

DOMESTIC VIOLENCE AS SEX DISCRIMINATION:
TEN YEARS SINCE THE SEMINAL EUROPEAN
COURT OF HUMAN RIGHTS DECISION IN
OPUZ V. TURKEY

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I. INTRODUCTION

The 2009 decision of the European Court of Human Rights (ECtHR) in *Opuz v. Turkey*¹ was a seminal case in more than one way; it was one the first times that the ECtHR had dealt with domestic violence, and the first time it declared such violence to constitute discrimination on the basis of sex under Article 14 of the European Convention on Human Rights (ECHR). In the ten years since the case was decided, the ECtHR has had numerous opportunities to develop the scope of domestic violence as sex discrimination, while also discussing the ways in which gender-based stereotypes can affect law enforcement and judicial actors. This paper will reflect on the landmark *Opuz v. Turkey* decision and examine how the ECtHR has dealt with domestic violence under Article 14 in the intervening ten years.

II. *OPUZ V. TURKEY*

The applicant in *Opuz v. Turkey* brought suit on behalf of her mother, who was killed by her husband. The case was brought under Articles 2, 3 and 14 of the ECHR, and alleged violations of the right to life, the prohibition on torture and

1. *Opuz v. Turkey*, App. No. 33401/02, 48 I.L.M. 909 (2009).

inhuman and degrading treatment, and the prohibition on discrimination. The applicant alleged that, despite her mother's constant complaints to the police, the police failed in its positive obligations to protect the victim from the criminal actions of a third party.² In a review of the relevant legal principles, the ECtHR referred to the 1998 case of *Osman v. UK*.³ This case established that states have a positive obligation to protect against the actions of third parties if the authorities "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."⁴

In this particular case, the ECtHR outlined its key question as whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal consequences or other appropriate preventative measures.⁵ There were a number of interactions between the victim and the police, signifying that the police were aware of the violence. The victim filed criminal proceedings, asked the Chief Public Prosecutor to take protective measures, filed a complaint that her husband had been carrying weapons, and submitted two petitions stating that her life was in immediate danger.⁶ In the ECtHR's view, the victim suffered an escalation of violence, of which the police were aware, and which was sufficiently serious to warrant preventative measures.⁷

The ECtHR went on to examine the police response to this escalation of violence. The Turkish government claimed that they did not take further action because that would have been a violation of the victim's ECHR Article 8 right to privacy.⁸ The ECtHR acknowledged that a balance must be struck in these situations but found that, based on the practice of

2. *Id.* at 925.

3. *Osman v. United Kingdom*, App. No. 23452/94, 29 Eur. H.R. Rep. 245 (1998).

4. *Id.* ¶ 116.

5. *Opuz v. Turkey*, App. No. 33401/02, 48 I.L.M. 909, 927 (2009).

6. *Id.* at 927–28.

7. *Id.* at 928.

8. *Id.* at 925.

member states, the more serious the violence, the less regard should be had for such Article 8 concerns.⁹ The ECtHR emphasised that the authorities appeared to place more importance on not interfering with a “family matter” under Article 8 than on the harm to the victim.¹⁰ The court held that the Turkish authorities were aware of an immediate threat against the life of the victim and did not take reasonable measures to prevent her death. Turkey failed in its obligations to protect against the actions of third parties, violating the right to life under ECHR Article 2 and the prohibition on ill-treatment under ECHR Article 3.¹¹

For the first time in a case concerning domestic violence, the ECtHR also held that, in conjunction with ECHR Articles 2 and 3, there was a violation of the ECHR Article 14 prohibition on discrimination.¹² This was the first time that Article 14 had been invoked in the context of domestic violence. ECHR Article 14 states that “[t]he 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.”¹³ In *D.H. & Others v. the Czech Republic*, the ECtHR stated that under the ECHR, discrimination means, “treating differently, without an objective and reasonable justification, persons in relevantly similar situations.”¹⁴ It also added that there need not be any discriminatory intent on the part of the state,¹⁵ and that legislation or practice will constitute a violation if it has “disproportionately prejudicial effects” on a particular group.¹⁶

In this case, the applicant argued that Turkish law on domestic violence was discriminatory because it treated a wo-

9. *See id.* at 929 (concluding that the more serious the offense, the more likely the prosecution should continue the investigation even if the victim objects).

10. *Id.* at 930.

11. *Id.* at 931, 934.

12. *Id.* at 938.

13. Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

14. *D.H. and Others v. Czech Republic*, 2007-IV Eur. Ct. H.R. 241, 310.

15. *Id.* at 315.

16. *Id.* at 313.

man's life as "inferior" to that of a man "in the name of family unity."¹⁷ As an example, she cited the domestic criminal code in force at the time, noting that it granted lighter sentences to persons who murdered their wives in name of honor, as had happened in this case.¹⁸ This discriminatory legislative framework was exacerbated by the culture of impunity granted to abusers by judicial and administrative bodies. The applicant further argued that she and her mother had been victims of the above described violations because they were women.¹⁹ In its analysis, the ECtHR first sought to define the scope of discrimination in the context of domestic violence. The ECtHR acknowledged that, when doing so, it is appropriate to take into account other, more specialized, international instruments, and not merely rely on its own case law.²⁰ The ECtHR, therefore, had regard for the Committee on the Elimination of All Forms of Discrimination Against Women's General Recommendation No. 19 on violence against women.²¹ In that recommendation, the committee stated that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men' and is thus prohibited under Article 1 of the CEDAW."²² By virtue of Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), states are also required to "take all legal and other measures that are necessary to provide effective protection of women against gender-based violence."²³ This is a prime example of the ECtHR utilizing its "living" instrument doctrine; here, it involved viewing the CEDAW as an evolving document that must be read in light of the societal context of the day.²⁴

17. *Opuz v. Turkey*, App. No. 33401/02, 48 I.L.M. 909, 935 (2009).

18. *Id.*

19. *Id.*

20. *Id.* at 933.

21. *Opuz v. Turkey*, App. No. 33401/02, 48 I.L.M. 909, 918 (2009) (citing Committee on the Elimination of Discrimination Against Women [CEDAW], *Violence Against Women: General Recommendation 19*, ¶ 1, CEDAW/C/1992/L.1 /Add.15 (1992)).

22. *Id.*

23. *Opuz v. Turkey*, App. No. 33401/02, 48 I.L.M. 909, 918 (2009) (citing Committee on the Elimination of Discrimination Against Women [CEDAW], *Violence Against Women: General Recommendation 19*, art. 24(t), CEDAW/C/1992/L.1 /Add.15 (1992)).

24. *Demir & Baykara v. Turkey*, 2008-V Eur. Ct. H.R 395, 422 (2008).

Since the ECHR came into force in September 1953, the second wave of the global feminist movement had taken off and CEDAW was signed and ratified. Though domestic violence was likely not contemplated as a form of discrimination at the time (it was not even mentioned in the text of CEDAW), the ECtHR can read in such an interpretation, via the living instrument doctrine.

Opuz was an incredibly important case; notably, it was the first time the ECtHR ruled on a state's obligations towards domestic violence victims and shed light on the influence that gender stereotypes can have on the realization of human rights for women. In its decision, the ECtHR established that a state's law on domestic violence must have a deterrent effect,²⁵ and that state officials must take domestic violence seriously and not create a practice of passivity or impunity.²⁶ The ECtHR heard evidence from Amnesty International and the Diyarbakir Bar Association, two non-governmental organizations (NGOs) familiar with gender-based violence in Turkey. These organizations pointed to instances of police officers acting as mediator and encouraging women to return home and withdraw their complaint.²⁷ Based on this evidence, the ECtHR concluded that there was an "insufficient commitment to take appropriate action to address domestic violence."²⁸

In the ten years following the *Opuz* decision, numerous cases on domestic violence in different contexts have come before the Court. This paper will now examine if and how the ECtHR has developed its understanding of domestic violence as sex discrimination.

III. DEVELOPING JURISPRUDENCE

A. Eremia v. Moldova²⁹

The applicant alleged that the Moldovan authorities had violated Article ECHR 3 because they had failed to protect her from the abuse of her husband, despite their knowledge of her

25. *Opuz v. Turkey*, App. No. 33401/02, 48 I.L.M. 909, 938 (2009).

26. *Id.*

27. *Id.* at 937.

28. *Id.* at 938.

29. *Eremia and Others v. Republic of Moldova*, App. No. 3564/11, 58 Eur. H.R. Rep. 2 (2013).

abuse.³⁰ She also argued that there had been a violation of ECHR Article 14 because the authorities failed to adequately apply the law on domestic violence, due to their “preconceived ideas concerning the role of women in the family.”³¹ The ECtHR held that there had been a violation of ECHR Article 3, in conjunction with Article 14, because the authorities’ conduct in dealing with the applicant’s complaints was not simply a matter of delay but amounted to “condoning” such violence.³² The judge presiding over the case refused to speed up the divorce process despite the request of the applicant, and the police refused to enforce the protection order of the court, commenting that the victim was “neither the first nor the last woman to be beaten up by her husband” and that she should attempt a reconciliation.³³ Referring to the findings of the U.N. Special Rapporteur on violence against women, the ECtHR went on to say that the Moldovan authorities did not take domestic violence seriously, reflecting a discriminatory attitude towards the gender of the applicant.³⁴ Like the *Opuz* court, the *Eremia* court did not make its decision based on per se discriminatory legislative provisions, but on the conduct of state officials in applying these provisions. The case appears to reinforce the idea that a legislative framework may be adequate in theory, but rendered ineffective by a culture of immunity among the judiciary and police.

B. Rumor v. Italy³⁵

Following an instance of serious domestic violence, the applicant in *Rumor* argued that the Italian authorities had failed to provide her adequate support and to protect her from further violence and psychological harm.³⁶ Despite her husband’s conviction and subsequent house arrest, the applicant alleged that she was in a state of constant fear in the after-

30. *Id.* ¶ 38.

31. *Id.* ¶ 80.

32. *Id.* ¶ 89.

33. *Id.* ¶ 25 (quoting the prosecutor-hired social workers who urged the applicant to attempt reconciliation with her abuser).

34. *Id.* ¶ 89.

35. *Rumor v. Italy*, App. No. 72964/10, HUDOC (2014), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%22document%22,%22itemid%22:%22001-144137%22%7D>.

36. *Id.* ¶ 39.

math of the violence. Her husband was on house arrest at a reception center a mere 15 kilometers from her home³⁷ (a fact of which she was not aware until he phoned her),³⁸ she had received multiple threatening letters from him,³⁹ and the manager of the centre where her husband was staying had visited her.⁴⁰ This manager allegedly “made indirect reference to his power to influence the proceedings concerning parental rights in order to prevent her from selling the company she co-owned with her former partner.”⁴¹ She claimed that this lack of support was a result of a legislative framework that was not adequate to deal with domestic violence, and which discriminated against women.⁴² The ECtHR held, however, that neither ECHR Article 3 nor Article 14 had been violated; rather, it believed the legislative framework had been effective in punishing the perpetrator of the crime of which the applicant was a victim and in preventing the recurrence of this crime.⁴³

Opuz and *Eremia* make clear that the ECtHR’s focus when examining state conduct is whether the domestic legislative framework was effective in preventing unlawful activity and whether the authorities treated domestic violence seriously. It is certainly arguable that the Italian legislation on domestic violence, as applied in this case, is not totally effective, especially if viewed in light of the evolving international opinion on domestic violence.⁴⁴ Ronagh McQuigg has argued that, if the Istanbul Convention had been in force at the time of this case, the decision may have been different.⁴⁵

As mentioned above, the ECtHR has been known to take relevant international instruments into account when making judgments on the conduct of states when it comes to gender-

37. *Id.* ¶ 66.

38. *Id.* ¶ 41.

39. *Id.* ¶ 42.

40. *Id.* ¶ 45.

41. *Id.*

42. *Id.* ¶ 36.

43. *Id.* ¶ 76.

44. Ronagh J.A. McQuigg, *Domestic Violence as a Human Rights Issue: Rumor v. Italy*, 26 EUR. J. INT’L L. 1009, 1009 (2015).

45. *Id.* at 1010.

based violence. The Istanbul Convention,⁴⁶ a Council of Europe Convention on preventing and combating violence against women, is made all the more relevant by the fact that it is a Council of Europe document and has been ratified by the majority of Council of Europe states.⁴⁷ For example, the applicant's husband only received a sentence of approximately three and a half years, but the Convention indicates that aggravating factors—such as an offense committed against a current or former spouse, an offense committed in the presence of a child, an offense committed with particular violence and harm, and the use of a weapon—should be taken into account when determining the appropriate sentence. All of these aggravating factors were present in the applicant's case, yet the sentence was still relatively weak.⁴⁸ The Istanbul Convention also stipulates that states should ensure that victims are informed when the perpetrator escapes or is released, especially if they may be in danger.⁴⁹ As is clear from the facts of this case, the authorities did not inform the applicant that her husband was released.

It is clear that the judicial practice and the conduct of the Italian police was not compliant with the Istanbul Convention. It is curious that the ECtHR did not mention the Istanbul Convention in its judgment as, although it did not come into force until a few months later, it had been signed three years earlier.⁵⁰ Instead, the ECtHR chose to follow the provisions of a number of different legal texts, some of which, like CEDAW, have only tangential links to the court. According to the ECtHR living instrument doctrine, the ECHR should be interpreted in the context of the society around it; it is clear that society's view of domestic violence has become broader in scope, as reflected in the ratification of the Istanbul Conven-

46. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, May 11, 2011, 3010 U.N.T.S. I-52313.

47. Council of Eur., Chart of Signatures and Ratifications of Treaty 210, COUNCIL OF EUR. PORTAL, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p_auth=U0HLNbKM (last updated May 4, 2019).

48. McQuigg, *supra* note 44, at 1022.

49. *Id.* at 1023.

50. Council of Eur., *Istanbul Convention: Historical Background*, COUNCIL OF EUR. PORTAL, <https://www.coe.int/en/web/istanbul-convention/historical-background> (last visited Apr. 19, 2019).

tion. The decision in this case could be a signal that the ECtHR does not want to go too far in interpreting convention provisions and earn the wrath of the state parties by imposing wide-ranging obligations on them. Whatever the reason, this was certainly a missed opportunity for the court to develop the scope of obligations on states in relation to domestic violence to ensure the effective prevention of unlawful acts.

C. Talpis v. Italy⁵¹

This case concerned an applicant who was a victim of domestic violence. The violence resulted in the attempted murder of the applicant and the death of her son.⁵² The ECtHR held that, by failing to respond appropriately to complaints filed by the victim, the Italian authorities had created a situation of impunity that led to the attempted murder of the applicant, thereby violating ECHR Articles 2 and 3.⁵³ The ECtHR also held that ECHR Article 14 was violated when the authorities underestimated the violence in question, and that their inaction was discriminatory.⁵⁴ The police did not launch an investigation, despite the applicant's numerous complaints, and also failed to take protective measures, despite being urging from the prosecution service to take immediate action.⁵⁵ In its decision, the ECtHR referred to its reasoning in *Eremia*⁵⁶ and reiterated that the circumstances of this case indicated that the inadequacy in protection was not a simple failure or a circumstantial delay.⁵⁷ Again, referring to the comments of the U.N. Special Rapporteur on violence against women, the ECtHR said that this practice was illustrative of a policing authority that did not take domestic violence seriously and so, in

51. Talpis v. Italy, App. No. 41237/14, HUDOC, ¶ 141 (2017), [https://hudoc.echr.coe.int/eng#{%22tabview%22:\[%22document%22\],\[%22itemid%22:\[%22001-171994%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],[%22itemid%22:[%22001-171994%22]}).

52. *Id.* ¶ 76.

53. *Id.* ¶ 147.

54. *Id.* ¶ 148–149.

55. *Id.* ¶ 144.

56. For the summation of this reasoning, see *Eremia and Others v. Republic of Moldova*, App. No. 3564/11, 58 Eur. H.R. Rep. 2, ¶ 89 (2013).

57. Talpis v. Italy, App. No. 41237/14, HUDOC, ¶ 141 (2017), [https://hudoc.echr.coe.int/eng#{%22tabview%22:\[%22document%22\],\[%22itemid%22:\[%22001-171994%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],[%22itemid%22:[%22001-171994%22]}).

effect, condoned it.⁵⁸ The ECtHR also distinguished this case from *Rumor*, saying that, in that case, the applicant did not provide sufficient evidence to suggest that domestic violence was prevalent in Italy, and that the circumstances of the case were indicative of a wider problem. In this case, the applicant presented “prima facie evidence” backed up by statistical data.⁵⁹ With this differentiation, it appears that the ECtHR is clarifying that, to prove discrimination, it is not enough for individual officials to treat an applicant in a discriminatory way; rather, the discrimination must be part of a wider practice.

D. Balsan v. Romania⁶⁰

In this case, the applicant alleged that the authorities had failed to protect her from the violence of her husband, despite the applicant’s numerous complaints to the police and the prosecution service.⁶¹ The ECtHR held that there had been a violation of ECHR Article 3 because the authorities had failed to protect the applicant,⁶² and a violation of ECHR Article 14 because the Romanian authorities had failed to follow the relevant legal provisions on domestic violence.⁶³ The ECtHR severely criticized the culture of passivity surrounding domestic violence.⁶⁴ The police claimed that the applicant had “provoked” the violence against her and that it was not serious enough to fall within the scope of criminal law.⁶⁵ The ECtHR found that the evidence the applicant presented indicated that police generally tolerated and perceived as normal such violence, and as such, the criminal justice system did not have a deterrent effect.⁶⁶ In assessing the conduct of both the judicial system and the police, the ECtHR made reference to provisions of the Istanbul Convention and reiterated that domestic

58. *Id.* ¶ 145.

59. *Id.* ¶ 146.

60. *Balsan v. Romania*, App. No. 49645/09, HUDOC (2017), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%22001-173619%22%7D>.

61. *Id.* ¶ 54.

62. *Id.* ¶ 71.

63. *Id.* ¶ 88–89.

64. *Id.* ¶ 82.

65. *Id.* ¶ 81.

66. *Id.* ¶ 87.

violence can constitute a form of gender-based discrimination.⁶⁷ Unfortunately, the ECtHR did not consider the Istanbul Convention in more detail than this.

IV. CONCLUSION

The aim of this comment has been to assess how the ECtHR has treated domestic violence under ECHR Article 14 since the *Opuz* decision. In the relevant case law, the ECtHR never explicitly states a test for domestic violence as sex discrimination; however, from an analysis of that case law, we can discern its general approach. In most of the cases where a violation of ECHR Article 14 was found, the ECtHR noted with approval that the applicant in the case had provided prima facie evidence of discriminatory behavior on the part of the authorities, and that this evidence had been backed up by statistics from NGOs, U.N. Special Rapporteurs, and U.N. Committees, demonstrating a wider problem of sex-based discrimination across the country.⁶⁸ While the ECtHR obviously needs to base any decision on credible evidence, the requirement that the evidence demonstrate a wider cultural issue may be problematic. As *Rumor* demonstrates, any sex discrimination on the part of the state warrants finding a violation, even if this discrimination is not a widespread, critical problem.

It is clear that the ECtHR has missed opportunities to broaden the scope of obligations on states to ensure the effective prevention of unlawful acts. From the *Opuz* case onward, the ECtHR has not been shy about referring to more specialized international instruments to inform its interpretation of domestic violence as sex discrimination. It has demonstrated, however, that this deference seems to only go so far, even when it comes to a Council of Europe instrument. The ECtHR makes reference to the Istanbul Convention to confirm that domestic violence can constitute sex discrimination, but it rarely goes further than that. As seen in the *Rumor* analysis, this is in spite of the fact that a deeper reading of the Istanbul

67. *Id.* ¶ 79.

68. *Eremia and Others v. Republic of Moldova*, App. No. 3564/11, 58 Eur. H.R. Rep. 2, ¶ 89 (2013); *Opuz v. Turkey*, App. No. 33401/02, 48 I.L.M. 909, 937 (2009); *Talpis v. Italy*, App. No. 41237/14, HUDOC, ¶ 145 (2017), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%5B%22document%22%5D%22itemid%22:%5B%22001-171994%22%5D%7D>.

Convention would greatly enhance the effectiveness of domestic legislation and make for a more sensitive and informed police force—requirements that the ECtHR has emphasized repeatedly in its judgments.

Despite this room for improvement, it is encouraging that the ECtHR's use of ECHR Article 14 in the *Opuz* decision has led to an increase in domestic violence cases brought under this provision, lending further credence to the proper view that domestic violence is an act of sex discrimination that imposes obligations on states to act, rather than a private issue more suitable for resolution within the private sphere.