



Intersectionality and its journeys: from counterhegemonic feminist theories to law of European multilevel democracy

MariaCaterina La Barbera¹

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Abstract. Intersectionality originated as a tool for critical legal analysis. It focused on the multiplicity of interactions among the grounds of social exclusion, such as gender, sexual orientation, race, religion, national origin, (dis)ability and socioeconomic status among others, shedding light on the complexity of the mechanisms of power and privilege in social relations. In the last twenty-five years, intersectionality gained increasing popularity in the Anglophone academia, but had uneven diffusion in the different socio-political contexts. This article addresses its conceptual origins, providing a genealogy that connects intersectionality with counterhegemonic feminist theories. Intersectionality is then examined in connection with Critical Legal Studies within the American socio-legal context of the 70s where it has originally been developed as a category of legal analysis. It is argued that transposing a concept from another legal system into the European legal framework poses a number of challenges. This article offers an overview of recent developments of European Union law as an example of the advancements and challenges that the implementation of intersectionality in European democracy might suppose. It finally discusses the utility of intersectionality for legal scholarship in the context of democratic societies that aim at removing the formal and substantive obstacles towards the equality of their members.

Key words: Equality, intersectionality, multiple discrimination, European Union, democracy.

[es] La interseccionalidad y sus viajes: de las teorías feministas contrahegemonicas al derecho de la democracia europea multinivel

Resumen. La interseccionalidad nació como herramienta para los análisis críticos del derecho. Permitted identificar la multiplicidad de interacciones entre las causas de exclusión social, como el género, orientación sexual, raza, religión, origen nacional, (dis)capacidad y estatus socioeconómico entre otras, arrojando luz sobre los mecanismos de poder y privilegio en las relaciones sociales. La interseccionalidad como concepto jurídico ha ganado popularidad creciente en la academia de habla anglosajona en los últimos veinticinco años y, sin embargo, ha tenido difusión desigual en los diferentes contextos socio-políticos. Este artículo aborda sus orígenes conceptuales, proporcionando una genealogía que conecta la interseccionalidad con las teorías feministas contra-hegemónicas. Relaciona después la interseccionalidad con los *Critical Legal Studies* en el contexto socio-jurídico estadounidense de los años 70 dónde se elaboró como categoría de análisis jurídico. Finalmente, considerando los desafíos que supone la trasposición en el marco jurídico de un concepto que ha viajado desde un sistema jurídico a otro, el artículo ofrece un recorrido del desarrollo reciente del derecho de la Unión Europea como ejemplo de los avances y desafíos que la implementación de la interseccionalidad en la praxis jurídica europea puede suponer. El artículo finalmente defiende la utilidad de la interseccionalidad para los estudios jurídicos en el contexto de las sociedades democráticas que tienen como objetivo eliminar los obstáculos formales y sustantivos para alcanzar la igualdad de sus miembros.

¹ Nebrija University, Madrid (Spain)
mc.labarber@gmail.com

Palabras clave: Igualdad, Interseccionalidad, Discriminación múltiple, Unión Europea, democracia.

Sumario. 1. Introduction. 2. A Conceptual Genealogy of Intersectionality from Counterhegemonic Feminist Theories. 3. From Counterhegemonic Feminist Theories to Law. 3.1. Intersectionality as a Category of Critical Legal Analysis. 3.2. Intersectionality as a Criterion for Judicial Interpretation. 4. Putting a Travelling Concept at Work in the European Union. 5. Conclusions. References.

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1. Introduction

This article dwells on the controversial relation among democracy, equality and difference². Although minimalist conceptions that reduce democracy to majoritarianism have been successful among political scientists (Dahl, 1957), strong arguments sustain that equality is foundational for the “rule of the people” (Post, 2006, 28). Considering democracy and equality as intimately related (Post, 2006, 34) entails two implications: first, democratic regimes are required to remove the causes that may prevent it; second, removing the causes that hamper equality implies recognizing the differences among its members.

Although procedural theories of democracy overlooked substantive equality, feminist scholars showed that promoting equality of opportunities and avoiding marginalization is consubstantial to democracy (Pateman, 1983; MacKinnon, 1987; Fraser, 1990; Lister, 1998; Fineman, 2008; Phillips, 2013). They revealed that pursuing equality means disentangling the complex relation between equality and difference, which generates power and subordination (Gianformaggio, 2005). Feminist scholars thus called for inclusion as a normative ideal of democracy (Young, 2000), which requires equal redistribution, recognition and participation (Fraser, 1998).

Yet, globalized neoliberalism, neocolonial relations, movements of people across national borders and the current economic crisis added further layers of complexity to the traditional challenges of accommodating equality and difference in the democratic arena (Benhabib, 1996). Old and new inequalities generated social gaps, discrimination and social exclusion based on differences, such as gender and sexual orientation; religion and beliefs; race³, skin color and ethnicity; country of origin and migratory status⁴; educational and occupational level; health, (dis)ability⁵ and

² I thank Jone Martínez Palacios for her careful reading and thoughtful suggestions.

³ The term “race” is used as a legal term to refer to a ground of discrimination. Yet, race is a problematic concept that erroneously conveys the idea of natural characteristics. In sociology or social anthropology, “race” has been replaced long ago by notions that give accounts of the processes of social construction, hierarchization and domination such as “racialized identity”.

⁴ Migration adds a significant layer of complexity because it implies a shift in social categorization. Gender roles are often different in the country of origin and in the host country. Also class is blurred in the migration process where citizenship regime, regular/irregular migration status, work conditions, level of study, religion, ethnicity and gender alter the conception of social class (La Barbera, 2015; Donato et al., 2006; Hennessy and Ingraham, 1997).

⁵ Although the most recent literature refers to the concept of functional diversity (Patston, 2007; Rodríguez Díaz and Ferreira, 2010), I choose to use the term “(dis)ability” not only because is the term used in EU legislation, jurisprudence and international conventions, but also because it allows to highlight the relational dimension of stigma and exclusion of the so-called “disability” on the one side and the privilege and invisible power behind “ability” on the other.

age, among others. Numerous data reveal the magnitude of social inequalities in the European multilevel democracy.

Recent studies show that Southern Europe has been particularly affected by the recent implementation of austerity policies, which threatened life satisfaction, wellbeing and inclusive development (Perrons and Plomien, 2010; Antonucci, Hamilton and Roberts, 2014). According to the 2016 Eurostat, the economic crisis and austerity measures seriously affected the young population causing a worrying increase in youth unemployment and a large age-based economic gap. The 2010 European Social Survey also shows that the distribution of domestic tasks—which has been identified long ago as one of the main causes of the subordination of women in the public space (Olsen, 1985; Pateman, 1988; Okin, 1989)—is still highly unequal in most European democratic societies. For this reason, austerity measures affected women in particular and increased gender-based discrimination (Karamessini and Rubery, 2014; Bustelo, Alfama and Espinosa, 2014). Finally, the 2012 Eurobarometer indicates that ethnic discrimination continues to be perceived as the most widespread form of discrimination, followed by (dis)ability and sexual orientation.

Postcolonial and globalized European democracies face the pressing challenge to eliminate such intertwined inequalities and prevent increasingly more complex forms of discrimination. To deal with such a complexity, adequate concepts and analytical tools are needed to enable new diagnoses, political strategies and legal mechanisms. To this end, I refer to intersectionality as a legal concept that enables addressing the complexity of the situations of discrimination that underlies the debate over equality and difference, and the related issues of redistribution, recognition and participation in European multilevel democracy.

Intersectionality has been defined as one of the most important contributions of feminist theory and praxis of the last twenty years (McCall, 2005). Since Crenshaw's early formulation (Crenshaw, 1989), this concept has been developed and elaborated in different ways, widely transforming feminist scholarship. The intersectionality approach currently is at the core of gender studies, and has been converted into a keyword in Anglophone feminist scholarship (Davis, 2008)⁶. Yet, it requires further theoretical explorations and needs to be better known in Southern European academia where it is still underestimated.

Following Jone Martínez Palacios, I argue that intersectionality offers novel perspectives to the debate on democracy because it perplexes how we understand social inequality and design the tools to tackle and overcome those (Martínez Palacios, 2016, 355-356). From my own particular academic positioning at the intersection of disciplines such as “law and society” and “law and politics”, the aim of this article is to contribute to the debate on intersectionality and its legal implementation in democratic European Union. Law is regarded here in its double component of reaction to injustice (case-law) and proaction to prevent it (legislation). The article is structured into three main parts i) tracing a genealogy from counterhegemonic feminist theories, ii) showing how intersectionality was shaped as a critical legal concept in

⁶ Such popularity has a downside too, which is delinking intersectionality from black women's subjectivities and radical social critique and movements that initially promoted such a perspective (Carastathis, 2013; Bilge, 2013; Kerner, 2016).

the North American legal system, and iii) analyzing how a traveling concept that has been put at work in the legal system of the European Union.

2. A conceptual genealogy of intersectionality from counterhegemonic feminist theories

The idea that subjectivities are not singular, but rather multiple and intermeshed, and that social sciences, movements and policies need to simultaneously address such a complexity is crucial in Anglophone academia today. Yet, it was not until the emergence of Black feminist thought in the United States, that the simultaneity of race, gender and class, and their intersection in people's experiences had been taken seriously into account (Belkhir, 2009; Carastathis, 2016). Since its origins, African American scholars and activists criticized the essentialism of the concept of gender, and exposed the need for feminist scholars to be self-reflexive, self-critical and aware of their own positionality as a standpoint (Hill Collins, 1990; Haraway, 1991).

During the 80s, the Combahee River Collective ([1977] 1982), bell hooks (1981, 1983), Angela Davis (1981), Audre Lorde (1982) and Elisabeth Spelman (1988), among others, claimed that the concepts of gender and race were represented as if all women were white and all men were black (Hull et al. 1982). In particular, gender was grounded on the experiences of white women and middle-class family models, and ignored how race, class and sexual orientation pluralize and particularize the meaning of being a woman.

The Combahee River Collective appealed to the concept of interlocking systems of oppression to point out "the need for an integrative theory of, and a transformative praxis against, multiple oppressions" (Carastathis, 2016, 162). They addressed together heteropatriarchy, white supremacy, capitalism and nationalism in its attempt to "combat the manifold and simultaneous oppressions that all women of color face" (Combahee River Collective, 1977 [1982], 13).

"Black feminist politics [...] have an obvious connection to movements for Black Liberation [...]. It was our experience and disillusionment within these liberation movements, as well as experience on the periphery of white male left, that led to the need to develop a politics that was antiracist, unlike those of white women, and antisexist, unlike those of Black and white men [...]. We believe that sexual politics under patriarchy is as pervasive in Black women's lives as are the politics of class and race. We also find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously. We know that there is such a thing as racial-sexual oppression, which is neither solely racial nor solely sexual, for example, the history of rape of Black women by white men as a weapon of political repression [...]. We need to articulate the real class situation of persons who are not merely raceless, sexless workers, but for whom racial and sexual oppression are significant determinants in their working and economic lives" (Combahee River Collective [1977] 1982, 14-16).

African American feminists pointed out that the different social positioning of women, and the differences in privileges and power among them, made their experiences of discrimination profoundly different. To say it with Patricia Hill Collins, “depending on the context, an individual may be an oppressor, a member of an oppressed group, or simultaneously oppressor and oppressed” (Hill Collins, 1990, 225).

The postmodern critique of essentialism was their fundamental analytical tool (hooks, 1990) to criticize the supposed neutrality of universalistic gender conceptualization and argue that such a norm is in fact constructed attributing the characteristics of the dominant group to all the others (Harris, 1989, 588). They denounced gender essentialism as a form of reductionism that identifies gender as the fundamental form of exclusion of all women, minimizing all other factors of social exclusion (Barlett and Harris, 1998, 1007-1008).

They denounced that to find a place in the struggles against racial and gender-based discrimination, African American women have been forced to fragment their experiences. By isolating a single aspect of their identity and offering it as a meaningful whole, they had to disown all other constituent parts of themselves (Lorde, 1984, 120). Through this way, gender essentialism reduced multiple discrimination to a problem of arithmetical sum, as if adding racism to sexism could explain the experiences of African American women, or adding racism to sexism and homophobia could give an account of the experiences of African American lesbian women (Spelman, 1988; Harris, 1990). African American feminists also alerted that the concept of patriarchy ignores how “racism ensures that black men do not have the same relations to patriarchal/capitalist structures as white men” (Carby, 1996, 213) and put all men together as the enemy.

In the attempt to offer a more inclusive conceptualization of “identity”, African American feminists used the notion of multiple consciousness to describe the causes of their exclusion and marginalization as linked to an inextricable web of social and institutional factors. By re-conceptualizing subjectivity as multiple and contradictory, African American feminist scholars and activists criticized mainstream theories of social identity that rely on self-representation and social positioning as fixed and immutable. They proposed to understand identity as a notion of a continuous process of social construction in which both the social contexts and individual wills are involved (Harris, 1990, 584). Claiming for the need to find new analytical tools to address this constantly changing complexity (Hill Collins, 1990), they recalled the need to integrate “inter-relatedness of sex, race, and class oppression” (hooks, 1983, 31) in conceptualizations of social justice.

In a similar venue, postcolonial studies critically assessed how the legacies of colonialism, including the forms of neocolonialism and imperialism, inform and shape the postcolonial configuration of the world (Kerner, 2016, 9). During the 80s, postcolonial feminists aimed at dismantling the discursive othering that placed women within social structures as if they were inert material. Lata Mani (1987, 130), Gayatri Chakravorty Spivak (1988, 306), Leila Ahmed (1992, 15), Amede Obiora (1993, 237) among others, challenged the notion of universal sisterhood and claimed for contextual and specific alliances to achieve shared social and political goals.

As Ofelia Schutte put it, “postcolonial studies acts as a necessary internal critical voice challenging both the imbalance of power existing between north and south, east and west and the representational practices that frame the less powerful of these in the discursive codes of those with the greater power” (Schutte, 2007, 167). Ac-

According to Chicana feminists in cultures the where, which central organizing axes of society are asymmetric relations based on race, class, heterosexuality and nationalism, one can “become a woman” also in opposition to other women (Alarcón, 1990, 356).

By using colonization and diaspora as fundamental categories, postcolonial feminists warned that the production of a particular cultural discourse on “Third World Women” that depicts them as poor, uneducated and backward usurped their life experiences. Such a discourse constituted women as subalterns who cannot speak by themselves (Spivak, 1988, 287). Chandra Talpade Mohanty criticized the notion of “Woman” based on a transcultural concept of gender that depicts the multiplicity of women’s social positioning as a coherent, homogeneous, “pre-social” group with common goals. Such a concept places real women out of history and social structures, and ignores that they are constituted instead within and through these very structures (Mohanty, 1988, 80). Rather than thinking about a universal sorority, Mohanty suggested strategic coalitions that acknowledge internal differences, power relations and conflicts among women. It is at the intersection of struggles against racism, imperialism and heteropatriarchy where we can “map the ground for feminist political strategy and critical analysis” (Mohanty, 2003, 120).

At the same time, socialist and Marxist feminists aimed at redressing women’s oppression and exploitation by connecting feminist theory and praxis with the material realities that shape race, gender, sexuality and nationality in relation to labor market and class system (Eisenstein, 1979; Delphy, 1980; Mackinnon, 1982; Hennessy and Ingraham, 1997). As Ann Ferguson put it, “much of human history can be understood only by conceiving societies in terms of interacting but semi-autonomous systems of human domination, three important ones having been class, race/ethnicity and sex/gender” (Ferguson, [1983] 1997, 40). Socialist feminists claimed the need for analytical tools able to explain the systemic intersection of capitalism and patriarchy (Eisenstein, 1979). They asserted that the Marxist vision of history was gender-blind and ignored women’s social production, while mainstream feminist analysis was often disconnected from history and material reality (Hennessy and Ingraham, 1997, 7). If women’s reproductive work at home is required for the entire functioning of the labor market and class system, then gender must be recognized as a crucial component of it (Benston, 1969). Along these lines, Silvia Federici (1975) and Lise Vogel (1983) showed how women’s unpaid labor is required for social reproduction and has been an invisible source of profit for capitalism, while Charlotte Bunch (1975) drew attention to how socio-economic status is affected by the institution of heterosexuality.

The strategy of turning to African American, postcolonial, and socialist feminist work to trace a genealogy of intersectionality pursues a twofold purpose. First, to argue that it is not an unprecedented concept but rather the result of long debates and discussions on the cross-culturality of gender as an analytical category and the dangers of essentialism. Yet, recovering back the origin does not serve the purpose of denying the originality of the concept. On the contrary, it is intended to emphasize that intersectionality addresses questions that were and continue to be crucial for feminist scholarship and social sciences. Answering to the question whether it is good for feminism (Zack, 2005), I claim that intersectionality is an unavoidable development of counterhegemonic and marginalized feminist voices that since the 70s questioned the mainstream perspective. In line with Patricia Hill Collins and

Sirma Bilge (2016), I argue not only that intersectionality does not distract from gender discrimination of women, but also that it allows to address the situation of the most vulnerable and marginalized women that have been forgotten by mainstream feminism. Second, to shift our attention towards the peripheral perspectives within feminism allows bringing them to the center (hooks, 1983). Moving towards the peripheries helps to recognize the coexistent and conflicting cores of feminism (La Barbera, 2012), and sets the machine in motion to convert it into “the very house of difference” where all diversity among women can find their place (Lorde, 1982, 226).

3. From counterhegemonic feminist theories to law

3.1. Intersectionality as a category of critical legal analysis

The notion of interconnectedness among gender, race and class has been thoroughly discussed on both sides of the Atlantic (Yuval-Davis, 2006), being differently named as “interlocking systems of oppression” (Combahee River Collective, 1977), “*consubstantialité des rapports sociaux*” (Kergoat, 1978) “multiple jeopardy” (King, 1988) and “matrix of oppression” (Hill Collins, 1990). Since the Columbia Law School professor Kimberlé Crenshaw coined the term “intersectionality” in 1989, this long-lived discussion was channeled and fuelled with renewed impulse, marking a turning point in the field. Although it cannot be found in dictionaries, it is not just a strange term to differently name the “holy trinity” of feminist studies (Dhamoon, 2010, 5). Naming creates realities (Dewey and Bentley, 1949, 133). If words are the tools to create concepts, and concepts are the tools to analyze and shape social reality, intersectionality as a new terminology brought new insights for the legal conceptualization of social inequalities and its multiple sources.

Kimberlé Crenshaw used intersectionality as a metaphor “to denote the various ways in which race and gender interact to shape the multiple dimensions of African American women’s employment experiences” (Crenshaw, 1991, 1244; Crenshaw, 2011, 230)⁷. She argued that, by segmenting the dimensions of discrimination, both feminist and anti-racist policies paradoxically ended in reinforcing the subordination of African American women (Crenshaw, 1991, 1252). She stated:

“I consider intersectionality a provisional concept linking contemporary politics with postmodern theory. In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are be-

⁷ When invited to discuss issues of gender and race discrimination in the United Nations expert group in 2000, Kimberlé Crenshaw affirmed: “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, 2000).

tween race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color” (Crenshaw, 1991, 1244-45).

Intersectionality is usually represented as if the writings of African American feminists had been downloaded into a compressed file and automatically converted to run in the operating system of the law (Crenshaw, 2011, 224). Yet, understanding that it originated to assess specific obstacles of the US antidiscrimination law helps to understand its nature, its limits as well as the issues that inevitably arise when implementing it in other legal and institutional contexts.

Since the 60s, affirmative actions were introduced in the United States as measure to correct the exclusionary recruitment practices that had created an all-white and masculine academia. This measure allowed access to law schools and legal professions to a growing number of African Americans and women. Throughout the 70s, the greater presence of women and African Americans among lawyers, professors and legal theorists allowed to question the traditional legal categories that excluded both women and people of color. During the 80s, this void began to be denounced in legal doctrine, feminist jurisprudence and Critical Race Theory⁸. Intersectionality emerged when US antidiscrimination law was being subjected to critical re-theorizing by scholars that sought to highlight the invisibility of “those who were not whites” and “blacks who were not men” (Crenshaw, 2011). Critical Legal Studies⁹ offered the discursive tools and critical mass to structure such a project as a collective enterprise (Crenshaw, 2011, 225).

Intersectionality was thus introduced as an analytical category to comment the case *De Graffenreid v. General Motors* [1977]. The case was brought before the court by five African American women against their employer, claiming that the “last hired-first fired” dismissal system, though formulated in neutral terms, in fact perpetuated race and gender discrimination in violation of the federal precept of nondiscrimination at work. In its ruling, the Court affirmed the possibility of claiming either racial or sexual discrimination, but excluded the possibility of claiming a combination of both. On such a premise, African American women were not recognized as a special group and therefore were not allowed to use a “super-remedy” that combined two or more remedies beyond the intention of the statute. The court also established that the claimants could not be compensated because the alleged damage could not be identified according to existing grounds established by the statute.

According to Crenshaw, De Graffereid and the other plaintiffs who had been fired by General Motors were in a particularly dangerous “junction” because of their disadvantaged position in the gender hierarchy for being black, and in the racial hierarchy for being women. Using the metaphor of the traffic accident, Crenshaw compared the decision of the court to an ambulance that, arriving at the site of the

⁸ In Crenshaw, Gotanda, Peller and Kendal’s words, Critical Race Theory is “a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole” (Crenshaw et al., 1995).

⁹ Critical Legal Studies is a group of North-American leftist legal scholars, among which Drucilla Cornell, Martha Fineman, Catharine MacKinnon, Mary Matsuda, Frances Olsen, Patricia Williams, Peter Gabel, Duncan Kennedy, Kendall Thomas, Mark Tushnet and Roberto Unger, who shed light on the ideological biases of law from a postmarxist and postmodern standing point (Minda, 1995; Carreras, 1999; Kennedy, 2002). They argued that law is politics and criticized law as a system that perpetuates social and economic inequalities.

collision, instead of helping those injured, had left them without medical attention because the cause of the accident were different from those envisaged by the traffic code (Crenshaw, 1989).

In her analysis of Black women's experiences of discrimination, Crenshaw introduced the idea that gender, race and class interact and jointly define the particular social disadvantage of African American women. Crenshaw noted that, by considering only one dimension of social exclusion at a time, anti-racist and feminist policies eventually excluded African American women and paradoxically reinforced their status of subordination and disadvantage (Crenshaw, 1991, 1252).

“I argue that Black women are sometimes excluded from feminist theory and anti-racist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender. These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and anti-racist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating “women’s experience” or “the Black experience” into concrete policy demands must be rethought and recast” (Crenshaw, 1989, 140).

In referring to the distinctive structural inequalities that shape African American women's lives, Crenshaw pointed at the intersection of race and gender in three interconnected levels, namely the structural, political, and representational levels. At the structural level, the intersectional approach serves to analyze the situation of African American women who, being at the crossroads between different exclusionary social structures, suffer forms of discriminations that are different from white women and African American men (Crenshaw, 1991, 1245). To what extent racism amplifies sexism and to what extent homophobia amplifies racism need to be considered (Matsuda, 1991). At the political level, intersectionality offers a new perspective to analyze how sexism, racism, homophobia and class exploitation are reproduced in law and policy-making processes. It implies considering, for example, to what extent feminist discourse can marginalize ethnic minorities or women with (dis)abilities (Verloo, 2006), or to what extent the instruments adopted to ensure gender equality can marginalize migrant women (La Barbera, 2009 and 2012). By “representational intersectionality” Crenshaw meant “the cultural construction of women of color” (Crenshaw, 1991, 1245)¹⁰. At this level, the intersectional approach allows exploring

¹⁰ Crenshaw states that sexualized images of African Americans go all the way back to Europeans' first engagement with Africans. Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented. These sexualized images of race intersect with norms of women's sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores. Thus Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot. The discrediting of Black women's claims is the consequence of a complex intersection of a gendered sexual system, one that constructs rules appropriate for good and bad women, and a race code that provides images defining the allegedly essential nature of Black women. If these sexual images form even part of the cultural imagery of Black women,

the discursive construction of disadvantaged subjects, considering to what extent popular culture and public discourse (re)produce their exclusion and marginalized situation (Verloo, 2006).

This perspective introduced new elements in the legal and political conceptualization of the multiple axes of discrimination. Anna Carastathis (2014, 307) identifies its benefits in simultaneity, complexity, irreducibility and inclusivity. Using intersectionality in critical analysis of law entails approaching social positioning as a locus of subjection, power and privilege, which dynamically changes over time and context in relation to the different structures that conform social life. Intersectionality also requires to integrate activism, theory and practice (Golberg, 2009; Cho et al., 2013; Cruells and Ruiz, 2014), breaking the divide between academia and social work. It finally calls for the collaboration of several actors from different societal spheres. Adopting intersectionality as a perspective of analysis exposes the necessity of working simultaneously on different fronts, at distinct levels, and among various disciplines to promote equality and advance towards social change. It speaks about connection and interdependence of the axes of discrimination, and necessarily involves the coalitions of actors, disciplines, and groups to reach the goal of eradicating structural inequality (Cruells and La Barbera, 2016). This is crucial for studies of law and democracy because it can allow to develop more comprehensive legal tools and political strategies of inclusion.

3.2. Intersectionality as a criterion for judicial interpretation

In Canada, the United States, and the United Kingdom a growing body of case-law that relies on the concept of intersectionality in judicial reasoning exists. It recognizes and compensates violations of the principle of nondiscrimination occurred on more than one ground simultaneously. It has been recognized that “the nature of discrimination is such that it cannot always be sensibly compartmentalized into discrete categories” (*Ministry of Defence v Tilern De Bique* [2010], UK). For instance, in the case *Ministry of Defence v Tilern De Bique*, the claimant, a single mother, was a soldier in the British army who had originally been recruited from a Caribbean island. In spite of having been allowed to accommodate her work hours with childcare arrangements, she was later subjected to disciplinary sanctions when she was absent for childcare. The Employment Appeal Tribunal dismissed the Ministry of Defense’s appeal, ruling that:

“The nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant’s true disadvantage. Discrimination is often a multi-faceted experience. The Claimant in this case considered that the particular disadvantage to which she was subject arose both

then the very representation of a Black female body at least suggests certain narratives that may make Black women’s rape either less believable or less important. These narratives may explain why rapes of Black women are less likely to result in convictions and long prison terms than rapes of white women” (Crenshaw, 1991, 1271).

because she was a 24/7 female soldier with a child and because she was a woman of Vincentian national origin, for whom childcare assistance from a live-in Vincentian relative was not permitted. The Tribunal recognized that this, double disadvantage, reflected the factual reality of her situation” (*Ministry of Defence v. Tilern De Bique*, [2010] IRLR 471).

Judicial reasoning acknowledged long ago not only that discrimination can occur at the intersection of race, gender, and/or other protected grounds, but also that “categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals” (dissenting opinion, *Canada v Mossop* [1993], Canada). The argument is that “where two bases for discrimination exist, they cannot be neatly reduced to distinct components [...]. The attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences” (*Lam v. Univ. of Hawaii* [1994], USA). Using an intersectional perspective allows to multiple discrimination it as a “whole [that] is more than the sum of its parts”, fostering protection to vulnerable subjects whose rights would not otherwise be guaranteed (AIRE Centre, 2012).

Notwithstanding, it is important to recall that the United Kingdom, Canadá and the United States are common law systems. They are built on a case-by-case basis through the use of precedents. Judges have to “stand by the decision” (*stare decisis*) of higher courts as binding precedents. They recognize judicially-made law as primary source of law. This allows to pay attention to the specific circumstances of each case, without fixing the content of legal principles that are rather defined by interpreting their meaning in relation to the facts occurred (Binder, 1996). Having been generated as a concept in a common law context, the implementation of intersectionality in a different legal system brings home technical and conceptual problems that are often underestimated (La Barbera, 2016; Cruells and La Barbera, 2016).

4. Putting a travelling concept at work in the European multilevel democracy

Contributing to the debate on the obstacles that intersectionality finds in its implementation, it is crucial to examine how it differently works in both sides of the Atlantic. European civil law systems are fundamentally based on the codification of general and abstract rules. The need to *a priori* identify all the possible intersections between the grounds of discrimination makes it difficult to incorporate intersectionality into the legislation of European multilevel democracy. To this end, I adopt Ange-Marie Hancock’s (2007) distinction of unitary, multiple and intersectional approaches as a useful explanatory categorization.

The unitary approach considers only one ground of discrimination at a time, for example the discrimination of gender. In contrast, the multiple approach considers in parallel two or more axes of discrimination, for instance race and gender. It implies considering various sources of discriminations as cause of the vulnerability of disadvantaged groups. Finally, the intersectional approach considers the interactions between the different grounds of discrimination and

explores the relationships between them as an open question that is linked to the specific context (Hancock, 2007, 64). This categorization distinguishes among additive criteria, which are conveyed by the term “multiple discrimination”, and an intersectional undertaking that seek to address the interactions among the different grounds in shaping the specific situation of discrimination under consideration.

Focusing on the supranational level, it is important to understand that EU directives have started to be drafted following a unitary approach, being each ground of discrimination historically addressed separately. Since the 70s, the development of gender equality directives has been remarkable, e.g. the Recast Directive (2006/54/EC), Employment Equality Framework Directive (2000/78/EC), Burden of Proof Directive (97/80/EC), Equal Treatment Directive (76/207/EEC)¹¹. An overview of EU legislative developments illustrates a slow and gradual shift from a unitary to a multiple approach.

An important advancement toward the consideration of multiple discrimination was reached in 2000 with the Racial Equality Directive (2000/43/EC) pursuing the implementation of the principle of equal treatment without distinction of racial origin, and the Equality Framework Directive (2000/78/EC) establishing a general framework for combating discrimination on the basis of religion or belief, disability, age and sexual orientation at work. These directives were intended to eliminate inequalities and promote equality between men and women, considering that women are especially exposed to the risk of suffering multiple discrimination. Since then, the multiple approach has begun to be adopted in EU law and policies addressing more than one dimension of inequality at once (Schiek and Lawson, 2011; Lombardo, 2014).

A step towards an intersectional approach can be identified in the recognition of multiple discriminations as structural causes of the particular vulnerability of specific groups. Some examples are represented by non-binding resolutions of the European Parliament adopted in the last five years. In particular, the resolution 2013 on women with disabilities (2013/2065/INI) recognizes that women with disabilities are exposed to multiple discrimination resulting from gender, age, religion, cultural and social inequality, stereotypes relating to disability that need to be addressed. Also, the 2014 resolution on violence against women (2013/2004/INL) states that women, due to race, ethnicity, religion or belief, health, marital status, housing, immigration status, age, disability, sexual orientation and gender identity, may have special needs and be more vulnerable to multiple discrimination.

Further progress towards the adoption of an intersectional approach can be detected in some of the more recent European Parliament non-binding resolutions where intersectionality is explicitly mentioned. For example, the 2011 resolution (2011/2244(INI)) on equality between women and men states that minority women, especially Romani women, systematically face multiple and intersectional discrimination because they are disadvantaged not only compared to women belonging to majority groups, but also compared to men from the same minority. Likewise, the

¹¹ Protection against certain types of discrimination has a hegemonic role and affects the design of law and public policies to address other types of discrimination depending on the specific context (Ferree, 2009). This is well illustrated by the predominance of gender in the EU, race in the US, or social class in Germany and France.

2013 resolution (2013/2066(INI)) on the gender dimension of inclusion strategies for Roma women invites Member States to take into account the multiple and intersectional discrimination faced by Roma women, especially regarding employment, housing, health and education.

A rich scholarly production exists explaining that intersectionality challenges political and legislative strategies that segment each dimension of social exclusion, and seek to provide adequate responses to the complexity of social inequalities as a whole (Hannet, 2003; Weldon, 2006; Hancock, 2007; Bowleg, 2008; Solanke, 2009; Nash, 2013). Paradoxically, official documents often confuse intersectionality with the mere reference to more than one dimension of discrimination at the time. The question of course is not merely terminological. Law and public policies can tackle the intersections among different grounds of social inequality without using the term intersectionality (Cho et al., 2013). Yet, the intersections among the different grounds of discrimination are still largely ignored by law and policies of European multilevel democracy (Makkonen, 2002; Uccellari, 2008; Lombardo and Verloo, 2009; Barrère, 2010; Degener, 2011; Fredman, 2016). I argue that terminological issue points to the difficulty of challenging the traditional separations of grounds of discrimination in abstract and *a priori* legislation.

This tendency is replicated in the segmented interpretation of discrimination adopted by European courts. The Court of Justice of the European Union (CJEU) and the European Court of Human Rights mainly address one ground of discrimination at time (Arnardóttir, 2009; Nielsen, 2009; Schiek and Mulder, 2011; Cruells and La Barbera, 2016; Fredman, 2016). The intersections among the different grounds of discrimination are ignored even in those few cases where more than one ground was taken into account (Vakulenko, 2007; Radacic, 2008; Schiek and Mulder, 2011). An important obstacle for the implementation of intersectionality in EU judicial praxis is that the list of protected grounds of discrimination approved in the Treaty and the Directives is considered as exhaustive. In other words, the CJEU considers that it has no margin to add further grounds to the listed ones (*Chacón Navas v Eurest Colectividades SA* [2006], §55 and 56; *Coleman v Attridge Law* [2008], § 46, *Fag og Arbejde v Kommunernes Landsforening* [2014], § 36 and 37).

5. Conclusions

Democratization processes involve questioning the exclusionary effects of law, policy and politics. The increasing complexity of postcolonial and globalized democratic societies makes this task especially difficult. Using intersectionality in studies of law and democracy enables to examine to what extent law and politics take for granted the privileges of the majority group, and reproduce the exclusion of disadvantaged people. By showing the interconnectedness and contextuality of power relations that shape social structures, intersectionality makes it possible advocating for social justice as a part of the wider effort to critique the *status quo* that negatively affects the most marginalized and vulnerable ones.

Through intersectionality, legal scholarship can tailor measures on the subject who is located at the crossroads between different systems of discrimination. Yet, the analysis of the implementation of intersectionality in different democratic law systems highlights that specific legal institutions in different legal contexts make it

working differently. Intersectionality seems particularly well suited to case-by-case decisions that can unravel how different grounds of discrimination interact and shape the particular discrimination at stake. As an interpretative criterion in judicial reasoning, intersectionality allows to consider the mutual and simultaneous constitution of discriminations based on gender, sexual orientation, ethnicity, religion, national origin, (dis)ability and socio-economic status among others. In contrast, civil law systems, being mainly based on abstract and *a priori* rules, experience problems in addressing the interconnection among different grounds of discrimination that make people vulnerable. In the attempt to address intersectional discriminations, EU law ends up reproducing multiple or additive approaches that intersectionality meant to denounce. Further studies need to analyze the specific legal tools, norms, and praxis that can help law practitioners to implement intersectionality in multilevel democratic Europe.

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