Gender Equality and Non-Discrimination from the Perspective of the European Court on Human Rights

Mykolas Černiauskas, senior lawyer at the Registry of the Court

What is the European Court of Human Rights

- **The right to individual petition**
- **The procedure before the Court in brief – admissibility criteria, Single Judge cases, Chamber cases and Grand Chamber cases**
- **The outcome of the Court's judgments: individual and general measures, pilot judgments**

The main topic – equality and non-discrimination in the Court's case-law

The definition of discrimination – Article 14 of the Convention

Article 14 (prohibition of discrimination):

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Whenever the Court considers an alleged violation of Article 14, this is always done in conjunction with a substantive right. An applicant will often allege a violation of a substantive right, and in addition, a violation of a substantive right in conjunction with Article 14. That is, that the interference with their rights was, in addition to failing to meet the standards required in the substantive right, also discriminatory, in that those in a comparable situation did not face a similar disadvantage.

The definition of discrimination – Article 1 of Protocol No 12 to the Convention (in force in 20/47 States)

Article 1 (general prohibition of discrimination) of Protocol No. 12 to the Convention of 4 November 2000:

"1. 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

Protocol No. 12 prohibits discrimination in relation to the 'enjoyment of any right set forth by law' is thus greater in scope than Article 14, which relates only to the rights guaranteed by the Convention.

The definition of discrimination – Article 1 of Protocol No 12 to the Convention

In the first case examined by the Court under Protocol No. 12, ***Sejdić and Finci v. Bosnia and Herzegovina***, the Court confirmed that Article 1 Protocol No. 12 introduced a general prohibition of discrimination. It further confirmed that the notions of discrimination prohibited by both Article 14 and Article 1 of Protocol No. 12 were to be interpreted in the same manner.

Article 1 of Protocol No. 12 relates to discrimination:

- (i) in the enjoyment of any right specifically granted to an individual under national law;
- (ii) by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- (iii) by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

The Court's approach in cases where a discrimination complaint is raised

- The initial burden rests with the applicant to establish evidence that suggests that discrimination has taken place.
- Statistical evidence may be used to help give rise to a presumption of discrimination.
- The burden then shifts to the Government who must prove that less favourable treatment was justified.
- The presumption of discrimination can be rebutted by proving: *either* that the victim is not in a similar situation to their 'comparator'; *or* that the difference in treatment is based on some objective factor, unconnected to the protected ground.

Sharing the burden of proof

The practice of the Court is to look at the available evidence as a whole, out of consideration of the fact that it is the State that often has control over much of the information needed to prove a claim. Accordingly, if the facts as presented by the applicant appear credible and consistent with the available evidence, the Court will accept them as proved, unless the State is able to offer a convincing alternative explanation. In the Court's words it accepts as facts those assertions that are:

"supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions… [P]roof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."

Role of statistics and other data

Statistical data can play an important role in helping the applicant give rise to a presumption of discrimination. It is particularly useful in proving indirect discrimination, because in these situations, the rules or practices in question are neutral on the surface. Where this is case, it is *necessary to focus on the effects of the rules or practices* to show that they are disproportionately unfavourable to specific groups of persons by comparison to others in a similar situation. Where data shows, for example, that women are particularly disadvantaged, it will be for the State to give a convincing alternative explanation of the figures. The Court spelt this out in the case of *Hoogendijk v. the Netherlands*:

"[T]he Court considers that where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex."

Role of statistics and other data

Example: The case of *D.H. and Others v. the Czech Republic* involved complaints by Roma applicants that their children were excluded from the mainstream education system and placed in 'special' schools intended for those with learning difficulties, on the basis of their Roma ethnicity.

The data submitted by the applicants relating to their particular geographical region suggested that 50 to 56 % of special school pupils were Roma, while they only represented around 2 % of the total population in education. Data taken from inter-governmental sources suggested between 50 to 90 % of Roma attended special schools in the country as a whole. The Court found that while the data was not exact it *did* reveal that the number of Roma children affected was 'disproportionately high' relative to the composition of the population as a whole.

Information from NGO's, UN bodies, etc.

Besides statistical information, the Court often relies on other sources, such as reports by the NGO's who sometimes are granted a right to intervene in the case, reports by the UN bodies (such as Committee on the Elimination of Discrimination Against Women), the Committee for Prevention of Torture, Resolutions by the Council of Europe Parliamentary Assembly, even EU law materials.

If it considers it necessary, the Court also prepares a comparative law report on a certain issue, especially in Grand Chamber cases. For example, in *Konstantin Markin* case about parental leave of army officers in Russia.

Enforcement of non-discrimination law

Anti-discrimination law can be enforced by initiating civil, administrative or criminal proceedings against the alleged discriminator.

Member States are free to choose between different adequate measures. However, applicable sanctions must be effective, proportionate and dissuasive.

Domestic violence

"… [T]he issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse … is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The [European] Court [of Human Rights] acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly. …" (***Opuz v. Turkey,*** judgment of 9 June 2009, §132).

Domestic violence

Positive obligations of the State – once the matter has come to the authorities' attention – they must act on it.

By underestimating domestic violence the authorities essentially endorse it.

Substantive and procedural aspects of Articles 2 and 3 of the Convention

Domestic violence

Opuz v. Turkey 9 June 2009

The applicant alleged that the Turkish authorities had failed to protect the right to life of her mother, who had been killed by the applicant's husband, and that they had been negligent in the face of the repeated violence, death threats and injury to which she herself had been subjected by him. She further complained about the lack of protection of women against domestic violence under Turkish domestic law.

The Court held that there had been a **violation of Article 2** concerning the murder of the applicant's mother and a **violation of Article 3** concerning the State's failure to protect the applicant.

It also held – for the first time in a domestic violence case – that there had been a **violation of Article 14** (prohibition of discrimination) of the Convention **in conjunction with Articles 2 and 3**. In this respect, the Court observed in particular that domestic violence affected mainly women, while the general and discriminatory judicial passivity in Turkey created a climate that was conducive to it. The violence suffered by the applicant and her mother could therefore be regarded as having been gender-based and discriminatory against women. Furthermore, despite the reforms carried out by the Turkish Government in recent years, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors, as in the applicant's case, indicated an **insufficient commitment on the part of the authorities to take appropriate action to address domestic violence**.

Domestic violence – applicant's daughter killed in spite of injunction orders

Halime Kılıç v. Turkey

28 June 2016

This case concerned the death of the applicant's daughter, who was killed by her husband despite having lodged four complaints and obtained three protection orders and injunctions.

The Court held there had been a **violation of Article 2** (right to life) and a **violation of Article 14** (prohibition of discrimination) **taken together with Article 2** of the Convention. It found in particular that the domestic proceedings had failed to meet the requirements of Article 2 of the Convention by providing protection for the applicant's daughter. By failing to punish the failure by the latter's husband to comply with the orders issued against him, the national authorities had deprived the orders of any effectiveness, thus creating a context of impunity enabling him to repeatedly assault his wife without being called to account. The Court also found that in turning a blind eye to the repeated acts of violence and death threats against the victim, the authorities had created a climate that was conducive to domestic violence.

Domestic violence – legal framework exists but not properly applied in this case

Bălşan v. Romania

23 May 2017

The applicant alleged that the authorities had failed to protect her from repeated domestic violence and to hold her husband accountable, despite her numerous complaints. She also submitted that the authorities' tolerance of such acts of violence had made her feel debased and helpless.

The Court held that there had been a **violation of Article 3** (prohibition of inhuman or degrading treatment) of the Convention because of the authorities' failure to adequately protect the applicant against her husband's violence, and a **violation Article 14** (prohibition of discrimination) of the Convention **read in conjunction with Article 3** because the violence had been gender-based. The Court noted in particular that the applicant's husband had subjected her to violence and that the authorities had to have been well aware of that abuse, given her repeated calls for assistance to both the police as well as the courts. Furthermore, *although there was a legal framework in Romania with which to complain about domestic violence* and to seek the authorities' protection, which the applicant had made full use of, the authorities had failed to apply the relevant legal provisions in her case. The authorities even found that the applicant had provoked the domestic violence against her and considered that it was not serious enough to fall within the scope of the criminal law. Such an approach had deprived the national legal framework of its purpose and was inconsistent with international standards on violence against women. Indeed, **the authorities' passivity in the current case had reflected a discriminatory attitude towards the applicant as a woman and had shown a lack of commitment to address domestic violence in general in Romania**.

Domestic violence – the Moldovan authorities do not fully appreciate the seriousness and extend

Eremia and Others v. the Republic of Moldova

28 May 2013

The first applicant complained about the Moldovan authorities' failure to protect them from the violent and abusive behaviour of her husband.

The Court held that there had been a **violation of Article 3** (prohibition of inhuman and degrading treatment) of the Convention in respect of the applicant in that, despite their knowledge of the abuse, the authorities had failed to take effective measures against her husband and to protect her from further domestic violence. The Court also held that there had been a **violation of Article 14 read in conjunction with Article 3**, finding that the authorities' actions had *not* been a simple failure or delay in dealing with violence against the applicant, but had amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman. In this respect, the **Court observed that the findings of the United Nations Special Rapporteur on violence against women, its causes and consequences only went to support the impression that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in the Republic of Moldova and its discriminatory effect on women.**

Domestic violence – legislative framework leaves a divorcee unprotected

M.G. v. Turkey (no. 646/10)

22 March 2016

This case concerned the domestic violence experienced by the applicant during her marriage, the threats made against her following her divorce. In particular the applicant criticised the domestic authorities for failing to prevent the violence to which she had been subjected. She also complained of permanent and systematic discrimination with regard to violence against women in Turkey.

The Court held that there had been a **violation of Article 3**, finding that the manner in which the Turkish authorities had conducted the criminal proceedings could not be considered as satisfying the requirements of Article 3. It also held that there had been a **violation of Article 14 read in conjunction with Article 3**, finding that after the divorce was pronounced in 2007 and until the entry into force of a new Law in 2012, the legislative framework in place did not guarantee that the applicant, a divorcée, could benefit from protection measures, and noted that for many years after applying to the national courts, she had been forced to live in fear of her ex-husband's conduct.

No psychiatric report before perpetrator's release from prison – mother and baby killed

Branko Tomašić and Others v. Croatia

15 January 2009

The applicants were the relatives of a baby and his mother whose husband/father had killed both them and himself one month after being released from prison, where he had been held for making those same death threats. He was originally ordered to undergo compulsory psychiatric treatment while in prison and after his release, as necessary, but the appeal court ordered that his treatment be stopped on his release. The applicants complained, in particular that the Croatian State had failed to take adequate measures to protect the child and his mother and had not conducted an effective investigation into the possible responsibility of the State for their deaths.

The Court held that there had been a **violation of Article 2** (right to life) of the Convention, on account of the authorities' lack of appropriate steps to prevent the deaths of the child and his mother. It observed in particular that the findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that the threats made against the lives of the mother and the child were serious and that all reasonable steps should have been taken to protect them. The Court further noted several shortcomings in the authorities' conduct: although the psychiatric report drawn up for the purposes of the criminal proceedings had stressed the need for the husband's continued psychiatric treatment, the Croatian Government had failed to prove that such treatment had actually and properly been administered; the documents submitted showed that the husband's treatment in prison had consisted of conversational sessions with prison staff, none of whom was a psychiatrist; neither the relevant regulations nor the court's judgment ordering compulsory psychiatric treatment had provided sufficient details on how the treatment was to be administered; and, lastly, the husband had not been examined prior to his release from prison in order to assess whether he still posed a risk to the child and his mother. The Court therefore concluded that the relevant domestic authorities had failed to take adequate measures to protect their lives.

Repeated acts of domestic violence may not be regarded as “trivial in nature”

Valiulienė v. Lithuania

26 March 2013

This applicant sustained light health injuries from her domestic partner; she was attacked five times within a period of one month. She also received threats to be put in a wheelchair. Although the Government had hesitations whether such facts could be seen as domestic violence, the Court placed particular emphasis on psychological effect – such as fear and anguish – which such violence should have caused to the applicant. The case was therefore to be examined under **Article 3** of the Convention (as opposed to Article 8 – protection of private life), and a violation was found since the authorities’ left the perpetrator unpunished.

In particular, there had been delays in the criminal investigation and the public prosecutor had decided to discontinue the investigation.

The Government acknowledges a procedural violation in a domestic violence case – application struck out

D.P. v. Lithuania (no. 27920/08)

22 October 2013 (strike-out decision)

The applicant complained in particular that the criminal proceedings in respect of her former husband for intentional and systematic beatings inflicted on her and their three older children had been protracted and the case had not been examined within a reasonable time. As a result, she submitted, the prosecution had become time-barred and her former husband had not received appropriate punishment by a court.

The Government acknowledged that the manner in which the criminal-law mechanisms had been implemented in the instant case was defective as far as the proceedings were concerned, to the point of constituting a violation of the State's positive obligations **under Article 3** of the Convention. Taking note of the terms of the Government's unilateral declaration and of the modalities for ensuring compliance with the undertakings referred to therein, the Court decided to **strike the application out of its list of cases**.

Let’s not forget – a man can also be the victim of domestic violence

Dornean v. the Republic of Moldova (application no. 27810/07)

29 May 2018 (not yet final)

The applicant complained that he had been beaten and assaulted by his ex-wife and adult children and that the authorities had failed to investigate his allegations properly. The applicant complained to prosecutors of various incidents of assault by his ex-wife and children. In particular, that they allegedly assaulted him at their home and broke his left elbow. Investigators looked at this complaint on and off for four years, but the investigation was eventually discontinued.

Relying on **Article 3** (prohibition of torture and of inhuman or degrading treatment) of the European Convention on Human Rights, the applicant complained that there had been no effective investigation into his allegation of ill-treatment by his ex-wife and children. The Court found a violation of that provision noting the excessive duration of the investigation in a case which did not appear to have been complex.

Police violence – harassment and forced gynaecological examination

Yazgül Yılmaz v. Turkey

1 February 2011

In this case the applicant complained that, at the age of 16, she was sexually harassed while in police detention. She was given a gynaecological examination – unaccompanied and without her or her guardian's consent – to verify whether her hymen had been broken. After being acquitted and released, she suffered from post-traumatic stress and depression. Her allegations of assault in custody were largely corroborated by subsequent medical examinations. No disciplinary proceedings were brought against the prison doctors concerned.

The Court noted that that the law at that time did not provide the necessary safeguards concerning examinations of female detainees and that additional guarantees were required for gynaecological examinations, particularly for minors. The general practice of automatic gynaecological examinations for female detainees – supposed to prevent false sexual assault accusations against police officers – was not in the interests of detained women and had no medical justification. The applicant had complained of sexual harassment, not rape, which could not be disproved by an examination of her hymen. The Court noted that the new Turkish Code of Criminal Procedure regulated gynaecological examinations, but made no specific provision for minors. It held that there had been a **violation of Article 3** (prohibition of inhuman treatment) of the Convention concerning both the gynaecological examinations of the applicant while in police custody and the inadequate investigation concerning those responsible.

Rape in police station amounts to torture

Aydın v. Turkey

25 September 1997

The applicant, a young Turkish woman of Kurdish origin (aged 17 at the relevant time) was arrested without explanation and taken, along with two other members of her family, into custody. She was blindfolded, beaten, stripped naked, placed in a tyre and hosed with pressurised water before being raped by a member of the security forces and then again beaten for about an hour by several people. A subsequent medical examination by a doctor, who had never before dealt with a rape case, found her hymen torn and widespread bruising on her thighs. The applicant further claimed that the family was intimidated and harassed by the authorities to coerce them into withdrawing their complaint before the European Court of Human Rights.

The Court stressed that rape of a detainee by an official of the State must be considered to be an **especially grave and abhorrent form of ill-treatment** given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. This experience must have left the applicant feeling debased and violated both physically and emotionally. The Court found that both the accumulation of acts of physical and mental violence inflicted on the applicant while in custody and the especially cruel act of rape to which she had been subjected had amounted to torture, in **violation of Article 3** (prohibition of torture and inhuman or degrading treatment) of the Convention. In addition, an allegation of rape by an official in custody required that the victim be examined with all appropriate sensitivity by independent doctors with the relevant expertise. That did not occur, rendering the investigation deficient and denying the applicant access to compensation, in **violation of Article 13** (right to an effective remedy) of the Convention.

Also see Maslova and Nalbandov v. Russia case.

Lack of physical resistance to rape does not absolve the authorities from duty to prosecute

M.C. v. Bulgaria (no. 39272/98)

4 December 2003

The applicant, aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was raped by two men; she cried during and after being raped and was later taken to hospital by her mother, where it was found that her hymen had been torn. Because it could not be established that she had resisted or called for help, the perpetrators were not prosecuted.

The Court found a **violation of Article 3** (prohibition of degrading treatment) **and Article 8** (right to respect for private life) of the Convention, noting in particular the universal trend towards recognising lack of consent as the essential element in determining rape and sexual abuse. Victims of sexual abuse, especially young girls, often failed to resist for psychological reasons (either submitting passively or dissociating themselves from the rape) or for fear of further violence. Stressing that States had an obligation to prosecute any non-consensual sexual act, even where the victim had not resisted physically, the Court found both the investigation in the case and Bulgarian law to be defective.

The Court acknowledges a structural problem of lack of effective investigation – it considers that general measures be taken

S.Z. v. Bulgaria (no. 29263/12)

3 March 2015

The applicant complained in particular of the ineffectiveness of the criminal proceedings for the false imprisonment, assault, rape and trafficking in human beings perpetrated against her. She complained in particular of the lack of an investigation into the possible involvement of two police officers and the failure to prosecute two of her assailants, and of the excessive length of time taken to investigate and try the case. She submitted, lastly, that her case was illustrative of a certain number of recurring problems regarding the ineffectiveness of criminal proceedings in Bulgaria.

The Court held that there had been a **violation of Article 3** of the Convention on account of the shortcomings in the investigation carried out into the illegal confinement and rape of the applicant, having regard in particular to the excessive delays in the criminal proceedings and the lack of investigation into certain aspects of the offences. The Court found it to be a cause of particular concern that the authorities had not deemed it necessary to examine the applicant's allegations of the possible involvement in this case of an organised criminal network of trafficking in women.

The Court also observed in this case that it had already, in over 45 judgments against Bulgaria, found that the authorities had failed to comply with their obligation to carry out an effective investigation. Finding that these recurrent shortcomings disclosed the existence of a systemic problem, it considered, under **Article 46** (binding force and execution of judgments) of the Convention, that it was incumbent on Bulgaria, in cooperation with the Committee of Ministers of the Council of Europe, to decide which general measures were required in practical terms to prevent other similar violations of the Convention in the future.

Risk of ill-treatment in case of expulsion

Collins and Akaziebie v. Sweden

8 March 2007 (decision on the admissibility)

The applicants, **Nigerian nationals**, are mother and daughter. They alleged that they would be subjected to female genital mutilation if they were returned to Nigeria, in violation of Article 3.

The Court declared the application **inadmissible** as being manifestly ill-founded, finding that the applicants had failed to substantiate that they would face a real and concrete risk of being subjected to female genital mutilation upon returning to Nigeria. It was not in dispute that subjecting a woman to female genital mutilation amounted to ill-treatment contrary to Article 3. Nor was it in dispute that women in Nigeria had traditionally been subjected to female genital mutilation and to some extent still were. However, several states in Nigeria had prohibited female genital mutilation by law, including the state where the applicants came from. Furthermore, while pregnant, the first applicant had not chosen to go to another state within Nigeria or to a neighbouring country, in which she could still have received help and support from her own family. Instead she had managed to obtain the necessary practical and financial means to travel to Sweden, having thus shown a considerable amount of strength and independence. Viewed in this light, it was difficult to see why she could not protect her daughter from being subjected to female genital mutilation, if not in her home state, then at least in one of the other states in Nigeria where female genital mutilation was prohibited by law and/or less widespread.

Also see inadmissibility decisions in **Izevbekhai v. Ireland,** 17 May 2011, and **Omeredo v. Austria,** 20 September 2011.

Alleged risk of being subjected to domestic violence in case of deportation

N. v. Sweden (no. 23505/09)

20 July 2010

The applicant, an Afghan national, arrived in Sweden with her husband in 2004. Their requests for asylum were refused several times. In 2005 **the applicant separated from her husband**. In 2008 her request for a divorce was refused by the Swedish courts as they had no authority to dissolve the marriage as long as the applicant did not reside legally in the country. Her husband informed the court that he opposed a divorce. In the meantime, the applicant unsuccessfully requested the Swedish Migration Board to re-evaluate her case and stop her deportation, claiming that she risked the death penalty in Afghanistan as she had committed adultery by starting a relationship with a Swedish man and that her family had rejected her.

The Court held that the applicant's **deportation** from Sweden to Afghanistan **would constitute a violation of Article 3** (prohibition of inhuman or degrading treatment or punishment) of the Convention finding that, in the special circumstances of the present case, there were substantial grounds for believing that if deported to Afghanistan, she would face various cumulative risks of reprisals from her husband, his family, her own family and from the Afghan society which fell under Article 3. The Court noted in particular that the fact that the applicant wanted to divorce her husband, and did not want to live with him any longer, **might result in serious life-threatening repercussions**. Indeed, the Shiite Personal Status Act of April 2009 required women to obey their husbands' sexual demands and not to leave home without permission. Reports had further shown that around 80 % of Afghani women were affected by domestic violence, acts which the authorities saw as legitimate and therefore did not prosecute. Lastly, to approach the police or a court, a woman had to overcome the public opprobrium affecting women who left their houses without a male guardian. **The general risk indicated by statistics and international reports could not be ignored**.

Placement for adoption of a child from abusive background

Y.C. v. the United Kingdom (no. 4547/10)

13 March 2012

The applicant's family came to the attention of social services as a result of an "alcohol fuelled" incident between the parents. There were subsequent incidents of domestic violence and alcohol abuse. Eventually the local authority obtained an emergency protection order after the boy was injured during a further violent altercation between the parents. Childcare proceedings resulted in an order authorising the child to be placed for adoption. The applicant complained that the courts' refusal to order an assessment of her as a sole carer for her son and their failure to have regard to all relevant considerations when making the placement order had violated her rights under Article 8 (right to respect for private and family life) of the Convention.

The Court held that there had been **no violation of Article 8** (right to respect for private and family life) of the Convention, finding that the reasons for the decision to make a placement order had been relevant and sufficient, and that the applicant had been given every opportunity to present her case and had been fully involved in the decision-making process. While it was in a child's best interests that his or her family ties be maintained where possible, it was clear that in the instant case this consideration had been outweighed by the need to ensure the child's development in a safe and secure environment.

No life sentences for women

Khamtokhu and Aksenchik v. Russia

24 January 2017 (Grand Chamber)

The applicants in this case alleged that, as adult males serving life sentences for a number of serious criminal offences, they had been discriminated against as compared to other categories of convicts – women, persons under 18 when their offence had been committed or over 65 when the verdict had been delivered – who were exempt from life imprisonment by operation of the law.

The Grand Chamber held, **by ten votes to seven**, that there had been **no violation of Article 14**, **taken in conjunction with Article 5 (right to liberty)**, as regards the difference in treatment on account of sex. It found that the justification for the difference in treatment between the applicants and certain other categories of offenders, namely to promote principles of justice and humanity, had been legitimate. The Grand Chamber was also satisfied that exempting certain categories of offenders from life imprisonment had been a proportionate means to achieving those principles. In coming to that conclusion, it bore in mind the practical operation of life imprisonment in Russia, both as to the manner of its imposition and to the possibility of subsequent review. In particular, the life sentences imposed on the applicants themselves had not been arbitrary or unreasonable and would be reviewed after 25 years. Moreover, **the Grand Chamber also took account of the considerable room for manoeuvre given to Contracting States to decide on such matters as penal policy, given the lack of any European consensus on life sentencing**. The GC also took note of various international instruments addressing the needs of women for protection against violence in prison and the need to protect pregnancy and motherhood.

Staying the sentence – need to protect motherhood

Alexandru Enache v. Romania

3 October 2017

Under Romanian legislation, only convicted mothers of children under the age of one can obtain a stay of execution of their prison sentences until their child's first birthday. The application for a stay of execution of prison sentence lodged by the applicant, the father of a child under the age of one, had been dismissed by the Romanian courts.

The Court held, by five votes to two, that there had been **no violation of Article 14** (prohibition of discrimination) **read in conjunction with Article 8** (right to respect for private and family life) of the Convention as regards the applicant's complaint about discrimination on grounds of sex. It found in particular that there was a reasonable relation of proportionality between the means used and the legitimate aim pursued (the best interests of the child and the special bonds between a mother and her child during the first year of the latter's life). The Court noted, in particular, that granting female prisoners the benefit of a stay of execution of sentence was **not** automatic, and that the Romanian criminal law in force at the relevant time provided all prisoners, regardless of sex, with other channels for requesting a stay of execution of sentence. It also observed that the aim of the legal provisions in question had been to cater for particular personal situations, especially concerning the unique bond between mother and child during pregnancy and the first year of the baby's life. The Court took the view that that aim could be considered legitimate within the meaning of Article 14 of the Convention. The Court therefore considered that in the particular sphere to which the present case related, those considerations might form an adequate basis to justify the difference in treatment afforded to the applicant. Motherhood presented specific characteristics which should be taken into account, among other things, by means of protective measures.

Gender equality

"... [T]he advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention ... In particular, **references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex**." (*Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, § 127)

Obligation for the wife to take husband's name after marriage - discrimination

Ünal Tekeli v. Turkey

16 November 2004

Following her marriage in 1990 the applicant, who was then a trainee lawyer, took her husband's surname. As she was known by her maiden name in her professional life she continued using it in front of her legal surname, which was that of her husband. **She could not use both names together in official documents however**. The applicant complained in particular that she had been discriminated against in that married men could continue to bear their own family name after they married.

The Court held that there had been a **violation of Article 14** (prohibition of discrimination) **taken together with Article 8** (right to respect for private and family life) of the Convention. It considered that the Turkish Government's argument that the fact of giving the husband's surname to the family stemmed from a tradition designed to reflect family unity by having the same name was not a decisive factor. Family unity could result from the choice of the wife's surname or a joint name chosen by the married couple. Moreover, family unity could also be preserved and consolidated where a married couple chose not to bear a joint family name, as was confirmed by the solution adopted in other European legal systems. Accordingly, the obligation imposed on married women, in the interests of family unity, to bear their husband's surname – even if they could put their maiden name in front of it – had no objective and reasonable justification. **Observing in particular that a consensus had emerged among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing**, the Court noted in this judgment that Turkey appeared to be the only Member State which legally imposed the husband's surname as the couple's surname – and thus the automatic loss of the woman's own surname on her marriage – even if the couple had decided otherwise.

Obligation to put the children's family name according to that of the father - discrimination

Cusan and Fazzo v. Italy

7 January 2014

This case concerned a challenge to transmission of the father's surname to his children. A married couple, the applicants complained in particular about the Italian authorities' refusal to grant their request to give their daughter her mother's surname, and about the fact that Italian legislation at the relevant time made it mandatory to give the father's surname to legitimate children. They considered that the law ought to have allowed parents to choose their children's family name.

The Court held that there had been a **violation of Article 14** (prohibition of discrimination) **taken together with Article 8** (right to respect for private and family life) of the Convention, on account of the fact that it had been impossible for the applicants, when their daughter was born, to have her entered in the register of births, marriages and deaths under her mother's surname. This impossibility arose from a flaw in the Italian legal system, whereby every "legitimate child" was entered in the register of births, marriages and deaths under the father's surname as his/her own family name, without the option of derogation, even where the spouses agreed to use the mother's surname. In consequence, the Court indicated, under **Article 46** (binding force and execution of judgments) of the Convention, that reforms to the Italian legislation and/or practice were to be adopted, in order to ensure their compatibility with the conclusions of the present judgment, and to secure compliance with the requirements of Articles 8 and 14 of the Convention.

Dismissal from a State run company on grounds of gender - discrimination

Emel Boyraz v. Turkey

2 December 2014

This case concerned a dismissal from public sector employment – a State-run electricity company – on grounds of gender. The applicant had worked as a security officer for almost three years before being dismissed in March 2004 **because she was not a man and had not completed military service**. She alleged that the **decisions** given against her in the domestic proceedings had amounted to discrimination on grounds of sex.

The Court held that there had been a **violation of Article 14** (prohibition of discrimination) **in conjunction with Article 8** (right for respect to private and family life) of the Convention. In the Court's opinion, the **mere fact** that security officers had to work on night shifts and in rural areas and had to use firearms and physical force under certain conditions had not in itself justified any difference in treatment between men and women. Moreover, the reason for the applicant's dismissal had not been her inability to assume such risks or responsibilities, there having been nothing to indicate that she had failed to fulfil her duties, but the decisions of Turkish administrative courts.

Parental leave: “the Convention does not stop at the gates of army barracks”

Konstantin Markin v. Russia

22 March 2012 (Grand Chamber)

This case concerned the refusal by the Russian authorities to grant the applicant, a radio intelligence operator in the armed forces, parental leave. The applicant complained of a difference in treatment in relation to the female personnel of the armed forces and to civilian women.

The Court held that there had been a **violation of Article 14** (prohibition of discrimination) in conjunction with **Article 8** (right to respect for private and family life) of the Convention, finding that the exclusion of servicemen from the entitlement to parental leave, while servicewomen were entitled to such leave, could not be said to be reasonably or objectively justified. This difference in treatment, of which the applicant was a victim, had therefore amounted to **discrimination on grounds of sex**. In particular, looking at the situation across the Convention States, the Court noted that in the majority of European counties, including Russia itself, the laws allowed civilian men and women alike to take parental leave. In addition, in a significant number of States both servicemen and servicewomen were entitled to parental leave. Consequently, that showed **that contemporary European societies had moved towards a more equal sharing between men and women of the responsibility for the upbringing of their children**. In this judgment, the Court accepted that, given the importance of the army for the protection of national security, certain restrictions on the entitlement to parental leave could be justifiable provided they were not discriminatory (for example, military personnel, be it male or female, could be excluded from parental leave entitlement if they could not be easily replaced because of their particular hierarchical position, rare technical qualifications, or involvement in active military actions). **In Russia, by contrast, the entitlement to parental leave depended exclusively on the sex of the person. By excluding servicemen from that entitlement, the legal provision imposed a blanket restriction**. The Court found that, as such a general and automatic restriction applied to a group of people on the basis of their sex, it fell outside of any acceptable margin of appreciation of the State. Given that the applicant could easily have been replaced by servicewomen in his function as a radio operator, there had been no justification for excluding him from the entitlement to parental leave.

Wearing of religious clothing

Dahlab v. Switzerland

15 February 2001 (decision on the admissibility)

The applicant, a primary-school teacher who had converted to Islam, complained of the school authorities' decision to prohibit her from wearing a headscarf while teaching, eventually upheld by the Federal Court in 1997. She submitted in particular that the prohibition imposed by the Swiss authorities amounted to discrimination on the ground of sex, in that a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition.

The Court declared the application **inadmissible** as being **manifestly ill-founded**. It noted in particular that the **measure** by which the applicant had been prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf **had not been directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system**. Such a **measure could also be applied to a man** who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith. The Court accordingly concluded that there had been no discrimination on the ground of sex in the instant case.

Entitlement to a refugee card (and thus to housing assistance)

Vrountou v. Cyprus

13 October 2015

The applicant complained about the **refusal of the authorities to grant her a refugee card**, alleging that this had meant that she had been denied a range of benefits, including housing assistance. She also alleged that denying her a refugee card **on the basis that she had been the child of a displaced woman rather than a displaced man had been discriminatory on the grounds of sex** and that no authority in Cyprus, including the courts, had examined the merits of her complaint.

The Court held that there had been a **violation of Article 14** (prohibition of discrimination) of the Convention **read in conjunction with Article 1 (protection of property) of Protocol No. 1** to the Convention. As to whether there was a reasonable and objective justification for this difference in treatment, the main argument advanced by the Government was the socio-economic differences between women and men allegedly existing in Cyprus when the scheme was introduced. However, **the Court recalled that this kind of reference to "traditions, general assumptions or prevailing social attitudes" provided insufficient justification for a difference in treatment on grounds of sex**.

Different pensionable age may be justified

Andrle v. the Czech Republic

17 February 2011

This case concerned the current pension scheme in the Czech Republic whereby women and men who care for children were eligible for a pension at different ages.

The Court held that there had been **no violation of Article 14** (prohibition of discrimination) of the Convention **taken together with Article 1** (protection of property) **of Protocol No. 1**, finding that the Czech Republic's approach concerning its pension scheme was reasonably and objectively justified and would continue to be so until such time as social and economic change in the country removed the need for special treatment of women. It considered in particular that the lowering of the age for which women were eligible for a pension in the Czech Republic, adopted in 1964 under the Social Security Act, was rooted in specific historical circumstances and reflected the realities of the then socialist Czechoslovakia. That measure pursued a **"legitimate aim"** as it was designed to compensate for the inequality and hardship generated by the expectations of women under the family model founded at the time (and which persisted today): that of working on a full-time basis as well as taking care of the children and the household. Indeed, the amount of salaries and pensions awarded to women was also generally lower in comparison to men. **The Court also emphasised that the national authorities were the best placed to determine such a complex issue relating to economic and social policies, which depended on manifold domestic variables and direct knowledge of the society concerned**.

Sexual orientation issues – a couple of general points

There is abundant case-law of the Court on the issues and the States' obligations on such subjects as:

- Obligation to protect sexual minorities during peaceful demonstrations from violence of third parties. See, for example, **Identoba and Others v. Georgia,** 12 May 2015 . The Court held that there had been a **violation of Article 3** (prohibition of inhuman or degrading treatment) **taken in conjunction with Article 14** (prohibition of discrimination) of the Convention with respect to the 13 applicants who had participated in the march.

- Obligation to allow demonstrations to take place. See **Alekseev v. Russia**, 21 October 2010. Violation of Article 14, taken in conjunction of Article 11.

- Conviction for prejudicial acts under the guise of freedom of expression may be justified. See **Vejdeland and Others v Sweden.**

Criminalisation of homosexual relations between adults and adolescents - discrimination

L. and V. v. Austria (nos. 39392/98 and 39829/98) and S.L. v. Austria (no. 45330/99)

9 January 2003 The applicants were convicted for having homosexual intercourse with young males of 14 to 18. Austrian legislation classified as a criminal offence homosexual acts of adult men with young males between 14 and 18, but not with young females in the same age bracket.

The Court held that there had been a **violation of Article 14** (prohibition of discrimination) **in conjunction with Article 8** (right to respect for private life). It found no sufficient justification for the difference in treatment complained of.

Sexual orientation issues

Offensive comments on internet

Beizaras and Levickas v. Lithuania (no. 41288/15)

Application communicated to the Lithuanian Government on 16 June 2017

This case concerns the Lithuanian authorities' decision to discontinue a criminal investigation concerning allegedly homophobic comments posted on the first applicant's Facebook page after he had published on his profile a photograph depicting a same-sex kiss between him and the second applicant.

The Court gave notice of the application to the Lithuanian Government and put questions to the parties under Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) of the Convention.

"Lithuania is based on traditional family values" argument. Third party intervention granted.

Prohibition of civil partnerships for same sex couples - discrimination

Vallianatos and Others v. Greece

7 November 2013 (Grand Chamber)

This case concerned the "civil unions" in Greece introduced by a law of 2008, entitled "Reforms concerning the family, children and society", which made provision for an official form of partnership, allowing the persons concerned to register their relationship within a more flexible legal framework than that provided by marriage. The applicants – eight Greek nationals (some of them living together as couples, while others are in a relationship but do not live together) and an association – complained that the law in question provided for civil unions only for different-sex couples, thereby automatically excluding same-sex couples from its scope. They complained that the Greek State had introduced a distinction which, in their view, discriminated against them.

The Court held that there had been a **violation of Article 14** (prohibition of discrimination) **taken together with Article 8** (right to respect for private and family life) of the Convention. It remarked in particular that, of the 19 States parties to the Convention which authorised some form of registered partnership other than marriage, Lithuania and Greece were the only ones to reserve it exclusively to different-sex couples. It found that the Greek State had not shown it to have been necessary, in pursuit of the legitimate aims invoked by the law introducing civil unions, to bar same-sex couples from entering into such unions.

However, no right to marry for a same sex couple

Schalk and Kopf v. Austria

24 June 2010

The applicants are a same-sex couple living in a stable partnership. They asked the Austrian authorities for permission to marry. Their request was refused on the ground that marriage could only be contracted between two persons of opposite sex; this view was upheld by the courts. Before the European Court of Human Rights, the applicants further complained of the authorities' refusal to allow them to contract marriage. They complained that they were discriminated against on account of their sexual orientation since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

The Court found that there had been **no violation of Article 12** (right to marriage), and **no violation of**

Article 14 (prohibition of discrimination) **in conjunction with Article 8** (right to respect for private and family life) of the Convention. It first held that the relationship of the applicants fell within the notion of "family life", just as the relationship of a different-sex couple in the same situation would. **However, the Convention did not oblige a State to grant a same-sex couple access to marriage**. The national authorities were best placed to assess and respond to the needs of society in this field, **given that marriage had deep-rooted social and cultural connotations differing greatly from one society to another**.

Transsexuals can marry

Christine Goodwin v. the United Kingdom

11 July 2002 (Grand Chamber)

The applicant complained of the lack of legal recognition of her changed gender and in particular of her treatment in terms of employment and her social security and pension rights and of her inability to marry.

The Court held that there had been a **violation of Article 8** (right to respect for private and family life) of the Convention, **owing to a clear and continuing international trend towards increased social acceptance of transsexuals** and towards legal recognition of the new sexual identity of post-operative transsexuals.

"Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, the Court reaches the conclusion that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant" (§ 93 of the judgment).

The Court also unanimously held that there had been a **violation of Article 12** (right to marry and found a family) of the Convention. It was "not persuaded that it [could] still be assumed that [the terms of Article 12] must refer to a determination of gender by purely biological criteria" (§ 100). The Court held that it was for the State to determine the conditions and formalities of transsexual marriages but that it "finds no justification for barring the transsexual from enjoying the right to marry under any circumstances" (§ 103).

The Court found no separate issue under Article 14.

Transsexuals – the State's failure to adopt rules concerning changed sex

L. v. Lithuania (no. 27527/03)

11 September 2007

This case concerned the failure to introduce implementing legislation to enable a transsexual to undergo gender-reassignment surgery and change his gender identification in official documents.

The Court further held that there had been a **violation of Article 8** (right to respect for private and family life) of the Convention. *Lithuanian law recognised transsexuals' right to change not only their gender but also their civil status*. However, there was a gap in the legislation in that there was no law regulating **full** gender-reassignment surgery. This legislative gap had left the applicant in a situation of distressing uncertainty with regard to his private life and the recognition of his true identity. Budgetary restraints in the public-health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code but not a delay of over four years. Given the limited number of people involved, the budgetary burden would not have been unduly heavy. The State had therefore failed to strike a fair balance between the public interest and the applicant's rights.

The Lithuanian law still stands as it was 11 years ago. The courts chose to bypass the gap by court decision.

Amount of compensation awarded for a medical error

Carvalho Pinto de Sousa Morais v. Portugal
25 July 2017

This case concerned a decision of the **Portuguese Supreme Administrative Court to reduce the amount of compensation awarded to the applicant**, a 50-year-old woman suffering from gynaecological 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. The applicant 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 Court held that there had been a **violation of Article 14** (prohibition of discrimination) **read together with Article 8** (right to respect for private and family life) of the Convention. It found in particular that **the applicant's age and sex had apparently been decisive factors in the Portuguese courts' final decision to lower the compensation awarded for physical and mental suffering. The decision had moreover been based on the general assumption 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. In this case the Court also recalled that gender quality was today a major goal for the member States of the Council of Europe, meaning that very good reasons would have to be put forward before a difference of treatment on grounds of sex could be accepted as compatible with the Convention. In particular, **references to traditions, general assumptions or prevailing social attitudes in a country were insufficient for a difference in treatment on grounds of sex**.

Muchas gracias por escucharme!

Alguna pregunta?