



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Seminar on Gender Equality in the Western Balkans

The Principle of Non-Discrimination on the Grounds of Sex in the Court's Case-Law

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Good morning everybody. What a pleasure it is to be here in Baden Baden addressing you in person at this Seminar on Gender Equality in the Western Balkans. I would like to thank warmly my colleague Judge Ivana Jelić, as well as the AIRE centre, and in particular Biljana Braithwaite, for today's programme and getting us together, among friends, in this small group.

As we all know the purpose of our discussions is to prepare the November 2021 Gender Forum and your goal is to create, what you have called "gender champions" among judges of the region.

Before coming to the precise topic of my intervention, I think it would be useful for me to begin by setting out the wider policy priorities of the Council of Europe in this field.

In her 2021 report on the State of Democracy, Human Rights and the Rule of Law¹, the Secretary General of the Council of Europe, Marija Pejčinović Burić, underlined that gender equality needs to remain a policy priority for member States with adequate resources being allocated and effective mechanisms in place. According to this report specific attention needs to be dedicated to the fight against sexism and harmful gender stereotypes, especially to protect women exposed to intersectional discrimination, such as migrant women, but also to ensure equal and effective participation of women in public and political life. Full implementation of the Istanbul Convention, including by spreading information on its positive impact, promoting progress in ratification and combating misinformation around it remained a key challenge ahead.

I will take my definition of gender equality from the Committee of Minister's 2019 recommendation (CM/Rec(2019) on preventing and combating sexism². That recommendation, which could be a useful resource for the November Forum, calls for specific action in areas such as: language and communications; internet and social media; media, advertising and other communication methods; the workplace; the public sector; the justice sector; education institutions; culture and sport; and the

¹ <https://www.coe.int/en/web/secretary-general/report-2021#page-0>

² <https://rm.coe.int/cm-rec-2019-1-on-preventing-and-combating-sexism/168094d894>

private sphere. Countries are encouraged to pass legislation that condemns sexism and criminalises sexist hate speech. It also requires that countries monitor the implementation of anti-sexist policies at the national level and report back periodically to the Council of Europe.

The preamble to the 2019 recommendation recalls that gender equality *“is central to the protection of human rights, the functioning of democracy and good governance, respect for the rule of law and the promotion of well-being for all, that it entails equal rights for women and men, girls and boys, as well as the same visibility, empowerment, responsibility and participation in all spheres of public and private life, and that it implies equal access to and distribution of resources between women and men”*.

It goes on to state *“that sexism is a manifestation of historically unequal power relations between women and men, which leads to discrimination and prevents the full advancement of women in society”*.

Let us also bear in mind that sexism can also affect men and boys when they do not confirm to stereotyped gender roles.

I think we can all agree that while there has been progress in relation to the rights of women, we are not there yet. The global pandemic has not helped, as it has been recognised that COVID-19 has had a regressive effect on their rights³ with a rise in domestic violence and in women performing more gender stereotyped roles in the home during lockdowns.

You have seen that I have made a leap from the term “gender equality” to “women’s rights”. I think that we should be honest and realistic with our terms. To achieve gender equality member States are asked to promote and protect women’s rights. It is quite clear from the excellent background paper which the Aire Centre has produced on *Gender and the Judiciary in the Western Balkans* that your focus for the November Forum is on tackling discrimination against women in the region and in particular addressing the justice sector.

My intervention this morning will be split into three main parts. Firstly, I will set out the framework for the Court’s analysis of discrimination on the grounds of sex. Secondly, I will touch upon some areas in which the Court has found differential treatment on the grounds of sex to have violated the European Convention on Human Rights.

Finally, I will look at the issue of gender equality and gender mainstreaming at the European Court of Human Rights itself.

I. The framework for findings of gender-based discrimination under the European Convention on Human Rights

As we know the Universal Declaration on Human Rights (1948), the inspiration for the Convention, provides for equality in a number of its articles including Article 7 on non-discrimination which states, and I quote, *“All are equal before the law and are entitled without discrimination to equal protection of the law.”*

It is interesting to consider that Article 14 of the European Convention does not in terms mention equality of treatment nor equality before the law. Neither does it mention gender equality, although that is less surprising. As well all know, Article 14 is a limited provision because it prohibits discrimination in the enjoyment of one or other rights guaranteed by the Convention.

³ <https://www.coe.int/en/web/secretary-general/report-2021#page-100>

Protocol No. 12 to the Convention, by contrast, provides for a general prohibition of discrimination. It removes the limitation in Article 14 and guarantees that no-one shall be discriminated against on any ground by any public authority.

The states within the Western Balkans have an excellent track record when it comes to ratification of Protocol No. 12⁴, having been ratified by all States within the region and 20 member States of the Council of Europe in total. Yet it has to be said that the Court's case-law under Protocol No. 12 is still under-developed, even though applications brought against Bosnia and Herzegovina are helping.

I could only find one decided case on gender equality argued specifically under Protocol No. 12. The case is *Napotnik v. Romania* from January this year. It is an interesting case of a young woman diplomat who argued that her posting was terminated because of pregnancy. The Chamber unanimously found no violation. Notwithstanding the narrow margin of appreciation afforded to them, the domestic authorities provided relevant and sufficient reasons to justify the necessity of the termination of her posting. The point one could usefully make about Protocol No. 12 within the Western Balkans' context is that there is scope for more gender equality cases being argued under this Protocol and brought to the Court for determination.

It is safe to say that the principle of gender equality finds its primary foundation in Article 14.

Generally speaking, *very* weighty reasons have to be put forward before a difference in treatment on the grounds of sex can be regarded as compatible with the Convention.⁵ Where a difference in treatment is based on sex the State's margin of appreciation is narrow. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once an applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified. A difference in treatment on grounds of pregnancy will amount to direct discrimination on grounds of sex, if not justified.⁶

References to traditions, general assumptions, prevailing social attitudes or financial interests in a particular country are insufficient justification for a difference in treatment on grounds of sex⁷. The Court has also observed that contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition.⁸

In certain circumstances positive action is required from the authorities. A difference in treatment between men and women may be acceptable if it is a positive measure aimed at correcting factual inequalities between men and women. In the case of *Andrle v. the Czech Republic* the applicant, a father, complained of the difference in pensionable age for men who had raised children compared to women. He sought to retire at 57 however the law at the time provided for retirement for men at 60. The Court found no violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. The Court accepted that the measure pursued the legitimate aim of compensating for factual inequalities and hardship arising out of the specific historical circumstances of the former Czechoslovakia, where women had been responsible for the upbringing of children and for the household, while being under pressure to work full time. In such circumstances, the national authorities were better placed to determine the moment at which the unfairness to men began to outweigh the need to correct the disadvantaged position of women by way of affirmative action.

⁴ https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=wKI2tMCV

⁵ *Jurčić v. Croatia*, no. 54711/15, § 65, 4 February 2021

⁶ *Napotnik v. Romania*, no. 33139/13, § 77, 20 October 2020

⁷ *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts)

⁸ *ibid.*, § 140.

II. Some areas in which the Court has found discrimination on the grounds of sex

Difference in treatment constituting discrimination on the grounds of sex has been found as regards family reunification between men and women permanently settled in the host country⁹; parental leave for military personnel¹⁰; unavailability of widows' allowances to widowers¹¹; the impossibility for a married woman to use only her maiden name on official documents¹²; the use of a method of calculation of invalidity benefits¹³; dismissal of a woman from a post of security officer.¹⁴ These are just some examples.

We also have cases where the Court has found no discrimination in respect of a difference in treatment on account of sex. In the case of *Khamtokhu and Aksenchik v. Russia* [GC]¹⁵ the applicants, two men, alleged discrimination in provisions governing life imprisonment (a sentence which could not be imposed on a woman or men under 18 or over 65).

A slim majority of the Grand Chamber (10 in favour and 7 against) found no violation of Article 14 in conjunction with Article 5 on the grounds of sex. The dissenting and concurring opinions of the Judges, demonstrate the complexity of the issues before the Court including the Court's general approach to life imprisonment as a punishment and whether accepting a difference in treatment could be seen as a form of paternalism and acknowledgement of the perceptions of women being more vulnerable than men and needing protection.

I would now like to turn to the Court's case-law on domestic violence. Domestic violence is a form of gender-based violence which is in turn a form of discrimination against women. The State's failure to protect women against domestic violence may breach their right to equal protection by law even if this failure is unintentional.

The 2009 *Opuz v. Turkey* judgment was the first case in which the Court ruled that domestic violence affects mainly women and that the general and discriminatory judicial passivity of the authorities had created a climate conducive to such violence. This landmark ruling paved the way for the Istanbul Convention, whose 10th anniversary is being celebrated this year.

The case of *Talpis v. Italy*¹⁶ concerned multiple incidents of domestic violence by the applicant's husband. The most serious of which resulted in the death of her son as he tried to protect the applicant from her husband's blows. The applicant complained to the authorities, but no investigation took place until seven months after her initial report, by which time she mitigated her allegations leading the judge to close the file concerning the violence. The Court found violations of Article 2, Article 3 and Article 14. It further found that the police underestimated the gravity of the violation through their inertia to respond within an appropriate time frame and effectively endorsed

⁹ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94

¹⁰ *Konstantin Markin v. Russia* [GC], no. 30078/06, § . ECHR 2012 (extracts)

¹¹ *Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV

¹² *Ünal Tekeli v. Turkey*, no. 29865/96, ECHR 2004-X (extracts)

¹³ *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016

¹⁴ *Emel Boyraz v. Turkey*, no. 61960/08, § ..., 2 December 2014

¹⁵ *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § ..., 24 January 2017

¹⁶ *Talpis v. Italy*, no. 41237/14, § 141, 2 March 2017

the violence. Consequently, the applicant, as a woman, had been a victim of discrimination prohibited by Article 14.

Talpis v. Italy is one of a growing series of cases where the Court relies on the provisions of the Istanbul Convention as well as the monitoring activity of the Council of Europe's GREVIO (the Group of Experts on Action Against Violence Women and Domestic Violence).

I would like to end this section by mentioning the issue of gender stereotyping. Gender stereotypes are preconceived social and cultural patterns or ideas whereby women and men are assigned characteristics and roles determined and limited by their sex.

The case of *Carvalho Pinto de Sousa Morais v. Portugal* (2017) dealt with the issue of gender stereotyping in the judiciary. The case concerned a decision of the Supreme Administrative Court of Portugal to reduce the amount of compensation awarded to the applicant, a 50-year-old woman suffering from gynecological complications, as a result of a medical error. An operation in 1995 had left her in intense pain, incontinent and with difficulties in having sexual relations. She alleged in particular that the decision to reduce the amount of compensation was discriminatory because it had disregarded the importance of a sex life for her as a woman.

The Strasbourg Court found in particular that the applicant's age and sex had apparently been decisive factors in the national courts' final decision not only to lower the compensation awarded for physical and mental suffering but also for the services of a maid. The decision had moreover been based on a gender stereotype, that sexuality was not as important for a 50-year-old woman and mother of two children as for someone of a younger age. In the Court's view, those considerations showed the prejudices prevailing in the judiciary in Portugal.

The findings in this case would seem to support the conclusions and recommendations of your background document on the need for further training and judicial mentoring on gender issues.

III. Gender equality and gender mainstreaming at the European Court of Human Rights.

Diversity on the judicial bench matters for three main reasons: To ensure the legitimacy of the judiciary in the eyes of the public, and especially the trust of our applicants; to improve the quality of judgments through the benefit of a broader range of judicial perspectives, drawn from the widest possible pool of talent and finally, to ensure that judges are selected through fair selection processes, which do not inadvertently disadvantage or advantage certain demographic groups.

As you know there are two phases to the election process of judges at the Court— firstly a national selection procedure, in which each State party chooses a list of three qualified candidates, and secondly the election procedure undertaken by the Parliamentary Assembly, in which a special parliamentary committee assesses the qualifications of the three candidates, as well as the fairness of the national selection procedure, before the Assembly proceeds with the election. I think it is essential that national selection procedures ensure that due attention is paid to gender balance when nominating candidates.

On 31 October 1998, the last day of the part-time Old Court, there sat 1 woman (Judge Elisabeth Palm), 33 men and 6 vacant seats. On 1 July 2010 the number of female Judges on the Strasbourg bench was 18. Today, we have 15 women judges which represents 32%. We have two female Section Presidents out of a possible five; one of whom is also Vice-President of the Court. I think that progress is coming too slowly. A gender-balanced Court is for the benefit of all, men and women alike.

Before finishing I would like to mention an event which took place at the Court in 2018. It was a master class for the Judges and senior court managers on gender mainstreaming, organised by Gender Equality Division of the Council of Europe and run by an academic (Dr Alexandra Timmer). The aim was to look at certain judgments of the Court through a gender lens, to identify obstacles to a gender-sensitive approach to drafting and to give some practical tools to reinforce this approach.

We learnt that stereotypes are not only descriptive but can also be also prescriptive and can reinforce inequality and discrimination (for example, “the special role of women in raising children”; “women are more likely to be in financial hardship” and “women are in the habit of making false accusations of sexual assault”). Dr. Timmer raised the issue of “benevolent sexism” referring to the Czech case I mentioned earlier. Are we rewarding women (by allowing them the benefit of retiring earlier) when they behave as they are expected to by having children?

We also learnt that gender main-streaming was about making judges recognise the minority voice or concern in a case where it might have been overlooked. However, for Judges at the European Court it was important that the gender element had been well argued at the domestic level, as the Court could not run a discrimination complaint if it had not been raised before the national courts.

The argument was also made for the Court to rely on Article 14 more often than it does currently, and not to find that it was unnecessary to examine a complaint under that provision. More third party interventions setting out the gender issues involved could also be helpful for the Court. Finally, other international standards, including soft law, could be relied upon more in the Court’s judgments.

I would like to also mention here a conference held at the Court in February 2020 in cooperation with the Fondation René Cassin-International Institute of Human Rights and with the support of the General Consulate of Japan in Strasbourg. The conference was entitled “Women’s Human Rights in the Twenty-First Century: Developments and Challenges under International and European Law”. It provided a forum of reflection on gender equality for members of the judiciary, as well as legal practitioners and academics.

Every court and every judge should try to introduce more sensitivity to gender issues: this is our common responsibility.

Thank you for your attention and I look forward to our discussions.