

Intersectionality and Vulnerability: Insights from the *Fireworks Factory* Decision of the Inter-American Court of Human Rights and the *Mahlangu* Decision of the Constitutional Court of South Africa

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ABSTRACT

Drawing on the theoretical frameworks on intersectionality and the related notion of vulnerability, this article analyses the *Fireworks Factory* decision of the Inter-American Court of Human Rights and the *Mahlangu* decision of the Constitutional Court of South Africa, considering them as significant examples of putting into practice the intersectional approach in the legal context. Both these judgments recognise the relevance of this analytical perspective in understanding discrimination on multiple grounds, focusing on their structural dimensions, related vulnerabilities and social inequalities. The article shows how intersectionality is used in these decisions as a tool to analyse the negative impacts of the interplay of various forms of discrimination, but also to grasp the specific subordination and oppression that arise from their intersection, which are often inadequately addressed by the law and its judicial enforcement.

KEYWORDS

intersectionality, vulnerability, structural oppressions, discrimination, substantive equality

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1. Introduction

Introduced by Black feminism in the 1970s, and formally coined by African-American legal scholar Kimberlé Crenshaw in 1989¹, the concept of intersectionality sheds light on the experiences of oppression and discrimination arising from the interplay of different and dynamic power structures, including those related to gender, sex, nationality, class, age and migration status. Crenshaw has proposed intersectionality as a tool to address the inadequacies of U.S. anti-discrimination law and its judicial enforcement in understanding and capturing the experiences of discrimination endured by Black women on the intersecting grounds of sex, race and class². As an analytical perspective, intersectionality illuminates the complexity and fluidity of individuals' identity, unveiling and addressing the power structures and related substantive inequalities that affect them³.

Since Crenshaw's seminal work introducing this concept, intersectionality has gained increasing prominence as a "travel notion"⁴, moving across various legal domains, including anti-discrimination law, family law, criminal law and immigration and refugee law⁵. Intersectionality has also extended beyond legal studies to influence the social sciences⁶ and has become a key tenet of contemporary feminist, social justice and anti-oppression movements⁷. This has contributed to what Sandro Mezzadra has called a "re-politicisation" of intersectionality because «over the last years in the United States the notion had become a kind of standard academic reference and its original political imprint had been to some extent neutralised»⁸.

Despite this growing great interest in the intersectionality approach, its application in law and legal praxis is still limited⁹, especially in the European context¹⁰. Although there have been significant advancements at the European Union (EU) level – including the incorporation of

¹ CRENSHAW 1989.

² See also CRENSHAW 1991.

³ See, for instance, BELLO 2020.

⁴ See CHO et al. 2013; LA BARBERA 2016; MARINI 2021.

⁵ See, for instance, AJELE, MCGILL 2020.

⁶ See, for instance, BELLO et al. 2022.

⁷ See, *inter alia*, DAVIS 2016.

⁸ MEZZADRA 2021.

⁹ See, for instance, AJELE, MCGILL 2020.

¹⁰ See FREDMAN 2016; ATREY 2019; BELLO 2020.

intersectionality into legally binding documents such as EU Directive 2023/970 on equal pay for men and women¹¹ and EU Directive 2024/1385 on gender-based violence¹² – much progress is still needed at the national regulatory level. Indeed, many European countries still address discrimination on separate grounds and neglect to consider the intersections of various axes of inequality in their political and legislative agendas¹³. A similar trend can be observed at the case law level¹⁴. Apart from a few tentative and rare openings towards an intersectional approach, European and national case law still struggles to integrate this perspective.

As some scholars have argued, the challenges in implementing the intersectionality approach within the European legal context stem from the fact that this approach has entered the EU's political and legislative agenda through political science and sociology, rather than being first examined, discussed and adapted by legal scholarship, as was for instance the case in the U.S.¹⁵. Furthermore, as Isabel Fanlo Cortès has noted, there is also a deeper structural reason related to the very analytical framework of classical liberal anti-discrimination law, which remains tied to a single-category approach and to the similarity-difference logic dominant in traditional legal culture¹⁶.

With regard to the case law of the European Court of Human Rights (ECtHR), it is worth underlining that the Court still lags behind with respect to embracing an intersectional approach. However, its judgment in the case *B.S. v. Spain*¹⁷ represents an important recognition of intersectional discrimination¹⁸. As further discussed in the following pages, the ECtHR has not fully addressed the structural dimension of intersectional discrimination¹⁹. Moreover, at the time of writing, this decision has not significantly influenced the ECtHR's interpretative approach to discrimination.

Against this background, this article focuses on the application of the intersectionality approach in two recent judicial decisions from different jurisdictions. One is the judgment of the Inter-American Court of Human Rights (IACtHR) in the case of the *Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil* of July 2020²⁰ (hereafter the *Fireworks Factory* case). The other is the judgment of the Constitutional Court of South Africa in the case *Mahlangu and Another v Minister of Labour and Others* of November 2020²¹ (hereafter the *Mahlangu* case). The IACtHR has embraced intersectionality in various judgments, particularly since 2015²². In its decision in the *Fireworks Factory* case, the Court notably employed intersectionality to address the structural dimension of intersecting discrimination and oppression stemming from systemic socio-economic and gender inequalities. The Constitutional Court of South Africa is renowned for its progressive stance²³ and is frequently cited by Courts worldwide for its transformative contributions. Consistent with this approach, its decision in the *Mahlangu* case has explicitly recognised the prohibition of intersectional discrimination under the South African Constitution, marking an important interpretive stance in the application of intersectionality.

¹¹ Directive (EU) 2023/970 on strengthening the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. See BELLO, MANCINI 2023.

¹² Directive (EU) 2024/1385 on combating violence against women and domestic violence.

¹³ See, for instance, BELLO 2020.

¹⁴ FREDMAN 2016; MARINI 2021.

¹⁵ See LA BARBERA 2016.

¹⁶ FANLO CORTÈS 2023, 62.

¹⁷ ECtHR, *B.S. v. Spain*, App. No. 47159/08, 2012. Hereafter the *B.S. v. Spain* case.

¹⁸ YOSHIDA 2013.

¹⁹ LA BARBERA, CRUELLS LÓPEZ 2019.

²⁰ IACtHR, *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil*, Merits, Reparations, and Costs, Ser. C No. 407 ¶ 61, 2020 (concurring, J. Pérez Manrique).

²¹ Constitutional Court of South Africa, *Mahlangu and Another v Minister of Labour and Others*, ZACC 24, 2020.

²² See, for instance, IACtHR, *Gonzales Lluy et al. v. Ecuador*, Merits, Reparations, and Costs, Ser. C No. 298, 2015; IACtHR, *Empleados de la Hacienda Brasil Verde vs. Brasil*, Ser. C No. 337, 2016.

²³ See ATREY 2019.

After outlining the theoretical framework concerning the notion of intersectionality and the related concept of vulnerability, this article aims to highlight how both the *Fireworks Factory* decision of the IACtHR and the *Mahlangu* judgment of the Constitutional Court of South Africa represent significant examples of putting intersectionality into practice. These decisions recognise the relevance of this analytical perspective in understanding the nature of discrimination based on a combination of grounds, paying attention to the structural dimension of discrimination, related situations of vulnerability and substantive social inequalities. Both these judgments use intersectionality as a tool not only to analyse the negative consequences resulting from various forms of discrimination, but also to shed light on the specific subordination and oppression that arise from their intersection and which are often inadequately addressed by the law and its judicial enforcement.

2. Unpacking Notions and Approaches

2.1 Intersectional Oppressions and their Structural Dimension

Although the development of the term “intersectionality” is commonly associated with the work of Kimberlé Crenshaw, the intersectional approach has a long history and a complex genealogy²⁴. Its gestation can be found in earlier feminist thought, especially within Black feminism²⁵. For instance, the attention to the interconnection between racism and sexism emerged in the writing and activism of such late 19th and early 20th century black feminists as Sojourner Truth and Maria W. Stewart. While they did not use the term “intersectionality”, these feminist thinkers identify

«racism and sexism – through activist organizing and campaigning – not only as separate categories impacting identity and oppression, but also as systems of oppression that work together and mutually reinforce one another, presenting unique problems for black women who experience both, simultaneously and differently than white women and/or black men»²⁶.

Another important antecedent of the intersectional perspective can be found in the 1977 statement of the Combahee River Collective, a Black radical feminist and lesbian organisation formed in 1974, which referred to interlocking systems of oppression²⁷, foreshadowing the concept of intersectionality. The Collective was «actively committed to struggling against racial, sexual, heterosexual, and class oppression»²⁸. «We also find it difficult», as they underlined in their statement, «to separate race from class from sex oppression because in our lives they are most often experienced simultaneously»²⁹. A similar perspective was followed in the reflections and activism of other non-white feminist movements of the 1970s, such as Chicana feminism, which, by highlighting the complex nature of Chicana subjectivities and experiences, encouraged reflection on the multiplicity of aspects related to their oppression. As the Chicana feminist writer and activist Elizabeth Martinez wrote in 1972, «[...] the Chicana suffers from a triple oppression. She is oppressed by the forces of racism, imperialism and sexism. This can be said of all non-white women in the

²⁴ See, for instance, COLLINS 2011; COOPER 2016; NASH 2019.

²⁵ MEZZADRA 2021.

²⁶ GINES 2014, 14.

²⁷ COMBAHEE RIVER COLLECTIVE, 1981, 210.

²⁸ COMBAHEE RIVER COLLECTIVE, 1981, 210.

²⁹ COMBAHEE RIVER COLLECTIVE, 1981, 213.

United States»³⁰. The focus was not on making a sterile “arithmetic” sum of the various categories (primarily “gender,” “race,” and “class”) that contributed to defining their condition as “oppressed”, but, rather, on considering how these different variables intersected and mutually defined each other.

Works from the 1980s by Black feminists such as bell hooks³¹, Angela Davis³² and Audre Lorde³³ and by Chicana feminists such as Gloria Anzaldúa³⁴ and Cherrie Moraga³⁵ constitute additional important antecedents to the contemporary conception of intersectionality. The Chicana feminist scholar Gloria Anzaldúa³⁶ focused on the figure of the *mestiza*, considered as the historical product of the encounter between different cultures, the intersection of various axes of power and their unpredictable combinations. Navigating through the complexities of dominant regimes, Anzaldúa calls for theorising and narrating the intricacies that constitute the Chicana women’s subjectivities and experiences, thus prompting reflection on the simultaneous forms of power and oppression that affect and shape them as well as their capacity to resist and react. In a similar vein, since the 1980s, postcolonial feminists have highlighted how dominant discourses have constructed an image of the “typical” Third World woman – referred to by Chandra Talpade Mohanty³⁷ as the “average Third World Woman”. This reduces the complexity of women’s agency and experiences, as well as the multiplicity of power discourses and social structures affecting them. At the core of all these reflections is a common critique of the essentialist tendencies in mainstream feminism, which overlook the additional axes of differentiation – such as “race”, class, ethnicity or legal status – that intersect to define and articulate the experiences of discrimination and oppression faced by non-white and non-Western women.

It is against this background that the feminist critical legal scholar Kimberlé Crenshaw, particularly in her seminal articles in 1989 and 1991³⁸, mobilised the notion of intersectionality to critique the use of a single-ground framework for recognising and understanding subordination and oppression in the context of legal discrimination. It is worth noting that the work of Crenshaw is situated within the realm of Critical Legal Studies and, more specifically, of the Critical Race Theory which has been developed since the mid-1970s to critically explore how racial inequalities and hierarchies are embedded in social structures and are enacted through the law³⁹. Thus, the focus is on how the law functions by producing and amplifying forms of subordination and oppression. However, for Critical Race Theory scholars, including Crenshaw, the law is also a means through which these dynamics of subordination and oppression can be challenged. As Giovanni Marini has underlined, «Crenshaw works within the law, taking advantage of its relative but not infinite flexibility»⁴⁰.

By examining some legal cases that dealt with the issues of both racial and sex discrimination, Crenshaw introduced the term “intersectionality” to highlight the limitations of U.S. anti-discrimination law in capturing the interconnections between various structural forms of oppression in the experiences of discrimination faced by Black women. Notably, she analysed the 1977 *DeGraffenreid v. General Motors* case⁴¹, in which the Court rejected the claim of five Black women that the company’s seniority system discriminated against them. According

³⁰ MARTÍNEZ 1997.

³¹ HOOKS 1981.

³² DAVIS 1983.

³³ LORDE 1984.

³⁴ ANZALDÚA 1987.

³⁵ MORAGA 1981.

³⁶ ANZALDÚA 1987.

³⁷ MOHANTY 1988.

³⁸ CRENSHAW 1989; 1991.

³⁹ See, for instance, CRENSHAW et al. 1996; KENNEDY 1992. See also HARRIS 1990.

⁴⁰ MARINI 2023, 29 (My translation in English).

⁴¹ *DeGraffenreid v. General Motors*, 413 F. Supp. 142 (E.D. Mo. 1976).

to Crenshaw, the Court failed to see and recognise the «combined race and sex discrimination», relying on the assumption that «the boundaries of sex and race discrimination are defined respectively by white women’s and black men’s experiences»⁴². This prevented the recognition of the specificities of the diverse lived experiences of discrimination among workers, particularly those of Black women situated at the intersection of multiple grounds. Crenshaw argued that the Court’s narrow view of discrimination was a clear example of the «conceptual limitations of [...] single-issue analyses»⁴³. In other words, the law appeared to overlook that Black women face discrimination not only based on gender and “race” individually but also through a combination of the two. Crenshaw made similar observations regarding the issue of violence against women of colour, emphasising how the use of a single-ground discrimination framework distorts the experiences of violence faced by Black women, who are simultaneously subjected to intersecting forms of oppression and subordination. As she wrote, «the intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately»⁴⁴.

Crenshaw used the famous metaphor of a road intersection to explain intersectionality:

«consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars travelling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in an intersection, her injury could result from sex discrimination or race discrimination»⁴⁵.

Far from viewing multiple discrimination as a simple sum of factors, intersectionality as an analytical perspective challenges the boundaries between axes of discrimination. It shifts the focus to their interaction, highlighting the simultaneous and dynamic operation of systems of racial, sexual, class, national and other forms of oppression and subordination affecting individual experiences and producing further forms of discrimination. In this sense, intersectionality reveals the limits of the law and its judicial enforcement in recognising and addressing the specific forms of discrimination produced by the interplay of multiple grounds. At the same time, it shows how the failure of the law to capture the specificities of these experiences further exacerbates disadvantages and inequalities. As Crenshaw argued, intersectional subordination is indeed «frequently the consequence of the imposition of one [normative] burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment»⁴⁶.

Crenshaw’s work on intersectionality has significantly influenced research and scholarship across various disciplines, leading to different conceptualisation and applications of this notion. Of note is the work by sociologist Patricia Hill Collins. Focusing on “intersecting oppressions”, Collins underlined that intersectionality is a specific tool to understand social location in terms of crisscrossing systems of oppressions. Intersectionality, she argued, is an «analysis claiming that systems of race, social class, gender, sexuality, ethnicity, nation, and age form mutually constructing features of social organization, which shape Black women’s experiences and, in turn, are shaped by Black women»⁴⁷.

⁴² CRENSHAW 1989, 143.

⁴³ CRENSHAW 1989, 149.

⁴⁴ CRENSHAW 1991, 1244.

⁴⁵ CRENSHAW 1989, 149.

⁴⁶ CRENSHAW 1991, 1249.

⁴⁷ COLLINS 2000, 299.

Far from being free of ambiguities, the intersectional approach has faced several critiques, including the risk of being trapped within the logic of identity politics and being too easily appropriated by dominant theories, which may detach it from its foundational roots in Black and other feminist movements⁴⁸. Particular concern arises from the fact that while intersectionality theory challenges the established group demarcations used in anti-discrimination law, it can lead to the proliferation of sub-groups. It thus risks falling into the very trap that it aims to avoid, namely «the assumption that all members of the sub-group are the same and that identity is fixed and static»⁴⁹.

Trying to address some of these critiques, Crenshaw has stressed how far from being a “blanket term”, intersectionality is «a lens through which you can see where power comes and collides, where it interlocks and intersects»⁵⁰. The attention is on the structures of power and exclusion, therefore on the structural dimension of intersectionality. Far from being an identity-focused critique concerned with recognition, the intersectional perspective has its roots in a radical critique concerned with social inequalities and the distribution of power⁵¹. It looks, in particular, at the way law and legal systems contribute to the creation and marginalisation of identities. In this sense, as has been argued, intersectionality serves as a lens to observe «how things work rather than who people are»⁵². This does not imply that identities are insignificant. Rather, as Fredman has pointed out, they «should be seen both as a manifestation of the intersection of multiple hierarchies and a way of maintaining such hierarchies»⁵³.

The intersectional perspective should be seen as shifting the focus to the material conditions and social relations in which persons are situated, within contexts marked by power relations and structures, examining the way the law functions. It thus addresses the structural and systemic issues related to discrimination and substantial inequalities and, at the same time, explores ways to affect the distribution of power through the law⁵⁴, thereby fostering social transformation.

2.2 *Situational Vulnerabilities*

Before proceeding to the analysis of the judicial decisions discussed in this article, it is important to briefly address the concept of vulnerability, for this is closely related to intersectionality and frequently used in legal reasoning which pays attention to intersectional perspectives. The notion of vulnerability is also often employed by Crenshaw. For instance, as she argued «the intersectional problem is not simply that one discrete form of discrimination is not fully addressed, but that an entire range of human rights violations are obscured by the failure to address fully the intersectional vulnerabilities of marginalized women»⁵⁵ – or other marginalised people.

As is well known, the notion of vulnerability has historically been particularly ambiguous for women’s and feminist movements. Feminist scholars have critiqued the patriarchal origins of this conception that attributes vulnerability to certain groups (including women and minors) viewed as ontologically fragile and thus deemed as deserving of protection. This conception of vulnerability, which is often supported by legal and policy discourses and instruments,

⁴⁸ See, for instance, in this regard PUAR 2012 and CARASTATHIS 2014.

⁴⁹ FREDMAN 2016, 31.

⁵⁰ COLUMBIA LAW SCHOOL 2017.

⁵¹ See in this regard also MARINI 2021.

⁵² FREDMAN 2016.

⁵³ FREDMAN 2016, 31.

⁵⁴ CRENSHAW 2011.

⁵⁵ CRENSHAW 2014, 18.

reinforces marginalisation and dynamics of victimisation by portraying some individuals or groups as passive and lacking agency⁵⁶.

By contesting such understanding of vulnerability, feminist social and legal scholars have proposed more nuanced approaches. They have challenged the dichotomy between vulnerable/passive *v.* non-vulnerable/active, and highlighted the potentialities of this notion, particularly in relation to the protection of fundamental rights⁵⁷. More precisely, echoing the classic theories of modern political-legal thought – which based the origins of the institutions of modernity on the assumption of human vulnerability⁵⁸ – feminist scholars like Martha Fineman⁵⁹ have framed vulnerability as a universal and inevitable human trait, thereby implying exposure to forms of harm⁶⁰. At the same time, these feminist reflections have highlighted how vulnerability is a condition arising from power relations, domination and inequality. It therefore varies in its intensity and form, as it is connected to the power hierarchies that characterise the context in which a person is situated. Alongside the understanding of vulnerability as a fundamental aspect of human existence is the recognition of its context-specific dimension.

Drawing from various perspectives and disciplinary fields, feminist reflections have thus highlighted that vulnerability is a variable condition, both in its form and intensity, depending on individuals' positions within society and power relations. In this sense, in their taxonomy of different sources of vulnerability, Mackenzie, Rogers and Dodds have developed the concept of "situational vulnerability"⁶¹. Such a notion sheds light on the interplay of personal and structural factors (including legal, economic, political and social factors) that produce and/or foster situations of vulnerability, and that are differently articulated depending on the power relations and contexts in which the person is situated. The situational understanding of vulnerability is therefore closely related to the perspective of intersectionality as it involves paying attention to the simultaneous and dynamic functioning of gendered, racialised, classed and other systems of subordination and oppression contributing to the creation and reinforcement of situations of vulnerability.

This contextual/situational dimension of vulnerability, and its link with structural intersectional discrimination, is often overlooked in legal and policy discourse and praxis. Despite its increasing use in legal texts, vulnerability is a particularly contentious notion when it is translated at the legal level. It is frequently associated with individuals/groups deemed inherently vulnerable⁶². This categorical and group-based approach to vulnerability, which can be found for instance in the EU asylum legal framework⁶³, risks favouring essentialist and deterministic views and leading to a rigid distinction between those deserving and undeserving of protection.

The lack of a normative definition and the difficulty of encompassing heterogeneous aspects in a single concept make it difficult to translate vulnerability at the legal level. However, as Giammarino and I have pointed out⁶⁴, the understanding of vulnerability in its situational/contextual dimension, taking into account the intersection of different factors that shape and reinforce situations of vulnerability, is the premise for the application of the principle of substantive equality. Indeed, it is not about creating lists of individuals deemed worthy of protection at the expense of the universality of human rights. Instead, this understanding of vulnerability helps to identify the measures needed to ensure that all individuals, including those in positions of

⁵⁶ See, *inter alia*, MACKENZIE et al. 2014.

⁵⁷ MACKENZIE et al. 2014. See also PARIOTTI 2018.

⁵⁸ See, in this regard, VERZA 2018.

⁵⁹ See, *inter alia*, FINEMAN 2010 and FINEMAN 2019.

⁶⁰ See also in this regard BUTLER 2004.

⁶¹ MACKENZIE et al. 2014.

⁶² See, for instance, TIMMER 2013.

⁶³ MUSTANIEMI-LAAKSO et al. 2016; SANTORO 2020.

⁶⁴ GIAMMARINARO, PALUMBO 2021.

subordination or disadvantage, can fully enjoy their rights.

This perspective challenges the classical liberal notion of autonomy as a natural and predetermined state, and instead refers to a conception of “relational” autonomy, which results from the «relationships and contexts that place the individual in a position to make autonomous choices»⁶⁵. In this view, the vulnerable person is not without agency or incapable of making choices. Rather, these capacities require a relational and institutional context that ensures the necessary conditions for persons being able to act in conditions of autonomy and responsibility. As Fineman has noted, State institutions play a crucial role in affecting the grade of vulnerability but also «in lessening, ameliorating, and compensating for vulnerability»⁶⁶, addressing the structural disadvantages and fostering substantial equality.

The situational understanding of vulnerability entails therefore seeing autonomy in terms of empowerment, requiring – in line with an intersectional approach – not merely protection but legal and political responses aimed at fostering social justice and recognition of fundamental human rights.

3. *The Application of Intersectionality in the Legal Context*

3.1. *The B.S. v. Spain Judgment of the ECtHR*

Having outlined the relevant theoretical framework concerning intersectionality and the related notion of vulnerability, this section shifts to the “law in action” dimension, exploring the way this framework has been embraced by Courts. Before examining the IACtHR’s ruling in the *Fireworks Factory* case and the Constitutional Court of South Africa’s ruling in the *Malanghu* case, this section (3.1) will briefly discuss the ECtHR’s decision in the case of *B.S. v. Spain*. As mentioned above, this was the first and main case in which the ECtHR employed an intersectional approach. However, the *B.S. v. Spain* judgment has also some limitations which need to be considered in relation to the more developed approach adopted by the IACtHR and the Constitutional Court of South Africa in the decisions examined below.

The *B.S. v. Spain* case arose from a claim alleging a violation of Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhumane or degrading treatment or punishment, in conjunction with Article 14, which prohibits discrimination. The claim was brought by Ms. B.S., a sex worker of Nigerian origin who was regularly residing in Spain. Despite sex work being legal in Spain, police officers on several occasions stopped Ms. B.S. for alleged identification purposes and ordered her to leave the area. Moreover, she was subjected to verbal and physical abuse, causing injuries to her hand and knee. Ms. B.S. claimed that she had been discriminated against on the grounds of both sex and race because police officers directed racial slurs at her while not stopping other sex workers in the area who had a “European phenotype”. The allegation of intersectional discrimination was based on the assertion that «her position as a black woman working as a prostitute made her particularly vulnerable to discriminatory attacks»⁶⁷. She argued that the factors shaping her social position should not be considered in isolation but rather in their interconnected and constitutive interaction. Thus, she claimed that the ECtHR needed to consider those factors «not [...] separately but [...] in their entirety, their interaction being essential for an examination of the facts of the case»⁶⁸.

The ECtHR demonstrated responsiveness to this argumentation. The Court stated that

⁶⁵ PARIOTTI 2018, 149 (My translation in English). See also in this regard SANTORO 1999 and NEDELSKY 2012.

⁶⁶ FINEMAN 2010, 13.

⁶⁷ The *B.S. v. Spain* case, para. 52.

⁶⁸ *Ibid.* para. 52.

Spanish authorities had breached Article 3 of the ECHR by not conducting an effective investigation into the «possible causal link between the alleged racist attitudes and the violent acts allegedly perpetrated by the police against the applicant»⁶⁹. The Court thus underlined the State's positive obligation to prevent ill-treatment, as derived from the prohibition of torture and inhuman or degrading treatment or punishment under Article 3 of the ECHR. After finding a violation of Article 3, the Court did not, however, dismiss the claim of discrimination as irrelevant. It instead held that authorities always have a duty to investigate the potential link between racist attitudes and incidents of violence. In this case the Court acknowledged that the applicant had promptly reported a derogatory remark made by the officers: «get out of here you black whore»⁷⁰. Additionally, she noted that other sex workers with a “European phenotype” had not been stopped or questioned by the police. The Court concluded that the Spanish Courts had failed to take into account the applicant's particular vulnerability arising from her status as a Black migrant woman and sex worker.

The *B.S.* judgment has been rightfully celebrated as a significant example of effective judicial recognition of intersectional discrimination, highlighting the Court's nuanced understanding of how multiple layers of discrimination can intersect and exacerbate the impact on individuals⁷¹. The ECtHR addressed the issue of intersectionality in a case involving both gender and racial discrimination, while also acknowledging how these forms of discrimination were compounded by the stigma surrounding sex work. It thus focused on the interplay of gender, race and sex work, an archetype of intersectional discrimination which illustrates how multiple layers of prejudice can converge to create a uniquely marginalised experience.

Nevertheless, the Court opted not to use the term “intersectional discrimination” but to use “particular vulnerability”. This choice underscores a preference for the more familiar concept of vulnerability which has progressively gained prominence in ECtHR jurisprudence in recent decades⁷². As previously noted, relevant literature has pointed out how the concept of vulnerability has tended to be understood by the Court as a fixed and static label related to individuals/groups perceived as inherently vulnerable⁷³. The use of this notion in the judgment of *B.S. v. Spain* represents a partial exception to this pattern⁷⁴. Indeed, by following intersectionality as an interpretative criterion, the Court considered vulnerability in a dynamic and multifaceted way in line with a situational understanding of this notion.

However, the ECtHR's allusion to the intersectional character of discrimination is, as noted by La Barbera and Cruells López, «laconic and minimal»⁷⁵. The Court did not delve into either an analysis of intersectional interpretation of discrimination or into the concept of vulnerability on the basis of its jurisprudence, leaving the line of reasoning around these notions insufficiently developed. Moreover, the ECtHR did not explore the structural dimensions underlying the factors contributing to the vulnerability of Black migrant women in Spain which expose them to intersectional discrimination. Although the Court addressed the specific circumstances affecting Ms. B.S., it did not investigate the wider systemic and structural issues that perpetuate the marginalisation and discrimination she faced. In other words, the Court did not fully frame, in line with an intersectional approach, individual experiences of discrimination with the broader systems of power and structural exclusion that sustain and perpetuate such discrimination⁷⁶. Consequently,

⁶⁹ *Ibid.* para. 60.

⁷⁰ *Ibid.* para. 61.

⁷¹ See, for instance, *YOSHIDA* 2013; *LA BARBERA, CRUELLES LÓPEZ* 2019.

⁷² See, for instance, *TIMMER* 2013.

⁷³ *TIMMER* 2013.

⁷⁴ *LA BARBERA, CRUELLES LÓPEZ* 2019.

⁷⁵ *LA BARBERA, CRUELLES LÓPEZ* 2019.

⁷⁶ See, in this regard, *ATREY* 2019.

the Court did not indicate to Spain any measure that should be adopted to address these forms of structural discrimination. As La Barbera and Cruells López argued, «by failing to incorporate any reference to the structural element of the discrimination against black migrant women in Spain, the ECtHR heavily restricted possible transformative effects of *B.S. v. Spain*»⁷⁷.

On the other hand, despite these limitations, the *B.S.* judgment is undeniably a notable example of judicial recognition of discrimination arising from the intersection of different axes of oppression. This judgment is indeed frequently cited as a pivotal reference for adopting an intersectional approach by various international and national courts, including by the IACtHR and the Constitutional Court of South Africa in the decisions examined in the following sections.

Nevertheless, the *B.S.* judgment cannot be viewed as the start of a new trajectory in ECtHR case law⁷⁸ as the Court currently lags behind in this respect. A clear instance where the judges in Strasbourg did not take the opportunity to address intersectional discrimination is the *Garib vs. Netherlands* judgment of November 2017⁷⁹. In this case, the Grand Chamber of the ECtHR stated that the refusal of a housing permit to a Dutch woman due to her failure to meet income requirements constituted a proportionate measure and, consequently, did not breach her freedom to choose her residence under Article 2 of the Protocol No. 4 of the ECHR. While the applicant requested the Grand Chamber to examine the case under Article 14 (prohibition of discrimination) in conjunction with Article 2 of Protocol 4 of the ECHR, the Grand Chamber opted not to do so. In his powerful dissenting opinion, Judge Pinto de Albuquerque referred to Crenshaw's theory of intersectionality and argued that the Court should have adopted an intersectional perspective to understand the situation of vulnerability faced by Mrs. Garic due to her status as a single mother and in a condition of poverty.

ECtHR's attention to the dimension of intersectionality can also be found in the case *J. I. vs. Croatia* of 2022⁸⁰ concerning a Romani woman in Croatia complaining about the failure of the police to protect her against gender-based domestic violence. The ECtHR stated that there was a procedural violation of Article 3 of the ECHR (Prohibition of torture and inhuman treatment) as the repeated victimisation through death threats by a rapist father was not investigated. By highlighting the particular situation of vulnerability of this plaintiff as a Roma woman and victim of serious sexual offences, the Court argued that leaving her to fear further abuse and assaults was inhumane treatment. However, even while suggesting an intersectional perspective to vulnerability, the ECtHR did not explicitly use the term intersectionality. Moreover, it confined vulnerability implications to investigation duties, failing to consider discrimination as an issue and thereby missing the opportunity to develop a substantial and contextualised analysis of intersectional discrimination in the framework of structural inequalities⁸¹.

3.2. *The Fireworks Factory Judgment of the IACtHR*

In the aforementioned dissenting opinion of Pinto de Albuquerque in the *Garib vs. Netherlands* decision of the ECtHR, the judge emphasised that the IACtHR has been particularly advanced in the area of intersectionality. Indeed, especially since 2015, the IACtHR has adopted intersectionality in a number of judgments⁸² as an analytical perspective to examine cases of human rights violations, understand the roots of multiple forms of discrimination and provide

⁷⁷ LA BARBERA, CRUELLS LÓPEZ 2019, 1193.

⁷⁸ See in this regard STAIANO 2017; DIAS OLIVEIRA 2023.

⁷⁹ ECtHR, *Garib vs. Netherlands*, Appl. No. 43494/09, 2017.

⁸⁰ ECtHR, *J. I. vs. Croatia*, Appl. No. 35898/16, 2022.

⁸¹ See, in this regard, DIAS OLIVEIRA 2023 and ILIEVA 2022.

⁸² For instance, IACtHR, *Gonzales Lluy et al. v. Ecuador, Merits, Reparations, and Costs*, Judgment, Ser. C No. 298 ¶ 2, 2015. See, in this regard, DIAS OLIVEIRA 2023 and YOSHIDA 2023.

recommendations to address structural issues contributing to intersectional discrimination⁸³. The IACtHR decision in the case of the *Workers in the Fireworks Factory in Santo Antonio de Jesus and their family members vs. Brazil* of July 2020 represents a further advancement in this regard. In this ruling, the Court incorporated an intersectional perspective to address structural discrimination, developing a detailed analysis and understanding of human rights violations and marginalisation practices based on the interplay of structural socio-economic and gender inequalities.

The case involved an explosion at a fireworks factory in the Brazilian city of Santo Antônio de Jesus, on 11 December 1998, which resulted in 60 deaths and left six people severely injured. All fatalities were either women or children and all injured survivors were women and girls. The factory operated irregularly and the conditions where the workers performed their tasks did not meet the minimum standards of quality and safety required. Additionally, they were not provided with personal protective equipment, training or qualifications to handle explosive materials. After the tragic event, survivors and family members were not offered due access to justice. This led them to report violations to the Inter-American Commission of Human Rights (IACHR). After failed negotiations, in 2018, the Commission presented the case to the IACtHR.

The IACtHR established that the State of Brazil was responsible for violating Article 24 of the American Convention on Human Rights, which regards the right to equal protection of the law, including substantial equality. Furthermore there was a violation of Article 26, which obliges States Parties to adopt measures to progressively achieve the «full realization of rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires». According to the Court, both Articles 24 and 26 were violated in conjunction with Article 1.1, which refers to the duty to respect and guarantee Convention rights without discrimination. Additionally, the Court recognised further breaches concerning the rights to life, personal integrity, judicial guarantees and judicial protection, as well as the duty of special protection of children.

This section focuses on the Court's argument concerning Articles 24 and 26 of the Convention, as it was in relation to these articles that the IACtHR paid special attention to the intersectional perspective.

In particular, the IACtHR identified a connection between the poverty experienced by people in Santo Antônio de Jesus and the State's failure to fulfill its obligations to provide individuals with material equality. Drawing explicitly on the theoretical insights of Crenshaw's work on intersectionality, the Court significantly highlighted the structural and intersectional dimension of discrimination suffered by people in Santo Antônio de Jesus, especially by women firework workers. The Court underlined that the irregular production of fireworks provided employment and income in the municipality and that it was characterised by female labour and by intense precarity, subordination and exclusion from formal work and labour rights. Most of these women workers were "Afro-descendants" and had no viable alternative but to accept precarious and dangerous work, such as firework production, due to socially assigned gender roles and socioeconomic gender inequality⁸⁴. Moreover, these women often performed this hazardous work while also caring for their children due to the unequal distribution of unpaid care work within families and the lack of available childcare facilities. As the Court pointed out, «women initiate their children into the manufacture of fireworks not only because this allows them to increase their productivity, but also because they have no one with whom to leave their children who will take care of them»⁸⁵.

By taking an intersectional approach and paying attention to the interplay of factors creating women workers' vulnerabilities, the Court argued that the presumed victims were

⁸³ See DIAS OLIVEIRA 2023.

⁸⁴ The *Fireworks Factory* case, para 65.

⁸⁵ *Ibid.*

«immersed in patterns of structural and intersectional discrimination. [They] were in a situation of structural poverty, most of them were Afro-descendant women and girls, four of whom were pregnant, and they had no other economic option but to accept dangerous work under exploitative conditions»⁸⁶.

According to the Court, «the confluence of these factors made it possible for a factory like the one described in this process to have been able to set up and operate in the region and for the women and children who are the alleged victims to have been compelled to work there»⁸⁷.

Since the intersections of discrimination placed these workers in a particular situation of vulnerability, the State's obligations to ensure their rights increased⁸⁸. As the Court highlighted, Article 24 of the American Convention has two dimensions – one formal (equality before the law) and one material/substantial which requires «the adoption of positive measures to promote historically discriminated or marginalised groups». However, the State of Brazil had not addressed the poverty and the lack of opportunity faced by the firework workers. It failed to «take measures to ensure material equality in the right to work for a group of women who were marginalized and faced discrimination»⁸⁹.

Hence, according to the Court, Brazil was responsible for violating Articles 24 and 26 in relation to Article 1.1, as it failed to ensure respectively the right to equality and the right to just and favourable conditions of work without discrimination. It is worth noting that Article 26 has been interpreted by the IACtHR jurisprudence to include the protection of the right to equal and satisfactory working conditions without discrimination. However, in the *Fireworks Factory* case, the Court did not compare the working conditions in the fireworks factory with those in other factories or other occupations, instead focusing on the lack of opportunities for the town's population to access other types of employment.

In general, as Saliba and Ferolla Vallandro do Valle have pointed out⁹⁰, the IACtHR's rationale for finding discrimination in this case centered on Article 24 of the American Convention and, consequently – as discussed in section 4 of this paper – on a broad notion of equality, including material equality, encompassed by this provision.

In line with this approach, the IACtHR ordered Brazil to adopt specific measures to combat structural and intersectional discrimination. In particular, it ordered the State to develop and implement a socioeconomic development programme in consultation with survivors and the families of the victims, in order to facilitate the transition of firework production workers into other labour markets and support the creation of alternative economic opportunities.

3.3 *The Mahlangu Judgment of the Constitutional Court of South Africa*

As Shreya Atrey has emphasised in her influential work on intersectionality⁹¹, the Constitutional Court of South Africa, renowned for its progressive stance, stands out among national Courts for its awareness of the complexity of discrimination resulting from intersecting social patterns. However, it is in the case *Mahlangu and another v Ministry of Labour and others* (19 November 2020) that the Court identified intersectional discrimination «as the go-to category for analysing discrimination claims based on multiple grounds»⁹², marking a significant advancement in applying an intersectional perspective in the legal context.

⁸⁶ *Ibid.* para. 197.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* para. 198.

⁸⁹ *Ibid.* para. 199.

⁹⁰ SALIBA, FEROLLA VALLANDRO DO VALLE 2021.

⁹¹ ATREY 2019.

⁹² ATREY 2021, 174.

The *Mahlangu* case concerned the tragic death of a domestic worker, Ms. Mahlangu, who drowned in her employer's pool while performing her cleaning duties. The woman could not swim and was partially blind. The employer – who was present in the house at the time of the incident – reported not having heard any screams or suspicious noises. After Ms. Mahlangu's death, her daughter, who was financially dependent on her at the time, sought compensation from the Department of Employment and Labour. However, her claim was denied due to the exclusion of domestic workers from the protections provided by the South African Compensation for Occupational Injuries and Diseases Act 1993 (COIDA). In particular, the COIDA (specifically, section 1 (xix)(v)) explicitly excluded domestic workers from the definition of “employee” for the purposes of accessing social security benefits in the event of injury, disablement or death in the workplace. The High Court in Pretoria upheld the challenge brought by Ms. Mahlangu's daughter, and the case was subsequently appealed to the Constitutional Court of South Africa.

In a striking and detailed judgment, the Court declared the provision constitutionally invalid as it violated the rights of domestic workers, who are predominantly Black women. This included breaches of the right to equality and non-discrimination under Section 9, the right to dignity under Section 10, and the right to have access to social security under Section 27 of the South African Constitution. Although the Court especially articulated an intersectional perspective in its analysis of the right to equality and non-discrimination under Section 9 of Constitution, it also applied this approach to the two other rights under examination, namely Sections 10 and 27. In this sense, Atrey has argued that in *Mahlangu* judgment «intersectionality is considered not just at the point of the discrimination inquiry to address intersectional discrimination based on multiple grounds under section 9(3) of the Constitution, but as a theory which guides the interpretation of all rights per se»⁹³.

More specifically, the Constitutional Court of South Africa first focused on the right to access social security, arguing that it is a fundamental human right protected both by international instruments – such as the Universal Declaration of Human Rights (Article 22) and the International Covenant on Economic, Social and Cultural Rights (Article 9) – and also by regional ones like the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the so-called “Maputo Protocol”), which stipulates that Member States establish «a system of protection and social security for women working in the informal sector» (Article 13(para f)). Since South Africa has ratified these international instruments, the Court deemed the exclusion of domestic workers from compensation for occupational injuries and diseases as “inexplicable”⁹⁴.

The Court then argued that the COIDA constitutes a «subset of the right of access to social security under section 27(1) of the Constitution»⁹⁵, and that social security assistance is intended to also support individuals in circumstances «where a breadwinner has died or cannot work due to injury or illness, her dependents may be left destitute and unable to support themselves»⁹⁶. In such cases, these benefits aim to improve the conditions of those «who would otherwise be condemned to living in abject poverty»⁹⁷. By referring to its earlier rulings on access to social security, including its decisions in the *Grootboom* and *Khosa* cases, the Court reiterated that, in determining the scope of socio-economic rights, it is crucial to consider the transformative purpose of the South African Constitution «which seeks to heal the injustices of the past and address the contemporary effects of apartheid and colonialism»⁹⁸. Social security provisions,

⁹³ ATREY 2021, 172.

⁹⁴ The *Mahlangu* case para. 52.

⁹⁵ *Ibid.* para. 52.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

therefore, serve a “remedial purpose” addressing the «gendered and racialised system of poverty inherited from South Africa’s colonial and apartheid past»⁹⁹. According to the Court, domestic workers are in a disadvantaged position due to intersecting forms of oppression based on “race”, sex and gender, which are rooted in the apartheid and colonial past, making them particularly vulnerable¹⁰⁰. Consequently, excluding this category of workers from COIDA is “manifestly unreasonable” and contrary to the constitutional values of human dignity, equality and *ubuntu*¹⁰¹.

From this perspective, which considers the historical and structural factors underlying intersecting oppression and producing vulnerabilities, the South African judge then ruled that the exclusion of domestic workers from national compensation legislation constitutes a violation of Articles 9(1) (equality before the law) and 9(3) (prohibition of unfair discrimination by the State) of the South African Constitution. With regard to the equality before the law, the Court argued that without any justification provided for differentiating between all employees and domestic workers under COIDA, the contested provision violated Section 9(1). It went on to focus on the violation of the prohibition of unfair discrimination by the State (Article 9(3)). Similar to the IACtHR, the South African judge explicitly referred to the concept of intersectionality and the theoretical insights of Kimberlé Crenshaw. The innovative and powerful aspect of the intersectional approach, the Court stated, «lies in its ability to highlight the experiences and vulnerabilities of certain groups that have been erased or rendered invisible»¹⁰². Adopting this approach, according to the Court, allows for an understanding of «the structural and dynamic consequences of the interaction between multiple forms of discrimination»¹⁰³.

Consequently, the Court argued, judicial authorities must consider the contextual factors that produce vulnerability, including the history of an individual or group and the «social and legal history of society’s treatment of that group»¹⁰⁴. In the concerned case, the Court stressed the need to consider the specific history of social security in South Africa as it relates to domestic workers and the historical disadvantages that Black women have experienced due to the «gendered implications of the apartheid’s racist system»¹⁰⁵. This system relegated Black women to the bottom of the social hierarchy and the labour market, confining them to the least skilled, lowest paid and most precarious sectors, such as domestic work. This sector was, and continues to be, excluded from major labour protection laws, including those related to occupational safety. According to the Court, the exclusion of domestic workers from the protection under COIDA must be considered within a context where these workers have, for decades, «had to bear work-related injuries or death without compensation»¹⁰⁶ and they have been rendered invisible.

Given the intersectional disadvantages and discrimination historically experienced by domestic workers in South Africa, their exclusion from social security assistance under COIDA constitutes, according to the Court, indirect discrimination by the State, violating the Constitution’s goal of achieving substantive equality and transformation for everyone.

The Court also established that this exclusion violates the dignity of domestic workers, protected by Section 10 of the South African Constitution, which provides that «everyone has inherent dignity and the right to have their dignity respected and protected». This exclusion, for the Court, reveals not only the persistent undervaluation of domestic work but also that this

⁹⁹ *Ibid.* para. 63.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* In Zulu, *ubuntu* means “I am because you are”, a concept frequently invoked by the Court to offer a relational perspective in constitutional interpretation. It is a term to describe African-origin value systems that emphasise the interconnectedness of individuals with their surrounding societal and physical worlds.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* para. 95.

¹⁰⁵ *Ibid.* para. 98.

¹⁰⁶ *Ibid.* para. 103.

activity is not considered real work¹⁰⁷. As the South African judge stressed, «one can only imagine the pain of these women who work graciously, hard and with pride only for their work and by consequence them, to go unrecognised»¹⁰⁸. The discriminatory and humiliating treatment experienced by these workers is due to the gendered and racialised nature of domestic work, which in South Africa has traditionally been performed by Black and poor women, whose dignity continues to be inadequately protected¹⁰⁹. In this sense, by highlighting the importance of intersectional lens, the Court argued that «when this case is measured along an intersectional framework, it is plainly evident that there are still disadvantaged groups who have not benefitted from democracy, or from the transformative constitutional project and whose dignity remains impaired and unprotected»¹¹⁰.

Lastly, the Constitutional Court of South Africa also adopted an intersectional perspective in addressing the issue of remedy. The judge argued that the intersectional nature of the discrimination by domestic workers compelled a retrospective remedy to «contribute towards the amelioration of systemic disadvantage suffered by these women and help break the cycle of poverty they endure»¹¹¹. Therefore, the Court not only declared that section 1(xix)(v) of COIDA was constitutionally invalid for excluding domestic workers, but also applied this ruling with immediate and retrospective effect.

3.4 Structural Discrimination, Substantive Equality and Social Transformation

Both the *Fireworks Factory* decision of the IACtHR and the *Mahlangu* decision of the Constitutional Court of South Africa are groundbreaking in that they put into practice intersectionality as a “point of view” – to use Giovanni Marini’s words¹¹² – to shed light on compounded forms of oppression and examine how the law addresses or amplifies these. The following pages will focus on some key aspects that I argue make these judgments important examples of adopting an intersectional perspective, representing a significant advance from the approach taken by the ECtHR, especially in the *B.S. v. Spain* decision.

The first aspect concerns the attention to the structural dimension of intersectional oppressions and discrimination. While explicitly citing the *B.S. v. Spain* decision as an example of intersectionality applied in other jurisdictions, both the IACtHR and the Constitutional Court of South Africa, unlike the ECtHR, employed terms such as “intersectional and structural discrimination” and “structural elements of discrimination”. Furthermore, unlike the judges in Strasbourg, both Courts offered an articulated analysis of the interplay of historical and social factors that contribute to the subordination and vulnerability of the affected groups – namely, Black women firework workers in the IACtHR decision and domestic workers in the decision of the Constitutional Court of South Africa. They examined how these factors intertwined, placing these groups at the crossroads of multiple oppressions and leading to specific forms of intersectional discrimination. Therefore, in line with an intersectional approach¹¹³, both the Courts evaluated the infringement of rights claims by considering not only the negative consequences of various forms of discrimination on disadvantaged groups/persons, but also the specific types of discrimination that emerge when these forms intersect within a context characterised by structural systems of power and exclusion.

¹⁰⁷ *Ibid.* para. 108.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* para. 110.

¹¹⁰ *Ibid.* para. 104.

¹¹¹ *Ibid.* para. 128.

¹¹² MARINI 2023 and MARINI 2021.

¹¹³ See in this regard, for instance, ATREY 2019; MARINI 2021.

In particular, in the *Fireworks Factory* judgment, the IACtHR highlighted the «patterns of structural and intersectional discrimination»¹¹⁴, based on economic, gender and “race” grounds of oppression, that have left Black women firework workers with no choice but to accept dangerous work under exploitative conditions. As the IACtHR argued, these women shared

«specific factors of discrimination suffered by those living in poverty, women, and Afro-descendants, but they also suffered a specific form of discrimination owing to the confluence of all these factors and, in some cases, because they were pregnant, because they were girls, or because they were girls and pregnant»¹¹⁵.

In the *Mahlangu* decision, the Constitutional Court of South Africa focused on the legacies of apartheid’s racist system and its gendered implications, which have led to the marginalisation of domestic workers, most of whom are Black women. The systemic disadvantages and discrimination that these workers continue to face are, according to the Court, evidence of the “brutality of apartheid”¹¹⁶ and reflect, as Mhlantla J described in the concurring opinion, «a complex history entrenching racism, sexism and social class»¹¹⁷. In addition, the Constitutional Court of South Africa recognised the undervaluation of domestic work as another structural element contributing to the intersectional discrimination faced by domestic workers. The judge powerfully explained that domestic work has traditionally been undervalued due both to its gendered character – as inherently women’s work and with no economic value – and also due to its racialised dimension¹¹⁸, as it is often performed by minority groups facing systemic discrimination and marginalisation. By echoing feminist theories on social reproduction¹¹⁹, the Court has thus underscored how patriarchal, gendered and racialised logics, which lead to the devaluation of domestic work, have resulted in a sector that is poorly regulated. This, consequently, renders «domestic workers amongst the most indigent and vulnerable members of our society»¹²⁰.

The gendered and devalued character of reproduction work, in particular unpaid care work, as another structural factor fostering situations of vulnerability and, consequently, leading to socioeconomic gender inequalities and discrimination, is also underlined in the *Fireworks Factory* judgment. Indeed, the IACtHR highlighted how assigned gender roles related to unpaid care work represent one of the reasons why Afro Brazilian women workers of Santo Antônio de Jesus turned to fireworks manufacturing. Due to the burden of unequal distribution of unpaid care work and the lack of public childcare facilities and services, these women opted for this industry because it allowed them to either bring their children to the factories or perform the production within their own homes, with both options involving inherent risks and dangerous conditions¹²¹.

Therefore, by paying attention to the structural dimension of intersectional oppressions, both the IACtHR and the Constitutional Court of South Africa use intersectionality as an analytical perspective to examine the social structures that shape and affect individual/group experiences. As the Constitutional Court of South Africa argued, intersectionality also «reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination»¹²². In this sense, intersectionality is «a useful analytical tool to understand the convergence of sexism, racism and class stratification

¹¹⁴ The *Fireworks Factory* case para. 197.

¹¹⁵ The *Mahlangu* case para. 191.

¹¹⁶ *Ibid.* para. 102.

¹¹⁷ *Ibid.* para. 185.

¹¹⁸ See also in this regard, among the others, GUTIÉRREZ-RODRÍGUEZ 2010.

¹¹⁹ See, for instance, PICCHIO 1992.

¹²⁰ The *Mahlangu* case, para. 93.

¹²¹ The *Fireworks Factory* case, para. 65.

¹²² The *Mahlangu* case, para. 79.

and the discriminatory logic embedded in these systems»¹²³. This approach entails a profound shift in perspective, moving away from the view of intersectional discrimination as isolated or contingent events. Instead, it frames these instances as reflections of deeper, systemic disadvantages that are intricately woven into the fabric of social, gendered and racial hierarchies and related legal regimes. As Virginia Mantouvalou and Natalie Sedacca have rightly noted with regard to the decision of the Constitutional Court of South Africa:

«despite the specifically tragic nature of Ms Mahlangu’s case, the judgment does not seek to treat her poor treatment as a domestic worker as exceptional. Instead, it contextualises Ms Mahlangu’s situation as one manifestation of a broader, ongoing structural disadvantage that dates back to apartheid and has not been adequately addressed to date»¹²⁴.

Similar considerations apply to the *Fireworks Factory* judgment of the IACtHR as the tragic event at the firework factory of Santo Antônio de Jesus is understood not as an isolated incident but within the broader framework of inequalities and oppression marking that specific context, thereby perpetuating and amplifying intersectional discriminations.

This focus on the underlying social structures and related systems of power that breed oppression and discrimination shapes the understanding of grounds of discrimination as markers of systems of power¹²⁵. Indeed, rather than being treated in a formalistic manner as a mere checkbox at the outset of an anti-discrimination case, grounds of discrimination are viewed expansively by both the Courts as describing «different power relationships, rather than as delineating a group»¹²⁶ with fixed boundaries.

This approach is closely related to the conception of vulnerability that emerges in these decisions of the IACtHR and the Constitutional Court of South Africa, and which is the second key aspect to highlight in these judgments. As underlined above, the ECtHR in its relevant case law, particularly in the *B.S.* decision, mentions the concept of “particular vulnerability” without, however, developing a detailed analysis. In the examined judgments of the IACtHR and the Constitutional Court of South Africa, although there is no specific analysis of the notion of vulnerability, the thorough examination of social structures that create intersectional discrimination provides important insights into how this concept is interpreted. In particular, far from relying on an essentialist view of vulnerability as a fixed attribute associated with specific groups or individuals, vulnerability is considered in these judicial decisions in its situational dimension¹²⁷. Both Courts focused on the embodied dimensions of vulnerability and how experiences of vulnerability are rooted in social and intersubjective dynamics. They considered the implied power dimensions and the impact of broader structural factors that contribute to generating unequal positions in specific contexts, exposing some individuals to subordination and discrimination. The focus is thus on the different factors producing and amplifying vulnerability and the ways they «interact in an intersectional manner with the others»¹²⁸. As the Constitutional Court of South Africa argues, it looked at the «intersection of compounded vulnerabilities due to intersecting oppression» based on different grounds¹²⁹.

It is interesting to note that in the *Fireworks Factory* case the IACtHR conveys a conception of vulnerability – as a lack of alternatives – that resonates with the situational definition of

¹²³ *Ibid.* para. 102.

¹²⁴ MANTOUVALOU, SEDACCA 2020.

¹²⁵ ATREY 2019.

¹²⁶ FREDMAN 2016, 35.

¹²⁷ GIAMMARINARO, PALUMBO 2021.

¹²⁸ The *Fireworks Factory* case, para. 31.

¹²⁹ The *Mahlangu* case, para. 65.

vulnerability provided by international soft law instruments and the EU Directive 2011/36 on trafficking in human beings¹³⁰. According to this definition, the position of vulnerability is «any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved»¹³¹. Rather than limiting vulnerability to the person's inherent characteristics, this definition significantly stresses the importance of considering the circumstantial and structural social factors that leave a person without any concrete and real alternative but to “accept” abusive and exploitative relations and conditions. In the *Fireworks Factory* judgment, the IACtHR echoes this conception of vulnerability by arguing how the confluence of elements (i.e. structural poverty and being Afro-Brazilian women, some of whom were mothers or pregnant) and the existence of this pattern of intersectional discrimination meant that these women (and child victims) «had no other economic option but to accept dangerous work under exploitative conditions»¹³². In other words, the interplay of these factors resulted in a situation in which these women had no a real alternative and, consequently, no real possibility of choice.

More generally, in both the *Fireworks Factory* judgment and the *Mahlangu* judgment, the intersectional lens sheds light on the social relationships and material conditions in which individuals are situated, as well as the constraints that may hinder their enjoyment of rights, leading them to accept undesired situations, thereby perpetuating social inequalities.

This brings us to the third and final point to highlight, which concerns substantive equality. Far from considering equality in a formal way, intersectionality involves understanding it in its substantive dimension¹³³. As Margot Young has pointed out¹³⁴, addressing the substantive dimension of inequality requires reconsidering power differentials, analysing the lived effects of the law, contextualising individual and group-based circumstances within social structures and, lastly, recognising positive and broad duties of the State.

In line with this view, by shifting from an abstract subject to a “situated” person – to recall the work of Stefano Rodotà¹³⁵ – the intersectional perspective, combined with a situational conception of vulnerability, not only permits us to contextualise the claim to equality¹³⁶ but also to advocate for a redefinition of power relations. As underlined by La Barbera and Cruells López, by emphasising how the causes of subordination are intermeshed and mutually constituted, «intersectionality calls for addressing inequality vis-à-vis the multiple social structures that articulate power relations»¹³⁷, thereby fostering social changes.

Such a substantive understanding of equality through adoption of an intersectional perspective is evident in both the *Fireworks Factory* and *Mahlangu* judgments. In the *Fireworks Factory* case, focusing on the substantial dimension of equality under article 24 of the American Convention on Human Rights, the IACtHR found that the State of Brazil failed to provide Afro-Brazilian women of Santo Antonio de Jesus with the real opportunity to achieve “material equality”. The Court criticised the State for not actively reversing the situations of structural poverty and marginalisation faced by these women¹³⁸, thereby preventing them from attaining a “life of dignity”¹³⁹. Notably, as Saliba and Ferolla Vallandro do Valle have noted¹⁴⁰, in this

¹³⁰ See in this regard GIAMMARINARO, PALUMBO 2021; SANTORO 2020.

¹³¹ See, in particular, the *travaux préparatoires* of the UN Protocol on trafficking and the Anti-Trafficking Directive 2011/36/EU.

¹³² The *Fireworks Factory* case, para. 38.

¹³³ See, for instance, in this regard, BARRÈRE, MORONDO TARAMUNDI 2011, LA BARBERA, CRUELLES LÓPEZ 2019.

¹³⁴ YOUNG 2010, 196.

¹³⁵ RODOTÀ 2007.

¹³⁶ RODOTÀ 2007.

¹³⁷ YOUNG 2010, 1169.

¹³⁸ The *Fireworks Factory* case, para. 199.

¹³⁹ *Ibid.* para. 31.

¹⁴⁰ SALIBA, FEROLLA VALLANDRO DO VALLE 2021.

judgment, the IACtHR framed Article 24 as a general right to material equality «regardless of the law»¹⁴¹, without specifying any Brazilian law that was being applied unequally, as it did in its previous case law. In this sense, as they argued, «the IACtHR’s interpretation takes the scope of the right to equal protection further than any other human rights body has done»¹⁴².

According to the IACtHR, by failing to adopt adequate measures to address Afro-Brazilian women’s right to material equality, the State «not only failed to ensure the right to just and favourable conditions of work of the presumed victims, but also contributed to increasing their situation of structural discrimination»¹⁴³. Consequently, the State’s inadequacies served to amplify existing intersectional discrimination. The IACtHR underlined that once a pattern of intersectional and structural discrimination is verified, the State has a positive obligation to implement systematic policies that address its causes and origins¹⁴⁴. It thus ordered the State of Brazil to adopt measures to tackle the root causes of poverty and marginalisation, and to ensure a substantial improvement in the lives of the community of Santo Antônio de Jesus. These include addressing the lack of employment options, especially for young people and Afro-Brazilian women living in poverty. Therefore, the IACtHR required the State to ensure these women’s right to material equality and, consequently, to provide them with dignified living and working conditions, thereby contributing to social structural changes.

Similarly, the use of intersectionality in the *Mahlangu* judgment of the Constitutional Court of South Africa also entails a substantive conception of equality. As this Court explicitly stated, «the intersectionality framework as a legal tool, leads to more substantive protection of equality»¹⁴⁵. The intersectional perspective, according to the Court, enables judicial authorities to understand the social structures that systematically produce vulnerabilities and forms of oppression, and how individual experiences vary on the basis of combination of structural elements of discrimination. In this sense, while upholding substantive equality, the «intersectional approach is the kind of interpretative approach which will achieve the progressive realisation of [South Africa’s] transformative constitutionalism»¹⁴⁶. In this regard, the Court underlined the South Africa’s constitutional commitment «to establishing a non-racist and non-sexist society based on human dignity, equality and freedom»¹⁴⁷. At the heart of the constitutional project is «an aspiration to achieve substantive equality and undo the burdens of our past»¹⁴⁸. According to the Court, the exclusion of domestic workers from the COIDA did not «advance the material well-being»¹⁴⁹ of these workers, undermining their substantive rights to equality. Furthermore, this exclusion undervalued the contribution of domestic workers to the social and economic life of the country and ultimately violated their dignity, preventing them benefiting from the transformative constitutional project. Consequently, declaring this exclusion invalid fulfils the transformative mandate set by the South Africa’s Constitution, «at both an individual and a group-based level»¹⁵⁰.

In line with this approach, the Constitutional Court of South Africa’s decision to grant immediate and retrospective effect to its ruling should also be seen as an effort to effectively address the systemic disadvantages and “cycle of poverty” experienced by domestic workers, thereby contributing to promoting substantial social transformation.

¹⁴¹ SALIBA, FEROLLA VALLANDRO DO VALLE 2021.

¹⁴² SALIBA, FEROLLA VALLANDRO DO VALLE 2021.

¹⁴³ The *Fireworks Factory* case, para. 201.

¹⁴⁴ *Ibid.* Concurring Opinion of Judge Ricardo C. Pérez Manrique, para. 43.

¹⁴⁵ The *Mahlangu* case, para. 79.

¹⁴⁶ *Ibid.* para. 79.

¹⁴⁷ *Ibid.* para. 97.

¹⁴⁸ *Ibid.* para. 97.

¹⁴⁹ *Ibid.* para. 106.

¹⁵⁰ *Ibid.*

4. Concluding Remarks

The *Fireworks Factory* judgment of the IACtHR and the *Mahlangu* judgment of the Constitutional Court of South Africa represent key examples of applying intersectionality in legal arguments and decisions. By marking a significant advancement over the intersectional approach taken by the ECtHR, particularly in the *B.S. v. Spain* decision, these judgments offer a nuanced analysis of the structural dimension of intersectional discrimination. By explicitly referring to Crenshaw's theory of intersectionality, these Courts have developed a detailed examination of the systems of power and exclusion that breed intersectional discrimination in the cases considered, and the role of the law in mitigating or exacerbating them. Through this lens, the intersectional discrimination faced by Afro-Brazilian women firework workers in the *Fireworks Factory* case or by domestic workers, in particular Black women, in the *Mahlangu* case is not seen as an isolated or exceptional event. Instead, it is understood as a manifestation of broader, systemic disadvantages that are deeply embedded in historical, social and legal contexts.

In line with this perspective attentive to the structural nature of intersectionality, both the IACtHR and the Constitutional Court of South Africa view the vulnerability of the individuals involved in the two cases not as a static or fixed attribute, but as closely related to their positions within societal and power dynamics. Vulnerability is understood in its situational dimension, paying attention to the interplay of various intersecting factors that expose individuals/groups to the risk of human rights violations and contribute to specific forms of discrimination.

Both the IACtHR and the Constitutional Court of South Africa use intersectionality as an analytical framework to examine the social structures affecting marginalised people. They seek to understand how these experiences vary according to the interplay of the various factors producing vulnerability, and evaluate fundamental rights violations based on their impact on specific intersectional and marginalised groups and individuals. Intersectionality is in this way employed not only to analyse the negative effects of various forms of discrimination but also to explore the specific subordination and oppression that arise from their intersections which are often inadequately addressed by the law.

Both Courts have thus concentrated on the material conditions and relationships in which persons are situated and the discrimination they face, addressing inequalities in a substantive manner. Intersectionality has been used as a lens to identify entrenched power relations, structures and related legal regimes that perpetuate discrimination, with the aim of challenging and dismantling them. In this sense, both the Courts aimed to ensure that marginalised people involved in the cases could achieve a "life of dignity"¹⁵¹. In other words, echoing Stefano Rodotà's reflections on social human dignity, it can be said that both the Courts focused on creating the material conditions necessary, respectively, for Afro-Brazilian women firework workers and South African women domestic workers to live and work in conditions of equality and responsibility¹⁵².

Far from viewing intersectionality merely in identity terms – as a theory aimed at identifying intersecting groups – the IACtHR and the Constitutional Court of South Africa have addressed the power systems where various axes of oppression and discrimination intersect. From this perspective, they have integrated intersectionality into their legal decisions by preserving its capacity to act as a concept that supports radical criticism against systemic inequalities and power imbalances. The hope is that this path will be followed by other international and national Courts.

¹⁵¹ The *Fireworks Factory* case, para. 173.

¹⁵² RODOTÀ 2012.

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