointed out that there is “little indication, however, that the human rights mechanisms have begun to engage in the substantially more difficult process of moving beyond the rhetorical acknowledgment of intersectionality as an observational aid to render visible the experience of particular groups in order to use this knowledge to challenge and reform existing power structures”.<sup>152</sup>

In addition, similarly to case law, international soft law seems to mainly rely on the concept of vulnerability, equated with the condition of intersectional disadvantage of some groups. This can be explained by the structure of international (and, consequently, domestic) human rights law, which has developed specific treaties for different categories of people, with this leading to the adoption of and reliance to group-specific recommendations.

While resorting to the notion of vulnerability has entailed a better adaptation of state obligations related to climate change and human rights,<sup>153</sup> its employment may lead to the problematic issues raised above. Nevertheless, it must be noted that this body of soft law has shown signs pointing to a renewed conception of vulnerable groups that implies the abandonment of a perspective that considers them as only victims and objects of protection, thus suggesting their role as agents in the design of climate change policies.

### **3.4. Migration, human rights, and intersectionality**

Intersectionality is not explicitly mentioned in international hard and soft law, nor in case law concerning migration issues. This area is characterized by the centrality of a vulnerability discourse, which, as

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<sup>148</sup> HRC, *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, 19.

<sup>149</sup> HRC, *The Impacts of Climate Change on the Human Rights of People in Vulnerable Situations*, U.N. Doc. A/HRC/50/57, 2022.

<sup>150</sup> IACtHR, *Advisory Opinion: The Environment and Human Rights (State Obligations in relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, OC-23/17, 2017.

<sup>151</sup> IACtHR, *Advisory Opinion*, paras. 48, 67, and 112.

<sup>152</sup> J. BOURKE MARTIGNONI, *op. cit.*, 401.

<sup>153</sup> On this, see M. MARCHEGIANI, *L'incidenza della nozione di vulnerabilità sullo sviluppo del diritto internazionale in tema di cambiamenti climatici*, Turin, 2023.



seen, is dominant in international human rights law<sup>154</sup> as well as in domestic jurisdictions.<sup>155</sup> As for the international case law, the most extensive use of the notion has been made by the ECtHR,<sup>156</sup> but also the IACtHR has shown relevant practice.<sup>157</sup> Several UN treaty bodies' soft law documents have resorted to the notion of vulnerability in regard to the rights of migrants, asylum seekers, and refugees in different contexts.<sup>158</sup>

Consequently, similarly to the area of climate change, research in this area focuses on how to include an intersectional perspective to questions related to migration by purporting to use intersectionality or broaden the consolidated concept of vulnerability. In particular, legal scholarly works have proposed to employ intersectionality or revise the application of vulnerability in (international and, especially, regional European) case law concerning migrants (some specific intersectional groups of them or in general).<sup>159</sup> Both the approaches have underscored the limitations of the current use of vulnerability

<sup>154</sup> On the "vulnerabilisation" of international human rights law, and, consequently of domestic human rights guarantees, and on case law references, see V. ENGSTRÖM, M. HEIKKILÄ, M. MISTANIEMI-LAASKO, *Vulnerabilisation: Between Mainstreaming and Human Rights Overreach*, in *Netherlands Quarterly of Human Rights*, 40, 2, 2022, 118-136; on the UN treaty bodies' practice, see J. BOURKE MARTIGNONI, *op. cit.*, 399-401, where documents of the CEDAW, CRC and HRC are quoted.

<sup>155</sup> On examples of domestic jurisdictions, see I. NIFOSI-SUTTON, *The Protection of Vulnerable Groups under International Human Rights Law*, London-New York, 2017.

<sup>156</sup> See, for instance, see ECtHR, *M.S.S. v Belgium and Greece*, application no. 30696/09, 21 January 2011; ECtHR, *Chowdry and Others v Greece*, application no. 21884/15, 3 March 2017; ECtHR, *Tarakhel v Switzerland*, application no. 29217/12, 4 November 2014, paras. 118-119; ECtHR, *O.M. v Hungary*, application no. 9912/15, 5 July 2016; ECtHR, *Rahimi v Greece*, application no. 8687/08, 5 April 2011; ECtHR, *Sakir v Greece*, application no. 48475/09, 24 June 2016; ECtHR, *N. v the United Kingdom*, application no. 26565/05, 27 May 2008; ECtHR, *Paposhvili v Belgium*, application no. 41738/10, 13 December 2016; on this, see M. BAUMGÄRTEL, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*, Cambridge, 2019; C. HERI, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*, Oxford, 2021; as observed by M. BAUMGÄRTEL, *Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights*, in *Netherlands Quarterly of Human Rights*, 38, 1, 2020, 12-29, these judgements show both the positive and negative implications of the current ECtHR interpretation of vulnerability.

<sup>157</sup> I. NIFOSI-SUTTON, *op. cit.*, 200-202; J. HERNÁNDEZ, *Inter-American Standards on Migration, Asylum and Refugee Law*, in *University of Vienna Law Review*, 2, 2, 2018, 198-214; see, for instance, IACtHR, *Case of Expelled Dominicans and Haitians v Dominican Republic*, Series C, no. 282, 28 August 2014; IACtHR, *Case of the Pacheco Tineo Family v Plurinational State of Bolivia*, Series C, no. 272, 25 November 2013; IACtHR, *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*, OC-18-03, 2003; IACtHR, *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of Protection*, OC-21/14, 2014.

<sup>158</sup> For instance, see CCPR, *Ioane Teitiota v New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, 23 September 2020, on the condition of climate refugee; on the limitation of a vulnerability perspective in this case, and the need for an intersectional approach, see I.J. DE JONG, *op. cit.*, 746-747; on the rights and the vulnerable position of migrants, internally displaced people, and refugees during the Covid-19 pandemic, see OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), *Covid-19 and the Human Rights of Migrants: Guidance*, 2020; see also I. NIFOSI-SUTTON, *op. cit.*

<sup>159</sup> V. MORENO-LAX, *op. cit.*, 43-84; K. TURKOVIĆ, *Challenges to the Application of the Concept of Vulnerability and the Principle of Best Interests of the Child in the Case Law of the ECtHR Related to Detention of Migrant Children*, in B. ÇALI, L. BIANNU, I. MOTOC (eds.), *Migration and the European Convention on Human Rights*, cit., 104-137; F. IPPOLITO, C. PÉREZ GONZÁLEZ, 'Handle with Care' in Strasbourg: The Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-economic Rights, in B. ÇALI, L. BIANNU, I. MOTOC (eds.), *Migration and the European Convention on Human Rights*, cit., 138-156; M. BAUMGÄRTEL, *Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights*, cit., 12-29; M.L. SATTERTHWAITE, *op. cit.*, 1-66; S.E. BERRY, I. TABAN, *The Right*





– which is widely resorted to in international soft and case law this area – and argued for its replacement by a more refined understanding of the latter concept or by the notion of intersectionality. This is supposed to lead to avoiding categorization, essentialization and the consequent shortcomings and exclusions in the protection of the rights of migrants that derive from the consolidated reading of vulnerability.

Other accounts – which provide some legal insights – have focused on (supranational and domestic) migration policies, among which also integration policies, and advocated for a stronger consideration of the intersectional conditions of migrants to unveil and take into account existing systems of domination and discrimination.<sup>160</sup> This strand of literature analyzes migration and integration policy design and implementation through the lens of intersectionality, in order to reveal the reproduction of domination and oppression systems and question the state hegemony in the definition of policy categories.<sup>161</sup>

### **3.5. Emergency, human rights, and intersectionality**

While several accounts from various disciplines have dealt with the different and unequal impacts of emergencies – in particular, recently, the covid-19 pandemic – on intersectional groups,<sup>162</sup> (broadly) legal scholarship on the issue of emergency, human rights and intersectionality is very limited. Some

*of Minority Refugees to Preserve their Cultural Identity: An Intersectional Analysis*, in *Netherlands Quarterly of Human Rights*, 39, 3, 2021, 198-219.

<sup>160</sup> S. BONJOUR, B. DE HART, *A Proper Wife, a Proper Marriage: Constructions of 'Us' and 'Them' in Dutch Family Migration Policy*, in *European Journal of Women's Studies*, 20, 1, 2013, 61-76; A.C. KORTEWEG, T. TRIADAFILOPOULOS, *Gender, Religion, and Ethnicity: Intersections and Boundaries in Immigrant Integration Policy Making*, in *Social Politics*, 20, 1, 2013, 109-136; K. HORSTI, S. PELLANDER, *Conditions of Cultural Citizenship: Intersections of Gender, Race and Age in Public Debates on Family Migration*, in *Citizenship Studies*, 19, 6-7, 2015, 751-767; A. KORTEWEG, *The Failures of 'Immigrant Integration': The Gendered Racialized Production of Non-Belonging*, in *Migration Studies*, 5, 3, 2017, 428-444; S. BONJOUR, J.M. DUYVENDAK, *The "Migrant with Poor Prospects": Racialized Intersections of Class and Culture in Dutch Civic Integration Debates*, in *Ethnic and Racial Studies*, 41, 5, 2018, 882-900; C. ROGGEband, M. VAN DER HAAR, *"Moroccan Youngsters": Category Politics in the Netherlands*, in *International Migration*, 56, 4, 2018, 79-95; L. CLETON, P. MEIER, *Contesting Policy Categories Using Intersectionality: Reflections for Studying Migration Governance*, in *Ethnic and Racial Studies*, 46, 14, 2023, 3014-3036; S. SCUZZARELLO, L. MOROŞANU, *Integration and Intersectionality: Boundaries and Belonging "From Above" and "From Below": Introduction to the Special Issue*, in *Ethnic and Racial Studies*, 46, 14, 2023, 2991-3013.

<sup>161</sup> On this, and also for further references, see L. CLETON, P. MEIER, *op. cit.*

<sup>162</sup> For instance, see the study requested by the COVID committee of the European Parliament, A. ŠPANIKOVÁ, M. MOULAC, P. PAVLOU, L. VONA, L. SIÖLAND, *Intersectional Evaluation of the Impact of the COVID-19 Pandemic on Different groups: Gender, Generational Differences and Vulnerable Groups*, Strasbourg, 2023.



accounts in this area are group-oriented, in the sense that they focus on a specific category of intersectional groups,<sup>163</sup> while others are issue-oriented, i.e. they deal with a specific aspect of the management of emergencies or specific emergencies globally or with regard to a specific jurisdiction.<sup>164</sup> All of them have proposed an intersectional analysis in the evaluations of rights violations and suggested including intersectionality-related considerations in the definition of policies to manage emergencies, based on the different impact that the latter have on the enjoyment of rights across social categories. The concept of vulnerability is employed in international human rights law also in this area. In particular, this is observable in the Covid-19 Guidance documents issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR)<sup>165</sup> and the UN treaty bodies, as well as in the latter's recommendations, which are collected in the OHCHR's document *Internal Human Rights Treaty Bodies Toolkit of Treaty Law Perspectives and Jurisprudence in the Context of Covid-19*.<sup>166</sup> While several recommendations and guidelines address the issue of vulnerable groups – within the wider categories of people they protect – almost no mention of intersectionality or employment of an intersectional perspective – in line with the theoretical developments mentioned above – is made.

Contrarily, it is interesting to note that the IACRH took a decisive stance in favour of an integration of an intersectional approach when it comes to emergencies (and the covid-19 emergency in particular) and human rights. In its Report titled *Pandemic and Human Rights*, the IACRH (together with the Special Rapporteur for Economic, social, Cultural and Environmental Rights) has underscored that the pandemic “generates differentiated and intersectional impacts on the realization of economic, social, cultural and environmental rights (ESCR) for certain groups and populations in particularly vulnerable situations”<sup>167</sup> and argued for a strengthened consideration of intersectionality when it comes to rights violations and rights protection.

### **3.6. A transversal (overlooked) issue: intersectionality, human rights, and inclusive participation/democracy**

The scholarly work on intersectionality has, as seen, predominantly focused on the issue of including an intersectional perspective in different areas of law, in order to reconcile legal frameworks and their

<sup>163</sup> For instance, see R. CELORIO, *Women and International Human Rights in Modern Times: A Contemporary Casebook*, Cheltenham-Northampton, 2022, esp. chapter 5, entitled *Women and Times of Emergency: the Case of COVID-19*; the analysis applied intersectionality as a lens to better understand human rights violations committed against intersectional groups of women; M.F. DAVIS, *The Human (Rights) Cost of Inequality: Snapshots from a Pandemic*, in M. KJAREUM, M.F. DAVIS, A. LYONS (eds.), *Covid-19 and Human Rights*, London-New York, 2021, 67-81.

<sup>164</sup> See S. SEKALALA, K. PEREHUOFF, M. PARKER, L. FORMAN, B. RAWSON, M. SMITH, *An Intersectional Human Rights Approach to Prioritising Access to COVID-19 Vaccines*, in *BMJ Global Health*, 6, 2021, 1-8; M. DUTTA, D. AGARWAL, M. SIVAKAMI, *The “Invisible” among the Marginalised: Do Gender and Intersectionality Matter in the Covid -19 Response?*, in *Indian Journal of Medical Ethics*, 5, 4, 2020, 302-308; R. CHATHAPURAM, M.L. COLVIN, D. DILLARD, N. STEPHENS, T. VITOLO, *Social Work and Human Rights: Learning from COVID-19*, in *Journal of Human Rights and Social Work*, 8, 2023), 449-459; A. KLASING, *Covid-19, Gender, and Intersectional Discrimination: Can the Promise of International Human Rights Meet the Moment?*, in *Proceedings of the ASIL Annual Meeting*, 114, 2021, 377-381.

<sup>165</sup> Available at the following link: <https://www.ohchr.org/en/covid-19/covid-19-guidance>.

<sup>166</sup> Available at the following link: [https://www.ohchr.org/sites/default/files/HRTB\\_toolkit\\_COVID\\_19.pdf](https://www.ohchr.org/sites/default/files/HRTB_toolkit_COVID_19.pdf).

<sup>167</sup> IACRH, *Pandemic and Human Rights*, OE/Ser.L/V/II, Doc. 396, 2022, para. 21.



implementations with the complexity of lived experiences of discrimination and human rights enjoyment and violations. In some (still limited) cases, law at the international or domestic level has incorporated the approaches suggested by research in this area.

Besides the mentioned shortcomings in the analyzed areas, it has been suggested that a significant part of literature and concrete developments have overlooked a central element of intersectionality theory. This element is the emphasis on the structures of power that determine patterns of domination and oppression, and the related transformative goal underlying such theories. In other words, the structural perspective of intersectionality – oriented to policy and law reform<sup>168</sup> in a bid to ensure the demarginalization of intersectional experiences<sup>169</sup> – has been overshadowed by the idea that intersectionality “requires only the expansion of identity categories to include an infinite number of differently situated subjects”.<sup>170</sup> The endorsement of this approach is evident in international law, characterized by the conflation of intersectionality with some intersectional groups.

Some recent developments in research seem instead moving towards the direction of addressing such structural issues with a focus on decision-making processes. The interest on democratic processes and participation of marginalized intersectional groups is in line with those human rights and democracy theoretical accounts (and legal developments both at the domestic and international level) that see democratic government as justified by,<sup>171</sup> designed for the fulfillment of,<sup>172</sup> and limited by<sup>173</sup> human rights. Based on this literature, democracy is the most suited system to respect, protect and fulfill human rights (beyond being limited by them) as it allows the participation in policymaking by the individuals who are affected by it on equal standing (legitimacy and intrinsic argument), with this leading to the best possible outcome in terms of tracking the “common good” and delivering the best outcomes that satisfy people’s preferences (instrumental argument).<sup>174</sup>

Following this perspective, the mentioned strand of literature builds on the literature on democratic innovations,<sup>175</sup> which originates from the recognition of the limitations (or crisis) of consolidated representative democracy channels in incorporating the numerous different voices composing today’s

<sup>168</sup> A.B. ALLEN DALE, *op. cit.*, 24; G. AJELE, J. MCGILL, *op. cit.*, 24-25.

<sup>169</sup> This demarginalization goal is epitomized in Kimberlé Crenshaw’s words: “When they enter, we all enter” in K. CRENSHAW, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, cit., 167.

<sup>170</sup> G. AJELE, J. MCGILL, *op. cit.*, 25.

<sup>171</sup> On the traditional theories that theorized popular sovereignty as the source of legitimacy of power, see, for instance, C. SÄGESSER, *Les droits de l’homme*, in *Dossiers du CRISP*, 73, 2, 2009, 9-96.

<sup>172</sup> C.C. GOULD, *The Human Right to Democracy and its Global Import*, in C. HOLDER, D. REIDY (eds.), *Human Rights: The Hard Questions*, Cambridge, 2013, 285-300; M. GOODHART, *Democracy as Human Right*, in T. CUSHMAN (ed.), *Handbook of Human Rights*, London-New York, 2012.

<sup>173</sup> C. GEARTY, *Human Rights Law*, in R. MASTERMAN, R. SCHÜTZE (eds.), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, 2019, 291-311.

<sup>174</sup> On the necessity to consider those arguments as integral to each other, see H. LANDEMORO, *Democratic Reason: The Mechanisms of Collective Wisdom in Politics*, in H. LANDEMORO, J. ELSTER (eds.), *Collective Wisdom: Principles and Mechanisms*, Cambridge, 2012, 251-289; H. LANDEMORO, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many*, Princeton, 2013; H. LANDEMORO, *On Minimal Deliberation, Partisan Activism, and Teaching People How to Disagree*, in *Critical Review: A Journal of Politics and Society*, 25, 2, 2014, 210-225.

<sup>175</sup> G. SMITH, *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge, 2009; B. GEISSEL, K. NEWTON, *Evaluating Democratic Innovations: Curing the Democratic Malaise?*, London-New York, 2012.



complex political communities and their various preferences and needs.<sup>176</sup> Democratic innovations are particular types of people's involvement in decision-making, often referred to as deliberative democracy or participatory instruments.<sup>177</sup> They are considered solutions to the crisis of representative democracy, which is ultimately complemented and not dismissed by these channels of participation that variously involve the population and enrich decision-making.<sup>178</sup> Examples of democratic innovations have been classified in four main conceptual families: namely, mini-publics, participatory budgeting, collaborative governance, and referenda and initiatives.<sup>179</sup>

Some studies in this area have dealt with democratic innovations from an intersectional perspective, based on the observation that consolidated decision-making processes risk perpetuating the existing societal hierarchies and systems of domination by excluding marginalized (intersectional) groups and individuals' voices and contribution in setting general norms. Such works have argued for bringing an intersectional perspective to democratic innovations, and, based on this, proposed models and studied the existing solutions to ensure an effective equal right to participation and a genuinely inclusive democracy.

In particular, Hill Collins proposed some theoretical considerations on the conceptual connections between intersectionality and participatory democracy, connections that enrich the aspirations and goals of both and help their concrete development.<sup>180</sup> The edited book titled *The Palgrave Handbook of Intersectionality in Public Policy* is a timely publication that contains the first comprehensive collection of scholarship offering conceptual considerations, as well as studying models and concrete cases concerning the integration of intersectionality in policy-making cycles, from agenda-setting to monitoring and evaluation of policies.<sup>181</sup> In this area, also the works of Bishwakarma et al. and Parken and Young have provided significant insights on possible operationalizations of an intersectional approach in the design of public policies processes.<sup>182</sup>

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<sup>176</sup> See among others M.A. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018; C. SCHMITT, E. KENNEDY, *The Crisis of Parliamentary Democracy*, Cambridge, 2000; R.A. DAHL, I. SHAPIRO, *On Democracy*, New Haven, 2015; P. BLOKKER, *New Democracies in Crisis?* London-New York, 2015; G. PASQUINO, *Strumenti della democrazia*, Bologna, 2007; S. ERCAN, J.-P. GAGNON, *The Crisis of Democracy Which Crisis? Which Democracy?*, in *Democratic Theory*, 1, 2, 2014, 1-10; S. PAROLARI, M. TRETTEL, *Democratic Quality and Territorial Distribution of Power in Italy*, in J. TUDELA ARANDA, M. KÖLLING, F. REVIRIEGO PICÓN (eds.), *Calidad democrática y organización territorial*, Madrid, 2018, 281-302.

<sup>177</sup> For an overview of the theoretical and practical developments in this area, see S. ELSTUB, O. ESCOBAR (eds.), *Handbook of Democratic Innovation and Governance*, Cheltenham-Northampton, 2019; A. BÄCHTIGER, J.S. DRYZEK, J. MANSBRIDGE, JANE, M. WARREN (eds.), *The Oxford Handbook of Deliberative Democracy*, Oxford, 2018; G. SMITH, *op. cit.*

<sup>178</sup> D.J. KAHANE, *Deliberative Democracy in Practice*, Vancouver 2010.

<sup>179</sup> S. ELSTUB, O. ESCOBAR, *Defining and Typologising Democratic Innovations*, in S. ELSTUB, O. ESCOBAR (eds.), *op. cit.*, 11-31.

<sup>180</sup> P. HILL COLLINS, *The Difference That Power Makes: Intersectionality and Participatory Democracy*, in O. HANKIVSKY, J.S. JORDAN-ZACHERY (eds.), *The Palgrave Handbook of Intersectionality in Public Policy*, Cham, 2019, 167-192.

<sup>181</sup> O. HANKIVSKY, J.S. JORDAN-ZACHERY (eds.), *op. cit.*

<sup>182</sup> R. BISHWAKARMA, V. HUNT, A. ZAJICEK, *Intersectionality and Informed Policy*, Manuscript, 2007; A. PARKEN, H. YOUNG, *Integrating the Promotion of Equality and Human Rights for All Cardiff, Wales: Towards the Commission of Equality and Human Rights*, Unpublished report for the Welsh Assembly Government and Equality and Human Rights Commission, Cardiff, 2007.



Lastly, Martinez Palacios, Beauvais and Wojciechowska have dealt with the issue of intersectionality in democratic innovations, by underscoring the risk of reproducing societal patterns of oppression and domination and proposing solutions to make these instruments incorporate intersectional voices.<sup>183</sup> All the accounts presented above show the potential of intersectionality beyond its traditional application in non-discrimination law. They explore its transformative role within democratic processes, whereby bottom-up engagement of civil society – and especially its most marginalized groups – can contribute to the design and implementation of regulations and policies more sensitive to intersectional realities.

#### **4. Conclusive considerations on intersectionality in the legal realm**

This article has attempted to provide a (not exhaustive) overview on the development of the notion of intersectionality and its applications in the legal realm, with a specific focus on some exemplary areas of human rights law.

The picture that results from this analysis is one of a promising but incomplete path towards the establishment of intersectionality as a scientific and operative notion capable of shedding light on the existing power systems and contribute to eradicating them.

If the developments are evident, especially in the area of non-discrimination law, the resistances in applying an intersectional heuristic perspective are not less significant, for the presence of concurrent more consolidated concepts (vulnerability) and approaches (the focus on specific categories of intersectional groups) and the difficulty in operationalizing it.

In particular, the overview presented above shows a consistent discrepancy between practical developments and theoretical accounts when it comes to considering the complexity of identity and the effects it has on the operation of law. The former mainly rely on a vulnerability discourse, while the latter claims for further inclusion of an intersectional approach. This is based on a critique to the current use of vulnerability, and on the claim that it cannot serve the same function as intersectionality. Vulnerability is generally considered as a positive step towards the consideration of the complexity of identity and the related several dimensions of discrimination and rights violation. It has indeed permitted a better adaptation of human rights and non-discrimination law to societal reality. Nevertheless, some shortcomings in the use of the concept have been highlighted. First, vulnerability, as used especially in case law and international soft law, may lead to reinforcing rigid categorizations and identity essentialization. Indeed, while the vulnerability discourse has allowed for a better adaptation of human rights and non-discrimination legal frameworks, this has been done by following a logic of subgroup recognition that is widely contested by intersectionality theory. As seen, several courts (and human rights bodies) have indeed progressively extended non-discrimination and human rights protection by identifying new vulnerable groups, with this distancing from a differentiated and individu-

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<sup>183</sup> J. MARTINEZ PALACIOS, *Equality and Diversity in Democracy: How Can We Democratize Inclusively?*, in *Equality, Diversity and Inclusion: An International Journal*, 35, 5-6, 2016, 350-363; E. BEAUV AIS, *Deliberation and Equality*, in S. ELSTUB, O. ESCOBAR (eds.), *op. cit.*, 144-155; M. WOJCIECHOWSKA, *Towards Intersectional Democratic Innovations*, in *Political Studies*, 67, 4, 2019, 895-911.



alized perspective required by intersectionality. This opposes the logic of intersectionality and reproduces the problematic issues related to the traditional legal approaches to non-discrimination and human rights protection, i.e. an exclusivist approach, and the homogenization and essentialization of groups of beneficiaries. An exclusivist approach entails that legal protection is the result of a selective process whereby only some societal categories are, for various reasons, considered worth specific focus, thus being legally recognized and endowed legal protection, while others are excluded. Homogenization and essentialization entail giving precedence to supposedly stable group characteristics over individual ones, with this leading to overlooking specific situations within the focused category.<sup>184</sup>

Secondly, the vulnerability framework risks reinforcing stereotypes and stigmatization with its focus on the vulnerable condition of some societal categories. This is the case when the concept is linked and applied to particular “weak” groups that are then identified as “passive objects of care and paternalistic forms of social regulation”.<sup>185</sup> As a consequence, these groups may find themselves “trapped” in a hierarchically subordinated societal and legal position which severely affects their life opportunities and chances of development.<sup>186</sup>

Notably, the critiques to the concept of vulnerability coming from intersectionality accounts do not intend to dismiss vulnerability, but to integrate it with an intersectional approach, which is supposed to overcome the mentioned limitations.<sup>187</sup> Thus, while vulnerability is legally employed to serve functions resonating – to a certain extent – with intersectional perspectives, the relationship between the

<sup>184</sup> On this, see T. GRILLO, *op. cit.*, 19: “Essentialism is the notion that there is a single woman’s, or Black person’s, or any other group’s, experience that can be described independently from other aspects of the person—that there is an “essence” to that experience. An essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts”; about “minorities within minorities”, see, for instance, D. MORONDO TARAMUNDI, *Minorities-within-Minorities Frameworks, Intersectionality and Human Rights: Overlapping Concerns or Ships Passing in the Night?*, in G. PENTASSUGLIA (ed.), *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques*, Leiden-Boston, 2017, 256-285.

<sup>185</sup> V. MORENO-LAX, N. VAVOULA, *Vulnerability’s Legal Life: An Ambivalent Force of Migration Governance*, in *International Journal of Law in Context*, 20, 1, 2024, 1-15; see also

<sup>186</sup> V. MORENO-LAX, N. VAVOULA, *op. cit.*, 3 and 7.

<sup>187</sup> The intersectionality theory’s contribution seems to be in line with FINEMAN’s reconceptualization of vulnerability: see, for instance, M.A. FINEMAN, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in *Yale Journal of Law and Feminism*, 20, 1, 2008, 1: “I argue that vulnerability is – and should be understood to be – universal and constant, inherent in the human condition. The vulnerability approach I propose is an alternative to traditional equal protection analysis; it is a “post-identity” inquiry in that it is not focused only on discrimination against defined groups, but concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality”; other authors that have followed this perspective are, for instance, F. LUNA, *Elucidating the Concept of Vulnerability: Layers Not Labels*, in *International Journal of Feminist Approaches to Bioethics*, 2, 1, 2009, 121-139; R. MACKLIN, *A Global Ethics Approach to Vulnerability*, in *International Journal of Feminist Approaches to Bioethics*, 5, 2, 2012, 64-81; J. BUTLER, *Rethinking Vulnerability and Resistance*, in J. BUTLER, Z. GAMBIETTI, L. SABSY (eds.), *Vulnerability in Resistance*, Durham, 2016, 12-27; however, as underscored by F.R. COOPER, *Always Already Suspect: Revising Vulnerability Theory*, in *North Carolina Law Review* 93, 3, 2015, 1340-1379, this approach based on the “inevitability of vulnerability” may determine the risk of distracting attention from the



two concepts does not seem one of concurrence, but of potential complementarity. In other words, the reviewed literature has shown that intersectionality may contribute to making law make a further (and arguably more decisive) step towards the recognition of the complexity of identity. It does so by urging structural flexibility and the avoidance of rigid categorization when applying human rights and non-discrimination law.

The “categorical” use of vulnerability and the less frequent employment of intersectionality appear to illustrate the difficulty in putting intersectionality into operation. Indeed, courts and legislators mainly rely on a concept – vulnerability – that, while bringing advancements, is employed in a way that reproduces the traditional/consolidated and more familiar legal approach towards societal complexity, one that tends to categorize and essentialize group identities. Intersectionality asks for fluidity, flexibility, and constant adaptation, with this challenging the categories on which legal structures (and authorities) necessarily rely to govern the reality. Doing this is a significant challenge for law, as categorizations are to a certain extent necessary for law to regulate societies. This could be seen as one of the main reasons why references to intersectionality in legal documents are often described as rhetorical. Given the nature and function of intersectionality – which entail the introduction of a high degree of flexibility in the application of non-discrimination and human rights legal frameworks and constant adaptation of legal norms – it has been shown that much of its incorporation in the legal realm depends on the role of the judiciary at any level. In turn, the judiciary may be empowered by the presence of a legal framework that does not necessarily use an intersectional vocabulary but does not oppose (or even encourages) intersectional applications.

Whereas the main way intersectionality has been operationalized so far is through the activity of the judiciary (and human rights bodies), the last paragraph has illustrated that there is room for further legal applications of the notion. Notably, these legal applications seem to particularly resonate with the structural/systemic and transformative dimension of the notion of intersectionality already identified by Crenshaw. Intersectionality calls for taking into consideration and transforming – also through law – the intersecting systems of domination that determine intersectional human rights violations and discrimination. If this holds true, then, as seen, a possibly effective way to do this could be through the inclusion of intersectional voices in decision-making processes. This way, intersectionality would affect the very processes of norms production, with this creating the conditions to imagine and build legal frameworks that are more responsive to the fundamental issues raised by this notion. Democratic innovations may thus be an important avenue to address the structural societal issues that are at the origin of intersectional disadvantage. To achieve this, the design of genuinely representative participatory models will be of major importance: in this sense, perhaps practitioners and scholars in this area may benefit from a more structured dialogue with diversity accommodation and minority rights theory and practice, which have studied and developed several participatory instruments for non-majority groups.<sup>188</sup>

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specific condition of some groups that strongly experience forms of violence and injustice; in this sense, intersectionality maintains its distinctiveness as it specifically aims at making these conditions emerge through a systemic critique to legal structures and the power systems that determine them.

<sup>188</sup> On this, and on the theoretical and practical advantages of a global perspective on diversity issues, see N.P. Alessi, *A Global Law of Diversity: Evolving Models and Concepts*, London-New York, 2025.

