Goettingen Journal of International Law 11 (2021) 1, 191-211

The European Court of Human Rights Through the Looking Glass of Gender: An Evaluation

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doi: 10.3249/1868-1581-11-1-alkiviadou-manoli

Abstract

Gender equality is of paramount importance for a functioning democracy and for economic growth. It is a central tenet of human rights law and has seen significant developments on the legislative, judicial, and policy levels of the Council of Europe. Through a *mélange* of theory, legislation, and jurisprudential analysis, this paper will assess developments in the European Court of Human Rights' approach to the issue of gender equality. This will be achieved through a survey of case law involving domestic violence, child-bearing, and the wearing of religious dress by women. The paper will demonstrate that, despite the existence of significant milestones in the ambit of promoting gender equality, and, notwithstanding effective advancements made by this body, particularly *vis-à-vis* domestic violence case law, improvements to its approach remain necessary. More specifically, on one level, the Court denounces and works against gender inequality and discrimination but, on another, consciously or unconsciously, its approach and findings are marred by its own stereotypes, patriarchal influences, misconceptions, and preconceptions about what gender equality *actually* is and how it *should be* pursued.

A. Introduction

Gender equality is a central tenet of a democratic society, of "utmost importance for productive and economic growth"[1] and a cornerstone of human rights law. In 2015, eighty world leaders committed to halting discrimination against women by the year 2030.[2] For the Council of Europe, gender equality means "[…] the same visibility, empowerment […] and participation [of both sexes] in all spheres of public and private life".[3] Its judicial organ, the European Court of Human Rights (ECtHR) proclaims gender equality to be "[…] one of the key principles underlying the Convention […]"[4] despite the fact that the term or other similar terms are not incorporated therein. Nevertheless, discrimination and inequality against women do continue to affect the lives of this group of people across the globe. In light of the significance of gender equality on a moral, ethical, legal, and practical level, this paper will assess the extent to which the ECtHR, conceptualizes and applies what it professes to be a cornerstone of the Convention it is mandated to supervise. Scholarship, to date, which is relevant to gender equality and the ECtHR has looked at women's rights in conjunction with particular themes such as religion,[5] Article 14 in a broader scope,[6] and the issue of stereotypes in ECtHR jurisprudence.[7] Radacic's 2008 piece *Gender Equality Jurisprudence of the European Court of Human Rights*[8] is of direct relevance to the current piece as it looks at sex discrimination

1 P. C. Salinas & C. Bagni, 'Gender Equality from a European Perspective: Myth and Reality', 96 *Neuron* (2017) 4, 721, 721.

2 *Ibid*., 721.

3 Council of Europe, 'Gender Equality Strategy 2018-2023' (2018), available at https://rm.coe.int/strategy-en-2018-2023/16807b58eb (last visited 9 December 2020), 5.

4 *Leyla Şahin v. Turkey*, ECtHR Application No. 44774/98, Judgment of 10 November 2005, para. 115 [Leyla Şahin v. Turkey].

5 C. Elkayam-Levy, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights', 35 *University of Pennsylvania Journal of International Law* (2014) 4, 1175 [Elkayam-Levy, Women's Rights and Religion].

6 S. Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', 16 *Human Rights Law Review* (2016) 2, 273 [Fredman, Substantive Equality].

7 A. Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', 11 *Human Rights Law Review* (2011) 4, 707 [Timmer, Anti-Stereotyping Approach].

8 I. Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights', 19 *European Journal of International Law* (2008) 4, 841, 842 [Radacic, Gender Equality Jurisprudence].

and gender equality in the ECtHR. This article looks at developments post-2008 but further applies a lens of intersectional feminist legal scholarship to the case law of the ECtHR. Moreover, it uses the principles of the *European Convention on Human Rights* (ECHR) and the ECtHR's own declarations *vis-à-vis* gender equality for the purposes of demonstrating the Court's approach to gender equality and the manner in which it deals with stereotypes and prejudices emanating from patriarchy, misogyny, and sexism. Feminist legal theory or feminist jurisprudence has considered the three themes previously mentioned and their impacts on the law. Theorists may look at the specific disadvantages faced by women,[9] while others, such as Gilligan, argue that the law is, in fact, male and that we have been conditioned to viewing life through a male eye.[10] MacKinnon argues that legal neutrality "equates substantive powerlessness with substantive power, and calls threating these the same 'equality'."[11] To this end, if sameness is how equality is conceptualised then sex equality "[…] is conceptually designed in law never to be achieved".[12] All the above must be applied, while simultaneously taking account of the fact that, as underlined by Butler, "[…] gender is not traceable to a definable origin because it itself is an originating process incessantly taking place".[13] While it is certainly beyond the scope of this paper to embark on a theoretical analysis of feminist jurisprudence, the fundamental aspect of all theorization on law and gender should be borne in mind throughout. This is, more specifically, the realization and identification of patriarchal influences on the creation, application, and interpretation of the law and the subsequent impact on the reality of women.

Examining the position of the ECtHR towards gender equality and the Court's handling of social phenomena, such as patriarchy, is of paramount importance given (i) the persistence of gender discrimination and gender-based violence (GBV) in the Council of Europe region, as will be illustrated by the case law developed hereinafter, and (ii) the innovation and power of the ECtHR as a one-of-a-kind regional judicial body that supervises and upholds human rights law in the form of the ECHR and its underlying principles and doctrines. In this

9 E. Jackson, 'Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal', 19 *Journal of Law and Society* (1992) 2, 195 [Jackson, Catharine MacKinnon].

10 C. Gilligan, *In a Different Choice: Psychological Theory and Women's Development* (1982).

11 C.M. MacKinnon, *'Feminism Unmodified'* (1987) 82 as cited in E. Jackson, 'Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal', 19 *Journal of Law and Society* (1992) 2, 208 [Jackson, Catharine MacKinnon].

12 *Ibid*.

13 J. Butler, 'Variations on Sex and Gender: Beauvoir, Wittig and Foucalt', in S. Benhabib & D. Cornell (eds), *Feminism as Critique* (1987), 131.

light, analyzing how the Court approaches the question of gender equality is of central importance for the purposes of tracking the development of the doctrine and the level of protection women actually enjoy to be free from discrimination. This will be pursued through an assessment of the Court's perception of gender equality and non-discrimination. The above will be achieved by firstly looking at the issue of non-discrimination within the ambit of the ECtHR and an analysis of Article 14 ECHR. This will be followed by an examination of GBV as an issue of equality and will close with a particular focus on Islamic veiling. This is chosen as a case study for the Court's perceptions and potential misperceptions *vis-à-vis* a very different *other* but also for purposes of examining the extent to which, if at all, intersectionality is embraced in the ECtHR's jurisprudential analysis.

A broad range of cases involving a variety of themes, ranging from discrimination to violence to religious dress, have been chosen for purposes of illustrating the Court's approach to gender.

B. The European Court of Human Rights on Gender Equality: Some Starting Points

I. Non-Discrimination and the European Court of Human Rights

The ECHR protects first generation human rights, and particularly civil rights, with the exception of two second generation rights in the form of a social and an economic right, namely the right to marry and the right to property. The *European Social Charter* (ECS) includes rights which are closer to the theme under consideration, such as equal pay between men and women and the special protection of mothers. However, the ECtHR is not mandated to supervise the application of the ESC and, as such, the cases that reach the Court need to illustrate a violation of Convention rights. On an ECHR level, Protocol 12 to the Convention is a general non-discrimination document while Protocol 7 incorporates the principle of equality between spouses *vis-à-vis* marriage and its dissolution. However, Article 14 of the Convention, the generic non-discrimination clause, is the most relevant provision. This is similar to that of, for example, Article 2 of the *International Covenant of Civil and Political Rights* and Article 2 of its counterpart, the *International Covenant on Economic, Social, and Cultural Rights*. In the same spirit, Article 14, which was drafted and came into force before the two preceding articles, provides that:

> „The enjoyment of any right set forth by law 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 corollary to the rest. It exists only if one or more of the other articles exist and, as such, has been described as "parasitic"[14], "subsidiary"[15], and "insipid"[16]. The manner in which the Court extrapolates on Article 14 commenced in 1968 with the *Belgian Linguistics* case. There, the European Commission of Human Rights found that there was no need for there to be a breach of a substantive right in order for Article 14 to come into play. It was sufficient for the discrimination in question to "touch the enjoyment"[17] of a Convention right. This threshold was endorsed by the Court and is a central part of non-discrimination cases until today. More particularly, "[…] for Article 14 to become applicable, it suffices that the facts of a case fall within the ambit of another substantive provision of the convention or its protocols".[18] Instead of setting out a particular test to determine whether or not discrimination exists, the Court incorporates the requirement of equal treatment unless there is a justifiable and legitimate reason not to. If a right has been breached and differential treatment does exist between men and women, the Court necessitates *very weighty reasons* for it not to find a case of discrimination.[19] In this realm, the Court established that discrimination means differential treatment of persons in relevantly similar situations without an objective and reasonable justification.[20]

In its analysis of the domestic violence case of *Opuz v. Turkey*, the ECtHR incorporated Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), namely that discrimination against women is:

14 Fredman, 'Substantive Equality', *supra* note 6, 273.
15 Radacic, 'Gender Equality Jurisprudence', *supra* note 8, 842.
16 Fredman, 'Substantive Equality', *supra* note 6, 273.
17 *Ibid*., 276.
18 *Ibid*., 276; Radacic, 'Gender Equality Jurisprudence', *supra* note 8, 842.
19 See, amongst others, *Van Raalte v. The Netherlands*, ECtHR Application No. 20060/92, Judgment of 21 February 1997, para. 39; *Willis v. the United Kingdom*, ECtHR Application No. 36042/97, Judgment of 11 June 2002, para. 39.
20 See *Ibid*., para. 48; *Okpisz v. Germany*, ECtHR Application No. 59140/00, Judgment of 25 October 2005, para. 33.

> "[...] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[21]

In *Opuz v. Turkey*, the Court recognized the generic nature of its Convention's clauses and explicitly noted that, when dealing with discrimination against women, "[…] the Court has to have regard to the provisions of more specialised legal instruments […]"[22] such as the CEDAW. Although, due to its nature as a document which provides generic protection to (mostly) civil and political rights, the ECHR does not contain, for example, an article on gender-based violence. However, the case-law of the Court has maneuvered around ECHR articles such as Article 8 and Article 3 in conjunction with Article 14.

II. Article 14: Formal v. Substantive Equality

In older case law, the Court viewed discrimination "[…] through a lens of formal equality".[23] The central characteristic of this approach is that persons in similar positions must be treated in an equal manner with no distinction on the grounds of protected characteristics, such as their sex or gender, unless and until a legitimately reasonable justification of this treatment can be put forth. Exemplary of the beginning of this approach was the 1985 case of *Abdulaziz, Cabales and Balkandi v. UK*, which considered the legitimacy of UK immigration rules at the time which allowed migrant women to join their spouses but did not extend this right to migrant men seeking to join their wives. The UK held that this rule was needed to protect the labour market in the UK during a time of high unemployment, putting forth this justification by citing an allegedly "statistical fact"[24], namely that "[…] men were more likely to seek work than women, with the result that male immigrants would have a greater impact than

21 *Opuz v. Turkey*, ECtHR Application No. 33401/02, Judgment of 9 June 2009, para. 186 [Opuz v. Turkey].

22 *Ibid*., para. 164.

23 Timmer, 'Anti-Stereotyping Approach', *supra* note 7, 710 (emphasis omitted).

24 *Abdulaziz, Cabales and Balkandali v. The UK*, ECtHR Application Nos. 9214/80, 9473/81 and 9474/81, Judgment of 28 May 1985, para. 75 [Abdulaziz, Cabales and Balkandali v. The UK].

female immigrants on the said market".[25] The Court was not convinced by the reasonableness of this rule and tackled it by firstly setting out the significance of ensuring equality between men and women which it found to be "[…] a major goal in the member States of the Council of Europe".[26] Against this backdrop, the "very weighty reasons"[27] test was born, which led the way when deciphering whether or not a distinction is reasonable and, thus, legitimate. As a result, it found that Article 14 taken together with Article 8, the right to respect for private and family life, was violated by reason of discrimination on the grounds of sex. Without seeking to diminish the importance of a positive finding in favour of the applicants of the case and of the Court's recognition that men and women should be equal, its approach to the doctrine of equality is not without its tribulations. In fact, formal equality could be argued that it has "serious shortcomings"[28] which, as Timmer recognizes "[…] are well documented in feminist legal literature."[29] These shortcomings emanate from the premise that the doctrine essentially confines gender equality to ensuring that men and women enjoy the same rights without substantially investigating or taking into account the particularities of a woman because of her sex or gender. Such a formal approach to equality could be deemed to disregard the biological differences between men and women and disregards the intersectional nature of discrimination in many instances.[30] In brief, equal does not actually mean the same as persons are equal but different and those differences should be taken into account when conceptualizing the issues at stake. The formalistic approach, set out in the above case, did work for the applicants and the just outcome was achieved. This was because the rule before the Court was clear cut: women are not entitled to the same rights as men. This rule was set in stone without any coveting or covering. However, the approach itself which is simplistic and ignorant of, for example, "[…] the historical and social reality of women and other non-dominant or vulnerable groups […]"[31] is not sufficiently coherent and would fall short if faced with a case involving an apparently neutral provision or a provision which involves positive action for purposes of promoting the rights of women. The Court, aware of such criticisms, has demonstrated "the preparedness to develop the concept of discrimination to include more

25 *Ibid*., para. 75.
26 *Ibid*., para. 78.
27 *Ibid*., para. 78.
28 Timmer, 'Anti-Stereotyping Approach', *supra* note 7, 711.
29 *Ibid*.
30 *Ibid*., 711.
31 *Ibid*., 711.

substantive conceptions such as indirect discrimination".[32] A good example of this is the case of *Andrle v. Czech Republic*, which involved an application against the lower pensionable ages for women as compared to men, with the pension scheme providing that the pensionable age for men is 60 years and for women 53-56 years old (depending on how many children they have raised) or 57 years old if they have raised no children. Here, the Court took into account the reality of women in communist Czechoslovakia, where they were expected to work full-time, raise their children, and maintain their family home. It accepted the government's argument that the lower pension ages for women existed to "[…] compensate for the factual inequality and hardship […]"[33] arising from the above-described reality of women. The Court recognized that the reality may not be the same today but that "[…] changes in perceptions of the roles of the sexes are by their nature gradual […]"[34] and it would be difficult to pinpoint when the affirmative action in favor of women, as in this case, would violate the rights of men.[35] As such, it found that the government had not violated the Convention rights under consideration and, importantly, set out a substantive, structural, and socio-historical understanding of the measure in question. It is a possibility that a formal approach would have found in favor of the applicant and would have, therefore, disregarded the social reality of women then and now.

The role of women in the home and workplace, and the resulting social benefits, was also a matter of consideration, albeit in a different manner, in the case of *Konstantin Markin v. Russia*. The applicant, who worked for the military and had custody of his three children, asked for parental leave when his baby was born. The military unit rejected his request for a three-year leave of absence on the grounds that this was reserved for women only and allowed him to take three months' leave, although he was called back to work before the end of that period. He complained to the ECtHR of the domestic authorities' refusal to grant him parental leave because he belonged to the male sex. The Court found that Markin's rights under Article 8 in conjunction with Article 14 had been violated. It took the "very weighty reasons" approach and held that phenomena such as stereotypes, preconceptions, and cultural norms do not

32 S. Fredman, *Discrimination Law*, 2nd ed. (2011), 2.

33 *Andrle v. Czech Republic*, ECtHR Application No. 6268/08, Judgment of 17 February 2011, para. 53.

34 *Ibid*., para. 58.

35 *Ibid*., para. 56.

constitute such reasons.[36] It went further to reiterate its previous findings in *Ünal Tekeli v. Turkey*, that the use of the husband's name derives from the "[…] man's primordial role and the woman's secondary role in the family"[37] and that in light of the "[…] advancement of the equality of the sexes […] prevent[s] States from imposing that tradition on married women".[38] The Court drew a correlation between different types of discrimination, holding

> "[…] the perception of women as primary child-carers and men as primary breadwinners cannot, by themselves, […] amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation".[39]

Although, on one level this case is a success as the Court "[…] clearly drew together the relevant dimensions of substantive equality,"[40] there is an untapped opportunity found therein. For example, the Court did not consider the impact of the parental leave policy on the experiences of women in the Russian military. In fact, everything that the Court agreed with in the abovementioned Czech case, namely, the need for positive action to compensate for burdensome roles allocated to women, was not recalled in *Markin*, in that the Court did not take that step further to consider "[…] the fact that not only (service)men are affected and burdened with stereotypes in this case […]".[41] The significance of elaborating on and rejecting gender stereotypes, notwithstanding the sex and claim of the applicant, cannot be understated given the continuous disadvantage in which women find themselves in the workplace. This disadvantage can be illustrated by, *inter alia*, the persistence in the gender pay gap in Europe, lower paying work for women, and a significant motherhood penalty.[42]

36 *Konstantin Markin v. Russia*, ECtHR Application No. 30078/06, Judgment of 22 March 2012, para. 127 [Konstantin Markin v. Russia].

37 *Ünal Tekeli v. Turkey*, ECtHR Application No. 29865/96, Judgment of 16 November 2004, para. 63.

38 *Ibid.*, para. 63.

39 *Konstantin Markin v. Russia*, *supra* note 35, para. 110.

40 Fredman, 'Substantive Equality', *supra* note 6, 291.

41 Timmer, 'Anti-Stereotyping Approach', *supra* note 7, 728.

42 European Commission, 'Commission Recommendation on Pay Transparency and the Gender Pay Gap – Frequently Asked Questions' (2014), available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_160 (last visited 9 December 2020).

A particularly interesting case which demonstrates the Court's evolving approach to equality is *Carvalho Pinto de Sousa Morais v. Portugal*. Here, the Court dealt with a 50-year-old woman who suffered from a gynaecological condition for which she had to undergo surgery. The operation failed, as the applicant experienced serious pain, incontinence, trouble sitting and walking, and could not have sexual relations. She became depressed and suicidal. After winning damages at lower courts, the Supreme Administrative Court of Portugal reduced the compensation for non-pecuniary damages from 80,000 to 50,000 Euros. It also reduced the compensation for a domestic worker from 16,000 to 6,000 Euros. It reasoned its judgements on the fact that (i) the operation had only aggravated her already existing situation, and (ii) that the applicant at the time already had two children and was at "[…] an age when sex is not as important as in younger years, its significance diminishing with age".[43] Regarding the reduction of the amount allocated for the costs of a domestic worker, the Supreme Court justified this on the grounds that, given the age of her children, she "[…] probably only needed to take care of her husband".[44] The applicant went to the ECtHR and argued that her Article 8 right to private life in conjunction with Article 14 had been violated. In reaching its decision, the ECtHR pointed to the stereotypes in Portugal's Supreme Administrative Court's reasoning in relation to the way in which the sexual life of a 50-year-old woman was conceptualized. More particularly, the Court emphasized that

> "[t]he question at issue here is not considerations of age or sex as such, but rather the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people".[45]

In highlighting the stereotypical and prejudicial approach of the national court, the ECtHR drew similarities between the applicant's case and two other judgements concerning medical malpractice against two men aged fifty-five and fifty-nine, respectively. In these cases, the Portuguese Court did not find the

43 *Carvalho Pinto de Sousa Morais v. Portugal*, ECtHR Application No. 17484/15, Judgment of 25 July 2017, para. 16 [Carvalho Pinto de Sousa Morais v. Portugal].

44 *Ibid*., para. 50 (quotation marks omitted).

45 *Ibid*., para. 52.

awards as excessive, considering the "tremendous shock"[46] or "strong mental shock"[47] experienced by plaintiffs who suffered irreversible consequences to their sex lives due to medical errors. In neither of the above cases did the Supreme Court take into account the plaintiffs' age or elements of their personal life. In essence, it is expected and accepted that men desire sexual relationships, regardless of age, but a woman's sexual activity is directly linked to her child-bearing role and sex after that age span is not considered to be necessary or relevant to her life. Through the above comparative analogy, the ECtHR identified the patriarchal perception through which the Supreme Court made its decisions. The theoretical backdrop was a blend of formal equality in that the ECtHR drew a direct parallel between the judicial treatment of the two men and the applicant in analogous situations and elements of substantive equality. Further, the ECtHR conceptualized the perceptions of the national court and the patriarchy, as well as the prejudices marring these perceptions. Nonetheless, discrimination can be established without a comparative approach which might, in fact, hinder the essence of unlawful discrimination and the disadvantages of subordination that are drawn from such discrimination, a point which was aptly set out by Judge Yudkivska. The Judge expressed the view that "[…] the more equality is provided for by law, the more subtle gender discrimination becomes, precisely because stereotypes about the 'traditional' roles of men and women are so deeply rooted".[48] In light of this statement, for discrimination to be eradicated, the roles of men and women need to be reformulated to the extent that there is no male comparator for purposes of demonstrating gender inequality.

Beyond the framework of cases in which the applicant himself/herself/themselves argued for a violation of Article 14 in conjunction with other articles are those cases where the applicant did not allege a violation of the non-discrimination clause, and, therefore, the elements of gender, gender inequality, and/or gender discrimination were not developed and/or did not impact the judgement. To advance this argumentation, reference is made to *Rantsev v. Cyprus and Russia*.[49] This case involved the trafficking of a woman to Cyprus for purposes of sexual exploitation. The woman, Oxana Rantseva, was found dead. In failing to protect her from her trafficker, Cyprus was found to have

46 *Carvalho Pinto de Sousa Morais v. Portugal*, *supra* note 42, Joint Dissenting Opinion of Judges Ravarani and Bošnjak, para. 37.

47 *Ibid*., para. 37.

48 *Ibid*., para. 52.

49 *Rantsev v. Cyprus and Russia*, ECtHR Application No. 25965/04, Judgment of 7 January 2010.

breached the procedural aspects of Articles 2, 4, and 5 whereas Russia was found to have breached the procedural aspects of Article 4. At the centre of this case was the "pink visa" scheme, which facilitated the trafficking of women between the two countries at the time. Notwithstanding the coherent contextual analysis of trafficking and sexual exploitation of women in Cyprus at the time, the Court completely disregarded the gender element of the case,[50] and all its aspects, from the moment that she was trafficked to the moment her death needed investigating. The previously discussed cases incorporated a clear-cut element of differential treatment between men and women in that the applicants themselves argued that there was an Article 14 violation. However, for one to perceive *Rantsev* as such, one would be required to substantiate and conceptualize trafficking in the broader social framework, something which, as demonstrated in the Court's position therein, it was not able and/or willing to do.

III. Gender-based Violence: An Equality Issue?

GBV has "[…] only relatively recently been recognised as an equality issue".[51] In 2016, the ECtHR passed a partly disappointing judgement. After years of abuse and time in a shelter for abused women, Selma Civek was murdered by her husband. Her children lodged an application at the ECtHR for a violation of Article 2 in conjunction with Article 14. The Court found a breach of Article 2 but, given this finding, decided that it was not necessary to examine the potential discrimination element of the case. This is particularly troublesome for two central reasons. Firstly, the Court did not even consider the possible role that the deceased's gender could have affected (i) her status as a victim of domestic violence, or (ii) the authorities' handling of her case. Instead, it viewed this case without any inkling of gender goggles, disregarding the vulnerability of women *vis-à-vis* domestic violence. In fact, it went further to note that men and children can also fall victims to domestic violence. While this is not doubted, the gender element of domestic violence has even infiltrated the Council of Europe's Istanbul Convention, which recognizes that "[…] domestic violence affects women disproportionately, and that men may also be victims of domestic violence".[52] In addition, the decision of the Court that a consideration of Article 14 is not necessary makes no legal sense at all in that it

50 Timmer, 'Anti-Stereotyping Approach', *supra* note 7, 731.

51 Fredman, 'Substantive Equality', *supra* note 6, 291.

52 *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, Preamble, CETS No. 210.

ignores the nature of Article 14 as corollary and essentially exploits this nature by choosing to disregard it. Reading this case, one might ask what the point of Article 14 is if the Court can so easily overlook it without any justification. A few months later, the Court, consciously or unconsciously, rectified its record in relation to its conceptualization of domestic violence and the relevance of Article 14 in the landmark case of *Opuz v. Turkey*, which involved a long history of violence against the applicant and her mother, the latter having been shot dead by the violent partner. Since 1995, the applicant and her mother had been filing complaints against the partner but, as argued by the applicant and agreed by the Court, the authorities failed to provide adequate protection. On this ground, the applicant complained to the Court under Article 14 read in conjunction with Articles 2 and 3, arguing that she and her mother had been discriminated against on the basis of their gender. The reliance on CEDAW provisions and findings of the Committee on the Elimination of All Forms of Discrimination against Women under the prism of relevant international obligations compensated for potential gaps in the toolbox of the ECtHR to tackle GBV and discrimination against women. Against this background, the Court took into account statistics, demonstrating that the highest number of reported victims of domestic violence was in Diyarbakir, where the applicant and her mother lived at the material time, that the victims were women, and that the majority of these women were of Kurdish origin, illiterate, and with no independent source of income.[53] Although the Court did mention such characteristics, it did not say whether the applicant herself was a member of such groups and did not proceed to consider the element of intersectionality in its conceptualization of the alleged discrimination. Further, the Court found that police officers do not investigate the reports but rather try to convince victims to return home, viewing it as a "[…] family matter with which they cannot interfere […]".[54] It is significant to note that, in the earlier case of *Bevacqua and S. v. Bulgaria*, it had underlined that domestic violence could not be deemed a private matter. Viewing it as such, and thus offering no assistance to victims, would be contrary to the positive obligation of States to ensure the enjoyment of Convention rights.[55] Other weaknesses in the process were deemed to include delays in processing such claims by the courts and dissuasive penalties on the grounds of custom, tradition, or honour.[56] In

53 *Opuz v. Turkey*, *supra* note 21, para. 94.
54 *Ibid*., para. 195 (quotation marks omitted).
55 *Bevacqua and S. v. Bulgaria*, ECtHR Application No. 71127/01, Judgment of 12 June 2008, para. 83.
56 *Opuz v. Turkey, supra* note 21, para. 103.

light of these social, contextual, and judicial realities supported by statistical information which went "unchallenged"[57], the Court found "[…] the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence".[58] Within this sphere, the ECtHR found a breach of Articles 2 and 3 in conjunction with Article 14. Thus, the Court looked at the contextual setting of the problem and the position of women within this context, with Fredman arguing that, important for the case's outcome, was the Court's emphasis on "[...] the ways in which stigma, stereotypes and prejudice against women can lead the authorities to refuse to recognize the victims as worthy of State protection [...]"[59]

In terms of intention, the Court clarified its position in *Eremia v. Republic of Moldova*, which came soon after *Opuz* and also involved a domestic violence case whereby the State was found to be in breach of Article 3 in conjunction with Article 14. In *Eremia*, it underlined that a failure of the State to protect women against domestic violence does not need to be intentional.[60] This statement is of paramount importance to the handling of GBV cases and to the general framework of gender discrimination, since it is reflective of the unconscious nature of some forms of bias and prejudice that fuel discriminatory acts and behaviour and that emanate from stereotypes, cultural norms, and perceptions. Once again, as with *Opuz*, the Court looked at international obligations and findings of institutions and at conceptual issues, such as patriarchy and its link with abuse, the perception of domestic violence as a private matter, and the hazardous impact of such realities. Another interesting element of *Opuz* and *Eremia* was the argument of the States involved that the applicants themselves had withdrawn their reports. However, the Court went down the correct path in substantively contextualizing and conceptualizing properly and comprehending the position and power of the women in the respective contexts. Such an approach, as adopted by the ECtHR, demonstrates that "[…] choices are not automatically regarded as an exercise of participation or agency".[61] This is one of the most promising elements of both cases as it demonstrates that the

57 *Ibid*., para. 198.
58 *Ibid*., para. 198.
59 Fredman, 'Substantive Equality', *supra* note 6, 292.
60 *Eremia v. Republic of Moldova*, ECtHR Application No. 3564/11, Judgment of 28 May 2013, para. 103.
61 Fredman, 'Substantive Equality', *supra* note 6, 294.

Court does not bind itself to formal and technical appraisals of these socially, psychologically, and contextually intricate cases of GBV.

C. Gender Equality: Perceptions and Misperceptions of the European Court of Human Rights

On a multitude of occasions, the ECtHR has referred to the significance of gender equality. For example, it notes that it is an important target for Council of Europe countries, "[…] one of the key underlying principles of the Convention […]",[62] and that "very weighty"[63] reasons would be necessary to justify differential treatment between men and women. However, there is no real substance in the manner with which the Court approaches gender equality in that it has not yet conceptualized what it means by this. The lack of such a definitional and semantical framework has led to difficulties in cases involving the wearing of Islamic dress. Given the intricacies involved with this theme, relevant case law will be dealt with in this section, separate from the rest of the case law. This is because this theme has been marred by generalizations, misperceptions, and sweeping statements *vis-à-vis* gender equality. In all cases discussed below, gender equality has arisen in one way or another. For example, in *Dahlab v. Switzerland*, the Court described the headscarf as "[…] a powerful external symbol […]",[64] the wearing of which "[…] appears to be imposed on women […] and which […] is hard to square with the principle of gender equality",[65] In this light, the Court argued that:

> "It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils".[66]

The way which this judgement developed was inherently correlated to the fact that the applicant was a primary school teacher. The Court appeared concerned with the impact that a headscarf could have on the young school

62 *Leyla Şahin v. Turkey*, *supra* note 4, para. 115.
63 *Abdulaziz, Cabales and Balkandali v. The UK* , *supra* note 24, para. 78.
64 *Dahlab v. Switzerland*, ECtHR Application No. 42393/98, Judgment of 15 February 2001, 13.
65 *Ibid*., 13.
66 *Ibid*., 13.

children. It did not, however, extrapolate on the meaning of gender equality, it did not clarify the perceived link between the wearing of the headscarf and gender inequality, and it did not explain why or how the hijab could impact the young children. Further, it did not explain how the wearing of a hijab could not be reconciled with, *inter alia*, the principle of non-discrimination and made no effort to consider the inverse argument: namely, that prohibiting a woman from choosing to cover her hair could, in fact, constitute a discriminatory practice in itself. It followed this rhetoric in *Şahin v. Turkey* which, although it did not involve young children but, rather the wearing of a headscarf by a university student, embraced the position developed in *Dahlab*, namely, that the headscarf could not be reconciled with gender equality.[67] For example, there was never any consideration of the position that the headscarf has been perceived as a "[…] tool of identity, freedom, empowerment and emancipation".[68] To this end, in her dissenting opinion in *Leyla Sahin v. Turkey*, Judge Tulkens underlined that the hijab "[...] does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women."[69] Furthermore, nowhere in either judgement was there a theoretical and conceptual examination of the issue of choice *vis-à-vis* the wearing of the headscarf. Instead, the Court satisfied itself with an unsubstantiated reference to the term gender equality as a tenet upon which the State could prevent adult women from wearing it. In fact, in her dissenting judgement in *Şahin*, Judge Tulkens underlined that:

> "Wearing the headscarf is considered […] to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? […] What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who chose not to".[70]

67 *Leyla Şahin v. Turkey*, *supra* note 4, para. 111.
68 Elkayam-Levy, 'Women's Rights and Religion', *supra* note 5, 1201.
69 *Leyla Şahin v. Turkey*, *supra* note 4, Dissenting Judgement of Judge Tulkens, 48, para. 11.
70 *Ibid*., para. 11.

In this light, and as argued by Judge Tulkens, the Court was paternalistic[71] and disregarded the right to personal autonomy as protected by Article 8.[72] In fact, in *Şahin*, the Court noted that "[t]he defining feature Republican ideal was the presence of women in public life and their active participation in society".[73] Although this is significant, the Court did not consider the ramifications that removing a woman's headscarf would have on facilitating her participation in society, nor did it consider that this could potentially hamper such participation. As Evans aptly points out, the bans are a "[…] peculiar way to achieve gender equality […]".[74]

In addition to this, the Court took no steps to adopt an intersectional view of the matters at stake, namely that the issue was also one of gender, since it was women who veil themselves. Adopting an intersectional approach is significant for purposes of ensuring proper results, an approach which has been taken by, *inter alia*, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*). An illustration of this is a 2015 judgement involving the prohibition of religious manifestations by teachers. In this case, the Court found that the provision "[…] *de facto* quite predominantly affects Muslim women who wear a headscarf for religious reasons".[75] In this light, therefore, the Court viewed the constitutional questions posed, not only through the right of religious expression, but, also, through the framework of gender-based discrimination. Corollary to this was the fact that the ECtHR did not conduct any sort of analysis to assess the impact of such judgements on the rights of women. Would these women continue working? Would they be confined to their homes? What is the psycho-social impact of forcing them to remove their headscarves? Instead, the Court fleetingly referred to gender equality as a justifying reason to prevent women from exercising their freedom of religion and, in *Şahin*, relied on the Turkish Constitutional Court's position that the headscarf could not be reconciled with gender equality and without exercising European supervision, adhered to that opinion.[76] As argued by Evans, the Court's opinions essentially emanate from generalizations and stereotypes about Islam and oppressed Muslim women being forced to wear the headscarf.[77] Where they receive this information from and how they reach

71 *Ibid*., para. 12.
72 *Ibid*., para. 12.
73 *Leyla Şahin v. Turkey*, *supra* note 4, para. 30.
74 C. Evans, 'The 'Islamic Scarf in the European Court of Human Rights', 7 *Melbourne Journal of International Law* (2006) 1, 52, 68-69.
75 BVerfG, Order of the First Senate of 27 January 2015. 1 BvR 471/10, para. 143.
76 *Leyla Şahin v. Turkey*, *supra* note 4, Dissenting Opinion of Judge Tulkens, para. 3.
77 Elkayam-Levy, 'Women's Rights and Religion', *supra* note 5, 1200.

these positions and opinions is not disclosed. In all this, the Court perceives Muslims as "[…] belonging to one homogenous group, sharing the same norms, religious practices and beliefs, rather than as different individuals who may wish to adhere to religion from varied perspectives".[78]

As a result of the above, "[t]he generality of the rulings sheds light on the regrettable absence of women's human rights analysis".[79] Judge Tulkens argued that the Court dealt with principles, such as secularism and equality "[…] in general and abstract terms […]".[80] She reminds the Court that "[…] where there has been interference with a fundamental right, the court's case-law clearly establishes that mere affirmations do not suffice […]".[81] However, in handling principles such as gender equality, the Court, in the particular case but also in the abovementioned case of *Dahlab*, makes narrative affirmations with no substance, as demonstrated in the examples above. As with all controversial issues, there is more than one school of thought on whether or not wearing a headscarf violates women's rights. There are scholars, such as Bennoune, who agree with the Court on the ground that "[…] religious contexts have become a serious challenge to efforts to secure women's human rights"[82] and, as such, "[…] it is most crucial to maintain secularism".[83] One of the major problems with the Court's decisions, however, is that it did not make a concerted effort to explore both sides of the coin. It does not extrapolate on literature and findings on the headscarf and women's rights. It equates, in a narrative and unsubstantiated manner, with no extrapolation as to why and how, the headscarf with oppression. As a result, its judgements on the headscarf, some of which are described above, do not enjoy legitimacy.

Then, quite significantly, came *S.A.S. v. France*, which involved the wearing of the burqa. Although finally finding in favour of France on the grounds of preserving the French doctrine of "living together"[84], the Court made a significant observation:

78 C. Chinkin, 'Women's Human Rights and Religion: How Do They Co-Exist', in J. Rehman & S. C. Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (2007), 71-72.

79 Elkayam-Levy, 'Women's Rights and Religion', *supra* note 5, 1182.

80 *Leyla Şahin v. Turkey*, *supra* note 4, Dissenting Opinion of Judge Tulkens, para. 4.

81 *Ibid*., 45, para. 5.

82 UN Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, UN Doc A/61/122/Add.1, 6 July 2006, 81.

83 Elkayam-Levy, 'Women's Rights and Religion', *supra* note 5, 1210.

84 This justification was also used in the Belgian cases of *Belkacemi and Oussar v. Belgium*, ECtHR Application No. 37798/13, Judgment of 11 July 2017, para. 61 and *Dakir v.*

> "[...] [A] State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms."[85]

The issue of *invoking* gender equality as a pretext to ban this practice had not come up in the previous cases on the headscarf and it is, at best, rather odd that this was considered in the realm of a full-face veil. Furthermore, the element of choice came up in the sense that the Court referred to a practice defended by women, another element that was completely disregarded in the headscarf cases. However, the fact that the Court went on to find in favour of the State and on grounds which do not even fit into the limitation grounds of Article 9, reduces the legitimacy of the decision in another sense.

D. Conclusion

In conclusion, the Court has found that differential treatment between men and women can only be regarded as compatible with the Convention if there is a "very weighty reason"[86] to justify such treatment. Further, it holds that elements such as "[…] traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex".[87] Notwithstanding that, on one level, the Court denounces and works against gender inequality and discrimination, this paper demonstrated that, at times, consciously or unconsciously, this institution's approach and findings are marred by its own stereotypes, patriarchal influences, misconceptions, and preconceptions about what gender equality *actually* is and how it *should be* pursued. The ECtHR has repeatedly underlined that gender equality is of paramount importance to it and reminds us of this at every opportunity. However, the Court has given different signals when dealing with cases involving gender equality. Apart from its dismal failure in *Civek*, the Court

Belgium, ECtHR Application No. 4619/12, Judgment of 11 July 2017, para. 60.

85 *S.A.S. v. France*, ECtHR Application No. 43835/11, Judgment of 1 July 2014, para. 119.

86 *Abdulaziz, Cabales and Balkandali v. The UK*, *supra* note 24, 78.

87 *Konstantin Markin v. Russia*, *supra* note 35, para. 127.

has adequately conceptualized the position of women *vis-à-vis* domestic violence and has comprehended, after conducting relevant contextual analysis, that national authorities may be marred by stereotypes and prejudices, preventing them from acting adequately when confronted with domestic violence cases. Beyond domestic violence, the picture is less positive. The Court has repeatedly failed to be anything more than narrative and stereotypical in relation to the wearing of Islamic veils by Muslim women. In finding in favour of the States in each instance, the Court has heavily relied on gender equality, which it never actually theorizes or defines, to justify headscarf bans. Bizarrely, this position is not followed in the burqa cases, where the Court essentially tells States that gender equality is not a trump card to allow them to do what they want with Islamic veiling. Moreover, the intersectionality of discrimination in a multitude of instances including, for example, religious and ethnic minorities, refugee women, LGBT women, and single mothers, as recognized by, *inter alia*, the Council of Europe's Steering Committee for Equality, is a pivotal element to take into account if true gender equality is to be achieved. The Court, nonetheless appears unable and/or unwilling to grasp the notion of intersectionality as would be necessary in, for example, cases involving persons such as S.A.S, who is an (i) immigrant (ii) woman (iii) member of a religious minority. However, steps have been taken in the right direction and the Court has even been innovative in cases, such as *Carvalho Pinto de Sousa Morais*, demonstrating an understanding of how social norms and structures lead to prejudice and inequality and blending forms of substantive with formal equality.