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No. 3/2023

**Who fits the stereotype?**

**Gender discrimination within the ECHR**

Benedita Menezes Queiroz



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## Who fits the stereotype? Gender discrimination within the ECHR

Benedita Menezes Queiroz\*

### Abstract

This article argues that the way women are judicially perceived within the system of the European Convention of Human Rights (ECHR) impacts the achievement of gender equality. While the European Court of Human Rights (ECtHR) plays an important role in dismantling harmful women stereotypes, the approach taken has not always been consistent or comprehensive in this analysis. The present article is divided in three main parts. The first part addresses the principle of non-discrimination on the grounds of gender and delves into the issue of gender stereotypes within the system of the Convention. At this stage the analysis focuses on landmark cases which made first visible gender stereotypes on the reasoning of the ECtHR, such as: *Konstantin Marin v. Russia* and *Khamtokhu and Aksenchik v. Russia*. The second part of this study argues that the Court did not shy away from applying the principle of anti-stereotyping. Yet, recent case law on sexual and reproductive rights shows that ECtHR missed the opportunity to address intersectionality in discrimination cases: *Carvalho Pinto de Sousa Morais v. Portugal* and *G.M. and others v. Moldova*. Finally, the article concludes by shedding light into the importance of equipping the Court with the tools to conduct a systemic effort. One that depends greatly on how judges' approach the law and assess discriminatory measures and that requires an explicit intersectional dimension.

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## 1. Introduction

“Judges fail in their role if they ‘facilitate the perpetuation of stereotypes by failing to challenge stereotyping’”. The way the judges, sitting on the European Court of Human Rights (ECtHR) bench, approach gender stereotypes and assess discrimination impact the achievement of gender equality. Feminist theorists have argued that “the woman question” is crucial for a feminist interpretation of the law. For Bartlett this question becomes a method if asked regularly and across different disciplines. The woman question “is designed to identify the gender implications of rules and practices which otherwise appear to be neutral.” Asking the “woman question” (or the set of questions) in human rights law includes questioning harmful gender stereotypes. Despite the concerns with affecting “the hard-fought-for advances in the area,” challenging the international human rights standards towards women is a determinant tool to measure gender equality achievements.

Through the analysis of the ECtHR case-law on discrimination on the grounds of gender, this article’s aim is to provide a snapshot of how women are judicially perceived, even if not in an exhaustive manner, within the system of the European Convention of Human Rights (ECHR). The Court’s approach to harmful gender stereotypes will be questioned as well as its reluctance to explicitly address the intersectional dimension.

The first part of the article will address the intersection of the ECHR and the principle of non-discrimination on the grounds of gender and the second will focus on the ECtHR approach to gender stereotypes in cases of gender equality. The second part of this piece analyses the impact of the Court’s anti-stereotyping approach on the dismantlement of structural gender inequality and questions whether this tool is enough to face it and, in addition, argues for towards an intersectional agency based comprehensive assessment of the Court in cases of multidimension discrimination.

## 2. The Principle of Non-Discrimination and Gender Equality

### 2.1 Non - discrimination within the ECHR

Article 14 of the European Convention on Human Rights provides protection against discrimination by establishing that the rights and freedoms covered by the

Convention shall be secured without any differential treatment on “any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status”. The prohibition of discrimination is central to any international human rights regime,<sup>1</sup> however and differently than other international treaties, within the ECHR system the non-discrimination clause plays (so far) a limited role as it is only applicable when coupled with other substantive right protected by the Convention and is not referenced in the Statute of the Council of Europe or the Preamble of the Convention<sup>2</sup>. In 2005, Protocol 12 to the Convention established a more general non-discrimination clause that would, in theory, answer to the lack of centrality of article 14 of the ECHR. To date only 20 of the 47 members of the Council of Europe ratified it showcasing the limited impact of this stand-alone guarantee.

Fredman argues that article 14 of the ECHR is a “relatively weak”<sup>3</sup> provision and Harris, O’Boyle and Warbrick share the view that it has ‘parasitic’ nature as it only complements other substantive provisions of the Convention<sup>4</sup>. The subsidiary character of this provision results from the lack of its independent existence. The Convention is very minimal with regards the definition of discrimination and from the wording of article 14 one concludes only that the rights should be enjoyed without it.<sup>5</sup> The absence of definition coupled with the non-exhaustive nature of the list of grounds this clause prompted the Court to develop its approach of the meaning of discrimination within the Convention.

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<sup>1</sup> See, for example, in Article 1(3) of the Charter of the United Nations the prohibition of non-discrimination as the only substantive human right set out in the Charter or Article 2 of the Universal Declaration of Human Rights: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

<sup>2</sup> WILLIAM A. SCHABAS, *The European Convention of Human Rights – A Commentary*, Oxford University Press, 2005, pp. 555-556 and D.J HARRIS, M. O’BOYLE, E.P. BATES AND C.M. BUCKLEY, *Law of the European Convention on Human Rights*, Third Edition, Oxford University Press, 2014, p. 783.

<sup>3</sup> SANDRA FREDMAN, “Gender Equality and the European Convention on Human Rights” in *International Human Rights of Women*, Niamh Reilly (ed.), Springer, 2019, p. 122 and ‘Emerging from the Shadows:

Substantive Equality and Article 14 of the European Convention on Human Rights’ in *Human Rights Law Review*, 2016, 0, 1-29, p. 1.

<sup>4</sup> HARRIS, O’BOYLE, BATES AND BUCKLEY, *Law of the European Convention on Human Rights*, p. 784.

<sup>5</sup> SANDRA FREDMAN, *Emerging from the Shadows:*

Substantive Equality and Article 14 of the European Convention on Human Rights’ in *Human Rights Law Review*, 2016, 0, 1-29, p. 6.

The case *Belgian Linguistics*<sup>6</sup> marked the development of the application of this provision by the Court and established that there was no need to be a breach of another substantive right for a breach of article 14. However, the Commission also recognized that it would suffice that discrimination would “touch the enjoyment” a right covered by the Convention<sup>7</sup>. Ever since the Court has argued that:

“(...) where a substantive article of the Convention has been invoked, both on its own and together with article 14, and separate breach has been found of the substantive article, it is not generally necessary (...) to consider the case under article 14 also, though the position is otherwise of a clear inequality of treatment in the enjoyment of the right in question is a fundamental right aspect of the case”<sup>8</sup>.

Whenever there is violation of a right and, in case of sex or gender inequality differential treatment between men and women, the Court must examine if there were “very weighty reasons” to avoid qualifying the measure as discriminatory<sup>9</sup>. In *Abdulaziz, Cabales and Balkandali v. The UK*,<sup>10</sup> the Court’s stance on discrimination was clear and considered discriminatory the UK’s rule that allowed migrant women to join their spouses but not the other way around (migrant men in the same circumstance could not join their wives) with the view of protecting the British labour market at the time. The ECtHR reaffirmed the centrality of ‘the advancement of the equality of the sexes’ as ‘a major goal in the member States of the Council of Europe’ and clarified that ‘very weighty reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention’<sup>11</sup>.

The “very weighty reasons” test is, thus, a tool to determine whether a certain differential treatment is legitimate or unreasonable. In *Abdulaziz, Cabales and Balkandali v. The UK* the Court found that article 14 in conjunction with 8, on the respect for private and family life, were breached due to discrimination on the grounds of sex and was not convinced that ‘the difference that may nevertheless exist between the

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<sup>6</sup> ECtHR, *Belgian Linguistic Applications* Nos 1474/62 et al, 1968.

<sup>7</sup> Ibid, para 276.

<sup>8</sup> ECtHR, *Aziz v Cyprus*, Application no. 69949/01, 2004, para 35.

<sup>9</sup> ECtHR, *Van Raalte v. The Netherlands*, Application No. 20060/92, 1997, para. 39; ECtHR, *Willis v. the United Kingdom*, Application No. 36042/97, 2002, para. 39.

<sup>10</sup> ECtHR, *Abdulaziz, Cabales and Balkandi v. UK*, Application No. 9214/80; 9473/81; 9474/81, 1985.

<sup>11</sup> Ibid, para 78.

respective impact of men and of women on the domestic labour market is sufficiently important to justify the difference of treatment'<sup>12</sup>.

In this decision the Court took a formalistic approach on gender equality: one that focused on giving women the exact same rights as men. This view is one, that regardless of its advantages, may have “serious shortcomings”<sup>13</sup>. The formal conception of equality had, at a starting point, a masculine framing which did not consider what was substantively different in a woman’s life from a biological perspective but also from an intersectional one. Timmer highlighted that pregnancy or discrimination on the grounds of different identities would not be taken in consideration properly through such a formalist lens and to answer this criticism the Court developed a substantive conception of equality<sup>14</sup>. A substantive conception of equality requires that the judicial analysis of a discriminatory practice assesses the rule’s impact on the disadvantaged group, instead of trying to guarantee the neutrality of rules regardless of the practical disproportional effects they may have on certain vulnerable groups.

In *Andrle v. Czech Republic*<sup>15</sup> the Court adopted a substantive approach on its analysis of the national measure that established different pensionable ages for women and men due to women’s reality and life circumstances in Czechoslovakia and stated that:

“(...) the more favourable treatment of women who raised children was originally designed to compensate for the factual inequality and hardship arising out of the combination of the traditional mothering role of women and the social expectation of their involvement in work on a full-time basis, the Court considers that this measure pursued a legitimate aim”<sup>16</sup>.

Under review was a measure that established the pensionable age for man was 60 and for women 53-56 years old and 57 years old if they did not have children. Thus, for the ECtHR the differential treatment of women with regards their pension ages was justifiable to compensate their treatment and reality in a communist Czechoslovakia, even if today the roles of the two sexes evolved and changed. For the Court, the

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<sup>12</sup> Ibid, para 79.

<sup>13</sup> ALEXANDRA TIMMER, “Toward an Anti-Stereotyping Approach for the European Court of Human Rights”, 11 Human Rights Law Review 4, 2011, p. 711.

<sup>14</sup> Ibid, p. 711.

<sup>15</sup> ECtHR, *Andrle v. Czech Republic*, Application No. 6268/08, 2011.

<sup>16</sup> Ibid, para 53.

government could not be criticised for not pushing for a complete equalization of the two sexes treatment faster and argued that this task required “well-thought-out solutions since the State has to place this reform in the wider context of other demographic shifts, such as the ageing of the population or migration, which also warrant adjustment of the welfare system”<sup>17</sup>.

Furthermore, it considered that the main aim of the different pensionable ages was “reasonably and objectively justified (...) until social and economic changes remove the need for special treatment for women”<sup>18</sup>. A reasoning that led to rule that the government did not breach the Convention by looking at the measure not simply through a formalistic lens, but through one that takes into account the social, cultural and structural context lived by women in that country. This decision showcased that in certain circumstances the Court will endorse the adoption of positive action to compensate women for their disadvantageous position. Moreover, the Court decided in the same vein in *D.H and Others v Czech Republic*,<sup>19</sup> this time on a case of segregation of Roma children in schools and argued similarly that “positive action is expected from the authorities, in order to correct factual inequalities”<sup>20</sup>.

## 2.2 The differential treatment on the grounds of gender

The ECHR’s open end non-discrimination clause includes the category “sex” and, like other equality provisions enshrined in other human rights instruments, this term has been replaced by “gender”<sup>21</sup> and includes gender identity. Although the ECtHR never used this precise qualification, “sex” is one of the “suspect categories”, which means that any differential treatment on these grounds is only justifiable by “very strong or weighty reasons”<sup>22</sup>. As mentioned above, in *Abdulaziz, Cabales and Balkandali v. The UK*, the Court for the first time clearly affirmed the importance of the achievement of the equality of sexes as a main goal of the High Contracting Parties of the Council of Europe and imposed the “very weighty reasons” test to the analysis of measures adopted on these grounds. Since that landmark case, the Court approached gender equality from different angles, to highlight only a few, in cases of gender-based

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<sup>17</sup> Ibid, para 58.

<sup>18</sup> Ibid, para 60.

<sup>19</sup> ECtHR, *D.H and Others v Czech Republic*, Application No. 57325/00, 2007.

<sup>20</sup> TIMMER, *Human Rights Law Review*, p.712.

<sup>21</sup> Regardless of the different meaning of the two concepts.

<sup>22</sup> HARRIS, O’BOYLE, BATES AND BUCKLEY, *Law of the European Convention on Human Rights*, p. 796.

violence, childbearing, religious symbols worn by women, female sexuality and ageism. For instance, in the case *Opuz v. Turkey*, on domestic violence, the insufficient protection of the applicant's mother offered by the police led to the death of the victim, which the Court considered a violation of article 14 in combination with articles 2 and 3 of the Convention. In this decision, the ECtHR cited article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), stating that "the CEDAW Committee has reiterated that violence against women, including domestic violence is a form of discrimination against women"<sup>23</sup>.

Later, in *Unal Tekeli v. Turkey*, the Court considered that Turkey breached article 14 in conjunction with article 8 of the ECHR when the applicant was refused the right to keep her maiden's name once she got married, differently from what happened with men who could keep their surnames. The Court considered that this was a case of discrimination and approached gender equality from a substantive perspective intertwining sex discrimination with other grounds for differential treatment, such as race, origin, colour or sexual orientation, stating that:

"(...) the perception of women as primary child-carers and men as primary breadwinners cannot, by themselves, [...] amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation"<sup>24</sup>.

The Government argued that the Turkish law, forbidding women to keep their surname after marriage, aimed at preserving family by reaffirming the husband's role as head of the family. Nevertheless, by doing so, it not only perpetuated the gender stereotype of "man's primordial role and the woman's secondary role in the family"<sup>25</sup>, and heteronormativity as the husband would exclusively be the head of the family, excluding LGBTIQ+ families that can be composed by two male or two women. For the Court the arguments put forward by the Turkish Government were weak and family unit would be "preserved and consolidated where a married couple chooses not to bear a joint family name"<sup>26</sup>. Furthermore, the ECtHR stated that "the obligation on married women, in the name of family unity, to bear their husband's surname - even

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<sup>23</sup> ECtHR, *Opuz v. Turkey*, Application No. 33401/02, 2009, para 187.

<sup>24</sup> ECtHR, *Unal Tekeli v. Turkey*, Application No. 29865/96, 2009, para 63.

<sup>25</sup> *Ibid*, para 63.

<sup>26</sup> *Ibid*, para 66.



if they can put their maiden name in front of it – has no objective and reasonable justification” for the gender-based difference in treatment argued in by the applicant<sup>27</sup>.

Apropos the Court recognized, in *Unal Tekeli v. Turkey*, the gender stereotype that results from traditionally a woman taking her husband’s surname and argued that family unity is not reflected only through a joint family name and added that “it can be reflected just as well by choosing the wife's surname or a joint name chosen by the couple”<sup>28</sup>. In this judgement, the Court directly approached a gender stereotype that was a determinant factor of the differential treatment of women and men in Turkey. Condemning stereotypes, as it will be shown below, is a key dimension of the ECtHR’s assessment of gender equality cases and an analytical lens that brings to light cases sexism, misogyny, and patriarchal structures.

### 3. Making gender stereotypes visible at the ECtHR

A stereotype as a “generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by members of a particular group”<sup>29</sup>. One can easily grasp the meaning of what a stereotype is but “we cannot entirely refute the practice of generalisations about a group of people” as law and rules are based on generalisations about to whom they apply.<sup>30</sup> While Peroni and Timmer conceive stereotypes as “beliefs about groups”<sup>31</sup> and explain that there can be prescriptive stereotypes, which prescribe a behaviour or an appearance to a group of people and there are also descriptive stereotypes that describe a statistical truth about a group, without the individual nuances.

Cook and Cusack define gender stereotypes as “beliefs about the personal attributes of women and men”<sup>32</sup>. This definition is not, however, exempted from criticism and has been pointed out for not being inclusive enough and disregarding the intrinsic fluidity of the concept of gender.

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<sup>27</sup> Ibid, paras 66 – 68.

<sup>28</sup> Ibid, para 64.

<sup>29</sup> REBECCA COOK AND SIMONE CUSACK, *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, 2010, p. 9.

<sup>30</sup> Concurring Opinion of Judge Motoc in *Carvalho Pinto de Sousa Morais v. Portugal*, para. 12.

<sup>31</sup> LOURDES PERONI AND ALEXANDRA TIMMER, “Gender Stereotyping in Domestic Violence Cases – An analysis of the European Court of Human Rights’ Jurisprudence’ in *Stereotypes and Human Rights Law*”, EVA BREMS AND ALEXANDRA TIMMER (eds.), Intersentia, 2017, p. 40.

<sup>32</sup> COOK AND CUSACK, *Gender Stereotyping: Transnational Legal Perspectives*, p. 20.

The core of this study is gender-based discrimination and the next subsections will address gender stereotyping through a jurisprudence analysis of the ECtHR. Identifying, naming, and sanctioning harmful gender stereotyping represents a powerful tool against structural discrimination.

### 3.1 The principle of anti-stereotyping and the ECtHR

For some, anti-stereotyping is “emerging as a transformative device in European human rights law”<sup>33</sup>, others refer to it as a methodology that “uncovers and contests the patterns that lead to structural discrimination” and a “a tool that the ECtHR could use to improve its reasoning to more fully protect specifically disadvantaged groups against stereotyping”<sup>34</sup>. This principle is usually conceptualized in two stages: firstly, “naming” the stereotype and secondly “contesting” it.<sup>35</sup> In this light, Oja and Yamin suggest that to play a transformative role dismantling gender stereotype, firstly, the Court would have to identify the gender stereotype (for example, a law that implied that women’s role is being a homemaker) and secondly, to ask whether that gender stereotype “denies women a benefit or imposes an undue burden, and whether it diminishes their dignity or otherwise marginalizes them”<sup>36</sup>

The following analysis of the case-law draws the attention to the Court’s *modus operandi* in cases of gender stereotyping and discusses whether its adoption of anti-stereotyping rulings impacts structural discrimination against women. For those purposes, the cases *Konstantin Markin v Russia and Khamtokhu and Aksenchik v. Russia* will be analysed in turn as examples of the first steps of the Court’s approach addressing gender stereotypes, followed by a most recent set of cases *Carvalho Pinto de Sousa Morais v. Portugal, Jurčić v. Croatia* and *G.M. and others v. Moldova*.

### 3.2 Making gender stereotypes visible

#### 3.2.1 *Konstantin Markin v. Russia*

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<sup>33</sup> LIV N HENNINGSEN, “The emerging anti-stereotyping principle under article 14 ECHR – Towards a Multidimensional and Intersectional Approach to Equality”, *European Convention on Human Rights Law Review*, 3, 2022, p. 185.

<sup>34</sup> TIMMER, *Human Rights Law Review*, pp. 709 - 712.

<sup>35</sup> *Ibid*, p. 710.

<sup>36</sup> LIIRI OJA AND ALICIA ELY YAMIN, ““Woman” in the European Human Rights System: How is the reproductive rights jurisprudence of the European Court of Human Rights constructing narratives of women’s citizenship”, *Columbia Journal of Gender and Law*, Vol. 32, No. 1, 2016, p. 64.

In the seminal case *Konstantin Markin v Russia*<sup>37</sup>, the Court clearly stated that “States may not impose traditional gender roles and gender stereotypes” – setting the scene for the contestation of gender stereotypes in the proportionality assessment of gender equality cases. For the ECtHR, a law that treated men and women differently in relation to the enjoyment of parental leave was discriminatory and represented an obstacle to the advancement of gender equality.<sup>38</sup> The applicant, Konstantin Markin, a Russian military serviceman was denied three-year parental leave to take care of his three children because under Russian law such leave could only be granted to female military personnel. Mr. Markin reacted against the national authorities’ decision arguing that it was discriminatory on the grounds of sex and that “the argument that women had a special social role in the upbringing of children was based on gender stereotypes”<sup>39</sup>. Furthermore, he argued that it perpetuated

“gender stereotypes, inequality and hardship arising out of women’s traditional role of caring for the family in the home rather than earning money in the workplace. As a result, that policy discriminated both against men (in family life) and against women (in the workplace)”<sup>40</sup>.

The ECtHR applied the “very weighty reasons” test<sup>41</sup> and found that the Russian law breached article 8 together with article 14 of the Convention. Thus, the difference in treatment on the grounds of sex could not be justified with references to traditions, general assumptions, or prevailing social attitudes. In the judgement, the stereotype was expressly named and the negative repercussions, for both man and women, made visible:

“The Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation”<sup>42</sup>.

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<sup>37</sup> ECtHR, *Konstantin Marin v Russia*, Application No. 30078/06, 2012.

<sup>38</sup> *Ibid*, para 127.

<sup>39</sup> *Ibid*. para 104.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*, para 127.

<sup>42</sup> *Ibid*, para. 143.

The Court “dismantles an important stereotype”<sup>43</sup> in *Markin*: “woman – homemaker / man-breadwinner”. Furthermore, it is made clear in the decision that States are prevented from “imposing traditions that derive from the man’s primordial role and the woman’s secondary role in the family.”<sup>44</sup>

The relevance of this case rests mostly on the first steps taken by the Court for the establishment of the principle of anti-stereotyping and the reiteration that the perception of women as primary caregivers and men as primary bread winners does not justify differential treatment. However, some significant aspects were left out of the equation, for instance how this policy impacted on women in the Russian military. Thus, neglecting that these harmful gender stereotypes could also affect them, for example through the maintenance of the “gender pay gap in Europe, lower paying work for women, and a significant motherhood penalty”<sup>45</sup>.

Recently, in *Beeler v Switzerland*,<sup>46</sup> the Court addressed once more the same gender stereotype affecting parenting and care.<sup>47</sup> The Court upheld the applicant’s claim of discrimination on the grounds of sex following the termination of his widower’s pension. After the death of his wife, Mr. Beeler stayed home to look after his young children and was granted a “widower’s pension” under the Federal Law on Old-Age and Survivors’ Insurance. Once his younger daughter reached the age of majority his pension was terminated, in accordance with the relevant law. The scenario would have been different if Mr. Beeler was a woman as, differently from widowers, widows were not deprived of their entitlement when their children reached the age of majority.

For the Court, this differential treatment on the grounds of sex was not justified and violated article 8 in conjunction with article 14 of the Convention. From the perspective of gender stereotypes, after reaffirming *Markin*, the ECtHR stressed that the Swiss law under review perpetuated “prejudices and stereotypes regarding the nature or the role of women in society and is disadvantageous both to women’s

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<sup>43</sup> TIMMER, *Human Rights Law Review*, p. 727.

<sup>44</sup> *Konstantin Marin v Russia*, paras. 127 and 142.

<sup>45</sup> NATALIE ALKIVIADOU AND ANDREA MANOLI, “The European Court of Human Rights Through the Looking Glass of Gender: An Evaluation” *Goettingen Journal of International Law*, 2021, p. 10.

<sup>46</sup> ECtHR, *Beeler v Switzerland*, Application no. 78630/12, 2022.

<sup>47</sup> For an in depth analysis of the case see ALICE MARGARIA, ‘Freeing Fatherhood From Breadwinning – Are we ready for (formal) equality? *Beeler v. Switzerland*’, in *Strasbourg Observers*, January 2023, available in <https://strasbourgobservers.com/2023/01/24/freeing-fatherhood-from-breadwinning-are-we-ready-for-formal-equality-beeler-v-switzerland/> (accessed on the 27<sup>th</sup> of January 2023).

careers and to men's family life".<sup>48</sup> As pointed out by Magaria in *Beeler*,<sup>49</sup> like in *Markin*, the Grand Chambre clearly stated that legislation that treated differently men and women based on the mother primary carer and father bread winner roles was reinforced stereotypes and was not justifiable under the ECHR. The main difference between these two cases, in this author's opinion,<sup>50</sup> lies on the anti-stereotyping approach the Court took in *Beeler* grounding the assessment and analysis on the specific circumstances of the case and the individual role Mr. Beeler played in his children lives. The Court seems to have taken a welcome step forward and departed from the general contestation of gender stereotypes to an individual reasoning laying the bases for further developing the application of the principle of anti-stereotyping.

### 3.2.2 *Khamtokhu and Aksenchik v. Russia*

In *Khamtokhu and Aksenchik v. Russia*<sup>51</sup>, the Court discussed whether it was discriminatory for the State to, *a priori*, exempt women, juveniles, and elderly people from life imprisonment. As a result of this measure, only men between the ages of 18 and 65 could be sentenced this penalty, thus entailing differential treatment between men and women in relation to life imprisonment. The Grand Chamber, even if not unanimously, found that there was no violation of the ECHR and agreed with the Russian government's position. One of the arguments put forward by the government in support of the above-mentioned measure was women's "special role in society which related, above all, to their reproductive function"<sup>52</sup> and "physiological differences between the sexes". The State argued that the Russian Criminal Code did not violate article 14 taken in conjunction with article 5 of the ECHR because of women's gender role as mothers and their exercise of their reproductive function, and that from an international law perspective, a "more humane approach" was provided to women<sup>53</sup>.

Despite the lack of consonance on the bench, the majority in the ECtHR's Grand Chamber agreed that there was no breach of the Convention, regardless of the

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<sup>48</sup> *Beeler v Switzerland*, para 113.

<sup>49</sup> MARGARIA, 'Freeing Fatherhood From Breadwinning - Are we ready for (formal) equality? *Beeler v. Switzerland*', 2023.

<sup>50</sup> *Ibid*.

<sup>51</sup> ECtHR, *Khamtokhu and Aksenchik v. Russia*, Applications nos. 60367/08 and 961/11, 2017.

<sup>52</sup> *Ibid*, para 47.

<sup>53</sup> *Ibid*, para 45. The Russian Government mentioned article 4 (2) of the the UN Convention on the Elimination of All Forms of Discrimination against Women and stated that special measures aimed at protecting maternity were not to be considered discriminatory.

indisputable difference in treatment on grounds of sex and age<sup>54</sup>. Moreover, the Court considered legitimate the aim of promoting “the principles of justice and humanity” through a sentencing policy which takes into consideration “the age and “physiological characteristics” of various categories of offenders”<sup>55</sup>.

Once more, and reaffirming the *Markin* case, the ECtHR rejected any differential treatment based on sex which could “be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation”<sup>56</sup>. Still, the Court argued that it was not within its powers to decide what is the appropriate term of detention applicable to a particular offence leaving that task within the margin of appreciation of the respondent State and the lack of European consensus concerning the imposition of life imprisonment<sup>57</sup>.

While condoning harmful gender stereotypes, the Grand Chamber decided that there had been no age discrimination (by sixteen votes to one) and that there had been no gender discrimination in the case (by ten votes to seven) allowing, to a certain extent, a measure that perpetuated some stereotypes, even if, those affected by them could be take advantages from it.

The six separate opinions to this judgement highlight the conflicting positions of the Grand Chamber judges on the matter and are a key element to unpack implications of this outcome within the wider debate of gender stereotypes.

Judges Nussberger, Turković and Mits in their concurring opinions stressed that deciding otherwise would reverse the trend of abolishing life sentences. Turković argued that legislation which exempted women from life imprisonment reflects “judicial paternalism”, however, that the complexity of the case led him to vote with the majority<sup>58</sup>. Alternatively, Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadlmayer in their partly dissenting opinion disagreed with the majority in what concerned not finding the Russian legislation discriminatory on the grounds of sex and argued that the Court had not properly address the “very weighty reasons

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<sup>54</sup> Ibid, para 69.

<sup>55</sup> Ibid, para 70.

<sup>56</sup> Ibid, para 78.

<sup>57</sup> Ibid, paras 79 and 85 – 86.

<sup>58</sup> Ibid, Concurring Opinion of Judge Turković, para 3.

test” in this regard<sup>59</sup>. In addition, these judges stressed that international instruments, like CEDAW, which protect women in specific situations, aim at providing proper protection in cases, for instance, of pregnancy or maternity and not solely due to their sex. Furthermore, that a measure like the one under review could, in fact, compromise maternity and was justified on the perception that women have a diminished “power endurance”<sup>60</sup>:

“Accordingly, we find it difficult to accept that the fact of prohibiting life imprisonment and providing for a maximum term of imprisonment of twenty years for women (...) amounts to a “special measure” aimed at protecting maternity within the meaning of Article 4, paragraph 2, of the CEDAW. Legitimate doubts can be raised in this regard, especially as even in the case of a twenty-year prison sentence the prospect of maternity will usually be compromised.”

Judge Pinto de Albuquerque dissented from the majority arguing that “the stereotyped message being conveyed here is that women do not have the same power of endurance as men”<sup>61</sup> and that it should not constitute a legitimate ground justifying a difference in treatment. Pinto de Albuquerque further argued that the protection against discrimination on the grounds of sex “should not serve as pretext for constantly viewing women as victims which would be damaging to their cause and would end up being counterproductive”<sup>62</sup>.

*Khamtokhu and Aksenchik v. Russia* is a troublesome judgement when analysed from the angle of the anti-stereotyping principle. The Court did name the stereotype of women experiencing a differential treatment of the grounds of sex but did not contest it since it dealt with the complex matter of life imprisonment. Furthermore, by not addressing the case from the perspective of the specific vulnerabilities of certain groups of women (such as pregnancy), the Court made the vulnerabilities of pregnant women and mothers, vulnerabilities of every woman and, by doing so, agreed with the government’s position.

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<sup>59</sup> Ibid, Concurring Opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadlmayer, paras 2-3.

<sup>60</sup> Ibid, para 7.

<sup>61</sup> Ibid, Concurring Opinion of Judge Pinto de Albuquerque, para 41.

<sup>62</sup> Ibid, para 8.

This reasoning protracts the gender stereotype of women being defined from the outset through motherhood. Thus, excluding from that role others who may deserve the special protection that parenthood should grant (for example, fathers who are primary carers, or who would suffer from being away of their children) and assumes an essentialist view of womanhood. Despite the being criticized for judicial paternalism, the majority played along with gender stereotypes, which were previously contested in *Markin*, instead of addressing the case from a neutral stance that would contribute to the dismantling of another harmful belief about women.

#### **4. What if I don't fit the description? The case of women sexual and reproductive freedom at the ECtHR**

The *Carvalho Pinto de Sousa Morais v. Portugal*<sup>63</sup> case addressed gender stereotypes and discrimination from an intersectional perspective (even if not explicitly) as the applicant was a victim of sexism and ageism. The applicant went through a failed gynecological surgery that left her experiencing pain, incontinence, limited mobility, and no sex life. In addition, she suffered from depression, and had suicidal thoughts. At the national level, the Portuguese Supreme Administrative Court, in an appeal, reduced the non-pecuniary compensation for the damage she suffered from 80.000 to 50.000 eur and the compensation to pay for domestic work from 16.000 to 6.000 eur and held that “Additionally, it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age”<sup>64</sup>.

The Portuguese court justified the decision reducing the compensation for non-pecuniary damage with the argument that the applicant at the time had two children and was fifty years old, therefore, sex should not be as important as it might have been in the past. Further, in relation to the compensation for domestic work, the national court argued that:

“(…) (1) it has not been established that the plaintiff had lost her capacity to take care of domestic tasks, (2) professional activity outside the home is one thing while domestic work is another, and (3) considering the age of her children, she [the plaintiff] probably only needed to take care of her

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<sup>63</sup> ECtHR, *Carvalho Pinto de Sousa Morais v. Portugal*, Application no 17484/15, 2017.

<sup>64</sup> *Ibid*, para 16.



husband; this leads us to the conclusion that she did not need to hire a full-time maid (...)"<sup>65</sup>

For the Portuguese Supreme Administrative Court, the applicant was old to prioritize her sex life, but not too injured to take of her husband. By establishing such a clear connection between sexuality, reproduction, age and the traditional role of motherhood the national decision contributed to the stereotypical view that women's sexuality is "essentially linked to child-bearing purposes" (...) and thus ignored its physical and psychological relevance for the self-fulfillment of women as people"<sup>66</sup>.

The ECtHR compared the situation under analysis with cases where malpractice against two men in their fifties left them unable to have sexual relations. In the latter cases, the Portuguese Supreme Court considered that the "fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous blow" and "severe mental trauma,"<sup>67</sup> thus taking into consideration the importance of the plaintiffs' sex life, regardless of their age. Therefore, it was clear for the ECtHR that the applicant was treated differently on the grounds of sex and her age and that article 8 on the right to private life in conjunction with article 14 were breached as a result<sup>68</sup>.

The *Carvalho Pinto de Sousa Morais* case is an important case for several reasons. Firstly, because the Court refers expressly to the patriarchal and stereotypical traditional gender roles that justified the reduction of the applicant's compensations arguing that "the Supreme Administrative Court made a general assumption *without attempting to look at its validity in the concrete case* of the applicant herself."<sup>69</sup> Secondly, the intertwining of sexism and ageism showcases the intersectional dimension of the case. A dimension that the Court had the opportunity to address more explicitly but missed. <sup>70</sup> Despite referring to sex and age in *Carvalho Pinto de Sousa Morais*,<sup>71</sup> the

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<sup>65</sup> Ibid, para 16.

<sup>66</sup> Ibid, para 52.

<sup>67</sup> Ibid, para 55.

<sup>68</sup> Ibid, para 53.

<sup>69</sup> Ibid, para 52.

<sup>70</sup> LOURDES PERONI, Age and Gender Discrimination: Laudable Anti-stereotyping Reasoning in *Carvalho Pinto v. Portugal* in *Strasbourg Observers*, September 2017, available in <https://strasbourgobservers.com/2017/09/28/age-and-gender-discrimination-laudable-anti-stereotyping-reasoning-in-carvalho-pinto-v-portugal/> (accessed on the 30<sup>th</sup> of August 2022).

<sup>71</sup> *Carvalho Pinto de Sousa Morais v. Portugal*, paras 45 and 51.

ECtHR did not directly acknowledge that the intersection of those two grounds of discrimination cumulatively affected the applicant in a particular way.<sup>72</sup>

*Carvalho Pinto de Sousa Morais* is, nevertheless, a step forward not only for the development of the anti-stereotyping principle, but also because it highlights the potential of the intersectional dimension of the prohibition of discrimination enshrined in article 14 of the ECHR.

### **5. Intersectionality: the one which the ECtHR refuses to name?**

Since *Markin*, the Court expressly addressed gender stereotypes in gender equality cases and contributes to the shifting the paradigm of the assessment in discrimination cases. Regardless of the impact that the Court's case law had in advancing the principle of anti-stereotyping, this analytical tool is still not systematically used by the Court to expose and condemn structural gender discrimination.

Notably, the ECtHR has recognized that stereotyping is a dimension of discrimination that negatively affects the individual if judged based on general assumptions and behaviours that conceal their individual capacities and needs. The case law revealed that the Court's assessment of discrimination in cases of discrimination against women is changing and is committed to deconstructing harmful gender stereotypes, however there is still room for improvement.

Clearly recognizing the interaction between gender and other grounds of discrimination is one way of refining the legal reasoning of the Court on these matters. The lack of acknowledgment of the interaction of gender with other grounds of discrimination risks reiterating stereotypes by portraying dominant experiences as the norm.<sup>73</sup>

Discrimination is a multidimensional phenomenon that requires more than a single axis decontextualized approach to substantively engage with its structural nature. The roots of the discussion on intersectionality go back the seminal work of Crenshaw.

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<sup>72</sup> HENNINGSSEN, "The emerging anti-stereotyping principle under article 14 ECHR - Towards a Multidimensional and Intersectional Approach to Equality", p. 214.

<sup>73</sup> OLGA FRANČZAK, '(Stereo)typical Law: Challenging the Transformative Potential of Human Rights', in *Guney, G., Davies, D., Lee, PH. (eds) Towards Gender Equality in Law.*, Palgrave Macmillan, Cham, 2022, p. 23.

This author argued that the dominant ground-specific approach overlooked specific forms of discrimination faced by black women.<sup>74</sup>

An intersectional approach to discrimination is one that recognizes that race, age, gender, disability, class, sexual orientation or other social identities are permeable, and that discriminatory practices and measures can conflate and overlap. Even if courts, like the ECtHR, have not yet explicitly addressed cases from this perspective, intersectionality is a key analytical tool when inequalities overlap – which is more common than not when one is in a vulnerable position (e.g. migrant women, LGBTQI+ asylum seekers, disabled pregnant women).

In *Carvalho Pinto de Morais*, the applicant was discriminated due to the interaction of female gender and age, but the majority court did not explicitly articulate them. A clear articulation of two grounds these would have strengthened the applicant's claim of discrimination by making her vulnerability more evident and acknowledged the age dimension, arguably overlooked in the case. By neglecting an intersectional dimension to gender discrimination, the ECtHR fails to assess the context that would contribute to name the stereotypes and also would also address the roots of these harmful generalizations.

Furthermore, engaging with more openly with the multidimensional nature of discrimination embraces a context-sensitive<sup>75</sup> assessment moving away from the “single-axis” focus often embedded by formalistic considerations that disregard the substantive of the damages caused. The ECtHR is not alienated of the multiplying effect of several grounds of discrimination upon certain groups of vulnerable people. *B.S v. Spain*<sup>76</sup> was an important development in this direction, the Court recognized, in this case, the special vulnerability of a migrant, female sex worker and found a violation of article 14 in conjunction with article 3 ECHR. Despite, the term intersectionality not being in the reasoning it revealed acknowledge that migrant sex workers were rendered more vulnerable to discrimination than other women or men.

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<sup>74</sup> KIMBERLÉ CRENSHAW, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 140 *The University of Chicago Legal Forum* 139-167, 154.

<sup>75</sup> SHREYA ATREY, *Intersectional Discrimination* (Oxford University Press, 2019).

<sup>76</sup> ECtHR, *B.S v. Spain*, Application no. 47159/08.

More recently, in *G.M. and others v. Moldova*<sup>77</sup>, a case concerning women with intellectual disabilities and reproductive freedom, the Court missed another opportunity to diagnose the overlapping vulnerabilities of the applicants. The Grand Chambre found a violation of article 3 ECHR due to the imposition of abortions and contraceptive measures upon women with intellectual disabilities. Despite the importance that this judgement had on the reproductive freedom of women with intellectual disabilities, the Court could have taken this opportunity to explore how sex and intellectual disabilities interact as overlapping grounds of discrimination. Stereotypes about the reproductive rights of women with intellectual disabilities in Moldova were named,<sup>78</sup> but these practices were not framed under article 14. By doing so the Court would have contributed to exposing the structural discriminatory dimension of the case and explicitly mention the intersecting vulnerabilities of the applicants.

## 6. Conclusion

Assumptions or perceptions that perpetuate restrictive and discriminatory structures preserving gender inequality are mostly based on harmful stereotypes. The analysis of the ECtHR case-law on discrimination on the grounds of gender aimed at answering the question of how women are judicially perceived within the system of the European Convention of Human Rights and what has been the Court's role in the dismantling women stereotypes that contribute to their discrimination at a structural level. Some have argued that "eradicating the roots of gender discrimination is a project that is larger than the law"<sup>79</sup>. Indeed, it is. It requires a structural and systemic effort and one that depends greatly on how judges' approach and analyse discriminatory practices and measures. The paradigm shifted within the ECtHR's case law on gender equality by clearly naming stereotypes that may discriminate women and stressing their negative impact of the achievement of gender equality. Nonetheless, there is potential to move even further from the single axis, formalistic and decontextualized assessment. The first steps were already taken by the Court towards a more substantive engagement, it remains to be seen whether it will take the route of intersectionality.

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<sup>77</sup> ECtHR, *G.M. and others v. Moldova*, Application no. 44394/15.

<sup>78</sup> *Ibid*, para 122.

<sup>79</sup> TIMMER, *Human Rights Law Review*, p. 738.