Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain

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Abstract

The term ‘intersectionality’ recognises the need for a ‘holistic approach’ in the determination of the right to be free from discrimination and violence. While the European Court of Human Rights has never expressly used the term, this article argues that the recent case of B.S. v Spain provides an example of a more robust use of Article 14 of the convention taking into account the real life experiences of those facing intersectional discrimination. The decision recognising the special vulnerability of a migrant, female sex worker is therefore both welcome and necessary.

Keywords

Discrimination · Feminist theory · Gender · Intersectionality · Migrant status · Sex work

Introduction

On 24 July 2012 the Third Chamber of the European Court of Human Rights (ECHR) unanimously decided the case of B.S. v Spain. This decision forms part of the Strasbourg court’s growing corpus of jurisprudence on violence against women. The applicant, B.S., was a migrant woman of Nigerian origin working legally as a sex worker in Spain. B.S. claimed that she had been assaulted and racially abused by police officers. The national courts dismissed her case. After exhausting domestic

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1 At the time of writing the decision was only available in French. Affaire B.S. c. Espagne (Requete n. 47159/08) 24 Juillet 2012.

2 For a compendium of cases see Chinkin (2009).

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remedies B.S. sought relief from the Strasbourg court on a number of Convention grounds, though primarily on the basis that she had been treated in a discriminatory manner due to her race, gender and her status as a sex worker.

In making her application before the ECtHR, B.S. argued that the Court should adopt an intersectional approach in its determination of whether her Convention rights had been breached by the Spanish authorities. To this end, the AIRE Centre and the European Social Research Unit (ESRH) based at the University of Barcelona were asked to present third party interventions on multiple and intersectional discrimination. Whilst the Court did not adopt the language of intersectionality expressly, the Third Chamber considered that the Spanish courts “had not taken into account B.S.’s special vulnerability inherent in her situation as an African woman working in prostitution”. Consequently, it found violations of Article 3 (torture, inhuman and degrading treatment) and Article 14 (non-discrimination) of the Convention due to the lack of an effective investigation into the allegations of ill-treatment, including racist and sexist abuse, which B.S. suffered at the hands of the Spanish police.

The term ‘intersectionality’ recognises the need for a “holistic approach” in the determination of the right to be free from discrimination and violence. It was first coined by Crenshaw who sought to illustrate (through an analysis of judicial decision-making) that “the intersectional experience is greater than the sum of racism and sexism” (1989, 140). It has since been extensively developed and debated within feminist and gender studies. Within legal studies, however, the application of intersectionality has been more limited. Though, that said, there are some examples of judges in the Canadian and English courts adjudicating on equality and non-discrimination issues have used the idea in recognition of the intersecting factors which affect people’s lives.

In this case note I argue that the B.S. v Spain case marks the beginning of an adjudicative approach incorporating the insights of intersectionality in the Strasbourg court. Lourdes Peroni (2012) has stated in her post in Strasbourg Observers ‘To my knowledge, the Court has not yet shown much awareness of intersectional discrimination in its case law. In this regard, B.S. represents an important development’.

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3 The application prepared by Women’s Link Worldwide representing B.S. is available online at: http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_proyectos&tp=proyectos&dc=26.

4 Supra note 1 at para 71: “A la lumière des éléments de preuve fournis en l’espèce, la Cour estime que les décisions rendues en l’espèce par les juridictions internes n’ont pas pris en considération la vulnérabilité spécifique de la requérante, inhérente à sa qualité de femme africaine exerçant la prostitution.”

5 There is a large amount of literature on intersectionality generally and specifically within legal studies. See, e.g., Crenshaw (1989), Yuval-Davis (2006), Phoenix (2006), Nash (2011), United Nations Division for the Advancement of Women (DAW), Office of the High Commissioner for Human Rights (OHCHR) and UN Development Fund for Women (UNIFEM) (2000).

6 See, e.g., Russo (2010), Nash (2008), McCall (2005), Davis (2008), Lutz et al (2011), Phoenix and Pattynama (2006).

7 See, eg, Madam Justice L’Heureux-Dubé writing for the minority in Canada (A.G.) v. Mossop (1993) 1 SCR 554 at 645–646; Lord Justice Moses in R (on the application of Kaur and Shah) v London Borough of Ealing (2008) EWHC 2062 (Admin).

8 Lourdes Peroni (2012) has stated in her post in Strasbourg Observers ‘To my knowledge, the Court has not yet shown much awareness of intersectional discrimination in its case law. In this regard, B.S. represents an important development’.
and seeks to argue that the case could have a positive impact in future cases involving multiple or intersecting forms of discrimination.

**B.S.: An Intersectional Approach?**

The facts of the case are as follows. B.S., a woman of Nigerian origin, had been lawfully resident in Spain since 2003. On 15 July 2005, whilst she was legally carrying out sex work on a street in Mallorca, she was approached by two policemen and asked to provide identification. After providing the police officers with her identity papers, she was re-approached by the same police officers later in the day. The officers racially insulted her, saying ‘get out of here you black whore’ (*puta negra, fuera de aqui*) and assaulted her with a truncheon, hitting her knuckles and left thigh. B.S. lodged a complaint with an investigating judge and went to hospital to have her injuries treated. Despite this, the proceedings were discontinued on the basis of a lack of evidence. B.S. appealed this decision and an oral hearing was granted. However, in an extraordinary turn of events, the police officers subsequently placed on trial were not those identified by B.S. and they were understandably acquitted.

On 23 July 2005, just 10 days after the first incident, B.S. was once again stopped for questioning and assaulted again by the police officers who had originally assaulted her. Again, she went to hospital and lodged another complaint alleging racial discrimination. And, again the proceedings against the police officers were stalled for lack of evidence—this time because B.S had been given no opportunity to identify the officers involved.

After exhausting domestic remedies, B.S. and her representatives applied to the ECtHR alleging violations of *inter alia* Article 3 regarding the lack of an effective investigation and ill-treatment and a violation of Article 14. She framed her complaint in terms of the discrimination she faced at the hands of the police officers and the judicial authorities, drawing attention to the discriminatory attitude of the latter by providing evidence of a reference by the investigating judge to the “shameful spectacle of prostitution on the public highway” when dismissing her case.9

The Spanish Government made two main arguments in their defence of the claim. First they argued that the injuries were not sufficiently serious to reach the threshold required by Article 3. The Court, however, disagreed and found that the injuries were sufficiently serious to engage Article 3 as evidenced by the medical reports.10 The Court found that while investigations had been opened into the injuries sustained they had not been sufficiently “effective”. The Court also noted that the investigating judges had not contacted potential witnesses and that the applicant’s requests for an identity parade had been denied with the result that, crucially, the police officers involved had not been identified.11

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9 *Supra* n 1 at para 29.
10 *Ibid* at para 40.
11 *Ibid* at para 43–44.
Secondly, the Spanish Government attempted to legitimise the identity checks on the grounds of public security, stating that measures were necessary in order to combat the human trafficking of foreign women for purposes of sexual exploitation in the Balearic Islands. The Court dismissed this, stating that preventative measures to combat human trafficking could not justify treatment contrary to Article 3.12

Having found a lack of an effective investigation by the Spanish authorities, the Court considered the claim under Article 14. The applicant accused the police officers of racial discrimination on the basis that women with a “European phenotype” carrying out sex work were not stopped for identity checks. The Spanish Government argued that the applicant had failed to provide any evidence to support the allegations of discrimination based on her African origin or her status as a sex worker.13

Rejecting the Spanish Government’s argument, the Court held that it was incumbent upon the government to introduce evidence which cast doubt on the applicant’s assertions when allegations of ill-treatment are concerned.14 This reversal of the burden of proof is present in Strasbourg jurisprudence where the applicant has alleged mistreatment at the hands of State authorities and can provide some medical evidence to that effect.15 It is for the Government to refute the applicant’s claim by providing a plausible alternative account of how the injuries have been sustained. The Court went on to reiterate that authorities investigating violent incidences have an obligation to take all reasonable measures to investigate whether the violence was motivated on racial hatred or prejudice.16 The Court also noted that neither the domestic authorities nor the domestic courts had taken into consideration the applicant’s “special vulnerability” as an African woman carrying out sex work. The Spanish Government had therefore failed in their obligations under Article 14 to take all possible measures to investigate whether State officials had acted in a discriminatory manner.17

By making explicit reference to B.S.’s unique situation as a migrant woman from Nigeria exercising prostitution, the Court understood that B.S. was racially profiled and harassed not only because she is of African origin but also because she was a sex worker. The combination of these factors meant that she was particularly vulnerable compared to other sex workers of Spanish or European origin or other African women living and working in Spain.

12 Ibid at para 46.
13 Ibid at para 58.
14 Ibid at para 58.
15 See Turan Cakir v. Belgium, no. 44256/06, § 54, 10 March 2009, and Sonkaya v. Turkey, no. 11261/03, § 25, 12 February 2008.
16 Supra note 1 at para 58.
17 Ibid at para 71.
Intersectionality and Structural Inequality

The judgment in the B.S. case reflects the arguments advanced by B.S. and her representatives in the application before the Court, which set out the definitions and differentiations between multiple, compound and intersectional discrimination and argued that:

It is essential to consider the different grounds of discrimination and the ways in which these grounds interact because those experiencing these complex forms of discrimination are too often among those in the most vulnerable, marginalized and disadvantaged situations, and thus are more prone to suffer violation of their rights including the ability to have access to justice.  

B.S. should be understood within the context of the ongoing strategic litigation brought by Women’s Link, B.S.’s legal representatives, challenging the use of racial profiling by the Spanish Government. For example, in the *LeCraft Williams* case, brought by Women’s Link and other organisations before the United Nations Human Rights Committee (HRC), Spain was found in violation of Article 5 of the International Covenant of Civil and Political Rights (ICCPR) for racial discrimination suffered by an African American woman with Spanish citizenship.  

In this case the applicant, Ms Williams, was stopped by a police officer and asked for her identity documents at Valladolid train station in 1992. When Ms. Williams asked why she, and not the Caucasian family members accompanying her or any other person in the train, had been stopped the officer pointed at Ms. Williams and explained that he had been told to identify persons who “looked like her,” adding “many of them are illegal immigrants.” In its decision of 17 August 2009, the United Nations HRC acknowledged that identity checks carried out for public security or crime prevention, or to control illegal immigration, serve a legitimate purpose. However, it found that physical or ethnic characteristics of a person should not “by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics.” Otherwise, the policy would contribute to the spread of xenophobic attitudes and run counter to measures attempting to combat racial discrimination.

In the context of Strasbourg jurisprudence, whilst the ECtHR has yet to find a violation of Article 14 for stop and search policies or identity checks, the Court has expressed its concern over statistics which show that the policies are used disproportionality on black and Asian ethnic groups. In *Gillan and Quiton v United Kingdom*, involving stop and search policies, the Court stated:

18 *Supra* n 3 at para 4.
19 *Rosalind Williams versus. Spain* (2009). UN Human Rights Committee. 17 August Communication 1493/2006.
20 *Ibid.* at section 111 (summary of the facts) para 2. See also Rosalind Williams’ complaint for the United Nations HRC here: http://www.opensocietyfoundations.org/sites/default/files/decision-en_20090812.pdf.
21 *Ibid* at para 7.2.
While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, as the judgments of Lord Hope, Lord Scott and Lord Brown recognised. The available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics... There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention.  

With this jurisprudence in mind, the application in the B.S. case expressly asked the ECtHR to “dismantle discriminatory systematic ethnic and sex profiling regarding the presence of black women in public spaces in Spain, and the endemic racism of the national court system.” Whilst the Court found that B.S.’s Convention rights had been violated, specifically listing the intersecting factors, the decision made no mention of structural and institutional racism or the policy of racial profiling. This omission thus fails to place the decision in B.S. in the context of the corpus of emerging international jurisprudence on stop and search powers and racial profiling. Instead, it is situated within the ambit of Article 14 and non-discrimination based on gender violence.

**Intersecting Gender and Racial Discrimination**

The Strasbourg Court has never used the term ‘intersectionality’ in its consideration of Article 14 which provides:

> 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.

Article 14 is a comparatively weak right, and violations can only be found in conjunction with another Convention right, leading some authors to deride the provision as ‘parasitic’. Even when the Court has been called upon to adjudicate cases in which Article 14 could come into play it has declined to do so, instead, focusing its decision making on other Convention rights.

Although, some scholars have argued that the ambit of Article 14 has become more robust through the development of jurisprudence on a number of concepts including, indirect discrimination, anti-stereotyping (Timmer 2011) and segregation (Goodwin 2009), O’Connell (2009) argues the Court continues to base its decisions...
on other Convention provisions where possible. This has traditionally been the case with regards to cases involving gender violence. Whilst the Court has called on member states to “eradicate all discrimination on grounds of sex” gender violence has not been conceived as an equality issue but rather as an act of violence by State and non-State actors in conjunction with the violation of other Convention rights. Thus in *X and Y v. the Netherlands* the Court found that discrimination was not a fundamental aspect of cases involving gender-based violence:

\[ \text{A} \text{n examination of the case under Article 14 is not generally required when the Court found a violation of one of the former Articles taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.}^{27} \]

One exception is in the groundbreaking decision of *Opuz v. Turkey*. In this case the ECtHR found for the first time that “the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women”.\(^{28}\) However, despite this decision, the Court has otherwise continued to apply restrictive reasoning in applications involving gendered violence, declining to consider the Article 14 implications.

The forced sterilisation of Roma women in *V.C. v Slovakia* is an illustrative example.\(^{29}\) In this case, the applicant, a woman of Roma ethnic origin, was sterilised in a public hospital without her full and informed consent following the birth of her second child. In finding Slovakia in violation of Article 3 and Article 8 (right to respect for private and family life), the Strasbourg court found the sterilisation to constitute “a major interference with a person’s reproductive health status”.\(^{30}\) However, in its consideration of Article 14 the majority found:

… the respondent State failed to comply with its positive obligation under Article 8 of the Convention to secure to the applicant a sufficient measure of protection enabling her, as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life in the context of her sterilisation. In these circumstances, the Court does not find it necessary to separately determine whether the facts of the case also gave rise to a breach of Article 14 of the Convention.\(^{31}\)

A single dissenting judgment was handed down by Judge Mijovic, who disagreed with the majority’s position on Article 14. He stated:

To my mind, the applicant was “marked out” and observed as a patient who had to be sterilised just because of her origin, since it was obvious that there were no medically relevant reasons for sterilising her. In my view, that

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\(^{26}\) *Unal Tekeli v Turkey* (2004) ECHR 635 at para 59. See further Besson (2008).

\(^{27}\) *Supra* note 25.

\(^{28}\) *Opuz v. Turkey* (2009) ECHR 870 at para 200.

\(^{29}\) *V.C. v. Slovakia* (2011) ECHR 1888.

\(^{30}\) *Ibid.* at para 106.

\(^{31}\) *Ibid.* at para 179–180.
represents the strongest form of discrimination and should have led to a finding of a violation of Article 14 in connection with the violations found of Articles 3 and 8 of the Convention.\footnote{Ibid. Dissenting Opinion of Judge Mijovic.}

Similarly, in the recent decision of \textit{N.B. v Slovakia},\footnote{\textit{N.B. v Slovakia} (2012) ECHR 991. See also: \textit{I.G. v Slovakia} (2012) ECHR 1910.} though the claimant argued that she had been discriminated against on the grounds of her race/ethnic origin and sex in the enjoyment of her Convention rights and that this discrimination had played a determining role in her forced sterilisation, the Court found violations of Article 3 and Article 8 but no violation of Article 14. In a unanimous judgment, the judges stated that they had no reason to depart from the \textit{V.C.} decision given the absence of evidence that the doctors acted in bad faith or evidence of an organisational policy in the hospital.\footnote{\textit{N.B. v Slovakia} at para 120.} Thus, as recently as 2012, the Court has declined to consider violations of Article 14 in cases of the forced sterilisation of Roma women. These decisions are in stark contrast to Judge Mijovic’s observations in \textit{V.C.} that the Court’s reasoning reduced the women’s claims to an individual level rather than taking into account the structural context of inequality. Judge Mijovic argued that:

Finding violations of Articles 3 and 8 alone in my opinion reduces this case to the individual level, whereas it is obvious that there was a general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), the effects of which continued to be felt up to the time of the facts giving rise to the present case… The fact that there are other cases of this kind pending before the Court reinforces my personal conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia.\footnote{Supra note 32.}

Whilst the Strasbourg Court has recognised that the particularities and vulnerabilities of the situations of some Roma people,\footnote{For an overview of cases on Roma and traveller communities see the ECHR factsheet on Roma and Travellers available at: \url{http://www.echr.coe.int/ECHR/en/Header/Press/Information+sheets/Factsheets/}.} the Court has failed to recognise the discriminatory nature of the forced sterilisations on the grounds of the Roma women’s sex and ethnicity in these cases. An intersectional approach to Article 14 would have led the Court to look at the specific historical exclusion of Roma women and to conceive of the forced sterilisations as a form of gender violence in breach of the prohibition of non-discrimination. The failure to recognise the discrimination in the cases of Roma sterilisation thus fails to address the root cause of the harm. By focusing on the harm suffered by the individual women, the structural discrimination affecting Roma women due to their gender and race was obfuscated by the Court.

With this context in mind, the \textit{B.S.} decision is a welcome development for two main reasons. First, the Court finds a violation of Article 14 where it did not strictly
need to do so. By this I mean that the Court had already found a violation of Article 3 and could have found that this finding was sufficient. However, by finding a violation of Article 14, the Court emphasised the discriminatory nature of the treatment at the heart of the case. Moreover, the Court found the violation of Article 14 based on a number of intersecting factors. This finding is all the more important given that, according to Ivana Radacic, the “Court’s jurisprudence has been largely impotent in challenging gender discrimination and achieving gender equality” (2008, 841). Analysing the Court’s jurisprudence on gender equality, prior to Opuz, VC and the other cases discussed in this note, Radacic calls for “an understanding of gender equality as challenging (multiple and intersectional) forms of disadvantage” (842) and goes on to argue that the Court’s approach to Article 14 and gender equality cases has been paternalistic and insensitive to the intersectionality of discrimination.

Secondly, from a theoretical point of view, the B.S. case is important since it extends the categories which usually form the focus of intersectional critique and application. Some feminist scholars have voiced concerns over the emphasis on the essentialist and monolithic conceptions of the categories and terms race, sex and class, thus neglecting particular social groups at the points of intersection (McCall 2005, 1774). In this case, the decision recognises a number of factors over and beyond the usual categories of race and sex. The Court places an emphasis on the fact that B.S. is a sex worker and an African woman in coming to their conclusion that she is particularly vulnerable due to these factors. The inclusion of various categories provides a more holistic picture of B.S.’s circumstances and illustrate that there are numerous and multiple factors beyond or within the categories of race, sex, and class, which affect people’s lives.

Conclusion

According to McCall intersectionality is “the most important theoretical contribution that women’s studies … has made so far” (2005, 1771). At the same time, the last 20 years has brought many difficult critiques from feminist scholars depending on their individual standpoints. Whilst it is important to recognise the limitations which intersectionality may have, that it cannot be a theoretical fix for all of gender studies’ woes, the application of intersectional theory in the judicial sphere is still arguably the most apt given its origins in Crenshaw’s work and the law’s blinkered focus on the individual rather than the structural.

The recognition of the intersecting factors, including B.S.’s status as a sex worker and African woman approximates a preferable approach to previous jurisprudence under Article 14. However, it remains to be seen whether the Court will adopt this adjudicative approach in the future where it is not expressly advocated by the application. Especially given the emphasis placed on intersectionality in both the application and the third party interventions in this case.

The strategy in B.S. aimed to use feminist theory in legal practice for the purpose of obtaining justice for the applicant The B.S. case was thus an important personal victory for the applicant. While the decision may have a limited impact on Article
14, given the non-precedential nature of Strasbourg decisions, the case is illustrative of how the idea of intersectionality remains relevant and functional in a legal setting.

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