

FROM STRUCTURAL DISCRIMINATION TO INTERSECTIONALITY IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: UNRAVELLING CATEGORICAL FRAMINGS

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Abstract: The paper focuses on the way human rights law has been incorporating notions of intersectionality through legal instruments as well as through human rights courts' decisions. The overall goal is to expose the shortcomings of the current conception of intersectionality as it has been applied by the Inter-American Court, which, I argue, derive from a categorical understanding of group and identity-based rights transplanted from the notion of structural discrimination. The paper argues that approaching human rights violations by means of categorical reasoning is detrimental to intersectional interests, since it perpetuates the problem that intersectionality seeks to overcome in the first place, and suggests that cutting across categories is a potentially more fruitful pathway for the future of intersectionality in the legal field.

Keywords: Intersectionality, structural discrimination, categories, identity, gender discrimination.

I. INTRODUCTION

The paper focuses on the way human rights law has been incorporating notions of intersectionality through legal instruments as well as through human rights courts' decisions within the period 2010-2017. The overall goal is to expose the shortcomings of the conception of intersectionality as it has been applied by the Inter-American System, which I argue, derive from a categorical understanding of group rights developed in the notion of structural discrimination. Through a reading of the Inter-American system reports and jurisprudence it will be argued that although a legal reform towards an intersectional discrimination is one of the paths that intersectionality might be heading towards, this form is unlikely to have meaningful impact. The fixed categories that emerged from a notion of structural discrimination have proved insufficient to grasp the complex forms of oppression involved in concrete cases. On the contrary, they have begun to dissolve the powerful claim that the concept seeks to articulate. The paper exposes how approaching human rights violations by means of categorical reasoning is detrimental to intersectional interests, since it perpetuates the problem that intersectionality seeks to overcome in the first place. Being exhorted or aware of an intersectional guiding principle is not enough when the very same categories that represent only the most privileged members of the group are shaping the analytical framework. The article is part of a larger study that has sought to operationalize intersectionality in human rights law from an interdisciplinary perspective. Therefore, the study's main objective is to provide a diagnosis of the actual

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implications of the intersectional approach in human rights law based on how it has been applied between the years 2010-2017, in order to revise its actual achievements for further operationalizing the concept. In addition to those reasons, the author understands intersectionality as a concept in constant movement and does not pretend to be conclusive. The present article, therefore, is a necessary pause to look at the trends within a time period, and think about what is necessary to adjust.

There have been changes in the way the principle of non-discrimination is understood. Since the 2000s, the Inter-American System has moved from applying a formal principle of non-discrimination, to a more substantial understanding of discrimination such as “structural disadvantages” and “state of vulnerability” (Ronconi, 2018; Barbera & Wences, 2020). Legal scholars explain them as the material sides of the principle of equality and non-discrimination that expose unequal distribution of power (Bórquez & Clérico, 2021). Following this path – with steps backwards and forwards, ambiguities and confusions– in the early 2010s the Inter-American System arrived at the notion of intersectional discrimination. In recent decisions, the Inter-American System has acknowledged the existence of structural patterns of discrimination against different groups, such as indigenous peoples, women, and people living in poverty. Although in some respects this can be considered a progressive approach—as will be seen below—the idea of “systematic” or “structural” patterns of discrimination has not yet grasped the differences within the groups. A notable example is the case *Velásquez Paiz et al v. Guatemala*, where the Court focused on the large number of women who were murdered, without taking into consideration the fact that certain groups of women were overrepresented (Sosa, 2017, p. 95).

I use the example of the group category “women” to argue that it is built from a structural dimension, that in turn, led to fixed notions of group rights and limits the ability to see hierarchies and obscured specificities within the group. For this purpose, the first section will develop notions of anti-discrimination and the limitations of this framing that have been addressed by legal scholars. The revision of human rights law based on the Inter-American System and their jurisprudence will demonstrate how this limited approach was overcome through a notion of structural discrimination, while at the same time backfired by reifying the analytical categories. Cases where structural discrimination against women is argued will serve as examples of how the Inter-American Court on Human Rights and the Inter-American Commission have expanded the approach to discrimination and applied it to specific cases.

While the first part of the paper will carefully expose how categories have been construed since the early 2000s and have resulted in a legal form of discrimination called structural discrimination, the second part will study the time period between 2010-2017 to observe how human rights law intends to address the overlapping of different forms of discrimination, mostly referred to as an “intersectional approach”, but also as an “holistic approach”, and as “adding vulnerabilities”, among others. The second section, in other words, will address the efforts to provide definitions and codify intersectionality in legal instruments and expose why they have proved problematic. For this, the section will also study how intersectional approaches have been applied by

the Inter-American Court on Human Rights in the cases *Gonzalez Lluy v. Ecuador* and *I. V. v. Bolivia*. Revising the case law will allow us to identify what the “intersectional approach” adds to the previous analytical framework, what the legal implications of this proto-type of discrimination are, and also the limitations of the current scope and how it can be expanded.

II. THE EMERGENCE AND APPLICATION OF STRUCTURAL DISCRIMINATION AGAINST WOMEN IN HUMAN RIGHTS LAW

The principle of non-discrimination, —which is limited to verifying that those individuals who belong to the category listed by the legislator are treated equally— (Clérico et al., 2013, p. 115) has been questioned for not being able to give an account of the historical and social conditions that leave certain groups in disadvantaged positions. Legal scholar Julie Suk unpacks this critique within the field of work discrimination, explaining why the principle of non-discrimination applied to challenge unequal working conditions imposed on women with kids is useful for only certain women:

The concept of discrimination does nothing to change the structural problem, which is that the workplace is designed around the assumption that the ideal worker is a person (*i.e.*, a man) with no significant family responsibilities. So, it’s a trade-off: the concept of discrimination targets some problems and not others. (...). If structural transformation of the workplace is the answer to that question, the concept of discrimination is not going to give us a lot of mileage (Mercat-Bruns, et. al., 2016, p. 170).

Moreover, Kimberle Crenshaw has argued that “faith in formal equality’s triumph over white supremacy was unwarranted; formal equality did little to disrupt ongoing patterns of institutional power and the reproduction of differential privileges and burdens across race.” (Crenshaw, 2011, p. 1312). Authors such as Owen Fiss (1976) have also stressed that the formal principle of non-discrimination is rooted in an individualistic notion of equality and suggest switching to the notion of disadvantaged groups, which adds to the principle of non-discrimination the principle of non-subordination based on the presence of systemic patterns of social, economic and political exclusion (Saba, 2005, p. 139). Finally, the author Consuelo Chacartegui exposes the limitations of the principle of non-discrimination in matters of evidence (2010, p. 60, 61). She takes a case from British law, which, although it recognizes multiple grounds of discrimination, lacks a comprehensive approach, and, therefore, demands separate proof of each one. *Bahl v. The Law Society* refers to an Asian woman who claimed to be discriminated against by her employer on the grounds of gender and race. The court of first instance decided in her favor, acknowledging that, compared to her male co-workers, race and gender compounded had caused the discrimination. The appeals court, on the contrary, considered that each discrimination ground should be weighed separately. This reasoning led to the same unfair decision as the famous *DeGraffenreid v. General Motors* case that inspired Crenshaw’s notion of intersectionality (Crenshaw, 1989). As a result, the employer argued that he neither discriminated against women —taking white women as a parameter— nor Asian people —in this case, making the comparison with non-Asian men.

The principle of non-discrimination is incorporated in Article 1(1) of the American Convention on Human Rights and establishes the right of every person to enjoy all stated rights “without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” (Organization of American States 1969). By including a prohibition of discrimination by “any other social condition” the norm becomes a general prohibition of discrimination (Shelton, 2009, p. 273). Similar to the notion of article 14 from the European system as a “parasite” clause, in the Advisory Opinion 4/84 (IACrtHR, 1984), the Inter-American Court on Human Rights pointed out that article 1(1) depends for its application on a right guaranteed by the Convention. Moreover, the Advisory Opinion made clear that to be unlawful, the difference in treatment must lack a legitimate purpose and lead to situations that are contrary to justice, to reason or to the nature of things (par. 57).

The Inter-American System has been expanding its interpretation of the principle of non-discrimination in a way that encompasses the notion of structural discrimination. Following Víctor Abramovich, this responds to a regional scenario in which States are not systematically planning human rights violations, but rather cannot prevent arbitrary practices carried out by their agents, or hold those subjects accountable for their acts (Abramovich, 2009, p. 17). This is a scenario in which representative democracies have institutional deficiencies that coexist with high levels of inequality and exclusion (p. 10). Therefore, the notion of structural discrimination is understood as a tool of the Inter-American System to face one of its biggest challenges, which is to improve the structural conditions necessary to ensure respect for human rights.

Since the early 2000s, different reports and decisions from the Inter-American System have informed the current scope of the notion of structural discrimination, going from general definitions that present the context as a fact to take into account, to more sophisticated ones that aim to disentangle the state responsibility that can be attributed to structural discrimination. The groundbreaking case in the development of the notion of structural discrimination is *Maria da Penha Fernández v. Brazil* from 2001, where the Inter-American Commission on Human Rights refers to a “systematic pattern”, when they affirm: “this case must be analyzed in a context of gender-based discrimination by Brazilian State organs, which serves to reinforce the systematic pattern of violence against women and impunity in Brazil” (IACHR, 2001a, para. 51). A further and more elaborate development of the concept is found in the broadly known report “Access to justice for women victims of violence in the Americas” issued in 2007. Here, the Inter-American Commission on Human Rights explains that non-discrimination can be broadened when associated with the idea of ending the subordination of women as a group, also referred to as the principle of anti-subordination: “By this definition of non-discrimination, discrimination against women is unacceptable not just because it presupposes unfair treatment for some individual women, but also because its function is to subordinate women as a group and to thereby create and perpetuate a gender hierarchy. Discrimination is regarded as one of a number of social factors responsible for the hierarchy of the sexes that leaves women at the bottom of the pyramid” (para. 75). Furthermore, the report affirms that structural approaches acknowledge the fact that “for

certain sectors of the population, special equalizing measures have to be adopted” (para. 99). Such different treatments are grounded in the limiting effects and encumbering of access to some service or good or the exercise of a right that equal treatment would have provided (para. 99). More recently the case of the workers of the Hacienda Verde delves deeper into this type of discrimination and further develops the legal implications of a notion of structural discrimination (IACrHR, 2017, para. 110-111). The responsibility of the State in the case follows the precedent of *Massacre de Pueblo Bello*, and is therefore grounded in failure to adopt positive measures in accordance with the special protection needs of a subject of law, “be it because of its personal conditions or the specific situation in which s/he is found.” (para. 316). Following this reasoning, that States are obliged to generate the necessary conditions in order to avoid violations of the right not to be subjected to slavery, and specifically to prevent state agents and particular individuals from infringing it (para. 317).

Structural discrimination, hence, is a notion of equality based on the acknowledgement of the existence of a disadvantageous position for certain populations that need the adoption of special measures to mitigate such a situation. Still, once the principle of equality and non-discrimination is interpreted as a principle of non-subordination, a further critique aims at the monolithic vision of the legal order that it might trigger.

The visionary article *Feminist Approaches to International Law* written by Hilary Charlesworth, Christine Chinkin and Shelley Wright in 1991 developed a critical view of the path that human rights law was undertaking, and argued that a feminist transformation of international law should not be limited to refining or reforming existing law. Instead, they affirm that the reform should be heading towards creating international regimes with a focus on “structural abuse and the revision of our notions of state responsibility” (Charlesworth et al., 1991, p. 644). Furthermore, they foresee that it could also challenge the centrality of the state in international law and to the traditional sources of international law (p. 644). Indeed, beginning in the early 2000s, structural approaches to discrimination against women were applied both by the Inter-American Commission as well as by the Court, however, as will be seen, the Commission has taken a more progressive position than the Court, especially in their reports. Barbera & Wences (2020) identified three trends in the Inter-American Court on Human Rights jurisprudence on gender discrimination: first, the ones that focus on women as a disadvantaged group and second, those that look at the social structure that enables discrimination. In the third place she located the intersectional trends that make gender converge other discriminating factors.

The Inter-American Commission on Human Rights addressed for the first time the principle of non-discrimination of article 1.1, in relation to women, in the case of *María Eugenia Morales Sierra v. Guatemala* (IACHR, 2001b, para. 52). The case referred to discriminatory norms included in the Civil Code of Guatemala that attributed the authority to represent the marital union, and the right to administer marital property to the husband, and only exceptionally to the wife; at the same time, the Code prescribed that the wife had the duty to provide care and domestic work for the children and the home, and explicitly limited professional engagement, allowing it only if it does not impede her primary role

as a mother and homemaker. The Commission stated that the laws discussed operate by imposing a system according to which approximately half of the married population is subordinated to the other half in essential matters. Moreover, they referred to a global effect of such norms that deprive married women of their autonomy, and impede the ability of the victim of such inequality to exercise a host of other rights and freedoms (para. 38).

Further on the interpretation of the principle of non-discrimination from a structural perspective, *María da Penha Fernandes v. Brazil* is about a case where it was not a blatant discriminatory norm, but rather questioned male impunity in a case of gender based violence. Famously, the Commission applied the Belem do Para Convention for the first time and referred to the existence of a “systematic pattern” of discrimination. Maria da Penha Fernandes’ ex-husband attempted to murder her and the domestic court failed to prosecute and convict him. The impunity that he enjoyed was seen as exacerbating the direct consequences of the aggression and a sign of tolerance by the State, not just as an individual case, but as a pattern. Hence, the Commission concludes, “[t]he condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women” (2001a, para. 55).

In contrast with the case of *María Morales Sierra*, here the Commission deals with a case of a human rights violation that involves individuals –not the state–, as the direct actors. In this sense, the Commission concludes that the State violated articles 8 and 25 of the American Convention, and refers to Article 7 of the Convention of Belem do Para to affirm that States have a duty of “preventive diligent action” to stop violence against women, even in cases where this is carried out by individuals and not state actors. In this sense, Víctor Abramovich explains that the structural situation of the group of women affected by the violence, on the one hand, triggers the duty to prevent in the head of the State and its reparatory obligations in the particular case, but it also explains the general recommendations ordered by the IACHR to the State, which include changes in the public policies, the legislation and in the judicial and administrative procedures. (Abramovich, 2009). However, continuing with Abramovich’s reasoning, it is important to highlight that whether the agents had information about the risk to Maria da Penha’s life before the attack happened was not controverted, and neither were the possibilities of the State to prevent that from occurring (Abramovich, 2010).

The next developments of the IACHR on structural discrimination against women are in the case of *Jessica Lenahan v. United States*, from July 2011. In 1999, Jessica Lenahan, and her daughters, Leslie, Katheryn and Rebecca Gonzales, who were victims of domestic violence, obtained a restraining order against her ex-husband, Simon Gonzales. That same day Mr. Gonzales kidnapped the daughters. That night Ms. Gonzales called the police department eight times and every time she asked them to try to find her daughters and explained that she had a restraining order. However, the police acted in a fragmented, discordant and unprofessional way. They did not follow the terms of the restraining order and even affirmed that “it was a little ridiculous to scare them saying that the girls are gone”. The morning after, Simon Gonzales drove his truck to the police department

and opened fire through the window, and the police fired back. As a consequence of the shooting Mr. Gonzales died. The bodies of the three girls were found in the truck, leaving many things unknown that still remain unresolved today, such as the cause, time and place of death.

In the report *Lenahan v. United States* the Commission focused on the age of the girls, noting that certain groups of women can be discriminated against on the basis of more than one factor at a time, and that this increases their chances of being subjected to violence (para. 113). In addition, the report develops the principle of due diligence according to which States can incur on international responsibility for not preventing, investigating, sanctioning and repairing acts of violence against women. Again, the principle of due diligence under certain circumstances can entail state responsibility for States, even when in certain cases violence against women —isolated from context— is an action by private actors. The Commission, therefore, understands that the duty of the states before these crimes also entails all the measures directed towards preventing the discrimination that perpetuates this problem (para. 126). Following this principle, States must adopt the necessary measures in order to change patterns of social and cultural behavior of men and women, and eliminate prejudice and consuetudinary practices based on inferiority or superiority of one of the sexes, and that perpetuate the imposition of stereotypes on both men and women (para. 126).

The importance of contextual and structural elements, and their impact on state responsibility, are further developed by the Inter-American Court on Human Rights in the cases *Gonzalez et al. v. Mexico*, (“Cotton Fields Case”); *Veliz Franco et al. v. Guatemala and Velázquez Paiz et al. v. Guatemala*. In the paradigmatic “Cotton Fields Case” (IACrHR, 2009) the Court developed human rights standards for violence against women perpetrated by private actors for the first time. The case extensively developed the principle of due diligence in relation to the case of three women that had been kidnapped and later found dead in a cotton field. The Court also introduced the term *feminicide* in their reasoning, without providing a definition, but explaining that the expression “homicide of women for gender reasons,” is also known by the term *feminicide* (par. 143); however, mentioning the term contributed to the advancement of legal reforms around the term *femicide/feminicide* in the Latin American region, such as the typification of *femicide* which exposes the contextual implications of gender violence within the crime. The Court looked not only to the individual facts, but also to women as a collective affected by a structural situation, following the doctrine of foreseeable and inevitable risk (Abramovich, 2010). The doctrine of foreseeable and inevitable risk sets a standard for determining when the state is responsible for human rights violations committed by private actors. In order to attribute responsibility according to the doctrine of the foreseeable risk, it is necessary to look at the particular circumstances of the case. The duty to adopt preventive and protective measures is conditioned by the knowledge of a situation of real and immediate risk for an individual or a determined group of individuals, and by the reasonable possibility of preventing that risk. Looking at this definition, Victor Abramovich finds four main elements. First, it must be a concrete risk (not hypothetical, eventual or remote) with a certain possibility of materialization; second, the risk must also be specific, meaning that the situation must be circumscribed to an individual or group and not a general situation

of uncertainty that affects an overall community; third, the State must have been either aware of the risk, or should have reasonably known or foreseen it²; fourth, the risk must be preventable, therefore, taking all the necessary measures the State must be able to stop the situation and prevent the risk from concretizing (Abramovich, 2010).

We clearly see how incorporating the context or structural elements of the case has a legal consequence in the attribution of state responsibility, however, the “Cotton Field Case” shows disagreements about the moment from which the State is responsible. The IACHR argues that, even though the State must be responsible due to the repeated pattern of violence, it is internationally responsible only from the moment they are aware of the disappearance of the three victims; it does not act in an effective way in order to avoid the crimes that were then committed. The Court, however, concluded that the responsibility must be based on the theory of risk, coupled with a reinforced duty of due diligence grounded on article 7 of the Convention of Belem do Para,

258. The foregoing reveals that States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. The prevention strategy should also be comprehensive; in other words, it should prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence against women. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence. This should take into account that, in cases of violence against women, the States also have the general obligation established in the American Convention, an obligation reinforced since the Convention of Belém do Pará came into force (para. 258).

The positions taken by the parties respond to attributing different weight to the situations of risk, and therefore, different expectations of the State’s actions and responsibilities. One is the general context of risk of violence against women that has an effect on the “particular risk” in which the victims find themselves after being kidnapped, but before they are found dead. The first one has an effect on the second moment, since it triggers an expectation in the response that the State should provide, given a “specific risk”. According to the Court, however, it is only from the moment the State knows

² The third step deserves a special explanation, since the risk may not have been known. It could also be the case that the State “should have reasonably known or foreseen the risk”. This is because, if we take the State’s data and monitoring obligations on behalf of certain vulnerable populations into consideration, the State is not allowed to argue that it was unaware of the situation of violence that they were suffering. In this line, Abramovich explains that “some risks are foreseeable due to its magnitude, its extension in time, because they respond to practices or systematic patterns, that exclude the possibility of the State to argue lack of awareness. Victor Abramovich, *Responsabilidad Estatal por Violencia de Género: Comentarios Sobre el Caso “Campo Algodonero” en la Corte Interamericana de Derechos Humanos*, *Anuario de Derechos Humanos*, 174 (2010).

of a “specific risk” that the State is responsible for not acting with due diligence³. The reasoning is problematic to the extent that it could lead to the conclusion that if this were the case for direct homicides, the State would not have been internationally responsible for their deaths (Abramovich, 2010). In spite of this interpretation, which might be seen as a limitation in the State’s responsibility also at the level of reparations, it is worth stressing that the context did have repercussions at the time of determining the reparations. In this sense, the Court observes that the context of the *maquilas*⁴ is of importance to design the reparations, which must be directed not only to retribute, but also to rectify (para. 450).

More recently, the cases *Veliz Franco et al v. Guatemala* (2014) and *Velázquez Paiz et al v. Guatemala* (2015) further developed the notion of systematic patterns of human rights violations in relation to situations involving the disappearance and later death of young girls. The *Veliz Franco* case reproduced part of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence and affirmed that violence against women is an expression of the historic unequal balance between men and women which has led to domination and discrimination of women, depriving women of their full emancipation, concluding that “the structural violence against women is based on their gender” (para. 207). Following the framing of the Commission, the Court attributed State responsibility for not adopting an integral and coordinated policy, supported with the necessary public funding to grant that cases of violence against women are prevented, investigated, sanctioned and repaired (para. 262). Still, the Court limited the scope of the responsibility to the deficiencies during the investigation of the murder of the victim. The lack of due diligence is based on not conducting the investigation in a reasonable timeframe, which is also a consequence of not having clear rules and protocols guiding the investigation of these cases.

Following this line of reasoning, the *Velasquez Paiz* case delved deeper into the importance of observing the context in order to determine the systematic patterns of discrimination. The Court brought to the analysis political, social and historical contextual elements in order to characterize certain facts as “parts of a systematic pattern of human

³ The reasoning of the Court on this aspect is explained at length in paragraph 283: With regard to the second moment – before the discovery of the bodies – given the context of the case, the State was aware that there was a real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed. The Tribunal finds that, in this context, an obligation of strict due diligence arises in regard to reports of missing women, with respect to search operations during the first hours and days. Since this obligation of means is more rigorous, it requires that exhaustive search activities be conducted. Above all, it is essential that police authorities, prosecutors and judicial officials take prompt immediate action by ordering, without delay, the necessary measures to determine the whereabouts of the victims or the place where they may have been retained. Adequate procedures should exist for reporting disappearances, which should result in an immediate effective investigation. The authorities should presume that the disappeared person has been deprived of liberty and is still alive until there is no longer any uncertainty about her fate. *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 205, (IACrHR 2009), para. 283.

⁴ The maquilas are a type of industry that imports raw materials and machinery with the purpose of export them. The main productions are textile industry; however, they also produce electronics, furniture, chemicals, toys, among others. See K. Pantaleo, “Gendered Violence: Murder in the Maquiladoras”. In *Sociological Viewpoints of the Pennsylvania Sociological Society*, (Pantaleo, 2010, p. 14).

rights violations, a practice applied or tolerated by the State, or as part of massive and systematic or generalized attacks against one sector of the population” (para. 43). Interestingly, the Court explicitly said that the contextual elements that were brought to the debate will have implications in the determination of the international responsibility of the State, the assessment of evidence, the need of reparation measures, and the standards regarding the obligation to investigate such cases (para. 43).

The situation of the jurisprudence that has been described shows the evolution of a way of framing structural forms of violence, from a mere contextual fact to the subsequent expansion of the State’s responsibility derived from them. The situations that led to the recognition of structural discrimination share the characteristic of being acts performed by private actors, such as gender based violence in the context of domestic violence by male ex-partners. The notion of structural discrimination allowed an understanding of these acts within a *continuum of violence* that is then incardinated in the institutions such as the police and the judiciary. Still, the decisions arbitrarily eliminate economic and ethnic elements that are also factoring into the situations addressed in cases of violence against women. Scholars have called attention to the lack of the element of “class”, especially in the cases of violence against women in *Cotton Field* and *Veliz Franco*. *Cotton Field* is a case where not only the element of gender is present, but it also takes place in the context of the *maquilas* in Mexico. This type of industry should not be detached from the context of neoliberal economic policies implemented during the 80s in Mexico and 90s in Central America (Bórquez, 2017, p. 89). *Veliz Franco*, on its part, refers to the murder of a girl in a context of violence against women, however, it focusses on the large number of female victims at the same time that it neglects the fact that the victims were mostly employed in non-qualified jobs while still in high school (Sosa, 2017, p. 99).

The need to build solid grounds for claiming a structural cause of discrimination that attributes an expanded responsibility to states seems to have obscured the complexity of the identitarian factors at play, such as their political stance, the need to conceive them as ongoing processes rather than fixed essences, and the need to account also for the larger context in which they are embedded. This is the course that structural discrimination as an expansion of state responsibility is taking. However, human rights law has shown efforts to overcome the unidimensional lens that characterized the field and incorporated the language into its instruments, decisions and reports. We see expressions such as “special vulnerability”, “holistic approach”, “multiple discrimination”, “intersectional nature of discrimination”, and so on, rapidly appropriated by human rights discourse. The following section will track the evolution of the concept of intersectionality in human rights law, to then analyze the way this new framework has been applied, if it has been attached to innovative notions of state responsibility, or linked to specific types of discrimination.

III. FROM STRUCTURAL TO INTERSECTIONAL APPROACHES TO DISCRIMINATION IN HUMAN RIGHTS LAW

A. Definitions

Intersectionality has been proclaimed as a type of discrimination that intends to reveal what remains unseen when multiple forms of oppression are conceptualized under

separate frameworks. Its landing in human rights law, however, has re-defined the scope of this concept. This section will observe the actual effects of intersectionality by tracking the scope and implications of the notion of intersectionality in the human rights field as it has been developed so far.

The early definitions of intersectionality as a specific type of discrimination usually refer to the developments of the Finnish scholar Timo Makkonen, who has forged the now classical distinction between the concepts of multiple discrimination, compound discrimination and intersectional discrimination (Makkonen, 2002). Multiple discrimination, according to the author, refers to the different treatment that a person suffers based on different factors (such as gender, race or ethnicity) when they happen at different times. Following this reasoning, Rey Martínez explains that a woman with disabilities may suffer discrimination by not being hired for a certain position because the building is not accessible for wheelchairs (Martínez, 2008, p. 263). By this example the author tries to exemplify a situation in which one factor does not interact with the other at the same time, given the hypothetical case that being a woman does not influence the decision to hire her. However, as Rey Martínez sharply observes, rather than multiple discrimination, in a strict sense, this is a case of a single ground discrimination (Martínez, 2008, p. 266).

In contrast, compound discrimination refers to the case when the multiple grounds of discrimination happen at the same time, or, in other words, they are compounded by one or more other grounds of discrimination. In this sense, following Moon Gay, the example can be found in the case *Perera v Civil Service Commission (no 2)* (Office for Official Publications of the European Communities, 2007). The case concerns a person born in Sri Lanka who emigrated to the UK as an adult, and had been serving as an executive officer at the civil service. He was frequently rejected for promotions and claimed that this was a case of racial discrimination. This case shows that he was unable to get a position because he did not meet more than one of the requirements set up by an employer: age, experience in the UK, command of English, and nationality. The discrimination is considered to be compounded “because the lack of one factor did not prevent him getting the job but it did make it less likely, and the lack of two factors decreased yet further his chances of selection for the job” (Office for Official Publications of the European Communities, 2007). The key feature of this type of discrimination is that the different factors of discrimination operate at the same time, without merging. In other words, they potentiate one another but don't operate in conjunction. Again, Rey Martínez criticizes the idea that there is a compound discrimination substantially different from an intersectional discrimination. He argues that it is a merely theoretical distinction that in praxis does not provide any different legal consequence from what intersectional discrimination intends to reflect (p. 266).

Finally, intersectional discrimination describes a type of discrimination that not only happens at the same time, but also occurs in a way that the multiple grounds are inseparable, turning into a specific type of discrimination (Office for Official Publications of the European Communities, 2007). Rey Martínez illustrates this with the example of Romani women. The type of discrimination suffered results from the combination of being women and belonging to a specific ethnic group. Moreover, they are affected by specifically negative social stereotypes, that do not affect either non-Romani women nor Romani men (p. 264). Additionally, the Ontario Commission illustrates intersectional

discrimination through the case of *Mercier*, a decision from the Supreme Court of Canada, in which, rather than referring to a specific ground of discrimination such as disability, they considered that the “determination of what constitutes a disability should be based on whether the person has experienced “social handicapping” rather than focusing on bio-medical conditions or limitations.” (Ontario Human Rights Commission, 2001, p. 2). However, in practice scholars interchange the terms, and use multiple discrimination as a synonym of intersectional discrimination.

In sum, even though these distinctions —multiple, compound and intersectional discriminations— can have pedagogic and analytical purposes, what Makkonen describes as multiple discrimination is strictly speaking not so. Moreover, it may lead to confusion, since the concept that better grasps the phenomenon that we are trying to describe is encompassed by what Makkonen calls intersectional discrimination (Martínez, 2008, p. 267). However, as will be later shown, we can see traces of this distinction, and confusion, in the later reception of the term in the human rights court's jurisprudence.

B. The incorporation of intersectionality in human rights instruments

During the early 2000s the language of intersectionality began to flourish through General Comments, Recommendations, Reporting Guidelines of UN bodies (Chow, 2016) as well as reports of the Inter-American Commission on Human Rights. As a first effort to codify the definition of the concept of intersectionality is the NGO Forum Declaration at the 2001 World Conference Against Racism, a watershed moment for the global dispersal of intersectionality (Collins & Bilge, 2016, p. 92). Article 119 includes a thorough definition of intersectionality that reads as follows,

[It] acknowledges that every person be it man or woman exists in a framework of multiple identities, with factors such as race, class, ethnicity, religion, sexual orientation, gender identity, age, disability, citizenship, national identity, geo-political context, health, including HIV/AIDS status and any other status are all determinants in one's experiences of racism, racial discrimination, xenophobia and related intolerances. An intersectional approach highlights the way in which there is a simultaneous interaction of discrimination as a result of multiple identities (World Conference against Racism, NGO Declaration, 2001, § 119).

In the year 2000, the CERD Committee issued the General Recommendation 25, focusing on the “Gender Related Dimensions of Racial Discrimination”. The first point of the document acknowledges that “racial discrimination does not always affect women and men equally or in the same way”, and “that there are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.” Moreover, the 2001 Report on Violence Against Women called for “action to be taken at both the national and international levels to raise awareness of the multiple nature of discrimination experienced by marginalized women and to mainstream an intersectional or more holistic approach at a theoretical level and addressed at a practical level” (Coomaraswamy, 2001, para. 199). In turn, the CEDAW Committee

issued the General Recommendation 28 which recognizes that gender is "inextricably linked" to other social factors of discrimination such as religion, race, politics, disability, etc. (para. 18).

Within the Inter-American System, Article 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belem do Para) is considered by the Inter-American Commission on Human Rights as the recognition of the "principle of intersectionality" (IACHR, 2015, para 28). During the early 2000s the Inter-American Commission included notions of intersectional approaches in their decisions. The case of *Ana, Beatriz and Celia González Pérez*, brought before the Inter-American Commission, is one of the first decisions that recognizes the context of multiple discriminations as causing more harmful consequences for the victims. It discusses article 1(1) of the Convention, and determines that the state of Mexico has breached its obligation to guarantee the exercise of the rights and liberties recognized in that instrument to the persons under their jurisdiction. The case refers to three indigenous women who were detained, raped and tortured by a group of soldiers after being separated from their mothers. The state then sent the case to the military jurisdiction, a clearly not-impartial jurisdiction that did not guarantee due process (IACHR, 2000, para. 85). Following the judgement of the Inter-American Court on Human Rights in the case *Velázquez Rodríguez* the commission indicated that the obligation of guarantee contained in Article 1(1) of the American Convention includes the duty to organize the governmental apparatus and, in general, all the structures by which the exercise of government power is manifested, so that they are capable of legally ensuring the free and full exercise of human rights. Moreover, the Commission stressed the aggravated harm perpetrated by the state due to its failure to provide an adequate judicial response, taking into consideration circumstances such as the victim's status as indigenous women, their different cosmogonies and languages.

In addition, the IACHR issued a report on the case *Escobar Ledezma et al v. Mexico* referring to the disappearance and subsequent death of Paloma Escobar, a 16-year-old girl from the city of Ciudad Juarez in Chihuahua, Mexico. The petitioners argue that due to the pattern of omissions, irregularities and deficient investigation that lead to that unfortunate outcome, the State of Mexico should be held responsible (IACHR, 2006). In the report, the Commission affirmed that taking the context into consideration, it could be concluded that the girl was exposed to a greater risk, therefore, she was exposed to a different type of discrimination:

discrimination, in its different expressions, does not always affect all women equally: there are women who are exposed to an even greater extent to the violation of their rights and to acts of violence and discrimination (para. 135).

A breaking point at the Inter-American level was during the symposium called "Intersectionality in the Inter-American Human Rights System" held in 2013, where commissioners, as well as representatives from international human rights organizations gather to discuss the topic. Among the main concerns were how to better conceptualize discrimination, how to address intersecting oppressions and adopt the right remedies

for human rights violations. Following Patricia Hill Collins highlights of the meeting, there were four valuable qualities found in intersectionality's approach. To begin, the move beyond the civil rights framework that incorporates the human rights framework at an international level. Second, they addressed a potential value of intersectionality that relies on its capacity to observe the complexity of social issues implicated in human rights violations. Third, she noticed the aim of advocates and human rights practitioners of incorporating intersectionality in their field of practice. Finally, Hill Collins refers to intersectionality's close relationship with the goal of social justice (p. 97-98).

A 2015 report from the Inter-American Commission on Human Rights on "Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System" refers to an inextricable link between the factors that expose women to discrimination along with their sex, such as their age, race, ethnicity, and economic position, among others (IACHR, 2015, para 28). In addition, the same year, the *Report on access to information, violence against women and administration of justice* stresses the importance of disaggregating statistical information produced by states based on sex, race, ethnicity, among other factors, "that make it possible to address violence and discrimination against women from an intersectional perspective, that is to say, giving due consideration to the specific human rights violations that women may face as a result of the intersection of factors in addition to their sex, such as their age, race, ethnicity, and financial status, among others." (IACHR, 2015, para 9).

An interest in analyzing the situation of indigenous women from an intersectional perspective can already be seen in the 2011 report where the IACHR showed its concern for the situation of indigenous women, afro descendant women and other groups, "who face additional difficulties to access housing due to the structural discrimination in which they live" (IACHR, 2011, para. 326). The topic is addressed at large in a more recent report on Indigenous Women issued by the IACHR that establishes intersectionality as a guideline for the Commission's work. The report makes different remarks on intersectionality in the section "Guideline Principles and Juridical Nature of the Report" and specifically establishes intersectionality as a guideline principle. Intersectionality is also included as the second guideline principle under paragraph 38, and in this instance, is described as a basic concept adumbrating that the discrimination indigenous women face for being women is intertwined with other factors such as race, ethnicity, religion, beliefs, health, status, age, class, cast, sexual orientation and gender identity (IACHR, 2017, par. 33).

The analysis so far has shown that the definitions of intersectionality as well as intersectional approaches at different human rights forums, are intended mostly as a reference to disadvantageous contextual conditions, additional vulnerabilities or marginalization, but without attributing any legal implication either in the framing, or in the outcome of the cases. In this, we observe that intersectional approaches are distant from the route that structural discrimination took, as was described in the previous section of the paper. Still, there are two cases of the Inter-American Court on Human Rights that incorporate concepts of intersectionality in their reasoning. Their scope will be studied in

order to track approaches to intersectional discrimination in practice. Exploring its uses in concrete cases will show the actual definition that is applied nowadays and will help to answer if it has actually provided new insights that the anti-discrimination approach was leaving unattended.

C. The use of intersectionality in judicial decisions

The first case of the Inter-American Court on Human Rights that expressly refers to intersectionality is *Gonzalez Lluy v. Ecuador* from 2015. The importance of the case lies in that it provides an initial attempt to apply an intersectional approach, although we will see that this was done with a great degree of vagueness and leaving many open questions. Some clarification came a year later through the case *I. V. v. Bolivia* of 2016, where the Court narrowed down the events where “intersectional discrimination” was involved during the case. Comparing the cases, looking at the continuities and twists from one case to the other, will provide more clarity about the scope that the Court is giving to the notion of intersectionality, as well as raising concerns about the degree of arbitrariness that could lead from granting legal implications to such malleable concept.

The *Gonzalez Lluy* case addresses the right to life and personal integrity, and the right to health and education of a girl in a low-income family that at the age of three was infected with HIV on receiving a transfusion of blood in a private health clinic. Her situation had a strong impact on her access to education and her family had to move on numerous occasions and were forced to live in unfavorable conditions and in isolated places (para. 155). Regarding her right to life and to personal integrity the Court considered that, according to Article 1(1) of the Convention, States have passive obligations such as to respect rights and freedoms recognized by the Convention, and also active obligations such as to adopt all the appropriate measures necessary to ensure those rights (para. 168). Once again, the Court follows the casuistry regarding human rights violations to the right to life by individual actors under its jurisdiction, in this case, through deficient health care services, and states that the lack of adequate medical treatment may constitute a violation of article 5(1) in relation to article 1(1) of the Convention. In this case, the Court found that the State of Ecuador was indeed responsible for the violation of the obligation to monitor and supervise the provision of health care services within the framework of the right to personal integrity and right to life, even when the health service is provided by a private entity.

Regarding the right to education, Article 13 of the Protocol of San Salvador (OAS, 1999), the Court examines its implications and the violation of the right to remain in the education system, the right not to be discriminated against, and adaptability in relation to the right to education. In doing this, the Court delves into the evolution of the concept of disability and affirms that living with HIV is not *per se* a disability. Under certain circumstances, however, the social and attitudinal barriers around people living with HIV can place them in a situation of disability (para. 237). The Court observes that the different treatment granted to Talia was based on her health status (para. 252) and therefore continues to analyze whether the differentiated treatment was discriminatory

or not.⁵ Since the Convention does not provide an explicit definition, the Court refers to the definition included by the Human Rights Committee of the International Covenant on Civil and Political Rights in the General Comment No. 18:

any distinction, exclusion, or restriction based on specific reasons, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other social condition, which has the intention or effect of nullifying or impairing the equal recognition, enjoyment, or exercise of the human rights and fundamental freedoms of all human beings (para. 7).

Insofar as the discrimination due to her HIV condition fits into the “any other social condition” of the definition (para. 255), the State had the obligation to demonstrate that the decision to expel Talia from the education system did not have a discriminatory purpose or effect (para. 257). Something they were unable to prove. Although there was a legitimate objective, which was the “collective interest” and the integrity of life of children, the measure adopted by the State was based on “unfounded and stereotypical presumptions concerning the possible risks related to HIV para. 266). Therefore, those were not appropriate means to ensure the legitimate objective aimed. On the contrary, they were harmful and disproportionate.

When the Court determines the scope of the discrimination they introduce, for the first time, the notion of intersectional discrimination. The Court recognizes that there are many factors of vulnerability and risk of discrimination at play; that “made her more vulnerable and exacerbated the harm that she suffered,” (para. 285) such as being a woman, living with HIV, being a person with disabilities, and being a minor, as well as her socio-economic status. But most importantly, the Court stresses that the discrimination that Talia experienced was a specific form of discrimination that “resulted from the intersection of those factors” (para. 290).

In order to define what they mean by this new type of discrimination; the decision distinguishes between multiple discrimination and intersectional discrimination. The Court points to the existence of multiple factors of vulnerability and that discrimination for being a girl or a woman, for living in poverty, and for living with HIV converged in Talia’s life. The judges agreed that many forms of oppression can affect one’s life (multiple discrimination), but focus on the result of a particular or specific discrimination that derives from the intersection of them (intersectional discrimination) (para. 290). They then go further in their analysis and explain that the treatment provided by health care services, the access to education and the right to decent housing would have been different

⁵ Regarding the alleged violation of Article 1(1) and 24 the Court clearly distinguishes between the obligation included in Article 1, this is, the State’s obligation to respect and ensure the rights contained in the American Convention “without any discrimination”, which would be violated together with the substantive right in question; and in Article 24, which refers to the unequal application or protection of domestic law. For this case, the focus will be the first.

if the girl, Talia, had not been living in poverty. Besides, as a girl living with HIV she needed special support from State policies in order to realize her rights fully. Finally, they identify the particular issues and challenges that Talia would face in the future's dilemmas around maternity and future relationships.

The concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot offers interesting distinctions on an effort to further clarify what the court means by intersectionality. He explains:

Indeed, the discrimination against Talia was associated with factors such as the fact that she was a woman, a person with HIV, a person with a disability, a minor, and due to her socio/economic status. These aspects increased her vulnerability and exacerbated the harm she suffered. The intersection of this factors in a discrimination with specific characteristics constituted multiple discrimination that, in turn, constituted intersectional discrimination. Nevertheless, not every multiple discrimination, is necessarily associated with intersectionality (para. 7)

With an explanation that resembles the distinctions made by Makkonnen, and therefore, also its limitations, as previously exposed, the concurring opinion affirms that in order to have an intersectional impact, the factors must interact to create a unique and distinct burden or risk of discrimination. On the one hand, they must be analytically inseparable, or unable to disaggregate into different reasons, and on the other, they must create consequences different from the consequences suffered by subjects affected by only one form of discrimination (para. 11). While multiple discrimination refers to several factors, intersectional discrimination addresses the concurrency of different reasons for discrimination in the same event. The difference, according to the judge, relies on whether the causes of discrimination have a separate or simultaneous impact. Finally, the Judge remarks that intersectionality adds “a new dimension to the principle of non-discrimination in certain kinds of cases,” (para. 11) since, the forms of discrimination that interact in the case, if assessed independently, would not explain “the particularity and specificity of the harm suffered in the intersectional experience” (para. 12). He delegates the definition of the scope of the approach, however, to future decisions.

The case that so far has specified the current extent of intersectional discrimination is that of *I.V. v. Bolivia* (IACrHR, 2016, par. 118). The case refers to a woman who was born in Peru, where she was twice detained by the National Department Against Terrorism (DINCOTE), and suffered physical, sexual and psychological harassment from the authorities. Later in her life, after having her first child, I.V. entered Bolivia as a refugee. While in Bolivia, she received treatment during her third pregnancy at the Hospital de la Mujer, in La Paz, a place where she was also treated during her labor. On this occasion, under the effects of epidural anesthesia, the doctors conducted a tubal ligation (or tubal occlusion) alleging that they had asked for her verbal consent, but not the patient's written consent. Her husband was provided with a form named “family authorization for surgery or special treatment” in order to authorize the C-section before the operation: however, the doctors could not reach him in order to give the specific consent for the tubal occlusion.

The doctors argued that the reason they proceeded in that way was because the uterus could rupture in case of a future pregnancy.

There were many rights involved in the case: the right to personal integrity, right to personal freedom, right to dignity, right to private and family life, access to information, and women's right to have a life free from violence, among others (para. 118). With respect to the human rights violations due to the sterilization without consent, the Inter-American Commission made a strong argument asserting the multiple discriminations faced by the victim. They affirmed that the case is an example of the multiple forms of discrimination that affect the enjoyment and exercise of human rights on behalf of some groups of women such as I.V. due to the intersection of different factors such as sex, migrant status and economic position (para. 136). In this sense, they highlighted that special economic vulnerability also impacts their access to health, because many times health care providers are biased by gender stereotypes about women's autonomy to decide on their own reproductive practices. The providers actions reflect a belief that they are in a better position to decide about women's reproductive health (para 137).

The Court, for their part, bases the decision on the principle of autonomy according to which every person must be treated as equal and no one can be treated as a means towards an end (para. 152). Regarding the principle of non-discrimination, the Court goes further and puts it in the domain of *jus cogens*. They establish a link between the principle of non-discrimination and the notion of human dignity and consider it to be incompatible with the privileged treatment of some groups over others. Not every difference in treatment can be regarded as discriminatory; the criteria, however, must be objective and reasonable. The criteria could coincide with those grounds enunciated in article 1.1 of the American Convention, or with the wording of the article left open under "other social condition". In these cases, the Court remarks that strict scrutiny must be applied, or in other words, that different treatment must constitute a necessary measure in order to achieve an imperative goal (para. 241). In this case, the Court observes that forced sterilization has a structural dimension exacerbated by social conditions which make women disproportionately affected by it. Moreover, the biological capacity of women to get pregnant causes greater exposure to unconsented sterilizations. As a consequence, the Court finds that the situation faced by I.V. falls into the strict scrutiny of Article 1.1. for reasons of sex and gender, and does not survive the test (paras. 243-245). This is because, according to the Court, the sterilization was not a necessary measure in order to protect the woman from the risk of a future pregnancy that could endanger her life. Indeed, the same goal could have been achieved with a less invasive measure.

The position of the Court regarding the allegations of multiple grounds of discrimination shows a restriction on the application of intersectional discrimination. Here the Court distinguishes between two scenarios. On the one hand, the Court analyzes whether unconsented sterilization is a phenomenon in which different factors of discrimination, such as economic position, race, disability, etc., are at play, in line with the allegations made by the Commission. The Court notes that the woman had insufficient access to public health care services; however, according to the Court, this does not entail *per se* that the decision of conducting a tubal ligation was due to her migratory status or

economic position, but rather *only* to her sex (para. 247-248). On the other hand, the Court analyzes the implications of the multiple factors of discrimination in I.V.'s right to access to justice. Here, the Court reaffirms its position according to which judicial impunity in cases of violence against women promotes further injustice and sends the message that it can be tolerated (para. 317), and notes that the intersection of her economic status and being an asylum seeker and persecuted had a major impact on her quest for justice (paras. 318-321). In this sense, the Court goes back to the definition given in the case *Gonzales Lluy y otros Vs. Ecuador*, and affirms that the discrimination that she faced was not only caused by these factors, but converged in a specific form of discrimination confirmed by the intersection of them; in other words, were one of these factors not in play, the discrimination would have had a different nature (para. 321).

The broad picture of the cases reviewed shows that intersectionality as “a new dimension to the principle of non-discrimination” is slowly making its way through human rights courts. The intersectional approach developed in the *Gonzalez Lluy* and followed by the *I.V.* case, inaugurate intersectionality as a new type of approach under the Inter-American System offering new and interesting insights and constituting a precedent to start building a more concrete definition of intersectionality following the traces of how it has been applied. Still, they also show that the definition, insights, juristic implications and legal grounds are vague and need to be unpacked.

The cases that applied the concept of intersectional discrimination share the common ground of focusing on the contextual elements of the case and bring to light structural elements of discrimination such as racism, patriarchy and economic disadvantage. The cases reviewed show that the intersectional approach is distinctively linked with the unfavorable economic context that affected the claimants, since in both cases the situation under review involved a person in a precarious economic situation. The economic precariousness was considered a factor intersecting with other forms of discrimination. Under an intersectional approach, the political economic structures arise in a similar fashion as the context of structural economic discrimination did in the previous section. In the same vein, the cases refer to rights with strong economic rights components, rather than civil rights: access to education in *Gonzalez Lluy*, and *I.V.* uses the intersectional approach to address the lack of access to justice (which, fits under both, civil and economic rights).

Paying a closer look to the development of the definition under the Inter-American System, we see in the concurring opinion of *Gonzalez Lluy v. Ecuador*, an initial broad definition of intersectionality that includes the categories of sex, poverty, disability and childhood as contextual elements that are interacting together in the context of access to education. The separate opinion clearly distinguishes between multiple discrimination and intersectionality: “The intersection of these factors in a discrimination with specific characteristics constituted multiple discrimination that, *in turn*, constituted intersectional discrimination. Nevertheless, not every multiple discrimination, is necessarily associated with intersectionality” (para. 7). This statement leaves to future decisions the task of limiting and defining the scope of the concept of intersectionality, which so far had been loosely defined as multiple reasons or factors that interact to create a unique and distinct burden or risk of discrimination.

In this sense, the Inter-American Court seems to follow the distinction between multiple, compound and intersectional discrimination⁶, imprecisely and ambiguously sketched by early works of intersectionality in human rights law. Still the Court has not been explicit about their methodology nor specified if there are a limited number of factors, or how those factors are determined as relevant to be brought into the analysis. The intersectional approach provided by the Court has not determined which social factors count when addressing experiences of oppression from an intersectional perspective. Which social categories should be taken into account and which should not? The imprecise scope and implications of intersectionality in the human rights field is worrisome since contrary to its original purpose, it can lead to arbitrary exclusions and to fixation in essentialist categories.

The *I.V.* judgement, in effect, is a good case from which to draw conclusions in this sense, since it certainly limits the scope of intersectionality when identifying the presence of intersectional discrimination against the victim in the case of access to justice, but not in the practice of tubal ligation. Unfortunately, there is little development of the Court's reasoning on this point, but the decision shows that being a migrant woman in a precarious economic position appears to have a different impact when the person is facing the judicial system rather than the healthcare system. For the Court, being a woman is a unified experience when facing discrimination from reproductive health care services, and it is drawn from the Court's reasoning, that living in poverty does not make this experience any different. The distinction demands attention inasmuch as *Gonzalez Lluy* concluded that living in poverty had impacted the treatment provided by the health care system of a girl with HIV. The limitation made by the Court, therefore, seems rather arbitrary. Interestingly, in this limitation, we observe semblances of a homogenous notion of women, according to which maternity experiences have a common ground that does not interact with other factors.

IV. CONCLUSION

The paper follows the development of the principle of non-discrimination in human rights law into the most recent incorporation of intersectional approaches. Observing the continuities and disruptions between the notion of structural discrimination and intersectionality allows for identification of the limitations of applying a notion of intersectionality built from categories developed through the lens of structural levels of discrimination. The development of notions of structural discrimination for certain groups, answers one of the main criticisms of the formal principle of non-discrimination, which is that its individualistic accounts of equality cannot protect the members of groups facing disadvantageous social positions, with *Maria da Penha* as its groundbreaking case, the *Cotton Field* case as proffering a more complex understanding of state responsibility drawn from structural discrimination.

⁶ In previous cases where the I-A Human Rights Court had referred to life experiences where more than one cause of oppression was involved, the term used was *multiple discrimination*. For example, that was the term that the Court chose when decided on cases where indigenous women suffered sexual assaults. See *Rosendo Cantú et al. v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 216, (IACrHR, 2010).

The construction of group and identity-based rights from structural perspectives may sharpen views on how, for instance, women see their right to life or right to personal integrity affected by gender based violence, but it led to fixed notions of identitarian categories such as that of women. In an effort to give a more complex account of the flux of identities in an array of inter-personal as well as structural settings, concepts of “multiple discrimination” first, “adding vulnerabilities” and “intersectional nature of the discrimination” later, have been gaining increasing attention in the IACHR and Court’s decision. Still, categories built from structural patterns of oppression occlude more nuanced understandings of power formations and leave the definitions of intersectionality, as well as its use in judicial decisions, trapped in the logic of categorical reasoning.

The reports and decisions reviewed have failed adequately to develop the connections between structural discrimination and intersectional approach. The reasons behind the silence in relation to the shared elements of both terms is difficult to explain, especially when we observe that one of the ways intersectionality is operating in the Court’s reasoning is by exposing contextual elements, with the same effects as structural discrimination. Still, they have been granted a different legal basis. While structural discrimination has been incorporated in an expansive interpretation that follows from article 1.1 of the American Convention, the intersectional approach is introduced as a mere contextual element whose main accomplishment is that of illuminating the social and economic vulnerabilities at play, and has been mainly been referred to as a “guiding principle”. The disparities in "juridical nature" have strong legal consequences and influence the future impact that the concept of "intersectionality" can bring to human rights law. An open question is whether the notion of intersectional discrimination should also be interpreted under article 1.1 of the American Convention. Should it also require special scrutiny? How should the theory of risk be applied when we have different structural oppressions at play in a case? Following this reasoning the question of the threshold that should be met arises. If this is the chosen path, first and foremost, should it be a methodology to determine the presence of an intersectional form of discrimination in human rights law? On the one hand, having to prove the presence of intersectional discrimination entail adding barriers, however, it may allow for an expansion of the international responsibility of States for their failure to comply with their obligations. On the other, if it keeps on being a merely contextualized description it may nonetheless illuminate and allow for a more complex understanding of the factors at play, and their legal consequences limited to perhaps some impact on reparations. In any event, there is an evident confusion regarding the definition, legal nature and effects, methodology and function of intersectionality in the development of human rights law.

The path the concept takes will have implications for the way we appropriate the concept of intersectionality to arrive at more just decisions. The current scope of the concept of intersectionality and intersectional approaches in human rights law evinces a strong connection with categorical approaches built from structural forms of oppression, which result in fixed and essentialist accounts of power formations. If the legal subject continues being atomistic and only amended through ad-hoc notions in the way “intersectional approaches” are being used now, it may eventually lead to a change over time, but the process will be slow. Intersectional approaches can follow a different path and deconstruct legal subjects by exposing how they are embedded in social practices.

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