

## **Implementing the Intersectionality Approach through Public Policies and the Law**

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### **Abstract**

The theoretical background from which this paper moves is the awareness, which has been raised in feminist scholarship since the ‘80s, of the mutually constitutive character of inequalities. Since Kimberlee Crenshaw coined the term “intersectionality” in 1989, an increasing number of feminist scholars focused on how strategies and policies that address one particular form of discrimination marginalize people who fall in the intersections between different inequalities. The intersectionality theory is a buzzword in feminist theory today, and yet it still needs theoretical elaboration and practical implementation. The first part of the paper addresses what is in a name, why and when was the intersectionality approach was born, what is it for, and how does it work. The second part addresses the legal philosophy differentiation between legal principles and rules as a key for implementing the intersectionality approach through legislation and jurisprudence in civil law systems.

**Keywords:** Gender, Migration, Cultural Diversity, Intersectionality, Public Policies, Jurisprudence, Feminist Legal Theory

### **1. How to Address the Complexity of Gender, Cultural Diversity, and Migration Interweaving**

One of the main concerns of social, juridical, and political sciences today is how to address the way in which individuals and groups consider, construct, and position themselves according to hetero-imposed categories such as gender, culture, race, class, nation, migration status, age, and occupation. This game between self-construction/representation of individuals and groups, and the hetero-imposition of social categories is defined as social identity today.

Social identity is described as consisting of the multiple roles endorsed by individuals, which are externalized through the use of markers such as language, dress, behavior, or space occupation. More importantly, it is impossible to understand social identity but as originally connected to the inclusion/exclusion dynamics. The formation of identity is indeed analyzed as

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<sup>1</sup> This work has been supported by Instituto de la Mujer and FSE grant n. 06/10.

a two-component process, inextricably made of mechanisms of identification –meant as belonging– and discrimination –meant in its original meaning of distinguishing (Brinthaupt 2008).

By social identity it is meant a complex social phenomenon resulting from constant interactions and negotiations between personal conditions, social relationships, and institutional frameworks. To this extent social identity is a concern for political scientists, policymakers, jurists and legislators. Indeed, social identity urges policy makers and legislators to find ways to respect self-identification positioning without creating and reinforcing new situations of exclusion and discrimination through public policies and the law.

Feminist scholars on their side focus on gender as the basic difference of humankind and foundational element of identity. The concept lies in the understanding of societal elaboration of biological sex differences in terms of expectations and behaviors. Gender, as a social product, is understood as shaped by history and culture and is interpreted as changing and changeable. Based on the idea that identity and body perception are modeled by social structures (Foucault 1984: 83), feminists refer to any aspect related to the male/female distinction as result of inextricable mix of natural and cultural. They argue indeed that distinguishing sex versus gender neglects the role of social practices and cultural interpretations of biological feature (Butler 1990). Gender is therefore meant as the social signification and organization of sexual differences. Since these meanings vary across cultures, social groups, and time (Scott 1988: 2), gender is understood as constitutively open to change and contestation, always re-establishing new borders.

International migration scholars noted that migrants often become particularly aware of the relational and contextual nature of gender as they attempt to fulfill expectations of identity and behavior that may differ sharply in the different places where they live (Donato and Gabaccia 2006). Migrations, understood as dynamic processes that do not end when landing in the host country, offer the best conditions to analyze the construction and transformation of social identities in the postcolonial and globalized world.

Scholars devoted to international migration studies, multiculturalism and integration take into account cultural diversity of migrants as an identity issue and shed light on the representational process and negotiations with the ethnic community and the society at large (La Barbera, in press). The issue of how gender, cultural diversity and migration interweave is crucial. The paradigm symbol of intersectional discrimination in legal discourse currently

seems to be the policies that aim to ban the hijab in Europe (Skjeie and Langvasbråten 2009, Radacic 2008).

How law and policies should take into account gender, cultural diversity and migration as constitutive parts of self-representation of individuals and groups? It has been argued that politicizing identities brings home the essentialization of it and the so-called identity politics actually prevent social change, encouraging the crystallization of gender, racial, and cultural discrimination. Yet, how could identity be described encompassing its inclusionary and exclusionary elements, both of which shift according to circumstances?

This paper proposes the intersectionality theory as an approach to tackle the interweaving of gender, cultural diversity and migration. The first part of the paper presents the intersectionality theory, answering to the question of what is in this name intersectionality, how does it work, and how it can be further developed. The second part addresses the legal philosophy differentiation between legal principles and rules as a key for implementing the intersectionality approach through legislation and jurisprudence in civil law systems.

## **2. The Intersectionality Approach**

During the 80s, Black women challenged the very foundation of feminism denouncing that gender is conceptualized as neutral notion but in reality it assumes whiteness, heterosexuality, middle class organization of family and housework as a norm, hiding the privileged position from where it is conceptualized (Lorde 1982, Combahee River Collective 1986, Spelman 1988, Harris 1990, hooks 1990, Hill Collins 1998). In its pretension to speak for all women, feminism ignored non-white, non-heterosexual, non-middle class women that since then had to assume such a dominant model of womanhood or “perish”. Since Black feminists raised the awareness of the differences among women and the danger of conceptualizing gender as neutral, scholars started to use different terminologies such as “gender-race-class matrix”, “multiple axes of inequality”, or “multiple discrimination” seeking to address the situation of discrimination that suffers those that fall in-between the fixed and isolated social categories.

Born as a response to a long tradition of essentialism within feminist and race scholarship, the awareness that the way in which race, class, and gender interconnect became crucial to understand social reality in general, and the discrimination of women in particular.

Along these lines, during the 80s gender, race and class became the sacred triad of social sciences.

Coined in 1989 by Kimberlee Crenshaw, the term “intersectionality” provided a word to easily refer to such a complexity giving new impulse to a vividly discussed issue on both sides of the Atlantic (Yuval-Davis 2006). Intersectionality flourished and spread as a theory during the 90s, becoming the buzzword of feminist theory in the last decade (Davis 2008).

While it is true that all women are in some way subject to the burdens of gender-discrimination, it is also true that other factors relating to women's social identities such as class, caste, race, color, ethnicity, religion, national origin, and sexual orientation are “differences that make a difference” in the ways in which various groups of women experience discrimination. These differential elements can create problems and vulnerabilities that are unique to particular subsets of women, or that disproportionately affect some women relative to others (Crenshaw, K. 2000. *Gender-related aspects of race discrimination* (EGM/GRD/2000/WP.1). *BACKGROUND PAPER for the United Nations EXPERT MEETING on “Gender and Racial Discrimination”, November 21-24, 2000 Zagreb, Croatia*).

Intersectionality refers to the inextricably interconnected effects that are produced by the interaction of social, economic, political, cultural, and symbolic factors that operates in each context and varies across time and space (Brah and Phoenix 2004). The intersectionality approach allows to focus on the individual locationality as an inextricable whole (Anthias 2002 and 2009, Brah and Phoenix 2004, Yuval-Davis 2006, Nash 2008, La Barbera 2009b) and urges to consider the structural and dynamic effects of the interactions between the different forms of identification/discrimination, particularly how sexism, racism, and classism, along with other discriminatory systems, contribute altogether to create, maintain, and reinforce formal and informal women’s social inequality (Berger and Guiroz 2009).

Analyzing each kind of discrimination as constituted by the intersection with other discriminations, intersectionality moves away from additive models and recognizes that social class is always gendered and racialized, and gender is always classed and racialized (Anthias 2002, Hancock 2007). The assumption that no form of discrimination stands alone sheds light on the interconnected dimensions of both evident and hidden structures of discrimination.

Yet, the intersectionality approach received several critics from those feminist scholars concerned with the dissolution of gender among an infinite list of other factors that would lead to the death of feminism. While I do not think that recognizing the differences among women weaken feminism I take seriously the alerted danger of loosing gender if we put it in the basket along with all the other forms of discrimination. For this reason I propose the term

intersectional-gender to stress the importance of focusing on gender as a determinant aspect of identity, and underline at the same time its intersectionality as an inherent and constitutive feature (La Barbera 2009a, 2009b, 2012).

Intersectional-gender is an interdependent category that captures the simultaneity of race and ethnicity, culture and religion, educational and occupational level as processes in continuous becoming that shape gender identity. To conceptualize gender as intersectional by itself means that it is connected, inter- and intra-acting as a constitutive rather than additive process. It strongly and unequivocally asserts that gender is originated at the crossroad with the other conditions of social identification/discrimination.

The notion of interrelatedness of gender with other factors of social discrimination has been claimed in feminist and gender studies since the ‘80s (Lorde 1982, Frye 1983, Jaggar 1983, Rich 1986, Spelman 1988, Nicholson 1994). Yet, coining this new term has the strategic importance of promoting the awareness that an integrated approach is required to understand the intertwined factors of discrimination that –as a web of dis/em-powering conditions strictly interconnected– shape the identities of women. Using the term intersectional-gender is meant not only to focus on how race and class inter-act with gender and produce multiple forms of subordination, but also how all the social factors intra-act shaping gender identity. In fact, the factors shaping identity are not just reducible to gender, race, and class, since culture, religion, ethnicity, sexual identity, body-ability, and economical or educational levels also matter. In this sense, placing gender within an endless list of social categories involves the risk of neglecting that gender crosses all of them.

### **3. How to Turn Intersectionality into Legal Norms? Dwelling on the Distinction between Legal Principles and Rules**

The intersectionality approach reveals how the different dimensions of social life are distorted by single-axis analyses, which are often counterproductive. Indeed, policies that separately address discrimination on the base of race, gender, or class paradoxically create ulterior and ultimate dynamics of disempowerment in turn (Crenshaw 1989, Hill Collins 2000). In contrast to the multiple discrimination approach, intersectionality warns against the additive method and claims that the discrimination suffered by those who fall in between multiple and interlocking discrimination is not the mere sum of those, and must be addressed in an integrated way (Eaton 1994, Hancock 2007).

Intersectionality is a powerful method of policy analysis. Mary Matsuda suggested to adopt the “asking the other question” method. It consists in asking about hidden forms of discrimination. For instance, when dealing with racism, we should ask: “Where is the patriarchy in this?” and when dealing with sexism, we should ask: “Where is the heterosexism in this?”, as well as when dealing with homophobia, we should ask: “Where is the classism in this?” (Matsuda 1991: 1189).

Yet, how to institutionalize intersectionality instead of the multiple (read: additive) discrimination approach through public policies? And, in particular, how the law should implement it? In order to understand how to apply the intersectionality approach it is crucial to clarify the distinction between common and civil law, and legal norms vs. principle. The lack of such a distinction generates misleading analyses and strategies of action in the regulation and implementation of intersectionality through the law.

As a preliminary step, it is useful to remember that the intersectionality theory has been developed in the Anglo-Saxon academic environment, and specifically the term has been coined by US legal scholar Kimberlee Crenshaw. This point is not immaterial since US is a country of *common law*. The main difference between common and civil law draws in the weight of judges versus parliaments in establishing the legal norms. Common law –also known as case law or precedent– is a law system developed by judges through courts decision on a case-by-case basis<sup>2</sup>.

By contrast, civil law –also called codified or continental law– is set on statutes adopted through the legislative/parliamentary process and/or regulations issued by the executive branch. Conceptually, civil law proceeds from abstractions, formulates general principles, and distinguishes substantive rules from procedural ones. It holds case law as secondary and subordinate to statutory law.

With this distinction in mind, it is easier to understand to what extent the intersectionality approach can be applied differently in the two legal systems. While intersectionality suits very well to be implemented as a principle of justice in legal systems based on case by case basis, it is harder to imagine how a general and abstract norm can foresee all the possible cases in which the system of discrimination cross, creating situations of multiple interlocking discrimination.

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<sup>2</sup> See <http://www.duhaime.org/LegalDictionary/C/CommonLaw.aspx>.

To tackle the issue of implementing intersectionality in civil law systems, I deem necessary to rely on the distinction between legal principles and rules made by legal philosophers (Dworkin, 1978, Zagrebelsky 1992, Mengoni 1996, Alexy 2000, Pino 2009).

According to such a scholarship, legal principles and rules have the following distinctive features:

- principles are particularly important norms. They are core values and constituents of legal ordering, and therefore one “adheres” to them, while “obeys” to rules;
- principles have a considerable degree of generality, vagueness, and indeterminacy. They are norms with “wide open” cases, or even “rules without case”, while the rules are legal norms that connect legal consequences to a given case;
- principles incorporate a value, while the rules are opaque with respect to the value they intend to protect, by simply associating a deontic mode (prohibition, permission, obligation) to a conduct;
- the application of principles is conditioned by considerations of “weight” and importance (more than one principle can be applied in a single case and should be balanced), while a rule applies or does not apply (all-or-nothing);
- principles prescribe the pursuit of a certain goal or value to the greatest extent possible depending on the factual and normative possibilities. They usually proclaims a value, an end (equality, freedom of expression, fairness in contractual relations, etc.), without establishing precisely how it must be made. Principles are “mandate of optimization”. They should not, however, be qualified as mere auspices of legislative policy or programmatic norms. Principles are absolute norms, while rules are hypothetical and contingent ones (they should be applied only if the factual circumstances foreseen have occurred).

Thus, the distinction between legal principles and rules can serve as a guide when seeking to institutionalize the intersectionality approach through the legislation and judicial practice in civil law systems. Since the goal of the intersectionality approach is to consider how the interactions between the different forms of discrimination create altogether new situation of injustice that are not protect on a single ground approach, I argue that it must be implemented as a legal principle rather than as a rule.

#### **4. From Legal Philosophy to Legislation and Judicial Practice**

In *Mossop vs. Canada* (n. 22145/1993), Madam Justice L’Heureux-Dubé, Supreme Court of Canada, in her dissenting opinion wrote: “[...] it is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap or some other combination.” “[...] Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect”<sup>3</sup>.

The awareness that people are discriminated against more than a ground at the time should not lead to legislate all possible form of interlocking system of discrimination. Each kind of discrimination should be legislated by its own. It is only on a case-by-case basis (that is to say through the judicial practice) that it is possible to protect the cases in which multiple systems of discrimination intersect<sup>4</sup>. Whether and how the different system of discrimination (gender, cultural diversity, age, disability, gender, religion, sexual orientation, disability, migration status) interlock and made the subject especially vulnerated is not foreseeable in general and abstract terms, and should rather be considered in relation to the complex and unique personal situation. I argue that the only path to pursue the intersectional approach in civil law systems is based in single ground legislation (Skjeie and Langvasbråten 2009). Yet, a minimum set of conditions is required.

- The proliferating legislation on discrimination should be harmonized in order to avoid different level of protection across the different strands of equality. At the moment gender equality is highly legislated in Europe while cultural, racial and religious diversity is not<sup>5</sup>. In order to pursue such a goal, an institution to monitor the laws and judicial approaches promoting an intersectional approach to equality should be created.

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<sup>3</sup> See <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/969/index.do>.

<sup>4</sup> Both gender advocacy organizations and anti-racist, ethnicity-based and religious/life stance-based organizations were concerned that ‘their’ equality strand might ‘lose out’ through such integration.

<sup>5</sup> For a powerful analysis of the institutionalization of anti-discrimination in the EU see Lombardo and Verloo (2009). For multiple vs. intersectional equality architecture in the UK see Walby et al. (2012). See also the comparative study of equality institutions in Italy, Portugal, and Spain by Lombardo and Bustelo (2012).



Norway legislation and equality institutional machinery offer a very interesting study case in this respect (Skjeie and Langvasbråten 2009).

- The monitoring agency could also act as a “part” claiming in court, as a public interest, integral (read: intersectional) protection of equality.
- Judges and lawyers should be trained in both recognizing and handling cases of intersecting discrimination.
- In order to avoid that each ground is disaggregated and separately considered in court although the claimant had experienced them as inextricably linked, the Courts should allow to identify claims based on intersection of two or more grounds, not compelling the complainant to choose between the different grounds of discrimination or submit two or more separate claims.

## 5. Conclusions

Throughout this paper I have argued that intersectionality is a key concept to understand discrimination as integral rather than fragmented (one-ground basis) situations. Answering to the question of how can intersectionality be turned into a legal norm, and relying on the distinction between principles and rules, I propose that intersectionality should not be implemented as a general and abstract legal rule connected an exact consequence to a precise case, since it is impossible to foresee the infinite situations of interlocking discrimination. Rather, intersectionality should be considered as a categorical principle of law prescribing the pursuit of equality to the greatest extent possible depending on the specific factual situation. It should be indeed used in judicial interpretation by “asking the other question” in order to protect people that suffer discriminations from interweaving situation of marginalization and disempowerment.

## References

- Alexy, R. (2000). On the Structure of Legal Principles. *Ratio Juris*, 13, 294–304.
- Anthias, F. (2002). Where do I Belong? Narrating Collective Identity and Translocational Positionality. *Ethnicities*, 2(4), 491–515.
- Anthias, F. (2009). Thinking through the Lens of Translocational Positionality: an Intersectionality Frame for Understanding Identity and Belonging. *Translocations: Migration and Social Change*, 4(1), 5–20.
- Apphia, A. (2005). *The Ethics of Identity*. New York: Princeton University Press.
- Berger, M. & Guidroz, K. (eds.) (2009). *The Intersectional Approach: Transforming the Academy through Race, Class, and Gender*. Chapel Hill: University of North Carolina Press.

- Brah, A. & Phoenix, A. (2004). Ain't I A Woman? Revisiting Intersectionality. *Journal of International Women's Studies*, 5(3), 75–86.
- Brinthaupt, T. (2008). *Identity*. International Encyclopedia of the Social Sciences. <http://www.encyclopedia.com/doc/1G2-3045301074.html> (May 24, 2012).
- Brubaker, R., Cooper, F. (2000). Beyond Identity. *Theory and Society*, 29, 1–47.
- Butler, J. (1990). *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge.
- Combahee River Collective. (1986). *Combahee River Collective Statement*. *Black Feminist Organizing in the Seventies and Eighties* (1977). Albany (NY): Women of Color Press.
- Crenshaw, K. (1989). Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum*, 14, 139–167.
- Crenshaw, K. 2000. *Gender-related aspects of race discrimination* (EGM/GRD/2000/WP.1). BACKGROUND PAPER for the United Nations EXPERT MEETING on “Gender and Racial Discrimination”, November 21-24, 2000 Zagreb, Croatia).
- Davis, K. (2008). Intersectionality in Transatlantic Perspective (pp. 19–35), in C. Klinger & A. Knapp (Eds.), *ÜberKreuzungen. Fremdheit, Ungleichheit, Differenz*. Münster: Westfälisches Dampfboot.
- Donato, K. M., Gabaccia, D., Holdaway, J., Manalansan, M., & Pessar, P. R. (2006). A glass half full? Gender in migration studies I. *International Migration Review*, 40(1), 3–26.
- Dworkin, R. (1978). *Taking Rights Seriously*. London: Duckworth.
- Eaton, M. (1994). Patently confused, complex inequality and Canada v Mossop. *Review of Constitutional Studies*, 1, 203–229.
- European Commission, Equal Opportunities Unit. (2007). *Tackling multiple discrimination: practices, policies and laws* (Vol. 118). Office for Official Publications of the European Communities, <http://ec.europa.eu/social/BlobServlet?docId=2026&langId=en>.
- Frye, M. (1983). *The Politics of Reality: Essay in Feminist Theory*. Berkeley (CA): The Crossing Press.
- Hall, S. (1996). *The Question of Cultural Identity*. London: Sage.
- Hancock, A. (2007). When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm. *Perspectives on Politics*, 5(1), 63–79.
- Harris, A. (1990). Race and Essentialism in Feminist Legal Theory. *Stanford Law Review*, 42(3), 581–616.
- Hill Collins, P. (1998). *Fighting Words: Black Women and the Search for Justice*. Minneapolis: University of Minnesota Press.
- Hill Collins, P. (2000). Gender, Black Feminism, and Black Political Economy. *Annals of the American Academy of Political and Social Science*, 568, 41–53.
- hooks, b. (1990). *Yearning: Race, Gender, and Cultural Politics*. Boston (MA): South End Press.
- Jaggar, A. (1983). *Feminist Politics and Human Nature*. Totowa (NJ): Rowman & Allanheld.
- Kershaw, G. (1997). *Mau Mau from Below*. Athens (OH): Ohio University Press.
- La Barbera MC. (2009). *Multicentered Feminism: Revisiting the “Female Genital Mutilation” Discourse*. Palermo: Compostampa.
- La Barbera, MC. (2010). Género y diversidad entre mujeres. *Cuadernos Kóre. Revista de historia y pensamiento de género*, 1(2), 55–72, <http://kusan.uc3m.es/CIAN/index.php/CK/article/viewFile/1039/480>.
- La Barbera, MC. (2012). Intersectional-gender and the Locationality of Women in Transit (pp. 17–31), in G. Bonifacio (Ed.) *Feminism and Migration: Cross-Cultural Engagements*. The Netherlands: Springer.
- La Barbera MC. (in Press). Negotiation of Identity in Migration Processes: An Interdisciplinary Approach. The Netherlands: Springer.
- Lombardo E. and Verloo, M. (2009). Institutionalizing Intersectionality in the European Union?. *International Feminist Journal of Politics*, 11(4), 478–495.
- Lombardo, E. and Bustelo, M. (2012). Political Approaches to Inequalities in Southern Europe: A Comparative Analysis of Italy, Portugal, and Spain. *Social Politics: International Studies in Gender, State & Society*, 19(4), 572–595.
- Lorde, A. (1982). *Zami: a New Spelling of My Name*. Watertown (MA): Persephone Press.

- Matsuda, M. (1991). Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition. *Stanford Law Review*, 43(6), 1183–1192.
- Mengoni, L. (1996). *Ermeneutica e dogmatica giuridica*. Milano: Giuffrè.
- Nash, J. (2008). Re-thinking Intersectionality. *Feminist Review*, 89, 1–15.
- Nicholson, L. (1994). Interpreting Gender. *Signs*, 20, 79–105.
- Pino, G. (2009). *Principi e argomentazione giuridica*. *Ars interpretandi*, 14, 131–160.
- Radacic, I. (2008). Gender equality jurisprudence of the European Court of Human Rights.
- Rich, A. (1986). *Of Woman Born: Motherhood as Experience and Institution*. London: Virago.
- Skjeie H. and Langvasbråten T. (2009). Intersectionality in Practice?. *International Feminist Journal of Politics*, 11(4), 513–529.
- Spelman, E. (1988). *Inessential Woman: Problems of Exclusion in Feminist Thought*. Boston: Beacon.
- Yuval-Davis, N. (2006). Intersectionality and Feminist Politics. *European Journal of Women's Studies*, 13(3), 193–209.
- Zagrebel'sky, G. (1992). *Il diritto mite. Legge diritti giustizia*. Torino: Einaudi.
- Walby, S., Armstrong, J., and Strid, S. (2012). Intersectionality and the quality of the gender equality architecture. *Social Politics: International Studies in Gender, State & Society*, 19(4), 446–481.