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Gender Equality Jurisprudence of the European Court of Human Rights

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Abstract

The European Court of Human Rights has recently proclaimed gender equality as one of the key underlying principles of the Convention. However, the Court's jurisprudence has been largely impotent in challenging gender discrimination in the member states. This article explores the reasons why this is so by analysing Article 14 sex discrimination jurisprudence and the application of the principle of gender equality in the 'Islamic headscarf' cases. The author argues that reasons lie in the Court's formalistic conceptualization of discrimination, and simplistic and paternalistic understanding of gender equality, which is insensitive to intersectionality of discrimination. The author proposes an understanding of gender equality as challenging (multiple and intersectional) forms of disadvantage. Under this approach, the question in equality jurisprudence would not be whether there was unjustified differential treatment, but rather whether the law or practice at issue perpetuated or produced subordination of women (as defined by other identity characteristics) and unequal gender (and other) relations.

1 Introduction

The principle of sex/gender equality[1] is one of the fundamental principles of human rights law. The European Court of Human Rights ('the Court') has consistently held that the 'equality of sexes is one of the major goals in the Member States of the

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[1] The term 'gender' has traditionally been used to describe the socially constructed identity of

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Council of Europe',[2] and has recently proclaimed gender equality as one of the key underlying principles of the Convention.[3] Notwithstanding these pronouncements, inequality of women in the member states of the Council of Europe persists. The Court's jurisprudence has been largely impotent in challenging gender discrimination and achieving gender equality. Case law has addressed only a limited number of problems, owing to the Court's formalistic interpretation of equality, and sometimes in a manner that might undermine rather than enhance gender equality.

This article explores the Court's approach to gender equality by analysing sex discrimination jurisprudence under Article 14 of the Convention and the application of the principle of gender equality in the 'Islamic headscarf' cases.[4] It criticizes the Court's approach to non-discrimination as inconsistent and formalistic, and the Court's application of the principle of gender equality in the 'Islamic headscarf' cases as paternalistic and insensitive to intersectionality of discrimination. The article proposes the conceptualization of equality as challenging (multiple and intersectional forms of) disadvantage.

2 Sex Discrimination Jurisprudence under Article 14

A *Main Characteristics of Article 14 Jurisprudence*

Article 14 is the main Convention provision on non-discrimination.[5] It is a subsidiary provision which cannot be invoked independently, but only 'in conjunction' with other Convention rights. However, the application of Article 14 does not presuppose a breach of one of the substantive provisions but requires only that the facts at issue fall 'within the ambit' of one or more of the Convention provisions.[6]

Article 14 does not prescribe a test of discrimination. The jurisprudence has clarified that the provision prohibits different treatment of individuals in analogous situations unless there is a 'reasonable and objective justification',[7] and

women and men, while the term 'sex' has traditionally been used to refer to their biological characteristics. However, as noted by many feminists, gender and sex are not easily separable categories. For ease of reference this article uses the terminology 'gender equality' (as the most commonly used term), except when referring to the Court's Art. 14 case law. For a critique of the binary view of sex/gender see, e.g., J. Butler, *Gender Trouble: Feminism and Subversive Identity* (1999), and *Bodies that Matter*: *On the Discursive Limits of Sex* (1993).

2 *Abdulaziz, Cabales and Balkandali v. UK* (1985) Series A, No. 94, at para. 78.

3 *Leyla Sahin v. Turkey* [GC], (2005), Reports 2005-, at para. 115.

4 *Ibid.*, *Dahlab v. Switzerland* (2001), Reports 2001-V.

5 In addition to Art. 14, there is now Art. 1 of Prot. 12, which generally proscribes discrimination. The Prot. entered into force on 1 Apr. 2005, but there is as yet no case law under it. Prot. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), CETS No 177.

6 On interpretation of the 'within the ambit' test see Wintemute, '"Within the Ambit": How Big is the "Gap" in Article 14 European Convention on Human Rights', 4 *EHRLR* (2004) 366.

7 The first case which established this test was the *Belgian Linguistics* case, the case 'relating to certain aspects of the laws on the use of languages in Belgium' (1968) Series A, No. 6.

equal treatment of individuals in *significantly* different situations, unless there is 'reasonable and objective' justification.[8] Objective and reasonable justification requires that there be a legitimate aim and a 'reasonable relationship of proportionality' between the means employed and the aims sought to be realized.[9] The case law suggests that affirmative measures could be justified under this test, but it does not seem that the Court would view them as necessary for achieving equality.[10]

While the Court has already in the first discrimination case[11] suggested that indirect discrimination is covered by Article 14, it has only recently started to apply the test.[12] Moreover, as of 5 May 2008, there has been only one case in which discrimination was found on account of the failure to accommodate difference.[13]

In assessing discrimination claims, the Court first looks at whether there is a difference (or similarity) in treatment and whether individuals are in analogous (or significantly different) situations. It then examines whether there is an objective and reasonable justification for such treatment. Sometimes, it undertakes the assessment of the similarity of situations together with the assessment of justification, in which case it usually leaves it within the state's margin of appreciation to assess whether difference in otherwise analogous situations calls for different treatment.[14]

The strictness of scrutiny depends on the badge of differentiation. 'Suspect' grounds, such as sex, race,[15] religion, nationality,[16] illegitimacy, and sexual orientation, will generally be subjected (at least nominally) to a higher degree of scrutiny. The following factors are also relevant in determining the strictness of scrutiny: the circumstances, the subject-matter, the background, and consensus.[17] The (lack of) common approach among member states has been the most prominent factor influencing the level of

[8] My emphasis.

[9] *Belgian Linguistics* case, *supra* note 7, at para. 10.

[10] In *ibid.*, at para. 10, the Court held that 'certain legal inequalities tend to correct factual inequalities', and in *Stec and others v. UK* [GC], (2006), Reports 2006-, at para. 51, it held that 'in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14'. However, in both cases the Court has adopted the 'sameness approach', and defined different treatment as exceptions. Affirmative measures are explicitly mentioned only in Prot. 12, but the Explanatory Report to the Prot. clarifies that they are not mandated.

[11] *Supra* note 9.

[12] The indirect discrimination was first found in *Zarb Adami v. Malta* (2006), Reports 2006-, but the indirect discrimination test was first clearly defined in *DH v Czech Republic* [GC], (2007), Reports 2007-. Before *Zarb Adami*, in indirect discrimination cases the Court had referred either to the legitimate aim of the measure, as in *Abdulaziz*, *supra* note 2, or to a high standard of proof, under which statistics are not sufficient to establish a *prima facie* discrimination claim, as in *Hugh Jordan v. UK*, *supra* note 12; and *DH and Others v. Czech Republic* (2006), Reports 2006-.

[13] *Thlimmenos v. Greece* [GC] (2000), Reports 2000-IV.

[14] See, e.g., *Rasmussen v. Denmark* (1984) Series A, No. 87.

[15] Colour, descent, and national or ethnic origin have all been taken to belong to the general category of 'race'.

[16] Not every differentiation between nationals (EC nationals) and non-nationals (non-EC nationals) is prohibited.

[17] See, e.g., *Petrovic v. Austria* (1998), Reports 1998-I, at para. 38. For an analysis of relevant factors see O.M. Arnadottir, *Equality and Non-discrimination under the European Convention on Human Rights* (2003).

scrutiny, as will be seen in the analysis of sex discrimination cases.

B *Sex Discrimination Cases*

All the cases arguing sex discrimination decided on the merits[18] concern claims of unjustified different treatment, even though women and men are different both biologically and socially, in terms of power. All but one concern direct discrimination,[19] even though today most instances of sex discrimination take the form of indirect discrimination.[20] Finally, most challenges in relation to sex discrimination have been brought by men, even though sex/gender discrimination disproportionately affects women.[21]

The Court first expounded its approach to sex discrimination claims in *Abdulaziz, Cabales and Balkandali v. UK*. It held that the '[e]quality of sexes is … one of the major goals in the Member States of the Council of Europe' and that 'very weighty reasons would have to be advanced before the difference of treatment on the ground of sex could be regarded as compatible with the Convention'.[22] Hence, the Court adopted the 'sameness approach' to sex equality and held that it would apply strict scrutiny. However, the level of scrutiny has not always been strict.

1 *Wide Margin of Appreciation*

In the three types of cases the Court undertook only a lenient scrutiny, leaving the states a wide margin of appreciation. *Rasmussen v. Denmark* and *Petrovic v. Austria*, concerning the different family roles of women and men, fall within the first category.[23] *Rasmussen v. Denmark* challenged the limitation periods for instituting paternity proceedings which applied only to putative fathers (but not to mothers).[24] The

[18] The cases I analyse here are judgments delivered up to 5 May 2008 in which sex discrimination was explicitly argued. These are: *Abdulaziz, Cabales and Balkandali v. UK, supra* note 2; *Schuler-Zgraggen v. Switzerland* (1993), Series A No. 263; *Burghartz v. Switzerland* (1994), Series A No. 280-B; *Karlheinz Schmidt v. Germany* (1994), Series A No. 291-B; *Van Raalte v. Netherlands* (1997), Reports 1997-I; *Petrovic v. Austria*; *supra* note 17; *Unal Tekeli v. Turkey* (2004), Reports 2004-X; *Willis v. UK* (2002), Reports 2002-IV; *Wessels-Bergervoet v. Netherlands* (2002), Reports 2002-IV; *Stec and others v. UK, supra* note 10; *Barrow v. UK* (2006), Reports 2006-; *Walker v. UK* (2006), Reports 2006-; *Pearson v. UK* (2006), Reports 2006-; *Zarb Adami v. Malta, supra* note 12; *Runkee and White v. UK* (2007), not yet reported. I also include cases where the ground was not explicitly stated, but concerns sex: *Rasmussen v. Denmark, supra* note 14; *Mizzi v. Malta* (2006), Reports 2006-. Some other Art. 14 cases are also relevant, particularly those which concern marital status and illegitimacy discrimination, e.g., *Marckx v. Belgium* (1979), Series A No. 31. I do not analyse cases which have not been decided on their merits.

[19] *Zarb Adami v. Malta*, *supra* note 12, is the only judgment on indirect sex discrimination. *Dahlab v. Switzerland, supra* note 4, also argued indirect discrimination, but was declared inadmissible.

[20] It is in the area of gender equality that indirect discrimination has first and most comprehensively been developed in EU law. Indirect discrimination on the basis of sex has been explicitly defined in Council Dir. 97/80/EC of 17 Dec. 1997 on the burden of proof in cases of discrimination based on sex: OJ (1998) L 14/6.

[21] Out of 17 cases that I classified as sex discrimination cases (see *supra* note 18), 10 were brought by men, five by women, and two by both women and men.

[22] *Abdulaziz and others v. UK*, *supra* note 2, at para. 78.

[23] *Supra* notes 14 and 17 respectively. There is another case concerning different family roles: *Mizzi v. Malta, supra* note 18. Like *Rasmussen*, it concerns limitations imposed on putative fathers in instituting proceedings which do not apply to mothers. Unlike in *Rasmussen*, the Court found a violation.

[24] The applicant argued a violation of Art. 14 in conjunction with Arts 6 and 8.

government aimed to justify the different treatment by the 'fact' that the 'mother's interest usually coincided with those of the child', while with father there was 'the risk that he might use them [paternity proceedings] as a threat against the mother'.[25] *Petrovic* challenged the non-availability of the parental leave allowance for fathers· which the government justified by the 'fact' that at the time in question mothers had the primary role in looking after young children.[26] In both cases, the Court proceeded reluctantly from the presumption of similarity of situations and then gave the government a wide margin of appreciation in assessing whether 'difference in otherwise analogous situations' constitutes an objective and reasonable justification for different treatment. In both cases the Court held that the state did not exceed its margin, taking into account that at the time in question there was no common ground among member states on the issues in question.

The second category of cases, consisting of *Stec and others v. UK, Barrow v. UK, Walker v. UK,* and *Pearson v. UK*, concerns challenges to differential age requirements in respect of the enjoyment of social benefits linked to state pension age.[27] In *Stec and others v. UK* the applicants, two men and two women, challenged the legislation imposing cut-off or limiting conditions in respect of reduced-earning allowance (REA) (industrial injury earning replacement) by reference to ages used by the statutory old-age pension scheme (60 for women and 65 for men). The government argued that it was legitimate to stop paying REA to people who no longer worked even if they did not suffer from a work-related injury or illness, and that using pension age as a cut-off point made the scheme easy to understand and administer. In respect of differing state pension ages, it argued that the issue fell within its margin of appreciation, as it concerned complex social and economic judgements, which states are better placed to make.

The Court first stressed that different treatment may not merely be justified under Article 14, but may even be required when factual inequalities are at issue. It then, however, re-stated the 'very weighty reasons formula'. Finally, it emphasized that states generally have a wide margin of appreciation when it comes to 'general measures of economic and social strategy'.[28] However, the Court did not state clearly how these three (conflicting) principles were to be applied in the case at issue: whether the applicants were to be considered as in the same or different situations, and how the doctrine of margin of appreciation was to be reconciled with the principle of strict scrutiny in sex discrimination cases.

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[25] *Rasmussen v. Denmark*, *supra* note 14, at para. 3.

[26] *Petrovic, supra* note 17. The applicant argued a violation of Art. 14 in conjunction with Art. 8.

[27] All *supra* note 18. The first was *Stec,* decided by the Grand Chamber. Other cases followed its reasoning. In *Pearson* the applicant (a man) challenged differing pension ages for women (60) and men (65). In *Walker*, the applicant (a man) challenged differing age conditions in respect of paying national insurance contributions (where men had to pay until they were 65, while women only until they were 60, even if they continued to stay in employment). In *Barrow,* the applicant (a woman) challenged age conditions in respect of receiving incapacity benefits (where for women they stopped being paid after they had reached 60 and for men after they had reached 65).

[28] *Stec and others v. UK*, *supra* note 10, at para. 52.

The Court eventually started from the presumption of analogous situations and then assessed the justification leniently, in the light of the wide margin of appreciation applicable in questions of administrative economy and coherence.[29] It also took into account the judgment of the European Court of Justice which held that the discrimination at issue fell within the exception of Article 7(1)(a) of Directive 79/7/EEC,[30] as it was 'objectively and necessarily linked to difference between retirement age for men and women'.[31] As a result, it found that the challenged policies were reasonably and objectively justified. The Court then assessed whether the underlying difference in the state pension scheme could be justified.[32] In the light of 'original justification for the measure as correcting financial inequality between the sexes', the slowly evolving nature of change in working women's lives, the absence of common standards among the member states, and the fact that pension age fell into one of the exceptions of the EC Directive, the Court deferred to the wide margin of appreciation and found the difference justified.

The third category, consisting of *Runkee and White v. UK,* concerns a challenge to a denial of widow's pension (WP) to men, where it would have been available to women in a similar situation.[33] The government submitted that this difference in treatment (which existed until 2001 when WP was abolished) was justified, as historically older widows, as a group, faced financial hardship and inequality because of the married woman's traditional role of caring for husband and family in the home rather than earning money in the workplace. The Court, without formally abandoning the 'sameness approach',[34] recognized that historically there were differences between women's and men's economic positions which the measure aimed to address, and emphasized that states have a wide margin of appreciation when it comes to general measures of social and economic policy, and thus in deciding when the measure was no longer justified. In light of these reasons, no discrimination was found.

2 Narrow Margin of Appreciation

In the rest of the cases the Court applied heightened scrutiny. The first type of case in this category concerns challenges to the discriminatory provisions on family name.[35] *Burghartz* challenged the lack of an option for husbands to add their own surnames to the family name (wife's surname) when this option was available to

[29] *Ibid.*, at para. 57.

[30] Council Dir. 79/7 of 19 Dec. 1978 concerning the progressive implementation of the principle of equal treatment of men and women in matters of social security, OJ (1978) L 6/1.

[31] Case C–196/98, *Hepple v. Chief Adjudication Officer* [2000] ECR I–3701, at para. 45.

[32] The applicants challenged the unequal age provisions only in respect of REA entitlements. The different age conditions for state pensions were challenged only in *Pearson, supra* note 19.

[33] The applicants also challenged non-payment to them of widow's payment, arguing a violation of Art. 14 in conjunction with Art. 8 and Art. 1 of Prot. 1. *Supra* note 18.

[34] As in *Stec, supra* note 10, the Court held that when factual inequality is at issue different treatment will be required under Art. 14, but then emphasized that very weighty reasons would need to be adduced for different treatment on the basis of sex to be compatible with the Convention.

[35] The applicants argued a violation of Art. 14 in conjunction with Art. 8.

women.[36] The government argued that the difference was justified because the default provision was for the parties to take the husband's name as their family name.[37] *Unal Tekeli* challenged the prohibition on women using their surnames as the family name where this option was available for men. The government tried to justify its position on the basis that there was a need to reflect family unity through the husband's name. In both cases the Court referred to the nature of the Convention as a living instrument and held that Article 14 prohibits discriminatory provisions concerning the family name. In *Unal Tekeli* the Court cited in support of its position a number of international legal instruments within the UN and the Council of Europe, and referred to the fact that Turkey was the only Member State which retained discriminatory provisions on the family name.[38]

The second category consists of the case alleging indirect discrimination. In *Zarb Adami v. Malta*, the applicant alleged that he had been treated differently from women who, though satisfying the legal requirements, were called on to fulfil jury service in smaller numbers than men, which, in his opinion, was caused by the way in which the lists of jurors were compiled.[39] The government argued that the difference in treatment depended on a number of factors of a cultural, social, and economic nature, including the fact that jurors were chosen from the population which was active in the economy and professions, that exemption from service could be sought for family reasons, and that defence lawyers might have had a tendency to challenge female jurors. The Court first recalled that a policy or a measure which has disproportionate effects on a group of people may be considered discriminatory even if it is not specifically aimed at that group, and that very weighty reasons would need to be put forward for a difference in treatment on the basis of sex to be compatible with the Convention. It held that the reasons adduced by the government were not weighty enough: the second and third factors did not explain the very low number of women enrolled on the list of jurors and, in any event, the submitted facts were not a valid justification.

The rest of the cases could be classified according to differences between women and men which were advanced as a justification. In *Abdulaziz, Cabales and Balkandali v. UK*, *Schuler-Zgraggen v. Switzerland*, *Wessels-Bergervoet v. Netherlands*, and *Willis v. UK* the different working patterns of women and men were advanced as a justification. *Abdulaziz, Cabales and Balkandali v. UK* concerned a challenge to immigration rules which imposed harsher restrictions on female than on male immigrants settled in the UK in obtaining permission for their

[36] *Supra* note 18. While it might thus look as if provisions were discriminatory only in respect of men, and that women were in an advantageous position when it came to choosing a surname, women were allowed the option of adding their surnames to the family name only because the default option for the family name under the law at issue was the husband's surname. The spouses could take the woman's name only if they showed a legitimate interest. The Court recognized both the husband and the wife as victims, as it held that the questions concerned both spouses.

[37] *Ibid.*, at para. 26.

[38] *Supra* note 18, at paras 17–32.

[39] *Zarb Adami v. Malta*, *supra* note 12. The applicant argued violation of Art. 14 in conjunction with Art. 4.

non-national husbands and fiancés to enter or remain in the country.[40] The government sought to justify this difference on the ground of the different impact of immigrant husbands on the domestic labour market, which it sought to protect, in the light of what it described as a statistical fact that men of working age were more likely to seek employment than women.[41] They also placed strong reliance on the margin of appreciation in the area of immigration control and socio-economic issues. The Court, however, refused to leave the state a wide margin. It held that even if there were differences between women and men in respect of their impact on the domestic market,[42] this was not sufficiently important to justify the difference in treatment on the basis of sex.[43]

Willis v. UK, Wessels-Bergervoet v. Netherlands, and *Schuler-Zgraggen v. Switzerland* concerned the discriminatory denial of social benefits on the basis of assumptions about differences in women's and men's working patterns.[44] *Wessels-Bergervoet* concerned a challenge to a reduction in a woman's pension on account of her husband's insurance status, which the government sought to justify by the 'fact' that, at the time in question, men were predominantly the breadwinners. *Willis* challenged the non-availability of a widow's payment or widowed mother's allowance[45] to a man, where a woman in similar circumstances would be granted these payments, which the government sought to justify by the 'fact' that women were more likely to be financially dependent on men. *Schuler-Zgraggen* concerned the denial of an invalidity pension to a woman on the basis that women with young children did not work. The Court undertook strict scrutiny and found that the reasons adduced were not 'weighty enough', even if the assumptions on which they were based were true.

In *Van Raatle v. Netherlands* and *Karlheinz Schmidt v. Germany* the government advanced biological differences as a justification. *Van Raatle* concerned a challenge to the imposition on childless men

[40] *Supra* note 2. The applicants argued a violation of Art. 14 in conjunction with Art. 8.

[41] The government also advanced the aim of securing public tranquility as a justification, but the Court was not persuaded that this aim was served by the distinction in the rules between women and men. See *ibid.*, at para. 81.

[42] While the Court, *ibid.*, at para. 79, accepted that at the relevant time there were on average more men than women of working age who were economically active, which was true in respect of immigrants as well, it held that this did not mean that a difference existed in fact, in view of the fact that there were many more immigrant women than men present in the UK before the introduction of the challenged legislation, and in light of some 'economically active' men creating, rather than seeking, jobs.

[43] In response to the judgment, the UK extended the rules applicable to women to men, levelling down (and not up) the protection. Hence, even though the applicants were successful in relation to the sex discrimination claim, they did not get the substantive right they were seeking (to have their husbands lawfully remain in the country). This evidences the limitations of a liberal approach: it endorses any kind of treatment as long as it is equally applied to both sexes.

[44] In *Willis, supra* note 18, the applicant argued a violation of Art. 14 in conjunction with Art. 8 and Art. 1 of Prot. 1. In *Wessels-Bergevoet, supra* note 18, the applicant argued a violation of Art. 14 in conjunction with Art. 1 of Prot. 1. In *Schuler-Zgraggen, supra* note 18, the applicant argued a violation of Art. 14 in conjunction with Art. 6.

[45] These also fall under the exception set out in Dir. 79/7, *supra* note 30. The same complaint was submitted in *Runkee and White v. UK, supra* note 18, and the Court followed the reasoning in *Willis*.

older than 45 of the duty to pay child care contributions where women in the same category were exempted, which the government sought to justify on account of the different reproductive capabilities of women and men.[46] *Karlheinz Schmidt v. Germany* challenged the imposition of the duty to pay a fire service levy only on men, which the government sought to justify on the basis of the need to protect women in view of their 'physical and mental characteristics'.[47] The Court held that the differences were over-generalized and anyhow irrelevant for the cases at hand: the imposition of the duty in *Van Raatle* was not linked with the entitlement to benefits, and the obligation was of a financial nature in *Karlheinz Schmidt.* It hence found a violation of the Convention in both cases.

3 Assessment

Even though the Court proclaimed in its first sex discrimination judgment, *Abdulaziz, Cabales and Balkandali,* that it would apply strict scrutiny, its approach has varied. Two factors have played the most prominent role in the Court's reasoning: the lack of 'consensus' (among the member states or in international law) and the subject-matter at issue, but the case law has not been consistent. In some cases the Court primarily looked at consensus;[48] in others it looked at the subject matter at issue,[49] or both the consensus and the subject-matter;[50] and in yet others it failed to discuss either the consensus or the subject-matter.[51]

The only cases in which the Court left the states a wide margin of appreciation were the early cases concerning the different family roles of women and men, the cases concerning different age conditions in relation to the enjoyment of social benefits linked to the pension age, and the case concerning non-availability of a widow's pension for men, in all of which the Court was not completely convinced that women and men were equally situated (in respect of family roles and working life patterns). In the first type of case the wide margin was justified on account of the lack of common approach, and in the second and third types on account of the fact that at issue were questions of socio-economic policy. In all other cases the Court started from presumption of the irrelevance of difference and applied strict scrutiny even where cases concerned socio-economic issues, and where justifications concerned allegedly different life patterns and biological characteristics. In these cases, consensus was not discussed.

The reasons for a less strict scrutiny in *Rasmussen* and *Petrovic* may lie in the fact that they concern the private sphere of family relations, which the Court might not have been prepared to challenge at the time of a decision[52] to the same extent

[46] *Supra* note 18. The applicant argued that this constituted a violation of Art. 14 in conjunction with Art. 1 of Prot. 1.

[47] *Supra* note 18, at para. 27. The applicant argued that this constituted a violation of Art. 14 in conjunction with Art. 4(3)(d) and Art. 1 of Prot. 1.

[48] Consensus was interpreted as (the lack of) a common approach among the Member States in *Petrovic, supra* note 17, and *Rasmussen, supra* note 14; and with reference to international human rights standards in *Unal Tekeli, supra* note 18.

[49] *Runkee and White v. UK*, *supra* note 18.

[50] *Stec, supra* note 14, and *Pearson, Walker,* and *Barrow,* all *supra* note 18.

[51] *Abdulaziz, Cabales and Balkandali, supra* note 2, *Schuler-Zgraggen, Karlheinz Schmidt, Van Raatle, Willis,* and *Wessels-Bergervoet* and *Zarb Adami,* all *supra* note 18.

[52] See *Mizzi v. Malta*, *supra* note 18, where a different approach was applied.

to which it challenged unequal treatment in the public sphere. However, a different assessment of sex-based distinctions in relation to public or private spheres is not warranted, as gender equality can be achieved only if discrimination in both spheres is simultaneously challenged.[53]

The reasons for leaving the state a wide margin of appreciation in *Stec v. UK* (and other related cases)[54] may lie in the complexities of the issue, and the fact that the distinctions were legitimate in EU law as objectively linked to differences between the retirement ages for men and women (the aim of which was to address women's disadvantage). While this may at first sight seem reasonable, the Court's approach can be criticized for being overly deferential. The Court was called upon to rule whether the disadvantage that the applicants suffered in relation to the receipt of social benefits (and not pension age *per se*)[55] on the basis of sex could be justified by reasons of administrative coherence (and not by an attempt to address women's disadvantage, and not even for financial reasons). In this respect, a cursory assessment of the applicants' arguments concerning the REA scheme and the focus on the differences in pension age as beneficial for women (in a case where two applicants were women) can be criticized as too deferential.

The reason for leaving the state a wide margin of appreciation in *Runkee and White* seem to lie in the fact that the aim of the measure was to ameliorate women's economic disadvantage. While this focus on disadvantage is to be applauded, the Court's deference to the state's judgment as to when the measure is no longer needed for women, on account of the complexity of the socio-economic policy at issue, can still be criticized as overly deferential.

The type of policy, sphere of life, or consensus at issue should not be a relevant question in assessing discrimination claims if the goal is to challenge disadvantage. An approach which starts from the presumption of the irrelevance of sex/gender difference but then accepts consensus, type of policy, and issue (the sphere it concerns and its complexity) as relevant justifications for sex differentiation cannot deal with gender difference and challenge the disadvantage attached to it. If the goal was to challenge disadvantage, the relevant question should not be whether the policy at issue is supported by common practice, what sphere of life it concerns, and how complex it is, but whether and how it perpetuates or produces the further disadvantage of traditionally disadvantaged groups (or whether it is aimed at ameliorating disadvantage and is *currently* serving this goal).

The disadvantage approach would start from the acknowledgment of gender inequality, discrimination against women, rather than from the presumption of the irrelevance of gender difference.

[53] For a critique of the public/private distinction see Charlesworth *et al.*, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 615; Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R. Cook (ed.), *Human Rights of Women: National and International Perspectives* (1994), at 85; Radacic, 'Human Rights of Women and the Public/Private Divide in International Human Rights Law', 3 *Croatian J European L and Policy* (2007) 443.

[54] *Pearson, supra* note 18, should, however, be distinguished from other cases, as it alone concerned the issue of different pension ages.

[55] This was a question only in *Pearson, supra* note 18.

Under this approach, the Court would be required to pay attention to the political context and power relations between the sexes. It would have to assess in all claims, whether made by women or men, how the challenged measure affected historically unequal gender relations, paying attention to the discursive effects of its judgments.

Under this approach, the question in *Petrovic*[56] would not have been whether the state was entitled to think that paternity leave was less necessary for fathers since mothers most often took care of young children and there was no agreement among the member states on the issue, but whether the non-availability of paternity leave for fathers disadvantaged fathers, mothers, and children, and perpetuated unequal gender relations. Similarly, in *Stec v. UK*,[57] the analysis would take seriously claims by women that unequal age conditions in respect of social benefits linked to pension age disadvantaged them and would assess the impact of such a policy on women, men, and gender relations, rather than narrowly focusing on the original reasons behind the different age requirements in the state pension scheme and deferring to state judgements in issues of complex social and economic strategies. In *Runkee and White*,[58] the Court's assessment would not have stopped at analysing the original aim of the measure, and historical economic position of widows as compared to widowers: the present (economic) position of women and men in respect of widow's pension, and the ways to address any remaining inequality would have also been discussed. Even in cases, such as *Burghartz*[59] or *Zarb Adami*,[60] where a violation was found, the impact of the measure on women, and not just men, would have been assessed.

In conclusion, under the disadvantage approach gender equality would mean more than equal treatment under the dominant norm, which is still the dominant conceptualization of gender equality in the Court's sex discrimination jurisprudence. The disadvantage approach understands gender equality not as a question of sameness or difference,[61] but as a question of distribution of power, of 'male supremacy and female subordination'.[62] To date, the disadvantage question has been asked in only two types of cases: cases challenging differing age conditions in respect of the enjoyment of social security benefits, and cases challenging the non-availability of a widow's pension to men. However, in the former category of cases the disadvantage question was not the central question and was not asked with respect to the issue at hand,[63] and in the latter category the inquiry did not go far enough.

[56] *Supra* note 17.

[57] *Supra* note 10.

[58] *Supra* note 18.

[59] *Supra* note 18.

[60] The fact that jurors are predominantly male has many adverse effects on women in the criminal justice system.

[61] As sex is conceptualized as difference and equality as sameness, issues of sex discrimination become almost impossible to solve under the Aristotelian formula: see MacKinnon, 'Difference and Dominance: On Sex Discrimination', in his *Feminism Unmodified* (1987), at 32.

[62] *Ibid.*, at 40.

[63] The question was posed in relation to different age conditions for state pensions for women and men and not in relation to differing age requirements in relation to the enjoyment of social benefits, which was at issue in these cases.

4 Gender Equality: One of the Key Principles Underlying the Convention?

In the controversial *Leyla Sahin v. Turkey* case, the Court for the first time held that the principle of gender equality was 'one of the key principles underlying [the] Convention',[64] and this was outside the context of a sex discrimination claim. In this case, adjudicated on by the Chamber in 2004 and by the Grand Chamber in 2005, an adult woman challenged the prohibition on students wearing headscarves at university campuses as contrary to her freedom of religion, freedom of expression, right to education, right to respect for her private life, and right to non-discrimination on the basis of religion. The government claimed that the prohibition served the aims of the promotion of secularism and gender equality. Both the Chamber and Grand Chamber found no violation of the Convention.[65] In reaching their decisions, they placed great emphasis on gender equality, the promotion of which, they accepted, was served by the prohibition.

The Court did not explicitly discuss the meaning of gender equality and how the applicant's actions threatened women's rights, or how the principle could justify prohibiting an adult woman from following what seemed to be a freely adopted and personally important practice.[66] It also failed to explore the consequences which the prohibition would have for the applicant[67] and thousands of other women in Turkey, who would not be able to access education.[68] It thus seemed that the Court excluded Leyla and other women who wore the 'Islamic headscarf' from the category of women whose rights and equality needed to be protected.

It is interesting to note that in *Dahlab v. Switzerland*[69] the Court found wearing a headscarf to be contrary to the principle of equality, even though the applicant primary school teacher, who was

[64] At para. 107 of the 2004 judgment (29 June 2004), and adopted in paras. 115–116 of the GC judgment, *supra* note 3.

[65] The Chamber analysed only a claim of violation of freedom of religion and found no violation, as it held that the prohibitions in question were in accordance with law and necessary in a democratic society for the protection of the rights of others and of the public order. The Grand Chamber also analysed the claim of a violation of the right to education, also finding no violation, holding that the same considerations applied to both rights. Other claims were not analysed.

[66] The applicant claimed that she was not pressured into wearing the headscarf, but considered it her religious duty. She felt strongly enough about veiling to take the case to the ECtHR and to move to Vienna to study. Moreover, she explicitly stated that she did not aim to influence other women to wear it.

[67] Not only did the ban prevent her from studying in Turkey, but it may have prevented her from living in Turkey, as she would not be able to practise medicine there. This had a negative impact not only on her life but also on Turkish society.

[68] As noted by Human Rights Watch, the judgment denies education and career opportunities to a significant number of Turkish women who wear the headscarf: see Human Rights Watch, *Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women Who Wear the Headscarf*, 29 June 2004, available at: http://hrw.org/backgrounder/eca/turkey/2004/headscarf_memo.pdf; Human Rights Watch, *Turkey: Headscarf Ruling Denies Women Education and Career*, 16 Nov. 2005, available at: http://hrw.org/english/docs/2005/11/16/turkey12038.htm. This judgment may also alienate Muslims, which might result in an increase in fundamentalism, with negative consequences for Muslim women.

[69] *Supra* note 4.

prohibited from wearing the headscarf while teaching, argued that a prohibition on wearing the headscarf and other 'visible religious symbols' constituted discrimination on the basis of sex. She claimed that a man belonging to the Muslim faith could teach at a state school without being subject to any form of prohibition, whereas a woman holding similar beliefs had to refrain from practising her religion in order to be able to teach. The Court held that the measure was not directed at her as a member of the female sex but that it pursued the legitimate aim of ensuring neutrality, and that it could easily be applied to 'a man who… wore clothing that clearly identified him as a member of a different faith', and hence found no violation.[70] The disparate impact on the prohibitions on Muslim women who considered it their religious duty to wear the headscarf and the disadvantage they suffered on that account were not sufficient to constitute *prima facie* discrimination consistent with the Court's (then) unsympathetic approach to indirect discrimination claims.

The Court's application of the principle of gender equality in the 'Islamic headscarf' cases was simplistic and paternalistic. The ruling displays a lack of sensitivity to difference, including cultural and religious identity, and fails to consider the intersectionality of discrimination.[71] In interpreting gender equality the Court dismissed the perspective of those affected, and failed to examine the distinct harms that Muslim women who wear the 'Islamic headscarf' suffer (imposed by both their communities and the state), and the consequences that the prohibitions would have on them. In dismissing the perspective of a woman in question, the Court pitted the principle of gender equality against the principle of personal autonomy, to which (the principle of personal autonomy) it generally gives great value.[72]

The Court started from the assumption that wearing the headscarf is an oppressive patriarchal practice which connotes the submission of women to men and the control of their sexuality, which can never be freely chosen, while research shows that the practice has a more complex meaning (for both wearer and observer), which depends on many different factors

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[70] *Ibid,* at 464.

[71] The concept of intersectionality of discrimination refers to the interrelatedness of the different systems of oppression. It was first developed by feminists of colour: see, e.g., Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics' [1989] *U Chicago Legal Forum* 139. For the intersection of discrimination based on sex and sexual orientation see, e.g., Cane, 'Feminist Jurisprudence: Grounding the Theories', 4 *Berkeley Women's LJ* (1989) 191.

[72] The Court's reasoning was thus in conflict with the Court's case law on the right to personal autonomy. Moreover, it was in conflict with its case law on religious freedom and freedom of expression. Finally, the Court's interpretation of the requirement that the prohibition is based in law; its use of the doctrine of the margin of appreciation (in particular consensus); its emphasis on the particularity of the general societal context, rather than on individual injustice and the facts of the case; and its acceptance of restrictions on fundamental individual rights on the basis of hypothetical rather than real threats for the community as proportionate, even when those restrictions undermine the essence of the right to education, is in conflict with the Court's general approach to interpretation. See the Dissenting Opinion of Judge Tulkens to the Grand Chamber judgment, *supra* note 3. See also Marshall, 'Freedom of Religious Expression and Gender Equality: *Sahin v Turkey*', 69 *MLR (2006)* 452.

including status and power relations in society.[73] For example, some women claim that wearing a veil is an act of submission not to men but to God. Others claim that wearing the veil actually promotes, rather than undermines, their dignity and protects them from unwanted sexual advances and objectification.[74] Yet others see it as a way of expressing identity and an act of resistance to anti-Muslim policies of the West, which have been on the increase since 9/11.[75] However, the Court completely neglected these aspects of the intersection of identity and systems of discrimination and the particular context of discrimination against Muslims. Instead, it focused on the headscarf's proselytizing effect and on its alleged link with Islamic fundamentalism.[76] Indeed, it seems that the Court was more concerned with the rise of Islamic fundamentalism (in predominantly Christian Europe) than with gender equality.

While the problem of Islamic fundamentalism (or any other religious/ideological fundamentalism) and its consequences for women's rights is not to be undermined, the way the Court linked wearing the headscarf and (the hypothetical threat of) fundamentalism in order to justify the prohibition on grounds of gender equality is problematic. Moreover, while the practice of veiling[77] is problematic from the perspective of women's rights, since one of its (many) meanings certainly connotes (sexual) control and the submission of women, and certainly violates women's human rights when it is forced on women, wholesale state prohibitions are not the appropriate answer.

This does not mean that the state should remain passive as it has obligations to take steps to 'eliminate prejudices and other practices based on the idea of inferiority and superiority of either of the sexes or on stereotyped roles for women and men which are implicated in at least some practices of veiling'.[78] The state should thus take measures to empower women from these communities by securing their education (including education on women's rights) and employment opportunities, and by fighting the gender and racial/religious discrimination that they face. In this respect, the state should undertake awareness-raising campaigns and educational activities on the human rights of women, gender equality, and sexuality. Indeed, such measures would be required under the 'disadvantage approach' to equality. However, measures which restrict women's educational and employment opportunities are difficult to reconcile with the agenda of gender equality understood as a challenge

[73] See, e.g., Lyon and Spini, 'Unveiling the Headscarf Debate' 12 *Feminist Legal Studies* (2004) 333; Abu-Odeh, 'Post-colonial Feminism and the Veil', 43 *Feminist Review* (1993) 26; D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (2006). For the meaning of veil in the Turkish context see Gecor, 'The Veil and Urban Space in Istanbul', 9 *Place and Culture* (2002) 5.

[74] The fundamental question is rather whether women should change their clothing in order not to be 'attractive', or whether men should change their (sexually harassing) behaviour.

[75] For discussions by Muslim women on the meaning they assign to veils see http://www.metafilter.com/mefi/46875.

[76] See the Grand Chamber judgment, *supra* note 3, at para. 115.

[77] I use 'veil' as a generic term, to include all of the Islamic dresses for women.

[78] The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 Dec. 1979, entered into force 3 Sept. 1981) 1249 UNTS 13, Art. 5(b).

to women's disempowerment and disadvantage.

The 'liberation of women' is hardly to be achieved by further restricting their already restricted choices. Dealing with one set of constraints (imposed by community/family) by imposing another (through state prohibitions) hardly seems a logical answer, especially when it can result in severe consequences for the women in question, including their further exclusion and marginalization. While the prohibition allegedly has as its aim allowing women to compete in public spheres and institutions on purportedly equal terms with men, free from the private, patriarchal restrictions of 'fundamentalist' fathers, brothers, husbands, etc., it may result in closing public spheres to women who are forced to wear it, or who find it their religious or community duty to wear it. Prohibitions could thus be counterproductive, and result in women not leaving their homes, instead of leaving their veils at home.[79]

Moreover, as Judge Tulkens, in what can be described as a 'different voice',[80] stated, 'if wearing the headscarf really was contrary to the principle of gender equality, then the Court should have imposed on States the positive obligation to prohibit it in private places as well'.[81] Prohibiting the veil only in the public sphere, while allowing it in the private, is not an effective way to stop the practice. The Court's assumption that there was a way to reconcile freedom of religion and gender equality by relegating religion to the private and gender equality to the public sphere was unwarranted.

Gender equality cannot be achieved if it is respected only in the public sphere, nor can religion be relegated only to the private sphere, because religious expression is inherently social. As Sunder argued, the construction of the private/public dichotomy in international human rights law, according to which the religious sphere is characterized by the lack of reason and equality, while the public sphere is characterized by (enlightened) reason and equality, does not provide meaningful choices for women within religious communities.[82] International human rights law has to find a way out of the dichotomy to provide women with meaningful freedom: freedom within the identity, rather than freedom outside the identity and community. In the *Leyla Sahin* case the Court failed to do so: Leyla

[79] On the other hand, it has been reported that some Muslim women and families found the French law of 2004 prohibiting the headscarf in schools to be a liberating experience: Sage, 'The Headscarf Ban is Judged Success as Hostility Fades', *The Times,* 5 Sept. 2005, cited in McGoldrick, *supra* note 73, at 270–275.

[80] While other judges engaged in what could be described as 'the ethics of justice' in defining relevant rights and principles in an abstract manner, without reference to the particular situation of the applicant, and then balancing them in a hierarchical manner (gender equality *versus* freedom of religion), Judge Tulkens reasoned in an 'ethics of care' mode. She was sensitive to the applicant's situation (as constituted by her different identity characteristics and her relationships in society), and concerned to find a solution which would 'harmonise the principles of secularism, equality and liberty, not… weigh one against the other': at para. 4 of her Dissenting Opinion. The idea of a 'different voice' was developed by Carol Gilligan in her book *In a Different Voice: Psychological Theory and Women's Development* (1982).

[81] At para. 12 of her Dissenting Opinion, *supra* note 72.

[82] See Sunder, 'Piercing the Veil', 112 *Yale LJ* (2003) 1399.

had to choose between her education and her religion.

If the Court conceptualized equality as challenging disadvantage (in its intersectional forms) and if it applied a more contextual approach which would include the ethics of care,[83] it could have found a way to reconcile the principle of gender equality with the right to personal autonomy rather than putting them into conflict. Reconciling gender equality with women's autonomy – as required under the disadvantage approach – means that both forced veiling and forced unveiling would constitute a violation of the Convention. Hence, if the disadvantage approach was applied in this case, the prohibition would be assessed as contrary to the Convention on the basis that it imposed a disadvantage on already multiply disadvantaged women. While problematic aspects of the practice from the perspective of gender equality would be noted, it would be recognized that prohibitions are even more problematic.

5 Conclusion

This article discussed the Court's approach to gender equality by analysing the main characteristics of Article 14, sex discrimination case law, and the application of the principle of equality in the 'Islamic headscarf' cases. The analysis of Article 14 and sex discrimination jurisprudence showed how the Court's approach to (gender) equality is a comparative approach concerned primarily with the prohibition of direct discrimination in the form of intentional distinctions in the public sphere, the illegitimacy of which is not questionable under the standard applied by the majority of the states, rather than a substantive approach concerned with challenging the disadvantage of traditionally disadvantaged groups. The focus is on the equality of treatment and not on results.

However, equality of treatment is not the best approach to equality, even if in some cases it may contribute to equality of results. Whilst a person should not be disadvantaged on the basis of her/his sex, the Aristotelian formula which the Court applies may not be the best way to secure equality. There are many problems with the formula. For it to be applicable, people have to be in an 'analogous situation', which requires interpretation. As seen above, the interpretation of the comparability of situations and an assessment of justification are often based on a dominant norm. It is only when the majority of the states, or at least the major part of the international human rights community or the EU, agree that certain distinctions are illegitimate that the Court will find a violation. More importantly, the formula requires one to search for a suitable comparator, which makes it difficult to apply it to the worst forms of discrimination against women, such as gender-specific abuses in the form of violence against women and the denial of reproductive and sexual rights, particularly where gender discrimination intersects with other forms of discrimination. Indeed, these issues have not yet been

[83] Ethics of care represents the contextual approach to moral problems, which values empathy and care and recognizes our relational nature, while ethics of justice involves abstracting moral problems from interpersonal relationships and balancing rights in a hierarchical fashion: Gilligan, *supra* note 80.

conceptualized as a violation of Article 14.[84]

Finally, the formula that the Court applies in assessing sex discrimination claims asks the wrong set of questions. The question should not be whether there is unjustified differential treatment or unjustified non-accommodation of differences, but rather whether the law or practice at issue perpetuates or produces the subordination of women (as defined by other identity characteristics) and unequal gender (and other) relations. Instead of asking the question about the illegitimacy of the distinction under the dominant standard, the Court should ask the question about disadvantage, in its multiple forms determined by the intersectionality of discrimination, as assessed from the perspective of the disadvantaged. While the Court has recently started to ask the question of disadvantage, it has yet to change its 'equal treatment' approach to the disadvantage approach.

The disadvantage test should be the Court's test not only in sex discrimination cases, but in analysing any claim which raises gender equality issues. This would enable the Court to conceptualize sex-specific abuses as gender discrimination. The disadvantage approach would also offer a more just application of gender equality as the key interpretative principle of the Convention. The way the principle was applied in the *Leyla Sahin* case – as a justification of restrictions on women's freedom – undermines rather than enhances gender equality. If the Court interpreted equality in accordance with the disadvantage test and continued to apply gender equality as one of the key interpretive principles of the Convention, the inclusiveness of the Court's jurisprudence could be significantly enhanced.

[84] Hitherto, the Court has not had many opportunities to address the question whether gender-specific abuses constitute gender discrimination. However, in *Tysiac v. Poland*, (2007), Reports 2007-, where the applicant argued that the non-availability of legal abortion where the applicant's health was at risk constituted gender-based discrimination, the Court did discuss this claim, and it failed even to refer to this argument. It will be interesting to see how the Court will respond to the argument that the failure to protect from domestic violence constitutes gender discrimination in App. No. 71127/01, *Bevacquva v. Bulgaria*, now pending.