INGRiD

INtersecting GRounds of Discrimination in Italy

Intersectionality as a legal approach: a multilevel perspective between international law, European law, Italian law, and comparative perspectives

By

FONDAZIONE BRUNO KESSLER | ISR CENTRO PER LE SCIENZE RELIGIOSE

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The INGRiD Project

INGRiD's priority is to combat discrimination using an intersectional approach which considers the (many) identities that each individual expresses and their interaction with wider systems of exclusion and discrimination. In Italy there are numerous actors involved in combating discrimination which, however, often focus on single factors of discrimination (gender, sexual orientation, ethnicity, etc.). Still, a lot of work remains to be done in order to fully recognise the impact of the intersection of all these dimensions in creating dynamics of exclusion, disadvantage, and discrimination.

INGRiD seeks to promote the intersectional approach in policies and practices of the actors involved in the fight against discrimination in Italy, and namely in the following territories: Trentino, Alto Adige, Veneto, Liguria, and Marche. INGRiD adopts a trans-sectoral approach involving a variety of stakeholders, and combines empirical research, training, innovation of practices, dissemination, and policy advice.

- Counter discrimination by promoting an intersectional approach.

- Increase the effectiveness of anti-discrimination services in preventing, recognising, and counteracting 'multiple discrimination' and consolidate a local and national network that works with an intersectional approach.

- Raise awareness on 'multiple discrimination' among professionals who work in public and private services, transforming them into 'active agents' of the struggle against discrimination.

- Dialogue with policymakers at local, national, and European level to promote more inclusive rules and practices and raise citizens' awareness by increasing their ability to recognise and combat discrimination.

INGRiD includes empirical research, training, exchange of best practices, and awareness-raising. INGRiD's action is informed by research work that explores the "hidden" dimensions of discrimination, both in legislation and in the practices and the implementation of the concept of intersectionality to understand its potential as an intervention tool in the social and legal field. Through the work of partners in the area, INGRiD offers a wide range of training actions aimed at professionals in public and private services (law enforcement, public transport, teachers, public employees, social services) and consolidates the work of a network of branches in various Ligurian provinces and in Trento. Through an awareness-raising campaign carried out with journalistic investigations and by initiating a dialogue with political decision-makers, INGRiD promotes the importance of an intersectional approach in the fight against discrimination. Strongly rooted in the territory, INGRiD constantly looks at the supranational dimension to contextualise the Italian case in the broader European landscape and be inspired by the best practices of other countries, in order to act in a transnational perspective for the adoption of new rules that guarantee an effective protection against all acts of discrimination.

FONDAZIONE BRUNO KESSLER | ISR CENTRO PER LE SCIENZE RELIGIOSE

The Center for Religious Sciences at the Bruno Kessler Foundation (FBK-ISR) is an non-denominational research unit financed mainly by the Province of Trento. FBK-ISR studies the role of religion (communities, minorities, practices, beliefs, institutions, and other actors) within processes of change in contemporary society, including digitisation, migration, growing cultural diversity, the polarisation of beliefs, and disagreement. The research team at FBK-ISR brings together expertise in sociology of religious diversity, social epistemology, philosophy of recognition and inclusion, research methodologies, and applied ethics in the field of medicine and health. FBK-ISR is involved in a number of research and action projects both at the international and national level, with focus on inclusive societies, tolerance and interreligious dialogues, intersectionality, non-discrimination, and participation of young people in social media.

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Authors

Daniele Ferrari is a researcher of Law and Religions at the Department of Social, Political and Cognitive Sciences of the University of Siena and researcher associate to the Groupe Sociétés, Religions, Laïcités (GSRL), CNRS-EPHE, in Paris. My research focuses on the protection of fundamental rights, paying particular attention to the intersection between religion, sexual orientation and asylum. In 2019 I published a monography about the notion of religious minority in international and European law.

Ilaria Valenzi has a PhD from the University of Rame, Tor Vergata, Faculty of Law. Since 2019 she is a research fellow at Fondazione Bruno Kessler, Centre for Religious Sciences.

Member of the Confronti Study Centre, she deals with religious freedom, discrimination and intercultural dynamics in the post-secularisation era. She is a member of the research group “Atlas of religious or belief minorities rights”. Secretary of the Research Centre “Religions, Law and Economics in the Mediterranean Area” (REDESM), University of Insubria (Como). She teaches law and religion at the Waldensian Faculty of Theology in Rome.

Nausica Palazzo is Assistant Professor of Constitutional Law at NOVA School of Law in Lisbon, focusing on family and constitutional law. Nausica was Adjunct Lecturer in Public Law at Bocconi University and Postdoctoral Fellow at the Hebrew University of Jerusalem. She has held visiting positions at the European University Institute and McGill University.

Nausica is particularly interested in queer approaches to family law, critical approaches to anti- discrimination law and theory, comparative constitutional law and the relationship between gender and religious norms in illiberal regimes. Nausica has published articles in these areas in leading journals such as the Columbia Journal of Gender and Law, the Michigan Journal of Gender and Law and the Onati Socio-Legai Series. Her latest book Legai Recognition of Non Conjugal Families is out in February 2021 with Hart Publishing and a collected work on queer/religious alliances in family law will be published by Anthem Press in 2022.

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Executive Summary

This report aims to investigate the legal dimension of the concept of intersectionality. Originated in the context and practice of American legal activism of the early 1920s, intersectionality enters the language of institutions and international law as a tool for reading the phenomenon of discrimination within the promotion of human rights. The comparative viewpoint identifies a general resistance to the use of the category of intersectionality by national and supranational courts, due to the preference for a specificity-led approach and the difficulties in adapting the common law tradition within the domestic legal systems. The Italian case is an interesting point of observation of the possible applications of the intersectional approach: a re-reading of some of the main pronouncements on anti-discrimination law by the national courts shows how intersectionality is a method of re-definition of the categories of discrimination that allows a wider protection of complex subjective identities. In this sense, the intersectional approach embraces a holistic conception of the human person and leads to the emergence of a plural and inclusive vision of anti-discrimination protection.

The drafting of the report is the result of a collective reflection and research process. Paragraphs 1 and 2 were written by Daniele Ferrari; paragraph 3 by Nausica Palazzo; paragraphs 4 and 5 by Ilaria Valenzi. Special thanks to Valeria Fabretti for the help and valuable discussion during the drafting of the text.

Introduction

INGRiD explores the theme of intersectionality from a socio-legal perspective. Regarding the legal perspective, the aim is to understand the concept and its meaning within international, comparative, and European and Italian law. Through an intersectional approach to human rights and equality, this report does not refer to an abstract and universalistic view of human rights nor to factors of discrimination understood in isolation (such as gender, race, or sexual orientation), but promotes a holistic assessment of human rights and the impact of discrimination with regard to subjects bearers a complex social identity. In this perspective, sharing Barbara Giovanni Bello's opinion that this approach goes in a "post-categorical" direction, intersectionality is treated in this report in order to answer a number of important questions: in which context is this concept first theorised? How is intersectionality defined? When is the linguistic category "intersectionality" used in legal texts and case law? To which characteristics of the person does the intersectional approach apply and how do these different characteristics interact with each other? How is intersectionality used by international and European institutions and what is the effect on national legal systems? How does the intersectional approach circulate from Euro-

pean Union law to the law of member states? Is intersectionality useful in protecting human rights? In order to answer these questions, this report applies a legal methodology aimed at reconstructing the genesis and application of the concept of intersectionality within four sections devoted to legal literature, international law, comparative and European law, and Italian law. This methodology, which aims to contribute to the construction of intersectionality from a legal point of view, requires two preliminary clarifications concerning the reason for the reference to legal literature and the multilevel scope of the analysis. From the first point of view, a reference to literature is necessary, since the concept of intersectionality finds its genesis first in legal doctrine and only at a later stage does it become part of the language of international, European, and national institutions. From the second point of view, the scope of the analysis is necessarily multilevel, since the intersectional approach is situated in innovative processes of interpretation and promotion of supranational sources in the field of human rights and is reflected in the law of the states that have ratified and implemented these sources. Intersectionality appears, therefore, as a multidimensional laboratory useful also to evaluate convergences and divergences between international law, European law, and national rights. Let us now look at the contents and objectives of the individual sections.

The **first** section, devoted to the legal literature focused on the concept of intersectionality, pursues the following objectives:

1. to identify the origin of the linguistic category;
2. to clarify, at the definitional level, the legal meanings of intersectionality;
3. to identify the transition of the concept from literature to the language of institutions.

The **second** section explores the intersectional approach under the prism of UN law, in order to:

1. reconstruct the categories to which intersectionality applies;
2. propose a mapping of the use of the concept in international documents;
3. highlight the effects of a practical definition of intersectionality limited to the dynamics of vulnerability.

The **third** paragraph offers a legal analysis of European Union and comparative law in order to understand:

1. the meaning of "intersectionality" in the case law of the Court of Justice of the European Union;
2. the applicability of intersectionality in systems that prefer an equality-as-rationality approach to the principle of non-discrimination (Germany and France).

The **fourth** paragraph explores the intersectional approach within Italian law, with the following twofold aim:

1. to understand how it can interact within the legal fields of its possible application, with particular attention to anti-discrimination law;
2. to test its application in a concrete case, offering an example of a possible intersectional reading of a judicial decision.

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I. Intersectionality in legal literature

The legal notion of intersectionality has been the subject of numerous studies in legal literature since 1989. Within this framework, the legal notion of intersectionality, first theorised by Kimberly Crenshaw with regard to the intersection of race and gender in the discriminatory experiences experienced by women of colour[1], has since been developed by scholars and based on further trajectories, namely: 1) development of a theoretical definition of intersectionality[2] and intersectional discrimination[3]; 2) distinction between different types of discrimination[4]; 3) inclusion of LGBTQI+ people in human rights[5]; 4) promotion of gender equality and women's rights[6]; 5) recognition of new minorities[7]; 6) debate on the protection of migrants[8] and refugees[9]; 7) new interpretations of freedom of conscience

1 K. CRENSHAW, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine. Feminist Theory and Anti-Racist Politics, in The University of Chicago Legal Forum, 1989, p. 139 ff.
2 B. G. BELLO, Intersectionality. Theories and practices between law and society, Milan, Franco Angeli, 2020. (Italian)
3 S. ATREY, Intersectional Discrimination, Oxford, Oxford University Press, 2019.
4 T. MAKKONEN, Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore, Turku, Abo Akademi University, 2002.
5 E. EVANS-E. LÉPINARD (edited by), Intersectionality in Feminist and Queer Movements Confronting Privileges, New-York, Routledge, 2020.
6 See, for example, R. J. COOK (edited by), Human Rights of Women: National and International Perspectives, Phialdelphia, University of Pennsylvania Press, 1994; M. CAMPBELL, CEDAW and Women's Intersecting Identities: A Pioneering New Approach, Revista Direito GV, 11, 2: p. 479-503, 2015; K. CRENSHAW, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine. Feminist Theory and Antiracist Politics, cit.; B. G. Bello, Diritto e genere visti dal margine: spunti per un dibattito sull'approccio intersezionale al diritto antidiscriminatorio in Italia, G. MANIACI, G. PINO E A. SCHIAVELLO (edited by), Le discriminazioni di genere nel diritto italiano, in Diritto e questioni pubbliche, 15/2, 2015, p. 141-171.
7 D. FERRARI, New and Old Religious Minorities in International Law (https://doi.org/10.3390/rel12090698), 12: p. 1-19, 2021; IDEM, Legal Code of Religious Minority Rights. Sources in International and European Law, Abingdon-New York, Routledge, 2021; IDEM, Mapping the Legal Definition of Religious Minorities in International and European Law, in M. VENTURA (ed.), The Legal Status of Old and New Religious Minorities in the European Union. Le statut juridique des minorités religieuses anciennes et nouvelles dans l'Union européenne, Granada, Editorial Comares, 2021, pp. 61-93.
8 A. AMELINA-H. LUTZ, Gender and Migration: Transnational and Intersectional Prospects, Abingdon and New York, routledge, 2019; D. FERRARI, Freedoom of Religion and Migrants, in M. Ventura-A. Palmieri-R. Pavoni-A. Milani, (eds.), Boosting European Security Law and Policy, Napoli, Edizioni Scientifiche Italiane, 2021, pp. 111-131.
9 D. FERRARI, Persecuzione e intersezionalità. Religione ed orientamento sessuale nel prisma dello status di rifugiato, in D. FERRARI – F. MUGNAINI (eds.), L'Europa come

and religion[10]; 8) protection of Roma rights[11]; 9) disability[12].

Starting from the observation of the literature, the intersectional approach conceives the protection and promotion of human rights in an innovative way. In particular, intersectionality tends to go beyond the universalistic approach to human rights, enhancing the specific needs of protection based on the diversity of geographical, social, political, and religious contexts in which people live and build their identity. More precisely, if the affirmation of universal human rights, starting from the Universal Declaration of Human Rights in 1948, globalises belonging to the human race as a universal factor of identity common to all people, the intersectional approach tends to problematise this model, enhancing, in critical terms, the intertwining of specific personal qualities (gender identity, sexual orientation, disability, migrant or refugee status) in which the human condition is contextualised and differentiated at the global level. This transition from a universalistic conception of the human person to a situated and intersectional view of different humanity is realised in legal literature in at least two ways.

The first way defines intersectionality as a category. From this point of view, Barbara Bello defines intersectionality as the critical examination of the "particular situation, qualitatively different, experienced by a person due to the simultaneous interaction between several categories of identity (no longer separable), compared to subjects who are self-defining or marginalised with reference to only one of these categories"[13]. The second way applies intersectionality to the protection and promotion of human rights through the principle of non-discrimination in the interactions between individual risk factors under anti-discrimination law. In these terms, the factors of discrimination provided for by international law, such as ethnicity, skin colour, sex, language, religion, political opinion or any other personal opinion, national or social origin, economic condition, birth or any other condition, in an intersectional perspective are considered from the point of view of their mutual relationship. This approach allows to bring new dynamics of oppression to the attention of scholars and legal professionals. In this perspective, the intersectional approach to discrimination allows us to decode specific dynamics of human rights violations, such as the case of a woman discriminated against not by virtue of being Muslim or lesbian, but as a result of the intertwining of these two factors. The intersection of religion and sexual orientation is the cause of discrimination, as the woman would not have been discriminated against if she were a Muslim, heterosexual woman or a lesbian, non-Muslim woman. Moreover, the woman is likely to suffer more intense violations of her rights than a person who is the victim of discrimination induced by one factor alone.

Overall, intersectional discrimination is defined in the difference from other types of single-factor, multiple, or composed discriminations, because of the cause of discrimination (two or more factors that cannot be separated from each other) and the effects of discrimination (more serious violation than a discrimination produced by a single factor). In this perspective, in her study on intersectionality in the European Union, Sandra Fredman has proposed the following definition of intersectional discrimination: "Intersectional discrimination happens when two or multiple grounds operate simultaneously and interact in an inseparable manner, producing distinct and specific forms of discrimination"[14].

Definition:

> Intersectionality defines variable processes of human rights transformation originating from the intersection of two or more qualities based on personal identity.

II. Intersectionality in United Nations law

Moving on to the United Nations, it is interesting to underline how intersectionality, which finds its origin in the legal studies recalled in the first paragraph, also appears, progressively, in the language of international institutions. Moving from the dynamics of theoretical construction of the concept to its practical application and, therefore, from literature to international law, the category can be constructed through some examples of linguistic use of the formula "intersectionality" and "intersectional discrimination". In this perspective, while international legal sources do not contain this formula, institutional approaches to guaranteeing and promoting human rights have referred to numerous perspectives on intersectionality. Here, we will just recall four of them concerning the intersection of (a) gender and race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation; (b) gender and religion; (c) gender and migration; and (d) LGBT persons and minorities. Before analysing some of the legal texts in which such intersectional perspectives emerge, the recurring reference to the intersection of specific qualities of the human person in international law prompts a preliminary observation regarding the reason for this use of intersectionality. In particular, the United Nations, showing some continuity with the relevant legal literature, has evoked gender identity or sexual orientation as vectors of specific forms of vulnerability when intersected with other characteristics of the person, such as professed religion or membership in a specific community. From this perspective, the

rifugio? La condizione di rifugiato tra diritto e società, Siena, Betti Editore, 2019, p.77-96.

10 J. BOND, Global Intersectionality and Contemporary Human Rights, Oxford, Oxford University Press, 2021, p. 141.

11 ERRC-Europen Roma Rights Centre, Journal of the European Roma Rights Centre, Multiple Discrimination, n° 2, 2009 (http://www.errc.org/uploads/upload_en/file/roma-rights-2-2009-multiple-discrimination.pdf).

12 M. G. BERNARDINI (a cura di), Migranti con disabilità e vulnerabilità. Rappresentazioni, politiche, diritti, Napoli, Jovene, 2019.

13 B. G. BELLO, Intersectionality. Theories and practices between law and society, cit., p. 29.

14 S. FREDMAN, Intersectional Discrimination in EU gender equality and non-discrimination role, Directorate Justice and Consumers, May 2016.

use of intersectionality in international human rights law has predominantly emerged as an application of anti-discrimination law to specific agendas dedicated to migrant rights, women's rights, LGBT rights, and minority rights.

a. Gender, race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation

Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 28 on the Basic Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28), December 16, 2010.

In the context of the interpretation of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of All Forms of Discrimination against Women highlighted in Recommendation No. 28 of 2010 the usefulness of the intersectional approach in fulfilling the obligations placed on States by the Convention[15].

> "18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25".

b. Gender and Religion

Gender-based violence and discrimination in the name of religion or belief, Report of the Special Rapporteur on freedom of religion or belief (A/HRC/43/48), 24 August 2020.

With regard to the intersection of gender identity and religion, in a 2020 report dedicated to gender-based violence and discrimination in the name of religion or belief, the special rapporteur on freedom of religion and belief urged a number of UN institutions to undertake joint work with the aim of drafting a document on the intersection of freedom of religion or belief and the right to equality and non-discrimination on the basis of gender.

> "The United Nations human rights system continue to clarify international human rights law on the intersections of freedom of religion or belief and gender equality and urge the Human Rights Committee, in consultation with the Committee on the Elimination of Discrimination against Women and relevant special procedures, to produce a general comment on the intersections between the right to freedom of religion or belief and the right to equality and non-discrimination on the basis of gender, including in the context of private services".

Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016, Sonia Yaker v. France (CCPR/C/123/D/2747/2016), 7 December 2018.

The applicant, a woman of the Muslim faith, complained that she had been sentenced in France to pay a conventional fine for wearing a dress designed to conceal her face in a public space in 2011. The applicant considered that the prohibition on concealing one's face in a public space under French law violated her rights guaranteed by articles 18 and 16 of the International Covenant on Civil and Political Rights. The Human Rights Committee considered that the application of the prohibition on concealing one's face in a public space constituted intersectional discrimination based on gender and religion.

> "In the light of the foregoing, the Committee considers that the criminal ban introduced by article 1 of Act No. 2010-1192 disproportionately affects the author as a Muslim woman who chooses to wear the full-face veil, and introduces a distinction between her and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable. The Committee hence concludes that this provision and its application to the author constitutes a form of intersectional discrimination based on gender and religion, in violation of article 26 of the Covenant".

c. Gender and migration

Special Rapporteur on violence against women, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44 (E/CN.4/2000/68), 29 February 2000*.

In this 2000 report, the special rapporteur analysed how migration can catalyse specific phenomena of intersectional discrimination against migrant women, who, if undocumented or trafficked, are more vulnerable than men.

15 Reference to intersectional discrimination has since emerged in the texts of other recommendations. See, for example, Committee on the Elimination of Discrimination against Women, General recommendation No. 33 on women's access to justice (CEDAW/C/GC/33), 3 August 2015.

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> "55. Gender-based discrimination intersects with discriminations based on other forms of "otherness", such as race, ethnicity, religion and economic status, thus forcing the majority of the world's women into situations of double or triple marginalization. Not only are women discriminated against as women, but as ethnic, racial or linguistic minorities and as ethnic, racial or linguistic minority women. Because discrimination based on ethnicity, race, religion, etc. is imbedded in State and social structures, such discrimination decreases the rights and remedies available to women and increases women's vulnerability to violence and abuse, including trafficking. For example, the Rohingya women, in northern Arakan State, Myanmar, have been rendered stateless by the fact that Myanmar denies the Rohingya citizenship. Owing to their undocumented status, they are unable to move freely across borders. For this reason, the Rohingya rely on facilitated migration. The women, in particular, become victims of traffickers who prey on their predicament".

d. Minorities and LGBT people

In this document, the expert elaborates on a new approach to guaranteeing and promoting minority rights. Minority rights, in particular, are qualified as a useful agenda for the construction of policies of law capable of detecting multiple or intersectional forms of discrimination based on sexual orientation or gender identity and minority membership.

Special Rapporteur on minority issues, *Report of the Special Rapporteur on minority issues (A/HRC/34/53*), 9 January 2017*.

> "Certain groups within minority such as (...) lesbian, gay, bisexual and transgender persons experience unique challenges and multiple and **intersectional** forms of discrimination emanating from their status as members of minorities and their specific condition or situation".

III. Intersectionality in Comparative and European Law

1. The European Union and intersectionality

Traditionally, the Court of Justice of the European Union has not adopted an intersectional approach to discrimination review. When faced with complex forms of discrimination the Court has shown a penchant for "shoehorning" claimants within a single ground of discrimination. The following two cases are paradigmatic examples of the approach taken by the Court in similar cases. It seems that the Court struggles to see forms of discrimination that are greater than the sum of discriminations based on single grounds.

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Case C-363/12, Z. v A Government department and The Board of management of a community school, EU: C:2014:159.

In this case decided in 2014, the applicant was a woman born without a uterus who decided to resort to surrogacy to have a child. When she applied for maternity leave, her employer refused to grant it based on the fact that she had not been pregnant and had not given birth to the child. The applicant thus claimed that this refusal constituted a form of both gender-based discrimination and disability-based discrimination.

The Court did not consider the ways in which this woman suffered a specific, gendered form of disability and thus the complex nature of her experience of discrimination, and ended up adopting a narrow understanding of motherhood as biological motherhood. It separated each aspect, and resorted to a formalistic approach to comparator analysis, after which it concluded that the woman had not been discriminated compared to other women (who actually gave birth, as they are two different positions that warrant different treatment) nor that she suffered a discrimination on grounds of disability.

Case C-528/13 Geoffrey Leger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang, EU:C:2015:288.

Lerger also raised the question whether multiple axes of discrimination acting simultaneously might give rise to a specific form of discrimination. The case concerned a permanent ban on blood donations for men in a same-sex relationship. The grounds at stake were sex and sexual orientation, grounds that created a specific and particularly odious form of discrimination for gay couples. While the Court did not recognise intersectional discrimination, the opinion of the Advocate General Mengozzi displays an awareness that a similar form of discrimination is at stake. He speaks of a 'clear indirect discrimination consisting of a combination of different treatment on grounds of sex — since the criterion in question relates only to men — and sexual orientation — since the criterion in question relates almost exclusively to homosexual and bisexual men'.[16]

Case C-443/15, David L. Parris v Trinity College Dublin and Others, EU: C:2016:897.

In Parris, the claimant tried to press a claim of intersectional discrimination based on age and sexual orientation. Parris had a male partner who could not obtain a survivor's pension due to allegedly discriminatory eligibility requirements. The programme required that the two partners get married prior to age 60. However, they could not possibly have done so since same-sex partnerships in Ireland only became legal after the two partners turned 60. In this case, discrimination did not concern same-sex

16 Opinion of Advocate General Mengozzi in Case C-528/13 Geoffrey Leger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang, EU: C:2014:2112, para. 44 .

couples as such but a sub-group within same-sex partners comprising those above 60. Neither were all persons above the age of 60 discriminated because heterosexual partners could have married "in time". Thus, the limits of an approach that looks at grounds in isolation is apparent in that there is a combination of factors that makes the case of Parris (and of similarly situated persons) unique.

Interestingly, in *Parris* the Court recognised the legal possibility of having an intersectional approach to equality. It defines it as a new category of discrimination that results from the combination of multiple grounds, and argued that "no new category of discrimination resulting from the combination of more than one […] groun[d] […] may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established".

However, the Court refused to make steps towards embracing the approach. It seemed to hint to the fact that the legislation is better placed to create a new type of (intersectional) judicial reasoning – meaning that it would not be necessary to add new grounds of discrimination (in this case, "same-sex partners above the age of 60").[17]

But on a more positive note, the Parris case signals that the Court acknowledges the existence and plausibility of intersectional discrimination, understood as the legal possibility to simultaneously review several grounds of discrimination[18]. The opinion rendered by the Advocate General Kokott is also worth mentioning, although the Court eventually did not follow it. In the AG's words, '[t]he Court's judgment will reflect real life only if it duly analyses the combination of those two factors, rather than considering each of the factors of age and sexual orientation in isolation'[19] since '[t]he combination of two or more different grounds […] is a feature which lends a new dimension to a case'[20]. This passage shows an awareness of the category, but also a strong resolution to implement it through a synergistic assessment of grounds without falling into the 'trap' of assessing grounds in isolation.

Some steps towards embracing the approach have been made in the area of discrimination based on disability.

Case C-152/11 Johann Odar v Baxter Deutschland GmbH, EU: C:2012:772.

In *Odar*, for instance, the Court recognises 'the risks faced by severely disabled people, who generally face greater difficulties in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age'. In this sense, the Court of Justice accepted the idea that the interplay of two factors, age and disability, is able to yield specific disadvantage.

17 G.Calvès, L'inflation législative des motifs illicites de discrimination: essai d'analyse fonctionnelle, Actes du colloque "Multiplication des critères de discrimination", 2019, p. 160, available here: www.droitucp.fr/uploads/filemanager/source/recherche/lejep/publications/2019/Calve%CC%80s%20colloque%20DDD.pdf.

18 This legal possibility had already been recognised in Meister (Case C-415/10 Galina Meister v Speech Design Carrier Systems GmbH, EU: C:2012:217), a case where a claim alleging discrimination on grounds of sex, age, and ethnic origin had been raised.

19 Opinion of Advocate General Kokott in Case C-443/15 David L. Parris v Trinity College Dublin and Others, EU: C:2016:493, para. 4.

20 Ibid par. 153.

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2. Comparative analysis outside of Europe

This section offers an overview of two approaches that come close to an intersectional approach. I review below examples drawn from South Africa and Canada.

The Constitutional Court of South Africa has explicitly adopted an approach that prohibits intersectional discrimination, understood as discrimination based on a confluence of many grounds. In the case below, the Court moves one step forwards and recognises intersectionality as a general theory of interpretation of constitutional rights.

Constitutional Court of South Africa, Mahlangu and Another v. Minister of Labour and Others [2020] ZACC 24

A woman, Ms. Mahlangu, was a blind domestic worker who had drowned in the swimming pool of her employer. Her daughter sued the government when she found out that her mother was not eligible to receive workers' death compensation under state law.

The question before the Constitutional Court was whether her exclusion amounted to a violation of equality, dignity, and access to social security under the Constitution of South Africa. Especially, since domestic workers were predominantly Black women, (indirect) discrimination on the basis on class, race, gender, and social status was raised.

In its judgment, the Court concluded that since the case involved more than one ground the 'importance of an intersectionality analysis [became] unavoidable'. The discussion then focused on how an intersectional approach can help unveil patterns of group disadvantage that are not easily discernible as they occur, as in the case of Black women who are domestic workers, based on multiple grounds at once.

Not only then did the Court strike down the exclusion of domestic workers from the programme, it also concluded that intersectionality is the principal theory of constitutional interpretation by arguing that '[a]dopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination. An intersectional approach is the kind of interpretative approach which will achieve "the progressive realisation of our transforma-

tive constitutionalism'.

Canada has also demonstrated awareness of intersectional discrimination, despite not embracing an intersectional approach at the constitutional level. In equality litigation, the Supreme Court of Canada recognised as a possibility the concept of 'confluence of grounds' or 'intersection of grounds'[21].The Canadian Charter of Rights and Freedoms protects against discrimination based on both enumerated and so-called analogous grounds not explicitly mentioned by the Charter. The introduction of an intersectional approach would be thus put to work by recognising a new non-enumerated, analogous ground. For instance, domestic workers who are mostly Black women could invoke the new ground of domestic workers instead of that of sex or race. Additional examples include custodial parents[22] or a group of elderly claimants, mostly female widows[23]. In this sense the notion of confluence of grounds into a new non-enumerated ground allows Canada to promote an approach that comes close to intersectionality.

At the provincial level, the Nova Scotia Court of Appeal adopted this approach.

***Sparks v Dartmouth/Halifax County Regional Housing Authority,* 1993 CanLII 3176 (NS CA)**

The case concerned an allegation of discrimination against public housing tenants, who were relatively less secure and more easily evicted compared to private housing tenants. The invoked grounds were race, sex, and income because persons in public housing were mostly low-income black women. On that occasion, the Court of Appeal held that public housing tenants formed an analogous ground (para. 33-34). Therefore, there was no need to understand whether discrimination was occurring on one of the invoked grounds of sex, race, and income.

3. European civil law jurisdictions: struggling with the concept

In Europe, the applicability of the theory of intersectionality might encounter hurdles. At the same time, the European contexts presents certain opportunities. This section thus lists both the problems and opportunities that the incorporation of intersectionality presents for EU Member States.

Problems:

Interpretative and enforcement-related obstacles legal practitioners could face when implementing a ground-based anti-discrimination ap-

21 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, paras. 93 and 94.
22 *Thibaudeau v Canada,* [1995] 2 SCR, L'Heureux-Dubé and McLachlin JJ dissent.
23 This is the case of the applicants in *Withler v Canada (Attorney General),* [2011] 1 SCR 396.

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proach borrowed from the common law tradition.

The Member States of the EU have a civil law system in place. Grounds-based anti-discrimination approaches to equality are especially widespread in common law jurisdictions and supranational systems in Europe, the European Union, and the framework of the European Convention of Human Rights. Notions of grounds of discrimination were thus largely extrinsic to the legal culture until recently[24]. The use of a model of grounds-based discrimination has been especially the product of the implementation of EU law into domestic legal systems.

This reduced familiarity with grounds of discrimination derives from the fact that legislation in continental Europe tends to adopt a conception of equality as rationality. This notion refers to the idea that, save when an adequate justification is put forward, like cases must be treated alike, and different cases deserve a different treatment. Equality here acts as a 'self-standing principle of general application'[25] and this type of review questions the rationality of the distinction or of the same treatment, where different treatment is warranted. The principle is so rooted in Europe that oftentimes even when the constitution mentions grounds of discrimination, the prevailing interpretation continues to be equality as rationality. This is the case of Italy, where the constitutional court, after a handful of initial decisions embracing an anti-discrimination approach based on a closed list of grounds for discrimination,[26] soon moved to adopt a broader equality-as-rationality approach. This is also the case of Germany, where the federal constitutional tribunal clarified the list of prohibited grounds (sex, parentage, race, language, national origins, faith, political, and religious opinion), only clarifying under which circumstances a differentiation will surely *not* be acceptable.[27]

Opportunities:

Intersectional approach to equality is not as much concerned with the notion of 'grounds' as it is with a holistic assessment of the discriminatory impact over a claimant with a complex social identity. Possibility that such an approach might be more manageable for legal practitioners acquainted with an equality-as-rationality approach and less with fixed grounds of discrimination.

Grounds-based anti-discrimination laws might cause legal practitioners to overlook the complex dimension of discrimination. This is because grounds tend to be assessed in isolation and if the experience of discrimination cannot be 'shoehorned' into one of the grounds (sex, or race)

24 B. Havelková & M. Möschel, Introduction. In: *Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford University Press, 2019.
25 C. McCrudden and S. Prechal, 'The Concepts of Equality and Non-discrimination in Europe: A Practical Approach' (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.2, November 2009) 15.
26 *See e.g.*, Corte cost., judgment n. 28/1957.
27 McCrudden & Prechal, *supra* note 11, at 24.

such an experience will fall through the cracks.[28] Searching discrimination through the lenses of grounds might thus prove problematic and those that are only used to detect discrimination through this analytical category might not be well equipped to see broader intersectional forms of discrimination.

Second, anti-discrimination systems unlike equality-as-rationality systems have a different function which is that of protecting a claimant from undue discrimination and interference with a protected sphere in which she is free from discrimination. In this sense one could quality anti-discrimination rights as negative rights, that is rights to be free from undue interference in the enjoyment of one's rights. By contrast, a conception of equality as rationality is more concerned with the rationality of the regulatory system and is structurally inclined not to prevent undue interference but assess the rationality of the system per se.

Where does intersectionality lie relative to these systems? This is not easily understood. One could see it as lying somewhere in-between. The starting point is still that of an anti-discrimination model. As an anti-discrimination model, however, it requires a *quid pluris* than seeing grounds as the conceptual lenses whereby we detect discrimination. Intersectionality as a framework requires a more holistic judgment of the personal circumstances of the claimant. Judges in civil law jurisdictions might be uniquely positioned to carry out this holistic assessment. First their approach is not one instinctively looking at single grounds, i.e. personal characteristics, to detect the unfairness of a government measure – although they are becoming a bit more familiar with this approach when it comes to the conduct of private actors, e.g. an employer[29]. Second, civil law judges are more used to conducting a systemic analysis whereby they look at the larger context to detect the rationality of the government measure.

4. Europe: A Case law analysis

This section looks at three case studies to understand the extent to which European legislation might be receptive of intersectionality: Germany, France, and Belgium.

Germany

According to anti-discrimination lawyers in Germany, there is a 'weak culture' of anti-discrimination law: 'Non-discrimination law still plays a minor role in practice'.[30]The reasons are many, but the critical axis of litigation

28 E.g., N. Iyer, Categorical Denials: Equality Rights and the Shaping of Social Identity, in Queen's Law Journal, Vol. 19, No. 1, 1993, 179-207; N. Palazzo, Equality in Canada: A tale of non-normative groups struggling with grounds of discrimination, in Oñati Socio-Legal Series Vol. 10, No. 1, 2020), 88-122.
29 Havelková & Möschel, supra note 9, at 5.
30 M. Wrase, Anti- Discrimination Law and Legal Culture in Germany. In B. Havelková & M. Möschel, supra note 9, at 136.

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is the one occurring before the Federal Constitutional Court (FCC). Constitutional arguments pivoting on other fundamental rights are simply more common as well as consistent with the German legal culture. The reception of EU equality directives turned out to be long and complicated, marked as it were by six years of debates on how to transpose them into the legal system. These debates expressed skepticism towards an anti-discrimination approach to equality, with criticism being raised both by politicians and civil society. A preoccupation, for instance, concerned the possibility for certain grounds to be discriminated against on more than one accounts. According to the explanatory memorandum of the Allgemeines Gleichbehandlungsgesetz -AGG, transposing EU equality directives, this should trigger a higher compensation.[31] But this interpretation has not been adopted so far. It is to be noted that most cases implementing AGG are in labour courts, though an estimated 0.2% of all incoming cases in German labour courts relate to the AGG'.[32]

Sarah Elsuni and Anna Lena Göttsche note the 'the absence of multidimensional court rulings'.[33]

In several cases, one or more dimensions of discrimination were overlooked by the court altogether.

Other times they were seen but then crossed out, with some limited exceptions.[34] This report analyses examples from two main set of cases, those concerning the headscarf and the so-called 'disco cases'.

Federal Constitutional Court of Germany, BVerfG, Order of 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10

The case concerned two Muslim teachers, who were refused employment by the state of Berlin because they wore headscarves and were then compensated under the AGG. Their compensation was due since the recruitment policy of Berlin violated a previous decision of the Federal Constitutional Court on religious clothing, in which the state law on religious neutrality in schools was challenged.[35]

The Court found the unconstitutionality of the scarf ban for teachers in public schools to express their religious identity as contrary to religious freedom. The decision, however, also engaged with the issue of discrimination. First, if found that the law violated the principle of equality by discriminating on the basis of religion to the extent that it introduced some educational privileges for the Christian denomination. As for additional grounds

31 BT-Drs. 16/1780: 38
32 M. Mahlmann, 'Country report: Non- discrimination' (European network of legal experts in gender equality and non- discrimination, European Commission 2017) 91.
33 S. Elsuni, A.L. Göttsche, Multidimensional discrimination and the law: Views and experiences from a German perspective, in Sociologia del diritto n. 2, 2016, 92.
34 Ibid., 87.
35 § 57 Abs. 4 des Schulgesetzes für das Land Nordrhein-Westfalen (SchulG NW) vom 15. Februar 2005 (GV.NW S. 102) in der Fassung des Ersten Gesetzes zur Änderung des Schulgesetzes vom 13. Juni 2006 (GV.NW S. 270).

of discrimination, the Court 'saw' and addressed the gender dimension since women are disproportionately affected by the law, since they are de facto the only workers wearing religious garments. Interestingly, this second dimension was raised by the court, not the claimants themselves.[36]

Decision of the Federal Labour Tribunal of 20 August 2009 - 2 AZR 499/08

In this decision, the claimants advanced a set of arguments before the federal labour court that included a violation of art. 3, par. 1 of the Fundamental Law (principle of equality), namely gender-based discrimination. The Court rejects the claim arguing that the state law on religious neutrality does not treat individuals differently based on gender: the law prohibits religious expressions (and the court establishes that wearing the headscarf constitutes religious expression) regardless of gender. In this case, the court concludes that the law 'is not overtly aimed at prohibiting the religious clothing such as the Islamic veil or headscarf'.[37] This is a clear repercussion of the failure to adopt an intersectional approach.

A claim arguing religion-based discrimination was also rejected. The court noted that the law on neutrality does not treat religions in a different manner, as 'it covers all religious expressions independent of their content'.[38] For instance, in its view, the expression of Christian religious beliefs would not be accepted either.

Regional Court of Appeals in Stuttgart of 12 December 2011 (OLG Stuttgart – 10 U 106/11).

In the 'disco cases' the problem is men of color being systematically denied access to dance clubs. This practice has been deemed racist after some studies unveiled how pervasive discrimination against persons 'who do not look German' is.[39] In this case, i.e. the main case within the saga, the Court of appeal recognised that the court of first instance failed to grasp the racist discrimination underlying the practice (and thus erred in not awarding compensation) to Black claimants.[40] It found that the lower court also failed to see the multidimensional nature of the discrimination suffered by the applicant, which was flowing from gender as well as skin-color.

France

The very notion of intersectionality has been met with resistance in France. In the country, notions of race are met with unease, and problems of inequality are mostly addressed through the lenses of class, meaning social and economic status.[41] The notion of the abstract subject inherited

36 Elsuni, Göttsche, *supra* note 19, at 96.
37 §1(4)(a).
38 §1(4)(a).
39 93.
40 The Court found that the practice of denying access violated 19 I Nr. 1 Var. 2 AGG.
41 M.R. I Escoda, F. Farinaz, É. Lepinard (dir.), Introduction, L'intersectionnalité : enjeux théoriques et politiques, Paris : La Dispute/SNEDIT, 2016 (recalling «la nécessité de ne pas omettre la classe et de penser les rapports sociaux dans toutes leurs articulations»). See also S. Bilge, « Le blanchiment de l'intersectionnalité », Recherches féministes, 2015, vol. 28, n° 2, p. 11.

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from the French revolution ('sujet de droit') exerts still a strong gravitational pull within French legal discourse. Anti-discrimination law, with its emphasis on the many facets one person possesses (that can lead to oppression, subordination, and deprivation of privileges), is fundamentally at odds with the notion of abstract subject.

As the parliamentary debates on the domestication of European directives on anti-discrimination attest to, the idea is that anti-discrimination law is inherently divisive as it creates as opposed to fight social and cultural cleavages:

The French Republican conception of equality considers that men are equal by the sole fact of being men: the fight for equality is necessarily grounded in the affirmation of a common belonging to humanity, independent from any private and secondary characteristic. Yet the proposed bill [incorporating the EU directives into the French legal system] conversely and simultaneously promotes the fight against inequalities and the exacerbation of differences. It implies that inequality is always linked to discrimination. Instead of turning the principle of equality into a common principle that brings individuals together, it turns it into a factor of division – each individual being thus sent back to his/her private characteristics.[42]

Legislation has attempted to mitigate concerns around the divisive nature of anti-discrimination through some devices. First, it has opted for the adoption of symmetrical grounds of discrimination that apply to all categories falling under a certain umbrella (e.g. both men and women under the umbrella sex/gender). Second, it has opted for the adoption of the most recurring grounds ('universally' applied grounds),[43] while attempting at the same time to remove the most divisive categories from the constitution (reference is made to race).[44]

As to the case law, France is a paradigmatic example of a country where the judge only looks at grounds in isolation (either single[45] or multiple[46] grounds) when reviewing cases of discrimination. At the same time, however, grounds of discrimination are not threshold requirements to satisfy and are hardly used to screen out cases. They have a more limited role in the sense that judges oftentimes do not clarify the ground on which discrimination occurs:

42 M. Dini, Rapport 253 fait au nom de la commission des affaires sociales du Sénat (2008) translated into English by St phanie Hennette- Vauchez and Elsa Fondimare in Incompatibility between the 'French Republican Model' and Anti- Discrimination Law? Deconstructing a Familiar Trope of Narratives of French Law, in Havelková & Möschel, supra note 9, at 59.
43 Bui- Xuan, Le droit public fran ais entre universalisme et diff rentialisme (Economica 2004) 88.
44 Constitutional Bill of 9 May 2018.
45 Versailles, 5 mars 2014, n° 12/03739 (race).
46 Paris, 21 février 2018, n° 16/02237 (sexual orientation and health status).

Il est vrai qu'en droit français de la non-discrimination, la question du motif ne présente pas une importance cruciale. En droit du travail, un quart des décisions par lesquelles les cours d'appel statuent sur une discrimination s'abstiennent d'en préciser le fondement. Le juge peut également requalifer le motif avancé par le salarié, ou évoquer d'offce un nouveau motif. Le moins que l'on puisse dire est que les « critères prohibés » énoncés par le code du travail ne font pas l'objet d'une approche très rigoriste. Il en va de même en droit administratif, où le juge n'hésite pas à placer sur un même pied les motifs protégés et ceux qui ne le sont pas.[47]

Based on similar observations, some scholars have put forward the idea that French judges might be more receptive of intersectionality and free to see 'discrimination that is based on multiple criteria of differentiation and [that], when this occurs, it is really not important to determine the grounds of discrimination.'[48]

Belgium

Ultimately, it is worth mentioning the case of Belgium for two reasons. First, a potential limit to the reception of intersectionality is the way in which the introduction of anti-discrimination laws has oftentimes been piecemeal and scattered throughout statutes. Scholars have thus noted that "[t]he potential to combine grounds, however, is complicated in some states by the continued existence of separate statutes. For example, in Belgium, each element of a multiple claim must be challenged separately under three different statutes, replicating the position at EU level."[49]

At the same time, however, Belgium illustrates how some countries adopt a particularly long and rich list of grounds. This also attests to how grounds have a different function in continental European countries, one in which they are hardly used as threshold requirements to satisfy and then to become *indicia* for discrimination able to help orient the assessment of courts. Let's take the example of the grounds protected by Unia, the equality body of Belgium. Its mandate is to address inequality based on what currently are seventeen grounds of discrimination: nationality, race, colour, ascendance, national or ethnic origins, disability, sexual orientation, age, la 'fortune', current or prospective health status, religious or philosophical beliefs, birth, physical or genetic characteristics, marital status, political ideas or affiliation with labour unions, and social status. As it can be noted, Unia has no jurisdiction over discriminatory acts based on gender. There is an ad hoc body entrusted with this mandate, i.e., the Institut pour l'égalité des femmes et des hommes.

47 G. Calvés, L'infation législative des motifs illicites de discrimination : essai d'analyse fonctionnelle, in Mission de Recherche Droit et Justice, Acte du colloque "Multiplication des critères de discrimination — Enjeux, effets et perspectives", 2018, https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/actes_colloque_accessibilite.pdf, p. 160 (citation omitted). Citing the following decision as an example using grounds not included in the law: CE, 16 October 2017, n° 383459 (age and place of residence).

48 S. Bilge, O. Roy, « La discrimination intersectionnelle : la naissance et le développement d'un concept et les paradoxes de sa mise en application en droit antidiscriminatoire », Canadian Journal of Law and Society/Revue canadienne Droit et Société, vol, 25, n°1, 2010, p. 68.

49 S. Fredman, Intersectional discrimination in EU gender equality and non-discrimination law, Directorate-General for Justice and Consumers (European Commission) , European network of legal experts in gender equality and non-discrimination, Brussels, 2016, p. 53, available at http://k6.re/0KSHa.

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The proliferation of grounds to protect could virtually be a fertile ground to promote an intersectional approach that combines such grounds as opposed to reading them in isolation. The concept of intersectionality is even mentioned in institutional documents.[50] However, at present it seems that its implementation has not occurred, and that intersectionality has merely been used as a 'buzzword'. The separate jurisdiction of the Institute over gender discrimination is a hurdle.

Most crucially, this is likely due to a widespread skepticism concerning the suitability for the concept to be applied in a clear manner. This skepticism creates the need, stressed in this report, for additional clarity in determining what intersectionality stands for.

IV. Intersectionality in Italian law

Despite some recent popularity of the intersectional term and practices in grassroots associations and organisations, the Italian legal context has remained little permeable to the concept of intersectionality. In addition to the difficulty in recording studies that have explicitly addressed the issue from the point of view of philosophy and sociology of law, there is a general resistance to the use of intersectionality within the pronouncements relating to its possible field of application, with particular regard to the rights of the person and to anti-discrimination law. This resistance should not, however, be surprising. It fits the model with which Italian anti-discrimination law has gradually been constructed, in that mixture of internal elements and transposition of supranational normative sources which constitutes the legal substratum of its application. In both cases, the protection of subjects who complain of direct or indirect discrimination is based on single categories or identity factors, poorly communicating with each other and functioning according to the principle of similarity/difference[51]. In particular, on the European front, the affirmation of discriminating factors is a legal conquest that has required time and repeated legislative interventions, with the gradual widening of the traditional grounds[52] for discrimination

50 See Annex of the Report

51 See in particular M. BARBERA, *Eguaglianza e differenza nella nuova stagione del diritto antidiscriminatorio comunitario, in Giornale di diritto del lavoro e di relazioni industriali,* n. 99/100, 2003. (Italian)

52 Consider, for example, art. 13 of the Treaty of Amsterdam which, in addition to art. 12 of the Treaty establishing the European Union, establishes that "The Council (...) may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation", thus expanding the range of discrimination factors, historically limited, within the EU, to nationality and sex.

and the formulation of specific anti-discrimination clauses within treaties[53], until the issuing, in 2000, of the new generation of anti-discrimination directives[54], whose implementation process has been completed in all member states. This process has helped determine the scope of protection in a uniform way, through the entry of the factors of discrimination listed in the directives even in those national contexts where they were missing.

In the Italian context, the transposition of EU legislation took place with legislative decrees 215 and 216 of July 9, 2003, which opened the door to some forms of so-called multiple discrimination[55] and contributed to the construction of a ramified system of sources of law on anti-discrimination. The implementation of the directives has in fact added to the already existing internal sources[56] and has been a starting point for subsequent implementation of European legislation[57]. Even the purely procedural aspect has contributed significantly to the construction of the Italian model, through the confluence of the entire matter (with the exclusion of the urgent anti-discriminatory action provided for by art. 38 of the Code of Equal Opportunities and, therefore, with exclusive reference to gender discrimination) within the summary procedure of cognition[58], a procedural tool designed to simplify the procedure and lighten the burden on the plaintiff to provide evidence of discrimination. This result has been achieved through the mechanism of partial reversal of the burden of proof and through the use of statistical data for evidentiary purposes[59].

Nonetheless, the first reference point for typification by factors is certainly to be found in the constitutional text which, in art. 3, offers a complete (though not exhaustive) list of elements around which to define the identity of subjects and, at the same time, preserve the principles of equal social dignity and equality before the law[60]. As has been effectively argued, although the law continually operates discriminations which are realised through the classification and distinction of subjects, legal positions of advantage, obligations, and duties, such discriminations take on a neutral value, constituting a prescriptive technique of the principle of equality rather than an act directed to achieve a difference in treatment not justified[61]. According to this assumption, all law operates for the affirmation of the principle of equality, understood both in a legal sense and as a socially shared value[62]. If this is true, the list of factors, with reference to which the principle of formal equality is expressed by art. 3 Const., is a mere prescriptive technique and does not assume a division between identity characteristics of the individual not communicating or mutually exclusive. This reflection offers an important point of analysis for the theory of intersectionality, which aims to unveil the contradictions and limits of law in shaping identities and to reconsider those subjectivities placed at the margin of its reflection, repositioning them at the centre, or rather at the crossroads of its discourse. Intersectionality operates, therefore, for the affirmation of a principle of equality that is more mature, in that it is more inclusive, and complete, in that it is applied in its entirety.

It is therefore necessary to start from the principle of equality and the historical-legal development of anti-discrimination law to analyse how the concept of intersectionality can find a space for application in Italian law.

53 The reference is to Article 21 of the Charter of Fundamental Rights of the European Union, according to which "any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaties and without prejudice to specific provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

54 This refers to Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. As will be seen, both have been implemented by Italy by means of respectively Legislative Decree no. 215 and 216, both dated July 9, 2003.

55 This is the case of discrimination as a form of racism of a "cultural" and religious nature", hypothetically diversified in the case of illicit conduct against women and men. On this point, see B.G. BELLO, *Multiple Discrimination and Intersectionality: these unknowns!* available here: https://www.asgi.it/wp-content/uploads/2015/05/Approfondimento-Barbara-Giovanna-Bello_-Maggio-2015.pdf (Italian)

56 This concerns art. 43 of Legislative Decree 286/98, on the prohibition of discrimination on the basis of race, ethnic or national origin, religious beliefs and practices and, even before, art. 15 of Law 300/70 (the so-called Workers' Statute), according to which any act or agreement aimed at discriminating on the basis of political, religious, racial, language or sex, disability, age or sexual orientation or personal beliefs is null and void.

57 Reference is made to Legislative Decree no. 196 of November 6, 2007, implementing Directive 2004/113/EC on the principle of equal treatment between men and women with regard to access to and supply of goods and services; to Legislative Decree no. 5 of January 25, 2010, implementing Directive 2006/54/EC on equal opportunities and equal treatment of men and women in matters of employment and occupation; and to the numerous legislative decrees implementing the directives relating to the status of third-country nationals from third countries. 5 of implementation of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in matters of employment and occupation; as well as the numerous legislative decrees implementing the directives relating to the status of long-term resident third-country nationals, the procedures for issuing a single permit for residence and work in a member state and all the rights in the workplace.

58 The inclusion of anti-discrimination matters in the summary procedure of cognition is due to the enactment of art. 28, Legislative Decree 150/11; the procedural indications relating to the procedure are contained in articles 702-bis et seq. of the Code of Civil Procedure.

59 ee I. VALENZI, The function of statistical data and the reversal of the burden of proof in the case of disability discrimination, in *Rivista giuridica di diritto del lavoro e della previdenza sociale,* no. 3, 2016 pp. 386-391. (Italian)

60 Art. 3 of the Constitution: "all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions. It is the duty of the Republic to remove economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country".

61 See L. GIANFORMAGGIO, Eguaglianza e differenza: sono veramente incompatibili?, in A. FACCHI, C. FARALLI, T. PITCH (eds.), Eguaglianza, donne e diritto, Il Mulino, Bologna, 2005, pp. 33-61.

62 L. GIANFORMAGGIO, Eguaglianza e differenza: sono veramente incompatibili?, cit.

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In this regard, two elements must be taken into consideration. The first concerns the nature of intersectional theory: a methodological approach, first of all, which consists in "doing" and "naming" intersectionality within the law, forcing its boundaries[63]. This nature allows the use of the concept of intersectionality despite the resistance of legislators and jurisprudence to make explicit use of it as a legal category. The second relates precisely to the question of intersectionality as a category: as Crenshaw herself has argued, it is not so much a matter of reworking an anti-discrimination law devoid of categories, but of re-signifying existing categories at their point of intersection[64].

With this view, we will try to re-read in an intersectional key some well-known Italian pronouncements in the field of anti-discriminatory law, in order to test how much this reading key can, hypothetically, guarantee a wider spectrum of protection to those subjectivities neglected or not intercepted by the simple mono-factorial approach.

1. Case Study: Intersection of Gender and Religion

Court of Appeal of Milan, Labour Section, judgment May 20, 2016, n. 579.

> Subject: The exclusion of a candidate from a selection for a job with duties as a hostess of a fair, determined by the refusal of the candidate to remove the hijab, constitutes direct discrimination on the grounds of religious affiliation, not being able to consider that the absence of the veil constitutes an essential requirement of the service ex art.3 d.lgs. 216/2003; it follows that the right of the discriminated subject to compensation for non-pecuniary damage.

The issue of the wearing of the Islamic headscarf in the workplace is an emblematic case of interpretation of anti-discrimination law according to the intersectional approach. The facts referred to in this judgment are well known and concern the case of a girl, an Italian citizen born from naturalised Italian Egyptian parents of Islamic faith, excluded from a selection for a job as a promoter to be carried out during a shoes fair, because of her unwillingness to remove the veil for the performance of the task. The matter was brought to the attention of the Court of Lodi, which found that there was no discrimination on the grounds of religion, either direct or indirect. On this last point, in particular, the judge referred to the requirements that the client company would have requested for the selection of female workers - strictly all women - such as *"height of at least 1.65 m, shoe size 37, size 40/42, long and fluffy hair, willingness to wear the uniform provided by the company with a miniskirt"*. No intentional or apparently neutral behaviour, according to the judge, was put in place against the young woman, since long and fluffy hair is an essential requirement for the performance of the service, to be enforced against any woman who does not intend, for any reason, to uncover it, so there are no discriminatory reasons related to the specific religious meaning to which the veil is connected. As is well known, the Court of Appeal of Milan overturned the ruling, deeming discrimination on religious grounds to exist, since the hijab has a purely religious connotation and hair is not an essential element for carrying out a specific job. In this sense, it is not possible to derogate from the principle of non-discrimination on the basis of a subjective choice by the employer.

In terms of intersectionality, it is possible to grasp more than one element of interest related to this pronouncement. The first is the difficulty in seeing in the Islamic veil an element of full expression of the personality and religious identity of the women who decide to wear it and, therefore, to understand the specific risk of religious discrimination to which Muslim women wearing the veil are subject. The intersectional approach helps us to unveil this ambiguity through the identification of the subject of comparison, necessary for the evaluation of possible discrimination:

Women -->Muslim women/believers --> Muslim women with veil

The scheme shows that, if the comparison had been made solely on the basis of gender, no discrimination would have been possible. The job offer in the case under analysis was, in fact, directed only towards women (even if with precise physical requisites). Even if the comparison had been limited to the first stage, i.e. only to the religious factor, we would not have been able to record any discrimination: nothing in the case in question suggests unjustly different treatment on the basis of this factor, since a woman's religion is not a differential requirement in itself (unless it manifests itself in some external form, incompatible with the employer's demands). On the other hand, the wearing of the veil by Muslim women is a protected factor that stands at the crossroads between religious affiliation and gender, determining the existence of intersectional discrimination against specific subjects. In this sense it is possible to conclude that, although the question has been resolved exclusively on the basis of the ascertained existence of discrimination on religious grounds, in fact the work of re-signification of the categories has also led to the emergence of the gender factor, which expressly qualifies, together with the religious one, the particular situation of these subjective identities.

2. Case study: Intersection of ethnicity, nationality, health, and indigent status

Court of Appeal of Genoa, Section III Civil, judgment August 26, 2020, n. 80

> Can we regard as discrimination against people of nationality of Third World countries grouped with the indication of three Conti-

63 B.G. BELLO, Intersezionalità. Teorie e pratiche tra diritto e società, cit.
64 K. CRENSHAW, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine. Feminist Theory and Antiracist Politics, cit. Più diffusamente, B.G. BELLO, Intersezionalità. Teorie e pratiche tra diritto e società, cit.

nents - and therefore violation of Articles 2 and 43 TU Immigration - municipal ordinances that, automatically correlating the onset of infectious diseases to the ethnic origin and geographical provenance of the subjects, bind right of residence of the same within the municipality to the presentation of a health certificate that ascertains that a person at that time certainly is not incubating an infectious disease or is not a healthy or asymptomatic carrier?

In 2015 and 2016, the municipalities of Alassio and Carcare issued health protection ordinances aimed at prohibiting people without a fixed abode from Africa, Asia, and South America, from settling or residing, even occasionally, within the municipal territory in the absence of a health certificate attesting to the negativity of transmissible infectious diseases. These measures were based on press reports alleging an exponential increase of citizens coming from the territorial areas indicated, in view of the poor prophylaxis measures in force in those countries, which make *"still present many contagious and infectious diseases such as TB, scabies, HIV, and is still ongoing a very serious epidemic of Ebola as also attested by the WHO"* (from the ruling of first instance, Trib. of Genoa, 28.7.2017). The ruling of the Court of Appeal of Genoa, fully confirming what was established in the first instance, recognised the existence of discrimination on the grounds of nationality and ethnicity. In this regard, art. 43 of Legislative Decree no. 286/1998 indicates as discriminatory any behaviour from which an illegitimate distinction derives on the grounds of the national origin of persons. In fact, the ordinances imposed an obligation to carry out health checks, of uncertain content, on a group of individuals identified on the basis of a general non-European geographical origin, prohibiting them from accessing the municipal territory and the relative reception facilities in the event of non-compliance. Due to its seriousness, the case had an important resonance in the national media. Consequently, in declaring the behaviour to be discriminatory, the judge ordered the municipal authorities to publish the order in a national newspaper and on the homepage of their respective institutional websites for a minimum of 3 months.

Analysis of the case in question according to an intersectional approach reveals the high degree of complexity of the issue and the various levels of intersection between protected factors. The first concerns the co-presence of the race and ethnicity factors with the nationality factor. In the case in point, nationality is the element of differentiation: in fact, the deterrent treatment is reserved to persons having a nationality other than Italian. The highlighted semantic fields cooperate therefore for the identification of specific subjectivities, which are the result of their mixture. The data are easily grasped through the mechanism of comparison and therefore:

race/ethnicity --> race/ethnicity + Italian citizenship --> race/ethnicity + foreign citizenship

This shows how the mere fact of belonging to an ethnic group is not a sufficient ground to delineate the subjectivity oppressed by discriminatory

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behaviour, since the factor related to the possession or not of Italian citizenship is also necessary. Only in this last hypothesis can discrimination be considered integrated.

A further element of intersection between the subjective dimensions under analysis concerns the social condition of foreigners. As examined in other sections of this report, several sources of national and supranational law introduce the prohibition of discrimination based on wealth, birth, and any other condition (art. 14 ECHR) as well as on the personal and social conditions (art. 3 of the Italian Constitution) of the person. In the case in question, the obligation to provide health certification was aimed exclusively at homeless foreigners who, in the absence of certification, would not have been able to stay in the municipality or access reception services. It is therefore obvious how the dimension of citizenship intersects with the condition of indigence and how discriminatory behaviour is a violation of the right to equal treatment of Italian and foreign nationals in access to services. This should be accompanied by a reflection on the abnormality of the sanitary measure (obtaining health certifications in relation to generic infectious diseases) that makes the prescribed fulfilment impossible for foreign persons only and the risk of discrimination between Italian and foreign persons of equal status,. According to our usual (simplified) scheme of comparison, we will therefore have the following situation of unjustified difference:

Italian people --> foreign people --> needy Italian people --> needy foreign people

The third element for intersectional reflection concerns the dimension of health. In this case, the municipal measures constitute discriminatory conduct because they establish a direct correlation between territorial provenance (generically indicated as being from the African, Asian, and South American areas) and the state of health/disease (to which a possible, but at the time non-existent, issue of public health must be connected). In this regard, as pointed out by UNAR (note of July 30, 2015), the risk of contracting infectious diseases cannot be linked exclusively and directly to migration and foreign origin, otherwise generally affecting people in situations of poverty and social marginalisation, that are more likely to be at risk of falling ill because of their state of fragility. The discriminatory behaviour of municipal administrations stimulates further reflection on the point: what would have happened, under the current ordinances, to foreign homeless people who were really ill? They would have seen their right to health discriminated against, with a correlated violation of the right to equal treatment in access to care. The discriminatory behaviour can be represented in a simplified way:

Italian indigent sick people --> foreign indigent sick people

The different intersections contained in this case highlight the complexity of the relationship between the factors involved.

3. Case study: gender and gender identity

Court of Trento, Order 31 July 2018

> Discrimination based on a person's transsexual or transgender condition falls within the notion of discrimination based on sex pursuant to Directive 2004/113/EC according to an interpretation that is consistent with the regulatory and jurisprudential evolution of the European Union, which has progressively interpreted the principle of non-discrimination from a rule instrumental to the observance of the right to free movement to a fundamental personal right, and with a constitutionally oriented interpretation of Legislative Decree no. 196/2007. 196/2007; consequently, also in the context of negotiation of relationships between private parties, in particular in the event of pre-contractual negotiations prior to a lease for residential use, the discriminatory conduct of the landlord, aimed at interrupting the pre-contractual negotiations due to the transgender condition of the other party, constitutes illegal conduct pursuant to Directive 2004/113/EC and Legislative Decree no. 196/2007, with the consequent reversal of the burden of proof and the right of the discriminated party to compensation for damages.

The plaintiff, a transgender person working for a start-up in the field of innovation, development and research, wanted to rent an apartment for personal and business reasons. Having read an advertisement for student, doctoral, or researcher accommodation, she contacted the agency, pointing out that she was working. Having checked with the property that the lack of student status was not an obstacle to the conclusion of the contract, the parties began the procedures for its conclusion. To this end, the plaintiff sent a copy of her identity card, which portrayed her as a man. Subsequently, having obtained a new identity card that showed her as a woman, she sent another copy to the agency, which promptly contacted her, explaining the owner's doubts related to the fear of improper use of the property. No contract was signed between the parties. Believing that she had been discriminated against on account of her transgender status, the plaintiff appealed to the court asking it to ascertain and declare the discriminatory nature of the acts carried out on account of her gender and gender identity.

Considering the provisions of Legislative Decree no. 198 of April 11, 2006 (the so-called "Code of Equal Opportunities for Men and Women"), as amended by Legislative Decree no. 196 of November 6, 2007 (implementation of Directive 2004/113/EC), applicable to the case 196 (implementation of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services), given that the appellant claims to be a transgender person and to have been subjected, due to this subjective condition, to discriminatory treatment in finding a property for residential use and, therefore, in accessing a property, the ruling focuses on an issue that is intersectional

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in nature. That is, it intends to answer the question of whether the protection provided by the aforementioned legislation relates exclusively to discrimination due to belonging to the female or male sex, i.e. to the fact that a person is a woman or a man, or also those relating to gender, so that these rules are also applicable to the change of sex and gender identity. To this end, the Court makes an accurate reconnaissance of the legal sources applicable to the case, starting from the reference to the principle of equality in art. 3 of the Constitution, which requires the exclusion of any discrimination based on sex, and the reference to art. 2, which recognises and guarantees the right to personal identity which, as established by the Constitutional Court in sentence no. 13/1984, is an expression of the dignity of the person and of his or her right to be recognised in the social context of reference for who he or she is, also with reference to sexual identity, which stems a "*conception of sex as a complex element of the personality, determined by a set of factors*" (Constitutional Court sentence no. 164/1982). The concept of gender identity is also reconstructed according to the indications of case law, in its components of body, self-perception, and social role, to be defined as the intimate and personal experience that each person has of sex and other expressions of gender (among others, Cass., no. 15138/2015). Finally, the Court makes a general reconstruction of the purposes of the principle of non-discrimination as inspired by a progressive expansion. On this point, the Court of Justice of the European Union has gradually extended the scope of anti-discrimination legislation and this also with regard to discrimination suffered by transgender people and therefore gender discrimination. The latter have been brought within the scope of discrimination between men and women and subject to the same level of protection. The Tribunal therefore concludes that "*if gender identity refers to the intimate and profound perception that each person has of sex and of themselves as belonging to a certain gender, a difference in treatment originating in that perception and in its external manifestations necessarily results in discrimination based on sex*".

The ruling in question is a case of intersectional approach to anti-discrimination law. The central question highlights the strictures of a legal framework built according to the mono or multi-factorial model, which, without a continuous work of interpretation, would risk leaving unprotected all those subjective identities and experiences prima facie not included in the regulatory scheme. In this case, discrimination based on sex per se would not imply immediate involvement of the sphere of gender identity, with the consequence of excluding transgender people and, in general, non-binary identities from the field of protection. The operation of searching within the sources of law and in the pronouncements of the Courts for an inclusive interpretive key makes it possible to redefine the category of discrimination on the grounds of sex at its point of intersection. Although the model of protection currently offered by the legal system leads to the need for an enlargement of the protected categories through their introduction by a legislative act, the intersectional approach nevertheless makes it possible to work on what exists and broaden the scope of the

instruments of protection.

4. Case study: gender and migration status, personal and social condition

Court of Brescia, labour section, order August 23, 2016

> The exclusion of mothers without a long-term residence permit from access to the benefit of the basic maternity allowance pursuant to art. 74 of Legislative Decree no. 151/01 constitutes discrimination pursuant to art. 44 of the Immigration Consolidation Act, such exclusion being in contrast with the principle of equal treatment in the field of social security pursuant to art. 12 of Directive 98/2011 and resulting in the disapplication of the conflicting regulation.

The applicant, a Moroccan citizen married to a Moroccan citizen working in Italy, residing in Italy and a new mother, held a residence permit for family reasons. This title could not be considered sufficient to benefit from the maternity allowance, for which the law required the possession of Italian nationality or EU citizenship or the possession of EC permit for long-stayers. This regulatory framework was declared discriminatory in that it gave rise to differentiated treatment based on the nationality of the person, and was therefore in contrast with the fundamental principles of European Union law, in particular with art. 14 of the ECHR and the corresponding art. 21 of the Charter of Fundamental Rights of the European Union. Maternity allowance is, in fact, one of the benefits of social security and, as such, its regulation cannot violate the principle of non-discrimination. The prohibition of discrimination is, moreover, a classic case of application of the direct effectiveness of Community law also with regard to the legislation on employment and social benefits; it is therefore necessary to disapply the conflicting domestic legislation. The Court therefore declared discriminatory the denial of the request for maternity allowance to the foreign applicant, condemning the local administration to recognise the right to social benefits and to publish the order on its institutional website.

The case under analysis exemplifies the intersection between factors related to gender, the migratory status of the person, her personal and social condition. In fact, it is clear that the case has as its object the female condition and the particular situation related to motherhood. These elements identify in their intersection a particular situation of risk of fragility specific to women, to which the recognition of a specific social benefit is linked. The level of complexity of the question is not limited to this first level of analysis, but involves the further element related to the migratory status of the woman. The right to social benefits was, in fact, directly connected to the possession of the EC long-term residence permit. In addition to the gender factor (and the sub-factor related to maternity status) there is also the factor related to nationality and, as a sub-factor of the latter, the possession of a particular type of residence permit (which we can generically indicate with the term migratory status). Finally, the third risk factor of

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discrimination is connected to the particular social condition of the woman and her family. In order to have access to the particular social benefit in analysis, the woman had to demonstrate that she had not benefited from the allowances provided for female workers and that she was part of a household with an income lower than the ISEE value provided for the year of reference. Also in this case the subjectivity under analysis shows all its intersectional complexity. An analysis of the elements that make up the specific identity of the person discriminated against returns a complete picture of the question and an image of the same person that is anything but one-dimensional. The discrimination in question could not have manifested itself if not in the presence and at the intersection of the various factors:

Woman > woman + mother > woman + foreign mother (with particular migration status) > social status

Without the intersection of the various factors, the specific subjective condition of the person could not have found full protection.

V. Conclusions and Challenges

The investigation carried out so far has offered a reconstruction of the legal emergence of the concept of intersectionality, starting from the origin of the linguistic category, which emanates from law, its transition into the language of institutions and international documents, and then analysing the fallout in the context of national and supranational courts. The focus on the Italian case offered an attempt to apply the intersectional approach within the model in which INGRiD operators are called to act. The methodological approach to which we intended to adhere goes beyond an abstract vision of the protection of persons and, by making the results of the intersectional method its own, prefers the different situated and holistic perspective of identities, from which to analyse the impact of discrimination in the wider sphere of the promotion of human rights. The framework that has emerged is that of a category useful for the protection of people in their complexity, taking into account the interaction between several non-separable identity factors. The use of intersectionality broadens the space of protection and coincides with the guarantee of situated dimensions of subjective identity which, as a result of the intertwining of different personal characteristics, remained invisible to a traditional legal approach. In this perspective, intersectionality finds primary use in the protection and promotion of human rights, through a renewed application of the principle of non-discrimination. Even where not expressly mentioned, intersectionality appears as a perspective from which to observe the interaction between the various risk factors evoked by anti-discrimination law. On this point, the mapping of the use of the concept of intersectionality in international documents provides a picture of possible areas of application. The approach followed by the United Nations shows a first and particularly significant element of reflection, which concerns the use of the intersec-

tional method in the specific context of the category of vulnerability. In this sense, intersectionality becomes a tool for the application of anti-discrimination law to the agendas foreseen for specific vulnerable individuals. If this is true, one cannot fail to notice how the circumscription to this sphere of application risks becoming a limitation for the wider circulation of the model of intersectional protection.

The legal analysis of the law of the European Union through the jurisprudence of the Court of Justice reveals a difficulty in the adoption of the intersectional approach, in favour of the broader tendency to apply anti-discrimination law in a mono-factorial key. Nevertheless, analysis of the proposed pronouncements reveals the Court's effort to grasp the greater complexity of the discriminatory phenomenon and, ultimately, the subjective dimension, which cannot be limited to a single or mere sum of several risk factors. In this sense, there has been an evolution in the pronouncements of the Court of Justice which seem, in some cases, to embrace a purely intersectional approach.

The analysis of the law of the member states also offers a picture in which intersectionality struggles to assert itself. The starting point that determines the obstacle to a post-categorical legal approach relates to the encounter between the internal legal systems of European countries, typically civil law, and European and supranational anti-discrimination law, based on individual risk factors. As such, the factor approach has made its way into the law of individual EU states, encountering little familiarity in legal practice. Nonetheless, it can be said that internal legal systems, constructed according to the equality/difference recognition scheme, tend to go beyond the single-category approach and affirm a conception of equality based on the reasonableness of the response offered by the regulatory system as a whole. In this sense, the intersectional approach would find an important applicative space, favouring a holistic judgment on individual subjectivities, more in line with the conception of equality trending in national systems, without neglecting the contribution of anti-discrimination law of supranational origin.

Finally, the Italian case offers a series of elements for reflection on the validity and applicability of intersectionality in domestic systems. Built on the encounter between national provisions and European derived law, Italian anti-discrimination law is the privileged field of action of intersectional theory. Although in Italy the legal application of the concept of intersectionality encounters the resistance already mentioned in the international and supranational context, at the same time the cardinal principles of the Italian legal system and, for all, the principle of equality, favour a possible emergence of an approach that goes in this direction. The analysis of some of the best known case law in the field of anti-discrimination law is the litmus test of the application of the intersectional approach even in cases of mono-factorial prevalence. On this point, we would like to underline how the clear predilection of the jurisprudential practice for the protection of single discrimination grounds is determined by the bottlenecks posed by

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the law itself, which tends to channel concrete cases within unique risk factors, sporadically communicating with each other. The result is a defensive approach that privileges the concentration of judicial action on the prevailing discriminatory parameter, in order to multiply the chances of possible victory. At the same time, the analysis of the cases has shown how concrete situations are the result of the intersection of several factors that are difficult to separate. Through the intersectional approach, this intersection emerges and allows to widen the space of protection, placing at the centre the subjectivities generally left at the margin. This operation is not based on the rejection of the concept of anti-discriminatory law based on categories, but rather on the redefinition of the categories themselves at their point of intersection. The interpretative key offered by intersectional theory does not allow in all cases to overcome the need for a legislative intervention to recognise subjective identities (see, for example, the debate still underway in Italy on the forms and limits of the recognition of the protection of gender identity). Nevertheless, it is possible to conclude that the intersectional approach allows for a reinterpretation of the law in force, widening its scope of action.

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CONTACTS:
Lead partner:Centro per la Cooperazione internazionale
Website https://www.project*INGRiD*.eu/
E-mail: *INGRiD*@cci.tn.it - info@cci.tn.it
Phone: +39 0461 182 8600

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