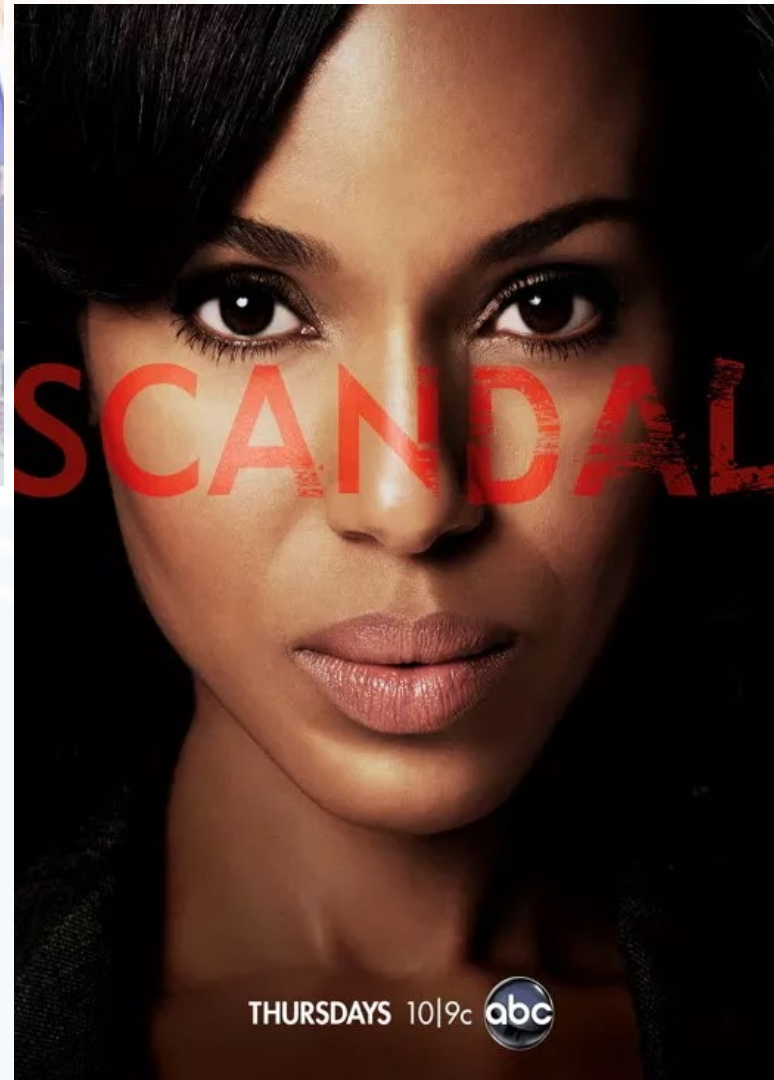
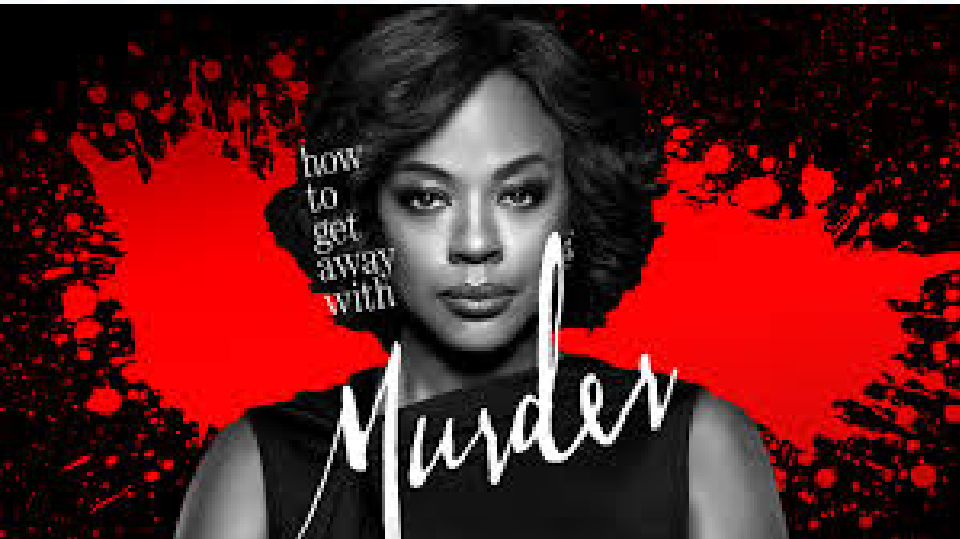




Gender, Intersectionality and Diversity in International and European Law – Case Law

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What are you watching?



What is intersectionality?

ethnic origin +
gender +
social class +
age +
disability +
migrant or
refugee status +

health situation +
deprivation of liberty +
sexual orientation +
physical appearance +
poverty

What is intersectionality?

1989. coined by Prof. Kimberly Crenshaw

- “overlapping or intersecting social identities and related systems of oppression, domination, or discrimination”

- there are several grounds of discrimination depending on one person's identity.

-“Intersectionality is what occurs when a woman from a minority group (...) tries to navigate the main crossing in the city (...) The main highway is “racism road”. One cross street can be Colonialism, then Patriarchy Street (...) She has to deal not only with one form of oppression but with all forms, those named as road signs, which link together to make a double, triple, multiple, a many layered blanket of oppression.” – K. Crenshaw

What is intersectionality?

- intersectional analysis considers intra-group differences as important as those between different groups
- not a legal term – no definition in legal documents
 - **a sociological phenomenon**
 - **an analytical tool** - to zoom in on the interconnectedness of various grounds of discrimination
 - **interpretative approach** - to identify patterns of discrimination to create legal responses and adequate policies

Why is intersectionality such a complex problem?

- identification, ramifications and remedies are much more complex and severe
- difficult to recognise it, understand it, analyze it and address it
- it reinforces oppression and enhances the violent aspect of discrimination.
 - typical measures used in cases of discrimination on a single ground are not enough
 - we need to develop specific measures

CEDAW

- The UN Committee on the Elimination of Discrimination against Women that monitors implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women (1979)
- for a long time it viewed “women” as a unitary group with comparisons being made against a male comparator, which is obviously inappropriate since it does not reflect reality.



CEDAW

A.S. v Hungary (2004)

- medical sterilisation of a Roma woman without full consent (done during a caesarean section prompted by the death of her foetus.
 - right to health information,
 - the right to non-discrimination in the health sector
 - the right to freely decide on the number and spacing of children
- She would have never consented to the sterilisation given her “strict Catholic religious beliefs that prohibit contraception of any kind”.

CEDAW

A.S. v Hungary (2004)

- the decision indirectly raised the issue of the systemic discrimination faced by many Roma women not only in Hungary and but also in the region.
- the Committee found violation of her rights, but failed to engage with the intersectional forms of oppression that she has faced:
 - a woman
 - belonging to the Roma minority
- It failed to recognise that, from a gender perspective, the experience of non-minority women does not encompass the experience of all women.

CEDAW

Cecilia Kell v Canada (2012)

- in 1990, Cecilia Kell, an Aboriginal woman, returned to her home community after attending university
- the local housing authority made lodging available to indigenous people
- she applied for housing and included both herself and her partner in the application
- he was not a member of the community, hence not eligible to apply alone
- application was successful and they were granted a house as co-owners



CEDAW

Cecilia Kell v Canada (2012)

- in 1993, Kell was subjected to domestic violence by her partner
- partner requested the removal of her name from the Assignment Lease, which was done without her knowledge or consent
 - he became a sole owner of the property
- in 1995, her partner changed the locks and denied her access to the house - leading to her official eviction
- Kell spent the next 10 years attempting to regain her property rights through the Canadian legal system
- shortly after the first suit, he was diagnosed with cancer and died
- by the time she filed the third action, the property had been sold by the company

CEDAW

Cecilia Kell v Canada (2012)

- her rights had been violated by the public authority acting with her partner, and that she had been discriminated against based on her identity as an
 - Aboriginal
 - woman
 - who was a victim of domestic violence
- “as the author is an Aboriginal woman who is in a vulnerable position, the State party is obliged to ensure the effective elimination of intersectional discrimination”

CEDAW

Cecilia Kell v Canada (2012)

- a systemic problem
- “Canada was required under the Convention to ensure effective access to justice for all Aboriginal women”
- “by taking steps to educate and train more Aboriginal women and provide legal aid to women “from their communities, including on domestic violence and property rights.”

HRC



UN Human Right Committee that
monitors implementation of the
UN International Covenant on
Civil and Political Rights (1966)

HRC

Sandra Lovelace v Canada (1981)

- Maliseet Indian, lived on the Tobique Reservation until she married a non-Indian man
- After her marriage ended, she returned but couldn't buy a home
- The Canadian Indian Act:
 - Indian woman marrying a non-Indian man loses her Indian status.
 - Loses access to federal programs, housing rights on reserves, and cultural benefits.
- An Indian man marrying a non-Indian woman does not lose this status.
- She claimed, *inter alia*, violation of the prohibition of discrimination



HRC

Sandra Lovelace v. Canada (1981)

- Article 27 of ICCPR ensures minority groups' right to enjoy their culture
 - Ms. Lovelace's cultural rights were violated since no external communities shared her language and culture
- Committee's conclusion: "denying her access to live on the reserve was unreasonable and unnecessary, hence her Article 27 rights were violated"
- Impact:
 - progress in eliminating gender discrimination in Canadian law
 - challenging the Maliseet gender hierarchy
- Critique:
 - did not use an intersectional analysis, but instead focused on cultural rights

HRC

Yaker and Hebbadj v France (2016)

- in 2010, France adopted a statute which provision criminalized concealing one's face in public



“No one may, in a public space, wear any apparel intended to conceal the face, unless it is authorized by law or justified for health or professional reasons, sports practices, festivities, or artistic or traditional manifestations.”

- a secular state
- its aim is to be religiously neutral
- Act was neutral with respect to religion and applied generally to all clothing that covered the face

HRC

Yaker and Hebbadj v France (2016)

- French authorities convicted and fined two French Muslim women for wearing niqab (full-face veil)
 - right to freedom of religion
 - right to non-discrimination
- HRC found that the ban restricted their right to manifest their religion, since it forced them to give up on their religious clothing or face penalties for wearing it
- Article 18 (3) of the ICCPR: freedom to manifest one's religion can be limited, but only when such limitations are “prescribed by law and necessary to protect public safety, order, health and morals, or the fundamental rights and freedoms of others”.

HRC

Yaker and Hebbadj v France (2016)

- HRC determined that the restriction was not justified, since a blanket ban on facial coverings was unnecessary and disproportionate to the state's need for identification and security
 - the ban on facial coverings did not make sense in light of exceptions to the prohibition on facial coverings for non-religious reasons such as sporting events
 - France claimed that “the ban was important to protect the “the rights of others” and necessary to establish trust among people
 - there was “insufficient connection between the fundamental rights of others and the ability to see women's faces in public”
- there was a violation of religious freedom of Yaker and Hebbadj

HRC

Yaker and Hebbadj v France (2016)

- HRC: differential treatment may be permissible if:
 - the rule or measure is reasonable, objective, and serves a legitimate state aim.
- not fulfilled in this case
- legislation prohibiting facial coverings disproportionately affected Muslim women
- exceptions were made for face coverings in sporting and other events, highlighting selective enforcement against Muslim women
- their right to non-discrimination was also violated
- Yaker and Hebbadj faced intersectional discrimination that was based on both gender and religion – but no meaning and no special remedies

ECtHR

- **European Court of Human Rights** that monitors implementation of the European Convention on Human Rights (1950)
- regional mechanism of Council of Europe
- Article 9 (2)- the right to manifest one's religion
 - allows for limitations when there is a legitimate aim (ex. protection of the rights and freedoms of others) and
 - it is necessary in a democratic society
 - prescribed by law



S.A.S v France (2014)

- did not address the Act's numerous exceptions
- mainly affected Muslim women
- “the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face”
- France's aim of securing “respect for the minimum requirements of life in society,” or “living together,” by ensuring that the human face would be revealed in public, was “linked to the legitimate aim of the ‘protection of the rights and freedoms of others’”
- applied wide “margin of appreciation” with respect to manifestation of religion



ECtHR

S.A.S. v France (2014)

- margin of appreciation
 - an approach of the the ECtHR
 - it has a subsidiary role in assessing local needs and conditions
 - in some cases the state is the one that knows better whether some human rights limitations were truly necessary for its local conditions
- France knew better and that the law did not contravene the ECHR
- the prohibition of discrimination - “the ban may have specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public”
- “this measure has an objective and reasonable justification”, hence there was no violation of the prohibition of discrimination.

HRC v ECtHR

- different contexts - universal v regional
 - European context - based on the assumption that Member States share common commitments as democracies to the rule of law and protection of fundamental rights
- political reasoning of ECtHR - “there was no European consensus on the validity of a comprehensive ban on the full-face veil”, despite the fact that no other European state at the time had adopted such a ban
- similar reasoning could be applied in an opposite manner
- limitation clause in the freedom of religion under ICCPR is more restrictive than the one in the ECHR
 - ICCPR: “fundamental rights and freedoms of others”
 - ECHR: “rights and freedoms of others”

B.S. v Spain (2012)

- Nigerian woman who worked as a prostitute
- verbally and physically abused by the police
- national courts did not investigate incidents thoroughly – insufficient evidence
- ECtHR: “the investigative steps taken had not been sufficiently thorough and effective to satisfy the requirements of Article 3 of the ECHR” – violation of Article 3
- domestic courts had overlooked the applicant's vulnerability as an African woman working as a prostitute and failed to investigate potential discrimination
 - violation of the prohibition of discrimination





Thank you 😊