

Seminar 2: Position of persons facing multiple disadvantage

Intersectional Discrimination in the case law of the European Court of Human Rights

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Content

- Prohibition of discrimination under Convention
- Intersectional discrimination in the ECtHR's case law
- Concept of vulnerable groups

Discrimination under the ECtHR

Art 14 Prohibition of discrimination

- The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Art 1 of Protocol 12 to the Convention (2005)

- General prohibition of discrimination
- expanded the scope of the prohibition on discrimination, to cover all rights guaranteed at national level, regardless of whether or not they are rights within the Convention.

Intersectional discrimination and the ECtHR

- the issue raised in several cases by the third party interveners:
 - S.A.S. v. France (2014) – gender + religion
 - Maděrová v. the Czech Republic (2021) – gender + ethnicity
 - Konstantin Markin v. Russia (2012) – gender + profession
- addressed by a judge in a dissenting opinion:
 - Garib v. the Netherlands (2017) Dissenting opinion of judge Pinto de Albuquerque – gender + poverty
 - the court has addressed intersectional discrimination in only one single case so far, and even not explicitly:
 - B. S. v. Spain (2012)

B.S. v. Spain (2012)

Circumstances of the case

- a migrant woman from Nigeria who was self-employed as a sex worker in Spain
- She was approached by the police at several points
 - asked to present her identity documents,
 - demanded her to leave the premises with lewd remarks,
 - police officers had even struck her on several occasions.

Alleged violation of the Art. 14 in connection with Art 3 of the Convention (prohibition of torture)

- on the basis of her race, gender, and employment status as a sex worker
- she complained of verbal and physical abuse by the police and mishandling of her case by the Spanish judiciary.

The Court's assessment

- Violation of Art. 14 and taken in conjunction with Article 3
- „the decisions made by the domestic courts failed to take account of the applicant's **particular vulnerability** inherent in her position as an African woman working as a prostitute“

Concept of vulnerable groups

- human rights violations are experienced more routinely and acutely by vulnerable groups
- if a restriction on fundamental rights concerns a particularly vulnerable group the Court applies **strict scrutiny**
- State's margin of appreciation is **substantially narrower**
- State must put forward **very weighty reasons** before a difference of treatment could be regarded as compatible with the Convention
- The ECtHR has not (yet) fully developed a list of indicators to determine what renders a group vulnerable.



Examples of vulnerable groups

- **D.H. and others v. Czech Republic (2007)**: Roma children discriminated against in the enjoyment of the right to education
 - *“the Roma have become a specific type of disadvantaged and vulnerable minority”*
- **Kiyutin v. Russia (2011)**: indiscriminate refusal of residence permit to those living with HIV
 - *“people living with HIV are a vulnerable group with a history of prejudice and stigmatization”*
- **Alajos Kiss v. Hungary (2010)**: blanket restriction on right to vote of people with mental disabilities in Hungary:
 - *„particularly vulnerable group in society, who have suffered considerable discrimination in the past“*

Concluding remarks

- **intersectional discrimination** in ECtHR case law:
 - The Court ruled out on the concept only in one case *B.S. v. Spain*
 - The ECtHR deploys new concepts after careful scrutiny,
 - proceed step by step first when the concept is well established by other international human rights documents
 - UN treaty bodies and international bodies are usually more progressive
- However, The Court recognises the concept of **vulnerable groups**
 - It recognises the disadvantaged situation of groups suffering from deep rooted discrimination

Thank you for your attention

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