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A Short Note on Intersectionality and EU Law – The Concept, its Prospects and Potential Pitfalls

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Introduction

The Equal Pay Directive brings the issue of intersectional pay discrimination to the fore of the legislative debate surrounding (gender) pay gaps. As rapporteur Samira Rafaela has stated: "I'm proud that with this Directive, we have defined intersectional discrimination for the first time in European legislation and included it as aggravating circumstances when determining penalties".[1] This inspired us to investigate the other uses of the term in EU law and its general history. In the following section, we will highlight uses of the term in EU law, including the Equal Pay Directive. We will then provide some remarks on the Equal Pay Directive's legislative process and investigate where the term "intersectionality" originated academically. Lastly, we will discuss prospects that may inspire further research as well as potential issues that may arise in the future.

The Term "Intersectionality" in EU Law

Within EU law, the most extensive use of the term "intersectionality" in context with questions of equality and discrimination occurs in the new Equal Pay Directive which was the topic of this year's summer school.

The Equal Pay Directive[2] explains its concept of intersectionality in Recital 25 (our highlighting):

> "(25) Article 10 TFEU provides that, in defining and implementing its policies and activities, the Union is to aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 4 of Directive 2006/54/EC provides that there is to be no direct or indirect discrimination on grounds of sex in relation to pay. Gender-based pay discrimination where a victim's sex plays a crucial role can take many different forms in practice. It **may involve an intersection of various axes of discrimination or inequality** where the worker is a member of one or several groups protected against discrimination on the basis of sex, on the one hand, and racial or ethnic origin, religion or belief, disability, age or sexual orientation, as protected under Council Directive 2000/43/EC (7) or 2000/78/EC (8), on the other. Women with disabilities, women of diverse racial and ethnic origin including Roma women, and young or elderly women are among groups which may face intersectional discrimination.

[1] EP Press release, 30.03.2023, Gender pay gap: Parliament adopts new rules on binding pay-transparency measures, https://www.europarl.europa.eu/news/en/press-room/20230327IPR78545/gender-pay-gap-parliament-adopts-new-rules-on-binding-pay-transparency-measures.

[2] Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

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> This Directive should therefore **clarify that, in the context of gender-based pay discrimination, it should be possible to take such a combination into account, thus removing any doubt that may exist in this regard under the existing legal framework and enabling national courts, equality bodies and other competent authorities to take due account of any situation of disadvantage arising from intersectional discrimination**, in particular for substantive and procedural purposes, including to recognise the existence of discrimination, to decide on the appropriate comparator, to assess the proportionality, and to determine, where relevant, the level of compensation awarded or penalties imposed.
>
> An **intersectional approach is important for understanding and addressing the gender pay gap.**"

The corresponding part of the enacting terms, Art. 3 para. 2 point (e), reads:

> "For the purposes of this Directive, discrimination includes: [...] intersectional discrimination, which is discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC."

And the subsequent paragraph 3 states that

> "Paragraph 2, point (e), shall not entail additional obligations on employers to gather data as referred to in this Directive with regard to protected grounds of discrimination other than sex."

Apart from the Equal Pay Directive, the terms "intersectional" or "intersectionality" are mentioned briefly in three regulations. The EU4Health Programme Regulation (2021/522)[3] mentions "intersectional approaches to prevention, diagnosis, treatment and care" in passing in Annex 1 Nr. 7 point c). Recital 11 of the Citizens, Equality, Rights and Values Programme Regulation (2021/692)[4] explains that "[t]he promotion of gender equality and gender mainstreaming in all activities of the Union is therefore a core task for the Union and a driver for economic growth and social development, and should be supported by the Programme. Actively tackling stereotypes and addressing silent and intersectional discrimination are of particular importance." Article 21 para. 1 of the Regulation on the European Union Drugs Agency (2023/1322) stipulates that "[t]he [European Union Drugs] Agency shall pay due attention to intersectionality as a crosscutting principle in its research-related activities."[5]

Further, there are multiple Parliament resolutions referring to intersectionality, such as the resolution of 10 November 2022 on racial justice, non-discrimination and anti-racism (2022/2005(INI)) which "[u]rges the EU institutions to address intersectional discrimination in

[3] Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No 282/2014 (Text with EEA relevance).
[4] Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014.
[5] Regulation (EU) 2023/1322 of the European Parliament and of the Council of 27 June 2023 on the European Union Drugs Agency (EUDA) and repealing Regulation (EC) No 1920/2006.

EU anti-discrimination legislation and policies and to promote an EU framework on the subject, in close cooperation with the Member States and the groups concerned" and "[e]mphasises the need to ensure meaningful participation of all groups affected by intersectional discrimination in policymaking at EU, national and local levels, especially minority groups". The Parliament majority's emphasis on intersectionality is mirrored in its contribution to the Equal Pay Directive, as will be shown in the following.

The Commission's proposal of the Directive already made reference to intersectional discrimination in Recitals 14, 20 and 42, as well as in the Explanatory Memorandum.[6] Specifically, the Commission proposed in Article 2 para 3: "Pay discrimination under this Directive includes discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or Directive 2000/78/EC."[7] It follows from this that the Commission was already aware of the possibility of discrimination where two or more grounds of discrimination may overlap, as well as the harmful impacts of such discrimination.

Nevertheless, the Parliament's mandate advocated for significantly increased use of the concept and refers more explicitly to intersectional discrimination and intersectionality. Specifically, the mandate intended for a new definition of intersectional discrimination in Article 3, stipulated that intersectional discrimination should lead to an adjustment of compensation or reparation (Article 14 para. 2) as well as fines (Article 20 para. 2 point c) and proposed an entirely new Article 22a which stipulates that intersectional discrimination has to be taken into account by Member States, employers, worker's representatives, equality bodies and monitoring bodies "when implementing the rights and obligations laid down in this Directive".[8] The available material does not contain reasoning relating to these amendments. Generally, the spirit in the Parliament regarding an intersectional approach was positive, though members from the ECR group voiced very general criticism of the concept, calling it unjust and the entire Directive overly bureaucratic.[9] However, available documents

[6] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

[7] On this, the explanatory memorandum argues that: "A new definition aims at clarifying that, in the context of gender pay discrimination, such combination should be taken into account, thus removing any doubt that may exist in this regard under the existing legal framework. This will ensure that the courts or other competent authorities take due account of any situation of disadvantage arising from intersectional discrimination, in particular for substantive and procedural purposes, including to recognise the existence of discrimination, to decide on the appropriate comparator, to assess the proportionality, and to determine, where relevant, the level of compensation awarded or penalties imposed."

[8] For the sake of simplicity, see four-column-document ST_8242_2022_INIT regarding these proposed changes.

[9] See, e.g., the statement by Margarita de la Pisa Carrión: "[…] [U]na vez más, con la excusa de una supuesta igualdad, se genera desigualdad, incluso entre mujeres. Algunos de ustedes llaman a esto interseccionalidad. Yo lo llamo injusticia. Es una Directiva «eslogan»: nada tiene que ver el título con lo que se nos quiere colar con ella. No se busca ayudar a la mujer y sí introducir una ideología de género en nuestras leyes, imponerse a los Estados miembros, dominar a las empresas, y también nuestras

from the parliamentary debate reveal no great detail on the underlying understanding of intersectionality.[10] Compare, for instance, rapporteur Rafaela's response to the criticism: "It's the very first step to close the gender pay gap. And it's a right. It's a European right. It's in our Treaties to treat men and women equally. So I don't understand the issue here. And I'm very proud because this legislation is progressive, it's modern, it's feminist, it's liberal, it's intersectional. So today is a good day. And I'm going to celebrate. I'm going to celebrate because we have true legislation in place from now to give women their rights specifically to be paid on an equal basis. So I'm going to celebrate big time because it's a good day for women in Europe."[11]

These excerpts may suggest that an intersectional approach is either an ideological injustice or a necessary corollary or completion of rights already enshrined. The material from the Council is even less conclusive. Mainly a separate statement by Bulgaria voices criticism of intersectionality at all. Namely, Bulgaria argues that "the inclusion of intersectional discrimination in the operative part of the Directive creates legal uncertainty in view of the legal basis for the adoption of the Directive (Article 157(3) TFEU), which covers only protection on the grounds of 'sex' (equality between men and women), but not protection on other grounds or on a combination of such grounds."[12]

Overall, what really happened in the trilogue is a matter of guesswork. Perhaps, all three parties shared the (obvious) premise that someone who is significantly structurally disadvantaged deserves protection by the state and that persons who face multiple kinds of discrimination at the same time are, generally, worse off. One may also surmise that the final version of the Directive represents a compromise between the position that an intersectional approach is an obvious necessity and the position that it is an unclear device of progressivist theory. This latter concern could have led to the removal of the proposed Article 22a that would have made the entire Directive subject to an intersectional interpretation.

Introducing "intersectionality" as a term and as a concept in the Equal Pay Directive may have seemed necessary because in literature, there have been increased calls to consider

vidas, para un igualamiento donde la actitud y el talento no tienen un reconocimiento. Mientras, las empresas europeas, sus trabajadores y las familias están maltratadas por el Pacto Verde, la inflación y una asfixiante burocracia. Ahora tienen que pasar también por una mala regulación que generará mal ambiente laboral y un colapso de litigios. […].", see Verbatim Report of Proceedings, CRE 30/03/2023 - 2; we are of the view that such statements are not much more than the rough scaffolding of arguments that could be analyzed as to their propositional content or inner logic.

[10] The hearings in the Committees, available only in video, are not significantly more detailed.

[11] Verbatim Report of Proceedings, CRE 30/03/2023 - 2.

[12] ST 7845 2023 ADD 1.

intersectional perspectives.[13] Similarly, courts have been criticised for overlooking intersectional aspects of cases at hand.[14]

Still, the need for such guesswork gives rise to an obvious point: It would be better for the EU legislative procedure if all participants enunciated clearer, much more detailed reasons for their proposals which could then be subject not only to shared scrutiny among the lawmakers, but to public acclaim or criticism.[15] Yet it is also clear that "closed doors" have structural advantages: As the public debate is a far cry from the idealised version that discourse theorists imagine[16], transparency has clear drawbacks, for it implies constant anticipation of irrational public reactions and shortened attention spans[17]. This does not mean that the prevailing opinion in the literature, which is clearly in favour of increased transparency, is false. Rather, the observation about the shortcomings of the public forum implies that the necessary balancing is not just one of public scrutiny versus procedural efficiency.[18] It has to be taken into account what forms of transparency about which information are conducive to a meaningful and rational public debate[19], also in light of the ever-changing social media landscape[20]. Such an analysis may well reveal that transparency can foster populism due to

[13] See for an early example of this *Lombardo*/*Verloo*, International Feminist Journal of Politics (11(4)) 2009, 478; see further *Bello*/*Royer*, Alizés: Revue angliciste de La Réunion (42) 2017, 15, 17.
[14] E.g. *Bello*/*Royer*, Alizés: Revue angliciste de La Réunion (42) 2017, 15, 17; *Weinberg*, EuZA 2020, 60, in part. 70 regarding ECJ, Judgement of 24 November 2016, David L. Parris v Trinity College Dublin and Others, ECLI:EU:C:2016:897; similarly *Chege*, NZA 2022, 307, 308 ff. and *Schmal*, EuR 2022, 612, 619.
[15] For a criticism of lacking transparency in the trilogues, see *Brandsma*, Journal of European Public Policy 2019, 1464; *Pennetreau*/*Laloux*, Politics and Governance, 2021, 248 with instructive analysis of 176 rapporteur speeches; *Leino-Sandberg*, European Journal of Risk Regulation 2023, 271; for a detailed analysis of legitimacy requirements, see also *Oppermann*/*Classen*/*Nettesheim*, Europarecht, 9th ed, § 15 mn. 10 et seq.
[16] See, instead of many, *Habermas*, Ein neuer Strukturwandel der Öffentlichkeit und die deliberative Politik, 2022, passim.
[17] Cf. *Giersdorf*, Der informelle Trilog, 2019, p. 86 et seq., also 185 et seq.
[18] Cf., however, *Giersdorf*, Der informelle Trilog, 2019, p. 225 emphasising that transparency fosters trust in legislative procedures and incentivizes rational and objective justification.
[19] For an introduction of what such a debate could look like, see *van Eemeren*/*Grootendorst*, A Systematic Theory of Argumentation, 2004.
[20] Cf. *Lafont*, The Journal of Political Philosophy 2015, 40 with instructive ideas on the improvement of public discourse considering contemporary challenges and *Lafont*, ApuZ 43-45/2023, 11.

excessive inclusivity/selectivity[21] or apathy due to information overload and inaccessibility[22]. In the case of the Equal Pay Directive, it may have aided the public discourse as well as future interpretations of intersectionality if the term's inclusion had been reasoned transparently and lucidly on an academic basis. This holds true particularly in light of the extensive literature on the term, which is chiefly understood from its academic origins. To elucidate this understanding, in the following section we will briefly turn to the academic uses of "intersectionality" and potential meanings.

The Academic Concept of Intersectionality

Intersectionality as a concept arrives in EU legislation having followed a somewhat circular path. From its cradle in critical and feminist legal studies,[23] it has been widely popularized across sociology and other fields, going so far as to be adopted in linguistic subfields such as linguistic anthropology,[24] psycholinguistics[25] and applied linguistics.[26] It therefore seems apt to return to the concept's birthplace, and acknowledge intersectional discrimination in a legally actionable way.

Coined by legal scholar *Kimberlé Crenshaw* in 1989,[27] the term originally aimed to identify the peculiar situation arising from cross-secting axes of discrimination.[28] The particular discrimination faced by Black women is at the forefront of Crenshaw's writings, but the term

[21] An example of excessive inclusivity would be the classic false balance, i.e. an approach that gives approaches which are in clear contradiction with shared assumptions or make use of illicit argumentative devices, too much space, cf. *Dittert*, ApuZ 25/2023, 25, 26 et seq. on false balance in the BBC's portrayal of the Brexit debate. Excessive selectivity, in contrast, may when aspects are excluded from the debate due to fears that they could be misunderstood or due to the assumption that certain arguments are per se harmful due to their semantic content, cf. only *Pfister*, ApuZ 43-45/2023, 42 et seq. for a criticism of the divisive effects of intersectional analysis within progressive groups. The argument that both these effects are bad is typically based on a consequentialist analysis: The chosen level of transparency in the debate leads to a rise of problematic political positions or ways of arguing instead of fostering a climate of open and pluralist exchange in mutual recognition. On recognition as a requirement for rational argumentation, see *Wohlrapp*, Der Begriff des Arguments, 2008, p. 492.

[22] Another obvious point: Citizens have limited time and motivation to find and engage with material, even if it is technically available.

[23] *Crenshaw*, University of Chicago and Legal Forum 1989, 138; see also https://www.oed.com/dictionary/intersectionality_n under 2.

[24] *Ke-Schutte/Babcock*, Journal of Linguistic Anthropology (33(2)) 2023, 112.

[25] *Tripp*, Applied Psycholinguistics 2023, 514, 526 et seq.

[26] E.g. *Brutt-Griffler*, Nordic Journal of English Studies (19(3)) 2020, 151; *Block/Corona*, in: The Routledge handbook of language and identity, 2016, 507, 511 et seq.

[27] *Crenshaw*, University of Chicago and Legal Forum 1989, 138; a discussion of intersectionality *avant la lettre*, as visible in the Combahee River Collective Statement, retrievable at https://www.loc.gov/item/lcwaN0028151/, would merit another thesis of its own.

[28] Note that the "axis" phrasing is reflected in recital 25 of the Equal Pay Directive; for a very brief overview see https://plato.stanford.edu/entries/feminism-political/#InteFemi.

frequently gets extended to other instances of individuals finding themselves positioned at more than one axis of discrimination.[29]

In critical legal studies as well as in other disciplines, the term "intersectionality" has been employed in a variety of ways. Its understanding is not undisputed,[30] as becomes evident when one considers the many theoretical meanings assigned to the term. It has been described variously as "an essential part of research into inequalities, power relations, and identity"[31], "a framework" of sorts[32], "an academic tool"[33], "regulative ideal"[34], "method"[35], "a concept [...] and a perspective"[36], to name only a few.

The variety of these descriptions illustrates that working with intersectionality necessitates complex theorising. Despite the evident social realities, to which it relates, the concept can hardly be reduced to a singular, obvious understanding. Against this backdrop, and in line with our understanding as detailed above, it would have been even more desirable for the Equal Pay Directive's context to have illustrated its – shared – understanding of intersectionality. This would have eased the transition of the term from a largely academic context to one of legal applicability, especially as it cannot be assumed that all legal practitioners, judges and lawyers alike, are familiar with the complex history of the term. As things stand, the Equal Pay Directive points a path forward through complex anti-discrimination matters, but leaves much clarity to future endeavours. While we wholeheartedly support such paths to a level playing field, it seems necessary to raise potential issues that may complicate the process in the following section.

Prospects and pitfalls

Finally, we want to raise three points about the concept of intersectionality in law that deserve (or may inspire) further thought and research:

Firstly, while acknowledging intersectional discrimination as discrimination means acknowledging a reality and protecting those who deserve it[37], there is also a caveat: Identity is complex and, in parts, may change over the course of time, either because the fundamentals that constitute that identity shift or because the relation the individual has to these

[29] *Lundberg/Simonsen*, Scandinavian Journal of Disability Research, (17) 2015, 7, 10; see *Bernstein*, Philosophical Studies (177) 2020, 321, and *Lawford-Smith/Phelan*, Journal of Political Philosophy (30(2)) 2022, 166 for an enlightening discussion of the metaphysical properties of such intersections.

[30] As is its usefulness in combating discrimination; for one point of criticism see https://plato.stanford.edu/entries/discrimination/#Int.

[31] *Bello/Royer*, Alizés: Revue angliciste de La Réunion (42) 2017, 15, 15.

[32] E.g. *Bello/Royer*, Alizés: Revue angliciste de La Réunion (42) 2017, 15., 15.

[33] *Al-Faham/Davis/Ernst*, Annual Review of Law and Social Science (15) 2019, 247, 250f., contrasting such an understanding with the notion of remedial potential.

[34] *Gasdaglis/Madva*, Ergo (44(6)) 2019, 1287.

[35] *MacKinnon*, Signs: Journal of Women in Culture and Society (38.4) 2013, 1019.

[36] *Lundberg/Simonsen*, Scandinavian Journal of Disability Research (17) 2015, 7, 9.

[37] Cf. *Weinberg*, EuZA 2020, 60, 61 et seq., especially 68.

fundamentals itself changes.[38] Any interpretation of intersectionality needs to heed this, for there is a real risk that the fight against discrimination turns into a blind essentialism[39], if the connection, for example, between belonging to a protected group and showing a certain behaviour or having a certain opinion is thought of as too fixed[40]. A potential remedy is the careful analysis of the terms used to name protected group and of the context of the intersectional discrimination.[41]

This leads to the second, more general point: When the law is dealing with people, categorization is inevitable. Yet at the same time, the law also seeks to do justice to the individual before the law, in order to correctly decide the case at hand. In the same vein, the law needs to be an affair that stays open to general, democratic discussion and that is at the same time specialised and differentiated enough to deal with the complexity of the problems that are in need of regulation and the cases that are in need of decision. There is thus a tension or an interplay between categorization and individuation, a sliding scale between both.[42] In any case, an intersectional analysis delivers important results regarding problematic power structures in play and therefore helps to safeguard freedom and dismantle unjustifiably asymmetric relations.[43] Furthermore, this observation relates to complex issues of identity, language and democratic discourse which cannot be adequately discussed within the scope of this paper.

Regarding the Equal Pay Directive, the benefits of intersectional benefits may, for instance, manifest in the interpretation and implementation of Article 4. Article 4 para. 2 requires Member States to "take the necessary measures to ensure that analytical tools or methodologies are made available and are easily accessible to support and guide the assessment and comparison of the value of work in accordance with the criteria set out in this Article. Those tools or methodologies shall allow employers and/or the social partners to easily establish and use gender-neutral job evaluation and classification systems that exclude any pay discrimination on grounds of sex." Regarding objective, gender-neutral criteria that enable the assessment of whether work is of equal value (and therefore requires equal pay), para. 4 stipulates that "[t]hey shall be applied in an objective gender-neutral manner,

[38] Of course, scholars are aware of these complexities, see for instance *Bernstein*, Philos Stud 2020, 321, 325 and *Ajele/McGill*, Intersectionality in Law and Legal Contexts, LEAF Report 2020, p. 30: "intra-category nuances are a critical part of understanding the workings of identity-based oppression".

[39] Cf. *Markard,* KJ 2009, 353, 355.

[40] This is why a typical conservative (or classically liberal) criticism of intersectionality oftentimes argues that the approach fosters simplistic tribalism, see for an example (that is itself simplistic) *Haidt*, City Journal, 17.12.2017, https://www.city-journal.org/article/the-age-of-outrage; cf. also The Economist, 22.05.2021, The all-American skin game: "Such a mechanical approach gives the false impression that the key to fixing racism is to seek out the most oppressed perspective possible".

[41] See *Markard,* KJ 2009, 353, 355 et seq. for an excellent example.

[42] Cf. *Altman*, Stanford Encyclopedia of Philosophy, "Discrimination", 7.: "Yet, no feasible treatment can take into account all of those identities and the many more socially salient identities that persons have in contemporary societies."

[43] *Valentiner*, JuS 2022, 1094, 1098; *Hill Collins*, Investig. Fem (Rev.) 2017, 19, 19 et seq. on the beneficial role an intersectional analysis can therefore play for participatory democracy; *Markard,* KJ 2009, 353, 357.

excluding any direct or indirect discrimination based on sex." Here, the explicit inclusion of intersectional discrimination due to Article 3 para 2 point e is crucial. Taken all three norms together, it follows that gender-neutral criteria for the evaluation of work need to be developed also on the basis of an intersectional analysis.

While such an analysis would take place mostly based on typological, categorising methods, the individual case can (and must) be taken into account when determining adequate compensation in case of an infringement of any right or obligation relating to equal pay according to Article 16 para. 1. Paragraph 3 of this Article expressly calls for Member State to "ensure that the compensation or reparation includes [...] any damage caused by other relevant factors which may include intersectional discrimination."

Our third and final remark is even more abstract. It takes as a starting point the observation that generally, the (well-justified) purpose of addressing intersectionality in anti-discrimination law is to take existing realities into account[44] and to change them for the better. This raises the question of how the law relates to (social and physical) reality. Clearly, its relation to any reality is mediated by language. Moreover, law both depicts or references and creates realities.[45] Any legal provision or judgement needs to be applicable to the facts at hand[46], yet at the same time it also needs to construct or uphold certain interpretations or institutions in order to be successful as regulation of general issues or resolution of individual conflicts.[47]

The phenomenon is not limited to law, obviously: language in general both represents or references and constructs or creates realities[48]. Therefore, understanding it purely as a reference to an underlying reality (the accuracy of which can be evaluated) or as a construction of concepts in mutual reference (the accuracy of which is irrelevant) would obviously be incomplete. The tension or oscillation between both aspects can never be eliminated.[49]

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[44] Cf., again, Recital 25: "to recognise the existence of discrimination".

[45] Cf. *Lüdderssen*, Genesis und Geltung, 1996, 359 et seq.

[46] Moreover, an important function of legal proceedings is to *find* such facts in the first place.

[47] Cf. *Wiethölter*, Rechtswissenschaft, 1968, p. 17 on how the selection and evaluation of facts relevant to the case at hand can serve as a devious replacement or even suppression of actual normative, political argumentation.

[48] Many legal theorists have dealt with this aspect, see for example *Delavalle*, ZaöRV 2017, 199 on the linguistic turn in jurisprudence; *Fish*, Doing what comes naturally, 2007 with the opening statement on p. 1 being: "It is one of the theses of this book that many of the issues in interpretive theory can be reduced to a few basic questions in the philosophy of language."; another locus classicus would be *Boyd White*, Texas Law Review 1982, 415, see also *Northrop*, The Complexity of Legal and Ethical Experience, 1959, p. 175: "There is a fundamental difference between the relation of the object to the symbol in the case of a concept by intuition as compared with a concept by postulation." This observation, though based on the problematic concept of intuition, enables *Northrop* to develop two entire models of law, one based on intuitive observations and one on intellectual constructions.

[49] No note, indeed no single publication could do this topic justice. Instead of a representative bibliography, cf. merely *I. Dilman*, Language and Reality: Modern Perspectives on Wittgenstein, 1998; *Kienpointner*, Argumentation 1996, 475; *Bruner*, Critical Inquiry (18) 1991, 1; *Nimis*, The Classical World 1986, 217.

In practice, this means that to demand of the law a better recognition of a reality (for example: a diversity or discrimination) through linguistic references is not irreconcilable with the necessary ability of the law to define terms freely or the necessary interpretation of any legal term in light of its context and purpose. In that regard, conservative authors sometimes argue against a more inclusive legal language on the basis of the constructive capabilities of law and legal interpretation: If one denied the ability of the law to employ the generic masculine and thus define a term as gender-neutral, any functional use and interpretation of legal terms would be impossible.[50] That this argument is rather misguided becomes obvious when the call for inclusive language is cast in a different light, namely as a call for more accurate terminology. In the context of legal informatics or, more generally, law relating to technology of any kind, there are vivid debates on the most accurate terminology.[51] Here, the claim that accurate representation of the real *technological* diversity is not a laudable goal of legal rules and instead implies an attack on the core functioning of law in a democratic society itself would appear alien.[52] Rather, the debate is more nuanced: While functional interpretation and creative definitions enable the application of (very) old norms to entirely new technologies, better terminology could also mean better law. An intersectional, diverse understanding of current legal terminology and the inclusion of new terminology in new legal acts is therefore neither unnecessary nor ideological. It can instead be understood as a well-founded attempt to find a new balance between representation and creation. This new balance itself will and

[50] See, for a German example *Kowalski*, NJW 2020, 2229, mn. 18: "Der dekonstruktivistische Ansatz der Genderlinguistik stellt genau das umgekehrte Vorgehen dar. Anstatt den Situations- und Kommunikationskontext eines einzelnen generischen Maskulinums darauf zu untersuchen, ob der Nutzer tatsächlich Frauen vom Adressatenbereich ausschließen möchte, wird der Begriff selbst per se als determinierende Funktion wahrgenommen. Auslegungsgegenstand und Auslegungsziel wären danach identisch und jegliche funktionale Auslegung eines Begriffs mit der Folge zweckausgerichteter, verschiedener Bedeutungen ausgeschlossen. In letzter Konsequenz müsste das Recht danach an allen Stellen, an denen keine Wortlautänderung durch den Gesetzgeber vorgenommen wird, vollständig versteinern."

[51] For German examples, see *Grieger/von Poser/Kremer*, ZfDR 2021, 394; *Martini/Kolain/Neumann/Rehorst/Wagner*, MMR-Beil. 2021, 3; on the necessity of an own, specialised terminology in law, see *Litowitz*, Mercer Law Review 1997, 709.

[52] Similarly, *Kowalski* NJW 2020, 2229, 2229 et seq. calls the causal relationship from terminology to discrimination into question: terms are only discriminatory when they are interpreted with malicious intent due to problematic underlying political views. This argument is again at certain odds with phenomena many (conservative) scholars would deem clear and unproblematic: The law creates institutions through specialised language in performative speech acts. It is the exact language of statues and courts that determines what a firm or a contract is. Whether the building one enters to withdraw money, for example, operates as a bank in the legal sense depends on an understanding of the institution that the law has created through language. The relevance of language in many critical cases is so great that courts often expressly copy parts of preceding decisions. Therefore, assuming a causal relationship from language to reality is not wholly incompatible with how the law functions. What this means is simple: Inclusive language will not magically solve discrimination. But if the claim that better terminology in banking law can bring about better credit agreements is rational, so is the claim that more inclusive legal language can bring about better social interactions. In that sense, the demands of "gender linguistics" (as opponents call theory about inclusive language) are no different from that of corporate consultants.

must of course be subject to analysis and questioning, for any path to progress is fragile, transitory and uncertain.[53] The language of the future is not yet ours.

Conclusion

In this brief paper on the notion of intersectionality in EU law, we have explored the occurrences of the term and shed a light on its theoretical origins and complexity. With a view to its complex meaning and the necessity of establishing actionable paths to justice for particularly marginalised individuals, we call for increased transparency in the legislative process.

Further, effectively combating all kinds of discrimination requires a mindful, reflected approach that heeds the spectre of essentialism. Such an approach would also have to consider the inherent tension between categorization and individuation. Lastly, the challenge for the upcoming decade will be to find a balance between representation and creation. More empirical research is needed to achieve such a balance. On the one hand, this would serve to investigate potential meanings and applications of the term and related concepts. On the other hand, multiple potential intersections of discriminatory grounds deserve to be examined closer, in order to provide effective legal remedies to those affected.

Ultimately, we consider the inclusion of an intersectional approach in the Equal Pay Directive a step forward in the right direction as it provides a legal basis for combating discrimination of multiply and intersectionally marginalised individuals. But as with all new developments in the law, only a careful and terminologically informed approach - taking into account the term's academic background and the social realities it relates to - can do the term justice.

[53] Consider, also, that within intersectionality research some intersections – in particular those of race/gender – have garnered more attention than others, which in turn may mean that for many other intersections, much research is yet to be done; see for instance *Bello/Royer*, Alizés: Revue angliciste de La Réunion (42) 2017, 15, 20.