

ADOPTING A FEMINIST LEGAL PERSPECTIVE IN ADJUDICATION:
A COMPARATIVE ANALYSIS OF THE JUDGMENTS OF THE
CONSTITUTIONAL COURT OF TURKEY AND EUROPEAN COURT OF
HUMAN RIGHTS

A Master's Thesis

by
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July 2024

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By Aysu Gül Yılmaz

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ABSTRACT

ADOPTING A FEMINIST LEGAL PERSPECTIVE IN ADJUDICATION: A COMPARATIVE ANALYSIS OF THE JUDGMENTS OF THE CONSTITUTIONAL COURT OF TURKEY AND EUROPEAN COURT OF HUMAN RIGHTS

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Laws of a legal system, as artificial creations, reflect the dominant ideologies present in the society. Therefore the inherent perspective of the legal system in any given society is male-oriented. This notion, consequently, results in the legal system perpetuating patriarchal values and gendered power hierarchies. This thesis will then argue that the judiciary, and especially the judges, both due to their significant social role as State agents and subsequently their responsibilities regarding the protection of human rights, are in a position to ameliorate this situation. Judicial ethics in this respect will present to be the philosophical basis for judges' ethical duties in realizing human rights, while the national and international legal framework will set out the positive law basis. Practical challenges will then be addressed to demonstrate the other side of the coin, specifically how the politicization of the judiciary and judicial conduct may present to become barriers for access to justice for women. The focus will be on judicial stereotyping and the inherent bias of

the judiciary, and how this phenomenon affects the adjudication processes. Feminist legal methodology is thus proposed to advocate for an intersectional gender perspective in judicial decision-making, in which this thesis will apply the theoretical framework presented to practical case law, by conducting a comparative analysis of the Constitutional Court of Turkey's and the European Court of Human Rights's judgments on various issues on gender. The ultimate aim of this thesis is to suggest that a gender-conscious approach to judicial decision-making will improve the legal system, help it function free from bias.

Keywords: Feminist Legal Methodology, Judicial Stereotyping, Judicial Ethics

ÖZET

YARGILAMADA FEMİNİST HUKUK PERSPEKTİFİNİN BENİMSENMESİ: T.C. ANAYASA MAHKEMESİ VE AVRUPA İNSAN HAKLARI MAHKEMESİ KARARLARININ KARŞILAŞTIRMALI ANALİZİ

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Hukuk kuralları, insan yaratımı olarak, toplumda var olan baskın ideolojileri yansıtır. Bu nedenle herhangi bir toplumdaki hukuk sisteminin perspektifi erkek odaklıdır. Sonuç olarak, hukuk sistemi, ataerkil değerleri ve cinsiyete dayalı güç hiyerarşilerinin sürdürülmesine neden olur. Bu tezde, yargının ve özellikle de yargıçların, hem Devlet organları olarak üstlendikleri önemli toplumsal roller, hem de insan haklarının korunmasına ilişkin sorumlulukları nedeniyle, bu durumu düzeltebilecek bir konumda oldukları savunulacaktır. Bu bağlamda yargı etiği insan haklarının hayata geçirilmesinde hakimlerin etik görevlerinin felsefi temelini sunarken, ulusal ve uluslararası yasal çerçeve de pozitif hukuk temelini sağlayacaktır. Daha sonra madalyonun diğer yüzü, özellikle de yargının siyasallaşmasının ve yargısal davranışların kadınlar için adalete erişimin önünde nasıl engeller teşkil edebileceğini göstermek üzere pratikte karşılaşılan zorluklar ele alınacaktır. Tezin odak noktası, yargısal kalıplaşma ve yargının doğasında var olan önyargı ve bu olgunun yargılama süreçlerini nasıl etkilediği olacaktır. Feminist hukuk

metodolojisi, yargı kararlarında kesişimsel bir toplumsal cinsiyet perspektifini savunmak için önerilecektir. Bu tez, Türkiye Anayasa Mahkemesi ve Avrupa İnsan Hakları Mahkemesi'nin toplumsal cinsiyetle ilgili çeşitli konulardaki kararlarının karşılaştırmalı bir analizini yaparak sunulan teorik çerçeveyi içtihadı uygulayacaktır. Bu tezin nihai amacı, yargısal karar alma süreçlerinde toplumsal cinsiyete duyarlı bir yaklaşımın hukuk sistemini iyileştireceğini ve önyargılardan arınmış bir şekilde işlemesine yardımcı olacağını öne sürmektir.

Anahtar Kelimeler: Feminist Hukuk Metodolojisi, Yargısal Kalıplaşma, Yargı Etiği

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AYM	: <i>Anayasa Mahkemesi</i> (Constitutional Court of Turkey)
CEDAW	: Convention on the Elimination of All Forms of Discrimination Against Women
ECHR	: European Convention on Human Rights
ECtHR	: European Court of Human Rights
ed/eds	: editor/editors
edn	: edition
GC	: Grand Chamber
ICCPR	: International Covenant on Civil and Political Rights
LGBTIQ+	: Lesbian, Gay, Bisexual, Transgender, Intersex, Queer +
TCC	: Constitutional Court of Turkey
trs.	: translated by

INTRODUCTION

“To build feminist dwellings, we need to dismantle what has already been assembled; we need to ask what it is we are against, what it is we are for, knowing full well that this we is not a foundation but what we are working toward. By working out what we are for, we are working out that we, that hopeful signifier of a feminist collectivity. Where there is hope, there is difficulty.”

– Sara Ahmed, *Living A Feminist Life*, p. 2

“Inequality is difficult to see when everything tells the unequal that the status quo is equality-for them.”

– Catherine A. MacKinnon, *Towards A Feminist Theory of the State*, p. 240

As an artificial creation, law assumes the perspective of the dominant social ideology present in society. In this vein, the existent jurisprudences are unequivocally male-oriented, meaning that they reflect patriarchal values and maintain gendered power hierarchies. In other words, the legal system, with all its institutions, serves to uphold patriarchal ideologies all the while repressing women’s perspectives. In this respect, the central question should be whether, and if yes then how, the same legal system can be used as a tool for the feminist quest to dismantle such patriarchal structures.

Feminist legal scholars have long since explored the concept of feminist approaches to judicial decision-making and how to introduce a gender dimension in practice. The reason to focus on the judiciary out of all the other legal institutions stems from the fact that the position of the judiciary as the safeguarding mechanism of

fundamental rights and freedoms, and the flexibility of judges in their reasoning and interpretation in cases, as well as the ethical responsibilities of judges, allow for a feminist approach to be adopted. Judiciary, in the scope of this thesis, will be used to denote to judges only, and will not regard other actors such as law enforcement or public prosecutors and their role in the adjudication process. On the other side of the coin, due to its special place in the organization of the State and power in society, the judiciary is both a site of immense opportunity for advancement and danger for backsliding.

In this context, this thesis will first present the central role of judges and their responsibility in realizing gender equality. Here, after explaining the critical role of judges in the society and the ethical duties that stem from this special role, this thesis will present the practical problems that affect the realization of this duty. Then, an overlook at the legal framework of both national and international levels will provide a basis for the obligations and responsibilities of the judiciary as State agents in upholding the principles of human rights law. Afterwards, in order to provide a new foundation for the conduct of judges, this thesis will present an account of feminist legal methodology and argue that feminist approaches and methods can be utilized in the advocacy for feminist and queer rights in judicial decisions. It will further suggest that the adoption of an intersectional gender perspective in adjudication will allow the points of view previously disregarded to find a place within the current patriarchal legal order.

The next chapter, then, will look into the adjudication of gender equality cases both at domestic and international order with a special focus on the jurisprudence of the Constitutional Court of Turkey and the European Court of Human Rights. The focus, in

both cases, will specifically be on the language employed by the courts with an aim to problematize the stereotypes used therein, as judicial stereotyping leads to secondary victimizations and new rights violations. The courts not unmasking and denouncing the stereotypes used by the public authorities in such cases will further be problematized in this chapter. The case law will be divided by themes, namely gender stereotypes and violence, autonomy, socio-economic rights, family, race and ethnicity, religion, and sexual orientation and gender identity, and look into how such stereotypes legitimize and produce discrimination and rights violations accordingly. The main aim of the thesis, in the end, is how the judiciary power of adjudication can be exercised in a gender-conscious framework.

This thesis will be comprised of two main chapters, first chapter titled “Presenting A Theoretical Account of The Judicial Responsibility to Realize Gender Equality” and the second “A Gender Conscious Perspective in The Practice Of The Judiciary”.

As such, Chapter I, in order to establish the duties of judges in realizing the human rights of women, will see to demonstrate the role of judges on both philosophical and legal grounds. Because judges’ conduct determines the ways in which State power is deployed, and their role is central to the realization of the rule of law, it is expected of them to meet the highest standards of ethics. Further, it is key that their judgments are morally defensible, and judges themselves ought to be responsible in ensuring that their conduct meets the conditions of legitimacy. In addition to independence and impartiality, courts

ought to examine and annul regulations that violate fundamental rights and freedoms in a way that is based on ethical principles as well as the positive law.

Section I-A will show that the judiciary becomes not only the arbiter or interpreter of existing national and international legislation, but also the main actor guiding the content of the norms (essence of law), their purpose (*telos*), their justiciability, and finally their impact on society (normative impact). The limits of judges' power to interpret the law differ in each legal system. Judicial ethics, as one of the dimensions of legal ethics, ensures respectability in the administration of justice with an aim to safeguard the public confidence in the judiciary. Therefore it will be demonstrated that judges, in their conduct, shall also engage in moral reasoning, meaning that the approach taken by judges shall go beyond strict legal positivism and that the judiciary should be conceptualized more than an arbiter that merely pronounces the word of the law. Moral reasoning, in this respect, is any reasoning practice about values and principles, rights, duties, not directly dictated by the text of the law. Due to the judges' positive obligations, as State agents, in the protection of human rights, it is important that they follow a professional code of ethics that explain and guide moral decision-making, lest they turn into the very public authority that commits such rights violations. The developing case law analysis in the second chapter will therefore try to concretize this notion. Judicial ethics therefore will serve the purpose of guiding judicial conduct in terms of minimizing the judge's political or ideological bias on the outcomes of cases. In this respect, it is crucial that judges, taken in the context of cases dealing with gender-sensitive problems, are required by their ethical obligations, to

be morally considerate in their decisions and to interpret the laws and situations accordingly.

However, as this thesis will demonstrate in section I-B, the concrete reflection of the exclusion of women from the patriarchal legal structure appears as barriers to access to justice. These barriers come to be in a myriad of ways, a most prominent one and the one that will be focused on for the purpose of this thesis is the usage of stereotypes in the language of judicial decisions. Stereotypes, while not being inherently harmful or problematic, become hazardous when utilized in ways to maintain and perpetuate the gender hierarchy or deny and infringe upon the fundamental rights and freedoms of marginalized social groups. In particular, judicial stereotyping where the conduct of the judges or other actors in a court proceeding depend on or perpetuate gender stereotypes will be especially scrutinized.

Further, especially in the face of authoritarian regimes across the globe where the achievements of democracy have been in a constant backslide, with executive and legislative becoming fused and heavily reflecting the right-wing ideologies and the rise of the anti-gender movement, the judiciary also carries the risk of politicization and consequently working to the detriment and curtailment of human rights. Politicization of the judiciary therefore could lead to perpetuating dominant ideologies. However, due to its *raison d'être*, the judiciary is tasked with the objective of safeguarding fundamental rights and freedoms. Even in cases where the other branches of the governments are politicized because the primary role of the judiciary in democratic societies, especially constitutional courts, is to recognize and protect universal legal principles, judicial

activism comes to be an important aspect. Accordingly, the recognition of marginalized social groups as subjects of law and in relation to public power, as well as the recognition and protection of rights and freedoms is necessary. Therefore, in addition to the function of judges to reveal the text of the law, systems that allow for judicial activism also affect the legalization of gender norms. At this point, just as interpretation methods guide the judge, judicial ethical principles are also an important tool in the judge's activity.

Section II will then lay out the States' judicial responsibility born from both national and international legislature, and postulate that in the implementation of judicial independence and impartiality is a crucial part in human rights protection. In this section, this thesis will try to establish that how, in addition to philosophical arguments, the legal framework already in place regarding the ethical conduct of judges can serve the interest of gender equality. In this respect, the focus will be on the responsibilities of judges as State agents, arising from both national and international obligations of the State, in protecting and realizing human rights. For this, both the national legal framework and the international hard and soft law, on both the UN and regional levels, will be examined.

In section III-A, after establishing the definitions of the terminology that will be used frequently in this thesis, the feminist theory that unearths the male-oriented nature of the existent jurisprudence will be examined in depth. Legal rules, and consequently the practice of law, are created artificially by men in a male dominant social order and they are built upon patriarchal prejudices. Through this, law becomes both a symbol and an instrument for the implementation of male hegemony and further works to the exclusion of narratives that do not correspond to the dominant ideology, such as women's points of

view. The question then becomes how gender works in law, and how law reproduces gender.

The question of equality is therefore an important point of contention, because the established understanding of equality as a legal terminology proves to not be adequate. For this reason, this thesis will present different accounts of feminist approaches to the question of equality, and conclude that structural change is necessary. Afterwards, an account of the public/private divide will be presented in order to consider the effects the achievements of the feminist movements had on the understanding of state responsibility and the relationship between women and the state.

The central aim in this section is therefore to showcase how law conceals existent inequalities and criticize the understanding of equality that has long failed to reflect the substantive problems. The fact is, the legal system and consequently its definition of equality takes men as the standard and therefore lacks the tools and methods to redress the situation of non-dominant social groups. In order to remedy this, one must first establish the state responsibility regarding achieving gender equality, so that it could translate to the conduct of judges as State agents. In the face of a legal structure that ignores women, it is important to highlight the recognition of women as legal subjects and the rights of the women as human rights. This section will then demonstrate that even if women's rights are recognized in domestic and international jurisdictions, and that certain legal protections do exist on paper, State practice that neglects the enforcement of such rights and protections will therefore render such recognition of women's rights meaningless and moreover work to perpetuate the subordination of women.

Method, in this sense, is important to establish feminist claims as legitimate and consequential. Further, it would not be possible to dismantle the existing power structures by utilizing the same traditional methods that defined those structures in the first place, lest one falls into the trap of recreating these structures anew. In section III-B, therefore, feminist legal methods will be examined to gauge how they could be utilized for the claims this thesis aims to realize. Feminist legal methods have developed with a view to problematize the legal system as it is, created from the perspective of the dominant ideology, patriarchy; which effectively worked to subordinate and discriminate on the basis of gender. Therefore, these methods will be useful to establish the claim that in order to insert women's perspectives into legal methods, see that non-dominant narratives find their reflection in the legal system, and approach legal issues with a gender conscious perspective, it is crucial to establish a feminist legal method.

The main goal of feminist methods is unearthing the subjugated knowledge on women's experiences, asking the women question and understanding the diverse social realities that they face, raising consciousness, gaining a historical understanding and tracing how patriarchy affects the lived realities of women and making a critical analysis of law as the bedrock upon which the subjugation of women is built on. This thesis will approach these structural issues from the perspective of the judiciary, both examining the way it perpetuates and legitimizes social injustices and looking for the ways it can ameliorate this situation. The purposed way to do is for the judiciary to utilize feminist legal methods in adjudication, especially taking an intersectional gender perspective.

The framework provided by the gender perspective allows for the examination of current legal procedures and regulations in order to highlight gender prejudices and stereotypes. Finding the different roles and responsibilities that are socially assigned based on various social statuses, exposing the rights and opportunities that these social statuses precipitate, exposing the power dynamics that these differences create, and examining the interactions between gender and race, ethnicity, religion, sexual orientation, age, and other factors are all necessary steps in adopting a gender perspective. Other steps include inquiring about the different impacts that laws and policies have on the basis of these grounds and determining whether a different treatment is either arbitrary or necessary.

Chapter 2, therefore, will look into the practical reflections of theories presented. As a consequence of the special emphasis put on the role of the judiciary in the safeguarding of rights of women, the denial of access to justice in the form of gender stereotypes internalized and utilized by the judiciary shall be contested, especially considering the fact that judicial decisions by virtue of having both individual and collective power frame the character of the judiciary.

To showcase this, this chapter will be dedicated to case law examples from both the Constitutional Court of Turkey (TCC) and the European Court of Human Rights (ECtHR, the Court, the Strasbourg Court). This thesis will then examine the respective approaches to gender-related cases of these two courts, compare and contrast them, and note their shortcomings as well as their strengths. Gender-related issues will be grouped by the stereotypes employed therein and the particular rights and freedoms that they damage. In this respect, the classification of the respective case law will be based on

gender stereotypes regarding gender-based and domestic violence, the autonomy of women in terms of sexual freedom and sexual violence, recognition of the gender identity of queer persons, the socio-economic reflections on the lives of women, familial relations, factors of race and ethnicity, religious freedom, and sexual orientation and gender identity issues. The goal of this section is to demonstrate how an intersectional gender approach could have improved the judicial activity of the two courts.

The ultimate aim of this thesis will be to present an account of an intersectional gender perspective to adjudication. Through the case law examples of these two courts, this thesis will demonstrate that, based on national and international law obligations as well as judicial ethics, employing the feminist methods proposed in the first chapter and especially the adoption of a gender perspective, judicial dismantling the dominant patriarchal ideology that has permeated the legal systems will be possible.

Keeping in mind that judicial decisions with stereotype-based reasonings or intentions give said stereotypes institutional backing as the judiciary acts on the authority of the State, gender stereotypes are therefore legitimized in the eyes of the public where certain social groups are alienated and/or degraded. In order to redress this situation, as discussed in the theoretical framework, feminist legal methodology and especially the adoption of an intersectional gender perspective is thus necessary. The main premise of this section is that, as important as international human rights instruments are, the rights and freedoms enshrined in such texts are only as good as the protection mechanisms that safeguard and realize those rights and freedoms. Decisions of the courts or treaty organs

have major influence not only on the parties of the specific case that has come before them but also on the progression of human rights as well.

This thesis will suggest that a feminist method focused on rebuilding decision-making practices to include women's point of view and to rid it off bias will ameliorate the legal system to work in a truly equal way.



CHAPTER I

PRESENTING A THEORETICAL ACCOUNT OF THE JUDICIAL RESPONSIBILITY TO REALIZE GENDER EQUALITY

I. The Role of Judges in Realizing Gender Equality

Throughout the evolution of societies, there has always been a figure that fulfilled the role of a judge, such as priests, elders, or even kings.¹ An official who settles disputes or guides people's conduct by referring to and applying pre-established standards is a central feature of all types of legal systems, and this feature presents to be the difference between law and other means of regulation that concern itself with social order.² Meaning that, so long as there has been a legal system, there existed an official who resolved conflicts by applying predetermined rules and standards.³ In the discharge of their function, these officials define the duties and rights of the citizens.⁴ Due to their direct and influential role on the rights and freedoms of people, judges present to be an important agent of the State in combating gender-based discrimination.

Legal rules, and consequently the practice of law, are created artificially by men in a male dominant social order. These rules are built upon patriarchal prejudices, and

¹ Leslie Green, "Law and the Role of a Judge" in Kimberly Kessler Ferzan, and Stephen J. Morse (eds.) *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* (Oxford University Press 2016) 322, 322.

² Green, 323.

³ Ibid.

⁴ Lydia Achode, "Judicial Ethics: A Key Tenet to Legal Ethics" (2022) 6 (1) *Starthmore Law Journal* 257, 260.

although the recognition of the principle of equality and prohibition of discrimination in both national and international legal texts has proven to be an advancement in terms of achieving gender equality, such formal equality has also proven to be insufficient.⁵ A legal system will contain many discriminatory laws and statutes in many cases. Even if a legal system seemingly eliminated its discriminatory, prejudiced and intolerant laws and created a more just system, the likelihood of which is infinitesimally low, the practical application and interpretation would still depend upon the judiciary. In other words, principles of equality or non-discrimination may have been established through both national and international legal frameworks in a system, but this formal equality would prove to be fruitless as the deep-rooted prejudices based on gender cannot simply be overcome by recognition of mere rules or laws. To ensure that the judicial process is successful in tackling the systemic inequalities and discrimination, it is important to examine the role of judges from an ethics perspective, and to try and establish a framework that would guide the conduct of judges so that they may interpret laws or render decisions in a gender-conscious manner.

⁵ Marco Evola, Ivana Krstić and Fuensanta Rabadán, “Feminist Judgments” in Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (eds.) *Gender-Competent Legal Education* (Springer Textbooks in Law 2023) 150.

A. Conceptual Framework to Explain the Fundamental Role of Judges

As state agents, judges' decisions represent the use of state power. Judicial decisions dictate and govern a state's stance on a particular issue, and has direct consequences on the citizens' interests.⁶ Therefore, it is of crucial importance that those who apply and interpret the law do so in ways that will ameliorate the conditions or guide the conduct of the subjects.⁷ Because judges' conduct determines in which ways the state power is deployed⁸, and their roles are central to the realization of the rule of law, it is expected of them to meet the highest standards of ethics.⁹ Further, it is key that their judgments are morally defensible¹⁰, and judges themselves ought to be responsible in ensuring that their conduct meets the conditions of legitimacy.¹¹

The decisions that a judge makes affect the lives or futures of people, and because all decisions that concern such subjects are ethical decisions, these judgments ought to be ethical as well.¹² Therefore, judges must be regulated and bound by ethical principles in their conduct. Further, it is crucial that these individuals that are tasked with the duty to apply the law adhere to the ethical principles so that they are able to effectively guide the behavior of those under their jurisdiction.¹³

⁶ Anthony R. Reeves, "Judicial Practical Reason: Judges in Morally Imperfect Legal Orders" (2011) 30 (3) Law and Philosophy 319, 319-320.

⁷ Green, 335.

⁸ Reeves, 339.

⁹ Achode, 260.

¹⁰ Reeves, 339.

¹¹ Reeves, 325.

¹² Gülriz Uygur, *Hukukta Adaletsizliği Görmek* (Türkiye Felsefe Kurumu 2013) 143.

¹³ Green, 335.

1. Judicial Ethics

As discussed above, because judges influence the law through the manner in which they write their opinions in decisions, or the way they decide on cases,¹⁴ upholding ethical standards is thoroughly important. These ethical standards find their expressions on philosophical grounds, as well as within the legal framework. Before providing an account of the legal framework that establishes state responsibility in this regard, this thesis will first present the standard of conduct that judges are expected to abide by.

The main tenets of judicial ethics are independence, impartiality, and integrity, to which judges are expected to adhere in their exercise of the judicial function. Combined, these values ensure a healthy administration of justice and the promotion of the rule of law.¹⁵ Because judicial ethics is fundamentally related to justice, which is a moral value, its main goal is the carrying out of judicial processes in a just, fair, and impartial manner.¹⁶

a. Independence and Impartiality

Judges are bound by some principles that shall guide legal decision-making which Hart calls “characteristic judicial virtues”.¹⁷ Accordingly, judges should exercise “impartiality and neutrality in surveying the alternatives; consideration for the interest of

¹⁴ Kent Greenawalt, “Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges” (1975) 75 (2) Columbia Law Review 359, 378.

¹⁵ Achode, 259.

¹⁶ Ergin Ergül, *Yargı Etiği Dersleri* (3rd edn, Adalet Yayınevi 2023) 56.

¹⁷ H.L.A. Hart, *The Concept of Law*, (3rd edn, Oxford University Press, 2012) 205.

all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision”.¹⁸

Impartiality entails the judges refraining from acting partially towards one party or exhibiting any form of prejudice or bias towards a particular party. The judge must refrain from acting with external bias, that is, under the influence of political bodies such as political parties, the parliament, or the government; and also with internal bias such as personal prejudices, sympathies or interests.¹⁹ External bias in this sense connotes to judicial independences whereas internal bias is to do with impartiality. Succumbing to these biases, in turn, would be a direct contradiction to the judiciary’s duty of protecting and realizing the rights and freedoms of people.

An independent judiciary, on the other hand, is a necessary by-product of the separation of powers doctrine and means that judicial duties are performed free of influence or oppression from any other institutions or persons. Separation of powers mainly refers to the judiciary being liberated from the other two branches, as the executive and the legislative demonstrate a close, often conjunct relationship regardless of the system of government in place.²⁰ Judicial independence is therefore a well-established feature in modern modes of government. The judiciary is independent from the legislative and executive branches of the government, and maintaining this independence serves to protect the public confidence in the judiciary. Besides the independence of the judiciary as a branch of the government, public trust in the judiciary is intrinsically linked to its

¹⁸ Ibid.

¹⁹ Andrew Heywood, *Politics* (4th edn, Palgrave Macmillan 2013) 345.

²⁰ Mehmet Turhan, *Anayasal Devlet* (3rd edn, Naturel Yayınları 2004) 88.

competence in upholding the rule of law. Because this is primarily the role of judges, public confidence and trust is therefore central to the conduct of individual judges.

In this respect, the essential features of judicial ethics is impartiality and independence²¹, and failing to respect these principles would manifest in ways such as the judiciary being dependent on the other State powers, or judges relying on reasons outside the law, such as according to personal relationship with the parties, taking irrelevant facts into account, or relying on political or ideological beliefs.²² Specifically, a judge that carries out their conduct with partiality or bias, therefore, is in breach of the moral obligations that come with assuming the judicial office.²³ By taking on this societal role, they are under the special obligation to conduct the duties of judicial function without resorting to bias.²⁴

Impartiality however, when there is no substantive equality, only becomes a form of preserving and reproducing inequalities.²⁵ In this sense, the morality of this ideological claim of impartiality shall be questioned. In other words, the role of judges in achieving gender equality means that judges would need to take extra-legal considerations when deciding on cases concerning gender related issues. Preserving an appearance of neutrality and impartiality is the key to the role of the judiciary²⁶, but approaching such cases with a view to eliminate gender inequality means making considerations of morality. In order

²¹ W. Bradley Wendel, "Impartiality in Judicial Ethics: A Jurisprudential Analysis" (2008) 22 Notre Dame Journal of Law, Ethics & Public Policy 305, 305.

²² Wendel, 306.

²³ Green, 333.

²⁴ Achode, 262.

²⁵ Margot Stubbs, "Feminism and Legal Positivism" (1986) 3 Australian Journal of Law and Society 63, 70.

²⁶ Evola, Krstić, Rabadán, 163.

to argue for the place of moral considerations in judicial reasoning, one must first present the different approaches to the nature of law by formulating the contention between legal positivism and its critics.²⁷

b. Legal Rules and Morality

The subject of judicial ethics finds their roots in the debates regarding the nature of law.²⁸ According to the writings of Montesquieu, judges are “no more than the mouth that pronounces the word of the law”.²⁹ This view would presuppose that the law under legislation was perfect. However, democratic institutions are under a grave risk of turning into majoritarian tyrannies, as became evident during the Second World War.³⁰ The judiciary, in this respect, represents an integral aspect of human rights protection, especially with the emergence of constitutional review in the United States, and in Germany after the Second World War.³¹ Thus, it could be said that a rights-based approach has replaced judicial review’s previous goal of a duty-based approach.³²

To expand, Moore contends that “Law obligates judges in their role as judges (...)”³³ to mean that judges are obligated by the law in their capacity as legal actors. The nature of this obligation, whether it carries a moral imperative or a sole adherence to

²⁷ Wendel, 306.

²⁸ Ibid.

²⁹ Charles Montesquieu, *Complete Works, vol. 1 The Spirit of Laws* (T. Evans 1748) 208.

³⁰ Murat Erdoğan, “The Rise of Hermeneutics in Human Rights Interpretation in the Case-Law of the ECtHR and the Domestic Courts” (2021) 70 *Annales de la Faculté de Droit d’Istanbul* 91, 93-94.

³¹ Tom Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases* (1st edn, Cambridge University Press 2003) 3.

³² Erdoğan, 93.

³³ Michael S. Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence*, (Oxford University Press 2000) 5.

established legal rules, is a topic of debate. In essence, the central question becomes: Does the law compel judges to act ethically in carrying out their judicial responsibilities, or does it simply obligate them to apply pre-existing standards in cases they are deemed fit? Before the Second World War, the consensual answer could have been the latter, as the 19th century saw the popularity of legal positivism.³⁴ However, this dominant position in legal theory brought with it heavy criticism, and this stream of criticism flowed, one way or another, into the debate about morality's position in legal theory.³⁵

i. Legal Positivism: Is It Enough?

Legal positivism is based on two key tenets: the social thesis and the separation thesis. The social thesis postulates that law is essentially a social phenomenon or a construct, and that social facts, on which the validity of law depends, serve as the source of law. The separation thesis, further, posits that a legal norm's validity is wholly independent of whether it fulfils moral requirements or merits, and that law and morality are conceptually different phenomena.³⁶

In this regard, the most prominent contra position to legal positivism was aimed at legal positivism's redundant formalism. Legal positivism, according to its critics, fails in its explanation of the source and validity of laws by asserting that morality has no bearings

³⁴ Giorgio Bongiovanni, "Legal Positivism in the First Half of the 20th Century" in Enrico Pattaro and Corrado Rovorsi (eds.) *A Treatise of Legal Philosophy and General Jurisprudence* (Springer Netherlands 2016) 187, 187.

³⁵ Leslie Green and Thomas Adams, "Legal Positivism" (*The Stanford Encyclopedia of Philosophy* Winter 2019 Edition) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed 11 December 2023.

³⁶ Wil J. Waluchow, "The Origins of Legal Positivism" in Torben Spaak and Patricia Mindus *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021) 487, 487.

on the nature of law.³⁷ However, it is contended, the separation thesis merely asserts that a legal rule's validity is not determined by its moral merit and that it cannot be denied there may exist instances where morality and law coincide with each other.³⁸ In fact, many legal systems, including Turkey's, require conformity with moral principles laid down in the constitution and subject the laws that fail to do so to Constitutional review to be struck down.

Laws of a society often reflect the moral values and principles inherent therein and a system may require judges to consult morality as a source of justification in their decisions.³⁹ Habermas emphasized the existence of a relationship between morality and the law by asserting that the two are "inseparable". On this complementary relationship, he noted that both law and morality deal with the same problem of "ordering interpersonal relationships through justified norms".⁴⁰

Legal positivism, on the other hand, defines law by its relation to the sovereign.⁴¹ Legal positivism presents a formalistic and consequently apolitical view of law. Due to this, it reinforces the subordination of women intrinsic to the legal system and reinforces the gendered relations. Therefore, as will be demonstrated later, a feminist perspective of the law should aim to go beyond this positivist tradition.⁴² The judiciary, on this account,

³⁷ Waluchow, 488.

³⁸ Waluchow, 489.

³⁹ Ibid.

⁴⁰ Willy Moka-Muabelo, *Reconciling Law and Morality in Human Rights Discourse: Beyond the Habermasian Account of Human Rights* (Springer Cham 2016) 83.

⁴¹ Stubbs, 65.

⁴² Stubbs, 67.

ought to be more than a neutral and value-free arbiter of social conflict and make extra-legal consideration for the realization of human rights.

A prominent example of this notion emerged as an answer to the Nazi laws and judges, and how a functioning legal system could allow such criminality and the atrocities of the Third Reich.⁴³ It is not as simple to suppose that the Nazi regime adopted a view of legal positivism, and that alone was the sole reason behind the judicial failure and the following injustices. To this end, Hart even asserts that “Legal positivism (...) has come to stand for a baffling multitude of different sins”.⁴⁴ However, this perceived dichotomy between approaches to the nature of law seemingly failed to ameliorate the circumstances that eventually led to the Third Reich.⁴⁵

ii. Moral Considerations and Their Place in Law

Amidst the trials of the Third Reich officials in the post-War era, Radbruch’s assertion that judges may disregard applying a law if they see it is “unbearably unjust or in deliberate disregard of human equality before the law”⁴⁶ has become universally significant. This pronouncement has come to be known as the Radbruch Formula⁴⁷ and

⁴³ Herlinde Pauer-Studer, “Symposium on Justifying Injustice. Legal Theory in Nazi Germany (CUP 2020): responses to critics” (2023) 14 (2) *Jurisprudence* 291, 291.

⁴⁴ H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 (4) *Harvard Law Review* 593, 595.

⁴⁵ Markus Dirk Dubber, “Review: Judicial Positivism and Hitler’s Injustice” (1993) 93 (7) *Columbia Law Review* 1807, 1825-1826.

⁴⁶ Angela Condello and Tiziano Toracca, *A Theory of Law and Literature Across Two Arts of Compromising* (Leiden, The Netherlands: Brill 2020) 120.

⁴⁷ “The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as “flawed law,” must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is

contained two dimensions: first is the intolerability criteria, where Radbruch's assertion is that a statute that is extremely unjust is not a valid law at all.⁴⁸ Evidently, this part of the formula is to do with the intrinsic relationship that morality has with the nature of law. In the second part, the disavowal formula, Radbruch extends the power to judges in instances where the existing laws "deliberately betray"⁴⁹ the principles of equality.⁵⁰ Even though Radbruch's thesis, due to its conditionally exceptional nature, is far from connoting to judges acting on their own accord of morality, it still found application in German domestic case law.⁵¹ What is significant about the Radbruch formula for the purpose of this thesis is the emphasis put on the role of judges.

Raz asserts that morality is such a concept that, due to its nature, "has no doctrine of jurisdiction setting out its conditions of application. It applies universally to all agents capable of understanding it".⁵² In the case of judges, owing to their public role as the interpreter and the applicator of laws, it could be said that they have "special obligations". Special obligations are obligations that come with a role and bind those people particularly because they occupy the said role, in the form of a set of norms, values, and expectations.⁵³ These obligations are binding on judges by virtue of them performing their given roles as

deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice." Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)" (2006) 26 (1) Oxford Journal of Legal Studies 1, 7.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Martin Borowski, "Gustav Radbruch's Critique of Legal Positivism" in Torben Spaak and Patricia Mindus *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021) 627, 640.

⁵¹ The formula was directly invoked in Germany by the Federal Court of Justice and the Federal Constitutional Court [BGHSt 39, 1 (1992); BVerfGE 95, 96 (1996)].

⁵² Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford Academic 2009) 183.

⁵³ Green, 328-329.

judges.⁵⁴ Put together, judges have moral duties to abide by because morality is such a notion that binds all agents and particularly also because they occupy a role in the society that has a wide significance and value in the community.⁵⁵

iii. Understanding Legal Ethics

But what *is* this moral duty, and what does it entail? Here, perhaps a distinction should be drawn between morality and ethics. At the root of the word ethics is the Greek word “*ethos*”, which is a term used to refer to one’s “custom or habit”, “*ethicos*” in adjective form.⁵⁶ Morality, on the other hand, finds its roots in the Latin term “*moralis*”, its adjective form “*mores*”. While *ethicos* was designated as the equivalent to *moralis*, some studies argue that these two words were indeed not identical nor interchangeable.⁵⁷ Whereas morality relates to social or group conduct, ethics is understood in terms of personalized or individual conduct.⁵⁸ Ethics as a branch of philosophy, therefore, tries to understand, explain, and guide moral decision-making by categorizing individual actions as being good or bad, or by whether they achieve a purpose of being good or valuable. It considers morality’s impact on a profession, in the context of professional ethics, as “principles of conduct that members of the legal profession are expected to observe in their practice”.⁵⁹

⁵⁴ Green, 328.

⁵⁵ Green, 330.

⁵⁶ Gagari Chakrabarti and Tapas Chatterjea, *Ethics and Deviations in Decision-making* (Palgrave Macmillan 2020) 16.

⁵⁷ Chakrabarti and Chatterjea, 16.

⁵⁸ Ibid.

⁵⁹ William P. Alford and Maynard E. Pirsig, “legal ethics” (*Encyclopedia Britannica*) <https://www.britannica.com/topic/legal-ethics> accessed 26 December 2023.

Legal ethics, then, questions what standards a legal professional shall uphold given their unique role in the society.⁶⁰ On the other hand, the term used for judicial ethics in French, rather than being ethics (*l'éthique*), is rather deontology (*la déontologie des magistrats*).⁶¹ The word deontology comes from two Greek words, “*deon*”, which means “duty”, or “that which is proper”, and “*logos*”, which means “knowledge”, or “the study of”. Deontology, then, is the knowledge of what is right or proper, and knowing what is to be done.⁶² It is the study of knowing which choices are morally required, forbidden, or permitted.⁶³ In terms of judiciary as a profession, deontology would come to mean the art of behaving well in this particular professional field, and the set of moral rules that a judge must follow.⁶⁴

Judges, by virtue of the social post that they occupy, are subjected to the rules and principles of professional ethics. After establishing this, it could then be argued that this provides a philosophical basis for the judges to be ethical in their conduct, later to be followed by a legal dimension. Judicial ethics and all it entails will then be the bedrock on which this thesis will build an argument for a gender-conscious perspective. In other words, to explain the role of judges in human rights protection, especially with regards to

⁶⁰ David W. Wilkins, “Redefining the “Professional” in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism” (1995) 58 (3/4) Law and Contemporary Problems 241, 243.

⁶¹ Ergül, 50.

⁶² Jeremy Bentham, *Deontology or, The science of morality: in which the harmony and co-incidence of duty and self-interest, virtue and felicity, prudence and benevolence, are explained and exemplified: from the MSS. of Jeremy Bentham* (ed John Bowring, Longman, Rees, Orme, Browne, Green and Longman 1834) 21.

⁶³ Larry Alexander and Michael Moore, “Deontological Ethics”, (*The Stanford Encyclopedia of Philosophy* Winter 2021 Edition) <https://plato.stanford.edu/archives/win2021/entries/ethics-deontological/> accessed 17 December 2023.

⁶⁴ Ergül, 48.

gender-related issues, it is important to recall this as being a dimension of their professional ethical duties, besides being a legal responsibility.

c. Interpretation and Legal Reasoning

Because judges' primary conduct may said to be the interpretation of existing legal rules and their application to material cases, it is crucial to look into the conditions of this practice. The question of "what the law is" is closely interconnected to the question of "how law is to be interpreted".⁶⁵ In theology, hermeneutics, its name coming from the god Hermes from Ancient Greek mythology⁶⁶, is the ancient art of interpreting the Holy Scriptures.⁶⁷ Hermeneutics, in this context, takes interpretation as a cognitive dialogue between the author's intent and the interpreter's.⁶⁸ Legal hermeneutics, in the same vein, coming from philosophical hermeneutics where interpretation is the free activity of the interpreter⁶⁹, focuses on the nature of legal meaning as a subject matter.⁷⁰ It is through this active dialogue, conducted by the judge, that the text of the law finds its meaning in the context of the case at hand.⁷¹ This way, contrary to the classical understanding of

⁶⁵ Raz, 266.

⁶⁶ Hermeneutics is derived from the Greek verb *hermeneuein*, which means to say or interpret; the noun *hermeneia*, which is the utterance or explication of thought; and the name *hermeneus*, which refers to the playful, mischievous, "trickster" Hermes. In bringing the messages of the gods to humans, Hermes entices interpretation. Hermes has the character of complication, multiplicity, lies, jokes, irreverence, indirection, and disdain for rules; however, he is the master of creativity and invention. He has the capacity to see things anew and his power is change, prediction, and the solving of puzzles. See: Nancy J. Moules, "Hermeneutic Inquiry: Paying Heed to History and Hermes an Ancestral, Substantive, and Methodological Tale" (2002) 1 (3) International Journal of Qualitative Methods 1, 2.

⁶⁷ Erdoğan, 98.

⁶⁸ Hans-Georg Gadamer, "Classical and Philosophical Hermeneutics" (2006) 23 (1) Theory, Culture & Society 29, 29.

⁶⁹ Erdoğan, 92

⁷⁰ Tina Botts, "Legal Hermeneutics" (*Internet Encyclopedia of Philosophy*) <https://iep.utm.edu/leg-herm/> accessed 23 December 2023.

⁷¹ Mehmet Akif Tutumlu, *Yargı Felsefesi Üzerine* (Seçkin Yayınevi 2018) 128.

hermeneutics, modern approach accepts interpretation to be a constituent tool rather than descriptive.⁷²

Judges conduct legal reasoning when making a legal decision. It is the process of identification and evaluation of the issue that is brought before the court, then the process of interpreting the laws and making choices between available legal rules and arguments to apply to the present case.⁷³ If, and when, there is an indeterminacy in the law, judges are disposed to exercise discretion in which they are to weigh and balance relevant considerations.⁷⁴

Law, according to critical legal thinkers, is intrinsically and implicitly vague and ambiguous.⁷⁵ As Hart remarks, there emerges a necessity to exercise judgment about a rule in order to determine its most accurate scope of application, as linguistic rules are indeterminate due to the open texture of language.⁷⁶ Here, laws, as shells, would need to be filled in with meaning with the help of moral principles.⁷⁷ Traditional view to law would then suggest a number of interpretation methods in order to resolve such indeterminacies in law, such as the “historical argument”, the “textual argument”, the “doctrinal argument”, the “prudential argument”, the “structural argument”, and the

⁷² Tutumlu, 129.

⁷³ Peter Wahlgren, “Legal Reasoning - A Jurisprudential Description” (1989) ICAIL '89 Proceedings of the 2nd international conference on Artificial intelligence and law 147, 148.

⁷⁴ Hart, “The Concept of Law”, 132-136.

⁷⁵ Erdoğan, 94.

⁷⁶ Hart, “The Concept of Law”, 126-9.

⁷⁷ Hart, “The Concept of Law”, 204.

“ethical argument”.⁷⁸ Wherever there is an indeterminacy, interpretation provides aid in finding the best possible meaning of the law in question.

Legal reasoning in this sense is a formalized form of moral reasoning.⁷⁹ Moral reasoning is any reasoning practice about values and principles, rights, duties, not directly dictated by the text of the law.⁸⁰ An example of moral reasoning being explicitly referred to by law can be demonstrated as statutes awarding custody to the parent that would be to the best choice for serving the highest interest of the child.⁸¹ In such cases, judges are required to reach legal conclusions based on moral principles.⁸² In a similar vein, with regards to cases concerning gender-based issues, judges can use moral reasoning to find the best possible interpretation of the available law that best protects and ameliorates the condition of women in the society.

Hart would call this process creating new law, as he believes that in some cases judges are permitted by law to refer to extra-legal considerations.⁸³ Dworkin, on the other hand, would purport the idea that judges must take into account the principles of justice and fairness, and occasionally social policies, and that these standards are not without legal authority but moral and social norms themselves are law and a part of the legal system.⁸⁴ According to Dworkin, the established laws – the settled law, as he calls them –

⁷⁸ Donald E. Bello Hutt, “Against Judicial Supremacy in Constitutional Interpretation” (2017) 31 *Dogmatics and Constitutional Interpretation*, <https://journals.openedition.org/revus/3659> accessed 13 December 2023.

⁷⁹ Neil MacCormick, *Legal Reasoning and Legal Theory* (Reprint ed., Oxford University Press 1994) 272.

⁸⁰ Jeremy Waldron, “Do Judges Reason Morally?” in Grant Huscroft (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008) 38, 43.

⁸¹ Michael S. Moore, “Four Reflections on Law and Morality” (2006-2007) 48 (5) *William & Mary Law Review* 1525, 1527; Moka-Muabelo, 78.

⁸² Moore, “Four Reflections”, 1527.

⁸³ Wendel, 307.

⁸⁴ Greenawalt, 360.

are only complete if they include their best constructive interpretation, which is the justificatory basis for all judicial decisions.⁸⁵

This difference in approach to the question of judicial discretion can be seen as a manifestation of the long-standing debate between legal positivists and its critics on the place of morality in law. However, it is possible to unite these two approaches by arguing from the Inclusive Legal Positivist perspective. Inclusive Positivists contend that merit-based considerations such as morality can be a part of law provided that these considerations are, implicitly or explicitly, made so by source-based considerations.⁸⁶

For example, the Turkish Civil Code's⁸⁷ Article 1 confers powers to judges that, in the absence of a provision, judges shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that they would make as legislator. Further on this point, the Constitution of Turkey's (the Constitution) Article 138 expresses that judges shall render their judgments in accordance with the Constitution, laws, and personal conviction conforming to the law. In these examples, judges are explicitly told by the material law that they may take into account morality.⁸⁸ Laws of these kind serve to prevent the exclusion of morality by law.⁸⁹ Even though it could be argued that moral reasoning does not necessarily have any bearings on legal interpretation⁹⁰, it can be reasoned that morality functions as a code of conduct in the legal

⁸⁵ Waluchov, 491.

⁸⁶ Green and Adams.

⁸⁷ Law no. 4721, Date of Acceptance: 22.11.2001 Date of Publication in Official Gazette: 8.12.2001 No: 24607 Vol: 41.

⁸⁸ Ibid.

⁸⁹ Raz, 202.

⁹⁰ David O. Brink, "Legal Interpretation and Morality" in Brian Leither (ed.) *Objectivity in Law and Morals* (Cambridge University Press 2001) 12, 55.

system to be implemented in every area of the society.⁹¹ Judges, therefore, shall be compelled to consider the principles of justice, fairness, and likewise, in addition to laws in the narrow sense.⁹²



⁹¹ Moka-Mubelo, 109.

⁹² Greenwalt, 360.

2. Conclusion

To take stock, ethics refers to the doctrine of distinguishing between which human conduct can be classified as good or which as bad, and the *quod erat faciendum*, whereas morality is the practical application of this understanding. Because judicial decisions have public consequences, judicial conduct cannot be taken to mean a practice of individual conduct, but rather as a practice of professional ethics.⁹³

Judicial ethics, in this respect, is the collection of moral principles that judges shall abide by in their professional conduct.⁹⁴ Judicial ethics, as one of the dimensions of legal ethics, ensures respectability in the administration of justice with an aim to safeguard the public confidence in the judiciary.⁹⁵ Trust in the judiciary is established through a judge's ability to uphold the rule of law. As justice is grounded in the principle of rule of law⁹⁶, even though judges' main responsibility is to find and apply the relevant law to a case, it is an undeniable part of their duty that they also must engage in moral reasoning.⁹⁷ Further, judicial ethics serves the purpose of guiding judicial conduct in terms of minimizing the judge's political or ideological bias on the outcomes of cases.⁹⁸ Judicial ethics, in this sense, is of utmost importance in guiding the conduct of judges.⁹⁹

⁹³ Mehmet Akif Tutumlu, *Yargı Felsefesi Üzerine* (Seçkin Yayınevi 2018) 252.

⁹⁴ Ergül, 55.

⁹⁵ Achode, 259.

⁹⁶ Achode, 258.

⁹⁷ Jeremy Waldron, "Judges As Moral Reasoners" (2009) 7 (1) International Journal of Constitutional Law 2, 9.

⁹⁸ Wendel, 318.

⁹⁹ Achode, 259.

While judges are first and foremost duty-bound to follow the law and not render decisions on the basis of personal preference or ideology, especially when there is an existent law that is suitable to be applied to the legal question at hand, there are cases in which judges are permitted to “legislate”.¹⁰⁰ However, judges are not completely free in using discretion, as they are bound by principles of judicial ethics that shall guide legal decision making,

Understanding judicial ethics as a litmus test that would reveal the distinction between the factors a judge may take into account when rendering judgments and those they shall exclude from consideration, is important.¹⁰¹ In the cases where there are multiple plausible interpretations of the law to be applied, or a lack thereof due to ambiguity, the reasonable expectation of the society would be for judges to deliberate in good faith and reach a conclusion that is the best reading of the law.¹⁰² In this case, this would mean that judges would have an obligation to be moral in their judgments, especially when they are using judicial discretion, in order to reach the most just conclusion. This, taken in the context of cases dealing with gender-sensitive problems, would come to mean that judges, in their conduct, are required by their ethical obligations, to be morally considerate in their decisions.

In this respect, as the essential feature of judicial ethics is impartiality¹⁰³, failing to respect this principle would manifest in ways such as judges relying on reasons outside

¹⁰⁰ Wendel, 307.

¹⁰¹ Wendel, 305.

¹⁰² Wendel, 321.

¹⁰³ Wendel, 305.

the law, such as according to personal relationship with the parties, taking irrelevant facts into account, or relying on political or ideological beliefs.¹⁰⁴ A judge that carries out their conduct with partiality or bias, therefore, is in breach of the moral obligations that come with assuming the judicial office.¹⁰⁵ By taking on this societal role, they are under the special obligation to conduct the duties of judicial function without resorting to bias.¹⁰⁶

Next section thereby will delve into the problems that arise from judges failing to uphold their duties under judicial ethics by either depending on populist ideological or political beliefs, or utilizing discriminatory and prejudiced views in their conduct as judges.

¹⁰⁴ Wendel, 306.

¹⁰⁵ Green, 333.

¹⁰⁶ Achode, 262.

B. Practical Problems Arising from Failure to Follow the Principles of Judicial Ethics

The rule of law doctrine is a pillar in democratic societies where a system of neutral laws are equally enforced, and independently adjudicated.¹⁰⁷ For this to happen, a justice system that functions fairly and without bias or discrimination must be in place.¹⁰⁸ However, it is not enough for such a system to be in place, but it should further be accessible to all those that seek it.

¹⁰⁷ United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) “Progress of the World’s Women 2015-2016” (2015) Transforming Economies, Realising Rights New York, 11.

¹⁰⁸ Ibid.

1. Access to Justice

Access to justice is a concept that comes into fruition by the assembly of protection of fundamental rights and effective provisions of justice services to everyone without discrimination.¹⁰⁹ In this respect, the term “access to justice” came to encompass the notion that legal and judicial outcomes themselves should be “just and equitable” and sensitive and responsive to the social realities.¹¹⁰

Access to justice is damaged by structural injustices. Young asserts that structural injustice occurs as a result of the conduct of both individuals and institutions in a society.¹¹¹ In this sense, structural injustice oppresses certain social groups and prevents them from developing and exercising their capacities while positioning others as the oppressors by creating inequality of opportunity between them.¹¹²

Thus, in order to ensure that women’s access to justice is realized, a gender sensitive approach that seeks to redress the gender inequalities should be put in place. As will be detailed below, feminist legal theorists have coined the term of asking “the woman question” that would aid judges specifically to acquire a gender perspective in their approach to cases that concern gender-related issues. In truth, structural and persistent inequalities that result in barriers to justice do not only affect women but rather are experienced by groups of people that are marginalized, those who are more suspect to

¹⁰⁹ Gülriz Uygur and Eileen Skinnider, “Understanding Barriers to Women’s Access to Justice and Legal Aid in Türkiye” (2022) Council of Europe, 13.

¹¹⁰ Elisabeth Duban and Ivan Radačić, “Training Manual for Judges and Prosecutors on Ensuring Women’s Access to Justice” (2017) Council of Europe, 12.

¹¹¹ Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011) 52.

¹¹² Nadire Özdemir, “Iris Marion Young Teorisine Genel Bir Bakış: Yapısal Adaletsizlik ve Adaletsizlikten Sorumluluğa İlişkin Sosyal Bağlantı Modeli” (2020) 146 Türkiye Barolar Birliği Dergisi 247, 249.

discrimination.¹¹³ However, only barriers to access to justice that result from the patriarchal structure of the legal system will be discussed within the framework of this thesis.

In this context, it is possible to divide these obstacles into those of a legal/institutional nature and those of a socio-economic and cultural nature.¹¹⁴ The legal/institutional level includes discriminatory or insensitive legal frameworks such as: explicitly discriminatory legal provisions; gender blind provisions that do not take into account women's social position and gaps in legislation concerning issues that disproportionately affect women; problematic interpretation and implementation of the law which discriminates against women; ineffective or problematic legal procedure such as the lack of gender sensitive procedures in the legal system; poor accountability mechanisms (including corruption); under-representation of women among legal professionals; and gender stereotyping and bias by justice actors.¹¹⁵

On the other hand, the socio-economic and cultural level includes lack of awareness of one's legal rights and legal procedures or of how to access legal aid, which can stem from gender differences in educational levels, access to information, etc.; lack of financial resources, including the means to pay for legal representation, legal fees, judicial taxes, transportation to courts, child care, etc.; unequal distribution of tasks within the family; and gender stereotypes and cultural attitudes.

¹¹³ Duban and Radačić, 13.

¹¹⁴ Ibid.

¹¹⁵ Shazia Choudry, "Women's Access to Justice: A Guide for Legal Practitioners" (2018) Council of Europe, 5-6.

Focusing on the legal/institutional level, denial of justice based on gender hierarchies may manifest in a myriad of ways. It could be through substantive laws that are by themselves discriminatory, called *de jure* discrimination, or it could be through less visible means where existing practices lead to discrimination, termed *de facto* discrimination.¹¹⁶ It could be said that legally mandated overt discrimination has mostly disappeared in Member States and is now rather more implicit and cognitive.¹¹⁷ In other words, “the more equality is provided by law, the more subtle gender discrimination becomes”, mostly in forms of gender stereotypes.¹¹⁸

a. Gender Stereotypes

The term *stereotype* finds its etymological origin in the combination of the Greek words “*stereos*” meaning “solid”, “firm”, and “*typos*” which means “impression”.¹¹⁹ It was first utilized by the French printer Firmin Didot to describe a method/process of printing in which a metal plate or a mold is used to duplicate an original work.¹²⁰ The term was later introduced to social science studies by Walter Lippmann to be used

¹¹⁶ Ulaş Karan, *Uluslararası İnsan Hakları Hukuku ve Anayasa Hukuku Işığında Eşitlik İlkesi ve Ayrımcılık Yasası* (1st edn, On İki Levha 2017) 70.

¹¹⁷ Alexandra Timmer, “Toward an Anti-Stereotyping Approach for the European Court of Human Rights” (2011) 11 (4) Human Rights Law Review 707, 708.

¹¹⁸ *Carvalho Pinto de Sousa Morais v Portugal* App no. 17484/15 (ECtHR, 25 July 2017) Judge Yudkivska Concurring Opinion.

¹¹⁹ Elena L. Vilibakhova, “The notion of stereotype in language study” (*History and Philosophy of the Language Sciences*, 22 May 2013) <https://hiphilangsci.net/2013/05/22/the-notion-of-stereotype-in-language-study/> accessed 6 March 2024.

¹²⁰ Ibid.; Oxford *English Dictionary*, s.v. “stereotype (*n.*), sense 1, https://www.oed.com/dictionary/stereotype_n?tl=true accessed 6 March 2024; Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) 9.

metaphorically as a concept for explaining the way “people preconceive others only as reprints from a mold”.¹²¹

Stereotyping is a form of perception where the information about the world and others is *a priori* imposed on people’s judgment. It is a way to understand and simplify the personal attributes, characteristics, and roles in a society.¹²² Stereotypes are useful in explaining social events as they make it easier to interpret new information, and an encounter with any information relating to an individual or a group arouses the outcome of stereotypes automatically.¹²³

Stereotypes are preconceived notions or beliefs about groups of people, and they are derived from the cliched categorical patterns that are engrained in a society relating to these specific social groups. This means that stereotypes can emanate from the dominant ideologies in a culture in which people socialize, and the inferences arising from various historical, political, or socio-economic roles or signifiers attributed to these groups will be prominent in the content of the stereotypes. They “freeze the process of objectification (...) at its moment of inaccuracy”¹²⁴ and therefore, stereotypes often serve to maintain and justify the status quo in a society.¹²⁵

Stereotypes may materialize in many different ways. They can be prescriptive, meaning that they may prescribe a standard of behavior or appearance to groups of people. They can also be descriptive, in which they may – sometimes accurately – describe a

¹²¹ Cook and Cusack, 9.

¹²² Cook and Cusack, 10.

¹²³ Zehra Y. Dökmen, *Toplumsal Cinsiyet: Sosyal Psikolojik Açıklamalar* (6th edn, Remzi Kitapevi 2009) 96.

¹²⁴ Catharine A. MacKinnon, *Towards A Feminist Theory of The State*, (Harvard University Press 1991) 229.

¹²⁵ Rupert Brown, *Prejudice: Its Social Psychology* (2nd edn, Wiley-Blackwell 2010) 105.

situation relating to groups of people. Prescriptive stereotypes refer to the kinds of behavior, appearance, or characteristics that are seen as desirable or appropriate for the chosen social groups, whereas descriptive stereotypes refer to beliefs about what characteristics or types of behavior or appearance is possessed by them.¹²⁶ In other words, prescriptive stereotypes allude to how people that belong to a particular social group should act, whereas descriptive stereotypes refer to the beliefs about how they do act. In this context, gender stereotypes are said to be more prescriptive than descriptive¹²⁷, meaning that they primarily focus on the societal roles put on the different genders. There may also be false stereotypes based on prejudice or unsound empirical basis. At last, stereotypes can be role-typing, by which is meant that they may assume and assign certain social roles or modes of behavior to groups of people.¹²⁸

Stereotypes are shaped based on the categorizations of people grounded in gender, race, ethnicity, sexual orientation etc., and these stereotypes mold the perceptions or relationships that people form with other people who may be part of such a social group.¹²⁹ Stereotypes attribute preconceived social, behavioral, or appearance-based group characteristics to the individual while disregarding the actual situation.¹³⁰ Gender stereotypes are one of such stereotypes and they may form the basis of gender prejudices.

¹²⁶ Mercedes López-Sáez and Ana Lisbona, “Descriptive and Prescriptive Features of Gender Stereotyping: Relationships Among Its Components” (2009) 24 (3) *Revista de Psicología Social* 363, 364.

¹²⁷ *Ibid.*

¹²⁸ Lourdes Peroni and Alexandra Timmer, “Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights’ Jurisprudence” in Eva Brems and Alexandra Timmer (eds.) *Stereotypes and Human Rights Law* (Intersentia 2016) 40-41.

¹²⁹ Dökmen, 98.

¹³⁰ Peroni and Timmer, 41.

Prejudices then result in discrimination. In other words, stereotypes feed prejudices, and discrimination is the behavioral outcome of them.

Gender stereotypes, therefore, are “structured set of beliefs about the personal attributes of women”.¹³¹ Gender stereotyping is based on the way the society understands gender and gender relations. While not inherently and necessarily problematic, they become hazardous when used to deny or infringe upon the fundamental rights and freedoms of women, or create or maintain gender hierarchies.¹³² In other words, gender stereotyping is a term referring to the generalized and preconceived view regarding the “attributes or characteristics possessed by, or the roles that are or should be performed by, men and women, respectively”.¹³³

Gender stereotypes differ from other group stereotypes on the account that they contain within themselves both the prescriptive and descriptive forms of stereotypes. Where descriptive stereotypes determine and define the standard of how women should be, the prescriptive account dictates how they should act or behave accordingly. Meaning that, “many descriptions of what women are, also function as prescriptions of how they should behave”.¹³⁴ Stereotypes further fixate gender roles and consequently construe them as “real, universal, eternal, essential, and/or unchangeable”.¹³⁵ Meaning that, as explained

¹³¹ Cook and Cusack, 20.

¹³² Ibid.

¹³³ Christina Zampas, “Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights – A review of case law” (2018) Office of the United Nations High Commissioner for Human Rights.

¹³⁴ Rikki Holtmaat, “Article 5 CEDAW” in Marsha A. Freeman, Christine Chinkin, and Beate Rudolf (eds.) *The UN Convention on the Elimination of All Forms of Discrimination Against Women; A Commentary* (Oxford University Press 2011) 147.

¹³⁵ Rikki Holtmaat and Jonneke Naber, *Women’s Human Rights and Culture: From Deadlock to Dialogue* (Intersentia 2011) 57.

above, because stereotypes serve to help people infer information through preconceived notions, gender stereotypes make gender roles seem self-evident.

Gender stereotypes further take away the individuality of women and fixate them according to their group membership only. Moreover, stereotyping based on gender is one of the many ways that serve to protect and maintain the status-quo, and consequently, existing power relationships between genders and the gender hierarchies.

Gender stereotypes' interactions with other stereotypes of identity traits, such as sexual orientation or race/ethnicity, create new avenues of discrimination.¹³⁶ This way, a more holistic approach is necessary in order to understand how such an intersecting oppression works, which can be done by first shifting away from an exclusive and distinct categorical analysis towards an analysis of “overlap, convergence, or intersection between multiple social categories” and second, by “reconceptualizing power as relational and contingent rather than binary and fixed”.¹³⁷ Intersectional stereotypes, in this respect, create “something unique and distinct from any one form of stereotyping standing alone” where stereotypes are not merely added together but coalesced, merged, which results in a distinct form of discrimination.¹³⁸ Therefore, an intersectional discrimination analysis will necessitate that structural barriers to equality and access to justice should be analyzed.

Stereotypes based on gender have detrimental social, political and economic effects on women, but especially with regards to their enjoyment of fundamental rights

¹³⁶ Timmer, “Anti-Stereotyping Approach”, 735.

¹³⁷ Erin C. Cassese, “Intersectional Stereotyping in Political Decision Making” Oxford Research Encyclopedia on Politics, 2.

¹³⁸ Alesha E. Dolan and Donald P. Haider-Markel, “The Role of Intersectional Stereotypes on Evaluations of Gay and Lesbian Political Candidates” (2010) 6 (1) Politics & Gender 63, 71; Cassese, 6.

and freedoms. Gender stereotypes are one of the leading causes for discrimination against women, and is a factor in rights violations, such as violations to right to life, right to health, right to adequate standard of living, education, marriage, family, work, freedom of expression and movement, and right to an effective remedy or access to justice.¹³⁹ In sum, wrongful gender stereotypes do not only infringe on their rights, but also prevent women from accessing justice. This is evident in the way the phenomenon termed “judicial stereotyping” effects the process and outcome of judgments regarding women.

b. Judicial Stereotyping

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)¹⁴⁰ prescribes that, as a general obligation, States “shall take the necessary steps to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men”.¹⁴¹ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁴² further underlines that “(...) stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be (...)”¹⁴³, or the

¹³⁹ Evola, Kristic, Rabadan, 152.

¹⁴⁰ Date of Conclusion: 11.5.2011 Entry into Force: 1.8.2014, Turkey Date of Signature: 11.5.2011 Date of Ratification: 14.3.2012 Entry into Force: 1.8.2014.

¹⁴¹ The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence Article 12.

¹⁴² Date of Conclusion: 18.12.1979 Entry into Force: 3.9.1981, Turkey Date of Ratification: 20.12.1985 Entry into Force: 19.1.1986.

¹⁴³ *Karen Tayag Vertido v The Philippines*, CEDAW/C/46/D/18/2008, 22 September 2010, para. 8.4.

judiciary may “adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to those stereotypes”¹⁴⁴ all of which compromise an unjust and discriminatory system for women and debilitate their enjoyment of the right to access to justice. “Judicial stereotyping”, in this regard, can be described as the ascription of certain characteristics, attributes, or roles depending on gender to individuals by the judiciary. Judicial stereotyping can be an active practice of perpetuation, as well as an inactive one by the failure to challenge them.

The cause of inequality lies in the social institutions and how they, through their rules and relations, and the decisions made within them, affect the lives of individuals that belong to a social group.¹⁴⁵ Regarding women, the social organization of labor, sexuality, authority and subordination all come together to constitute a system in which women are oppressed and differentiated. In this context, the existing social structures serve to maintain hierarchies based on gender. Human social activity is self-reproducing in nature, meaning that the pre-existing structures in place both influence agents and their actions, and are reproduced by said actions.¹⁴⁶ Gender stereotypes that are engrained in a society can thus be reproduced by human action, and also determine it. The problem occurs when said reproduction is done not by ordinary people but by people who act as a bearer of State power, namely judges, and in a setting where such reproduction would also come to mean legitimization.

¹⁴⁴ *J.I. v Finland*, CEDAW/C/69/D/103/2016, 5 March 2018, para. 8.6.

¹⁴⁵ Iris Marion Young, “Equality of Whom? Social Groups and Judgments of Injustice” (2001) 9 (1) *The Journal of Political Philosophy*, 8.

¹⁴⁶ Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984) 2.

Judicial stereotyping thus refers to the practice of judges who adopt preconceived views about a case before or without regarding all of the facts applicable. Judges will ascribe stereotypical beliefs, attributes, characteristics, or roles to the parties of the case by reason of their belonging to certain social groups, for example women. Both the defense and the judges acting on gender-based prejudices throughout the judicial process serve to reproduce and justify the discriminatory gender stereotypes. Even if the established laws in question are not *prima facie* discriminatory, when legal interpretation is left at the hands of those that are themselves not free of their prejudiced views, they might become discriminatory and perpetuate stereotyped representations of gender relations. This aspect is frequently disregarded, as the general perception is that judges are knowledgeable, professional, and impartial; however, they are just as biased and prejudiced as anyone.¹⁴⁷

It should be noted that judicial decisions that are based on gender stereotypes also have a broader projection. Because judicial decisions have both individual and collective power, they frame the character of the judiciary. Meaning that, such decisions with stereotype-based reasonings or intentions give said stereotypes institutional backing. Further, as the judiciary acts on the authority of the State, stereotypes are legitimized in the eyes of the public and they further help alienate and “other” certain social groups, as well as damage their dignity. It compromises the impartiality and integrity of the justice system, and further creates a culture of victim blaming, silencing victims, or impunity for criminals.

¹⁴⁷ Evola, Krisitc, Rabadan, 144.

Moreover, because such stereotypes are ingrained deep within society, they are easily reciprocated within judicial decisions. This notion can have several potentially grave consequences. For instance, some stereotypes based on gender roles may distort judges' approach to the facts of the case, influence their perception of who the victim is in a case or sow distrust regarding a witness' credibility. It overall comprises the impartiality of the judiciary and may lead to secondary victimization¹⁴⁸ of the victims or to the miscarriage of justice. Wrongful gender stereotypes, not only during the trial but in all phases of judicial processes starting from the prosecution and investigation and all the way up to the decision stage, may be present and as a result may influence the outcome of cases.¹⁴⁹ Therefore, judicial stereotyping is a prevalent barrier in the enjoyment of the right to access to justice.¹⁵⁰ Stereotypes and prejudices based on gender are the at the basis of the structural inequalities present in all spheres of society, and these inequalities cannot be eliminated by simply recognizing equality in legal rules.¹⁵¹ For this reason, the phrase "law is unjust" employed by the feminist movement is one of the many criticisms directed at the legal system.

Law is comprised of narratives, and only a few select narratives find their congruence within the mainstream legal order. Opposite the dominant narratives there are

¹⁴⁸ "Secondary victimization means the victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim" Recommendation (CoM) Rec(2006)8 of 14 June 2006 on assistance to crime victims, Article 1.3.

¹⁴⁹ Evola, Krstić, Rabadán, 156.

¹⁵⁰ Simone Cusack, "Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-based Violence Cases" (2014) Office of the Hight Commissioner for Human Rights, ii.

¹⁵¹ Evola, Krstić, Rabadán, 150.

the narratives that do not or cannot find their correspondence.¹⁵² Since legislation is historically made by men with a patriarchal essence, and women were kept out of such processes,¹⁵³ feminist critique of law is that the law is male.¹⁵⁴ Therefore, because male is the deciding and dominant narrative, all the other experiences and narratives are excluded from finding meaningful representation in law. This exclusion, then, creates a ground where the law and its appliers are blind to the experiences of some social groups while they centralize the male point of view. The outcome of this phenomenon is the reproduction of harmful stereotypes and prejudices.

Stereotypes may affect the credibility of women's statements, arguments, experiences, and testimonies. For instance, in cases regarding marital rape, because the male point of view disregards the experiences of women and the legal order fixates on stereotypical understandings of gender roles, marriage, family, and consent, the sexual assault is not recognized in front of the courts. In the same vein, as will be exemplified in the chapter dedicated to case law, the victim of a sexual assault having an active sexual life, dressing a certain way, behaving in a certain way have often been used by defense counsel and accepted as mitigating circumstances or grounds for rejecting a case by the judges. In turn, the accused is found more believable or innocent if he is a man.

¹⁵² Gülriz Uygur, "Yargılamada Karşılığını Bulmayan Anlatılar–Karşılığı Bulunulamayan Anlatılar" Gülriz Uygur and Zeynep İspir (eds.) *Hukukta Anlatı-Hukukun Anlatısı* (Seçkin Yayınevi 2021), 41.

¹⁵³ Catherine A. MacKinnon, "Reflections on Sex Equality Under Law" (1991) 100 (5) *The Yale Law Journal* 1281, 1285.

¹⁵⁴ Gülriz Uygur, "Adaletsizliği Görmek", 116.

To stereotype is to impose a generalized worldview that may or may not be accurate for some members upon all the individual members of a group.¹⁵⁵ This misrepresentation could lead to stigmatizing outcomes for individuals. Judicial stereotyping therefore leads to judges misinterpreting facts or misapplying laws, and ultimately punish women rather than the actual culprits.

On the contrary, if judges were to adopt a gender perspective in adjudication, as will be presented in the section below presenting feminist legal theories, such stereotypes would not have been utilized and perpetuated, but rather rejected and denounced. Put differently, judiciary has the means to make compelling impact on the prevention of structural inequality by identifying and contesting these harmful stereotypes.¹⁵⁶

¹⁵⁵ MacKinnon, “Reflections”, 1293.

¹⁵⁶ Peroni and Timmer, 39.

2. Politization of Judiciary

The concept of sovereignty had been described as absolute, unlimited, singular and unitary by philosophers like Bodin¹⁵⁷, Hobbes¹⁵⁸, and Rousseau¹⁵⁹. However, this understanding of sovereign power has been widely criticized in the modern discourse, rendered intolerable especially vis-à-vis the principle of the rule of law. The rule of law doctrine is dependent upon an understanding of state power that is limited and bound by law, namely the constitution and the overarching principles of law. In such systems, an absolute model of sovereignty has thus been abandoned. Further, unquestionably, an absolute view of sovereign power is incompatible with the modern notion of human rights doctrine.¹⁶⁰

The emergence of fundamental human rights doctrine can be traced back to the long-standing struggle aimed at limiting and decentralizing political authority. Once state power was taken away from a singular or group sovereign entity, the concept of self-governance by the populace has been instilled as the foundational tenet of modern states.¹⁶¹ Subsequently, the once thought to be absolute and unbound sovereign power and authority had been divided by means of adoption of the separation of powers doctrine, and restricted through of the rule of law doctrine. The latter requires all State entities and actions to be bound within the principles of the legal order. Today, these limitations find

¹⁵⁷ See: Jean Bodin, *On Sovereignty: Six Books of the Commonwealth* (trs. M. J. Tooley, Basil Blackwell Oxford 1967).

¹⁵⁸ See: Thomas Hobbes, *Leviathan* (Penguin Books 2017).

¹⁵⁹ See: Jean-Jacques Rousseau, *The Social Contract* (trs. Christopher Betts, Oxford University Press 1999).

¹⁶⁰ Oktay Uygun, *Devlet Teorisi* (On İki Levha 2014) 266-267.

¹⁶¹ Rıza Adıgüzel, “Yargının Siyasallaşması: Kavramsal Bir Çerçeve” (2022) 27 (47) Dicle Üniversitesi Hukuk Fakültesi Dergisi 563, 565.

their basis in fundamental human rights doctrine enshrined in constitutions, safeguarding the rights and liberties of people as well as ensuring the accountability of state institutions.

Where the sovereign authority and power is distributed between the executive, the legislative, and the judiciary in accordance with the separation of powers doctrine, constitutions act both as the power vesting instrument and as a safeguard of rights. Within this context, in order to ensure that the branches of the state abide by the principles of law and democracy, and refrain from developing into authoritarianism when utilizing political power, the key role lies within the judiciary. Especially in cases where the lines become blurred between the legislative and the executive in some forms of government, keeping judiciary as independent and impartial as possible is of crucial importance for the upholding of the rule of law.¹⁶²

In cases where the legislative and the executive are melted down into each other, the legislative becomes highly politicized and fails to adhere by democratic values, therefore becoming a vessel for the executive to realize its political objectives.¹⁶³ When the “chosen” representatives only represent the oppressive majority and disregard the rights and freedoms of the rest of the populace, the legal rules issued in such parliaments become tools for legitimizing the executive’s dominant ideologies.

In the face of oppressive ideologies, the judiciary emerges as the safeguarding mechanism of the fundamental rights and freedoms. However, despite this crucial role, or

¹⁶² Luis López Guerra, “The Judiciary and the Separation of Powers” (Conference for Constitutional and Supreme Court Judges from the Southern African Region, Siavonga, Zambia, 12-13 February 2000) 4-5.

¹⁶³ Turhan, 89.

precisely because of it, the judiciary bears the risk of becoming politicized as well. In states where politics is interpreted as a means of implementing narrow ideological agendas rather than ensuring social peace, the judiciary, along with the legislature, can become a vessel for the executive.¹⁶⁴ Politicization of the judiciary thus means that the adjudication is performed not in accordance with the rule of law doctrine, but rather in line with the interests of the dominant political classes or ideologies present in a society. Then, the judiciary becomes a place of perpetuating social hierarchies.

a. Bias in the Judiciary

A politicized judiciary is one that is influenced by the presiding political power and is therefore reliant and biased, lacking the independence and impartiality essential in contemporary democratic nations. While there are various democracy examples, Lijphart finds that these systems are fundamentally based on two different patterns of practice: majoritarian and consensual. While the power is concentrated in the hands of the “bare majority” in the majoritarian model, the consensus model is built on the premise of a dispersed and limited sovereign power.¹⁶⁵ In line with this dichotomy, in democracy models where the patterns¹⁶⁶ point to a majoritarian model, legal rules are considered to

¹⁶⁴ Rıza Adıgüzel, “Yargının Siyasallaşması Olgusu ve 1982 Anayasası Perspektifinde Türkiye’de Yargının Siyasallaşmasının Yapısal Nedenleri” (LL.M. thesis, Ankara University 2016) 42.

¹⁶⁵ Arend Lijphart, *Patterns of Democracy* (2nd edn, Yale University Press 2012) 2

¹⁶⁶ Lijphart lists the dimensions of majoritarian democracies as follows: “1. Concentration of executive power in single-party majority cabinets, 2. Executive-legislative relationships in which the executive is dominant, 3. Two-party system, 4. Majoritarian and disproportional electoral systems, 5. Pluralist interest group systems with free-for-all competition among groups, 6. Unitary and centralized government, 7. Concentration of legislative power in a unicameral legislature, 8. Flexible constitutions that can be amended by simple majorities, 9. Systems in which legislatures have the final word on the constitutionality of their own legislation, 10. Central banks that are dependent on the executive.” Lijphart, 3-4.

be norms set forth by the political power representing the majority.¹⁶⁷ In other words, where the positive law is merely used for the purpose of promoting the dominant and oppressive ideologies in a society by means of welding the political majority, a strict application of laws would do little to ensure the rule of law in the true sense of the principle. It must be emphasized that accepting the “acceptable principle that political power is best entrusted to the majority” is not mutually exclusive to resisting the idea that “what the majority do[es] with that power is beyond criticism and must never be resisted”.¹⁶⁸ Therefore, while an impartial and independent judiciary is crucial for the safekeeping of the rights and freedoms against the oppressive political backdrop, a more activist judiciary is equally important.

b. Legitimizing the Dominant Political Ideology

A politicized judiciary is one that “articulates the dominant values of society, and so acts to defend the existing political and social order”.¹⁶⁹ Therefore, in cases where the judiciary is said to be politicized, domestic courts become vessels for the dominant ideologies of the executive on every level and impose prejudiced worldviews into their decisions. Ideology is defined by the social context in which a certain language is employed. What is important is less about what is pronounced and more about what is said to who and by whom, and for what purposes.¹⁷⁰ Consecutively, ideology refers to a question of power.¹⁷¹ This means that when language is harnessed for the purpose of

¹⁶⁷ Adıgüzel, “Yargının Siyasallaşması Olgusu” 45.

¹⁶⁸ HLA Hart, *Law, Liberty, and Morality* (Stanford University Press 1963) 79.

¹⁶⁹ Heywood, 346-347.

¹⁷⁰ Terry Eagleton, *Ideology* (Verso 1991) 9.

¹⁷¹ Eagleton, 5.

intentionally promoting a certain set of beliefs, thoughts, or agendas in a context of social engineering, and especially by State officials, it becomes a case of legitimizing and sustaining relations of domination.

The dominant political ideology can therefore legitimize itself by employing six different methods: by promoting beliefs and values that align with its interests; naturalizing and universalizing these beliefs in order to make them appear self-evident and inevitable; disparaging ideas that pose a challenge to its authority; excluding competing ideologies often through implicit yet systemic means; obscuring social realities in a way that would serve its agenda; and by masking or suppressing social conflict.¹⁷²

If one were to apply this schema to the populist anti-gender campaigns that are spread throughout the world, the rise of the right-wing hegemony and decline of democratic values can be properly understood. Thus, in the next section this thesis will aim to demonstrate how the different methods of legitimizing oppressive political ideologies are employed by anti-gender movements to wage a war against the achievements of women's and LGBTIQ+ movements, and the unique place of the judiciary therein.

c. Anti-Gender Politics

¹⁷² Eagleton, 5-6.

Gender equality is a part of a broader conflict that finds its roots in human rights, and is therefore a part of the struggle for democracy. However, in recent years, gender equality, as a concept and with every intersectional issue it contains, has come under increasing attacks due to a global anti-gender movement.¹⁷³ This movement solidifies itself as the hegemonic political ideology by conceptualizing itself as a stance against “degeneration” and “demographic decline”. It does this by redefining the meaning of gender and gender equality and claiming to represent “the people”. Gender, as defined by populist right-wing parties and governments, is deemed ideological, unscientific, and unnatural; a rhetoric used to restore the authority of masculinity along with conservative “values” of family and traditional gender roles.¹⁷⁴ In other words, the political power establishes its authority by re-framing the discourse of human rights and positions itself as the defender of the majority all the while oppressing the rest of the populace.

The roots of the anti-gender movement thus depend mainly on the fearmongering created by mostly right-wing institutions and governments by utilizing terms such as “gender ideology”, “gender theory” or “genderism”. Proponents of this phenomena argue that the aim of the gender equality policies is to conspire against the “natural order of things” and abolish traditional gender norms including but not limited to the roles of the

¹⁷³ Adnieszka Graff and Elzbieta Korolczuk, *Anti-Gender in the Populist Moment* (1st edn, Routledge 2022) 2-3.

¹⁷⁴ e.g. in France, “it includes strong opposition to assisted reproduction reflecting the ideological conflict about the nature/culture frontier. In other locations, such as Poland and Russia, the focus of anti-gender campaigns is to demonize non-normative sexualities and family configurations, whereas in Spain the central target is anti-violence legislation, which is reframed by the anti-gender movement as an attack on the family.” Graff and Korolczuk, 6.

father and the mother.¹⁷⁵ The actors of this movement are diverse, both in respect to their motivations and arguments, but also with regards to their backgrounds and degrees of institutionalization.¹⁷⁶ In other words, the anti-gender movement is not confined to any one nation, region, or religion, but is rather of a transnational character where the actors of the movement form international coalitions and allegiances.¹⁷⁷

By masking dogmatic national and cultural values as public morals, these anti-gender allegiances misappropriate international human rights terminology and aim to legitimize their attack on the progress made in terms of equality.¹⁷⁸ Sanders refers to this phenomenon as “norm-spoiling” where actors directly challenge existing norms with the aim of weakening their influence.¹⁷⁹ In terms of rights relating to gender or gender equality, the anti-gender movements use human rights norms such as “the right to life” and “right to family life” and interpret and recontextualize them in a way that serves their ideology.¹⁸⁰ They further work to delegitimize the achievements of women’s and

¹⁷⁵ Roman Kuhar, “The Rise and Success of the Anti-Gender Movement in Europe and Beyond” in László Andor, Ania Skrzypek, Hedwig Giusto (eds) *Progressive Yearbook 2023* (Foundation for European Progressive Studies 2023) 116; “(...) the family theme arguably has been the most salient international unifier of the divergent conservative, nationalist, religious and patriarchal populist norm spoilers targeting women’s rights” Rebecca Sanders and Laura Dudley Jenkins, “Control, Alt, Delete: Patriarchal Populist Attacks on International Women’s Rights” (2022) 11 (3) *Global Constitutionalism* 401, 416.

¹⁷⁶ Marie Wittenius, “The Transnational Anti-Gender Movement in Europe” Heinrich Böll Stiftung Gunda Werner Institute Feminism and Gender Democracy, <https://www.gwi-boell.de/en/2022/02/03/the-transnational-anti-gender-movement-europe#top-of-page> accessed 29 May 2024.

¹⁷⁷ Kuhar, 117.

¹⁷⁸ Zülfiye Yılmaz Yamaç, “Feminist Constitutional Narratives, the Pandemic and Hyper-Presidentialism in Turkey” (2024) 102 *Women’s Studies International Forum* 1, 2.

¹⁷⁹ Rebecca Sanders, “Norm Spoiling: Undermining the International Women’s Rights Agenda” (2018) 94 (2) *International Affairs* 271, 272.

¹⁸⁰ Sanders, 273.

LGBTIQ+ movements in the legal arena by “advocating cultural relativism and ‘traditional values’, and by appropriating anti-colonial critiques of women’s rights”.¹⁸¹

In the specific case of Turkey, the appropriation of human rights have traditionally been framed in the context of threats to national security, public order, and secularism.¹⁸² In the last few years, however, the emphasis has shifted from “the protection of the secular nation to the pious family” where “the protection of public morals” and “traditional family values” have been the single most employed phrase to justify this backsliding.¹⁸³ The strategy employed here for the purposes of promotion of beliefs aligned with the dominant ideology, exclusion and backtracking of competing ideologies, and the obstruction of social realities is the misappropriation of human rights and its language. In this context, the traditional family and the “pious woman” is presented as the authentic bearers of human rights, and this positioning is justified through the creation of a hierarchy of rights where the rights not serving this dominant ideology are made to take a backseat.¹⁸⁴ What is most striking, however, is the fact that the State structure with all its institutions play a part in this misappropriation, especially as the domestic courts fail to be a site of legal mobilization in favor of challenging human rights appropriation.¹⁸⁵ The judiciary, by utilizing legal arguments that tend to misappropriate and misinterpret human rights norms, makes significant contributions to the curtailment of a range of human rights.¹⁸⁶

¹⁸¹ Ibid.

¹⁸² Başak Çalı and Esra Demir-Gürsel, “Continuity and Change in Human Rights Appropriation: The Case of Turkey” (2023) 21 (1) *International Journal of Constitutional Law* 266, 268.

¹⁸³ Çalı and Demir-Gürsel, 271-271.

¹⁸⁴ Çalı and Demir-Gürsel, 277-279.

¹⁸⁵ Çalı and Demir-Gürsel, 283.

¹⁸⁶ Lorena Sosa, “Beyond Gender Equality? Anti-Gender Campaigns and the Erosion of Human Rights and Democracy” (2021) 39 (1) *Netherlands Quarterly of Human Rights* 3, 9-10.

All over the world, the effects of the anti-gender movement are felt in the backsliding and curtailing of women's and LGBTIQ+'s rights, especially with the rise of right-wing populism.¹⁸⁷ While the women's rights movement has always faced backlash, the use of human rights language to further anti-gender agendas is something to be on the alert for. In this regard, it is more crucial than ever to notice, denounce, and contest the usage of implicit or explicit anti-gender language.

d. Could Judicial Activism Be the Answer?

In such political climates, it is crucial to have an independent and impartial judiciary that can act as a safeguarding mechanism. In this context, the independence and impartiality of the judges is the most important guarantee of the rights and freedoms of persons.¹⁸⁸ The primary role of the judiciary in democratic societies, especially constitutional courts, is to recognize and protect universal legal principles, namely human rights.¹⁸⁹ In order to fulfill this duty, the supreme courts cannot only be expected to stay in the confines of positive and/or national laws. In addition to independence and impartiality, courts, especially constitutional courts, ought to examine and annul regulations that violate fundamental rights and freedoms in a way that is based on universal legal principles as well as positive law. Condemning such an institution to merely being the executor of general laws would render its entire premise useless,

¹⁸⁷ Rebecca Sanders and Laura Dudley Jenkins, "Patriarchal Populism: The Conservative Political Action Coalition (CPAC) and the Transnational Politics of Authoritarian Anti-Feminism" (2023) 58 (3) *The International Spectator* 1, 3-4.

¹⁸⁸ Turhan, 89.

¹⁸⁹ Adıgüzel, "Yargının Siyasallaşması Olgusu" 90.

especially in States where the process of legislation is defined by political parties who have the voting majority but not the best interest of the populace in mind.

Judicial activism, while not having a single, agreed upon definition, can be defined as the creativity of the judiciary in interpreting the text of laws on matters of adherence to constitution. Judicial restraint, on the other hand, is the exercise of caution in the interpretation of the laws.¹⁹⁰ Here, the creative power of the constitutional judiciary manifests itself in the way it interprets the fundamental rights and freedoms, and this forms one of the branches to be looked at in this section. The other is the creative power of the international human rights mechanisms, specifically the European Court of Human Rights for the purposes of this thesis.

In the domestic sense, whether the constitutional courts may go beyond what the law dictates in their interpretation of norms is debated. It could be said that the most crucial function of constitutional judiciary is to keep authorities within constitutional boundaries by way of judicial review.¹⁹¹ In monitoring whether established legislation or the conduct of the public authorities are in line with the constitution, the judiciary may interpret the constitution broadly and refer to its spirit, which then forms the basis of judicial activism. Judicial activism, and as a contra-position judicial restraint, are concepts that are frequently raised in almost all countries that have adopted constitutional jurisdiction.¹⁹² It

¹⁹⁰ Lina Urbaitė, “Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State” (2011) 11 *Baltic Yearbook of International Law* 211, 225.

¹⁹¹ Vija P. Singh, “Judicial Activism as an Essential Tool for the Protection and Expansion of Human Rights in India” (2023) 10 (1) *Kutafin Law Review* 88, 95.

¹⁹² Ergun Özbudun, “Türk Anayasa Mahkemesinin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi” (2007) 62 (3) *Ankara Üniversitesi SBF Dergisi* 257, 258.

can therefore be seen as a by-product of the principle of the supremacy of the constitution. Judicial activism is oftentimes criticized for judges, the appointed few, essentially overruling the will of the chosen, the people. It is also feared to be gateway for juristocracy, where democracy is damaged on the basis of subjective ideologies.¹⁹³ Therefore, the general push is for the constitutional courts to be practicing judicial restraint.

However, a distinction should be made between the constitutional courts taking an “ideology-based approach” and a “rights-based approach”.¹⁹⁴ In the former case, if the judiciary is under the influence of the hegemonic political ideology, then it would undoubtedly lead to problems regarding the rights of the people and the democracy¹⁹⁵, as demonstrated above. However, if the judiciary were to take a rights-based approach, then the fundamental rights and freedoms, as well as human rights principles, would be prioritized and the judiciary would use its activism for the protection, realization, and fulfillment of these concepts.

On the other hand, the judicial activism or restraint of a court “dedicated to human rights is unique” because fundamental rights have an open texture that is suitable for determination.¹⁹⁶ As a court of human rights that is tasked with the regional protection of human rights, ECtHR has to maintain and assure the further realization of human rights,

¹⁹³ Özbudun, 268.

¹⁹⁴ Nilüfer Coşkun, “Resmi İdeoloji ve Yargısal Aktivizm” (2017) 22 (36) Dicle Üniversitesi Hukuk Fakültesi Dergisi 59, 77.

¹⁹⁵ Ibid.

¹⁹⁶ Françoise Tulkens, “Judicial Activism v Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights” (2022) 3 European Convention on Human Rights Law Review 293, 294.

and fulfill this duty bound by the “brief” text of the European Convention on Human Rights (ECHR, the Convention).¹⁹⁷ Because the national sovereignty of Member States is prioritized, it could be said that the Court practices judicial restraint by referring to margin of appreciation.¹⁹⁸ However, the established case law also showcases generous interpretations of the text of the Convention. Judge Mahoney refers to this as judicial activism and judicial restraint as being the two sides of the same coin¹⁹⁹ with regards to the jurisprudence of the Court, while Judge Popović would later reject this claim and argue that the Court is predisposed to engage in judicial activism.²⁰⁰

The creative power is thus enhanced by the generally open-ended wordings of the international human rights instruments.²⁰¹ Despite, or precisely because of, their universal and abstract nature, fundamental rights are in need of contextualization and interpretation.²⁰² Thus, the role of the becomes that much pronounced with regards to gender issues, as the anti-gender movements strategy too rests on this notion. In accordance with judicial ethics and as State agents, judges are under the obligation to protect, and further the progression of human rights. While judicial restraint is an important aspect that keeps the judicial activity within the bounds of legality, a rights

¹⁹⁷ Date of Conclusion: 4.11.1950 Entry into Force: 3.9.1953, Turkey Date of Signature: 4.11.1950 Date of Ratification: 18.5.1954 Entry into Force: 18.5.1954; Urbaitè, 225.

¹⁹⁸ Ibid.

¹⁹⁹ Urbaitè, 226 citing Paul Mahoney, “Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin” (1990) 11 (1-2) Human Rights Law Journal 57-88.

²⁰⁰ Dragoljub Popović, “Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights” (2009) 42 Creighton Law Review 361, 363ff.

²⁰¹ İbrahim Özden Kaboğlu, “Hukukun Genel İlkeleri ve Anayasa Yargısı (Özgürlükler Hukuku Açısından Bir Yaklaşım)” (1991) 8 Anayasa Yargısı Dergisi 291, 300.

²⁰² Tulkens, 295.

based understanding of judicial activism is necessary to interpret the laws on fundamental rights and freedoms in a way that serves to the realization of human rights.



3. Conclusion

It is thus evident that for the realization of the rule of law, the recognition of individuals as subjects of law vis-à-vis public power and judicial protection of individual freedoms, an independent judiciary separated from political decision-making processes and the establishment of the principle of legality are needed.²⁰³ Therefore, in the next section this thesis will aim to provide a legal framework that sets the ethical obligations and responsibilities of the judiciary as State agents in upholding the principles of human rights law

²⁰³ Mithat Sancar and Eylem Ümit Atılğan, “*Adalet Biraz Es Geçiliyor...*”: *Demokratikleşme Sürecinde Hâkimler ve Savcılar* (Tesev Yayınları 2009) 17.

II. Legal Framework Regarding the Role of Judges as a Human Rights Protection Mechanism

Those who administer justice ought to comply with their obligations under both national and international law, such as the constitution, national administrative legislations, international treaties and conventions, and especially soft laws. It should be noted here that formal guarantees for judicial independence date back to roughly 1700s, to England.²⁰⁴ While it could be said that constitutional guarantees for judicial independence ensure State commitment, international legal texts on human rights, which include provisions on fair procedures and the right to be tried before an impartial and independent tribunal, had impacted how international law affects judicial independence in a domestic context. In this respect it could be said that domestic legal systems have benefited greatly from international principles of judicial independence, which have been promoted by international jurisprudence.²⁰⁵

Judges must enforce, respect, protect, and guarantee the right to equality and non-discrimination.²⁰⁶ Because establishing equality principles or recognizing women's rights on paper do not by themselves guarantee that substantial equality is achieved, nor the factual circumstances are ameliorated or structural inequalities or prejudices against

²⁰⁴ David S. Law, "judicial independence" (*Encyclopedia Britannica*) <https://www.britannica.com/topic/judicial-independence> accessed 1 July 2024.

²⁰⁵ Shimon Shetreet, "The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges" (2009) 10 (1) *Chicago Journal of International Law* 275, 275-276.

²⁰⁶ *Judicial Decision Making with a Gender Perspective: A Protocol* (trans) Hilary Hammell and Jessica Ernst Powell, https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf accessed 11 October 2023, 23.

women are eliminated, it is evident that a different approach is necessary. This is the reason why, in this section, this thesis will try to establish how the legal framework already in place regarding the ethical conduct of judges can serve the interest of gender equality. In this respect, this section will focus on the responsibilities of judges as State agents, arising from both national and international obligations of the State, in protecting and realizing human rights.

The positive obligation doctrine ensures that States do not only respect or protect human rights, but also make sure that the provisions foreseen in this regard are properly implemented. The State, in this sense, is not only the guarantor but also the actuator of human rights.²⁰⁷ This would mean that implementors of law shall act proactively in the face of legal problems arising in the field of human rights, with a view to ensure the protection of human rights.²⁰⁸

It is useful to remember here that the independence and impartiality of the judiciary has been developing concepts supported by national, regional and international legislature that can both be characterized as hard law as well as soft law. In fact, it will be possible to evaluate from the bellow listings that soft law documents have especially been detailed and revolutionary in this respect, providing an up-to-date and solid framework for judicial ethics for the protection and realization of human rights.

²⁰⁷ Semih Batur Kaya, “İnsan Haklarında Devletin Pozitif Yükümlülüğü: Avrupa İnsan Hakları Mahkemesi ve Anayasa Mahkemesi Üzerine Bir Analiz” (2022) 9 (1) İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi, 56.

²⁰⁸ Turgut Tarhanlı, “Avrupa Düzeni ve Anayasal Düzen İlişkisinde Hukukun ve Yargıcın İşlevi” in *Bülent Tanör Armağanı* (Legal Yayıncılık 2004), 666.

A. National Legislation to Illustrate the Role of Judges

Judges' roles in the judicial systems are regulated, detailed, and fixed by law and these duties vary according to different jurisdictions.²⁰⁹ A legal system could confer on the judges the power and the duty to strike down laws that are contrary to the Constitution, whereas in another, the judges could have no power to do so.²¹⁰ In the Turkish legal system, in accordance with the hierarchy of norms, judges' duties, especially with regards to impartiality and the protection and implementation of human rights, are regulated in the Constitution foremost and throughout the relevant statutes, laws, bylaws, and declarations.

²⁰⁹ Green, 332.

²¹⁰ Ibid.

1. Primary Legislation

a. Constitution of Turkey²¹¹

Article 138 of the Constitution sets forth the principle of judges issuing judgments “in accordance with the Constitution, laws, and their personal conviction conforming to the law.” Emphasis should be put on the personal convictions of judges, as it relates to the conscience of judges, and then the question becomes one of judicial morals, as this would mean grounding one’s decisions on their moral convictions.²¹² As discussed in the previous chapter, this is the result of the Second World War, where the following decades saw democratic States extend new and in some cases exceptional powers to courts for reviewing the acts of the executive branch and/or enactments of legislatures, making the impact of morality even more pronounced.²¹³ Especially with regards to Constitutional provisions, where concepts such as rights, equality treatment, and respect for life and dignity are prominent, the issue of morality and ethics for the judiciary is thus much important.²¹⁴ However, it is crucial to make the distinction between individual morality and the ethical standards that are set forth for the judges.

The term “personal convictions”, in this sense, could lead one to think of judges relying on their personal moral convictions when deliberating on a case. If this were to be the case, taking into account the personal and professional background and education of

²¹¹ Law no.2709, Date of Acceptance: 18.10.1982 Date of Publication in Official Gazette: 9.11.1982 No: 17863 Vol: 22.

²¹² Ronald Dworkin, “The Judge’s New Role: Should Personal Convictions Count?” (2003) 1 (1) Journal of International Criminal Justice 4, 4.

²¹³ Dworkin, 5.

²¹⁴ Dworkin, 6-7.

the judges in a given country, it would mean that these personal convictions are politically and societally mainstream²¹⁵, and therefore, not in line with the principles of human rights doctrine in most cases. This is precisely why it is abundantly important that positive law guarantees the ethical duties of judges with respect to their obligations to respect, protect, and implement human rights. As argued by the Constitutional Court of Turkey, “Article 138 of the Constitution stipulates that judges shall rule in accordance with the Constitution and the law. When Article 11 (Supremacy and binding force of the Constitution) and Article 138 of the Constitution are evaluated together, it becomes clear that judges are responsible for implementing the principle of equality under Article 10 of the Constitution”.²¹⁶

Article 5 of the Constitution establishes that the fundamental aims and duties of the state are “(...) to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual’s material and spiritual existence.” This is also a central theme in Article 2 as well where the characteristics of the Republic are listed as “(...) social state governed by rule of law, within the notions of public peace, (...) respecting human rights (...)”. Article 17, in a similar vein, regulates

²¹⁵ Dworkin, 9.

²¹⁶ AYM, *Tuğba Arslan*, B. No: 2014/256, 25.6.2014, para. 111.

“(…) the right to life and the right to protect and improve his/her corporeal and spiritual existence”.

These rights place an obligation on the State to establish an effective legal framework that includes judicial guarantees that provide procedural safeguards against interferences with human rights, and to ensure that judicial authorities render effective and fair decisions in disputes that come before them within this legal framework. Taken in conjunction with Article 10 of the Constitution regulating the prohibition of discrimination and equality before the courts, this means that the State shall pay special attention to vulnerable groups within the context of its duties regarding the realization of human rights. Article 13 further establishes a protection framework by asserting that the “fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence”. Article 10 further reiterates that “the State has the obligation to ensure that [gender equality] exists in practice” and that “measures taken for this purpose shall not be interpreted as contrary to the principle of equality”. In this regard, anti-discrimination laws ensure that members of disadvantaged groups’ well-being is protected.²¹⁷

Bearing these provisions in mind, it becomes clear that the State is obligated to take appropriate measures to safeguard the rights of women in particular, as well as taking proactive steps to fully realize gender equality. In order to do this, it is the duty of all branches of the Government to apply the measures in line with the respective nature of

²¹⁷ Tarunabh Khaitan, *A Theory of Discrimination Law* (1st edn, Oxford University Press 2015) 137-138.

their vocation.²¹⁸ The practical reflection of gender equality in the context of the judiciary is realizing women's access to justice. In this regard, this would mean adopting codes of ethical conduct. Article 6 of the Constitution states that State sovereignty belonging to the nation shall be exercised through the authorized organs, as prescribed by the principles set forth in the Constitution. Judicial power, in this respect, is to be exercised by independent and impartial courts, according to Article 9 of the Constitution. It is essential to realize that the importance of the judiciary in a society relates back to this understanding of sovereign power as had by the nation being exercised by means of public officials. It is further notable that the impartiality of the judiciary is underlined in the Constitution, as ethical obligations of the judges are further ensured in this way.

b. The Turkish Civil Code²¹⁹

Article 1 of the Turkish Civil Code regulates the application of law in the solving of conflicts and specifically refers to the judges' law-making powers in the following way: "...In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. In doing so, the court shall follow established doctrine and case law". This provision is a necessary byproduct of the fact that it simply is not feasible or possible for legal rules to account for every possible circumstance that could arise within a society. As Hart articulates, "if the world in which we live were characterized only by a finite number

²¹⁸ Cook and Cusack, 84.

²¹⁹ Law no.4721, Date of Acceptance: 22.11.2001 Date of Publication in Official Gazette: 8.12.2001 No: 24607 Vol: 41.

of features, and these together were known to us, then provision could be made in advance for every possibility (...) Plainly this world is not our world”.²²⁰ It is therefore appropriate that the law leaves open the possibility of legal reasoning for areas of conduct to be developed by courts or officials.²²¹

The Turkish Civil Code therefore recognizes that in certain situations the judge may make law as if they were the legislator. Here, the judge must act and think like the legislator (*modo legislatoris*).²²² This is a byproduct of the prohibition of denial of justice principle. In such situations, the judge must isolate the law that they make from the parties to the case and create it in abstract. The judge must also seek to establish a balance between the interests of the parties, as well as the public.²²³ It is further important the judge resorts to their sense of justice in creating this law, and minds that this new law is in compliance with the existing legal system and legal security.²²⁴

Further on this point, Article 4 systematizes the discretion of judges by conferring the responsibility of abiding by the principles of justice and equity. It is clear that judges not only shall apply the positive, established laws but also do other things that are necessary in the application of law.²²⁵ Their discretionary powers, in this regard, are limited to what Hart asserts are the “characteristic judicial virtues”.²²⁶ While ‘virtues’ is

²²⁰ Hart, “The Concept of Law”, 128.

²²¹ Robert J. Yanal, “Hart, Dworkin, Judges, and New Law” (1985) 68 (3) *The Monist* 388, 389.

²²² Kemal Gözler, *Hukuka Giriş* (14th edn, Ekin 2017) 378; M. Kemal Oğuzman and Nami Barlas, *Medeni Hukuk* (22nd edn, Vedat Kitapçılık 2016) 117.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Green, 333.

²²⁶ Hart, “The Concept of Law”, 205.

not the term preferred by the legislator, these have become engrained in several instruments concerning judicial codes of conduct.

c. Code on Judges and Prosecutors No. 2802

Article 4 ensures once more that judges are independent in their duties and that they judge according to their personal convictions in accordance with the Constitution and the law. While there is no explicit obligation to the “characteristic judicial virtues”, Article 68 that regulates the disciplinary actions of judges mentions that the punishment of displacement will be applicable to judges who create the impression, through their words or conduct, that they cannot perform their duties impartially.

Article 118 further makes a reference to Council of Judges and Prosecutors resolutions (*ilke kararları*) where the criteria set out for career advancement provides an important outlook for the principles that judges are made to abide by. Accordingly, it is analyzed whether judges, on the basis of the principles of judicial independence, have caused a violation decision in the examinations made by the European Court of Human Rights and the Constitutional Court, the nature and severity of the violation they have caused, and whether they have made efforts to protect the rights guaranteed by the European Convention on Human Rights and the Constitution.²²⁷

²²⁷ Hakim ve Savcıların Derece Yükselmesi Esaslarına İlişkin İlke Kararı, Article 6/j, No: 675/1 K.T. 5.4.2017 <https://www.hsk.gov.tr/Eklentiler/1611202211461-derece-ilke-kararipdf.pdf> accessed 29 June 2024.

d. Code of The Council of Judges and Prosecutors No. 6087

Article 7 of the Code of The Council of Judges and Prosecutors asserts that one of the duties of the Council is to determine and issue the principles of ethical conduct that judges and prosecutors must comply with.

e. Presidential Decree no. 34 on the Justice Academy of Turkey

The Justice Academy of Turkey is an institution responsible for the training of new judges and prosecutors. Before the presidential system that came into place in 2017, the Justice Academy of Turkey was established by the Law no. 4945 enacted by the legislature. After the presidential system, however, it was repealed and founded anew by the Presidential Decree no. 34. As the main purpose of this Decree is to regulate the institution that is the sole enforcer of the training of candidate judges and prosecutors and the in-service training of judges and prosecutors, the pre-professional and in-service training of judges and prosecutors or their appointment as lecturers, examining judges or in any other capacity, it was highly contested on the grounds of being contrary to the principles of legality and separation of powers as the Justice Academy, by this way, became susceptible to all kinds of intervention by the executive. Constitutional Court of Turkey annulled said decree for the above-mentioned reasons, which is an important step for the realization of the principle of impartiality.²²⁸

²²⁸ AYM, E.2019/7 K.2023/229 K.T.28.12.2023.

2. Secondary Legislation

a. Court Of Cassation Code of Judicial Conduct²²⁹

The Court of Cassation Code of Judicial Conduct (the Code of Judicial Conduct), in its preamble, emphasizes the importance of public trust in the judiciary as a necessity of a modern democratic society. Article 2.1 of the Code of Judicial Conduct maintains that a judge shall perform their duties without bias or prejudice, and Article 2.7.1 further states that the judge must recuse themselves from the case before them if they were to have actual bias or prejudice for or against a party.

Further, under Article 4.5, it is expressed that a judge shall act in a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary when exercising his freedom of expression and belief. While these provisions serve as an overarching set of exigencies relating to the judges' duty of impartiality, it is explicitly stated in Article 5 and its subset articles from 5.1 through 5.5 that it is essential for judges to both respect and further make sure all parties abide by, the principle of equality. It is emphasized that judges should be aware of the diversity present in a society and refrain from acting discriminatory towards people of diverse backgrounds such as of color, sex, religion, conscience, belief, culture, dress, language, place of birth, ethnic or social origin, disability, age, marital status, sexual orientation, social or economic status or other like causes. It is equally as important that judges do not manifest bias or prejudice

²²⁹ https://www.yargitay.gov.tr/documents/CoC_CodesofConduct.pdf

towards any social group in their performance of judicial duties, either through their words or conduct.

b. The Council of Judges and Prosecutors Declaration of Ethics for Turkish Judiciary²³⁰

Article 1 of the Council of Judges and Prosecutors Declaration of Ethics for Turkish Judiciary (the Declaration of Ethics) imposes on judges and prosecutors the duty to respect human dignity, to protect human rights, and to treat everyone equally. Article 1.1 specifically asserts that judges shall act in accordance with human rights and freedoms, and Article 1.2 furthers this point by declaring that the judges shall be aware of their duties in terms of the protection and the realization of human rights as a condition for the principle of a State based on human rights. Articles 1.3 and 1.4 together illustrate the requirement of judges to respect the differences and the conditions of living in a society together and to regard everyone with equality, and especially to refrain from employing discriminatory or prejudiced language or behavior.

Article 3, on the other hand, deals with the principle of impartiality. Articles 3.1 and 3.2 mention the obligation not only to stay neutral to both parties of the dispute, but to take an objective position at all times in order to dispel all suspicion. However, it ought to be emphasized again that staying neutral in every case could lead to unjust results. Indirect discrimination may occur in such situations, when a seemingly neutral law or a judicial position bears detrimental consequences for certain social groups.²³¹ Articles 3.3

²³⁰ <https://www.cjp.gov.tr/Eklentiler/050620231600declaration-of-ethics-for-turkish-judiciarypdf.pdf> accessed 21 November 2023.

²³¹ Cook and Cusack, 115.

and 3.5 further assert that judges shall not employ discriminatory speech, nor shall they allow their personal beliefs, prejudices, or thoughts to infringe their impartiality. It is emphasized that judges should continuously check their behavior for any bias or enmity towards a social group.

According to Article 8.2, judges must moreover be aware of the fact that, due to their role in the society, their decisions or acts have immense effects on the rest of the society. As John Chipman Gray professes, “the difference between the judges and Sir Isaac (Newton) is that a mistake by Sir Isaac in calculating the orbit of the earth would not send it spinning around the sun with an increased velocity (...) while if the judges (...) come to a wrong result, it is none the less law”.²³²

c. Judicial Reform Strategy of Ministry of Justice in 2019²³³

The judicial reform strategy that had been taken into the agenda of the Turkish Ministry of Justice mention that the goals for the strengthening of the judicial role include strengthening the rule of law, protecting and promoting rights and freedoms more effectively, strengthening the independence of the judiciary, and improving impartiality.

d. Human Rights Action Plan of Ministry of Justice in 2021²³⁴

In the context of the human rights action plan that had been foreseen for the following years, the emphasis on the human rights specific training of judges is striking.

²³² MacKinnon, “Feminist Theory of the State”, 157.

²³³ https://sgb.adalet.gov.tr/Resimler/SayfaDokuman/23122019162949YRS_ENG.pdf accessed 29 June 2024.

²³⁴ <https://insanhaklarieylemplani.adalet.gov.tr/resimler/eylemplani.pdf> accessed 29 June 2024.

According to the action plan’s article 9.2, judges will be trained regularly on human rights, including the jurisprudence of the Constitutional Court and the ECtHR alongside internship opportunities at said courts.

However it should be noted that even though capacity building and training of judges in human rights is determined as a goal for the human rights action plan, trainings specializing on gender equality are not included in the mandatory training programs for prospective judges and prosecutors at the Justice Academy of Turkey under the Ministry of Justice. It should therefore further be noted that most judges and prosecutors do not have a gender-sensitive perspective, because they have never been trained to adopt one.²³⁵

²³⁵ Seher Kırbaş-Canikoğlu, “Kadınların Adalete Erişiminin Ölçülmesi ve İzlenmesine İlişkin Uluslararası Seminer Sonuç Raporu” (Türkiye’de Kadınların Adalete Erişiminin Desteklenmesi Projesi, Ankara, 2022) https://dspace.ceid.org.tr/xmlui/bitstream/handle/1/2123/KAE_%C3%9Czerine_%C3%96l%C3%A7me_De_eriendirme_Seminer_Raporu_Seher%20K_rba_%20Caniko_lu%20%281%29.pdf?sequence=1&isAllowed=y accessed 9.7.2024, 11.

B. International Legal Framework to Illustrate the Role of Judges

Human rights law presents a framework for how the State shall treat the people under its jurisdiction. At their core, all human rights instruments ensure that States will not arbitrarily and unlawfully take life, subject its citizens to torture, inhumane or degrading treatment, interfere with their private and family life nor their freedom of expression, unlawfully impede with their property, or arbitrarily deprive them of their freedom.

By accepting international human rights instruments and obligations born from them, the State thereby determines and limits the boundaries of its own sovereignty.²³⁶ Rather than creating obligations between nations, treaties based on human rights obligate States to take on certain responsibilities to be realized within the country they preside over. Therefore, such treaties retain a close link to constitutional provisions that regulate fundamental rights and freedoms.²³⁷

How the Constitution, in the domestic regard, enshrines these limitations and obligations has been discussed above. The international framework, on the other hand, is regulated in Article 90 of the Constitution, specifically in the fifth paragraph:

“International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between

²³⁶ Reyhan Sunay, “İnsan Haklarının Yatay Etkisi ve Devletin Sorumluluğu” (2015) 23 (1) Selçuk Üniversitesi Hukuk Fakültesi Dergisi 9, 11.

²³⁷ Tarhanlı, 672.

international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”.

The existence of Article 90/V of the Constitution further serves as a promise of protecting and furthering human rights as well as an opportunity for an emancipatory and effective interpretation method.²³⁸ While Article 90/V provides a solid basis for the application of international treaties regarding human rights in the domestic legal system, it does not say anything about the application of rules of customary international law, and this proves to be an important challenge for the non-binding principles of international law and specifically international human rights law.

However, Article 138 of the Constitution here presents an interesting passage. Tarhanlı, in this respect, proposes that Article 138’s prescription that “Judges (...) shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law” can be read in a way to encompass principles and rules accepted by international law.²³⁹ The Turkish text of the Article differs from the official English translation in the way that where the English version spells “laws”, the Turkish text uses “*kanuna ve hukuka*”, translated literally to “according to acts/rules/codes and the law”. It is then postulated that the usage of “the law” (*hukuk*) opens a communication between the domestic legal system and the rules and principles of international law. This position is further backed by the reports from the drafting procedure of the 1961 Constitution of

²³⁸ Tarhanlı, 670.

²³⁹ Tarhanlı, 688.

Turkey where the term "the law" used in the article was used to be interpreted as authorizing the courts to apply customary international law.²⁴⁰

Because the law of treaties is based on the principle of *pacta sunt servanda*, it is the duty of the state to abide by the treaties it has signed and to realize their terms in good faith. Article 31 of the 1969 Vienna Convention on the Law of the Treaties (Vienna Convention) purports that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

It should be noted that Turkey did not ratify the Vienna Convention, and thus it should be assessed whether it would be possible for this clause to be applicable in Turkish law as a rule of customary international law.²⁴¹ Because there is no specific regulation on the application of customary international law in the domestic legal system, one must see whether other regulations in place allow this. As explained above, it is seen possible that Article 138 of the Constitution could be utilized in this respect. Further, because the legal system requires judges to present their reasoning in a judgment, they must rely on the authority of both national and international law in order to support their decisions.²⁴²

²⁴⁰ Hilal Nur Şarbak, “Uluslararası Hukukta Yorum ve Uluslararası Hukukun Ulusal Mahkemelerde Yorumlanması” (LL.M. Thesis, İstanbul University 2018) 194 citing Sevin Toluner, *Milletlerarası Hukuk ile İç Hukuk Arasındaki İlişkiler* (Sulhi Garan Matbaası 1973) 688.

²⁴¹ Şarbak, 192

²⁴² Evola, Krstić, Rabadán, 149.

Below, this thesis will provide an international legal framework on the role of judges in protecting human rights by looking first at the United Nations level texts, then at regional instruments. Here, hard laws to which Turkey is a party as well as soft laws will be presented.



1. United Nations Texts

a. Hard Law

i. International Covenant on Civil and Political Rights²⁴³

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) prescribes equality before the courts and tribunals, followed by asserting that “a fair and public hearing by a competent, independent and impartial tribunal established by law” shall be available for everyone. Further, Article 26 regulates the principle of equality before the law, nondiscrimination, and equal protection of the law. Taken in conjunction, it is clear that the ICCPR foresees judicial duty to be free of prejudice.

ii. Convention on the Elimination of All Forms of Discrimination Against Women²⁴⁴

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) presents a detailed formulation of the duties of the State in realizing human rights, specifically with regards to rights of women.²⁴⁵ As recognizing women’s rights on paper do not guarantee that inequalities and prejudices affecting the daily lives of women are wholly eliminated, it is crucial that such rights instruments categorically impose upon the States to take positive, active, and structural actions in order to address the structural and factual inequalities. In its preamble, CEDAW underlines that signatory States thereby

²⁴³ Date of Conclusion: 16.12.1966 Entry into Force: 23.3.1976, Turkey Date of Signature: 15.8.2000 Date of Ratification: 23.9.2003 Entry into Force: 23.12.2003.

²⁴⁴ Date of Conclusion: 18.12.1979 Entry into Force: 3.9.1981, Turkey Date of Ratification: 20.12.1985 Entry into Force: 19.1.1986.

²⁴⁵ Judicial Decision Making with a Gender Perspective: A Protocol, 24.

assure that they will implement the principles set forth within and adopt the measures required for the elimination of discrimination in all its forms and manifestations.

In Article 2, it is imposed on the States that they shall embody the principle of equality in their constitutions and other legislations, and that they shall ensure through law and other means the full and practical realization of this principle. States are ought to take all appropriate measures to modify or abolish laws or other standards of social conduct regulations that constitute discrimination against women. Further, in line with establishing appropriate legal protection of the rights for women, States must ensure the effective protection and realization of these rights through competent national tribunals and other public institutions. States must ensure that they do not engage in acts or practices that discriminate against women and that public authorities and institutions comply with this obligation.

Further, Article 5 (a) reinforces Article 2 by requiring States to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. These outlined obligations confer upon all branches of the government to implement appropriate measures to modify existing social and cultural patterns of behavior with a view to eliminating such prejudices and practices. Even if the laws or other regulatory instruments do not constitute discrimination for the purposes of Article 2(f), the State is nevertheless obligated to pursue the objectives stipulated in Article 5

(f).²⁴⁶ The judiciary, in this respect, is one of the primary instances where the duty befallen on the State could be realized, if judicial codes of conduct are to be taken in conjunction with the provisions.

As the content of CEDAW, and also the obligations on the States are determined by the method of treaty interpretation, the CEDAW Committee's manner of application of the provisions laid down in CEDAW is important.²⁴⁷

b. Soft Law

i. Universal Declaration of Human Rights

Article 10 of the Universal Declaration of Human rights prescribes that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal (...)”. This, taken in conjunction with Articles 7 and 8 provide a basis for the obligations of judges in the international arena, especially considering the customary law nature of this document. Article 7 presents the principle of equality before the law, as well as equal protection of the law without discrimination. Article 8 solidifies this position by asserting that the “right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted” is to be ensured under this document.

²⁴⁶ Cook and Cusack, 75.

²⁴⁷ Ibid.

ii. United Nations Basic Principles on the Independence of the Judiciary

The United Nations Basic Principles on the Independence of the Judiciary, in its preamble, accepts that even though there exists a gap between the vision underpinning the provisions and the actual situation in judiciaries world-wide, every country shall nonetheless strive to organize and administer justice inspired by the principles set forth in this and other relevant instruments in order to translate them fully into reality. Because judges are charged with the ultimate decision over the life, freedoms, rights, duties and property of citizens, the principles mentioned in this document shall be “taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general”. The most crucial principle with regards to highlighting the importance of judiciary in combating gender inequality is impartiality, where the judiciary shall “decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”. This provision safeguards the notion that judges shall not be swayed in their judgments by their own biases or prejudices towards certain social groups, nor should they be influenced by external dispositions.

iii. Bangalore Principles on Judicial Conduct

The Bangalore Principles of Judicial Conduct (the Bangalore Principles), published in 2003 by the United Nations, is a milestone instrument regulating judicial

ethical conduct. The principles set forth aim to set standards for the ethical conduct of judges to guide and provide the judiciary with a framework for regulating judicial conduct. Although these principles are an example of soft law, they are a universal text that is accepted by many countries today.²⁴⁸

The ECtHR has referenced the Bangalore Principles in a number of its cases²⁴⁹ and accepts the instrument under relevant international law. In Turkey's case, the text of Bangalore Principles was adopted by the Council of Judges and Prosecutors in 2006 and the Constitutional Court of Turkey has referenced the principles in its judgments, both in terms of individual application and constitutional review.²⁵⁰ Further, in the preamble, the Bangalore Principles acknowledge that the fundamental principles and rights set forth in the document are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

The preamble of the Bangalore Principles moreover underlines the importance of a competent, independent and impartial judiciary for the protection of human rights, and asserts that the realization of rights ultimately rests on the proper administration of justice. In this sense, a competent, independent and impartial judiciary is essential and that public

²⁴⁸ Esra Nur Tuğan and Uğur Ömürgönülşen, "Türkiye'de Yargı Etiği İlkeleri Üzerine Bir İnceleme" (2020) 24 Atatürk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 85, 92.

²⁴⁹ *Gyulumyan and others v Armenia* App no 25240/20 (ECtHR, 21 November 2023) paras. 50-52; *Samsin v Ukraine* App no. 38977/19 (ECtHR, 14 October 2021) para. 35; *Xhoxhaj v Albania* App no. 15227/19 (ECtHR, 09 February 2021) para. 407; *Svilengačanin and Others v Serbia* App no. 50104/10 (ECtHR, 12 January 2021) para. 48; *Rustavi 2 Broadcasting Company Ltd and Others v Georgia* App no. 16812/17 (ECtHR, 09 December 2019) paras. 224-225; *Upīte v Latvia* App no. 7636/08 (ECtHR, 01 September 2016) para. 21; *Harabin v Slovakia* App no. 58688/11 (ECtHR, 20 November 2012) para. 107-108.

²⁵⁰ AYM, *Tuğba Arslan*, B. No: 2014/256, 25.6.2014; AYM, E.2011/143 K.2013/18 K.T. 17.1.2013.

confidence in the judicial system, its moral authority and integrity is of paramount importance in a modern democratic society, and judges must strive to maintain this confidence in the judiciary.

The impartiality principle maintains that it is essential not only to the decision itself but also to the process by which the decision is made. In this context, a judge shall perform their judicial duties without bias or prejudice and ensure that their conduct inspires confidence in the judicial system in the public. For this reason, a judge shall not participate in proceedings where they give the impression that they are unable to decide the matter impartially. This includes situations in which the judge has an actual bias or prejudice in relation to a party.

With regards to the principle of equality, the Bangalore Principles stress that a judge “shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, color, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes”, for short, the “irrelevant grounds”. It is further accentuated that a judge shall not demonstrate bias or prejudice towards any person or group on “irrelevant grounds” by their words or conduct during the course of their judicial duties.

Furthermore, judges shall guarantee that lawyers, in the proceedings, refrain from exhibiting bias or prejudice based on “irrelevant grounds” as well. Thus, it is emphasized that stereotypes and/or narratives that emerge as a result of prejudices towards certain social groups shall bear no weight in the outcome of the court proceedings, and judges have a duty to ensure this notion

iv. **Commentary on the Bangalore Principles of Judicial Conduct**²⁵¹

Commentary on the Bangalore Principles (the Commentary) provide a deeper look into these principles. It first presents a contextual background for the preamble of the Bangalore Principle in detail, drawing on support from international legal texts. It is especially important that the commentary underlines the role of judges and fundamental universal values as the framework for these principles.

For independence, the Commentary emphasizes that it a responsibility that comes attached to the judicial office, and further draws attention to the obligation to reject outside influences, especially the other branches of the government. It posits judicial independence as a necessary precondition for impartiality, where impartiality is the “core attribute of the judiciary”²⁵². Here, being free of bias or prejudice, and to appear that way, is prioritized. The Commentary also provides an explanation of how bias and/or prejudice may manifest in judges, as either verbally or physically. It is accepted that slurs, as well as negative stereotypes are included in the verbal manifestation of bias and/or prejudice.²⁵³

For equality, moreover, international standards are recognized where it is most notable that, in addition to the general non-discrimination grounds, other circumstances” is interpreted to include sexual orientation, economic status, disability, and HIV status.²⁵⁴ Further, it is posited that judges must avoid stereotyping, and gender discrimination, and

²⁵¹ Commentary on the Bangalore Principles of Judicial Conduct
https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf

²⁵² Commentary on the Bangalore Principles of Judicial Conduct, para. 52.

²⁵³ Ibid, para. 58.

²⁵⁴ “ace, colour, sex, language, religion, political or other convictions, national or social origin, means, status (...)” Ibid para. 183.

it is notable that the Commentary specifically connects this notion to the principle of impartiality.²⁵⁵ It is further crucial that the Commentary asserts that, in addition to not being influenced by stereotypes, myths or prejudices, judges should also “make every effort to recognize, demonstrate sensitivity to, and correct such attitudes”.²⁵⁶ The language used by the judges is therefore important, as the Commentary further posits that judges have a duty to refrain from making derogatory comments.²⁵⁷

v. ICCPR General Comment No. 32

General Comment No. 32 provides a deeper look at Article 14 of ICCPR. It refers to Article 14 as a clause that ensures “the proper administration of justice, and to this end guarantees a series of specific rights”. Especially with regards to Article 14’s guarantee of equality before courts and tribunals, the General Comment provides that it “not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever national law entrusts a judicial body with a judicial task”. The General Comment asserts that equal access to courts as well as equality of arms is protected under Article 14, and it further ensures that the parties to the proceedings are treated without any discrimination.

The most crucial part of this General Comment for the purposes of this thesis is the acknowledgement that Article 14 further “prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and

²⁵⁵ “(...) a judge who reaches a correct result but engages in stereotyping does so at the expense of the judge’s impartiality, actual or perceived” Ibid, paras. 184-185.

²⁵⁶ Ibid, para. 184.

²⁵⁷ Ibid, para 187.

reasonable grounds”, meaning that refusal of access to courts or tribunals based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited.

vi. Human Rights Council Resolution 44/3 on Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers

The resolution stresses the importance of the independence and impartiality of the judiciary as a Sustainable Development Goal²⁵⁸ and in the quest of realizing human rights in full and without discrimination. It is especially underlined that judges – alongside prosecutors and lawyers – play a critical role in upholding human rights. Here, it is important to note “the rights and specific needs of women, children and persons belonging to minorities, particularly those in situations of vulnerability who are in contact with justice systems, who may require particular attention, protection and skills from the professionals interacting with them, especially from lawyers, prosecutors and judges”, and for States to consider developing guidance on issues such as gender, children, persons with disabilities, indigenous peoples and migrants, among others to inform the action of judges, lawyers, prosecutors and other actors in the judicial system.

vii. The Universal Charter of the Judge adopted unanimously by International Association of Judges

The Charter acknowledges the issues relating to the external and internal independence of the judiciary, and provides a safeguarding system. Further, under Article 6, the Charter

²⁵⁸ Sustainable Development Goal 16 of the 2030 Agenda for Sustainable Development.

emphasizes that judges must be guided by ethical principles that guide judges in their professional duties as well as their way of behaving. It is also presented that ethical principles should be a part of judges' training. Further, it is prescribed that judges must perform their duties "with restraint and attention to the dignity of the court and of all persons involved" and must "refrain from any behavior, action or expression of a kind effectively to affect confidence in his/her impartiality and independence".

viii. CEDAW General Recommendations

General Recommendation No. 25²⁵⁹

CEDAW Committee's General Recommendation No. 25 is significant in its postulation that CEDAW is a living instrument. It further states explicitly that combating wrongful gender stereotyping is a central duty of the State, followed by the obligation to eliminate the direct and indirect discrimination against women and the mission to improve the de facto position of women in the society. It is iterated that the measures to be taken in this respect will not be contrary to, or an exception to the principle of non-discrimination.

General Recommendation No. 28²⁶⁰

General Recommendation No. 28 on the Core Obligation of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women stipulates that, while the provisions bear obligations on all branches of the

²⁵⁹ CEDAW/C/GC/25 2004.

²⁶⁰ CEDAW/C/GC/28 2010.

government, the judiciary in particular is required to refrain from stereotyping, to ensure that stereotyping does not infringe human rights, and to ensure that women can exercise and enjoy the right to be free from wrongful gender stereotyping.

General Recommendation No. 33²⁶¹

The General Recommendation No. 33 on women's access to justice further requires the State to adopt all necessary measures to remove the obstacles that women face in trying to access effective remedies. Gender bias in the judiciary, in this respect, have serious consequences for with regards to women's full enjoyment of their human rights. In this context, it should be emphasized that even though the judiciary administers justice according to the stipulations of the law itself, judges' interpretation of the facts of the case may be biased or prejudiced.²⁶² General Recommendation No. 33 thus puts the responsibility of eliminating such conduct on the States.

General Recommendation No. 35²⁶³

General Recommendation No. 35 on gender-based violence against women that updates General Recommendation No. 19 is a significant international legal text to draw a framework around the State responsibility in this respect, and is important for the recognition of the prohibition of gender-based violence as a principle of customary international law. For the judiciary, General Recommendation No. 35 underlines that the judiciary as a State actor is required to refrain from direct or indirect discrimination and

²⁶¹ CEDAW/C/GC/33 2015.

²⁶² Evola, Krstić, Rabadán, 153.

²⁶³ CEDAW/C/GC/35 2017.

ensure that legal procedures should be “unaffected by gender stereotypes or the discriminatory interpretation of legal provisions, including international law”.²⁶⁴ It is further recommended that States shall develop and implement measures that “address and eradicate the stereotypes, prejudices, customs and practices” that promotes gender-based violence.²⁶⁵ It is further important to build capacity and train the members of the judiciary in this regard.²⁶⁶



²⁶⁴ Ibid, para. 26(c).

²⁶⁵ Ibid, para. 30(b).

²⁶⁶ Ibid, para. 30(e).

2. Council of Europe Texts

a. Hard Law

i. European Convention on Human Rights²⁶⁷

Preambles, in the context of international law, are not only a byproduct of diplomatic necessity but also an emphasis of the reasons of the respective instruments' preparations, purpose, and aims.²⁶⁸ The fact that the European Convention on Human Rights, in its preamble, maintains that one of the aims of the Convention is “the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms” demonstrates the importance of its place in the Turkish legal system.²⁶⁹

Article 1 of the Convention further ensures that all contracting parties shall secure that everyone within their jurisdiction enjoy the rights and freedoms set forth in this document, which therefore imposes positive and negative obligations on Turkish State agents. Even though in the past the European Court of Human Rights has left identifying the corrective measures to be taken up by Member States and their oversight to the Committee of Ministers, in its recent judgments, the Court has adopted a new trend of

²⁶⁷ Date of Conclusion: 4.11.1950 Entry into Force: 3.9.1953, Turkey Date of Signature: 4.11.1950 Date of Ratification: 18.5.1954 Entry into Force: 18.5.1954.

²⁶⁸ Tarhanlı, 666.

²⁶⁹ Tarhanlı, 666-667.

determining the remedial measures that the States must implement to address breaches of the Convention.²⁷⁰

Article 6 establishes that everyone is entitled to a fair and public hearing conducted by “an independent and impartial tribunal established by law”. Article 6, taken in conjunction with Article 14, which regulates prohibition of discrimination on grounds such as sex, race, color, language, religion, political or other option, national or social origin, association with a national minority, property, birth or other status, it becomes evident that the Convention imposes on the States to ensure impartiality in their judiciary.

The European Court of Human Rights approaches the issue of impartiality from two dimensions: “First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect”.²⁷¹

In terms of the inner workings of the Court, the Convention, in Article 21, establishes that in order to be selected as a judge in the Court, one must possess a high moral character, be qualified, impartial and independent. In addition to these criteria, the Court adopted the Resolution on Judiciary Ethics (the Resolution) in the interest of strengthening the obligations of integrity, independence, and impartiality of judges.²⁷²

²⁷⁰ <https://www.justiceinitiative.org/voices/case-watch-judicial-activism-european-court-human-rights>, accessed 30 November 2023.

²⁷¹ *Findlay v the United Kingdom*, App no. 22107/93 (ECtHR, 25 February 1997) para. 73.

²⁷² Grégor Puppink, ‘Measures Aimed at Providing Additional Safeguards to Preserve the Independence and Impartiality of the Judges of the European Court’ (2023) <http://media.aclj.org/pdf/Measures-aimed-at-providing-additional-safeguards-to-preserve-the-independence-and-impartiality-of-the-judges-of-the-European-Court,-Gregor-Puppink,-January-2023.pdf>, accessed 29 November 2023.

ii. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence²⁷³

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention), much like CEDAW, is a crucial document in combating structural discrimination and violence that women are faced with.

Even though Turkey had withdrawn from the Istanbul Convention in 2021, Law No. 6284 on the Protection of the Family and Prevention of Violence against Women (Law no. 6284)²⁷⁴, which refers to the Istanbul Convention, is still in force domestically and must be implemented. In this context, the Istanbul Convention's definition of gender-based violence and the responsibility it places on the state to eradicate it continue to remain relevant. Furthermore, for ECtHR, it is “not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies”.²⁷⁵ In other words, ECtHR by principle, regardless of the respondent State’s signature, could consider a human rights instrument under “relevant international law”

²⁷³ Date of Conclusion: 11.5.2011 Entry into Force: 1.8.2014, Turkey Date of Signature: 11.5.2011 Date of Ratification: 14.3.2012 Entry into Force: 1.8.2014.

²⁷⁴ Law to Protect Family and Prevent Violence against Woman (*Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun*) Law no. 6284, Date of Acceptance: 8.3.2012 Date of Publication in Official Gazette: 20.3.2012 No: 28239 Vol: 52.

²⁷⁵ *Demir and Baykara v. Turkey* App no. 34503/97 (ECtHR [GC], 12 November 2008) para. 86.

and base its judgment on it. For this reason, it can further be concluded that Turkey will still be bound by the Istanbul Convention's provisions despite "withdrawing" from it.

According to the Istanbul Convention Article 4, it is an obligation of the State to take the necessary legislative and other measures to promote and protect the rights of women and ensure that they live free from violence in both the public and the private sphere. In order to do so, States should take the necessary legislative and other measures, in particular by "embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realization of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; and abolishing laws and practices which discriminate against women". It is reiterated that measures to be taken in this regard will not be considered as discrimination.

It is further noted that public authorities, officials, institutions, and other State agents act in conformity with these obligations. Articles 5 and 6 of the Istanbul Convention emphasize that States "shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for" the violence suffered by women and that they "shall undertake to include a gender perspective" in the implementation provisions of the Istanbul Convention.

As mentioned above, the judiciary is an integral component of the State and any obligation imposed on the State by nature will extend to the judiciary as well. Even though one could make a case for judges' obligation in this respect alone, the Istanbul Convention further explicitly states judiciary's role in dealing with violation against women by stating,

in Article 18, that States shall take all necessary measures to ensure that “all relevant state agencies, including the judiciary” will co-operate in order to protect and support victims of violence. The crucial responsibility that befalls on the judiciary, as underlined in Article 42, is that in court decisions, “culture, custom, religion, tradition or so-called “honor” shall not be regarded as justification” for acts of violence against women, including situations where the victims are claimed to have “transgressed cultural, religious, social or traditional norms or customs of appropriate behavior”.

b. Soft Law

i. European Charter on the Statute for Judges

The European Charter on the Statute for Judges (the European Charter) aims to ensure that judges are competent, independent, and impartial in a manner that “every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights”. Competence, independence, and impartiality are positive references in the meaning that judges must strive to guarantee them, but they are also negative references because judges shall not behave in ways that might adversely affect the public confidence in the existence of these guarantees. The importance of regulating the conduct of judges is further emphasized by their role in society and the position of power they occupy, where individuals may “often feel very vulnerable when confronted with the judicial system”.

ii. Resolution on Judiciary Ethics

Reiterating the high moral character criteria of the Convention, the Resolution further highlights the integrity of the judicial office and touches upon the “loyalty, dignity and discretion inherent in the authority and reputation of the Court”. In terms of impartiality, the Resolution emphasizes the public trust in the judiciary. Moreover, the Resolution states that judges, when exercising their freedom of expression, shall nonetheless be careful not to cast doubt upon their impartiality. This provision seems especially important with regards to the speech that judges employ in the judgments, and how, in the context of the nature of and limits to freedom of expression, discriminatory speech will not be protected and count as a breach of their duty of impartiality. The freedom of expression of judges will be further examined below.

iii. Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010

The Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities the Recommendation, contrary to the Resolution above, imposes responsibilities on the Member States to ensure in their respective judicial systems rather than the Court itself. In its preamble, it is stated judicial independence is not only a guarantee for the judges but a guarantee of respect for human rights and fundamental freedoms as it allows the public to have confidence in the justice system.

In Clause 13, it is imposed on the Member States that they shall take all necessary measures to respect, protect, and promote the independence and impartiality of judges. Further, under Clause 59, it is emphasized that judges should protect the rights and freedoms of all persons equally, respecting their dignity in the conduct of court proceedings. This is an important provision in the sense that, as mentioned above and will be discussed below, judges employing discriminatory language or having personal convictions based on stereotypes influence their judgments further harm and marginalize certain social groups.

Under Chapter VIII titled “Ethics for Judges”, the Recommendation underlines that not only should judges be guided by ethical principles of professional conduct in their activities, but they also play a leading role in the development of such codes and these ethical principles should inspire confidence in the judiciary, as is the basis of the protection of fundamental rights of persons.

iv. Magna Carta of Judges

The Magna Carta of Judges issued by the Consultative Council of European Judges (CCJE) serves as a fundamental basis for the principles to be followed by judges belonging to European States. Under its provisions relating to ethics and responsibility, the Magna Carta of Judges underlines that judicial independence and impartiality are essential prerequisites for the operation of justice. In line with this reasoning, it asserts that judges shall follow deontological principles, and that misconduct in this sense shall be faced with disciplinary sanctions.

v. Opinion no. 3 of the Consultative Council of European Judges (CCJE)

The CCJE questioned, in this context, whether existing rules and principles were in all respects consistent with the independence and impartiality of tribunals required by the European Convention on Human Rights in its Article 6, not only with regards to the text, but also in the context of the aim of the article. Article 6 reads that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

The CCJE in its Opinion no. 3 asserts that Article 6 sets out the safeguards and the principles of independence and impartiality that underpin the duties of judges. Impartiality, in this sense, rests on two grounds: subjective and objective approaches. Subjective approach takes into account the personal conviction or interest of a particular judge in a given case, while the objective approach is to do with whether the judge in question offered guarantees sufficient to exclude any legitimate doubt in their conduct in the eyes of a reasonable person. Paragraph 23 underlines that "judges should therefore discharge their duties without any favoritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything which falls outside the application of the rules of law. As long as they are dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute, or which could influence the fairness of the proceedings". It becomes apparent that this line of reasoning is crucial with regards to cases concerning women, as judges not acting with, or even making any observations based on any prejudice against or pre-conceived notion

regarding women is one aspect of their duty of impartiality. This should not come to mean that judges shall be isolated from the society in which they live. On the contrary, judges must take into account the economic, political, and social conditions under which women experience inequality, and that this gender perspective should not lead to a breach of non-discrimination. Rather, as Paragraph 28 mentions, a balance should be struck. The methods that judges use in the settlement of disputes must inspire confidence in the judiciary, and as a precondition of this, the powers entrusted to judges shall be strictly linked to the values and principles of justice.

C. Conclusion

Undoubtedly, as unfurled in the discussions above, the role of a judge is to uphold the rule of law and to ensure the administration of justice in accordance with the national and international legal rules. While fulfilling this duty, judges must not only adhere to the written law, but further maintain the ethical standards required by the judicial office. However, it is doubtful that merely adhering by these ethical principles, both in the context of moral philosophy as an extension of the role specific obligations, and in the context of positive legal obligations, is sufficient for the realization of gender equality and the elimination of discrimination in the true sense.

In the next section, this thesis will argue that even though judicial ethics and activism could serve as a basis for judges to take effective action with regards to the State's object to realize gender equality and women's access to justice, neither the existent philosophical background nor the existent provisions have proven to be effective in this regard. Thus, this thesis will demonstrate how feminist legal methodology could benefit the considerations or outcomes of cases regarding gender.

III. Feminist Legal Theory to Provide a New Approach to Adjudication

In order to present the need to acquire a gender perspective in adjudication, it is important to examine the concepts that are essential to this thesis, and especially their correct usage. Terminology and method shape the way phenomena are perceived, and it is crucial to reject and challenge the patriarchal definitions and perceptions of these concepts if one aims to proffer a legal system responsive and perceptive to women's issues and agency.

This section will therefore delve into the debates surrounding the central concepts that this thesis depends on in order to present a pathway to the solution it aims to provide. Feminist methods are the bedrock on which this thesis will build an argument, therefore it is crucial to gain an understanding of how they all, in their own ways, provide a way to unearth and denounce the patriarchal viewpoint that permeates the legal system.

A. Feminist Legal Theory

Law occupies a substantial role in the social order. Bearing this in mind, it becomes equally important to uncover the relationship between law and patriarchy in a legal system. Legal systems differ from other social systems, such as political or economic systems, due to the fact that they operate on the basis of abstract rationality.²⁷⁶ Owing to this, law becomes universally applicable and therefore capable of neutrality and objectivity, all of which are the attributes that bestow law its authority.²⁷⁷ However, because “law is (...) an artificial creation of human society”²⁷⁸, it is not objective nor natural in the sense it claims to be, and rather carries within itself the prejudices and beliefs of the prevalent class in a society. This class, all throughout history, has been men.

There have been various criticisms directed at the partial nature of laws, which coincided with different waves of feminism. Smart identifies that the first stage of realizing legal systems as being prejudiced in favor of men is to see that the existent “law is sexist”, which then will be followed by the second stage “law is male”, and at the last stage, realizing that “law is gendered”.²⁷⁹

The “law is sexist” argument connotes to the fact that legal rules differentiate between men and women and actively disadvantage women, denying them certain rights, failing to recognize the harms done to them, or judging them by biased standards.²⁸⁰ The

²⁷⁶ Hilary Charlesworth, Christine Chinkin and Shelley Wright, “Feminist Approaches to International Law” 85 (4) 1991 *The American Journal of International Law* 613, 613.

²⁷⁷ *Ibid.*

²⁷⁸ Haxhi Xhemajli, “The Role of Ethics and Morality in Law: Similarities and Differences” (2022) 48 (1) *Ohio Northern University Law Review* 81, 82.

²⁷⁹ Carol Smart, “The Woman of Legal Discourse” 1 *Social & Legal Studies* 1992 29, 30.

²⁸⁰ Smart, 31.

feminist criticisms in this stage focused on the way women were pushed out of the public life and discourse, and how legal rules that claimed to be objective, rational, and impartial were actually subjective and partial in favor of men.²⁸¹ Here, the central idea is not to criticize the assumptions that the legal order harbors, but rather that women are treated discriminatorily by law because they are differentiated from men. It then asserts that the removal of these overtly sexist rules could be the solution.²⁸²

The following realization “law is male”, therefore, argues that the law orients towards the male norm and standard, as those with the power in a society design its norms and institutions, for example, write the constitutions and therefore set the status quo.²⁸³ MacKinnon further asserts that the law need not explicitly subordinate women or discriminate against them, as even the passive stance is enough for the rights of women to be violated so long as no proactive action is taken.²⁸⁴

Because the narrative and the phenomenological depiction of law differs from the male perspective to that of a woman’s²⁸⁵, women and their experiences are excluded, and

²⁸¹ Antonio Álvarez del Cuvillo, Fabio Macioce, and Sofia Strid, “Feminist Political and Legal Theories” in Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (eds.) *Gender-Competent Legal Education* (Springer Textbooks in Law 2023) 76.

²⁸² Smart, 31; Álvarez del Cuvillo, Macioce, and Strid, 76.

²⁸³ MacKinnon, “Feminist Theory of the State”, 238.

²⁸⁴ “(...) No law silences women. This has not been necessary, for women are previously silenced in society-by sexual abuse, by not being heard, by not being believed, by poverty, by illiteracy, by a language that provides only unspeakable vocabulary for their most formative traumas, by a publishing industry that virtually guarantees that if they ever find a voice it leaves no trace in the world. (...) No law guarantees that women will forever remain the social unequals of men. This is not necessary, because the law guaranteeing sex equality requires, in an unequal society, that before one can be equal legally, one must be equal socially. So long as power enforced by law reflects and corresponds-in form and in substance-to power enforced by men over women in society, law is objective, appears principled, becomes just the way things are. So long as men dominate women effectively enough in society without the support of positive law, nothing constitutional can be done about it” MacKinnon, “Feminist Theory of the State”, 239.

²⁸⁵ Linda C. McClain, “‘Atomistic Man’ Revisited: Liberalism, Connection, and Feminist Jurisprudence” (1992) 65 (3) Southern California Law Review 1171, 1174.

the male point of view is thus adopted.²⁸⁶ Meaning that, legal rules, and consequently the practice of law, are created artificially by men in a male dominant social order and they are built upon patriarchal prejudices. Through this, law becomes both a symbol and an instrument for the implementation of male hegemony.

The “law is gendered” assertion does not reject or fully divert from the “law is male” argument, but rather builds on it by allowing one to think about law in terms of processes that work in a variety of ways. As such, in this view, the impossibility of reducing the effect of patriarchy to a single set of factors is underlined, allowing for a more fluid notion of a gendered subject position.²⁸⁷ The implicitly white, cis-heterosexual²⁸⁸, and middle-class perspectives underpinning the fixed and isolated category of “woman” is denied, and the importance of factors such as race, social class, sexual orientation, and age are highlighted.²⁸⁹ The question then becomes how gender works in law, and how law produces gender.²⁹⁰ Unmasking the role the legal system plays in the codification and practice of gendered prejudices is therefore the aim of the feminist legal theory.

It is not possible to speak of one, unified feminist legal theory. Just like feminist theories, feminist legal theories too differ from each other in the approaches they adopt

²⁸⁶ MacKinnon, “Feminist Theory of the State”, 237; Lydia A. Clougherty, “Feminist Legal Methods and the First Amendment Defense to Sexual Harassment” (1996) 75 (1) Nebraska Law Review 1, 2.

²⁸⁷ Smart, 33.

²⁸⁸ Being both cisgender and heterosexual. cisgender, adj. “an individual whose gender identity aligns with their sex assigned at birth (...) whose internal gender identity matches, and presents itself in accordance with, the externally determined cultural expectations of the behavior and roles considered appropriate for one’s assigned sex as male or female” (*American Psychological Association*, 15 November 2023) <https://dictionary.apa.org/cisgender> accessed 30 June 2024.

²⁸⁹ Álvarez del Cuvillo, Macioce, and Strid, 77.

²⁹⁰ Smart, 34.

toward analyzing law. It should be disclosed that even though feminists differ in their approaches, the central aim is the criticism and analysis of law as a patriarchal institution.²⁹¹ Accordingly, liberal feminism, cultural feminism, Marxist-socialist feminism, radical feminism, and postmodern feminism could be said to be the five most influential varieties of feminist legal theory.²⁹²

Liberal feminism finds its roots in liberal political thought. It purports the idea that the liberal ideals that are applicable and available for men shall be valid for women as well. Thus, the two main tenets, equal rights and equal opportunity is the focus.²⁹³ Ideas of autonomy, universal rights, equal citizenship and liberties are emphasized.²⁹⁴ Here, acquiring equal rights and opportunity as men was seen as the ultimate way for women's liberation. However, liberal feminism was criticized for its individualism of the legal subject and its compliance with unjust power structures.

Cultural feminism on the other hand goes beyond a demand for equal rights and stresses the differences between men and women and argue for a legal system that bears in mind these differences, such as with regards to laws concerning pregnancy. Here, care ethics²⁹⁵ play an important role, which in essence purports that women have a unique outlook to life and its questions, adopting an intuitive, emotional, and detailed approach

²⁹¹ Fatma İrem Çağlar, "Feminist Hukuk Teorisine Kısa Bir Giriş" in Hayrettin Ökçesiz (ed) *Hukuk Felsefesi ve Sosyolojisi Arkivi-4* (İstanbul Barosu Yayınları 2001) 82, 84.

²⁹² Çağlar, "Feminist Hukuk" 85; Nicola Lacey, "Feminist Legal Theory and the Rights of Women" in Karen Knop (ed) *Gender and Human Rights* (Oxford University Press 2004) 13, 17.

²⁹³ Çağlar, "Feminist Hukuk" 86.

²⁹⁴ Lacey, 19-20.

²⁹⁵ For more on ethics of care see: Carol Gilligan, *In a Different Voice* (Harvard University Press 1982).

which in turn proves to be better than men's analytic perspective.²⁹⁶ In terms of its approach to law, the assertion here is that the perspective of women in law is crucial and can work to the betterment of it. Further, cultural feminist theory's demonstration of the inadequacy of gender-neutral laws is important. However, this view is criticized for being "bio-essentialist".²⁹⁷

Marxist-Socialist feminism sought to extend the Marxist thought to encompass the distinct struggles of women in relations of power. Its aim is to recognize women as suppliers of labor.²⁹⁸ Here, the focus is not only on the labor market for women but also on the unrecognized and uncompensated labor of women, especially in the context of childcare, household work²⁹⁹, and even sexuality.³⁰⁰ Socialist feminism, from another side, aims to end women's oppression in economic, social, and cultural settings and further addressing the differences on the grounds of religion, ethnicity, etc. in addition to class difference.³⁰¹ In both, it is therefore important to highlight how law reproduces dominant gender regimes by protecting and enforcing the practice of capitalist systems.

²⁹⁶ Oktay Uygun, "Feminist Hukuk Teorisi ve Özen Ahlakı" (2017) 14 (1) Yeditepe Üniversitesi Hukuk Fakültesi Dergisi 127, 136.

²⁹⁷ "The belief that 'human nature', an individual's personality, or some specific quality (such as intelligence, creativity, homosexuality, masculinity, femininity, or a male propensity to aggression) is an innate and natural 'essence' (rather than a product of circumstances, upbringing, and culture)" biological essentialism. *Oxford Reference*. <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095507973> accessed 28 June 2024.

²⁹⁸ P. Ishwara Bhat, "Methodology of Feminist Legal Research" in *Idea and Methods of Legal Research* (Oxford University Press 2020) 575.

²⁹⁹ Ülker Yükselbaba, "Feminist Perspektiften Hukuk" (2016) 74 (1) İstanbul Üniversitesi Hukuk Fakültesi Dergisi 123, 134.

³⁰⁰ "Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away" MacKinnon, "Feminist Theory of the State" 3.

³⁰¹ Bhat, 575.

Radical feminism, on the other hand, criticizes both the liberal feminist thought of amending the laws and Marxist-socialist feminist argument that centers capitalism rather than patriarchy as the source of women’s continued subordination.³⁰² Its primary focus is “tracing the site of domination” and eradicating its influence.³⁰³ The most important assertion of the radical feminist legal theory is the “personal is political” slogan that aims to problematize the once-disregarded aspects of women’s lives and bring them into public debate. Radical feminism’s focus on patriarchy as the root cause of the inequalities women face is the key to unearthing how laws are complicit alongside other institutions in enforcing the subordination of women.³⁰⁴

Postmodern feminism rejects both emphases on the difference or the similarity between women and men, and argues that one cannot speak of a single condition or experience that is applicable for all women and consequently a description of the category of women.³⁰⁵ Instead, the focus for postmodern feminists is to question the varying perspectives of people and to renounce the notions of objectivity and universality, as one cannot speak of such concepts without bringing their own perspectives and perceptions which lead to exclusion. Postmodern feminism as a legal theory therefore aims to unearth the male-oriented perspective of laws and consequently renounce them, like radical feminists, while also rejecting an essentialist view of women and the women experience.

³⁰² Yükselbaba, 132.

³⁰³ Bhat, 574.

³⁰⁴ Nancy Levit and Robert R. M. Verchick, *Feminist Legal Theory* (2nd edn, New York University Press 2016) 20-21.

³⁰⁵ Çağlar, “Feminist Hukuk” 96; Levit and Verchick, 36.

The following section will present a conceptual framework of the central feminist concepts and the approaches of different feminisms, and then demonstrate the intrinsically gendered perspective legal systems harbor, both on the basis of the sovereign state and in the international framework.

1. Central Concepts and Questions in Feminist Legal Theory

This section will provide an overview of the concepts that will be prevalent in the context of this thesis. Starting with definitions of certain terminology in order to provide a unified understanding throughout, this section will then delve into central feminist concepts such as the question of equality and the concept of the public/private divide.

a. Language Matters: Definitions Related to Gender Perspective and Their Mode of Employment in the Present Work

As explained above, it is important that those who seek to eradicate patriarchy infused legal systems must first start with ridding the terminology employed within of its discriminatory and prejudiced connotations. This is why it is important to understand and correctly use the terms that emerge quite frequently in the judgments which this thesis will aim to problematize. Below, therefore, this thesis will clarify the concepts of sex, gender, sexual orientation, and intersectionality for the purposes of this thesis.

i. Sex

A binary structure of sex for human species is accepted from a biological and reproductive point of view. This understanding depends on the anatomical, morphological, and physiological disparities between females and males which can be differentiated by

human perception.³⁰⁶ The biological explanations for the binary structure of sex depend on various elements of human anatomy, such as gametes, chromosomes, muscle and bone structure, hormones, or reproductive organs and their differing nature across the denominated sexes.

The biological explanation of the binary of male and female is thus easily and generally accepted, at times as the sole truth, because science is regarded as irrefutable and these categories immutable. Referred to as “biological essentialism” or “biological determinism” as defined above, this concept presents the binary division of biological sex, and consequently the characteristics attributed to these sex categories, as universal and unchangeable traits. This notion, however is problematic, and further should be problematized from the point of view of feminist legal theory because its irrefutable perception provides to be a fertile ground for the patriarchy to sow and reap its own depiction of gender and gender roles. In this regard, the biological explanation of sex is both shaped by pre-existing gender standards and it also shapes the gender standards upon which hierarchical gender relations are built and justified.

The method of genealogy, as conceptualized by Foucault, is used to critically understand the present by tracing the events and power relations that make them as they are conceived today.³⁰⁷ Genealogy will therefore be instructive for examining how sex

³⁰⁶ Álvarez del Cuvillo, Macioce, and Strid, 57, 59.

³⁰⁷ Sonja Erikainen, *Gender Verification and the Making of the Female Body in Sport: A History of the Present* (1st edn, Routledge 2020) 9, See: Michel Foucault, “Nietzsche, Genealogy, History” in Donald F. Bouchard (ed) *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press 1980) 139-164.

differences and distinctions emerge, and how the binary sex categories are formed and given meaning depending on time, place and circumstances.³⁰⁸

Dominant western epistemologies rely on binary oppositions to understand the world. This means that the object of knowledge on one side of the binary is defined in relation to the object on the other side of the binary.³⁰⁹ In the context of gender, it is seen that categories of men and women are created to understand human nature, and in this distinction, women are defined according to men. The emergence of scientific epistemologies influenced by Darwinian evolutionary theory in the 18th and 19th centuries put sex differences on a natural and hierarchical basis. In other words, anatomical, physiological, and biological differences are conceptualized according to this binary view and these characteristics are categorized to reflect and serve the patriarchal power dynamics. Indeed, from Ancient Greece to the 18th century, the “one-sex model” that was discussed in Laqueur’s theory³¹⁰ had been generally accepted, where women had the same genitals as men except that theirs were “inside the body and not outside it”, but it was later changed to the two-sex model by scientists towards the end of the 18th century.³¹¹ This binary framework legitimized gender roles, and medicalized women's bodies, shaping

³⁰⁸ Gender has also been a subject of debate among different feminist thoughts. While late 1960s and 1970s saw little to no references to “gender theory” in major feminist theorists’ works, queer-feminist, post-colonial, and black feminist theorists in the 1980s and 1990s criticized it for its biological foundationalism, heterosexism, and racial and cultural bias. See: Jemima Repo, “Feminist Deployments of Gender” in *Biopolitics of Gender* (Oxford Academic 2015).

³⁰⁹ Erikainen, 10.

³¹⁰ Thomas Laqueur, *Making Sex: Body and Gender From the Greeks to Freud* (1st edn, Harvard University Press 1992) 4.

³¹¹ Serhat Özkan, “Cinsiyet Geçiş Sürecinin Hukuki ve Toplumsal Boyutu: Haklar ve İhlaller” 14 (1) Yeditepe Hukuk Fakültesi Dergisi 2017 55, 56.

them through myths and body politics that change its aim with what the current socio-cultural landscape dictates.

This binary notion of biological sex, however, is disrupted by intersex people. The term “intersex”³¹² is used to describe a wide range of physical and biological sex variations that do not conform to the generally accepted medical and social definitions of male and female bodies. Individuals with intersex status are born with sex characteristics (reproductive organs, gonads, chromosome patterns) that do not conform to typical gender binary norms. In this regard, Butler argues that the concept of biological sex, too, is socially constructed, and these “other” bodies, by not fitting into this binary, make “gender trouble” in society.³¹³

In the same vein, the binary sex is thus used to delimit human diversity into two social groups, women and men, which has economic, social, political, and cultural effects.³¹⁴ This system has thus been used to justify gender inequalities. Almost all known human societies were built on a notion of male dominance and women’s subordination that depends on the biological division of sex, which causes inequalities with regards to “symbolic status, economic functions, political power, freedom of choice, life

³¹² It is essential not to confuse intersex with transgender or to see it as a purely medical condition. Intersex individuals face problems such as pathologization of their condition and related non-consensual “correction” surgeries, often unnoticed, at birth. Non-consensual “corrective” surgeries especially can cause physical and psychological trauma. “Intersex” is also an umbrella term, with some people preferring to refer to themselves as “intersex” while others may use “intersex variations”, “intersex characteristics” or “variations of sex characteristics”. “Differences of sex development” or “DSD” can sometimes be used, however it is not generally preferred by some subjects because it is considered medicalized. Older terms such as “hermaphrodite” are considered pejorative due to their past derogatory usage. In the end, what matters is which term the person is comfortable with using and this should be respected.

³¹³ Judith Butler, *Gender Trouble* (Routledge 2002) 8-10, 44.

³¹⁴ Álvarez del Cuvillo, Macioce, and Strid, 59.

opportunities and access to society's resources".³¹⁵ These are not inequalities based on the individual situations of women, but are rather structural and systemic in a way that is maintained across different societies and different periods of time.

When looked at how the law defines and employs sex, however, it can be seen that almost all documents that speak of equality refer to "sex" rather than gender.³¹⁶ However, considering its usage and interpretation by the courts and committees, as will be demonstrated below, it is possible to see a more complex understanding of sex as a term encompassing gender and gender expression as well. While a positive development, it still is an inadequate interpretation because the outlook remains binary. This will be problematized in the following sections as well as the second chapter.

In this regard, the feminist aim is to reject the bio-essentialist position that subjugates women into a subordinate position in the society by depending on anatomical differences or natural dispositions, and unearth and emphasize their socially constructed nature in order for women's emancipation.

ii. Gender

The term "gender" has thus been employed to depict the social and cultural patterns attributed to perceived sexes. In this sense, gender can be defined as "determined social roles and expectations, even as the set of stereotypes, prejudices and cognitive

³¹⁵ Álvarez del Cuvillo, Macioce, and Strid, 59-60.

³¹⁶ For example, Universal Declaration of Human Rights Article 2, Convention on the Elimination of All Forms of Discrimination Against Women Articles 1 and 5, European Convention on Human Rights Article 14, Constitution of Turkey Article 10. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, on the other hand, emphasizes "gender" rather than "sex" throughout its text and takes a rather non-binary approach to gender.

biases that different societies and cultures attribute to each biological sex, that are not a necessary consequence of physiological differences between men and women”.³¹⁷ This notion is summarized by de Beauvoir as “One is not born, but rather becomes, woman”.³¹⁸

Gender therefore denotes that the differing roles, behaviors, characteristics and responsibilities attributed to women and men respectively are socially constructed and that this is not a natural or an intrinsic division. These roles, behaviors, or characteristics that women are expected to perform are dependent on the socio-cultural position of different nations, cultures, or families, and this alone is evidence that they are something artificially created rather than inherently natural. In other words, the social status and roles put on women are not an extension of their natural state, but are ideologically constructed and enforced by the society.

Gender division is a social construct that divides power, and it is therefore a political system. This is most evident in the way that women are “economically exploited, relegated to domestic slavery, forced into motherhood, sexually objectified, physically abused, used in denigrating entertainment, deprived of a voice and authentic culture, and disenfranchised and excluded from public life”.³¹⁹ Some feminists believe that as long as this difference is maintained, discrimination too will, and the only way forward then would be to strive for and create a genderless society. However, others maintain that a concept

³¹⁷ Álvarez del Cuvillo, Macioce, and Strid, 60.

³¹⁸ Simone de Beauvoir, *The Second Sex* (trans) Constance Borde and Shelia Malvony-Chevallier (1st edn, Vintage Books 2011) 330.

³¹⁹ MacKinnon, “Feminist Theory of the State”, 160.

of gender is necessary and that a self-identified gender identity may be beneficial for personality development.³²⁰

As for the legal framework around gender, it is still not a widely used term in legal texts but is thoroughly employed and referred to in the decisions of relevant courts and committees. Even though the “living document” principle, or the evolutive interpretation method never made it into the text of the Vienna Convention on the Law of Treaties³²¹, the practice of international and regional human rights courts and committees differ. ECtHR in this respect employs the “living instrument doctrine” whereby the text Convention is adapted to the legal, social, ethical or scientific developments.³²² It could be said that other human rights protection bodies too adopt the same approach, be they regional, international, judicial, or quasi-judicial.³²³ For example, while CEDAW did not refer to or define gender, the CEDAW Committee in its General Comments defined and employed it. For instance, General Comment No. 28 prescribes gender as “socially constructed identities, attributes roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men”.³²⁴

³²⁰ Álvarez del Cuvillo, Macioce, and Strid, 62.

³²¹ For an account of the debates regarding the inclusion of the principle of contemporaneity and evolutive interpretation in the Vienna Convention on the Law of Treaties see: Fransico Pascual-Vives, “Evolutive Interpretation as a Method of Interpretation in Public International Law” in *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill | Nijhoff 2019) 73-94.

³²² Linos-Alexander Sicilianos, “Interpretation of the European Convention on Human Rights: Remarks on the Court’s Approach” (The Contribution of the European Court of Human Rights to the Development of Public International Law, Prague, 23 Semptember 2020) 1.

³²³ Ibid.

³²⁴ CEDAW/C/GC/28, para. 5.

It should also be noted that some feminists further criticize creating a distinction between sex and gender as, in this theoretical framework, sex is referred to as natural and immutable whereas gender is the opposite. In this regard, the distinction between sex and gender is a crucial separation of concepts because it underlines that gender is the cultural form that the body acquires³²⁵, but as discussed above, sex difference could as well be regarded as socially constructed.³²⁶ In addition, social position and consequently oppression is not solely determined by gender, but rather there are a myriad of other factors including, but not limited to, gender identity, sexual orientation, race, ethnicity, social class, age, and disability.³²⁷ Therefore, a critical analysis should take into account the intersection of such factors to gauge the social structure that bears these inequalities.

iii. Sexual Orientation and Gender Identity

Gender identity in the preamble of the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles)³²⁸ is defined as “(...) each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.

³²⁵ Judith Butler, “Sex and Gender in Simone de Beauvoir’s *Second Sex*” (1986) 72 *Yale French Studies* 35, 35.

³²⁶ Butler, “Gender Trouble”, 9-11.

³²⁷ Álvarez del Cuvillo, Macioce, and Strid, 62.

³²⁸ https://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf accessed: 30 June 2024.

Gender identity is differentiated from gender on the grounds that it denotes to a self-perception and self-identification³²⁹ rather than a social construction. In other words, while gender is socially constructed based on patriarchal perspectives and therefore both creates and is created by power hierarchies, gender identity is a self-conception. In this regard, people can be cisgender, meaning that they identify with the sex assigned to them at birth, or they could be transgender where people identify as either the opposite gender category, or wholly outside of the binary structure as nonbinary.

Sexual orientation, on the other hand, is about how people relate to others. It is “the enduring pattern of an individual’s emotional, sexual, and/or romantic attraction”.³³⁰ In the preamble of the Yogyakarta Principles it is defined as “(...) each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”. Sexual orientation cannot be thought separate from gender as feminist theory aims to dismantle the gendered power relations, and both gender and sexual orientation challenge this dominant understanding.³³¹ Much like the way gender binary contends that the biological differences between women and men are based on natural and immutable differences which then can be used to establish and maintain the dominance of men and

³²⁹ Álvarez del Cuvillo, Macioce, and Strid, 62; Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) refers to gender identity and sexual orientation as “self-identified” in Principle 3.

³³⁰ “sexual orientation, n” (Encyclopedia Britannica, 19.9.2023) <https://www.britannica.com/topic/sexual-orientation> accessed: 28.5.2024.

³³¹ For a detailed analysis of the relationship between feminist legal theory and queer theory see: Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge, 2016)

the subordination of women, heteronormativity³³² too aims to preserve heterosexual relations based on the sex binary as the norm, and to exclude and criminalize orientations that fall outside this norm.

With regards to the law's approach to the concept of sexual orientation and gender identity, it could be said that the situation is mixed. In most legal instruments on human rights, sexual orientation or gender identity is not acknowledged nor referenced.³³³ However, as explained above, international and regional human rights protection bodies have, by interpreting the existing text so as to include sexual orientation and gender identity, began to offer protection to LGBTIQ+ persons in case law. However, as will be demonstrated in the second chapter, the current discourse on SOGI rights is limited to private life. Without presenting an entire account of the public/private divide, as it will be delved into in the following sections, it should be asserted that sexual orientation and/or gender identity, while being an aspect of a person's identity, is also an expression outwards. In other words, as a person's identity underlies their behavior and existence and one aspect of this identity is one's sexual orientation and/or gender identity, the practical enjoyment of their rights will first require taking into account the public and social foundations of the problems encountered.

³³² heteronormativity, n. “the assumption that heterosexuality is the standard for defining normal sexual behavior and that male–female differences and binary gender roles are the natural and immutable essentials in normal human relations. According to some social theorists, this assumption is fundamentally embedded in, and legitimizes, social and legal institutions that devalue, marginalize, and discriminate against people who deviate from its normative principle (e.g., LGBTQ+ individuals)” (*American Psychological Association*, 15 November 2023) <https://dictionary.apa.org/heteronormativity> accessed 30 June 2024.

³³³ The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence Article 4 explicitly mentions “sexual orientation and

People whose sexual orientation and/or gender identity are “different” than the socially accepted norms of sexuality and gender are thereby ostracized, repressed, and oppressed by the dominant patriarchal systems in place. The widely held beliefs and assumptions about “different” sexual orientations and gender identities then translate into overt or covert discrimination in the society. Therefore, feminist theory is (should be) also concerned with a range of other topics including sexual orientation and gender identity, along with race, ethnicity, social class, age and disability, besides gender.

iv. Intersectionality

The concept of intersectionality focuses on the way individual characteristics such as race, social class, gender, sexual orientation or gender identity intersect and overlap. In other words, an intersectional analysis focuses on the unique situation that comes out at the intersection of different sets of social relations.³³⁴ Coined by Crenshaw in the context of the legal field, the concept of intersectionality dates to earlier scholarships and insights of Black feminists.³³⁵ Crenshaw asserts that the “dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis”.³³⁶ Meaning that intersectional thought problematizes the perception of antidiscrimination theory from the framework of a single-axis. Crenshaw presents this by

³³⁴ Eva Bermúdez Figueroa, Valerija Dabetić, Raquel Pastor Yuste and Zara Saeidzadeh, “Gender and Structural Inequalities from a Socio-Legal Perspective” in Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (eds.), *Gender-Competent Legal Education* (Springer Textbooks in Law 2023) 104.

³³⁵ See: Sojourner Truth, *Ain't I A Woman?* (1851); bell hooks, *Feminist Theory: From Margin to Center* (South End Press 1984).

³³⁶ Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” 1 University of Chicago Legal Forum 1989 139, 140.

demonstrating how the claims of Black women are rejected because they can neither be categorized along with white women's nor Black men's claims. Here, she employs an analogy of a car accident happening at a four-way intersection, where she illustrates that,

“Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.

*Judicial decisions which premise intersectional relief on a showing that Black women are specifically recognized as a class are analogous to a doctor's decision at the scene of an accident to treat an accident victim only if the injury is recognized by medical insurance. Similarly, providing legal relief only when Black women show that their claims are based on race or on sex is analogous to calling an ambulance for the victim only after the driver responsible for the injuries is identified. But it is not always easy to reconstruct an accident: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm. In these cases the tendency seems to be that no driver is held responsible, no treatment is administered, and the involved parties simply get back in their cars and zoom away”.*³³⁷

³³⁷ Crenshaw, 149.

It should be noted that intersectional analysis should not be understood as social statuses added together to create “oppression olympics”, but rather as an understanding of social inequality based on the interactions of various identities a person holds.³³⁸ Even though Crenshaw establishes intersectional thought from the point of view of Black women, it could be utilized across all grounds of inequalities, such as race, ethnicity, sexuality, gender identity, social class, poverty, disability, age, and other subordinating categories.

Neither existing human rights instruments nor their respective mechanisms recognize explicitly an intersectional approach to fundamental rights and freedoms and discrimination law. However, as will be showcased, as a dimension of feminist legal methodology, intersectionality will provide the most just outcomes with regards to practical cases. While the current widespread understanding is to regard certain aspects of one’s identity as separate, and to pick and choose one to base the legal arguments on equality or nondiscrimination, it will be shown below in the second chapter that ECtHR has recently developed a method similar to intersectionality, although still leaves a lot to be desired.

b. Question of Gender Equality: The Different Answers Provided by Different Feminisms and the Law

Different feminist theories offered different interpretations regarding the meaning of equality. A classical answer had been provided by Aristotle as a starting point, that

³³⁸ Patricia Hill Collins and Sirma Bilge, *Intersectionality* (1st edn, Polity Press 2016) 26.

equality means treating like cases alike, and different cases different accordingly. However, this formulation of equality has proved to be problematic for women due to the existence of a system that is built on women's oppression. This understanding of equality, moreover, fails to acknowledge the different social, political, cultural, biological, physical and/or economic backgrounds or conditions that women may possess. This led feminists to rethink the ways in which this issue can be resolved. Thus, in the discussion of gender equality, it is crucial to ask: equal to whom?

In order to answer this, it will be useful to look into the answers provided by different feminism waves and theories. Gender equality has been thought of in different ways: sameness, difference, domination, anti-essentialism, and transformation,³³⁹ and the feminist quest has generally been divided into “waves” to denote the main objectives pursued by the movement in specific historical periods.³⁴⁰ The equal treatment theory where sameness is emphasized coincides with the approach of the first wave feminism that emerged in the late nineteenth and early twentieth century. The suffrage movement marked this period and the focus was on voting rights, access to higher education, and other related civil rights. In this regard, the rationale behind the equal rights theory was that women were entitled to the same rights as men because women and men were similarly situated.³⁴¹ In other words, because women and men are fundamentally the same, they therefore should be treated in the same way. This view is also called or matched with liberal feminism as the granting of equal rights or equal opportunity all within the existing

³³⁹ Álvarez del Cuvillo, Macioce, and Strid, 72; Levit and Verchick, 12-39.

³⁴⁰ Álvarez del Cuvillo, Macioce, and Strid, 63.

³⁴¹ Levit and Verchick, 12.

power structures was seen as the ultimate way for women's liberation. However, liberal feminism's over emphasis on the "sameness" between women and men alongside its push for "neutral" or objective approach to solve issues stemming from discrimination proved to be its undoing.³⁴²

The difference approach adopted by cultural feminists, on the other hand, stressed that the formal equality the sameness approach foresees did not always result in substantive equality.³⁴³ In this regard, the equality model is criticized for being "male-biased" as well as being unable to atone for the shortcomings of gender-neutral laws.³⁴⁴ Instead, cultural feminists center women and emphasize the values and culture arising from their unique experiences.³⁴⁵ In other words, as an alternative to the pursuit of achieving equality with men, cultural feminists employing the difference rhetoric seek to put emphasis on the unique perspective women could provide to society.³⁴⁶ Underlining the differences and moreover celebrating them, however, was met with criticism as the qualities attributed to women in this regard also contained a somewhat stereotypical understanding of femininity, such as glorifying motherhood and maternal qualities like being empathetic, caring and nurturing.³⁴⁷ Furthermore, the difference model is criticized for heavily relying on the binary-sex model and being essentialist in this regard, further perpetuating the stereotypes around women and their abilities. Lastly, defining feminism

³⁴² Evola, Krstić, Rabadán, 244.

³⁴³ Levit and Verchick, 15.

³⁴⁴ Ibid.

³⁴⁵ Marlene LeGates, *A History of Feminism in Western Society* (Routledge 2001) 6.

³⁴⁶ Ibid.

³⁴⁷ Levit and Verchick, 18; For a defense of this approach see: LeGates, 247-256.

by depending on how different women are from men, cultural feminism stumble into same pitfall as liberal feminism.

Equality, therefore, is seen in terms of a relationship between genders, and gender is perceived through a lens of sameness and difference.³⁴⁸ Nevertheless, in both respects, male is the measure, the standard. This is the point de Beauvoir underscored when she asserted that a woman is “determined and differentiated in relation to man”.³⁴⁹ Women are equal to men, “under sameness rubric”, which means that women are measured by their closeness to men and that equality is determined by this proximity. “Under the difference rubric”, on the other hand, women are judged by their distance from men as their womanhood is affirmed this way. Masculinity is the reference point for both.³⁵⁰

Rejecting both sameness and difference approaches, the dominance theory or radical feminists, finding their place in the second wave feminism, posit hierarchical power relations as the basis of inequality.³⁵¹ The second wave was then focused on problematizing the patriarchal institutions in the society and the unequal power relations. In this sense, patriarchy and the institutions whether it be the state or the family that reproduces this system of dominion is renounced.³⁵² Divided into two currents of effort, the second wave feminists on the one hand fought to eradicate the discriminatory practices faced by women in public, economic and legal discrimination emerging for example in the labor market, while on the other hand criticizing the personal, sexual, and family life

³⁴⁸ Mackinnon, “Feminist Theory of the State”, 218

³⁴⁹ De Beauvoir, 26.

³⁵⁰ Mackinnon, “Feminist Theory of the State”, 220-221.

³⁵¹ Levit and Verchick, 20.

³⁵² Álvarez del Cuvillo, Macioce, and Strid, 65-66.

and their oppression of women.³⁵³ Feminists of the second wave thus stressed the complications that arose from the public/private separation, and the famous slogan “the personal is political” emerged. Patterns of male domination that can be traced in every corner of a woman’s life constantly working to privilege men and subordinate women is the root cause of inequality, and therefore in overcoming this one must go beyond the sameness/difference argument and equality discourse altogether, and instead work to dismantle the power relations. However, the dominance approach and the second wave had been criticized for being essentialist as well, mainly on the grounds of positing that a common thread of being subordinated or being the victim among women existed which mistakenly disregarded the differences based on race, ethnicity, class, and so on in order to promote a universalized women experience.³⁵⁴

Thus, the third wave, which is considered to have come to prominence in the 1990s, was characterized by the different perspectives within the feminist theory. In other words, third wave emerged as a critique of the one-sided narration of feminist theories, where the white, middle-class, cis-heterosexual woman was felt to be overrepresented, and the movement in this period worked to include and amplify different voices within the feminist cause. In this regard, it could be said that the third wave feminism aimed at undoing the gender-essentialist approaches that came before and presented a critical and intersectional viewpoint to the central concepts. Emergence of critical race feminism, black feminism, postmodern feminism, ecofeminism and queer feminism marked this

³⁵³ LeGates, 346-347; Álvarez del Cuvillo, Macioce, and Strid, 64.

³⁵⁴ Levit and Verchick, 23.

period. Accordingly, inequality, rather than being understood on the grounds of sameness or difference, is presented to be a uniquely experienced phenomenon according to one's different experiences due to their varying and compound social situations.

For the purpose of this thesis, it is important to see which approach the law adopts when it speaks about the principle of equality or, as an extension, the principle of nondiscrimination. The legal framework analyzed in the above section, in this regard, provides the key words and concepts one would need to ascertain the law's outlook toward the notion of equality. Equality was seen as an intrinsic and undeniable aspect of being a person. As such, people, just by virtue of being people, were born equal and with dignity. However, the question of precisely who was considered a person in this sense proved to be very exclusionary, considering slaves, women, anyone who was not white, male, and wealthy were not considered to be a person in the legal sense.³⁵⁵ With the emergence of the capitalist system, equality then came to be understood as "equality before the law" in a manner that disregarded the structural inequalities by generalizing the society.³⁵⁶ Further, the exclusivity of the previous approach still persisted, as early bourgeois liberalism depended on the concept of citizenship and thus explicitly excluded women, the poor, the disabled, and the old.³⁵⁷ Phrases such as equality before the law, equal rights between men and women, equal opportunities and so on employed in both national and international legal texts therefore lead to the conclusion that the approach taken here is rather focused on being gender-neutral and formal. Equality before the law, for women, did not come

³⁵⁵ Şennur Ağırbaşı, *Sınırlı Ayrımcılık Yasağından Genel Eşitlik İlkesine* (Seçkin Yayınevi 2009) 25.

³⁵⁶ Ağırbaşı, 26.

³⁵⁷ Iris Marion Young, "Five Faces of Oppression" (1988) 19 (4) *The Philosophical Forum* 270, 281.

with birth but rather had to be won through struggle. However, as explained above, this form of formal equality never fully translated into practice.³⁵⁸ Seeing this, the next understanding of equality in the context of law was equal opportunity, making state responsibility to go beyond negative obligations and on to positive obligations where active action had to be taken to ensure substantive equality. However, in all cases, the understanding of equality and the structural barriers are never questioned. Thus, it could be reasoned that the prevailing understanding of equality in the context of laws often implies women “achieving” parity with men. It could be said that law, by nature, has to be neutral and formal, and cannot take into account every material situation that may come up, as demonstrated above. However, neutrality in the absence of material and substantive social equality works conversely.

Inequality is built on the biological differences between the male and female body. An artificial division is built on this equally arbitrarily perceived difference, and then social dominance. Gender is a system of social hierarchy, and realizing this is important to understand that law serves to neutralize and rationalize this dominion by taking a supposedly objective stance, which is intrinsically male. Male standpoint in law therefore permeates through the fabric of the society, all the while hiding under a cloak of objectivity and a badge of legitimacy.³⁵⁹ Law is the legitimate way that makes social inequalities invisible. What should be realized in terms of conceptualizing equality is that the focus should not be on the extent to which men and women are similar or different, but rather

³⁵⁸ Fatma İrem Çağlar, “Eşitlik ve Farklılık Yaklaşımları Çerçevesinde Feminist Hukuk Teorisi” (LL.M. Thesis, Ankara University 2002) 36.

³⁵⁹ Mackinnon, “Feminist Theory of the State”, 237.

on the ways of transforming the social, political, and economic structures in place.³⁶⁰ Young purports that oppression is not a single concept, but is rather built on different practices. In other words, oppression does not have a single materialization but rather can appear as Exploitation, Marginalization, Powerlessness, Cultural Imperialism and Violence.³⁶¹ Meaning that any one of these forms, or more than one, could be applicable for the social situations of certain social groups. What Young argued for in this context is that this varied and many forms of oppression call for structural reforms.³⁶² Thus, it could be said that understanding social injustices based on gender should be liberated from the equality/inequality model and a consideration on oppression and power relations should be made. When oppression and inequality is this varied and structural, the means to combat them shall also be focused on transforming these very institutions.

c. Making Visible the Experiences of Women: The Public/Private Divide

The distinction between the private and public spheres comes from the distinction between *polis* and *oikos* in Ancient Greece signifying a public space that is open to free people and the individual's own sphere of existence (*idia*), respectively.³⁶³ A person's position in the *polis*, the public sphere as a realm of freedom and permanence, was dependent on his despotism and power in the *oikos* as the head of the family.³⁶⁴ In this

³⁶⁰ Álvarez del Cuvillo, Macioce, and Strid, 72.

³⁶¹ See: Young, "Five Faces", 276-287.

³⁶² Bhat, 573-574.

³⁶³ Jurgen Habermas, *The Structural Transformation of the Public Sphere* (5th edn, The MIT Press 1993) 3; The word "oikos" is derived from "oika" meaning "house", and also from the word "oikizein" meaning "to sit" See: Umberto Eco, *Antik Yunan* (trs. Leyla Tonguç Basmacı, Alfa Tarih Basımevi 2012) 281. Furthermore, in Ancient Greece, family was referred to as "oikos" in the meaning of household, and "anchisteia" in the meaning of close relatives within the wider circle of *genos* See: Hugh E. Seebohm, *On the Structure of Greek Tribal Society* (Macmillan and Co Press 1895) 54-55.

³⁶⁴ Habermas, 3-4

context, the one who dominated the private sphere also achieved the privilege to exist in the public sphere where political debates and exchange of ideas took place, which happened to be men while women were stuck in the private sphere of the household. The public sphere was thus constructed as the sphere of reason and rationality where social and cultural institutions could be questioned and changed and where lively discussion and deliberations on societal issues took place. This construction also defined its opposite, the private sphere, where women as the “other” were confined in.

Ancient Greece, then, paved the way for the establishment of the public sphere in the modern sense, the key takeaway being that the public sphere is the visible sphere where political solutions to structural problems can be discussed and reached. The issue here is the fact that, much alike the situation in Ancient Greece, men dominate this sphere while other social groups are disregarded and sidelined. In this regard, men dominate the public sphere of political and economic life.³⁶⁵

The slogan “the personal is political” emerged as one of the central claims of the feminist movement, problematizing the structural inequalities that stem from the distinction between the public and private spheres. This division has been problematized since and by the first modern feminists, however, still impacts the way state responsibility is conceptualized, as will become more apparent in the evaluation of case law in the second chapter of this thesis. In this context, feminists emphasize that private situations are in fact shaped by public and social factors. Examples include laws on abortion or rape,

³⁶⁵ Hilary Charlesworth, “Alienating Oscar - Feminist Analysis of International Law” (1993) 25 *Studies in Transnational Legal Policy* 1, 9.

state policies on reproductive rights, the status of the “wife” in marriage, which places women in a subordinate and inferior position to men, inequalities in childcare and domestic divisions of labor, and invisible labor. Due to the fact that men not generally being the victims of gender discrimination, degradation, or violence, these matters were cosigned to the private sphere and consequently ignored.³⁶⁶

In the face of a political history that has ignored women and their experiences, claiming the personal to be political revealed the connection, permeability and integral relationship between the private and public spheres. In other words, women’s experiences of subordination and inequality, and the injustices that occur in the private sphere according to this divide have political significance. Women’s issues, such as sexuality, reproduction, birth control, care work and housework, bodily integrity and autonomy, intimate partner violence and so on are in need of political intervention to generate change.³⁶⁷ In this context, it is understood that all these problems that seem to take place in the private sphere are in fact closely related to the public sphere.

The public/private divide finds its roots in the liberal thought where the private sphere is deemed in need of protection from state interference.³⁶⁸ This notion further serves to exclude gender-based rights violations, especially domestic violence, from scrutiny. The feminist contestation further works to dismantle the idea that only violations stemming from the State or State actors can be investigated and be held responsible, and

³⁶⁶ Charlesworth, Chinkin and Wright, 622.

³⁶⁷ Álvarez del Cuvillo, Macioce, and Strid, 7.

³⁶⁸ Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Leiden, The Netherlands: Brill 2017) 56.

instead asserts that horizontal discrimination or rights violations by non-state actors shall be subjected to scrutiny in the context of international human rights law as well.³⁶⁹

By breaking down the dichotomy of the private and public spheres, feminist theory criticizes the political understanding based on this distinction, and challenges the gender-specific contextualization of these realms and their subjection to correlating hierarchy. Women and the problems they face are rendered invisible when they are deemed to belong to a private sphere created by observing this distinction. This invisibility, in turn, leads to the exclusion of women's interests, experiences and women's movements from the political sphere.³⁷⁰

The demand for the private to become political came to the fore when marginalized social groups came together and realized that their individual experiences of exclusion, ignorance and injustice had in fact been structured and systemic.³⁷¹ In this way, many situations categorized in the so-called private sphere have gained political significance.³⁷² At this point, Fraser further argues that the aim should rather be on overcoming “the gender hierarchy that gives men more power than women” that draws the line in this distinction in the first place.³⁷³ In other words, it is not only enough to eradicate this

³⁶⁹ Sjöholm, 57.

³⁷⁰ Ulla Wischermann and Ilze Klavina Mueller, “Feminist Theories on the Separation of the Private and the Public: Looking Back, Looking Forward” (2004) 20 *Women in German Yearbook* 184, 185.

³⁷¹ “Consciousness Raising” as a method will be discussed below.

³⁷² Wischermann and Mueller, 187.

³⁷³ Nancy Fraser, *Justice Interrupts: Critical Reflections on the “Postsocialist” Condition* (1st edn, Routledge 1997) 115.

distinction but further to reject it altogether by realizing the “political, ideological, gender-coded character of these categories”.³⁷⁴



³⁷⁴ Ibid.

2. The State is Male: Gendered Essence of the Sovereign State Power

Where the State is defined as “father-state”, the mainland upon which it is built is generally referred to as the “motherland”, which is a striking symbolization on the type of relational position the state is in.³⁷⁵ Because the state is commonly conceptualized in terms of its relationship with citizens, this relational position is especially important in for women.³⁷⁶ Today in most States women are full citizens for all purposes of the law, but the State still poses to be an oppressive force that directly or indirectly affects and limits women.³⁷⁷ According to Connell, “the State is historically patriarchal, patriarchal as a matter of concrete social practices”.³⁷⁸ Meaning that the State does this by perpetuates and reinforces gendered social dynamics by establishing and sustaining systems and institutions that oppress and subjugate women.

There are four different theories regarding the nature and *raison d'être* of the State vis-à-vis gender relations. The first is the liberal theory that positions the State as the neutral arbiter that is tasked with the duty of resolving social conflicts.³⁷⁹ In this regard, a liberal understanding of the State would embrace a legal system that is neutral, and by that is meant apolitical, which in turn fails to address and resolve systemic inequalities by turning a blind eye. The second approach takes the State beyond being an organization of

³⁷⁵ Canan Çetin, “In What Ways is the State Gendered?” (2023) 27 Istanbul Üniversitesi Kadın Araştırmaları Dergisi 7, 8.

³⁷⁶ Mary McIntosh, “The State and the Oppression of Women” in Annette Kuhn and AnnMarie Wolpe (eds) *Feminism and Materialism: Women and Modes of Production* (Routledge 1978) 254, 256.

³⁷⁷ McIntosh, 159.

³⁷⁸ R.W. Connell, “The State, Gender, and Sexual Politics: Theory and Appraisal” (1990) 19 (5) *Theory and Society* 507, 535.

³⁷⁹ R.W. Connell, *Gender and Power* (1st edn, Stanford University Press 1987) 127.

power and rather aims to explain it in terms of its regulatory and dominating nature, framing it as disperse apparatuses of social control and thereby providing an explanation for its place in people's day-to-day lives. However, this approach falls short in explaining the reason why the State regulates social life and people as much as it does.³⁸⁰ A third approach centers class relations in its theory and frames the State as the pursuer of class interests. Here, the issues of sex and gender are byproducts of this pursuit, with the State controlling and maintaining women's subordination in accordance with the needs of the capitalist system.³⁸¹ The fourth approach, rather than taking gender as a secondary consideration, places it at the basis of the creation of the State. The State, according to this theory, is "from the start a patriarchal institution".³⁸² In this view, the State was created with a view to institutionalize male violence and male point of view, and to create and maintain a male hegemony.³⁸³

Mackinnon asserts that "the state is male"³⁸⁴ to argue that State power that is vested in law materializes throughout the society.³⁸⁵ The organization of the state rests upon the hierarchical power dynamics favoring male power, and in the abstract sense, it is a macro entity built to protect and further male interests. Haney adds to this notion by postulating that the state is also "a complex of concrete institutions with which women interact in direct and immediate ways"³⁸⁶, meaning that the systemic maleness of state power has

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Connell, "Gender and Power", 128.

³⁸³ Ibid.

³⁸⁴ Mackinnon, "Feminist Theory of the State", 161.

³⁸⁵ Mackinnon, "Feminist Theory of the State", 170.

³⁸⁶ Lynne Haney, "Homeboys, Babies, Men in Suits: The State and the Reproduction of Male Dominance" (1996) 61 (5) American Sociological Review 759,759.

direct influence on the lives of women. As the state composes the social order in accordance with male interests, its authority is materialized in the form of legal norms that legitimize gender inequality. This legitimization is done through a process of “recapitulating the male point of view”³⁸⁷ as the default design, and by masking the social, political, and economic inequalities under the guise of being natural.³⁸⁸

Law serves to conceal the existent inequalities.³⁸⁹ As the sole and legitimate mechanism for resolving social conflict in many societies, it is perhaps the most powerful tool at the disposal of the state. Law claims to be objective and neutral, but as a symbol of male authority, it merely masks the particular hierarchies and distribution of power in the society.³⁹⁰ The reason for this is because male is the implicit reference for what it means to be a human. This premise was demonstrated clearly when the 1789 Declaration of the Rights of Man and of the Citizen adopted during the French revolution excluded women, and the French National Assembly failed to recognize the natural and political rights of women. This prompted Olympe de Gouges to draft the Declaration of the Rights of Women and of the Female Citizen, emphasizing the forgotten and excluded legal recognition of women.

³⁸⁷ Mackinnon, “Feminist Theory of the State”, 162.

³⁸⁸ Charlesworth, Chinkin and Wright, 613.

³⁸⁹ Janet Rifkin, “Toward a Theory of Law and Patriarchy” (1980) 3 Harvard Women’s Law Journal 83, 87.

³⁹⁰ Ibid; Katherine T. Bartlett, “Feminist Legal Methods” (1990) 103 (4) Harvard Law Review 829, 878.

3. International Law is Male: The Struggle to Position Women's Rights As Human Rights

The main aim of feminist legal theories was to eradicate the structural gender inequalities, and underlying them is the implicit (sometimes explicit) suggestion that the international human rights doctrine could do more to address it.³⁹¹ In this regard, it is important to analyze the way in which existent jurisprudential systems historically tried to answer this demand, and note their shortcomings to offer a better perspective.

MacKinnon, posing the question “are women human?” in the context of international human rights law, reproaches that,

“If women were human, (...) Would we be sexual and reproductive slaves? (...) Would we be sold into marriage to priests to atone for our family's sins or to improve our family's earthly prospects? Would we, when allowed to work for pay, be made to work at the most menial jobs and exploited at barely starvation level? Would our genitals be sliced out to "cleanse" us (our body parts are dirt?), to control us, to mark us and define our cultures? Would we be trafficked as things for sexual use and entertainment worldwide in whatever form current technology makes possible? Would we be kept from learning to read and write?

If women were human, would we have so little voice in public deliberations and in government in the countries where we live? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly

³⁹¹ Sjöholm, 47.

to death, and to death, by men with whom we are close? Would we be sexually molested in our families? Would we be raped in genocide to terrorize and eject and destroy our ethnic communities, and raped again in that undeclared war that goes on every day in every country in the world in what is called peacetime? If women were human, would our violation be enjoyed by our violators?

And, if we were human, when these things happened, would virtually nothing be done about it?"

This questioning remains relevant in today's mainstream human rights discourse. Due to the legal system's deliberate ostracization of women, violations of women's human rights are not recognized, or when they indeed are, they are not punished nor remedied, and over and above, these violations are justified by the legal system as a return of culture, religion, or human nature.³⁹² Meaning that, even if women's rights are recognized in domestic jurisdictions and certain legal protections do exist on paper, as will be demonstrated below, State practice neglects the enforcement of such rights and protections and moreover wages the subordination of women.

a. State Responsibility

The concept of state responsibility in this regard serves as a means of ensuring that States are obligated to protect an individual's exercise and enjoyment of rights, effectively investigate and punish violations, and provide effective remedies to victims within the

³⁹² Rebecca J. Cook, "State Responsibility for Violations of Women's Human Rights" (1994) 7 Harvard Human Rights Journal 125, 126.

context of their obligations stemming from international law. Developments in international human rights law further translated into developments in State responsibility and adherence to obligations enforced by multilateral human rights conventions and treaties..³⁹³

State responsibility in the context of human rights used to be framed as being direct and limited.³⁹⁴ As such, States were under the obligation not to breach fundamental rights, meaning that only the negative obligations of States were recognized. As an extension of the public and private divide also, States were further exempted from being responsible for the acts or abuses of private individuals and could only be held responsible for the actions of public authorities.

However, with the practice of human rights protection mechanisms and legal doctrine, this notion of state responsibility had gradually expanded to include positive obligations of States to respect, protect, ensure, and promote human rights, which then was revised into the “tripartite division” of human rights to respect, protect, and fulfill human rights.³⁹⁵ Positive obligations can further be divided into procedural and substantive obligations, whereas substantive positive obligations can generally be found in the text of a human rights instrument, positive obligations of a procedural nature prove to be especially important, especially with regards to the State obligations regarding the

³⁹³ Rebecca J. Cook, “State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women” in *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 229.

³⁹⁴ Tijen Dündar-Sezer, *İnsan Hakları Hukukui Açısından Kadına Yönelik Şiddet* (2nd edn, Turhan Kitapevi 2023) 59.

³⁹⁵ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 242.

effective investigation and sanctioning of violations.³⁹⁶ It should further be added here that the International Covenant on Economic, Social, and Cultural Rights (ICESCR) foresees in its text that a progressive realization of human rights³⁹⁷ and it is thus acknowledged that another leg of the States' responsibilities with regards to human rights is the achievement of these rights. The Committee on Economic, Social and Cultural Rights in its General Comment No. 13³⁹⁸ further supplied that States had a specific and continuing obligation under the progressive realization of human rights obligation.

Therefore, States were obligated to act, meaning that they had to proactively take the necessary measures to safeguard the rights of individuals. The previous acceptance of States not being responsible for the actions of private persons or agencies was further overturned in the sense that States became responsible for their failure to exercise due diligence to eliminate, to reduce, and to mitigate the conduct of private actors that posed as a breach of fundamental rights and freedoms of another person.³⁹⁹ State obligations in this respect will be solidified within the context of case law in the second chapter below.

b. Women's Rights Are Human Rights

What do such developments in state responsibility in the context of international human rights mean for women's rights? As MacKinnon had said, are women considered human within the human rights legal structure? This question is mainly about the legal

³⁹⁶ Dinah Shelton, *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2010) 572.

³⁹⁷ The International Covenant on Economic, Social, and Cultural Rights Article 2,

³⁹⁸ UN Doc. E/C.12/1999/10.

³⁹⁹ Cook, 151.

recognition of women as subjects in the legal structure. Due to its gendered nature, the international human rights law failed to take into consideration the systemic discrimination and violence that women faced in different spheres.⁴⁰⁰ Even though nondiscrimination laws of international and regional systems have included “sex” as a prohibited ground of discrimination, a concrete framework of state responsibility regarding women had not extensively been developed until the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in the international arena.

CEDAW is distinguished from other human rights documents by its way of deviating from the gender-neutral norms that foresee an equal treatment of men and women in line with the sameness and difference rubric that takes male as the standard, and “acknowledges that the particular nature of discrimination against women is worthy of a legal response”.⁴⁰¹ In this regard, CEDAW broadens the scope of state responsibility and explicitly obligates States to actively take measures to eradicate discrimination against women in all its effects⁴⁰², as well as holding States responsible for the discriminatory actions of private actors.⁴⁰³

On the question of regional human rights documents that explicitly purport state responsibility in the context of women’s rights, the Council of Europe Convention on

⁴⁰⁰ Karen Brown Thompson, “Women’s Rights Are Human Rights” in Sanjeev Khagram, James V. Riker, Kathryn Sikkink (eds.) *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (University of Minnesota Press 2002) 102-103.

⁴⁰¹ Cook, 155.

⁴⁰² Convention on the Elimination of All Forms of Discrimination Against Women, Article 2.

⁴⁰³ Convention on the Elimination of All Forms of Discrimination Against Women, Article 2/e.

Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention)⁴⁰⁴ provide solid legal framework for the positive obligations of States.

The proposed universality of international human rights law with a “genderless, neutral, and abstract human being”⁴⁰⁵ as its standard masks a male standard that implicitly works to the detriment of women finding a place within the human rights law. On the other hand, it could be said that human rights texts that solely center on women and their distinct oppression carry the risk of alienating women from the “mainstream” human rights law altogether.⁴⁰⁶ The proposed alternative, then, should be to challenge the approach to human rights law. It stands to reason that human rights law, when interpreted and applied from a gender perspective, could turn into an effective tool to achieve gender equality.

It befalls on the State under its obligations in both domestic and international context to realize gender equality. As mentioned above, States’ obligations with regards to human rights can be characterized as the obligation to respect, the obligation to protect, and the obligation to implement. The obligation to respect requires States and State agents to not infringe on the rights of persons themselves, whereas the obligation to protect refers to the duty of the State to prevent third parties from violating the rights of persons, and to punish those that do so.⁴⁰⁷ The obligation to implement, then, conveys the States’ duty to

⁴⁰⁴ Date of Conclusion: 9 June 1994 Entry into Force: 5 March 1995.

⁴⁰⁵ Sjöholm, 49.

⁴⁰⁶ Charlesworth, 6.

⁴⁰⁷ Jean-François Akandji-Kombe, “A Guide to the Implementation of the European Convention on Human Rights” (2007) Council of Europe Human Rights Handbooks No. 7, 5.

enforce specific positive measures to give full realization and effect to rights.⁴⁰⁸ In this context, the judiciary could very well be utilized to address the structural causes of women's subordination by and in law. However, it can also be precarious to fully thrust this mission into the hands of the judiciary, as it can also be a vessel for dominant, by which is meant patriarchal, ideologies.



⁴⁰⁸ Ibid.

B. Feminist Methodology

Method matters because it “organizes the apprehension of truth” and “determines what counts as evidence and defines what is taken as verification”.⁴⁰⁹ Therefore, in order to challenge existing structures of power that are to be identified and denounced, one cannot use the same methods that create those very power structures.⁴¹⁰

Because it is the systemic social hierarchy that is the issue, gender neutrality is inadequate at best, if not adverse, to address this problem.⁴¹¹ In a system where patriarchy is weaved into the very fabric of the legal system, a need to rethink the existent practices is evident. Therefore, a need for a legal theory that is perceptive and receptive to systemic inequalities based on gender is needed.

⁴⁰⁹ MacKinnon, “Feminist Theory of the State”, 106.

⁴¹⁰ Bartlett, 830-831.

⁴¹¹ Mackinnon, “Feminist Theory of the State”, 232.

1. Feminist Research Methods

Law, rather than being fixed and immutable, is a social phenomenon that inherits the gendered social norms and realities present in a society. Gender research in law is therefore essential to explore the structured gender hierarchies embedded in the legal system. Feminist methodologies offer alternative epistemologies and ontologies where the traditional and male oriented methodologies are criticized. Feminist research therefore challenges such biased knowledge production and problematizes dominant conceptions that exclude and subordinate some groups including women.

Feminist research aims to do this by focusing on how the social location of an individual affects their day-to-day life experiences and how social structures built around the dynamics of gender, sexuality, race, ethnicity, age, place, and socio-economic status create situated knowledge.⁴¹² Below, some feminist research methods reflected in feminist legal writings will be discussed in order to explore the best way for the production of feminist knowledge.⁴¹³

a. Feminist Standpoint Theory

Feminist standpoint theory aims to understand how the production of knowledge is imbued with gendered power relations. It posits that knowledge can be produced by taking into account the unequal gendered social relationships, as women experience life

⁴¹² Zara Saeidzadeh, “Gender Research and Feminist Methodologies” in Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (eds.) *Gender-Competent Legal Education* (Springer Textbooks in Law 2023) 188.

⁴¹³ Bartlett, 832.

differently from men and live in specific social contexts of male power.⁴¹⁴ In order to fully gauge and remedy the misrepresentation and exclusion of women from the dominant knowledge, it is necessary to involve the experience, reality, and knowledge of women.⁴¹⁵ In other words, feminist standpoint theory claims that being the oppressed enables women to have a perspective, an access to knowledge, that the oppressor cannot ever have.⁴¹⁶ The idea is not that women, by nature, have privileged access to knowledge but rather that women share a common material situation of being subordinated due to gender and therefore develop a common political consciousness.⁴¹⁷

In sum, the feminist standpoint theory advocates that women's subjugated position allows them to develop a better view of social life than men.⁴¹⁸ However, feminist standpoint theory has been criticized for being essentialist and oppositional, and not taking into account the differing realities between women of different backgrounds.⁴¹⁹ Further, associating women with specific characteristics such as ethics of caring in fact assume a male view of womanhood.⁴²⁰ Another debatable point is whether solely a victim status is a legitimate way of acquiring feminist knowledge.⁴²¹

b. Feminist Poststructuralism or Postmodernism

⁴¹⁴ Caroline Ramazanoğlu and Janet Holland, *Feminist Methodology: Challenges and Choices* (1st edn, SAGE 2002) 61.

⁴¹⁵ Saeidzadeh, 189.

⁴¹⁶ Bartlett, 873.

⁴¹⁷ Ramazanoğlu and Holland, 68.

⁴¹⁸ Charlesworth, 3

⁴¹⁹ See: Bartlett, 873-877.

⁴²⁰ Charlesworth, 3

⁴²¹ Fehmiye Ceren Akçabay, "Feminist Hukuk Metodolojisi: Hukuk Uygulaması, Feminizm ve Politika" Gülriz Uygur and Nadire Özdemir (eds.) *Hukuk ve Toplumsal Cinsiyet Çalışmaları* (3rd edn. Seçkin Yayınevi 2022) 40.

While the feminist standpoint theory aimed to relocate the source of knowledge from the traditional-male-oppressor to the oppressed-women, the poststructuralist or postmodernist approach criticized the essentialist way of thinking in that it rejects the core identity of subjects, and thus aims at the deconstruction of identities, such as the category of woman.⁴²² Feminist poststructuralism asserts that women do not have core identities but rather their identity transcends situatedness and is compromised through multiple structures that overlap, intersect, and contradict.⁴²³

Poststructuralism asserts that reality is socially and discursively constructed, and therefore feminist poststructuralism asserts that gender is socially and discursively constructed, rather than being an essential and core feature that exists as a singular category.⁴²⁴ Feminist poststructuralists problematize the fact that law, despite resting on the premise of being neutral and objective, masks certain hierarchies and distributions of power within.⁴²⁵ Here, the approach to law as a social phenomenon opens up the avenue of decentralizing the States' power and exposing gendered hierarchies.

c. Positionality Approach

While the poststructuralist approach has, by aiming to deconstruct the binary categories of male and female, exposed the way hierarchical power dynamics are produced and reproduced, some feminists⁴²⁶ claimed that only deconstructing the existing

⁴²² Bartlett, 877; Saeidzadeh, 190.

⁴²³ Bartlett, 877.

⁴²⁴ Saeidzadeh, 190.

⁴²⁵ Bartlett, 378.

⁴²⁶ “(...) an effective feminism could only be a wholly negative feminism, deconstructing everything and refusing to construct anything” and “The position of women is relative and not innate, and yet neither is it ‘undecidable.’ Through social critique and analysis we can identify women via their position relative to an

power structures was not enough and that a feminist methodology should also aim to construct its own stance toward producing knowledge. Bartlett offered a new stance for feminist epistemic method termed “positionality” in which the existence of empirical truths, values, and knowledge is acknowledged as is their contingency.⁴²⁷ Positionality borrows from both the feminist standpoint theory and feminist poststructuralism in that it retains the value of the experience of exclusion and oppression as knowledge of their subtlety, pervasiveness, and the consciousness to change it, as well as the rejection of external and objective truths by conceiving of its partial and situated nature.⁴²⁸ In other words, positionality “reconciles the existence of reliable, experience-based grounds for assertions of truth upon which politics should be based, with the need to question and improve these grounds”.⁴²⁹

Here, the essentialist definitions are decidedly rejected because making identity independent of its external situatedness leads to stereotypic traits that seem like objective ontological truths. Positionality puts identity in a relative context, one that takes into account the network of elements involving others, economic conditions, cultural and political institutions and ideologies, so on.⁴³⁰ In other words, women, by their position as the “oppressed” harbor the specific knowledge belonging to the oppressed and know the

existing cultural and social network” Linda Alcoff, “Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory” (1988) 13 (3) *Signs: Journal of Women and Culture and Society* 1988 405, 418 and 434; “We need the power of modern critical theories of how meanings and bodies get made, not in order to deny meanings and bodies, but in order to build meanings and bodies that have a chance for life”, Donna Haraway, “Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective” (1988) 14 (3) *Feminist Studies* 575, 580.

⁴²⁷ Bartlett, 880.

⁴²⁸ Ibid.

⁴²⁹ Bartlett, 884.

⁴³⁰ Alcoff, 433.

particularities of how this situation is masked by so-called objective rules and structures, but this is not due to any intrinsic characteristics that they possess and is rather something that appears in external contexts.⁴³¹

Positionality renders it possible to identify women by their position within this context of systemic relations of power, effectively making it feasible to ground a feminist methodological approach not on the innate characteristics and capacities of women but on the argument that their “position within the network lacks power and mobility and requires radical change”.⁴³²

d. Intersectionality Approach

As a closely related concept to positionality, intersectional approach aims to “transparently situate, re-imagine, and mobilize transgressive knowledge production and political action to take into account the relationships to power in which all claims to knowledge are embedded”.⁴³³ As such, feminist intersectionality centers an understanding of the production of knowledge that is multidimensional and multilayered. Intersectional analysis brings together feminist, anti-racist, postcolonial, queer, masculinity and disability studies to explore how norms are constructed at the intersection of different power relations.⁴³⁴ As such, the aim of incorporating an intersectional dimension to feminist method is crucial for reflecting on and problematizing the social categories and

⁴³¹ Akçabay, 42.

⁴³² Alcoff, 334.

⁴³³ Kelly F. Jackson, Sara Goodkind, Mery Diaz, Sharvari Karandikar, Ramona Beltrán, Mimi E. Kim, Jennifer R. Zelnick, Margaret F. Gibson, Sarah Mountz, Gina E. Miranda Samuels, Sam Harrell, “Positionality in Critical Feminist Scholarship: Situating Social Locations and Power Within Knowledge Production” (2024) 39 (1) *Affilia* 5, 6.

⁴³⁴ Saeidzadeh, 192.

power dynamics that underlie oppression, and for exploring how they are reinforced and how they can be challenged.⁴³⁵ Feminist legal studies especially have utilized, and need to utilize, an intersectional analysis in order to unearth the one-dimensional approach of the legal system and how this masks the intersecting social structures that oppress, or privilege, certain social groups.

The oppression of women is universal but is maintained in a myriad of ways, and feminist theories need to account for the interplay of class, culture, religion, race, ethnicity and other frameworks. However, it is also possible to suggest a “collective social history of disempowerment, exploitation and subordination extending to the present”.⁴³⁶

An analysis of gender cannot be thought separately from other social categories, as it occurs “not apart from but within the contexts of multiple identities”.⁴³⁷ Legal protection too, therefore, occur in the face of these intersecting grounds and moreover should account for the significance of these relations of inequalities, rather than reducing them to one or conflating two or more into one ground.⁴³⁸

⁴³⁵ Ibid.

⁴³⁶ Catherine MacKinnon, “From Practice to Theory, or What is a White Woman Anyway?” (1991) 4 (13) Yale Journal of Law and Feminism 13, 15.

⁴³⁷ Bartlett, 848.

⁴³⁸ Bermúdez Figueroa, Dabetić, Yuste and Saeidzadeh, 104.

2. Feminist Legal Methodology

The criticism that feminist legal method, born from this need to criticize and reject the male-oriented legal structures, aim to “unveil legal issues which are overlooked and suppressed by traditional methods”.⁴³⁹ Where traditional legal methods emphasize predictability, certainty, and fixity of legal rules, feminist legal methods valorize “rule-flexibility and the ability to identify missing points of view”.⁴⁴⁰ In other words, feminist legal methods have developed with a view to problematize the legal system as it is that had been created from the perspective of the dominant ideology, patriarchy, which effectively worked to subordinate and discriminate on the basis of gender, and to include women’s perspectives into legal methods and approach legal issues with a gender conscious perspective.

Clougherty claims that feminists can use feminist legal methods in three different ways; to expose bias against women in traditional legal methods, to construct decision-making in a way to include women’s point of view, and to convince judges to employ feminist legal methods in order to make them confront the inherent biases in their decision-making.⁴⁴¹

Moreover, method can shape substance in the meaning that deciding which facts matter or are relevant in a specific case, which legal rules or precedents are applicable or considerable, all are affected by the decisionmaker and without a methodology in place it

⁴³⁹ Saeidzadeh, 193.

⁴⁴⁰ Bartlett, 832.

⁴⁴¹ Clougherty, 7.

would entirely be up to the personal or societal preferences.⁴⁴² In this respect, three methods identified by Bartlett are asking the woman question, feminist practical reasoning, and consciousness raising.

a. Asking the Woman Question

Asking the woman question method is designed to unearth how legal rules may drown and disregard the perspectives of women and other excluded groups.⁴⁴³ The question assumes the main tenets of feminist legal theory and approaches law as not only not equal nor neutral but is essentially patriarchal. Thus, by asking the woman question, the aim is to understand the gender implications of social practice or a rule and to effectively confront gender bias. In this regard, Wishik suggests a number of questions to be asked:

- “1. What have been and what are now all women's experiences of the 'Life Situation' addressed by the doctrine, process, or area of law under examination?*
- (...) 2. What assumptions, descriptions, assertions and/or definitions of experience - male, female, or ostensibly gender neutral - does the law make in this area? (...)*
- 3. What is the area of mismatch, distortion, or denial created by the differences between women's life experiences and the law's assumptions or imposed structures? (...)*
- 4. What patriarchal interests are served by the mismatch? (...)*
- 5. What reforms have been proposed in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and*

⁴⁴² Bartlett, 845.

⁴⁴³ Bartlett, 836.

ideologically? (...) 6. In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation? (...) 7. How do we get there from here? ”⁴⁴⁴

Women’s movements around the world have achieved legal reforms by challenging the legal rules and practices that omitted women from consideration which were justified by extra-legal and stereotypical notions such as women’s nature, disposition, their second-class status and so on. The woman question reveals that the once thought to be natural differences that were unexamined and unquestioned serve as the justification of women’s subordination.⁴⁴⁵ Asking the woman question therefore helps to identify the underlying gender implications of laws and practices and works to eradicate them in favor of rules that do not, explicitly or implicitly, perpetuate women’s subordination.⁴⁴⁶

It should be realized that asking the woman question does not implicate or require that a decision in favor of women will be reached. Rather, as a method, asking the woman question requires judges to seek for gender bias and then reach a decision that is defensible in the light of that bias. In other words, asking the woman question stipulates that judges pay special attention to situations that historically were overlooked in substantive rules.⁴⁴⁷ The difficulty in recognizing and looking out for oppression one has not experienced was the central theme of the feminist standpoint theory. However, as a “method”, asking the

⁴⁴⁴ Heather Ruth Wishik, “To Question Everything: The Inquiries of Feminist Jurisprudence” (1985) 1 (1) Berkeley Women’s Law Journal 64, 72-75.

⁴⁴⁵ Bartlett, 843.

⁴⁴⁶ Ibid.

⁴⁴⁷ Bartlett, 846.

woman question eradicates the proposed need to be the one oppressed and instead allows one to gauge the inequalities from the positionality approach.

b. Feminist Practical Reasoning

Feminist practical reasoning is a version of practical reasoning presented by Bartlett. It builds on the traditional legal reasoning by combining it with a feminist perspective, basing its premise on women's everyday experience of subjugation and oppression and positioning these practically lived experiences over generalized and, as discussed, patriarchal laws. Bartlett, while finding that the assertion of women reasoning differently than men debatable, asserts that the key point of prioritizing tangible and individual reality over abstract and generalized laws and rules allow for the differences to find a voice in the legal system.⁴⁴⁸

Practical reasoning in law focuses on the specific situation and intricacies of a case from multiple perspectives, and the practical arguments that provide a justification basis for judicial decisions, rather than the application of established legal doctrine.⁴⁴⁹ It seeks to move beyond the traditional and established approach to the notion of legal relevance in decision-making.⁴⁵⁰ Feminist practical reasoning, too, acknowledges that there are patriarchal structures behind existing legal rules and asserts that they are unreliable to determine accurately the issues arising from gender inequality.⁴⁵¹ Therefore, feminist legal

⁴⁴⁸ Bartlett, 849; Akçabay, 27.

⁴⁴⁹ Bartlett, 851; Saeidzadeh, 194; See: Vincent A. Wellman, "Practical Reasoning and Judicial Justification: Toward an Adequate Theory" (1985) 57 University of Colorado Law Review 45, 92.

⁴⁵⁰ Saeidzadeh, 194.

⁴⁵¹ Ngozi Chukwuemeka Aja, "Bartlett's Feminist Legal Methods and the Question of the 'Rule of Law in Nigeria'" (2020) 2 (2) Makurdi Owl Journal of Philosophy 87, 97.

reasoning aims to expand the “traditional notions of legal relevance to make legal decision-making more sensitive to the feature of a case not already reflected in legal doctrine”.⁴⁵²

c. Consciousness Raising

Consciousness raising, in a similar way, reimagines a production of knowledge by “exposing the political behind the personal, the dominance behind the submission”.⁴⁵³ In more general terms, feminist consciousness raising creates knowledge through the sharing and exploring of the common life experiences that women have. Here, what are “experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression”.⁴⁵⁴ In other words, personal experience becomes political through collective empowerment.

Usually referred to in the context of the bluestockings and the consciousness raising group of women, Bender argues that it also operates as a feminist method on a more public and institutional level by bearing witness to patriarchy in litigation.⁴⁵⁵ Bartlett further asserts that consciousness raising has consequences on laws and institutional decision-making in general.⁴⁵⁶ It problematizes established legal principles through the lens of those that are or have been directly affected, and then challenges those dominant

⁴⁵² Bartlett, 836-837.

⁴⁵³ MacKinnon, “Feminist Theory of the State”, 240.

⁴⁵⁴ Leslie Bender, “A Lawyer's Primer on Feminist Theory and Tort” (1988) 38 (1/2) Journal of Legal Education 3, 9; Bartlett, 864.

⁴⁵⁵ Bender, 9-10.

⁴⁵⁶ Bartlett, 865.

structures through perception and insights drawn from women's own or other women's experiences.⁴⁵⁷

d. Intersectional Gender Perspective in Adjudication

Feminist theorists recognized that the patriarchal order of the legal systems and institutions create a subtle duality between men as the subject while women are relegated to the position of the "other".⁴⁵⁸ Such a gender hierarchy produces gender inequalities as well as shaping its social meaning. MacKinnon argues that a solution based on gender neutrality would have made sense if differentiation were the problem, but as the central issue is gender hierarchy, gender neutrality is not only inadequate, but further adverse.⁴⁵⁹

This is most apparent in the application of gender-neutral laws, where a passive and neutral approach by the judge deepens the gender inequalities present in a material case. Here, feminist methods have unmasked and unearthed the fact that the legal system reproduces the and justifies the prevailing anti-feminist and stereotypical societal norms and practices. In such circumstances, it becomes necessary to go beyond a neutral approach and assume a gender perspective aimed at actively deconstructing the established patriarchal structures.

Gender perspective provides a framework in which existing laws and legal practices are questioned to expose gender biases and stereotypes. Taking a gender perspective requires the identification of the differing roles and duties that are socially

⁴⁵⁷ Bartlett, 837, 866.

⁴⁵⁸ De Beauvoir, 26; Álvarez del Cuillo, Macioce, and Strid, 75.

⁴⁵⁹ MacKinnon, "Feminist Theory of the State", 232

assigned on the basis of different social statuses, revealing the different rights and opportunities that these social assignments precipitate, exposing the power relationships that these differences create and the interplay between gender and race, ethnicity, religion, sexual orientation, age, etc., inquiring about the different impacts that laws and policies have on the bases of these assignments and power differentials, and determining whether a different treatment is either arbitrary or necessary, in light of the above.⁴⁶⁰

Gender perspective further means acknowledging the complexity of a person's identity, recognizing the multifaceted identities that a person may have. This would, in turn, require the judges to adopt a new approach to the legal system, one that takes into consideration the intersecting grounds of identity and the ensuing discrimination. In other words, an intersectional gender approach to law, besides acknowledging the manners in which discrimination is experienced on the grounds of race, ethnicity, gender, sexuality and so on, further unearths the structural barriers that produce such social inequalities.⁴⁶¹

While it could be argued that the judiciary's mandate to appear neutral and impartial would contradict with the premise of a gender perspective, this is not quite the case. Adopting a gender perspective would only expect that judges become aware of the biases surrounding a law or a case, as well as their own prejudices, and take a stance accordingly. This does not automatically translate to judges always finding women in the right, but rather that they are aware of the barriers that an intrinsically patriarchal legal system creates for women in accessing to justice. Such awareness would, in turn, lead to

⁴⁶⁰ Judicial Decision Making with a Gender Perspective: A Protocol, 64.

⁴⁶¹ Saeidzadeh, 195-196.

incorporating the realities of women, asking specific questions or raising particular issues, and viewing the cases through a gender lens.⁴⁶²

A gender perspective would reveal the ways in which women have been excluded from the design and practice of the legal system, and further, the ways in which their inclusion can be accomplished. In this regard, one must first expose the inherent bias present in the legal system and introduce a gender dimension to the discourse, and later actively translate it into practice.⁴⁶³ A gender-conscious approach to decision-making then would deconstruct the constructed male dominance in law and take into consideration the perspectives of women.

⁴⁶² Evola, Krstić, Rabadán, 163

⁴⁶³ Vanessa Sauls, “Rewriting reproductive rights – A feminist perspective on abortion law and gender justice in the legal process” (LL.B. thesis, Queen Mary, University of London 2016) 6.

D. Conclusion

As established above, what this thesis will aim to do is to unearth the feminist potential of the legal system by providing an account of a judiciary that is inclusive and receptive to the demands of the feminists. In order to do this, this thesis first had to establish the state responsibility regarding achieving gender equality, so that it could translate to the conduct of judges as State agents, on both philosophical and legal grounds. Then, the feminist legal theory and its methods were presented to draw a framework that could be useful for evaluating the conduct of the judiciary. The feminist legal framework made apparent that if one were to approach the legal system as it is today from a gender critical viewpoint, the systemic injustices intrinsic in the legal system would come to surface. As mentioned, one way to face these problems relies upon the role of judges. Judicial ethics, in this sense, will provide to be an important aspect of combating gender inequality and its adverse effects on women.

As will be demonstrated in the second chapter, besides patriarchy infused laws, judges do harbor certain biases and prejudices against women based on gender, and this influences their decisions. This phenomenon is especially apparent in the justifications for written judgments, and the language employed therein. Moreover, even if judges were able to disregard bias, it is still not enough for judges to be impartial, as neutrality in the face of systemic injustices would still yield unjust results for one party. Thus the next chapter will analyze the shortcomings as well as the triumphs of case law concerning gender related issues from both the Constitutional Court of Turkey and European Court of Human Rights, comparing and contrasting their respective approaches.

CHAPTER II

A GENDER CONSCIOUS PERSPECTIVE IN THE PRACTICE OF THE JUDICIARY

I. Introduction to Gender Perspective in Practice: Case Law

Feminist legal theory concerns itself with power relations of patriarchy, specifically power as a dimension of gender. However, this power is less about men exerting direct dominion over women, but more a structural issue of gender hierarchy.⁴⁶⁴ In this sense, the State, at the structural level, is the very place in which unequal power relations are exercised and reinforced.⁴⁶⁵ Examples of this include the way in which sexual violence victims are put on trial and their plausibility questioned instead of the perpetrator's; family law relations where the State's authority is transferred to the husband and thus the oppressive patriarchal system is multiplied so as to control women both in macro and micro levels; the direct State authority and intervention over women's autonomy and bodies, and so on.

Poststructuralist feminists and queer activists, on this matter, objected to the idea of the State as a hegemonic, unitary power, and rather re-conceptualized it as a set of many

⁴⁶⁴ Convention on the Elimination of All Forms of Discrimination Against Women in its preamble asserts that "(...) a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality (...)" while the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence in its preamble recognizes that "the realization of de jure and de facto equality between women and men is a key element in the prevention of violence against women (...) violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women (...) the structural nature of violence against women as gender-based violence (...)"

⁴⁶⁵ Bermúdez Figueroa, Dabetić, Pastor Yuste and Saeidzadeh, 102.

identities.⁴⁶⁶ This way, it will be easier to tackle the issue of gender-power relations by engaging with different sets of institutions within the State. The legal system as one of such institutions serves to control gender and gender identities based on gender essentialism and gender fundamentalism.⁴⁶⁷ While this is the case, it is also important to see how its power as an institution can be utilized for progressive change, and the case law examples from therein will attempt to showcase that such a change can be accomplished though obtaining a gender perspective in adjudication.

As important as international human rights instruments are, the rights and freedoms enshrined in such texts are only as good as the protection mechanisms that safeguard and realize those rights and freedoms. International, regional, or domestic organs and courts define and interpret the scope and application, or even the content of such documents.⁴⁶⁸ Legal texts, especially those concerning human rights, are accepted to be living documents, as explained above. Decisions of the courts or treaty organs have major influence not only on the parties of the specific case that has come before them but also on the progression of human rights as well.

In this section, this thesis will cover and compare the respective approaches of Constitutional Court of Turkey and European Court of Human Rights to issues concerning gender and gender-based stereotypes, and will note their shortcomings as well as strengths

⁴⁶⁶ Davina Cooper, “An Engaged State: Sexuality, Governance, and the Potential for Change” (1993) 20 (3) *Journal of Law and Society*, 257, 258.

⁴⁶⁷ Bermúdez Figueroa, Dabetić, Pastor Yuste and Saeidzadeh, 102.

⁴⁶⁸ Dündar-Sezer, 174.

and how the adoption of a gender perspective would have ameliorated the reasoning and outcome of these cases with regards to gender equality.



II. Constitutional Court of Turkey's Approach to Cases Concerning Gender

Gender stereotypes are one of the primary contributing factors of violations of a variety of rights, such as right to life, right to health, education, work, family relations, and so on. For this reason, it is important to realize just how such stereotypes, if and when utilized by the judiciary, can affect the outcome of judicial decisions and contribute to a culture of discrimination and violence based on gender. Conversely, it is equally important to see how the rejection of such stereotypes and the adoption of a gender perspective can have a positive influence.

As seen above, the jurisprudence of a State is intrinsically male and gendered and this stance especially comes to light in the practice of constitutional adjudication.⁴⁶⁹ In its caselaw on the principle of equality in general, Constitutional Court of Turkey relies on Aristotle's premise of treating like cases alike and different cases differently. While TCC accepts that such treatment will not be regarded as unconstitutional, over the years it also accepted that the discriminatory or different treatment amongst "equals" will be considered contrary to article 10 of the Constitution of Turkey on the principle of equality, granted that such treatment is not based on a legitimate and justified cause.⁴⁷⁰

⁴⁶⁹ MacKinnon, "Feminist Theory of the State", 160.

⁴⁷⁰ "As emphasized in many decisions of the Constitutional Court, equality before the law does not mean that everyone will be subject to the same rules in all respects. In the application of the laws, discrimination based on language, race, color, sex, political opinion, philosophical belief, religion cannot be considered valid under the Constitution. This prohibition prevents the application of different rules to those in the same situation and the creation of privileged individuals and communities. It is not contrary to the principle of equality for some citizens to be subjected to different rules based on a justifiable reason; the peculiarities of their situation and position may necessitate different rules and different practices to be applied. Different treatment that depends on reasons that are justified as such are valid, not contrary. (...) The equality intended by the Constitution is legal equality, not de facto equality. If the same legal situations are subject to the same rules and different legal situations are subject to different rules, the equality envisaged by the Constitution is not violated. In other words, different practices cannot be applied between those whose personal qualities

Constitutional Court of Turkey uses parameters such as “necessity”, “requirement”, “conformity with the nature and purpose of the task” to materialize the legitimate or justified cause, as well as determining whether the different treatment was proportionate or not.⁴⁷¹ In this sense, it is evident that TCC employs the European Court of Human Rights’ criterion of assessment on article 14 of the Convention in its own judicial review.

In terms of individual application, which was introduced to the Turkish legal system in 2012, TCC makes an assessment of whether the application of certain laws or executive practices that constitute a breach to the fundamental rights and freedoms exist in the common denominator of rights enshrined in both the Constitution of Turkey and the European Court of Human Rights.⁴⁷² In this case, the individual application procedure can only be started if and when an alleged violation of the right to life, prohibition of torture and degrading treatment, right to a fair trial, right to respect for private and family life (including the right to work; physical, psychological, and moral integrity; privacy; identity and autonomy; home; and correspondence), and prohibition of discrimination in the context of cases concerning gender and other related issues that may come up.

Another limit to the content of individual applications is regulated in article 45/3 of the Law no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court where the legislative and regulatory administrative acts are kept out of the scope of

and situations are identical. It cannot be concluded that the Constitutional principle of equality is violated if different practices are introduced by law based on the necessities arising from changes in circumstances, public interest, or other justifiable reasons” AYM E. 1988/4 K. 1989/3 K.T. 12.1.1989.

⁴⁷¹ Dündar-Sezer, 346.

⁴⁷² Constitution of Turkey Article 148: “Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted”.

individual application, as well as the decisions of the Constitutional Court of Turkey and acts excluded from judicial review by the Constitution. In other words, aside from judicial review where allegedly unconstitutional norms are brought before TCC, individuals can only claim that certain acts of State actors to be infringing on their fundamental rights and freedoms. Article 46/1 further stipulates that an individual application can only be filed by those whose actual and personal rights are directly affected by the act, action or omission that allegedly led to the violation. Meaning that, individual application cannot be filed against norms of any kind in abstract, but rather against the implementations that result in or leads to the alleged violations.

However, the possibility of a legislative act's direct application or implementation may also constitute a violation of an individual's fundamental rights and freedoms. In such cases, TCC also accepts to see such situations under the rubric of "potential victim". In other words, while individual application procedure only concerns the grievances arising from the implementation of the norms and not the norms themselves in abstract, if a "potential victim" were to convincingly prove that their fundamental rights and freedoms are under a foreseeable, direct and definite threat, the application would be accepted.⁴⁷³

Before individual application was an option, TCC, by employing the interpretive methods of comparative law and international law, and by making references to international legal texts such as the European Convention on Human Rights, had built a significant amount of case law in the context of fundamental rights and freedoms.⁴⁷⁴ In

⁴⁷³ Abdurrahman Eren, "Hukuki Yorum Yöntemleri Açısından Bireysel Başvuru Kararlarının Anayasanın Yorumuna Etkileri" (2016) 32 (1) Anayasa Yargısı 231, 245.

⁴⁷⁴ Eren, 232.

this context, it is important to evaluate which interpretative methods TCC utilizes in order to methodologically propose a gender perspective. Within the dichotomy of the classical approach, which can be conceptualized as Montesquieu's "mouth that pronounces the word of the law"⁴⁷⁵, and the realist approach, where the judge can be regarded as a "co-legislator" (*co-législateur* or *co-auteur*) as it possesses the power to annul the norms created by the legislator according to Kelsen and Troper⁴⁷⁶, TCC could be said to adopt the classical approach while also seeing itself as the "co-legislator" within the framework of the realist approach.⁴⁷⁷ In this schema, besides the standard methods of interpretation such as textual, systematic (or contextual), purposive (or teleological), and historical, the methods of interpretation of the Constitution, especially in terms of fundamental rights and freedoms, can be named as constitutionality, autonomous interpretation, dynamic interpretation, constitutional integrity, principle of compatibility, interpretation in favor of freedom, and interpretation in accordance with international law and principles. In terms of feminist legal methodology, enumerated methods can therefore be the intermediary for a gender perspective to be utilized as well.

⁴⁷⁵ Montesquieu, 208.

⁴⁷⁶ Kemal Gözler, "Realist Yorum Teorisi ve Mekanist Anayasa Anlayışı" (1998) 15 Anayasa Yargısı 207, 218-219; Eren, 254.

⁴⁷⁷ Eren, 255.

A. Gender Stereotypes and Violence

Stereotypes based on gender roles position women as subordinates to men in every area of life and society, and this concurrently is one of the many factors behind gender-based violence.⁴⁷⁸ Below, the Constitutional Court of Turkey's judgments regarding the issues connected to gender-based violence, both judicial review and individual complaint in nature, will be discussed at length. The analysis will show that while some decisions issued by TCC show a promising understanding of gender, most do disregard such an approach and fall victim to stereotypical views and reflect the intrinsic patriarchal dynamics present in society.

One of the reasons for this unstable approach is the fact that realizing the gender stereotypes so deeply ingrained in the society's subconscious mind and accepted as culturally normal is really challenging. The second reason would then be that, it is not an inability per se, but rather an involuntariness towards abandoning "pervasive and persistent gender stereotypes, particularly those that reflect actual modes of social organization and behavior".⁴⁷⁹

The Istanbul Convention in this regard notes that the judicial bodies shall further exclude unacceptable justifications such as "honor", or mitigating factors such as "guilt" and States should further ensure that such breaches are sanctioned lest these regulations

⁴⁷⁸ Bezar Eylem Ekinci, "Anayasa Hukukuna Feminist Yaklaşımlar ve Anayasa Mahkemesi Kararlarında Toplumsal Cinsiyet Eşitliğine İlişkin Genel Bir Değerlendirme" Gülriz Uygur and Nadire Özdemir (eds.) *Hukuk ve Toplumsal Cinsiyet Çalışmaları* (3rd edn. Seçkin Yayınevi 2022) 201.

⁴⁷⁹ Cook and Cusack, 41-42.

remain ineffective.⁴⁸⁰ In this case, in order to realize whether such gender stereotypes are upheld by the State, one should ask whether the State, through its laws, policies, or practices, perpetuated a gender stereotype which then resulted in the legitimization and normalization of that stereotype.⁴⁸¹

In 2008, TCC reviewed article 86/3 of the Turkish Criminal Code⁴⁸² which regulated that in cases where intentional injury is committed against a spouse, the penalty to be given shall be increased and shall not require a complaint for the investigation and prosecution to commence.⁴⁸³ The complaint against this provision was that the perpetrator spouse was discriminated against compared to third parties on the grounds that the penalty foreseen was lesser and a complaint was needed in cases where a third party were to be the perpetrator of this crime. Another complaint was, incredulously, that taking away the possibility of the victim withdrawing their complaint would result in an increase of domestic violence.

TCC in its assessment referred to the positive obligations of the state in the context of article 17 of the Constitution which regulates the obligation to protect and improve people's corporeal and spiritual existence, especially with regards to domestic violence, and held that the relationship dynamics between the parties mattered considering that the victim's complaint may be prevented by pressure from the abuser spouse. TCC's view of

⁴⁸⁰ María Acale Sánchez, Ivana Marković and Susanne Strand, "Gender Competent Criminal Law" in Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (eds.), *Gender-Competent Legal Education* (Springer Textbooks in Law 2023) 460

⁴⁸¹ Cook and Cusack, 56-57.

⁴⁸² Turkish Criminal Code (*Türk Ceza Kanunu*) Law no. 5237, Date of Acceptance: 26.9.2004 Date of Publication in Official Gazette: 12.10.2004 No: 25611 Vol: 43.

⁴⁸³ AYM E. 2005/151 K. 2008/37 K.T. 3.1.2008.

gender-based violence in this case showed a parallel to the obligations set forth both by the Constitution and by international treaties such as CEDAW and later, the Istanbul Convention. One important point is the reference to States' positive obligations in the context of domestic violence. Another one was the overcoming of stereotypes regarding victims of gender-based violence and the adopting a gender-sensitive standpoint by taking into account the very real experiences of domestic violence victims and how hard – at times impossible – it could be for them to come forward and complain to authorities, and even more so, to not withdraw their complaints due to threats or pressure coming from their abusers.

In a similar situation, an amendment regarding gender-based violence was made in the Turkish Criminal Code and related codes in 2022 regulating that certain crimes such as murder, intentional injury, torture, and threat, if committed against women, were to be punished with an increased penalty. These provisions were brought before TCC with similar claims as above, and TCC held that the aim of such amendments was to protect women and to ensure deterrence, and that it was the duty of the state according to Article 10 of the Constitution, which also foresees that measures taken for women to enjoy equality in practice as well could not be seen as contrary to the principle of equality.⁴⁸⁴

While seemingly similar reasonings by TCC, the two situations bear important differences. First, whereas the first clause proved to have positive effects on the situations of victims and itself was based on the real-life experiences of victims of gender-based violence, the second situation, the amendments made to the Turkish Criminal Code,

⁴⁸⁴ AYM E. 2022/117 K. 2023/4 K.T. 5.1.2023.

demonstrated a lack of substantive understanding of a gender perspective and had a rather tangential view of gender-based violence.

In the face of an ever-growing trend of impunity for the perpetrators and the exponential increase in the social reaction against it, the legislator seemingly took a populist approach with a goal to quash this reaction without delving into the actual sociological, cultural, and political foundations behind gender-based violence.⁴⁸⁵ The matter at hand is, gender-based violence is not solely about a woman being murdered, bodily harmed, tortured, or threatened *de facto*, but it is a form of systemic violence directed against a person solely because of that person's gender, or the existence of a system of violence that affects persons of a particular gender disproportionately. It has its roots in patriarchy, and a refusal to acknowledge this fact only serves to gloss over the actual problem.

Most gender-based violence cases within the context of Turkey emerge as domestic violence, in one way or another. Domestic violence as intimate partner violence includes physical, sexual, psychological, or economic violence between the current or former spouses as well as current or former partners.⁴⁸⁶ The reason for emphasizing the domestic nature of the gender-based violence is due to the long-fought debate over the public and private dichotomy, as discussed above. Direct state intervention had been

⁴⁸⁵ Selcen Özdemir, “7406 Sayılı Türk Ceza Kanunu ve Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Kapsamında Düzenlenen, Ağırlaştırıcı Bir Neden Olarak Mağdurun Cinsiyeti” (2023) Cinsiyet Bağlamında Hukuka Eleştirel Bakış Sempozyumu Bildiri Kitabı 133, 134.

⁴⁸⁶ “Istanbul Convention” Explanatory Report, para. 42.

regarded as inappropriate in the private sphere, which consisted of the family and the home.⁴⁸⁷

In such cases, the recent caselaw of the ECtHR accepts that the States have a duty to effectively and adequately investigate and prosecute the perpetrator with a “special diligence”.⁴⁸⁸ Further, it is established that States shall take into consideration the distinctive properties and dynamics of gender-based violence.⁴⁸⁹ In domestic law, the Law no. 6284 that was put into effect shortly after the ratification of the Istanbul Convention, also contained clauses that aim to effectively and adequately investigate and prosecute the perpetrators as well as to protect the victims and potential victims by means of protective measures, interim measures, restraining orders and so forth.

Constitutional Court of Turkey decided on a number of cases concerning such interim measures and their legality. In the *M.L.* application⁴⁹⁰ concerning the decision of the lower courts where they granted the father, whom the mother and the two daughters had restraining orders against during the divorce process, the right to establish personal relations with his daughters. TCC demonstrated a domestic violence sensitive viewpoint and decided that the reason such restraining orders were granted in the first place was due to the violence the members of the family – the mother and the daughters – suffered at the hands of the perpetrator and that there had been many instances where the abuser spouse killed or abused the children during or after the divorce proceedings.

⁴⁸⁷ Charlesworth, Chinkin and Wright, 627.

⁴⁸⁸ *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017) para. 129.

⁴⁸⁹ Dündar-Sezer, 378.

⁴⁹⁰ AYM, *M.L. ve Diğerleri*, B. No: 2019/20735, 28.12.2021.

It shows that TCC employed the view of article 31 of the Istanbul Convention where States are obligated to ensure that the exercise of any visitation or custody rights does not jeopardize the rights and safety of the victim or children. Another decision of TCC regarding the interim measures of the Law no. 6284 is the *A.Z.Ö.* application⁴⁹¹ where the applicant, after a number of protective measures were issued against her abusive ex-spouse, could not work due to the constant threat of violence, and as a result one of her children committed suicide. The applicant claimed that despite her several requests for change of identity and interim financial support, the government's apathetic and slow treatment infringed upon her rights under Article 17 of the Constitution concerning the protection and improvement of corporeal and spiritual existence.

TCC held that the State had positive obligations regarding interpersonal relations as well, and as per Law no. 6248, it had an obligation to provide the victim support and services enshrined in the law in a speedy manner, showcasing that the protective or interim measures by themselves are not adequate by themselves if they are not followed up with tangible support by the government. Due diligence in this sense is an important term for the judicial actors, as they have to be proactive and diligent to the nuances and dynamics that could be present in gender-based violence cases. It should be noted that the dissenting judge in the *A.Z.Ö.* case stressed that States' positive obligations with regards to establishing an effective judicial system is not in and of itself a guarantee on the results, and rejected the majority's finding of inadequate response by public authorities by arguing that they were, in fact, adequate, as the public authorities acted as far as they could foresee

⁴⁹¹ AYM, *A.Z.Ö.*, B. No: 2014/546, 19.12.2017.

the consequences and followed standard procedure.⁴⁹² However, the problem itself lies herein what is considered as “adequate” or “standard”, as the lived realities of women showcase a completely different picture of immediacy, and adequacy.

TCC followed a similar outlook to the dissenting opinion in another decision. *Özlem Tuncel Kaya* application⁴⁹³ concerned a woman who claimed that she was constantly suffering abuse, threat, and insults by her spouse, but the public prosecutor issued a decision of non-prosecution without listening to testimonies from their neighbors. TCC, while seeing this case under prohibition of torture and ill-treatment⁴⁹⁴, found the case inadmissible. However, especially seeing how TCC was capable of considering the hardships of proving domestic abuse, such a disregard of gender-based violence and its nuanced dynamics, and the expectation that all victims of abuse would and could always document their abuse, run contrary to the principles set forth by international human rights texts as well as the Constitution.

A similar negligence was present in the case of *Nefise Erdoğan and Abdurrahman Erdoğan* decision⁴⁹⁵ where the applicants’ fifteen-year-old daughter was found dead hanging and the autopsy reports showed clear signs of sexual abuse. While not a domestic abuse case, it is still an important decision to showcase the lack of due diligence on the part of public authorities and the judicial system as a whole. Although the Assize Court found a perpetrator, M.E. from the same village, the case was dismissed upon the death of

⁴⁹² A.Z.Ö., Dissenting Opinion of Judge M. Emin Kuz.

⁴⁹³ AYM, *Özlem Tuncel Kaya*, B. No: 2013/8868, 10.3.2016.

⁴⁹⁴ ECtHR, in its recent decisions, regards domestic abuse under Article 3 of the Convention. See: *J.I. v Croatia* App no 3589816 (ECtHR, 8 September 2022) para 84.

⁴⁹⁵ AYM, *Nefise Erdoğan and Abdurrahman Erdoğan*, B. No: 2014/4616, 7.2.2018.

M.E. The family insisted that the evidence and dismissed testimonies show that he was not alone in the crimes committed against their daughter and a few others aided and abetted M.E, both in the murder and sexual abuse. However, these perpetrators were exonerated by the Assize Court (*Ağır Ceza Mahkemesi*) and later, TCC held that the State had fulfilled its due obligations in the present case and found the case inadmissible. In the end, the family was left with a picture of impunity in the face of a series of crimes in which a fifteen-year-old girl was sexually abused and then murdered. Considering both the public interest regards to such horrific crimes, and the personal grievances of the deceased's family, TCC should have regarded the case more diligently and in the context of gender-based violence. Obtaining a gender perspective would have helped TCC to determine the scope of the State's positive obligations in conducting effective investigation and prosecution⁴⁹⁶, along with a duty to establish a case law that is deterrent for such crimes. All of which are regarded as the State's responsibilities under international human rights texts, specifically CEDAW and the Istanbul Convention.⁴⁹⁷

Two other decisions made by TCC concern similar shortcomings by the State failing to comply with its obligations under the abovementioned texts. In the *T.A.* judgment⁴⁹⁸, S.E., daughter of the applicant, was murdered by her ex-husband V.A. S.E. had constantly and repeatedly complained to the authorities of the insults and death threats from V.A., and even though preventive measures were in place, V.A. murdered S.E. by

⁴⁹⁶ Dündar-Sezer, 398.

⁴⁹⁷ Convention on the Elimination of All Forms of Discrimination Against Women Article 2; The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence Articles 5(2) and 6.

⁴⁹⁸ AYM, *T.A.*, B. No: 2017/32972, 29.9.2021.

using his visitation rights as a front and later tried to establish himself an alibi. Despite these facts, the lower instance courts reduced his sentence as they did not deem the situation a premeditated murder. TCC, referring to CEDAW, ECHR, Istanbul Convention, and the case law of ECtHR⁴⁹⁹, accepted that the State having positive obligation to put together an effective system, legal or otherwise, to combat violence against women, held that the laws and systems in place were adequate and effective enough regardless. Moreover, TCC, accepting that the reducing of the sentence is a problem, reasoned that because V.A. was still punished with twenty five years of prison, the situation would not lead to a case of impunity. With regards to State's obligations, TCC evaluated whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to S.E.'s life – ECtHR's *Osman* test⁵⁰⁰ – and that considering she had openly stated that she was under death threats from her ex-husband and that V.A. already had a prison sentence regarding the threats, there were preventive and protective measures in place, the murder of S.E. was foreseeable, and that there had been a violation of the right to life.

In this instance TCC regarding the reduced sentence as a problem but not seeing it as a violation ground is perplexing, especially since the growing trend of impunity is one of the causes for violence against women becoming a mainstream reality of Turkey. While TCC's assessment regarding the foreseeability of the murder is important, it is still crucial to consider that despite the fact that S.E. was the so-called "perfect victim", that she had

⁴⁹⁹ *T.A.*, paras. 85-98.

⁵⁰⁰ *Osman v the United Kingdom*, Reports of Judgments and Decisions ECtHR 1998-VIII, 28 October 1998, para. 116

clearly and openly tried to report and complain that she was under death threats from V.A., she still faced belittlement and was not taken seriously by the judiciary. And despite everything, she was still murdered. As a comparison ground, ECtHR's recent judgments in which it evaluates whether the public authorities' inaction depends on prejudiced notions with regards to gender-based violence⁵⁰¹ is important to establish the gendered nature of such violence.

The second case, *Fatma Güneş* application⁵⁰², too concerns the applicant's daughter, E.B., who was killed by her husband R.B. Prior to her murder, E.B. had complained to public authorities for her husband had abused and insulted her, had protective measures in place, and the ensuing judicial proceedings resulted in a judicial fine and a decision of deferral of the announcement of the verdict. TCC, despite referring to Law No. 6284, ECtHR judgments and the Istanbul Convention⁵⁰³ in its decision and accepting that the verdict could have resulted in a case of impunity, held that the legal system in place was adequate.

TCC reasoned solely from the grounds of protective measures and stated that the State had fulfilled its obligations and that public authorities had no means to know whether E.B. was under a serious threat of being murdered as she had not alerted or complained to authorities after the initial complaint. First, TCC failed to draw a correlation between the result of impunity and the State obligation to protect the right to life. In the present case,

⁵⁰¹ *Tkheldze v Georgia* App no 33056/17 (ECtHR, 8 July 2021) para. 60.

⁵⁰² AYM, *Fatma Güneş*, B. No: 2016/8300, 3.6.2020.

⁵⁰³ *Fatma Güneş*, paras. 37-48, focusing on the procedural obligations and responsibilities borne from this framework.

even a direct causal link could have been established between the failure of the lower courts to punish R.B. and the ensuing murder. Further, it is evident that TCC yet again refused to see the real dynamics of domestic abuse. It is unclear why the initial complaints were not enough for the State obligation to protect E.B., and to do it diligently. TCC further refused to consider the four pillars established by the Istanbul Convention, which are prevention, protection, prosecution, and coordinated policies. Apparent in the case is the fact that even though the protection measures were in place, the failure to follow up, to ensure their effective implementation, has detrimental consequences.

The Istanbul Convention foresees integrated and systemic policies to be adopted⁵⁰⁴, and this case demonstrates how it was lacking, contrary to TCC's assessment. Further, it should be noted that ECtHR actually modified the *Osman* test with another decision, *Kurt v. Austria*, and refined it by introducing stricter requirements in cases of domestic violence. In this context, the public authorities are "under a duty to carry out a lethality risk assessment which is autonomous, proactive and comprehensive (...) The terms "autonomous" and "proactive" refer to the requirement for the authorities to not rely solely on the victim's perception of the risk, but to complement it by their own assessment. Indeed, owing to the exceptional psychological situation in which victims of domestic violence find themselves, there is a duty on the part of the authorities examining the case to ask relevant questions in order to obtain all the relevant information, including from other State agencies, rather than relying on the victim to give all the relevant details".⁵⁰⁵

⁵⁰⁴ The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence Article 7.

⁵⁰⁵ *Kurt v Austria* App no 62903/15 (ECtHR [GC] 15 June 2021) paras. 168-169.

Further on this point, the case of *Opuz v. Turkey*⁵⁰⁶ will be analyzed in detail under ECtHR judgments, but for this section's purposes, it is appropriate to mention the principles and obligations established within, especially considering the two cases and *Opuz* bear similarities that all stem from the failures of the public authorities of Turkey. It should be noted that the drafting of the Istanbul Convention started because of the principles set forth in *Opuz*, as it is a landmark decision in the history of ECtHR and Turkey specifically.

In the case, the applicant, Nahide Opuz, and her mother had been subjected to repeated threats and suffered years of violent domestic abuse by the applicant's husband. Even though these incidents were repeatedly brought to the attention of public authorities, no concrete measures had been taken, and the complaints of the victims were more or less neglected, and at times they were forced to withdraw their complaints. Although criminal proceedings against the husband resulted in a sentence, they were reduced to judicial fines. All of these events culminated in the killing of the applicant's mother by the husband, as the mother was trying to help the applicant flee from their matrimonial home. ECtHR, in its judgment, elaborated for the first time on the nature of States' obligations with respect to domestic violence. The Court underlined that domestic abuse is neither private nor a family matter, but is a systemic issue that requires States to take effective action. The Court stated that "the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors... indicated that there was insufficient commitment to take appropriate action to address domestic violence".

⁵⁰⁶ *Opuz v Turkey* App no 334001/02 (ECtHR, 9 June 2009).

Looking back at the previous decisions by TCC in light of the identified shortcomings of Turkey's legal system, and the understanding of domestic violence in general, it is evident that a gender perspective in adjudication is needed for there to be improvement. The central issue in almost all cases concerning gender-based violence is the stereotyped perception of women as subordinates to men, which perpetuate and normalize practices of violence, coercion, family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision.⁵⁰⁷

⁵⁰⁷ CEDAW/C/GC/19, 1992, Article 11.

B. Gender Stereotypes and Autonomy

Legal personhood, as it stands, presupposes autonomy as a characteristic requirement. However, the legal system does not grant this autonomy to those who do not conform to its standards.⁵⁰⁸ As discussed above, because the standard in law is male, women are left without agency. This situation is most prominent in cases that concern sexual and reproductive rights, and in general women's bodies and their autonomy over their own bodies. In such cases, the "real" experiences of women are often at odds with what the legal system assumes to be the reality or the norm. Gender stereotypes work as an anti-thesis of this autonomy where they degrade or devalue, restrict one's capacity to define and shape their own identity and subordinate them to men.⁵⁰⁹ In this sense, women and queer people should be able to shape their own identities, free of gender stereotyping in all its manifestations. The positionality approach is especially relevant in the context of self-autonomy for subjects of gender-based discrimination. As will be made apparent below, the social and legal structures in place disregard women and LGBTIQ+ voices, bending and mending their lives to fit into the hegemonic ideology. In other words, gender hierarchy, by utilizing economic, social, and political structures, oppress women and LGBTIQ+ by taking away or rejecting their autonomy. For this reason, this section will demonstrate that asking the women question and taking an intersectional gender perspective will unearth these structures and emphasize on the experiences of the oppressed.

⁵⁰⁸ Sauls, 11.

⁵⁰⁹ Cook and Cusack, 68.

1. Honor

Honor connotes different meanings between Western and Eastern cultures. Whereas honor in the Western sense signifies moral integrity, it is an integral dimension of Eastern culture where honor is closely related to one's personal and social value. While a positive iteration of this can manifest as esteemed social status, the negative dimension materializes as a biased scale that men use to judge other men and excessively women.⁵¹⁰ Honor, at times, expands from an individual to that individual's kin, and at that instance "an insult to one person is interpreted as an insult to the whole kinship group, just as an insult to a kinsperson is interpreted as an affront to the self".⁵¹¹ "Honor killings" too can be formulated as a response stemming from this understanding of honor where a supposed shameful act by one person affects the whole of the group that they belong to. Honor killing is a term used to refer to the premediated murder of women by the male members of immediate or extended family.⁵¹² Because honor for a woman is tied to her ability to deny her sexuality,⁵¹³ such acts of women are seen as a slight toward the honor of an entire patrikin.

The reflection of such socio-cultural codes regarding women can be found in the Constitutional Court of Turkey's decision regarding the judicial review of the article foreseeing the mitigation of sentence in cases of the so-called honor killings.⁵¹⁴

⁵¹⁰ Aysan Sev'er and Gökçeçiçek Yurdakul, "Culture of Honor, Culture of Change: A Feminist Analysis of Honor Killings in Rural Turkey" (2001) 7 (9) *Violence Against Women* 964, 971.

⁵¹¹ Lila Abu-Lughod, *Veiled Sentiments: Honor and Poetry in a Bedouin* (University of California Press 1988) 65.

⁵¹² Sev'er and Yurdakul, 964-965.

⁵¹³ Abu-Lughod, 152.

⁵¹⁴ AYM E. 1997/45 K. 1998/48 K.T. 16.7.1998.

Conveniently referred to as the “sister mitigation on the grounds of unjust provocation”, article 462 of the previous Turkish Criminal Code regulated that in instances where the designated sentence of the killing (or battery) of a female sibling and/or those with whom she had been caught or suspected of having an illegitimate sexual intercourse is to be mitigated. The applicant claimed that the rationale behind such an article could only be the claim of ownership and domination of another individual – women – who is an adult, a competent individual, and is living her life freely and in accordance with her preferences, and the egoism of not allowing someone else to be their lover as well as the idea of “cleansing one’s honor”.

TCC, without investigating the protected legal interest (*bene giuridico*), which is the “honor” of a family, held peculiarly that since the norm did not distinguish between the perpetrator of the crime on grounds of gender, it was not against the principles of equality and the obligation to protect and improve their corporeal and spiritual existence. This approach adopted by TCC reflects the conception of family as an extension of patriarchal dominion and familial moral values being above questioning. Again, stereotypes about sex harming or degrading the honor or dignity of women find their correspondence in the larger culture of commodification of women and the preoccupation with their virginity. As her body is a commodity of the patrikin, a women’s honor too does not belong to her but to her family. Such defilation of honor, then, can only be “cleaned up” by killing.

This fact is evident in the text of the decision, where TCC reasoned that this article accomplishes taking into consideration the “deep and severe attack on the perpetrator’s

personal dignity and familial honor” as a mitigating factor in such acts. However, article 5 of CEDAW casting States the obligation of modifying the social and cultural patterns of conduct and eliminating the “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” provided the legal foundation TCC needed to depend on. Interpreted in this light, TCC, with this decision, failed to eliminate the traditionalist understanding of “honor” in society and on the contrary, used it as a justification.

The amendments made to the Turkish Criminal Code later, while regulating the motivation based on honor as an augmenting factor in murder instead of a mitigating factor, used “honor” in the meaning of tradition/custom (*töre*) and not honor (*namus*) thereby still leaving the door open for gender-based violence. Further, even if the will of the legislator were to include both meanings, which is highly dubious, it did not translate to the judgments or reasonings of the courts. In particular, taking this notion in conjunction with the rules on unjust provocation reductions, the practical outcome is that the concept of "honor killing" is still considered in the law in the light of social prejudices and as a justification for reducing the penalty for perpetrators.⁵¹⁵

⁵¹⁵ Ece Göztepe, “Namus Cinayetleri” (*Feminist Bellek* 7 May 2021) <https://feministbellek.org/namus-cinayetleri/#:~:text=Yasama%20s%C3%BCrecinde%20hem%20%E2%80%9Cnamus%E2%80%9D%2C,a%C4%9F%C4%B1rla%C5%9Ft%C4%B1r%C4%B1lm%C4%B1%C5%9F%20m%C3%BCebbet%20hapis%20cezas%C4%B1%20%C3%B6ng%C3%B6r%C3%BClm%C3%BC%C5%9Ft%C3%BCr> accessed: 1 July 2024.

2. Sexual Violence

Gender based sexual violence occurs against all genders and people of different sexualities. Yet, women make up the majority of victims in sexual violence while the perpetrators are usually male.⁵¹⁶ Sexual violence includes rape, sexual assault, sexual harassment, statutory rape where the victim is below the age of consent, marital or spousal rape⁵¹⁷, and child marriage, where two or more sexual violence forms intersect. The judiciary, as a reflection of the wider social attitudes and mechanisms, consciously or unconsciously employs “rape myths” in trials. As an extension of gender stereotypes rape myths have a direct effect on the outcome of cases on sexual violence. The judges, jurors, others present in the court proceedings all inherently carry their own myths about sexual

⁵¹⁶ UN Women, “Facts and figures: Ending violence against women” (21 September 2023) <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> accessed 10 April 2024.

⁵¹⁷ Even though there have been many instances where the Turkish Court of Cassation made judgments on inter-marital sexual assault cases, there has not been any instance where the topic was brought before the Constitutional Court of Turkey. “Although there are opinions in the doctrine to the contrary, it is possible for the simple form of sexual assault to be committed against the spouse. As a matter of fact, there is not any provision regulating that the spouse cannot be the victim of the simple form of the crime of sexual assault. It should be noted that the opinions to the contrary and the practice of the Court of Cassation, which does not accept that such a crime is possible, do not comply with Article 36 of the Istanbul Convention. Indeed, Article 36 of the Istanbul Convention, titled “Acts of Sexual Violence, Including Rape” regulates the dimensions of sexual violence that should be punished by States. In the Turkish Criminal Code, it is determined that “performing vaginal, anal or oral sexual acts with another person with any organ or object without consent” and “performing other sexual acts with another person without consent” is regulated, without any other indication. Article 36 of the Istanbul Convention overlaps with the provisions in the Turkish Criminal Code and neither includes an exception in cases where the person who commits the act is the spouse of the victim. Therefore, it is evident that the spouse can be the victim of the simple form of the crime of sexual assault in line with the Istanbul Convention” Aras Türey, “Eşe Karşı Gerçekleştirilen Cinsel Saldırı Eyleminin Şikayete Tabi Olması ve İstanbul Sözleşmesi” (*Anayasa Gündemi*, 1 September 2019) <https://anayasagundemi.com/2019/09/01/forum-ar-gor-aras-turay-ese-karsi-gerceklestirilen-cinsel-saldiri-eyleminin-sikayete-tabi-olmasi-ve-istanbul-sozlesmesi/> accessed 10 April 2024.

violence and may find the perpetrator not guilty or the victim less reliable, as research has shown.⁵¹⁸

Feminist theories and movement had contributed to the legal understanding of sexual violence to change and expand to include all possible forms of sexual violence, and for their recognition and effective punishment.⁵¹⁹ It was also due to feminist efforts that the concept of sexual violence has changed from being a crime against honor or public morals, and was instead contextualized as a crime against one's sexual freedom, as the root cause was identified as the want of patriarchal control over women's bodies and a performance of hegemonic masculinity.

Gender stereotypes form the basis, the impunity culture surrounding it, and the justification behind sexual violence. The patriarchal culture that posits women as men's sexual property enables the sexual exploitation of women and such sexual stereotypes, while regulating women's sexuality, also further and protect male power relations in the context of sex.⁵²⁰ Gender stereotypes help cultivate a culture in which sexual abuse is normalized, and in some contexts, expected. Termed "rape culture", this social understanding creates an environment in which sexual violence is "tolerated, trivialized, normalized, eroticized and justified through different social, cultural and structural practices, behaviors and discourses".⁵²¹ Gender stereotypes, in this respect, provide the

⁵¹⁸ See: Jennifer Temkin, Jacqueline M. Gray and Jastine Barrett, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 13 (2) *Feminist Criminology* 205-226.

⁵¹⁹ See: Sarah N. Canan and Mark A. Levand, "A Feminist Perspective on Sexual Assault" in William T. O'Donohue and Paul A. Schewe (eds) *Handbook of Sexual Assault and Sexual Assault Prevention* (Springer 2019) 3-16.

⁵²⁰ Cook and Cusack, 27.

⁵²¹ Bermúdez Figueroa, Dabetić, Yuste and Saeidzadeh, 126.

background for a system where victims are disbelieved and/or blamed, and perpetrators set free. Some stereotypes include the belief that women are obligated to protect themselves from sexual violence, – because their (or rather their family's) honor and public morality is at stake, as discussed above – by dressing and behaving modestly; that women lie about sexual abuse to frame their abusers; that a sexual violence victim would and could, always, report and evidence the assault; that women enjoy being sexually assaulted; or wrongful perceptions about consent and its nature. Gender stereotypes deeply affect attitudes towards and response to sexual violence, both in society and also in court proceedings. “Rape myths”⁵²² where prejudiced, stereotyped, and/or false beliefs about the circumstances surrounding rape, rape victims, and rapists find their place in the attitudes of judges dealing with cases of sexual violence.

TCC has issued many controversial decisions regarding sexual violence over the years. Mainly, it seems that the Court fails to grasp the concept of consent and further accepts sexual violence as a criminal offence not as an infringement of sexual freedom or bodily autonomy, but rather as an issue of public morality or honor. This lacking

⁵²² “The popular rape myths include the following opinions and statements: women mean “yes” when they say “no”; women are “asking for it” when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures; if a woman says “yes” once, there is no reason to believe her “no” the next time; if a woman agreed to kissing, it means she agreed to sexual intercourse; women who ridicule men deserve to be raped; the majority of women who are raped have bad reputations; if a woman does not want to be raped, she will just fight back at any cost; women provoke rape; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; most of the rape accusations are false; women secretly desire to be raped; women exaggerate how much rape affects them; women report rape immediately; only strangers can commit rape, thus marital rape or rape by acquainted is not a rape” Karolina Prażmowska-Marcinowska, “Impact of rape-myths on judiciary proceedings A lack of acknowledgement in the European Court of Human Rights case-law” (2022) 1 (3) Forum Polityki Kryminalnej 1, 3.

perspective has resulted in gross miscarriages of justice and reproduction of gender stereotypes.

Article 438 of the previous Turkish Criminal Code concerning sexual violence and kidnapping contained a mitigating factor clause stipulating that in cases where such actions are done to sex workers, the punishment foreseen for rapists are to be reduced accordingly. When this article was brought before TCC for judicial review regarding discrimination⁵²³, the Constitutional Court of Turkey justified the article by asserting that the severity of harm suffered by “loose women who has made prostitution a profession” (sex workers) cannot be equal to the harm suffered by “chaste” women in similar situations. The rationale behind this distinction was that, as the kidnapping or sexual violence imposed on “chaste” women would damage her honor and respectability in the society irreparably, the same could not be said for the situation of sex workers. Moreover, TCC reasoned that as kidnapping and sexual violence are crimes against honor and chastity, and a sex worker, lacking these, therefore would not suffer harm as much. Due to the reasoning listed above, TCC, by a majority, found the article indiscriminatory, and the mitigation of sentencing for these crimes within its discretion.

The dissenting opinions in the decision, while stating that the decision gravely undermines the principles of human rights, human dignity, and equality,⁵²⁴ still managed to employ stereotypic, patronizing, and pitying expressions such as “prostitutes are human too”, or “(those) who, as a result of the unbearable force and heavy pressure of social and

⁵²³ AYM E. 1988/4 K.1989/3 K.T. 12.1.1989.

⁵²⁴ AYM E. 1988/4 K.1989/3 K.T. 12.1.1989, Dissenting Opinion of Judge Mahmut C. Cuhruk.

economic conditions, were not able to live out their girlhood, or even their childhood, and got stuck in the quagmire of prostitution”.⁵²⁵

Here, TCC’s understanding of consent and the nature of sexual violence as a crime is troubling. TCC adopts a stereotypic view of sex workers as willingly engaging in any and all sexual acts with any and everyone, and because it views sex as an inherently amoral act, especially for women, it believes that women who has engaged in sexual acts are lacking in honor. TCC further appears to conflate “women who has made a profession out of prostitution” aka sex workers with women who are forced into sex work. However, in any case, sexual violence is a matter of lack of consent. So, while some feminists believe that sex work cannot be consensual as it is exploitative in nature, and an overwhelming majority of women are forced into performing sex work either as a consequence of trafficking or having no other option socio-economically, some advocate for consensual sex work to be recognized as a form of labor and for it to be protected under labor laws. In the first instance, it is clear that consent is nonexistent. In the latter case, bad working conditions or experiences of sexual violence can still happen. What TCC fails to consider is the fact that a history of sexual activity or a “profession” does not equate to a generalized consent for sex and that these women can still be victims. The sexual act needs to be evaluated with regard to the situational absence of consent, regardless of the profession, behavior, or conduct of the victim, or the relationship between the perpetrator and the victim. Moreover, because society and the legal system conceptualizes sexual violence as

⁵²⁵ AYM E. 1988/4 K.1989/3 K.T. 12.1.1989, Dissenting Opinion of Judge Necdet Darıoğlu and Servet Tüzün.

a crime against one's honor or public morality, those who – in any way, shape, or form – have engaged in such activities before are thought to have “lost” said honor and therefore cease to be a concern of public morality.

The stereotypic understanding of sex and sexual acts being amoral and women who engage in them (extramaritally) being or becoming “dirty”, “loose”, “lacking honor”, etc. form the basis for patriarchal dominion. By this way, sex becomes a tool for oppression and violation, and sexual violence leads to various outcomes. One other result of this view is the silencing of women who are sexually assaulted. The practice of victim-blaming and moral and masculine codes that have a dominant place in society become an invisible element of pressure on the victim from the moment the crime occurs. The use of these codes by society, from the social environment to law enforcement and judicial officials, pushes victims to silence, and those who manage to make their voices heard are punished and oppressed. This is the reason why a context-sensitive assessment of the offence and evidence is of crucial importance. Because sexual violence, by nature, is a crime that usually takes place in environments without witnesses, and generally between people that know each other, the testimony of victims is of utmost importance.

Continuing from the understanding of sexual violence as a crime against one's honor and public morality, the legal system assumed that one way to restore this situation was for the victim of the sexual assault to marry with her perpetrator. Article 434 of the previous Turkish Criminal Code held that in cases where the perpetrator of a sexual assault or kidnapping crime marries with their victim, the penalty foreseen for the crimes are suspended. While this provision itself stems from a gender stereotype, the law further

indicates women as the potential victims of such crimes and emphasizes this fact in its language. Thus, said article presents a double and prescriptive stereotypical understanding of sexual violence.

However, this understanding was put to test when a case concerning a woman who kidnapped and married a man was not able to benefit from the suspension of punishment came before the Constitutional Court of Turkey for judicial review regarding discrimination.⁵²⁶ TCC however refused to see the case on procedural grounds, turning a blind eye to the transgression regarding the fact that the law sees women as merely potential victims and men as potential perpetrators. This indicates the fact that some gender stereotypes that are so deeply integrated within a society cannot even be seen or discussed as they are accepted without a second thought.

Another example of women only being regarded as potential victims is the judicial review decision of TCC regarding the Article 416 of the previous Turkish Criminal Code.⁵²⁷ The article criminalized “sexual relations with a minor with their consent” and actually used a gender-neutral language. However, TCC interpreted this crime as one that can only be committed by men. While TCC asserted that the Turkish Criminal Code generally does not distinguish between the perpetrators being men or women as a rule, “there are some crimes that can only be committed by a woman, and there are some that can only be committed against a woman”. TCC further reasoned that there are certain characteristics based on either disposition or the legal system that disqualifies women

⁵²⁶ AYM E. 1973/10 K. 1973/12 K.T. 02.03.1973.

⁵²⁷ AYM E. 2001/478 K. 2004/38 K.T. 25.3.2004.

from committing specific crimes, and that such crimes can only be committed by men. TCC moreover refers to the biological differences between men and women as a justification for its claims.

However, as mentioned in the dissenting opinion, the assumption that only men can commit such crimes is without any scientific basis and is rather an outcome of the male-dominant worldview and widespread societal assumptions.⁵²⁸ This judgment further asserts that since it interpreted that only men can be the perpetrators of the crimes listed in Article 216 and that it is not discriminatory, the before-contested Article 343 that foresees suspension of sentence for male perpetrators in the event of marriage with their (women) victims is also justified. It is clear that Constitutional Court of Turkey's approach is completely based on gender stereotypes prevalent in a patriarchal society. In addition, TCC's belief that crimes of such violative nature can be amended, and that public order can be restored by marriage and the formation of a "family unit" is highly problematic rhetoric and is yet again a product of gender stereotypical perspective.⁵²⁹

Constitutional Court of Turkey continued to refuse to acknowledge the criminality potential of women with regards to sexual crimes and held that the perpetrator being the stepfather of the victim in a child sexual abuse case being considered as an aggravating factor was not against the principle of equality in a similar vein. In other words, the case of a stepmother sexually abusing her children would not be considered as an aggravated crime, as TCC reasoned that as sexual crimes are mostly committed by men and that men

⁵²⁸ AYM E. 2001/478 K. 2004/38 K.T. 25.3.2004, Dissenting Opinion of Judge Fazıl Sağlam.

⁵²⁹ Ekinci, 176.

have the potential to use more physical force compared to women, the provision is an effective way to protect children and further complies with the principle of equality.⁵³⁰ However dissenting opinions emphasized that the purpose of such a provision is to effectively protect the child from people that have an authority over and who are close to them. However, the dissenting opinions pointed out, the majority in this case wrongfully assumed that it is the father who has the authority in a family unit, and this is a direct product of gender stereotypes.

Myths about sexual violence and social definitions based on these myths, at the hands of a judiciary with a male point of view, replace the facts and empirical research on sexual assault, and gender-based violence gains legal legitimacy. While law legitimizes dominant power relations, criminal law determines socially acceptable behavior and the role of women in society. Therefore, when such myths are used during the trials, judicial stereotyping becomes the primary oppressor force for the victim.

One such example is the *A.D.* judgment by TCC.⁵³¹ The case concerns the applicant who, when she was seventeen years old, had been sexually abused by seven people and upon the sending of photos related to the incidents to her aunt, had attempted suicide. The Public Prosecutor then issued a decision of non-prosecution because “the fact that the perpetrators had let the victim go after each incident and the victim repeatedly went to the locations determined by the perpetrators because she thought she was under

⁵³⁰ AYM E. 2008/93 K. 2009/41 K.T. 05.3.2009.

⁵³¹ AYM, *A.D.*, B. No: 2014/7967, 23.5.2018.

some type of spell, and the fact that she had not mentioned any of this to anyone” went against the natural course of life.

Constitutional Court of Turkey stated firstly that as a principle, the public authorities were under a positive obligation to conduct investigations swiftly and with due diligence in the context of ill-treatment, and that it shall decide whether there had been any significant flaws that resulted in a breach of State’s effective investigation obligations. In its assessment, TCC relied on the belief that the investigation had been conducted diligently and in a swift manner, and in the light of the “inconsistent” statements by the applicant, public authorities still conducted an effective investigation but did not find convincing enough evidence for the claims of sexual abuse. Here, it is clear that TCC depended on the premise that sexual abuse survivors always act in a composed, logical, and orderly manner; immediately reporting the crime, gathering possible evidence, and presenting coherent statements. However, considering the fact that sexual violence victims suffer such an extraordinary traumatic event, it should be considered that their actions may not always fall in line within the natural course of life. Even though the applicant had supplied TCC with reports stating that she suffered from learned helplessness and was clearly stuck in a spiral of violence, TCC failed to consider the victim’s family situation, her mental health, and refused to ask the “woman question”.⁵³²

The *R.K.* decision⁵³³ made a year before *A.D.* showcases a similar situation in which TCC, again, did not find a violation on the grounds of ill-treatment, because its

⁵³² Dündar-Sezer, 388.

⁵³³ AYM, *R.K.*, B. No: 2013/6950, 20.4.2016.

understanding of what sexual violence entails is too narrow and shaped by stereotypes relating to gender and sexuality. On the contrary, in *M.C. v. Bulgaria*, ECtHR asserted that “(...) any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim”.⁵³⁴

In a similar case, TCC again failed to consider the expanse of what positive obligations of public authorities entail in the context of sexual violence.⁵³⁵ The applicant, Z.C., who was a minor, was forced to marry under threat from both her family and the perpetrator in an unofficial religious ceremony. Z.C. claimed that she had been sexually abused five times, had to quit going to school and was forced to live with the perpetrator. She had reported to Public Prosecutor that she had been deprived of her liberty with the intention of sexual conduct, had been sexually abused and was under constant threats and insults, to which a decision of non-prosecution was issued.

TCC made an assessment on the grounds of prohibition of torture and ill-treatment, similar to above-mentioned cases, and analyzed whether appropriate legal measures were in place regarding the protection of children. After deciding that legal system was

⁵³⁴ *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003) para. 166.

⁵³⁵ AYM, Z.C., B. No: 2013/3262, 11.5.2016.

adequately equipped, TCC made an assessment based on the *Osman* test of the ECtHR, as mentioned above. It held that because the applicant had not complained to public authorities for the seven months she had been “staying with” the perpetrator, the authorities had no way of knowing the circumstances, and therefore there had not been a violation with regards to the State’s positive obligations. TCC then made an assessment on the grounds of ill-treatment and concluded that the Public Prosecutor’s reasoning for concluding that there had not been a case of sexual abuse was amiss as it failed to diligently collect and assess evidence, and therefore there had been a violation of the prohibition of torture and ill-treatment on procedural grounds.

While *Z.C.* is an important decision due to the fact that TCC made a reference to the prohibition of torture in the context of sexual violence, it is still lacking in certain aspects. Firstly, TCC’s claim that public authorities could not have known the existence of such events is still based on a stereotypical understanding and expectation of how victims ought to act. However, precisely due to the vulnerable and impossible situation of victims, especially the ones that claim they had been deprived of their freedom, the State had all the more reason to be more diligent in its investigation. In fact, public authorities should have investigated why the applicant, who had been a minor and was going to school at the time, suddenly dropped out of mandatory education. Another point is the fact of the Public Prosecutor’s behavior and expressions. The Public Prosecutor did not believe that sexual abuse took place depending on crude and prejudiced notions, and these beliefs served as the basis of his assessment where the decision of non-prosecution. In fact, it was issued

on the grounds of the assumption that Z.C. had consent even though she was a minor and herself expressed that that was not the case.

It seems that neither TCC nor the public authorities have improved in the roughly ten years since the above-mentioned cases, if the *E.K.* judgment delivered in 2022 is any indication.⁵³⁶ The application concerns E.K., who alleged that her right to prohibition of ill-treatment was violated due to lack of effective investigation into the series of sexual violations she had suffered. In her statements, E.K. asserted that M.A. had forced her to have sexual intercourse by threat and coercion, albeit without physical force. The applicant stated that the same thing happened three or four times in intervals. When the applicant went to a hospital for kidney pain it was discovered that she was pregnant and consequently the police were notified. Initially the applicant did not request a lawyer and the Public Prosecutor asked for a report on the applicant's perception abilities and intelligence, and also mental health, as she apparently had not realized that she had been pregnant for almost nine months, which was deemed to be against the natural course of life. It was further observed that the applicant had trouble expressing herself. The report determined that the applicant's intellectual capacity was limited and she had difficulty in establishing cause and effect relationships and that she had a dull intelligence level. Another report determined that she did not have a mental illness and that she could defend herself against sexual assault, however that may be interpreted. As a result, the Public Prosecutor issued a decision of non-prosecution on the grounds that there had not been sufficient evidence showing that M.A. sexually assaulted E.K.

⁵³⁶ AYM, *E.K.*, B. No: 2017/21844, 26.7.2022.

Applying for individual complaint to TCC, E.K.'s lawyer claimed that as E.K. was illiterate, her mother tongue was Arabic, and had been diagnosed as mentally dull, the public authorities' failure to provide her with an interpreter, a psychologist, and a lawyer during her interrogation constituted a violation. TCC stated that it could not make a direct assessment of the evidence in lieu of the other judicial authorities, and that as there had been no allegation of a failure to collect evidence or a complaint about the length of the procedures, and further stated that the authorities acted with due diligence and there had not been a violation. TCC's decision is questionable especially considering the fact that authorities failed to take the applicant's statement in the presence of a psychologist, a lawyer, and an interpreter even though they themselves had enough doubts about the abilities of the applicant to the degree that they requested a mental health report, the first of which demonstrated that she was not a fully capable individual. In addition to all of these, in the face of the fact that the applicant mentioned deception, if not physical coercion to a point of persuasion, the authorities did not consider that the applicant might have kept silent due to fear of the consequences of the disclosure of the extramarital relationship considering the social structure of the region where she lived. It was stated that even though the applicant's complaint about the incident showed that she did not consent to the sexual intercourse and that she was deceived by promises or that she was unable to resist, in other words coerced, this was not taken into account by the investigating authority. The reason for this is yet again the stereotypic understanding of sexual violence and misconceptions about consent.⁵³⁷ The authorities and TCC further

⁵³⁷ Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear

failed to take into account applicant's fear of not being able to inform her family, her lack of economic independence, her inability to fully express her complaints and requests in her mother tongue, her illiteracy, her inability to go to her family's house after giving birth and her accommodation in a women's shelter, and the fact that her statement was taken in a hurry without a lawyer, all of which made the applicant even more powerless. This situation is a clear example of how a refusal to approach cases from a female standpoint, or asking "the woman question" could lead to negative outcomes.

TCC's judgments regarding sexual violence, however, are not always bad, even though the above-mentioned cases and many more paint an adverse picture. In the *Gözde Başar* application⁵³⁸, TCC held that, the inaction of public authorities, the delay in prosecution and the collection of evidence, the negligence of taking testimony, the refusal to look into camera records, failure to demonstrate due diligence and to regard evidence in a reasonable manner constituted a breach of the State's positive obligations. TCC showcased a similar approach in a case where Albina Kıyamavo claimed that she was subjected to stripped search by government officials constituting to degrading treatment, and that such a treatment was based on the fact that she was Russian, and the perception of Russian women was based on the stereotype that she was a sex worker. In its decision, TCC held that conducting effective investigation and prosecution was under the State's positive obligations and more importantly, considering the fact that proving gender-based

permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression" <https://tinyurl.com/ykds9hw9> accessed 2 July 2024.

⁵³⁸ AYM, *Gözde Başar*, B. No: 2016/3122, 28.5.2019.

violence is not easy, even though the claims of the victim did not have enough details, the vulnerable situation that she was in should have been taken into consideration and a proactive investigation should have been conducted by the authorities. This viewpoint employed by TCC is a good example of a gender perspective that should be present in adjudication.

Sexual violence is already a traumatic experience. In addition, gender stereotypes, discriminatory laws, intersecting or combined discrimination, procedural and evidentiary requirements and practices make judicial mechanisms inaccessible to women are all among the obstacles that constitute a persistent violation of women's fundamental human rights. Thereby, acknowledging sexual violence as an exercise and abuse of power is pivotal for a correct understanding and evaluation of the facts of a case. Further, assessing evidence on a case-by-case basis and in the context of the unique circumstances and conditions that may be present with regards to the victims in each case is important.

The Explanatory Report of Istanbul Convention states that “it is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality”.⁵³⁹ Taking into consideration the differing behavioral responses to sexual violence and looking deeper into the socio-economic and psychological facts that surround the cases should be the way forward for tackling this systemic issue.

⁵³⁹ “Istanbul Convention” Explanatory Report, para. 65.

3. Issues Regarding Bodily Integrity, Birth and Abortion

Specifically with regards to reproductive rights, it is evident that women's right to exercise control over their bodies is positioned in direct opposition with the State's, the husband's, or the unborn's claims over it.⁵⁴⁰ Reproductive rights cover a range of different topics, such as access to contraception, the management of pregnancy and childbirth, abortion, sterilization, use and misuse of caesarean sections, access to childcare and reproductive healthcare, and so on. As underlined many times throughout this thesis, the main problem with the legal system is the fact that it embodies a patriarchal perspective. Consequently, a patriarchal value-oriented jurisprudence sets a male oriented perspective regarding the relationship between life and law.⁵⁴¹

One can see this phenomenon manifest in the legal rules and related judicial decisions concerning women's bodily integrity and autonomy. According to the General Public Health Act (*Umumi Hifzıssıhha Kanunu*) Article 153 a caesarean section (c-section) may only be performed if it is medically necessary for the health of the pregnant woman or the baby. The condition of a "health necessity" was contested before TCC on the grounds that pregnant women's autonomy to choose the method by which they will deliver the baby is protected under the obligation to protect and improve their corporeal and spiritual existence as well as their dignity.⁵⁴² It was primarily argued that the concept of human dignity included people's right to make decisions regarding their bodily integrity,

⁵⁴⁰ Álvarez del Cuvillo, Macioce, and Strid, 86.

⁵⁴¹ MacKinnon, "Feminist Theory of the State", 238.

⁵⁴² AYM E. 2012/103, K. 2013/105, K.T. 03.10.2013.

spiritual as well as corporeal existence and that these all manifest in pregnant woman being able to choose the method in which they want to deliver their unborn baby. It was further alleged that the right of a woman to prefer a c-section, whether due to a fear of natural birth or other reasons, is restricted and infringed upon, and because doctors fear the risk of sanctions, they refrain from performing c-sections which is ultimately a constraint on their working and professional rights, which is protected under the right to work. Lastly, it was claimed that as women who are financially better-off will have the opportunity to travel abroad and have a c-section performed there, women who do not have such financial means will be left with no choice in this matter, and that this is a class issue and contrary to the principle of equality.

TCC in its assessment contended that the obligation to protect and improve one's corporeal and spiritual existence is not an absolute and unlimited right against interferences by either one's own or by third parties. It further held that the regulation in this case protected the right to work of medical practitioners as it eliminates the possibility of pressuring from expected mothers. Regarding the claims of discrimination, TCC asserted that "income distribution is not a criterion for the exercise of constitutional rights" as the right to nondiscrimination serves to provide equality before the law and therefore is not concerned with the practical outcomes that may occur. As a result, TCC denied the application by a majority, with five members writing dissenting opinions.

Regardless of the fact that TCC failed to consider that the principle of equality and nondiscrimination by letter also bears responsibility on the State in terms of positive obligations, the dissenting opinions focused on the fact that TCC's decision deliberately

disregarded women's autonomy in favor of medical expertise. One such dissenting opinion asserted that even though the right to dispose of on one's own body is not unlimited and medical practitioners cannot be pressured to perform methods that is deemed medically harmful to the patient, the issue at hand is rather whether the expectant mother, after being sufficiently informed, can choose the method of c-section to give birth. A contrary view would disregard the preference of the expectant mother and treat her as an object. Therefore, upholding such a rule would constitute disproportionate interference with the bodily integrity of the person.⁵⁴³

In addition to women's autonomy, it may be useful to look into the core reasons why States feel inclined to regulate reproduction, almost always at the behest of women. The State here has two main interests: first, regulating reproduction through laws is a direct practice of population control agendas. At the time this decision was issued, the government demonstrated a clear displeasure at slowing birth rates and the agenda to increase the number of children born per household.⁵⁴⁴ Another issue was the fact that c-sections were more costly compared to normal births, and therefore had the potential to put a strain on the tax-run healthcare system. Both facts considered, feminist theory's regard of the state and on a smaller scale family as a unit of dominance, and reproductive exploitation as the primary locus of women's oppression coincides with capitalism's

⁵⁴³ AYM E. 2012/103, K. 2013/105, K.T. 03.10.2013, Dissenting Opinion of Judges Engin Yıldırım and Zühtü Arslan.

⁵⁴⁴ Selen Göbelez Dumas, "Erdoğan banned caesarean sections, so why does Turkey have the highest rates in the OECD?" *The Conversation* (26 September 2016) <https://theconversation.com/erdogan-banned-caesarean-sections-so-why-does-turkey-have-the-highest-rates-in-the-oecd-65660> accessed: 10.4.2024.

interests. Both structures become areas of authority and dominance for women through their organization and control systems.⁵⁴⁵

Oftentimes, women have trouble accessing to correct information regarding their bodies. One reason for this is the fact that the medical field, much like any other field, is grossly underdeveloped with regards to knowledge about women's anatomy. This had been a millennia-long trend, going back to ancient civilizations where women's blood temperature was made into a debate, to more recent times where any woman who displayed a modicum of emotion or intelligence was diagnosed with "female hysteria"⁵⁴⁶, to even more recent times where, still, so little is known about the workings of bodies that are not traditionally male. Another reason for the difficulty is the socio-economic challenges that many women face in access to knowledge and information in general. Therefore, it is important that women are given the opportunity to make informed decisions concerning their bodily integrity, and the failure to recognize this autonomy would counteract the quest for equality, continuing the legacy of patriarchy and profit.⁵⁴⁷

The other biggest issue concerning reproductive rights is the highly controversial and multifaceted topic of abortion. Recent discourse seems to be concentrated on the competing rights of the woman over her body and bodily integrity and the rights of the fetus, or the so called pro-choice and pro-life debate. Certain religious and/or misogynistic impetuses lie in the background of this debate. Within the context of Turkey, however, at

⁵⁴⁵ MacKinnon, "Feminist Theory of the State", 61.

⁵⁴⁶ See: Charlotte Perkins Stetson, "The Yellow Wallpaper" 1892.

⁵⁴⁷ Katherine Beckett, "Choosing Cesarean: Feminism and the Politics of Childbirth in the United States" (2005) 6 (3) Feminist Theory 251, 269.

least in the legal scene, the legality of abortion is not (yet), at least compared to the anti-abortion movements across the globe, a topic of debate, but rather the conditions of or the restrictions to the right to abortion is discussed. So far, TCC has only had two cases before it about abortion as of the writing of this thesis, both of them concerning the termination of pregnancy as a result of sexual violation.

In the first judgment, the applicant, R.G.⁵⁴⁸, who was eighteen years old at the time, became pregnant as a result of forced sexual intercourse. She had been repeatedly forced to have sexual relations, in other words sexually abused, by five people and under threat, ever since she was sixteen. National legislation on abortion dictates that in cases where the pregnant woman consents and there are no issues regarding her health, abortion procedures can be done up to the first ten weeks of pregnancy. In cases where the pregnant woman is married, the consent of the husband is sought out as well. This provision seems to have been a relic from the times where the previous Turkish Civil Code named the husband as the head of the family. The law further foresees that after ten weeks, pregnancy can only be terminated if the medical specialists deem the continuation of pregnancy a health risk to the pregnant woman, or if the fetus is found to have a “severe disability that could affect the future generations”. If the woman gets pregnant as a result of an offense, provided that the pregnancy is less than 20 weeks, it is also permitted.

In the present case, as her pregnancy was over ten weeks, R.G. needed authorization from the authorities to terminate her pregnancy. She repeatedly applied to local courts but was either turned down for inconsequential reasons, and her claims never

⁵⁴⁸ AYM, R.G., B. No: 2017/31619, 23.7.2020.

being taken seriously by the authorities even though she had reports documenting that her mental health was deteriorating rapidly due to this unwanted pregnancy that was the result of an already traumatic event, and at the prospect of becoming a mother in her age. In the end, the procrastination and negligence of the public authorities led to R.G. necessarily giving birth. She applied for an individual complaint to TCC on the grounds that public authorities' inaction infringed upon her right to protect and improve her corporeal and spiritual existence.

TCC reasoned that the legitimate aim of such provisions was to strike a fair balance between the interests of the woman with regards to the protection and improvement of her spiritual and corporeal existence and the interests of the fetus by taking into consideration the established moral, ethical and religious values that the right to life of the fetus should be protected.⁵⁴⁹ Regarding the specifics of the case, TCC stated that the interference made to women's right to personal autonomy must be proportionate, and interpretations and practices that make the termination of pregnancy (whenever allowed by law) impossible, or difficult, or make this possibility meaningless may render the intervention disproportionate.⁵⁵⁰ Accordingly, TCC decided that the inaction and delays on account of public authorities constituted a breach upon R.G.'s rights under article 17 of the Constitution of Turkey, even though it also held that the requirement of authorization from public authorities for the performance of abortion in such cases was an interference that is necessary in a democratic society.

⁵⁴⁹ Bezar Eylem Ekinci and İlker Gökhan Şen, "The Turkish Constitutional Court's First Decision on Abortion: Is It Too Early to Draw Conclusions?" (2020) 9 (18) *Anayasa Hukuku Dergisi* 659, 693.

⁵⁵⁰ *R.G.*, para 101.

The other decision by TCC concerning abortion was made four years after *R.G.*, in 2024.⁵⁵¹ The applicant, C.Ö., was a sixteen-year-old minor at the time of the events. She was sexually abused and had become pregnant as a result, and applied to the local court for the authorization to terminate her pregnancy as she was more than ten weeks along. The local court denied her application on the grounds that the “right to life of the child” preceded the “mental well-being of the mother”. As a result of the prolonged process and repeated denials of her requests, she had to give birth.

C.Ö. then applied to TCC and claimed that her right to private life and her dignity were infringed upon as she was forced to carry out a pregnancy that she did not want, which was the result of sexual abuse, and the further the fact that her mental well-being has deteriorated, as well as her right to education as she had to quit school, was not taken seriously by the lower instance courts. TCC reasoned in the same manner as the *R.G.* case and stated that the public authorities’ conduct prevented C.Ö. to access abortion as per was her right under the circumstances that were present.

It should be stated that TCC’s approach to abortion does not deviate too far from ECtHR’s caselaw on the matter. In fact, the Court grants a wide margin of appreciation to States to decide on their own domestic laws regarding abortion and finds that each member State has differing cultural and moral codes to uphold. Notable ECtHR caselaw concerning right to abortion will be analyzed below, but for the purposes of this section, it should be noted in passing that while the Court does leave a margin of appreciation, it

⁵⁵¹ AYM, C.Ö., B. No: 2020/26150, 2.11.2023.

also holds that if the State has granted such a right within its national legal framework, it shall then ensure that it is not merely a theoretical law and is accessible in practice.⁵⁵²

However, both courts seem to circumvent a glaring issue in their judgments. In order to tackle this complex issue, one must first tackle the concept of abortion beyond what dominates the current discourse. In fact, the portrayal of abortion as a choice between two competing rights, putting the woman against the fetus, and making it into an ethical dilemma only serves to shift the focus away from a more comprehensive discussion and curses both sides to go around in circles with their arguments.

Approaching abortion as a competing rights issue brings about the question of which rights are being compared. If abortion is framed as a question of private life solely, then the perspective becomes too liberal and individualistic. Further, this concept problematizes access to abortion as demonstrated in the renowned *Roe v. Wade*⁵⁵³ judgment delivered by the Supreme Court of United States of America. Seeing it as a private life issue prevents unwarranted government intervention, yes, but it also blocks public access and dismisses the States' positive obligation doctrine in general. Personal being political necessitates that some form of State response is present for such rights to be realized. Further, pitting these against the supposed "right to life" of the fetus is tricky because the courts can deter from the issue simply by referring to margin of appreciation in the protection of "morals" in a country.⁵⁵⁴ As seen in the *C.Ö.* case, once, and it does

⁵⁵² *A, B and C v Ireland* App no 25579/05 (ECtHR [GC], 10 December 2010) paras. 263-264; *R.R. v Poland* App no 27617/04 (ECtHR, 26 May 2011) para. 210.

⁵⁵³ *Roe v Wade* 410 US 113 (1973)

⁵⁵⁴ *A, B and C*, para. 222.

not matter how far along she is in her pregnancy, a woman is pregnant, the State attributes personhood to the fetus and claims it, effectively erasing the woman's personhood as she merely becomes a vessel for the fetus.⁵⁵⁵ Even the week restrictions themselves, and the contemporary discourse on at exactly what week the fetus shows signs of viability, to set a limit for the termination of pregnancy, is actually prioritizing the *potential* well-being of a not-yet person, the fetus, over the existence and corporeal integrity of the woman

As it stands, pregnancy is a distinctively gendered experience, opposed to the way legal rules are composed in, as the legal system has an intrinsic male point of view. In other words, as gendered an experience as pregnancy is, it is also an issue on the agenda of the legal discourse. Here, the control over women's bodies exerted by the State is also co-opted by the medical professionals due to the belief that they have the best medical knowledge. However, it is shown time and time again that the medical practice is far behind in the knowledge about women's bodies⁵⁵⁶, and this can at times lead to obstetric violence, and the judiciary may disregard the material situation by depending on its trust on the medical professionals. Medical professionals' mistreatment cause a loss of autonomy and significantly damage women's ability to make decisions regarding their own body and sexuality.⁵⁵⁷

⁵⁵⁵ Sauls, 14.

⁵⁵⁶ "Historically, women have been excluded from clinical trials and biomedical research (...) most research data have been collected from males and generalized to females, intersex people, transgender people or gender nonconformists (...) the clinical literature has been dominated by research on male participants and the female body considered to be that of a 'small male', discounting biological differences outside of sexual organ diversity (...) which may have significant consequences for the care of the female patient" Lea Merone, Komla Tsey, Darren Russell, Cate Nagle, "Sex and Gender Gaps in Medicine and the Androcentric History of Medical Research" (2021) 45 (5) Australian and New Zealand Journal of Public Health 424, 424.

⁵⁵⁷ For ECtHR's stance on this issue see: Catherine Van de Graaf, "Obstetric Violence and the European Court of Human Rights" (*Human Rights in Context*, 4 June 2021)

Neither TCC nor ECtHR attempts to bring principle of equality or nondiscrimination as consideration points, because equality had always been understood in the context of comparison to the male standard. This is precisely the reason why no one is able to deal with the subject directly and instead resorts to understanding by means of comparison or analogies. As MacKinnon states, discrimination law is unable to gauge and tackle sex discrimination in the practices that only concern women, such as reproductive rights, because the principle of equality can only be deemed violated when there is a similarly situated man who is treated differently.⁵⁵⁸ She further states:

*“Because legal method traditionally proceeds by analogy and distinction, attempts at analogy between the relationship between the fetus and the pregnant woman and relations already mapped by law are ubiquitous. Had women participated equally in designing laws, we might now be trying to compare other relationships- employer and employee, partners in a business, oil in the ground, termites in a building, tumors in a body, ailing famous violinists and abducted hostages forced to sustain them-to the maternal/fetal relationship rather than the reverse. Sometimes there are no adequate analogies. As it is, the fetus has no concept of its own, but must be like something men have or are: a body part to the Left, a person to the Right. Nowhere in law is the fetus a fetus”.*⁵⁵⁹

<https://www.humanrightsincontext.be/post/obstetric-violence-and-the-european-court-of-human-rights> accessed: 11 July 2024.

⁵⁵⁸ MacKinnon, “Reflections”, 1289; Jennifer S. Hendricks, “Body and Soul: Pregnancy, and the Unitary Right to Abortion” (2011) *College of Law Faculty Scholarship*, 41.

⁵⁵⁹ MacKinnon, “Reflections”, 1314.

Thereby, a comprehensive and gender sensitive approach is necessary. Women's experiences need to be at the forefront of the discussions without falling into moot pitfalls. This would mean placing abortion in the general context of reproductive *freedom* of women, not as solely rights. This would then encapsulate a whole range of topics starting from sexual education, to access to contraception, to abortion. Because, as is evident from the *R.G.* case, the point is not exactly that she was prevented from making a choice to terminate her pregnancy, but rather her access has been denied based on gender stereotypes that disregard women's autonomy. Therefore, what is most useful in such situations is to have a gender perspective and criticize the restrictions or limitations on abortion in this light.

The truth is, the practice of balancing rights or imposing restrictions on access to abortion do not pursue a legitimate interest because at their basis lie the desire to preserve traditional gender roles and control women's sexuality. Indeed, the exceptions made to the abortion restrictions such as the case of pregnancies resulting from sexual violation or abuse, or the risk of the fetus being born with disabilities, are arbitrary at best. Thus, taking an approach that sees abortion in the context of reproductive freedom, and utilizing gendered experiences as interpretative tools in order to ensure liberties would be a more forward way of thinking about these concepts. Only then can one start to comprehend interventions to access to abortion as a denial or a restriction posed on women's reproductive freedom.

4. Recognition of Gender Identity

The legal system's insistence on exerting control over personal autonomy also manifests itself in its stance towards trans people and the recognition of their gender identity. The concept of personal autonomy covers the right to determine one's gender and also the decision for gender affirming surgery.⁵⁶⁰ In recent years, many different legal systems have recognized the existence of a variety of gender identities. The secession from an understanding of gender based on biology, legal recognition of non-binary, trans, and queer gender identities demonstrate the socially constructed nature of gender.⁵⁶¹ Trans people, by identifying with a gender different from the one assigned to them at birth, "disrupt and denaturalize (...) the unitary psychosocial gender that is rooted biologically in corporeal substance".⁵⁶² In other words, gender is understood as something that is fixed to the biological features of the body, typically, the genitals. Such disruption of categories leads to confusion, and this confusion manifests itself in the legal systems' misrecognition of trans people as functioning members of the society.⁵⁶³

Legal recognition, in this sense, entails the official recognition of a "person's gender identity including gender marker and names in public registries".⁵⁶⁴ However, legal systems' limited knowledge coupled with prejudices stemming from a cis-heteronormative perspective result in the refusal of recognition of subjective experiences

⁵⁶⁰ Evola, Krstić, Rabadán, 235

⁵⁶¹ Bermúdez Figueroa, Dabetić, Yuste and Saeidzadeh, 100.

⁵⁶² Susan Stryker, "The Transgender Issue: An Introduction" (1998) 4 (2) *A Journal of Lesbian and Gay Studies* 145, 147.

⁵⁶³ Bermúdez Figueroa, Dabetić, Yuste and Saeidzadeh, 101.

⁵⁶⁴ European Commission, "Legal gender recognition in the EU - The journeys of trans people towards full equality (General Publications)" (2020).

of trans people as well as discriminatory practices that concentrate on the state control over their autonomy. One example is the restrictive laws on gender affirming surgeries.

Turkish law foresees a step-by-step process for the legal recognition of gender. Article 40 of the Turkish Civil Code required individuals to undergo sex reassignment surgery in order to obtain a legal recognition of their gender. The surgery can only be performed if one obtains an authorization from the courts, and such authorization is only granted if and when the person can prove that they are perpetually unable to procreate, alongside a number of medical reports confirming that they are “of the transsexual nature” and that such a transition is mandatory for their mental well-being. Further, the law required that upon the authorization granted to the individual, they must present a report that a “gender change surgery appropriate for the aims and medical procedures” was performed in order to change gender markers and public registries.

In 2014, the applicant, a trans man, applied to the civil court of first instance for a request of name change in identity documents. He fulfilled the required documents listed in article 40 of the Turkish Civil Code except for the report stating that he had undergone surgery. While he did get a mastectomy and a hysterectomy, the law, although not clear, probably referred to a requirement of genital surgery as well. However, the applicant, due to the medical concerns and complication risks, refused to undergo genital surgery which would mean to permanently impair his bodily integrity. In the face of this dilemma, the first instance court applied to TCC for a judicial review of the provision.

Before TCC delivered a judgment on this case, ECtHR had issued a decision regarding another provision of the same article in 2015. In *Y.Y. v. Turkey*, which will be

examined below, the Court found that “the sterilization requirement”, in the other words the requirement to be perpetually unable to procreate, posed to be a violation of Article 8 of the Convention. The Court concluded that conditioning the legal recognition of gender to surgery is a matter of an individual’s right to personal development and autonomy, and includes the ability to make decisions about one’s body.⁵⁶⁵ The Court asserted that even though the provision may have had a legitimate aim of protecting the health of individuals, positioning sterilization as a requirement is nevertheless not a proportional measure.⁵⁶⁶

Even though according to article 90/5 of the Constitution of Turkey, in cases where national legislation and the provisions of international treaties concerning fundamental rights and freedoms clash, international agreements shall prevail. However, said provision was not annulled and after ECtHR’s judgment and was brought before TCC for judicial review two years later. The argument was that the provision created discrimination between trans people who are and are not permanently unable to procreate, and that depriving people who are not of the chance to undergo gender affirming surgery in order to have their gender recognized is a violation of their Constitutional rights.

TCC made an assessment within the scope of the material and spiritual existence, respect for private life, and restrictions on fundamental rights and freedoms and concluded that "subjecting the person who will undergo gender reassignment surgery to a separate medical intervention in order to be deprived of the ability to reproduce before this surgery is a restriction imposed on the person's material and spiritual existence and private life",

⁵⁶⁵ *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015) paras. 58, 66.

⁵⁶⁶ *Y.Y.*, para. 121.

thereby annulling the said provision.⁵⁶⁷ TCC then adjudicated on two other individual applications on the same issue, and concluded that requiring reproductive permanent inability was against the protection and improvement of corporeal and spiritual existence⁵⁶⁸ and respect to private life⁵⁶⁹ respectively. In both decisions, it was important and welcome of TCC to note that the authority to make decisions over one's own body is among the fundamental rights and freedoms, and that the State has a positive obligation to protect the right to life of all individuals against the actions of public authorities and other individuals. In the present cases, the State therefore has an obligation to protect trans individuals from surgeries performed in order to deprive them of their reproductive ability, as it may lead to extremely severe and irreparable situations in terms of its consequences.

Going back to the first application, however, TCC was not as accepting of trans people's autonomy and protective of their bodily integrity as in the sterilization judgments. In the judicial review of the provision requiring trans people to undergo gender affirming surgery in order to have their gender legally recognized, TCC found that, despite listing principles such as right to private life and its guarantee of the right of the individual to organize their life free from State intervention, and the protection of this Constitutional right expanding to one's "sexual preferences" as well, and despite finding that such a provision is a restriction on such rights, TCC concluded in the proportionality test that followed that "due to the irreversibility of sex reassignment surgery and the risks it carries in terms of health", state supervision was necessary in order to prevent surgeries from

⁵⁶⁷ AYM E.2017/130 K. 2017/165 K.T. 29.11.2017.

⁵⁶⁸ AYM, *M.K.*, B. No: 2015/13077, 12.6.2018.

⁵⁶⁹ AYM, *Sahra Bayraktar*, B. No: 2015/9211, 29.11.2018.

being “trivialized”.⁵⁷⁰ TCC further determined that the purpose of the provision was "to protect public order, taking into account the importance of civil registry records and the legal order". TCC also made a practical evaluation and asserted that, if legal gender recognition was possible without the requirement of surgery, a possibility of a discrepancy between the biological sex of a person and the gender marker that appears in public registries would be imminent, as well as the risk of people using this practice in their favor to enjoy certain rights or avoid certain obligations that are generally reserved for women, all of which would adversely affect the social life and public order.

In the dissenting opinions an emphasis was put on the bio-essentialist perspective of TCC and its disregard for autonomy for the sake of a vague and non-disclosed “public order”. It was asserted that individuals who “exhibit behaviors that do not conform to gender stereotypes that essentialize and internalize the biological qualities associated with women and men and act contrary to these stereotypes, go outside these patterns, are expected to comply with the current gender regime on the grounds of public order. Social norms expect biological sex and gender identity to be in harmony with each other”. The experiences of trans people were taken into account in the dissenting opinion, as well as the prescriptive stereotypes that were put on trans people by the society, stating that while some trans individuals may see no harm in undergoing gender affirming surgery “to unify their biological and psychological genders”, some other may not want to for various reasons, and the serious burden of a medically risky operation placed on the individual for public order is not proportional. With this provision, trans individuals who do not consent

⁵⁷⁰ AYM E. 2015/79 K. 2017/164 K.T. 29.11.2017.

to surgery are forced to struggle with the legal consequences of not being regarded as the gender that they belong to. It should further be underlined that the protection of corporeal and spiritual existence means the protection of bodily autonomy and the right to (sexual) self-determination as well as bodily integrity; and bodily autonomy further means having the freedom of choice in making decisions regarding one's own body.⁵⁷¹ The other dissenting opinion highlighted the fact that the advancements in the medical field, make it possible to gauge one's "transsexual nature" without the need for such a surgery. In this sense, the assertion made by TCC that the "trivialization" of changing one's gender legally in order to take advantage of some measures implemented for women can be remedied by the usage of less invasive methods.⁵⁷²

At the heart of the problem lies the pathologization of trans people, where even the uncontested psychological evaluation requirements seeking to confirm a "transsexual nature" point to this phenomenon. The State further has a strong belief that the transition process should be "crowned" with genital surgery⁵⁷³, perpetuating a stereotypical view of the gender binary where any and all bodies are perfectly fit into one of the two genders. It should further be noted that ECtHR in *X and Y v. Romania* in 2021 held that "the refusal of the domestic authorities to legally recognize the applicants' gender reassignment in the absence of gender reassignment surgery amounted to unjustified interference with their right to respect for their private life".⁵⁷⁴

⁵⁷¹ AYM E. 2015/79 K. 2017/164 K.T. 29.11.2017, Dissenting Opinion of Judge Engin Yıldırım.

⁵⁷² Ibid.

⁵⁷³ Sinem Hun, "Türk Medeni Kanunu'nun 40. Maddesi Somut Norm Denetimine Tabiyken: Trans Geçiş Sürecinde 'Bekletmeler'in Trans Öznelliklere Etkisi" (2015) 4 Ankara Barosu Dergisi 311, 315.

⁵⁷⁴ *X and Y v Romania* App nos 2145/16 and 20607/16 (ECtHR, 19 January 2021) para 145.

C. Stereotypes and Sexual Orientation and Gender Identity (SOGI)

Feminist legal theory is concerned with the gendered power relations and social hierarchies that yield discriminatory results. In this respect, gender cannot be thought separately from issues concerning sexual orientation and gender identity. Indeed, the inherently patriarchal and male dominated legal field is also cis-heteronormative, and the laws' heteronormative nature has thus been challenged by the social practices of people of different sexual orientations.⁵⁷⁵ Not only is the law intrinsically cis-heteronormative, but the application of them also demonstrate a prejudiced view. As such, gender stereotypes that belie at the heart of such jurisprudence cover a range of beliefs about personality traits, behaviors and roles, physical characteristics and appearance, occupations, and assumptions about sexual orientation.⁵⁷⁶

The first decision of TCC that made a reference to sexual orientation is its decision on an article of the Law on the Duties and Powers of the Police.⁵⁷⁷ The provision foresaw that the police may take fingerprints and photographs of those who "behave in a manner that is shameful and disapproved in terms of social order that is in violation of general rules of morality and decency". Although there had been no explicit reference to sexual orientation, the vagueness granted the police to utilize their powers liberally which led to arbitrary results, and TCC annulled the provision on the ground of such vagueness.

⁵⁷⁵ Bermúdez Figueroa, Dabetić, Yuste and Saeidzadeh, 100.

⁵⁷⁶ Cook and Cusack, 20.

⁵⁷⁷ AYM E. 1985/8 K. 1986/27 K.T. 26.11.1986.

However, the reasoning of TCC contained many problematic points. First, it referred to homosexual relationships as a problem of today's world and stated that "if the Article had only covered homosexuals whose attitudes and behaviors were unacceptable in terms of social order, it could have been said that the provision was justified in terms of public health". TCC further reasoned that the main problem of this ambiguity is that it had the potential lump together the "good" persons with "indecent women, prostitutes, and homosexuals", and thus created a discriminatory hierarchy between citizens. TCC, without evaluation, considered all homosexual relationships immoral, shameful, and indecent by nature because they defied the "pure" heterosexual relationship pattern, and used "public morals" as a blanket justification for the prejudiced views, as per the strategy of the anti-gender movement.

In a similar vein, article 226 of the Turkish Criminal Code included the phrase "unnatural sexual behavior" in the context of the prohibition of production or distribution of "obscene" images. The provision itself grouped "unnatural sexual behavior" with images of sexual acts that contain "violence, animals, or dead bodies", and while it was ambiguous what is meant by "unnatural" in such a context, which had been the reason the provision was taken to judicial review, it has been defined by the Court of Cassation to include "anal, oral, group sex, gay and lesbian intercourse". TCC, however, not including the dissenting opinions, did not consider this practice of the Court of Cassation and concluded that the point of assessment should be focused on whether the conduct has a "negative impact on the moral standards of a democratic society". TCC however does not specify what these standards are and instead reasons that it is not possible for the legislator

to foresee and enumerate all the behaviors that fall within this concept, since unnatural sexual behavior can manifest in many ways.

One dissenting opinion drew attention to the fact that such a provision would only lead to forms of surveillance and the exposure of the private lives of individuals, and the punishing of those who do not conform to these ambiguous standards.⁵⁷⁸ Another dissenting opinion further argued that consensual relationship between adults cannot be criminalized based on ambiguous criteria, and states that the sexual activities, behaviors and preferences of individuals are the most intimate part of their private lives, and the State shall not interfere with them unless there is a legitimate reason. The restriction in question on private life therefore does not comply with the requirement of necessity in a democratic society, because it does not correspond to an "urgent social need".⁵⁷⁹

While the majority decision of TCC is problematic as it sets arbitrary standards in the context of public morality as well as ignoring the utilization of this provision to implicitly criminalize same-sex relationships, the dissenting opinions too fall into error by only referring to the "intimate private lives" of individuals and not also putting into perspective the violation of the principle of equality and prohibition of discrimination. Which, in turn, perpetuates the idea that people who fall outside the cis-heteronormative standards of the society cannot exist in the public sphere, but rather their only area of freedom shall be the private sphere.

⁵⁷⁸ AYM E. 1985/8 K. 1986/27 K.T. 26.11.1986, Dissenting Opinion of Judge Osman Alifeyyaz Paksüt.

⁵⁷⁹ AYM E. 1985/8 K. 1986/27 K.T. 26.11.1986, Dissenting Opinion of Judge Engin Yıldırım.

A similar decision about a similar law was delivered by TCC, this time regarding a provision in the Military Penal Code.⁵⁸⁰ According to the provision, “military personnel who engage in unnatural sexual intercourse with another person or who have this act done with their consent shall be sentenced to dismissal from the Turkish Armed Forces”. TCC, this time, realized that the provision was in breach of the right to respect for private life, but reasoned that this interference had the purpose of "protecting and maintaining military discipline" and stated that it served the legitimate aim of ensuring the proper conduct of military service. Furthermore, TCC stated that "the behaviors in question are sexual behaviors that have a negative impact on the moral standards of the society and therefore cannot be accepted as natural in all social orders" and found the punishment in question to be lawful.

Just as the above-mentioned case had done implicitly, TCC explicitly divides sexual behaviors into categories of “natural” and “unnatural” and does this so by relying on prejudiced views on sexual orientation. By making a distinction between a reasonable citizen and an unreasonable citizen, it violates the freedom to pursue the profession of one's choice, which is closely linked to one's personality and the right to self-development. In addition, TCC refrains from explaining to what extent the sexual behavior is related to the person's military service.

A further point was raised by the dissenting opinion on this case, specifically on the value and human dignity of persons. The dissenting opinion stated that military personnel who have a different sexual orientation from other personnel or the general

⁵⁸⁰ AYM E. 2015/68 K. 2017/166, 29.11.2017.

public represent a non-negligible part of society, and this constitutes an ingrained aspect of their personality, and discriminating against them for this reason is unconstitutional. Further, the dissenting opinion argued that people who belong to sexual orientation minorities are criminalized, “not because of something they do, but because of who they are or who they are perceived to be”, which cannot be justified.⁵⁸¹ Further, the central problem in this case is the existence of a provision that directly prevents people from enjoying their constitutional right to work based on sexual orientation, which, again, is an issue that falls in the scope of the principle of equality and nondiscrimination.

The same problem of people being barred from enjoying right to work due to their sexual orientation came before TCC as an individual application in the *Z.A.* application.⁵⁸² Individual application decisions for LGBTIQ+ individuals are few, both because the individual application is a relatively new remedy and because the violations are mostly taboo subjects. In the present case, *Z.A.*, a religious studies teacher in a middle school, was dismissed from his position based on the allegations that he proposed “homosexual intercourse” to the janitor at the school, and that there had been other reports of him proposing intercourse to few other people from the town as well. After his dismissal, there had been an issue of full pardon for disciplinary dismissals, and he requested reinstatement based on this decree. However, he was not reinstated and when *Z.A.* appealed to the administrative authorities against this situation he was met with a rejection, which led to him lodging an individual complaint to the Constitutional Court of Turkey.

⁵⁸¹ AYM E. 2015/68 K. 2017/166, 29.11.2017, Dissenting Opinion of Judge Engin Yıldırım.

⁵⁸² AYM, *Z.A.*, B. No: 2013/2928, 18.10.2017.

TCC examined whether the administrative decisions in question violated the right to privacy and inviolability of private life and contended that "it is understood that the applicant's request for reappointment as a teacher was rejected not because of his sexual orientation but because of the acts subject to the investigation" and therefore the applicant was not treated differently.⁵⁸³ Although TCC claimed that there was not a discrimination based on sexual orientation in the concrete case, the dissenting opinion pointed out that the "unchastity/disturbing the peace arguments" used by the administration when rejecting the applicant's request proves that the applicant was discriminated against based on sexual orientation.⁵⁸⁴

In its general jurisprudence, TCC recognizes that there is a close relationship between the professional life and private life of individuals, and that the exploitation of private life matters as a justification to impair one's professional life would be examined within the scope of the right to respect for private life. ECtHR, in its *Özpınar v. Turkey* judgment, mentions that the right to respect for private life means the right to lead a private social life (*vie privée sociale*) in a broad sense, including the possibility of developing one's social identity.⁵⁸⁵ At this point, the autonomy of the individual is linked to the public sphere. In this context, the right to meet and associate with one's peers will also be included within the scope of the right to respect for private life⁵⁸⁶, which is an important aspect of LGBTIQ+ experience.

⁵⁸³ Z.A., para.75.

⁵⁸⁴ Z.A., Dissenting Opinion of Judge Engin Yıldırım.

⁵⁸⁵ *Özpınar v Turkey* App no 20999/04 (ECtHR, 19 October 2010) para. 45.

⁵⁸⁶ Zülfiye Yılmaz, "Özpınar v. Türkiye Kararı İncelemesi" 2 (3) 2013 Anayasa Hukuku Dergisi 205, 210.

“Orientation”, as a word, has a different and stronger meaning than preference, inclination, or positioning. In this context, sexual orientation should be understood as people establishing meaningful relationships with their peers and one another. The main problem is that the evaluation of private life in terms of establishing relationships and self-development is still carried out in a way that is disconnected from the “public” sphere. The autonomy of LGBTIQ+ individuals is not reconciled with the social sphere and is even removed from it, and the most prominent example of this is the ignorance of the social dimension of the rights violations experienced by LGBTIQ+ individuals.

As such, in the present judgment, TCC had made a distinction between a person's identity and their behavior in the outside world. By reducing Z.A.'s identity to his sexual life, TCC interpreted private life in the sense of an intimate space, the “private” thus severed from the “public”. Despite this, TCC also assessed Z.A.'s sexual orientation in terms of prohibition of discrimination, but it employed stereotypical prejudices such as the best interests of children and public “values/morals”, which are vague and cannot be concretely demonstrated in the judgment, to justify the discriminatory treatment. TCC therefore took the stance that a person's identity or behavior related to this identity are not subject to intervention so long as they remain within the private sphere. When this identity and related behaviors have a reflection in the public sphere, then it would be legitimate to subject them to discrimination by considering the social status quo and dogmas, lest it harm established patterns.

The last decision to be analyzed in this section concerning TCC and sexual orientation and gender identity matters is the *Cemal Duğan* application.⁵⁸⁷ The applicant, a trans woman, was taken to the police station by law enforcement officers as she was walking on the side of the road. She had been deprived of her liberty for two/three hours and was consequently fined. The most important point in this case is the fact that the applicant was taken not to the traffic bureau, but to the “morality” bureau, on the allegation that she was disturbing the order of traffic. TCC emphasized in its decision that there had not been an interference to the principle of equality and right to respect for private life due to the imposition of a traffic fine, and refrained from assessing why the applicant was taken to the “morality” bureau in the first place.

The avoided and unsaid reality in the case is the applicant’s transgender identity. Indeed, in the dissenting opinion it was emphasized that if a cisgender individual had committed the same act, they would probably have been released with only an administrative fine without being taken to any branch of the police station. Further, the dissenting opinion pointed out that the burden of proving discrimination was not on the applicant, but the State had to prove that there had not been a differentiating treatment, and if there was that then it had been justified.

What TCC failed to see is that the treatment the applicant suffered was based on marginalizing practices against her identity and the social group to which that identity belongs. Failing to see this, in other words ignoring one's sexual orientation and gender

⁵⁸⁷ AYM, *Cemal Duğan* B. No. 2014/19308, 15.2.2017.

identity in the public sphere, has the consequence of rendering invisible the existing structural discrimination and marginalization trans individuals face.

LGBTIQ+ people are often pushed into social, political and economic vulnerability and are deprived of demanding and obtaining their rights and freedoms.⁵⁸⁸ The main reason for this is that, in the distinction between the private and public sphere, the systemic problems that LGBTIQ+ individuals are exposed to are rendered invisible by the confinement of the private sphere. LGBTIQ+ individuals are removed, disempowered, and disassociated from seeking and finding employment, professional development, income, health, and education opportunities, and social and community life, and the judicial bodies perpetually disregard this phenomenon.

⁵⁸⁸ Salih Şahin, “LGBT Rights Handbook for the Ministry of Labor and Social Security” (KAOS GL, 2015).

D. Gender Stereotypes and Family

Patriarchal family structures have dominated the legal system for the longest of times, going back to the composition of Roman law that provides the basis for many civil laws today.⁵⁸⁹ In this patriarchal, and cis-heterosexual family model, the husband is the head of the family and has the power to decide on all matters relating to the marriage, the wife's life outside of marriage as well, the upbringing and education of children, and is overall the sole authority over the family. Husband's authority over the wife is particularly interesting for the purposes of this thesis, as his "parental" authority over children presides over to the wife as well, trapping the woman in a structure where she bears almost all the responsibility concerning the children and the household, and even the husband, but has no voice or control over any of it as well as her own body and life. The woman, who had been under her father's dominion in the family, was made to trade this for another dominion, this time her husband's, upon marriage. In other words, family had always existed as an oppressive structure under which women lost their personhood and rights.

Roman law is a key to understanding European legal systems, as it has been the source of many private laws in force today. Turkey, too, adopted many laws from Western European countries during the legalization movement and therefore the Roman influence is still present.⁵⁹⁰ Married women lacked the legal capacity to work, have economic independence, to choose their own profession, to have or acquire property, to enter into

⁵⁸⁹ Ivana Barać, Amalia Blandino, Letizia Coppo, Giampaolo Frezza, Uros Novaković, Fuensanta Rabadán, and Zara Saeidzadeh, "Gender Competent Family Law" in Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (eds.) *Gender-Competent Legal Education* (Springer Textbooks in Law 2023) 567.

⁵⁹⁰ See: Seldağ Güneş Ceylan, "Roma Hukukunun Günümüz Hukuk Düzenlerine Etkisi" (2004) 8 (2) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi.

contracts, even to keep her own surname. It is true that the most oppressive structure, after the State, is the family, and perhaps it is thus fitting that the Constitution of Turkey was amended to include the phrase “Family is the foundation of the Turkish society” under the Article 41 that regulates protection of the family and children’s rights. This clause further creates an oxymoron as it continues with “[Family is] based on the equality between the spouses”. In general, the woman is deemed to have been a possession of the husband, where his authority took the form of a setoff prerogatives granted to him with the establishment of marriage⁵⁹¹, as the following judgments will demonstrate.

⁵⁹¹ Barać, Blandino, Coppo, Frezza, Novaković, Rabadána and Saeidzadeh 548.

1. Adultery or Extra-Marital Affairs

One of TCC's most controversial decisions is its judicial review of the (now annulled) consequent articles of the (previous) Turkish Criminal Code that criminalized adultery. While committing a sexual act with a man other than one's husband was enough to convict a woman according to Article 440, Article 441 required that a married man could only be convicted of adultery if it was proved that he was living with a woman other than his wife, and that said woman also had to be unmarried. In other words, whilst adultery committed by a woman was punishable in its simple form, the law sought for the qualified version of the offence for it to be punishable with regards to men.

These two articles were brought before TCC for judicial review in 1967⁵⁹² and 1968⁵⁹³ respectively. Both times, TCC employed a peculiar assessment method by refusing to examine the articles against each other and instead chose to judge whether the respective articles contained any norms against the principle of equality, consequently finding nothing. Additionally, in both of decisions, TCC only made an examination regarding the punishment foreseen for such offences and did not even think to inquire why adultery is regulated as an offence in the first place.⁵⁹⁴

In 1996, however, nearly thirty years after the fact, TCC at last decided to examine Article 441 with comparison to Article 440 and annulled Article 441 by reasoning that the conditions present in the adultery committed by men are not required for women is a form

⁵⁹² AYM E. 1966/30, K. 1967/9, K.T. 02.3.1967.

⁵⁹³ AYM E. 1968/13, K. 1968/56, K.T. 28.11.1968.

⁵⁹⁴ Ekinci, 178.

of discrimination.⁵⁹⁵ It is further notable that TCC referred extensively to international human rights instruments such as the Universal Declaration of Human Rights, European Convention on Human Rights, and most noteworthy, CEDAW. TCC stated that in their essence, there are no differences between the provisions of the international texts listed and the Article 10 of the Constitution of Turkey which regulates the principle of “equality before the law”, and that the developments seen in the contemporary understanding of the law require the reconsideration of the domestic legal systems and the amendment of discrepancies.

However, since Article 440, offence of adultery committed by women, was not the article that was contested before TCC, it continued to exist in the Turkish Criminal Code while Article 441 was annulled, thereby creating an even bigger dissymmetry. In 1998, at last Article 440 was also brought before TCC and was annulled depending on the same reasons. What is interesting in this decision is the fact that the two judges who had voted with the majority decision on the annulment of the Article regulating adultery for men contested this decision by asserting that criminalization of adultery serves the purpose of protecting the family, marriage, children, and the public order and therefore should not be annulled.

Regarding the issue of whether adultery can be regarded as an offence, TCC left it to the legislator and said that it may very well still decide for it to be an offence, with or without requiring certain conditions. Both situations show that women’s sexual freedom

⁵⁹⁵ AYM E. 1996/15 K. 1996/34 K.T. 23.9.1996.

is punished. Denial of sexuality is closely linked to virtue or morality for women⁵⁹⁶, and thus it is expected of them to reserve themselves to their husbands. Consequently, the fact that the sanctity of family or public order is only a concern related to the actions of women and not men demonstrate that the idea of equality did not materialize in the perception of the judges despite the references to international human rights texts, contemporary understandings of law, or changes made in the legal system.

Here, two points arise. First, the asymmetric laws between the husband and the wife, coupled with the change in the behavior of the two judges, indicate that the legal system inherited the societal prescriptions that treat women as the sexual property of men and at the same punishing them for their sexuality, while men are not made to bear any responsibility for the same behavior. This is an example of the gender stereotypes that prescript “pure” and “chaste” sexual identities for women but not men.⁵⁹⁷

The other point is the criminalization of such acts in the first place. It was unclear what the legislator was going to do after both of the above-mentioned provisions were annulled. In the end, the concept of adultery took its place in the present Turkish Civil Code as one of the reasons for divorce, and the general view was that it finally ceased to be a crime. However, because it will serve as a ground in the attribution of fault to one of the parties in the divorce proceedings, and will likely have consequences with regards to compensation and alimony, it is still in effect treated as a crime. Only, this time it is a crime in the civil sense, instead of just an indicator of matrimonial breakdown.

⁵⁹⁶ Abu-Lughod, 155.

⁵⁹⁷ Cook and Cusack, 27.

2. The Issue of the Paternal Surname

One central issue regarding the marital status and its effects on women is the topic of surnames. As an extension of patriarchal family structure, marriage constraints the rights and freedoms of women in many areas of life. One such limitation concerns the almost universal tradition and necessity of women taking the surname of their husband upon marriage. The history of TCC's adjudication on this issue is a compelling tale, due mostly to the relentless pressures and applications from feminist legal activists. It is also an important topic to gauge how much TCC inherently relies on traditional patriarchal approaches and internalizes and legitimizes women's subordination and second-class position in society.

TCC's first judicial review concerning the surname of women was delivered in 1998 in which it concluded that the provision served the legitimate aim of "ensuring order in the family unity" and that it is a matter of public interest that one of the spouses may be prioritized and the fact that this spouse just happens to be the husband does not infringe upon the principle of equality, as "the public order and certain necessities" justify this.⁵⁹⁸ TCC moreover asserted that the fact that said provision envisages that women could also use their "maiden" name along with their husbands' surname upon application is another point which renders the claim of breach of the principle of inequality without basis. However, the most troubling section of the judgment is TCC's reasoning on why the husband was to be prioritized. TCC held that "in family law tradition, it is accepted that

⁵⁹⁸ AYM E. 1997/61 K. 1998/59 K.T. 29.9.1998.

women are created different compared to men, and that women needed to be protected in the face of social realities and necessities”.

In 2004, ECtHR delivered the *Ünal Tekeli v. Turkey* decision and emphasized that although the important repercussions a change in the system could have on the keeping registers of births, marriages, and deaths, “(...) society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen”.⁵⁹⁹ The Court underlined also that the family unity would still be preserved even if the married couple chooses not to bear a joint family name⁶⁰⁰, and that recent advancements in equality law and nondiscrimination would lead the States to refrain from imposing the husband’s surname on women based on tradition.⁶⁰¹

After this decision, it was expected of the Constitutional Court of Turkey to issue a judicial review annulling the relevant provision based on its international and national law obligations.⁶⁰² However, in its decision issued in 2011, TCC simply referred to the principle of margin of appreciation and reiterated its reasoning as the 1998 judgment and concluded by a slight majority that the provision was not against the principle of equality.⁶⁰³ What is remarkable is that eight judges out of seventeen wrote dissenting opinions to the decision, and in summary they emphasized that the amendments made to

⁵⁹⁹ *Ünal Tekeli v Turkey* App no 29865/96 (ECtHR, 16 November 2004) para. 67.

⁶⁰⁰ Ibid., para. 66.

⁶⁰¹ Ibid., para. 63.

⁶⁰² Sultan Tahmazoğlu-Üzeltürk, “Ad ve Soyada İlişkin Kararlar: Bireyin Kimlik Hakkı” (2014) 3 (5) *Anayasa Hukuku Dergisi* 11, 15.

⁶⁰³ AYM E. 2009/85 K. 2011/49 K.T. 10.3.2011.

the Constitution of Turkey in 2001⁶⁰⁴ and the Turkish Civil Code in 2002⁶⁰⁵ certified that the traditional understanding of marriage was no longer valid.⁶⁰⁶ Additionally, CEDAW's article 16 instructs the States to "ensure that women have equal rights with men in all aspects of family life, including in marriage". Despite this, and despite the fact that name is a strictly personal right, TCC continued to use vague and overarching phrases like public order or public interest. The contesting opinions also drew attention to the fact that favoring or prioritizing the husband and subordinating the woman cannot, in any way, be explained by constitutional provisions.⁶⁰⁷ It is further important to understand that, as with everything concerning patriarchy, such impositions are a reflection of power and power relations between social groups, in this instance between genders. In the context of taking the surname of the husband, women are forced to relegate back to being invisible in the political and public sphere and result in the loss of their individuality.⁶⁰⁸

After this decision by TCC, there had been a plethora of applications to ECtHR, in which the Court sustained its reasonings in the 2004 decision and awarded each applicant compensations.⁶⁰⁹ Because of these decisions, TCC decided to amend its case law and started to grant women this right on the grounds of Article 17 of the Constitution, the

⁶⁰⁴ Constitution of Turkey Article 41/1: "Family is (...) based on the equality between the spouses".

⁶⁰⁵ The previous Turkish Civil Code, which contained the provision that "the husband is the head of the marriage union", was annulled and in its place the new Turkish Civil Code Article 188: "Each one of the spouses shall represent the union of marriage (...)".

⁶⁰⁶ AYM E. 2009/85 K. 2011/49 K.T. 10.3.2011, Dissenting Opinion of Judges Fulya Kantarcıoğlu, Fettah Oto, Serdar Özgüldür, Serruh Kaleli, Zehra Ayla Perktas and Recep Kömürcü.

⁶⁰⁷ AYM E. 2009/85 K. 2011/49 K.T. 10.3.2011, Dissenting Opinion of Judge Osman Alifeyyaz Paksüt.

⁶⁰⁸ AYM E. 2009/85 K. 2011/49 K.T. 10.3.2011, Dissenting Opinion of Judge Engin Yıldırım.

⁶⁰⁹ *Tanbay Tüten v Turkey* App no 38249/09 (ECtHR, 10 March 2014); *Tuncer Güneş v Turkey* App no 26268/08 (ECtHR, 3 September 2013); *Leventoğlu Abdülkadir v Turkey* App no 7971/09 (28 May 2013).

protection and improvement of corporeal and spiritual existence, although it decidedly refrained from seeing the case on the ground of the principle of equality.

Afterwards, almost ten years following the last judicial review of the provision regarding married women's surname, it was brought before TCC again. In 2023, TCC concluded this time that the provision in question was contrary to the principle of equality.⁶¹⁰ Up until this point, TCC had always looked at the provision from the perspective of whether it was pursuing a legitimate aim or not. In this instance, TCC went a step further and evaluated whether this legitimate aim had objective and reasonable justification, and even if it does, whether the treatment in question was proportionate. It found that first, public order or registry keeping cannot be justifiable reasons for barring women from keeping their surname, especially considering the technological developments in that area. Another argument was that family members having the same surname protecting family ties and contributing to the fulfillment of the family's social function. However, TCC held that the wife taking her husband's surname after marriage is not the only option that makes this fulfillment possible and that there are other ways, such as letting the spouses choose the family name. In any case, it is not possible to accept that protecting family ties as a reasonable ground for different treatment. Thus, TCC concluded that this provision is discriminatory.

The decision was taken by a majority, and there were two respective dissenting opinions: the first one asserted that a family surname is directly related to protection of family and the strengthening of familial ties and is therefore a concern of public order. In

⁶¹⁰ AYM E. 2022/155 K. 2023/38 K.T. 22.2.2023.

this respect, there is nothing contrary to the principle of equality, as the husband's surname prevailing was just the legislature's exercise of its discretionary powers.⁶¹¹ The second one went a step further and stated that "the anatomical, physiological, psychological and gender differences of women and men make social equality impossible. In short, there are dispositional inequalities between men and women as a reality of creation. This is an obstacle to the equality of women and men in terms of their position in society in general. Therefore, although gender equality is put conceptualized as a dogmatic value that must be accepted without criticism, the equality between men and women in the family is a modern superstition and cannot provide peace, justice nor happiness neither in the family nor in society".⁶¹² Denouncing gender equality as a superstition and asserting that "true" equality cannot ever be realized because men and women are different by disposition and creation contains many levels of internalized stereotypes and prejudices. Besides being a cis-heteronormative dichotomy, the belief that biological differences determine gender relations and therefore the hierarchy of genders is as natural and immutable as biology appears to be a prevalent gender bias. The dissenting judge also asserted that such a matter should be "decided by the legislature in accordance with the demands of the society" and not be guided by judicial decisions.⁶¹³

As discussed above, judiciary has direct and consequential effects on the lives of people as well as on the legal system. This does not only manifest in the prison sentences or acquittal, but in ways the judicial decisions and the reasonings presented therein shape

⁶¹¹ AYM E. 2022/155 K. 2023/38 K.T. 22.2.2023, Dissenting Opinion of Judges Kadir Özkaya, Yıldız Seferinoğlu, Selahaddin Menteş, İrfan Fidan, Muhterem İnce.

⁶¹² AYM E. 2022/155 K. 2023/38 K.T. 22.2.2023, Dissenting Opinion of Judge Muammer Topal.

⁶¹³ Ibid.

and guide the society. Left alone to the legislature, where political interference is directly felt and little room is available for deviating from the status quo, an independent and impartial judiciary's forward-thinking guidance is needed for the betterment of society.

What makes surname an important cause to defend is the close relationship between names and personhood. Name facilitates the individualization of a person⁶¹⁴, but moreover it also holds every memory, experience, and heritage that a person may have acquired. It may seem as though for women, the resistance and reluctance against being forced to assume the surname of their husband is pointless as the surname that they do have also traditionally and technically belonged to their father. However, it should not be missed that being born with a name, growing up into a person with that name and living as that name is what makes it belong to women's own person. Considering the fact that to have a surname is an absolute right that is an aspect of personhood, erasing or changing it by way of a legal act suggests that it is rather treated as a personal right.⁶¹⁵

Another issue with respect to women's surname in the context of gender stereotypes and biases concerns the surname of the child upon divorce or the child born outside marriage. As mentioned, the father/husband is in a privileged position in the patriarchal family model. One manifestation of this hegemonic position of the father/husband is the "preference" of the surname in marriage, as discussed above. Another example is the same "preference" for the paternal surname over the maternal

⁶¹⁴ Ece Göztepe, "Anayasal Eşitlik İlkesi Açısından Evlilikte Kadınların Soyadı" (1999) 54 (2) Ankara Üniversitesi SBF Dergisi 101-131, 114.

⁶¹⁵ Göztepe, "Kadınların Soyadı" 115.

surname when legally determining the son or daughter's filiation.⁶¹⁶ Article 321 of the Turkish Civil Code regulated that the surname of the child who is born outside the marriage shall take the surname of the mother. While a reasonable regulation for the situations in which a single mother is concerned, this provision made it impossible for the father who or established paternity later to give the child his surname.

TCC, in its decision in 2009, held that such a provision was against the principle of equality.⁶¹⁷ In its reasoning, however, TCC stated that the best interest of the child is for them to take the surname of the father as the level of protection enjoyed by the child would be greater. It is unclear precisely why the surname of the father would benefit the child better than the mother's. It is possible that TCC, not explicitly mentioning this but perhaps subconsciously depending upon, the fact that the child would be harmed by having the surname of the "unchaste" mother who, apparently had sexual intercourse outside of marriage.⁶¹⁸ Indeed, such a view could only be explained by the adoption of a patriarchal and sexist approach.⁶¹⁹ In the end, the provision was annulled, but as TCC does not have the jurisdiction to create laws, the legislature had to amend the provision, which it had not. In 2011, TCC judicially reviewed the provision in Surname Law no. 2525 which envisaged that even in instances where the custody of the child is given to the mother, they will take the surname the father decides upon.⁶²⁰ TCC concluded that spouses were equal

⁶¹⁶ Barać, Blandino, Coppo, Frezza, Novaković, Rabadána and Saeidzadeh, 564.

⁶¹⁷ AYM, E. 2005/114 K. 2009/105 K.T. 2.7.2009.

⁶¹⁸ Ece Baş Süzel and Gökçe Kurtulan, "Çocuğun Soyadına İlişkin Anayasa Mahkemesi Kararlarının İncelenmesi" (2015) 10 (135-136) Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 77, 86.

⁶¹⁹ Rona Serozan, "Anayasa Mahkemesinin Yeni Medeni Hukuka İlişkin Kararları" in Tufan Öğüz and İlhan Helvacı (eds) *Anayasa Mahkemesinin Medeni Hukuka İlişkin Kararlarının Değerlendirilmesi Sempozyumu* (1st edn, On İki Levha 2012) 149.

⁶²⁰ AYM, E. 2010/119 K. 2011/165 K.T. 08.12.2011.

in rights and responsibilities both during the marriage and in divorce. To bar women from the right to decide on a surname for the child that came alongside the custody therefore is a practice contrary to the principle of equality.

After the annulment of this provision, an individual application was lodged to TCC in 2015 where the request of the mother, who had the custody, to have her child take her surname after divorce was rejected by lower instance courts based on a misapplication of unrelated legal rules.⁶²¹ In this application, TCC concluded that the practice meant an infringement upon Article 20 of the Constitution on privacy of private life, but did not deem it necessary to make an assessment on the grounds of Article 10 of the Convention on principle of equality and nondiscrimination as it found that no separate issue arose. However, it would have been more accurate for TCC to implore the case as an issue of equality, alongside the principle of best interest of the child, as the primary issue in such rights violations stems from an intrinsic belief of women's inferiority. In the individual applications that came before it after this judgment, TCC started to assess Article 20 alongside Article 10, which can be seen as an improvement.⁶²²

⁶²¹ AYM, *Hayriye Özdemir*; B. No: 2013/3434, 25.6.2015.

⁶²² AYM, *Deniz Altınbaş ve Diğerleri*, B. No: 2014/2033, 26.10.2017; AYM, *Ayten Yıldırım*, B. No: 2014/1826, 20.7.2017; AYM, *Nurcan Yolcu*, B. No: 2013/9880, 11.11.2015; AYM, *Gülbü Özgüler* B. No: 2013/7979, 11.11.2015.

3. Permission to Work

The previous Turkish Civil Code included a provision requiring women to obtain permission from their husbands for being able to choose or perform a profession or art. The provision also envisaged that in the event of the husband's refusal, such permission may be granted by the judge if the wife proves that it is in the interests of the union or the whole family for her to engage in a business or an art. The issue was brought before TCC for judicial review by a civil court after a woman was prevented from working due to her husband not permitting her just before they had divorced.⁶²³

In its judgment, TCC referred to CEDAW for the first time in its adjudication history and made a detailed case regarding gender discrimination. TCC stated that the (old) Turkish Civil Code was well behind the contemporary and equality based legal systems, but efforts were being made to abolish laws that are based on the dominion of the husband. TCC, referring to the Universal Declaration of Human Rights, ECHR, European Social Charter, and CEDAW, established the grounds of the principle of equality and nondiscrimination, and even though it did not explicitly mention “gender”, the structural subjugation of women was explained. TCC concluded that a married woman shall have the same rights as men to freely choose her profession, work, and to engage in activities that may benefit the society, and found said provision to be against the freedom of work.

⁶²³ AYM E. 1990/30 K. 1990/31 K.T. 29.11.1990.

The annulled provision explicitly positioning women as subjugated to men, and in the absence of it, transferring the dominion over to the state, is one of the most self-evident examples of the legal system's patriarchal background. Thus, to the credit of TCC, it was important for it to highlight that the "laws based on the dominion of the husband" was the root cause of the discrimination, and to regard the issue as a systemic rather than a discrete one. Further, the fact that the judgment did not use vague expressions such as "public interest", "obligations arising from certain social realities", "peace and order of family unity", which are often used in gender decisions, is a positive note.⁶²⁴ The references made to international texts are also important as they showed the openness of Turkish Constitutional adjudication to international law and international human rights law specifically.

A recent decision of TCC concerned a woman was not covered by insurance because she worked in her husband's establishment.⁶²⁵ She argued that even though she technically worked for "free", it was not compulsory to fork for a wage in order to benefit from insurance coverage, and a person working for their spouse's workplace contributes financially to the family economy, in any case, and that her labor should not be ignored or disregarded. TCC however drew a context around marriage and the responsibilities that come with it, and regarded the labor of the wife as a "manifestation of the obligation to help the spouse". Here, the denial of property or wages and the disregard of women's labor presents a remarkable combination of patriarchal and capitalist structures. Women's labor,

⁶²⁴ Bertil Emrah Oder, "Anayasa'da Kadın Sorunsalı: Norm, İçtihat ve Hukuk Politikası" Hülya Durudoğan, Fatoş Gökşen, Bertil Emrah Oder, Deniz Yüksek (eds.) *Türkiye'de Toplumsal Cinsiyet Çalışmaları: Eşitsizlikler, Mücadeleler, Kazanımlar* (Koç Üniversitesi Yayınları 2010) 225.

⁶²⁵ AYM, E. 2022/15 K. 2022/73 K.T. 1.6.2022.

in addition to being unseen and unrequited, are seen as a natural yield of marriage. However, if TCC were to take a rather Marxist-socialist feminist approach, would recognize the systemic injustices surrounding women's position.

The primary issue behind all of the judgments mentioned above is the fact that men are believed to be the head of the family and women, therefore, are subjugated and seen to be inferior and dependent. The patriarchal family places the father, the husband, as the head of the family and legal rules reflect this, both drawing their legitimacy from this belief and legitimizing it in a cyclical manner. CEDAW states that States Parties have a duty, on a basis of equality of men and women, that the same personal rights, including the right to choose a family name, a profession and an occupation, are envisaged for both the husband and the wife.

4. Gender Stereotypes and Socio-economic Status

The social inequality that exists between men and women seeps into the world of work as well. In other words, the power imbalance in favor of men in the family and society also function as the basis of their domination in the world of labor. Labor laws take the point of view of a male oriented understanding of work and working conditions and disregard women entirely, even though women have been a part of the work force approximately since the industrial revolution, not considering the invisible labor that they undertake at home. The root cause of such asymmetry is the long-standing distinction made between the public and private spheres. In the public sphere of the workplace, where power and authority are exercised, men are seen as the natural presiders of the field. In contrast, in the private sphere, where home, the hearth, and children are the concern, women are expected to belong in. Because the public sphere is where the work, the law, politics, intellectual life, and culture takes place, it is not deemed appropriate for women.⁶²⁶ Even though this distinction between the private and public domains have been refuted by feminists as being a solely culturally constructed phenomenon, as discussed above, and women have started occupy more and more in the public life, its effects on legal thinking and systems are still preserved.⁶²⁷ This understanding is backed by gender stereotypes and gender essentialism.

For example, the previous Turkish Civil Code and related laws had many provisions that barred women from certain types of jobs as these went against the

⁶²⁶ Charlesworth, Chinkin and Wright, 626.

⁶²⁷ Charlesworth, Chinkin and Wright, 627.

stereotypic view of women's capabilities and prowess, or lack thereof. TCC judicially reviewed a case where the law on public servants regulated that even though women becoming public servants was "licit", their place of duty was nonetheless determined by the laws dedicated to specific public servant jobs, unlike men's employee processes.⁶²⁸ Therefore, the right to become a public servant was reserved for men whereas women's participation in the profession was subjected to the additional condition of appointment by law.

In the face of this obvious discriminatory regulation, TCC held that as the "anatomy of women" was not, at times, suited for the "nature of some jobs", such a provision was not in breach of the principle of equality. Here, the gender stereotypes about women being "weak" or not suitable for the performance of certain jobs compared to men had direct effect on the reasoning of TCC. In a dissenting opinion, a judge nevertheless asserted that such laws were drafted with a male oriented perspective that considered public service as being reserved for men, and a favor for women.⁶²⁹

Similar to the above-mentioned reasoning, TCC adjudicated on a case concerning an article of the law on Human Rights and Equality Institution of Turkey.⁶³⁰ According to the article, the "Cases making it imperative to employ a certain sex" cannot be used as grounds for discrimination claims. TCC concluded that taking into account the nature of certain jobs and biological factors, it is the natural course of action and necessary that

⁶²⁸ AYM E. 1963/148 K.1963/256 K.T. 25.10.1963.

⁶²⁹ AYM E. 1963/148 K.1963/256 K.T. 25.10.1963, Dissenting Opinion of Judge İ. Hakkı Ülkmen.

⁶³⁰ AYM E. 2016/132 K. 2017/154 K.T. 15.11.2017.

discrimination is applied, especially if such a provision has the aim of protecting the ones that are prevented from working on such jobs, as this is a matter of public interest.

What TCC fails, or refuses to acknowledge, is the fact that such discrimination based on gender, no matter how lofty its aim is portrayed, harms women and legitimizes the view of women as second-class citizens. TCC's majority reasoning that depends on gender essential gender perspectives were criticized in contesting opinions, as advancements in technology and changing social norms and understandings eliminate the distinction between traditionally gendered professions, allowing all genders to perform a wider range of jobs.⁶³¹ In this respect, all forms of restrictions on women's working conditions, even maternity protections, come from a stereotyped and paternalistic incentive. Another aspect pointed out in the contesting opinions is that the phrase "cases making it imperative" is too vague so as to being vulnerable to subjective interpretation by employers that could lead to arbitrary discrimination.⁶³² Biological differences are given as a reason and a justification for the discrimination between men and women in many areas of life, especially employment. These regulations, claiming to serve a goal of protecting women as per their "weak constitution", actually serve as a "legal blockade" in job opportunities and earnings.⁶³³

The State's paternalist approach to women in the workforce manifests in other ways as well. According to Article 14 of the Turkish Labor Law a woman becomes entitled

⁶³¹ AYM E. 2016/132 K. 2017/154 K.T. 15.11.2017, Dissenting Opinion of Judge Osman Alifeyyaz Paksüt.

⁶³² AYM E. 2016/132 K. 2017/154 K.T. 15.11.2017, Dissenting Opinion of Judge Engin Yıldırım.

⁶³³ Thais Guerrero Padrón, Ljubinka Kovačević, and María Isabel Ribes Moreno, "Labour Law and Gender" in Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (eds.) *Gender-Competent Legal Education* (Springer Textbooks in Law 2023) 586.

to severance pay if she voluntarily terminates her employment within one year from the date of her marriage. This provision, as it did not foresee the same right for men, was brought before TCC on the ground that it was a breach of the principle of equality. In its assessment, TCC went beyond the grounds of the application and made an evaluation based on Article 41 of the Constitution of Turkey on the protection of the family, as well as on Article 50 that regulates the working conditions.

This choice of bringing the concept of family into the discussion where women's labor rights are the topic of discussion is certainly a very symbolic choice by the TCC as it further showcases the paternalist agenda it seeks to further. In its decision, TCC emphasized the "social reality" of the traditional family structure where, despite legal change, male dominion still perseveres, and how this provision aims to repair and amend this notion. Here, TCC was of the view that benign discrimination would overcome such a "social reality", overlooking the fact that regulations that stem from gendered stereotypes only serve to internalize the structural inequalities. Further, it cited vague and inconsequential sources such as "family law doctrine", "order and harmony of the marriage union", "the responsibilities women shoulder in the familial and social life" for justification. TCC further cites CEDAW by referring to it as "documents that protect women", implicitly vocalizing the paternalistic approach it takes. Here, TCC seems to have conflated Article 4 on "temporary special measures" with Article 5's reference to measures to be taken for the eradication of structural inequality.⁶³⁴

⁶³⁴ Oder, 221.

TCC's determination should not have been so superficial as to only cite this "social reality" without even looking into the facts that create this reality. The determination, in fact, should have been made on an assessment of whether the provision was based on, or likely to perpetuate, traditional, stereotypical generalizations about women, or whether it was designed as a measure of intentionally and reasonably remedying inequalities and disadvantages that stem from past discrimination.⁶³⁵

Gender essentialism positions men and women as fundamentally and inherently different, and gender stereotypes reinforce this perspective. Postulations such as women being naturally nurturing or good at interpersonal relations, or men being more analytical or better at physical labor shape the cultural and societal perceptions of what types of jobs are suitable for men and women respectively. These beliefs, in turn, create a gender-segregated job market.⁶³⁶ While the primary victim of such discrimination is women and sexual minorities, men too can be negatively affected by gender stereotypes.

TCC, judicially reviewing the provision that prevents men from becoming nurses, decided that such a norm went against the principle of equality.⁶³⁷ TCC accepted that there was not any public interest in making a discrimination between genders regarding the nursing profession and that the provision in question was inherited from the traditional understanding that some jobs could only be done by women. TCC concluded that the

⁶³⁵ Patricia Ann Boling, "Pregnancy Benefits, Benign Sex Discrimination, and Justice: Why Does It Matter How We Ask the Questions?" (1981) 11 (3) Golden Gate University Law Review 980, 991.

⁶³⁶ Mette Løvgren and Julia Orupabo, "Gender Essentialism at Work? The Case of Norwegian Childcare Workers" (2023) 30 (3) Social Politics: International Studies in Gender, State & Society 844, 846.

⁶³⁷ AYM E. 2006/166 K.2009/113 K.T. 23.7.2009.

provision in question discriminated against men based on a stereotypic understanding that arose from traditional gender roles attributed to men.

It is true that such distinctions – jobs suited for men/women – are made on the basis of expectancies that come with gender identities and making choices based on such stereotypic conceptions may even strengthen a person's gender identity.⁶³⁸ While a celebrated decision by TCC, compared with the judgment made on the basis of women's struggles of similar topics, it further showcases just how male oriented the judicial system can be, as the ease with which TCC sees and annuls discriminatory practices that harm men seemingly did not carry over to amend women's problems.

⁶³⁸ Løvgren and Orupabo, 846.

III. European Court of Human Rights's Approach to Cases Concerning Gender

Anti-gender movements and a backsliding on women's rights across the globe render it important that human rights mechanisms are equipped to uphold the principle of equality and non-discrimination. Keeping in mind that legal rules can only achieve so far in this regard, it is equally as, if not more, important that domestic and international judicial bodies seek to better the social and legal conditions of women. In this respect, the scope and legal framework of the European Convention on Human Rights offers a dynamic approach to human rights advocacy and allows legal practitioners to have an intersectional gender perspective.⁶³⁹

Persisting inequalities between women and men, gender bias, and stereotypes lead to problems of inequality with regards to access to justice.⁶⁴⁰ This situation is especially exacerbated in places where structural barriers and cultural taboos prevent access to justice. Against this backdrop, the European Court of Human Rights's approach to cases concerning gender issues is worth analyzing, notably as to draw a comparison to the Constitutional Court of Turkey's approach.

As with Turkish law, overtly discriminatory laws have largely disappeared in the European legal systems. However, as inequality and discrimination still persist, and no amelioration is made in the situations of women and other marginalized groups, a need to look deeper for the hidden biases in the form of gender stereotypes is apparent. In this

⁶³⁹ See: Intersectionality and Multiple Discrimination - Gender Matters (coe.int); Saeidzadeh, 196.

⁶⁴⁰ See: Guaranteeing Equal Access of Women to Justice - Gender Equality (coe.int)

sense, the Court, as per its *raison d'être*, shall take steps to recognize and address stereotyping as a structural cause of discrimination⁶⁴¹ and guarantee that its practice includes a consistent gender perspective.⁶⁴²

Looking at the Court's history, it could be observed that the case law on gender was examined through a lens of formal equality.⁶⁴³ Although formal equality was not harmful, per say, feminist theorists criticized it by emphasizing its failure to take into consideration the structural inequalities present in the realities of women and minorities, while asserting that this concept ultimately dons a male perspective and point of reference. Over time, the Court started to develop a substantive concept of equality, where the point of reference is not the privileged male but the "reality of a rule or practice as it is experienced by a disadvantaged group".⁶⁴⁴ From this point on, the Court has come to understand that even if the letter of the law is neutrally formulated it may, and does, still impose disproportionate burdens on vulnerable social groups. As valuable and useful as an approach, it still has its limits as the underlying structural causes of such discrimination or inequalities remain undisturbed.

The societal biases and gender hierarchies in place bring about a need to dismantle and disrupt the legal *status quo*, and the Court's current approach in its case law is seemingly focused more on "positive equality duties" rather than examining and

⁶⁴¹ Timmer, "Anti-Stereotyping Approach", 708.

⁶⁴² Joanna Evans, "Gender Mainstreaming at the European Court of Human Rights: The Need for A Coherent Strategy in Approaching Cases of Violence Against Women and Domestic Violence" (2023) 54 (1) University of Miami Inter-American Law Review 1, 22.

⁶⁴³ Timmer, "Anti-Stereotyping Approach", 710.

⁶⁴⁴ Timmer, "Anti-Stereotyping Approach", 711.

denouncing the gender stereotypes which are the root cause of most issues⁶⁴⁵, even though it has recently started to acknowledge this phenomenon.

Below, the Court's influential, controversial, and perhaps sometimes lackluster examples of case law will be analyzed through a gender lens, and their strengths as well as shortcomings demonstrated. In this sense it can be said that the Court's case law, while at times exhibiting a dynamic and comprehensive understanding of inequalities and problems based on gender, lacks a profound and consistent intersectional perspective.

⁶⁴⁵ Timmer, "Anti-Stereotyping Approach", 712-713.

A. Gender Stereotypes and Gender Based Violence

ECtHR's jurisprudence exhibits an assorted picture in terms of cases concerning domestic violence. As such, many cases that come before the Strasbourg Court do so after such violence causes irreparable damage or ends in fatality, and thus most cases concern the State failure of taking any or effective action. Other, albeit small number of cases are taken to the Court by the survivors of domestic abuse themselves, seeking redress for abuse already endured, or protection for future violence that they again could not procure from public authorities.⁶⁴⁶

Gender based stereotypes, while not the sole cause, are still a significant contributing factor to occurrences of domestic violence. At the root of it, gender-based violence is deeply connected to the patriarchal social setting where men assert their masculinity, control, and domination over women in forms of violence. Stereotypes, in such a setting, both provide the reason and the justification for violence inflicted on the basis of gender. Gender stereotypes may also appear as aggravating factors in the difficulty of access to justice or even to protection mechanisms. These types of stereotypes stem from the public/private dichotomy where the belief that the private affairs of a family cannot be interfered with, and whatever happens between the four walls of the so-called family home has to be endured. It must go without saying that the person who performs such endurance is oft the woman, as well as sometimes the child, but never, if rarely, the man, in a heterosexual matrimony. The abuse that men inflict upon the other members of

⁶⁴⁶ Evans, 8.

this nuclear family is presented as something default that happens in a domestic setting, and therefore it cannot be a public concern. As a result, many victims choose to stay silent on such matters and the ones that do speak up are either turned away or publicly shunned.

In the landmark decision *Opuz v Turkey*, the most prominent issue had been the inactiveness of the public authorities. Despite numerous assaults on both the applicant and her mother, the complaints lodged, and medical reports and witnesses, public authorities failed to effectively prevent harm and protect the victims. One glaring reason behind the lack of action by the police and other State officials had been this stereotypical view that domestic violence was a private family affair with which they could not interfere. Further, when the victims were forced to withdraw their complaints the public authorities did not take into account the possibility that the victims could have been coerced or threatened, given the nature of the case where the perpetrator continuously threatened and assaulted the victims. The complete disregard of the victims' complaints and the documented abuse they suffered, in turn, led to the killing of applicant's mother.

Traditional and social gender roles further pose as the basis of such violence where the expectations and responsibilities put on women in the context of marriage or family come into play. The repeated assaults of H.O. on the applicant had the undertone of "righteous anger" due to the wife "failing" in her domestic duties. In one such instance, H.O. demanded that Nahide Opuz should have been cooking for him instead of "wandering outside" and that she should have been looking after the children instead of going to her mother's house so often⁶⁴⁷, showcasing that the stereotypical role expected

⁶⁴⁷ *Opuz*, para. 38.

from women to be “servants”, “homemakers” and “caregivers”⁶⁴⁸ can serve as the justification for violence if not undertaken, or if not performed “sufficiently”. Another manner gender stereotypes played part in the unfolding of events concerns the applicant’s late mother, where H.O. murdered her for his “honor” as she was trying to help her daughter get away. According to the perpetrator’s testimony, he shot at the applicant’s mother because she told him that she would “take away [his] wife and sell [her]”, and that he was trying to protect his and his children’s honor. H.O.’s claim was accepted by the lower instance courts, as honor, especially a man’s, is something that must be defended and kept intact by all means necessary, and allusions to one’s wife can be grounds of “provocation” because men have ownership over their wives. Depending on these reasons, along with his alleged “good behavior” during the trials, his sentence was mitigated to a mere fine.⁶⁴⁹ This is a direct example of gender stereotypes being employed by the judiciary, in other words, judicial stereotyping, negatively affecting the outcome of a case.

Opuz is a special case in the sense that gender stereotypes’ presence and their impact on the occurrence of domestic violence, responses or lack thereof to domestic violence, and the hearing of the case concerning domestic violence. ECtHR’s judgment, in this context, carries utmost importance in unearthing the shortcomings of domestic courts in Turkey, and demonstrating the lacunae of legislation and mechanisms in the legal system. The Court’s assertion that “(...) domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was

⁶⁴⁸ Timmer, “Anti-Stereotyping Approach”, 57.

⁶⁴⁹ “(...) taking into account the fact that the accused had committed the offence as a result of provocation by the deceased and his good conduct during the trial, the court mitigated the original sentence (...)” *Opuz*, para. 57.

conducive to domestic violence” is therefore a crucial assessment pointing out the systemic nature of such violence, both on cultural and jurisprudential levels.⁶⁵⁰ The Court’s highlighting of the fact that domestic violence is a systemic problem, one that is gender based, throughout the judgment formed the basis for ECtHR finding a violation of Article 14 along with Articles 2 and 3 for the first time in a domestic violence case.

The acceptance that domestic violence is an issue that falls within the ambit and scope of the Convention⁶⁵¹ gradually established the basis for States’ positive obligations regarding gender based domestic violence, even if the abuse comes from individuals. The fact that the drafting and the subsequent ratification of the Istanbul Convention after the *Opuz* judgment solidified this, and even though the judgment itself lacked in the respect that it did not provide a definition for domestic violence, or highlighted that domestic violence existed as a part of the patriarchal social structures⁶⁵², Istanbul Convention’s extensive and inclusive definitions could provide an amendment in this regard.

It was further remarkable for the Court to analyze *Opuz* under Articles 2 and 3, as it sometimes opted for an evaluation of Article 8 in domestic violence cases. In fact, the Court seemed like it did not know how to classify domestic violence, vacillating between applying Article 2, Article 3 and Article 8. For example, in *Bevacqua and S v Bulgaria*⁶⁵³ in 2008, despite the fact that the applicant relied on both Article 3 and Article 8, the Court decided to examine the case under Article 8 only, according to “the particularities of the

⁶⁵⁰ *Opuz*, para. 198.

⁶⁵¹ *Kontrová v Slovakia* App no. 7510/04 (ECtHR, 31 May 2007).

⁶⁵² Shazia Choudry and Jonathan Herring, “Opuz v Turkey” Loveday Hodson and Troy Lavers (eds.) *Feminist Judgments in International Law* (Oxford Hart Publishing, 2019) 254.

⁶⁵³ *Bevacqua and S. v Bulgaria* App no. 71127/01 (12 June 2008).

case”.⁶⁵⁴ A year later, however, the Court found a violation of Articles 2 and 3 in *Opuz*, asserting that the circumstances of the case were “sufficiently serious to amount to ill-treatment within the meaning of Article 3”.⁶⁵⁵ The Court, however, did not specify what exactly had been the threshold of ill-treatment is, or what particularly made it so that the two cases differed. In *E.S. and Others v Slovakia*⁶⁵⁶ the Court found a violation of both Article 3 and Article 8, where the nature and severity of the circumstances amounted to a breach of the State’s positive obligations under both articles. The Court later reverted to examining domestic violence cases under Article 8 in *A. v Croatia*⁶⁵⁷ and *Kalucza v Hungary*⁶⁵⁸, where it omitted an analysis of Article 3 and deemed it “unnecessary” because it found breaches of Article 8. The focus of Article 8, however, had been puzzling.

The Court relied on the physical and psychological integrity of persons in its examination of Article 8, which is an important emphasis, but does lack the severity of Article 3, which is an absolute right. Further, assessing domestic violence cases as merely being a violation of one’s personal integrity, whether physical or psychological, is a rather individualistic approach considering the systemic and acute nature of gender-based violence. The Court did reach that conclusion in *Opuz*, asserting that domestic violence is a phenomenon that mainly affects women, and that within the context of Turkey’s “religio-conservative gender climate”⁶⁵⁹ the interpretation and enforcement of national

⁶⁵⁴ *Bevacqua and S.*, para. 55.

⁶⁵⁵ *Opuz*, para. 161.

⁶⁵⁶ *E.S. and Others v Slovakia* App no. 8227/04 (ECtHR, 15 September 2009).

⁶⁵⁷ *A. v Croatia* App no. 55164/08 (ECtHR, 14 October 2010).

⁶⁵⁸ *Kalucza v Hungary* App no. 57693/10 (ECtHR, 24 April 2012).

⁶⁵⁹ Devran Gülel, “A Critical Assessment of Turkey’s Positive Obligations in Combatting Violence against Women: Looking behind the Judgments” (2021) 18 (1) Muslim World Journal of Human Rights 27, 30.

jurisprudence is heavily patriarchal. But such violence is not confined to any one nation or culture and is rather a global quagmire, and the Court could have expanded this reasoning to other cases as well. Granted, establishing a violation of Article 8 is comparably easier and a more straightforward way than demonstrating and substantiating a breach of Article 3⁶⁶⁰, especially considering the fact that assessing whether the ill-treatment had reached the severity required shall be reasonably decided on a case-to-case basis.⁶⁶¹

However, in *Kalucza* specifically, the Court actually did make a sound evaluation of the facts of the case. In other words, it did show that it was capable of donning somewhat of a gender lens when assessing such cases, but in a two-step-forward-one-step-back fashion refused to take this approach further and did not see the case under Article 3. *Kalucza* concerned a case where the domestic courts rejected the applicant's complaints and requests for protective measures because she had fought back against the perpetrator. This behavior of the domestic judges is an evident example of judicial stereotyping where the stereotypical and ideal victim of a domestic violence case is expected to be weak, passive, and helpless; an extension of the "passive and tolerant feminine".⁶⁶²

A woman victim who falls outside this perfect victim blueprint, which is a prescription of the patriarchal point of view, therefore, is stripped away from her victim

⁶⁶⁰ Ronagh J.A. McQuigg, "The European Court of Human Rights and Domestic Violence: Volodina v. Russia" (2021) 10 International Human Rights Law Review 155, 164.

⁶⁶¹ Nina Overmeyer, "Domestic Violence as a Violation of the European Convention on Human Rights: the Application of Articles 3 and 8 by the European Court of Human Rights in Cases Concerning Domestic Violence" (Bachelor thesis, Örebro University 2021) 28.

⁶⁶² Peroni and Timmer, 49; Leigh Goodmark, "When is a Battered Woman Not a Battered Woman? When She Fights Back" (2008) 20 (75) Yale Journal of Law and Feminism 75, 94.

status and even seen as the aggravator. The Court held that the fact that the violence had been “mutual” did not absolve states from fulfilling their positive obligations.⁶⁶³ The Court further noted that the victim acting in “legitimate self-defense cannot be ruled out” and found a violation. As important as the correct identification of the bias assumed by the domestic courts and the contestation of it, much like its refusal of a consideration of Article 3, the Court’s language should be noted here as well. Phrases such as “mutual assaults”, “mutually violent parties” and “(...) the fact that she had also been violent towards him” do insinuate a “both sides” argument, which is far from the truth.

“Mutuality” presupposes equal footing, which is a null claim in gender-based violence cases as the abuser, as the oppressor, cannot be oppressed, much akin to the nonexistence of “reverse-racism”. Moreover, victims who do fight back in such cases are usually the ones with fewer options, ones that lack the resources to access justice or are vary or unwilling to go to public authorities due to societal stigmas, or those whose marginalized status may prevent them from seeking help otherwise.⁶⁶⁴ Therefore, it is important that victims’ various narratives are reciprocated in judicial bodies.

Another one of the Court’s inexplicable derivations from its judgment in *Opuz* is the reversal of examining domestic violence cases under Article 14. In *Civek v Turkey*⁶⁶⁵, a case with similar pressure points as *Opuz*, the Court’s refusal to acknowledge the gender-

⁶⁶³ “(...) the Court notes that if [the restraining order] could not be ordered in cases of mutual assaults, then the aim of providing effective protection to victims would be seriously undermined” *Kalucza*, para. 66

⁶⁶⁴ Goodmark, 77.

⁶⁶⁵ *Civek v Turkey* App no. 55354/11 (ECtHR, 23 February 2016).

based nature of such violence, especially after having established it in the context of Turkey before, is puzzling.

In the case, the victim Selma Civek had complained many times to public authorities that the perpetrator H.C. had assaulted her and threatened her with death, but her repeated complaints and search for protection were unheeded by the public authorities, which resulted in Selma Civek to be stabbed to death by the perpetrator. In his defense, H.C. asserted that he had been “provoked” into this act as his honor as a husband was tarnished because Selma Civek had been “unfaithful”, and that he “lost control”.⁶⁶⁶ Apparent in H.C.’s testimonies that his defense strategy had been to seize narrative reciprocation from the judiciary by employing gender stereotypes of women causing, especially through slights at the men’s honor, violent outbursts from the perpetrators.⁶⁶⁷ Such a reasoning places the source of the problem on the victim, as the “trigger”, and detaches the perpetrator from his actions into an agentless place, effectively shifting responsibility as well as blame. In such a context, although the Court found that Turkish authorities had not complied with their positive obligations under Article 2 by failing to prevent the fatal outcome, held that it was not “necessary” to examine any grievances separately under Article 14. More outrageous was the assertion that “domestic violence does not only affect women: men can also be victims of domestic violence, as well as children, who are often direct or indirect victims”.⁶⁶⁸

⁶⁶⁶ Civek, para. 28.

⁶⁶⁷ Most curious is H.C.’s defense that “(...) any men would have done the same in my stead. Where has our values gone?” (*Presque tous les hommes auraient réagi comme moi. Sinon, quelles seraient nos valeurs dans ce monde ?*) Civek, para. 13; Peroni and Timmer, 52.

⁶⁶⁸ Civek, 50.

While the Court had uttered the same premise in *Opuz* as a principle as well⁶⁶⁹, it did also acknowledge the structural and gendered issue it is, highlighting the disproportionate effects on women, and found a violation of Article 14. In the context of this case, however, refusal of the examination of Article 14 would suggest that such an approach had not been presented on principle but rather as a pillar reasoning that the Court depended upon. Such acts of violence stem from a system of asymmetric gender dynamics where structural discrimination against women is embedded in the society; a refusal to acknowledge the discriminatory nature of domestic violence would therefore render this case as merely a murder rather than a form of gender-based violence⁶⁷⁰ and would therefore go against the aim of realizing gender equality.

Notably, the Court did decide on another domestic violence case concerning Turkey roughly a month after *Civek* and this time did examine the case under Article 14, finding a violation alongside Article 3.⁶⁷¹ The *M.G. v Turkey* case concerned the applicant who had been subjected to various forms of assault and violence by her former husband since the beginning of their marriage, who later had fled her home and filed for divorce in 2006, as well as lodged complaints for criminal proceedings. However, criminal prosecution would not start until 2012, during which time the death threats continued and her requests for protection measures from the family courts were denied on the account that she was now divorced.

⁶⁶⁹ *Opuz*, para. 132.

⁶⁷⁰ Fleur van Leeuwen, “Just Another Murder or Gender-based Violence? A Commentary on *Civek* versus Turkey” (*Strasbourg Observes*, 3 March 2016) <https://strasbourgobservers.com/2016/03/03/just-another-murder-or-gender-based-violence-a-commentary-on-civek-versus-turkey/> accessed 7 May 2024.

⁶⁷¹ *M.G. v Turkey* App no. 646/10 (ECtHR, 22 March 2016).

In its assessment, the Court reiterated that the positive obligation to protect the physical integrity of a person under Article 3 also extends to the effectiveness of a criminal investigation⁶⁷², but more importantly referred to the Istanbul Convention saying that States are under the obligation to conduct criminal proceedings without undue delay while taking into consideration the rights of the victim at all stages.⁶⁷³ Further, it asserted that courts shall take into account the precarious situation of the victim as well as their various vulnerabilities.⁶⁷⁴ In its examination of Article 14, the Court reiterated its sentiments from *Opuz* that the general passivity and discrimination of the Turkish judiciary had created a climate that is conducive to this violence, and rather than treating this as a solitary occurrence of violence and relates such experiences to the general climate in Turkey.⁶⁷⁵

After such a period of confusion with regards to how to approach and characterize domestic violence cases, the Court has established a somewhat stable case law of employing Articles 2 and 3 as well as Article 14 in combination generally. It further continues to build on this extensive case law by making nuanced considerations that connote to a progressing understanding of gender perspectives in decision-making. For

⁶⁷² *M.G.*, para. 79.

⁶⁷³ *M.G.*, para. 94.

⁶⁷⁴ *M.G.*, para. 95; Vulnerability as a term has an important place in human rights theory. According to the ontological perspective, vulnerability is understood as a fundamental and common condition of humanity, as the potential of individuals to affect and be affected by others, while according to the particular approach, it emerges in specific and differentiated forms in concrete conditions. From a particular perspective, vulnerability can be defined as vulnerability to harm, abuse and exploitation. See: Erinn C. Gilson, “Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence” (2016) 42 (1) *Signs: Journal of Women in Culture and Society* 71, 72.

⁶⁷⁵ *M.G.*, para. 116; Fleur van Leeuwen, “Back on track! Court acknowledges gendered nature of domestic violence in *M.G. v. Turkey*” (*Strasbourg Observes*, 14 April 2016) <https://strasbourgobservers.com/2016/04/14/back-on-track-court-acknowledges-gendered-nature-of-domestic-violence-in-m-g-v-turkey/> accessed 7 May 2024.

example, in *Talpis v Italy*⁶⁷⁶, the Court held that the violence inflicted on the applicant shall be regarded as being based on sex⁶⁷⁷ and that it consequently amounts to a form of discrimination against women.⁶⁷⁸ It further noted that the passivity and inaction of the public authorities underestimated, and even condoned violence, showcasing a discriminatory approach by the authorities due to the applicant being a woman.⁶⁷⁹

In *Talpis*, while the Court had been in agreement on there being a breach of Article 3 (unanimous) and Article 2 (six votes to one), the decision on violation of Article 14 raised some questions amongst the Court. Notably, the dissenting opinions seemingly focused on the need for a more concrete demonstration of how public authorities' conduct amounted to discrimination, or how they exhibited discriminatory intent, rather than "pure passivity".⁶⁸⁰ In other words, the central question seemed to be that whether inaction, by itself, amounts to discrimination, or if there should be more evidence to suggest active intent, such as in *Opuz* where the police officers tried to convince the women to drop their complaints and regarded the issue of domestic violence as a family matter.

However, this line of thinking is denotive of the male oriented point of view's transmission to judiciary. The majority in the judgment asserted that "(...) the risk of real and imminent threat must be assessed taking due account of the particular context of domestic violence".⁶⁸¹ A legal system may contain adequate provisions, but the high rates

⁶⁷⁶ *Talpis v Italy* App no. 41237/14 (ECtHR, 2 March 2017).

⁶⁷⁷ The Court should have used the term "gender".

⁶⁷⁸ *Talpis*, para. 148.

⁶⁷⁹ "La requérante a par conséquent été victime, en tant que femme, d'une discrimination contraire à l'article 14 de la Convention" *Talpis*, para. 145.

⁶⁸⁰ *Talpis*, Judge Spano Partly Dissenting Opinion para. 21.

⁶⁸¹ *Talpis*, para. 122.

of femicides and the lack of effective practice of such measures combined with structural and socio-cultural attitudes to domestic violence would suggest an otherwise approach. Further, bearing in mind the Court's practice regarding discrimination claims and the difficult nature of proving discrimination, the burden of proof should fall on the State rather than the victim in any case.

Of course, it is not as simple as to argue that inaction of public authorities always connotes to encouragement of domestic violence, but such situations certainly have their roots in the innate acceptance of violence as a mandatory part of a woman's (married) life, a default consequence of being a woman, and a deserved one too if said woman acts outside the socio-cultural norms present.⁶⁸² There are many such examples in the Court's established case-law, listing all of which would be beyond the scope of this thesis, and they are not limited to any one country or culture either. Most notable ones in terms of demonstrating the Courts ever-evolving understanding of gender will thus be briefly mentioned.

In *Bălșan v Romania*⁶⁸³, the Court emphasized the fact that the public authorities had to have been aware of the abuse the applicant was being subjected to, given her repeated attempts of emergency calls to the police, requests for protection, formal criminal complaints, etc. Every time, however, the authorities and domestic courts either ignored

⁶⁸² For example, in *Eremia v the Republic of Moldova* [App no. 3564/11 (ECtHR, 28 May 2013)], the State officials accepted the husband/perpetrator, having assaulted the victim repeatedly, "did not represent a danger to society" and was well-respected at work and in the community (para. 27). The social workers further advised the victim that she should reconcile with her husband because she was "neither the first nor the last woman to be beaten up by her husband" (para. 25). This line of thinking therefore suggests a prescriptive stereotype where women are expected to bear male aggression. Peroni and Timmer, 54.

⁶⁸³ *Bălșan v Romania* App no. 49645/09 (ECtHR, 23 May 2017).

the applicant or acquitted the perpetrator, going so far as to claim that the applicant “provoked” the perpetrator. In light of these facts, the Court contended that such an approach had rendered the national legal framework in place useless and was further inconsistent with international standards on violence against women. Moreover, the Court held, public authorities’ passivity reflected a discriminatory attitude towards the applicant as a woman and had shown a lack of commitment to address domestic violence in general, and therefore the State was in breach of Article 3 as well as Article 14.

ECtHR’s conceptualization of domestic violence in *Volodina v Russia*⁶⁸⁴ is also noteworthy in this regard, as the Court emphasized that domestic violence does not only constitute physical violence but may also take the form of coercive control and psychological abuse, and these forms of non-physical violence may also fall within the ambit and scope of Article 3. The Court especially underlined that “even in the absence of actual bodily harm or intense physical or mental suffering, treatment which humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or which arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, may be characterized as degrading and also fall within the prohibition set forth in Article 3”.⁶⁸⁵

On the question of Article 14, the majority was of the view that the circumstances of the case was enough to establish that domestic violence affected women disproportionately in Russia, and that the failure to enact legislation to combat this

⁶⁸⁴ *Volodina v Russia* App no. 41261/17 (ECtHR, 8 January 2018).

⁶⁸⁵ *Volodina*, para. 75.

phenomena therefore meant a breach of Article 14.⁶⁸⁶ Most crucial in the judgment was that the Court, in the context of Article 14, asserted that “substantive gender equality can only be achieved with a gender-sensitive interpretation and application of the Convention provisions that takes into account the factual inequalities between women and men and the way they impact women’s lives”⁶⁸⁷, which is exactly the view that should be present in all cases concerning gender related issues, and is directly linked to feminist legal theory’s impact on judicial decision making.

In adopting such a view, the Court then recognized the factual inequalities and the vulnerabilities of the victim, shifted the burden of proof. Moreover, the Court referred to CEDAW Committee’s recognition that gender-based violence as a form of discrimination has evolved into a principle of customary international law. Further notable in *Volodina* is that in their Separate Opinions, Judge Pinto De Albuquerque joined by Judge Dedov, and also concurred by Judge Serghides, they asserted that the characterization of domestic violence as “ill-treatment” in this case failed to convey the severity of the situation and that a framework of “torture” would therefore have been more fitting for the “the gravity and effect of persisting patterns of domestic violence”.⁶⁸⁸

In *Volodina* Judge Pinto De Albuquerque further asserted that a “real and immediate risk” in a domestic violence case, as per the *Osman test*, does not serve well in context. Indeed, when “immediacy” arises in a domestic violence case, this often means that the perpetrator would be in the direct vicinity of the victim and any State action would

⁶⁸⁶ *Volodina*, paras. 117-124.

⁶⁸⁷ *Volodina*, para. 11.

⁶⁸⁸ *Volodina*, Judge Pinto De Albuquerque, Joined by Judge Dedov Separate Opinion, para. 8.

therefore be too late, which could then be used as a legitimate excuse by the State for not acting in a timely manner.⁶⁸⁹ After this, in *Kurt v Austria*⁶⁹⁰, the Court's longstanding *Osman test* was refined to include gender-based violence-specific consideration, namely that public authorities have a duty to conduct comprehensive risk assessments and gauge potentially lethal risks in an autonomous, proactive, and comprehensive manner.⁶⁹¹ The Court further emphasized that the notion of "imminence" in the context of domestic violence cases refers to the "common trajectory of escalation"⁶⁹², while holding that a healthy response to domestic violence would require authorities to understand the dynamics of domestic abuse and offer better protection.⁶⁹³

However, Judge Huseynov, in his Concurring Opinion, asserted that the application of the *Osman test*, however modified, is questionable in domestic violence cases that has fatal results. Judge Huseynov asserted that domestic violence, as a continuous practice of intimidation and abuse, requires States to "react, with due diligence, to each and every" and "take all necessary measures to make sure that such acts do not lead to more serious consequences".⁶⁹⁴ In other words, the obligation should be present regardless of if the risk or threat is imminent, and that just the presence of it shall be enough to trigger State mechanisms into action.

⁶⁸⁹ *Volodina*, Judge Pinto De Albuquerque, Joined by Judge Dedov Separate Opinion, para. 12.

⁶⁹⁰ *Kurt v Austria* App no 62903/15 (ECtHR [GC] 15 June 2021).

⁶⁹¹ *Kurt*, para. 168.

⁶⁹² *Kurt*, para 176.

⁶⁹³ *Kurt*, para. 174.

⁶⁹⁴ *Kurt*, Judge Huseynov Concurring Opinion, para. 4.

Another notable principle uttered by the Court was that “where several persons are affected by domestic violence, be it directly or indirectly, any risk assessment must be apt to systemically identify and address all potential victims”.⁶⁹⁵ While it was important of the Court to draw this framework around domestic violence and State responsibility, the majority of ten votes to seven in the case still refused to see that there had been a breach of Article 2 with regards to the applicant’s son’s death. The majority’s reasoning was that public authorities did display the required “special diligence” in responding swiftly to the claims of domestic violence, and that they conducted an autonomous, proactive and comprehensive risk assessment, the outcome of which was the barring order. The fact that this risk assessment did not indicate a real and immediate lethal risk to the applicant’s son was therefore the basis of the State not being in violation of its obligations under Article 2 of the Convention.⁶⁹⁶ However, this reasoning by the Court does not hold as in its previous case law it had consistently laid out domestic violence to directly or indirectly affect the children as well, especially since the such a danger could have been inferred from the perpetrator’s past violent behaviors and continued death threats.

Other problematic reasoning employed by the majority in the Court was their endorsement of public authorities, especially with regards to their undermining of domestic and sexual violence inflicted on the applicant. For example, public authorities repeatedly saw the abuse suffered by the applicant and her children as “place-dependent” meaning that the term “domestic” was taken literally to be confined to the marital house,

⁶⁹⁵ *Kurt*, para. 173.

⁶⁹⁶ *Kurt*, para. 211.

rather than “person-dependent”, which had been the reason behind the restraining order not covering the school the applicant’s son went to.⁶⁹⁷

Another factor that public authorities claimed was that the applicant had not immediately reported the sexual violence and assaults by the perpetrator, and they further depended on the prescriptive stereotypical view of how sexual violence victims should act by claiming that the husband “did not hold her down and did not use violence during the act, and she did not scream”.⁶⁹⁸ The ECtHR too took part in this victim-blaming and asserted that “(...) the applicant herself seemed not to have been aware of the acute danger emanating from her husband in respect of their children following the incident reported (...) She remained in the marital home for three days after that incident before going to the authorities”.⁶⁹⁹ This type of reasoning is actually in direct contradiction to the principles set forth in the very same judgment, where the victims themselves cannot be solely relied upon for public authorities to take action in domestic violence cases, and that there has to be external investigation into the facts.

Indeed, domestic violence by nature consists of different tactics of intimidation, emotional and psychological abuse, coercion, threats, forced isolation, manipulation, limiting of personal freedom, economic dependency, and so on.⁷⁰⁰ Moreso, the fact that the applicant was a Turkish immigrant undoubtedly contributed to her aversion, which

⁶⁹⁷ Lisa Maria Weinberger, “Kurt v Austria: A Missed Chance to Tackle Intersectional Discrimination and Gender-Based Stereotyping in Domestic Violence Cases” (*Strasbourg Observes*, 18 August 2021) <https://strasbourgobservers.com/2021/08/18/kurt-v-austria-a-missed-chance-to-tackle-intersectional-discrimination-and-gender-based-stereotyping-in-domestic-violence-cases/> accessed 8 May 2024.

⁶⁹⁸ *Kurt*, 28.

⁶⁹⁹ *Kurt*, 79.

⁷⁰⁰ Power and Control Wheel - Understanding the Power and Control Wheel (2 May 2016) <https://youtu.be/5OrAdC6ySiY?si=qrPfaJVIAXbQuXI4> accessed 8 May 2024.

establishes a need to see this case from an intersectional perspective.⁷⁰¹ Taking into consideration the vulnerabilities of the applicant and the evident circumstances of the case, not only did the Court fail in its approach to gender-based violence cases by refusing to acknowledge that there had been a breach of Article 2, but also overlooked to examine the case under Article 14.

While the principles set forth in *Kurt* was not taken into consideration by the very same court in *Tkheldze v Georgia*⁷⁰², it found that police inaction could be considered a systemic failure depending on the risk assessment criteria. The Court drew a broader structural context around domestic violence by asserting that “(...) violence against women, including domestic violence, has been reported to be a major systemic problem affecting society in the country at the material time”.⁷⁰³ The need of public authorities to assess the domestic violence cases according to the “special diligence” criteria therefore seems to be the current ongoing assessment method of the Court, which is a noteworthy approach when applied correctly.

In sum, with regards to domestic violence cases, it could be said that the Strasbourg Court does make an effort not to employ paternal or patronizing language in its judgments⁷⁰⁴, and has seemingly grasped the need to employ a gender perspective in its

⁷⁰¹ Lisa Maria Weinberger, “Kurt v Austria: A Missed Chance to Tackle Intersectional Discrimination and Gender-Based Stereotyping in Domestic Violence Cases” (*Strasbourg Observes*, 18 August 2021) <https://strasbourgobservers.com/2021/08/18/kurt-v-austria-a-missed-chance-to-tackle-intersectional-discrimination-and-gender-based-stereotyping-in-domestic-violence-cases/> accessed 8 May 2024.

⁷⁰² *Tkheldze v Georgia*

⁷⁰³ *Tkheldze v Georgia* para.56.

⁷⁰⁴ Referring to the way Court’s reluctance to consider women to be inherently vulnerable to domestic violence while acknowledging in its recent judgments that domestic violence does affect women disproportionately, See: Peroni and Timmer, 60.

adjudication. The practice of it, however, still leaves much to be desired. It is evident from the case law discussed above that the Court still does fall victim to prejudiced and stereotyped understandings of gender relations, and very rarely does it acknowledge the root cause of problems. Indeed, while its referrals to the “climates conducive to perpetuation of domestic violence” is important, the Court, consciously or unconsciously, mainly serves as a patchwork and gender stereotypes that belie the State unresponsiveness to domestic violence remains unnamed and uncontested.

B. Gender Stereotypes and Bodily Autonomy

1. Sexual Violence

Justifications for sexual violence, victim-blaming, perfect victim ideation, secondary victimization are amongst the many difficulties that victims face during sexual violence trials.⁷⁰⁵ Women's responses to sexual violence are therefore categorized and presented as arguments against the credibility of their claims. The ECtHR's caselaw on sexual violence is therefore an important reference point, because such judicial stereotyping needs to be called out and contested and the "wide range of behavioral responses to sexual violence and rape which victims exhibit"⁷⁰⁶ recognized.

One of the first and perhaps influential cases that came before the Court is the case of *Aydın v Turkey*.⁷⁰⁷ The case concerns the applicant who was seventeen-years-old at the time of the events, who had been threatened, subjected to horrific assaults and torture by the gendarmerie and sexually assaulted. After she, along with her father and sister-in-law who had also been subjected to torture by the gendarmerie, went to the public prosecutor to report what had happened, the Public Prosecutor sent the applicant to a medical practitioner to "determine whether she was a virgin" rather than to seek evidence of sexual violence. Even though the medical practitioner determined that there were physical injuries and bruises, because he had no prior experience with sexual violence survivors,

⁷⁰⁵ Bermúdez Figueroa, Dabetić, Yuste and Saeidzadeh, 126-127.

⁷⁰⁶ "Istanbul Convention" Explanatory Report, para. 192.

⁷⁰⁷ *Aydın v Turkey* App no. 23178/94 (ECtHR [GC], 25 September 1997).

he did not make a determination on sexual violence. The applicant was forced to go under two more instances of examinations, all of which were of the “virginity check” origin.

The strongest part of this case was the Court examining sexual violence in the context of Article 3, prohibition of torture. The Court further acknowledged the psychological effects of sexual violence alongside the physical effects by reasoning that sexual violence left “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”.⁷⁰⁸ Contextualizing and conceptualizing sexual violence as amounting to torture is a landmark reasoning by the Court and thus could provide to be the basis for future sexual violence cases to come.⁷⁰⁹

While certainly being a remarkable decision on part of the Court, one glaring point in the present case was the applicant’s Kurdish origin. The dismissive behavior of the Public Prosecutor, the ill-treatment and inflicted torture, the reason she was taken to the gendarmerie headquarters blindfolded in the first place all have to do with the fact of her ethnicity. As such, the Court’s emphasis on her “sex and youth”⁷¹⁰ and the unique vulnerability of her as a detainee⁷¹¹ could have been intersectioned with her Kurdish origins and a case of Article 14 could have been presented as well.

In the years following, another landmark case on sexual violence had come before the Court and showcased the progression of its jurisprudence. In *M.C. v Bulgaria*⁷¹², the

⁷⁰⁸ *Aydın*, para. 83.

⁷⁰⁹ Prażmowska-Marcinowska, 8.

⁷¹⁰ *Aydın*, para. 84.

⁷¹¹ *Aydın*, para. 83.

⁷¹² *M.C. v Bulgaria* App no. 39272/98 (ECtHR, 4 December 2003).

rape myth of resisting sexual violence had been at play in the conduct of public authorities which led to a climate of impunity.⁷¹³ The applicant, who had been fourteen years-old at the time of the events, claimed that she was sexually assaulted by two different men. Her allegations were questioned by the public authorities on the grounds of lack of evidence that the perpetrators used threats or violence, applicant's calm behavior after the events, her going out with one of the alleged perpetrators, and no resistance on the applicant's part as well as attempts to seek help.⁷¹⁴

The Court established that States have a positive obligation under Articles 3 and 8 to effectively investigate and punish sexual violence⁷¹⁵ and most importantly held that old and formalistic conceptions of sexual violence negatively impact State response to such crimes. In that, it was progressive of the Court to reason that the requirement of proof of physical force and physical resistance have mostly been abandoned by other Convention States, lest such a rigid approach risk leaving certain forms of sexual violence unpunished, and that a focus on lack of consent has started to be the norm.⁷¹⁶ Having formed this basis, the Court examined the case and asserted that the public authorities failed to conduct an effective investigation by not exploring all available possibilities, and that this was due to the persisting opinions that the situation was a "date rape" where they could not "infer proof of lack of consent" because there were not any hard evidences of the sexual violence such as "traces of violence and resistance or calls for help".⁷¹⁷ The Court concluded that,

⁷¹³ Evola, Krstić, Rabadán, 159.

⁷¹⁴ *M.C.*, paras. 57-61.

⁷¹⁵ *M.C.*, para. 153.

⁷¹⁶ *M.C.*, paras. 156-166.

⁷¹⁷ *M.C.*, paras. 178-179.

the authorities must have explored all the facts by focusing on “the issue of non-consent”⁷¹⁸ and therefore the State had violated its positive obligations under Articles 3 and 8.

However, the approach of the public authorities, the fact that they very clearly relied on stereotypical views regarding sexual violence and sexual violence victims, should have opened up an examination of Article 14 as well. Much like the Court’s acceptance that domestic violence disproportionately affecting women renders the issue a gender-based one, the same argument could have been made with regards to sexual violence as well, especially where rape myths target women and their conduct.

In a similar vein, in *DJ v Croatia*⁷¹⁹ the Court again refused to make an examination under Article 14 with regards to the gender stereotypes employed and exhibited by public authorities. In the case, the applicant claimed that she had been sexually assaulted by the perpetrator on his private boat. After calling the police, the applicant’s claims and complaints that she had been sexually assaulted had been thoroughly undermined because she was under the influence of alcohol and that she was “disrupting public order”, and her requests that the officer secure the evidence at the scene was denied by the curt declaration from the officer that “she had not been raped”. During the domestic trials, it was evident from the approach of the judges to the case that they held strong contempt for the applicant due to her conduct or how they perceived her to be.

⁷¹⁸ *M.C.*, para. 181.

⁷¹⁹ *D.J. v Croatia* App no. 42418/10 (ECtHR, 24 July 2012).

Judicial stereotyping in these proceedings employed the rape myths that women “deserve” or “provoke” sexual violence by the clothes they wear or the way they act.

The Court did pick up on this notion, and asserted that the judge, by voicing a strong opinion of the applicant largely based on his disagreement on her conduct, meant that the judge lacked impartiality.⁷²⁰ Furthermore, the Court stressed that “the allegation that a rape victim was under the influence of alcohol or other circumstances concerning the victim’s behavior or personality cannot dispense the authorities from the obligation to effectively investigate”⁷²¹, and that there had been “objective flaws” in the investigation that demonstrated a “passive attitude” on part of the public authorities.⁷²² It is however certainly questionable that the Court pointed out all of these shortcomings and yet did not find a violation of Article 14, as these types of conduct is evidently gender-based.

Similar reasonings of victim-blaming or putting the victim on trial in domestic courts have persisted in judicial conduct regardless of the country of origin. As examples, in *I.P. v the Republic of Moldova*⁷²³ the domestic courts alluded to women’s “immoral behavior” as the cause of sexual violence, as well as dependence on “resistance” arguments, which the Court examined by referring to the *M.C. v Bulgaria*. However, the Court yet again failed to acknowledge that gender-based stereotypes had been the root

⁷²⁰ *D.J.*, paras. 99-100.

⁷²¹ *D.J.*, para. 101.

⁷²² *D.J.*, para. 103.

⁷²³ *I.P. v the Republic of Moldova* App no. 33708/12 (ECtHR, 28 April 2015).

cause behind the violations made by State officials, and therefore passed on the opportunity to tackle sexual violence as a form of discrimination against women.⁷²⁴

In *Y v Slovenia*⁷²⁵ the stereotype at play had again been that women who do not consent, who do not want to be sexually assaulted must, then, resist and fight back. The domestic authorities in the case questioned why the applicant, who was eleven years-old, did not fight back against the assaults by “scratching or biting”⁷²⁶ along with many improper questions regarding her credibility, as if she was standing trial, adding to her secondary victimizations.⁷²⁷ The Court, again, did not see any of these issues from a gender lens, however it did set standards for victim protection in sexual violence cases stating that cross-examination shall not be used for intimidating or humiliating the victim, and that it is first and foremost the responsibility of the presiding judge to ensure that respect for the applicant’s personal integrity was adequately protected at the trial, referencing the problem of secondary victimization.⁷²⁸

The need to tackle such “ideal/perfect victim” stereotypes were especially present in *M.G.C. v Romania*.⁷²⁹ The domestic authorities in the case relied on the arguments made by the perpetrators and their counsel that the eleven-year-old provoked them by being “scantly dressed” and thus the charges were dropped. Again, in line with *M.C. v Bulgaria*, the Court found a violation of Articles 3 and 8 on the grounds of lack of effective

⁷²⁴ Yaiza Janssens, “I.P. v. The Republic of Moldova: Missed Opportunity to Tackle Rape Myths” (*Strasbourg Observes*, 20 May 2015) <https://strasbourgobservers.com/2015/05/20/i-p-v-the-republic-of-moldova-missed-opportunity-to-tackle-rape-myths/> accessed 10 May 2024.

⁷²⁵ *Y v Slovenia* App no. 41107/10 (ECtHR, 28 May 2015).

⁷²⁶ *Y*, para. 22.

⁷²⁷ *Y*, paras. 31-37.

⁷²⁸ *Y*, para. 108-9.

⁷²⁹ *M.G.C. v Romania* App no. 61495/11 (ECtHR, 15 March 2016).

investigation and punishment of sexual violence, but, as plain as such stereotypes are, did not issue commentary on the gender-based nature of these issues. Here, Romanian authorities engaged with two stereotypes, namely that by dressing a certain way women “ask” to be sexually violated, or in this case, women themselves initiate the conduct. Second, victims, especially child victims, are expected to report the sexual abuse to their parents immediately.⁷³⁰ Further, victims are expected to fight back and resist, call for help, etc. to lament their lack of consent. In all of these cases these prescriptive gender stereotypes affected the respective outcomes in domestic litigation, yet the Strasbourg Court, while acknowledging that the public authorities failed in their response to the cases, refused to examine the very reason behind such shortcomings.

In *N.Ç. v Turkey*⁷³¹ the focus of the Court’s decision was on the secondary victimization of the applicant, which could also have been the case for the above-mentioned cases, especially *Y. v Slovenia* as well. In the case, N.Ç. was forced into prostitution when she was fourteen years-old, was deprived of her liberty and subjected to qualified sexual assault by many people. N.Ç. later filed a complaint with the Public Prosecutor's Office and twenty-eight people were identified as perpetrators and twenty-seven of them were arrested. After the first hearing, which had been decided will be a closed one, relatives of the perpetrators attacked N.Ç. and her representatives. As a result, N.Ç.'s lawyers requested protective measures to be implemented and for the case to be the transferred for security reasons, which were rejected by the court. In addition, the trials

⁷³⁰ Lourdes Peroni, “Clothes on Trial: M.G.C. and the Need to Combat Rape Stereotypes” (*Strasbourg Observes*, 20 April 2016) <https://strasbourgobservers.com/2016/04/20/clothes-on-trial-m-g-c-and-the-need-to-combat-rape-stereotypes/> accessed 10 May 2024.

⁷³¹ *N.Ç. v Turkey* App no. 40591/11 (ECtHR, 9 February 2021).

lasted eleven years, during which time N.Ç. was subjected to numerous and repeated detailed medical examinations at the request of the court, the reasons for which were not explained, and was confronted with her perpetrators in court hearings without support from social counselors, psychologists or other experts. She was moreover forced to reconstruct and describe in detail the acts of sexual violence of which she was the victim of in front of her perpetrators, and no legitimate or necessary reason for any of these was given by the domestic courts. Despite all this, the judicial body did not take any measures to protect N.Ç. from the perpetrators, ignored the threats and violence of some of the perpetrators and family, and adopted the view that N.Ç. consented to the acts of sexual violence in the end.

The Court drew special attention to the fact that, given the applicant's "young age at the time of the events, she had been in a vulnerable situation"⁷³², and in this context, the secondary victimization she suffered without a doubt fell within the scope of Article 3. The Court further asserted that in such cases, the question should be whether the State had sufficiently protected the applicants' rights, especially their personal integrity.⁷³³ Thus the Court found that the State failed to aid the applicant by never providing an expert or a psychologist for her during the interrogations and the proceedings; failed to protect her from further aggrandization from the perpetrators; unnecessarily caused anguish to the

⁷³² "La Cour confirme que, au vu de son jeune âge au moment des faits, la requérante était dans une situation de vulnérabilité" *N.Ç.*, para. 100.

⁷³³ *N.Ç.*, para. 103.

applicant by forcing her to reconstruct the sexual violence she had suffered; and unnecessarily interfered with her physical and psychological integrity.⁷³⁴

On the issue of consent, which the domestic courts incredulously asserted was present even though the applicant had been a minor at the time, the Strasbourg Court held that in sexual violence cases the primary focus should be on the lack of it, and reiterated the vulnerable situation of the applicant.⁷³⁵ As a result, the Court concluded that the conduct of public authorities did not comply with the obligation to “protect a child victim from sexual exploitation and abuse”.⁷³⁶ Despite being an overall good adjudication on the part of the Court and further a great progress in the Court’s case law regarding sexual violence in terms of its detailed examination of the secondary victimization, there are still a few points that need discussion.

For one, the Court, while actually referring to the “sexual exploitation” of the applicant, did not consider that the case could have fallen under Article 4 and involuntary servitude, as the Court established in *S.M. v Croatia* that Article 4 not only covered human trafficking but also “exploitation of prostitution” even without the other elements of human trafficking being present.⁷³⁷ Further, the Court kept referring to N.Ç. being vulnerable, but did not clarify on what grounds. However, a more thorough exploration of her poverty, the stigmatizing aspect of the society she lives in, and her Kurdish ethnicity

⁷³⁴ *N.Ç.*, paras. 105-112.

⁷³⁵ *N.Ç.*, paras. 113-119.

⁷³⁶ *N.Ç.*, para. 133.

⁷³⁷ *S.M. v Russia* App no. 75863/11 (ECtHR, 22 October 2015) para. 54; See: Vladislava Stoyanova, “The Grand Chamber Judgment in *S.M. v Croatia*: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR” (*Strasbourg Observes*, 3 July 2020) <https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/> accessed 10 May 2024.

could have been incorporated into the judgment for a more intersectional analysis of the situation. Further, instead of namedropping secondary victimization, it could have been beneficial for the future cases to come before the Court to include a literature on the issue.

Secondary victimization occurs when the questions posed by the judge, the perpetrator, or the counsel to the victim in order to clarify the incident causes the victim to be burdened with recounting the incident over and over again, thus exacerbating her trauma or creating further traumas. In addition, such a questioning is more often than not of the aggressive nature and the questions themselves are based on gender stereotypes.

Further, requiring the victim to recount the already traumatic events over and over, most times even in the presence of the perpetrators, as well as the rape myths' further effects cause the victim to relive the same experiences all over again, leading to long-term consequences on their mental health as well as physiology.⁷³⁸ The fact that the crime in question is about private life due to its nature, the fact that the victim is often under pressure arising from the dominant atmosphere of the court environment and the social prejudices she has felt since the moment of the incident, and on top of everything, confronting the defendant causes irreversible psychological traumas in her.

The Court acknowledged secondary victimization in *J.L. v Italy*⁷³⁹ where the case concerned the applicant's claims that she had been subjected to sexual violation by seven men while she had been unresponsive due to alcohol. During the investigation where she

⁷³⁸ See: Nicole Maiorano, Áine Travers, Frédérique Vallières, "The Relationship Between Rape Myths, Revictimization by Law Enforcement, and Well-Being for Victims of Sexual Assault" (2023) 29 (14) *Violence Against Women* 2873-2890.

⁷³⁹ *J.L. v Italy* App no. 5671/16 (ECtHR, 27 May 2021).

had been questioned three times and the trials which had seventeen public hearings open to the public, her private life had been thoroughly questioned in cross-examinations, ranging from her familial and personal situation to her sexual experiences, and even her prior participation in a sex-themed workshop.⁷⁴⁰ The perpetrators argued that *J.L.* had initiated that they all have sexual intercourse with her, and that she had been provocative due to her clothing and her behavior.⁷⁴¹ While the domestic courts did not find the applicant's recounting of the events consistent with the evidence presented to the court, it nevertheless held that the applicant had been visibly impaired and that she had been in a "state of inferiority"⁷⁴² and therefore was unable to consent, finding the parties guilty. The case was then appealed, in which the Court of Appeals, noting the inconsistencies in the applicant's story, and further alluding to her familial situation of her mother being ill and her father being absent, her "fragile but creative and uninhibited", "bisexual", "vulgar", "extremely provocative" nature, having sexual intercourses with people she does not know very well, her "ambivalent attitude towards sex" and "lascivious" dancing, her underwear, her conduct and lack of resistance, reversed the judgment.⁷⁴³

In the face of such textbook victim-blaming consideration of the events, the Strasbourg Court was neglectful in its recognition and contestation of gender stereotypes present in the case. Even though the Court did acknowledge that the Court of Appeals breached its positive obligations to protect the applicant from further stigmatization and

⁷⁴⁰ *J.L.*, para. 24

⁷⁴¹ *J.L.*, para. 26.

⁷⁴² *J.L.*, para. 35.

⁷⁴³ *J.L.*, paras. 40-47.

secondary victimization⁷⁴⁴, as established in *Y. v Slovenia*, and contended that the language used by the court conveyed the prejudices inherent in the Italian society and impeded effective protection of the rights of victims of gender violence⁷⁴⁵, it dismissed the applicant's claims that the public authorities' attitude towards her and the acquittal decision of the Court of Appeals stemmed from prejudice based on gender and amounted to discrimination.⁷⁴⁶

It was important of the Court to hold that it was “essential that the judicial authorities avoid reproducing sexist stereotypes in judicial decisions, minimizing gender-based violence and exposing women to secondary victimization by using guilt-inducing and moralizing language likely to discourage victims' confidence in the justice system”, but avoiding in such circumstances is not enough, and the usage of stereotypes should be explicitly denounced. The nature of the slights on *J.L.* were undoubtedly gender-based and sexism-motivated, clearly amounting to grounds for discrimination. Further, the Court held that *J.L.* was not particularly in a vulnerable situation⁷⁴⁷, which again begs the question, what makes someone vulnerable? This approach seems rather gender-insensitive, as vulnerability especially in sexual violence cases shall not be scarcely and hierarchically granted but rather be inclusive and accommodating to the diverse and particular situations of victims.⁷⁴⁸

⁷⁴⁴ *J.L.*, para. 119.

⁷⁴⁵ *J.L.*, para. 140.

⁷⁴⁶ *J.L.*, para. 145-147.

⁷⁴⁷ *J.L.*, para. 127.

⁷⁴⁸ Margarita S. Ilieva, “J.L. v. Italy: A Survivor of Trivictimisation – Naming a Court’s Failure to Fully (Recognize and) Acknowledge Judicial Gender-based Revictimization” (*Strasbourg Observes*, 6 September 2021) <https://strasbourgobservers.com/2021/09/06/j-l-v-italy-a-survivor-of-trivictimisation->

2. Issues Regarding Bodily Integrity and Abortion

Reproductive rights have been a highly debated topic in the Strasbourg Court. With anti-gender movements' pushbacks on the vested rights of women, most prominent cases have been made for the anti-abortion stances.⁷⁴⁹ A reason for this might be that abortion is one of the few areas concerning women that exists in the intersection where patriarchal, governmental, and religious dominions meet. In this sense, where reproductive rights in general are distinctly gendered issues, the high stakes of control require that patriarchy, the State and religious authorities work in tandem. As discussed above, positioning the topic of abortion as one where the interests of the women oppose the interests of the fetus creates a false dilemma and leads to an impasse, where the Court generally opts for using the margin of appreciation doctrine which does not benefit women at all, on the contrary means opening up more avenues for anti-gender sentiments to be exercised.

The Court examines the issue of abortion as a competing rights issue and seeks to strike a balance, hence it is important to look into the case law questioning whether the States have a duty to protect the life of the fetus under Article 2. The Court regarded the fetus not as "a person directly protected by Article 2" and rather implicitly limited its potential interests by the mother's rights and interests.⁷⁵⁰ Regarding State responsibility, the Court had left it to their margin of appreciation to whether consider life from the moment of conception, or from birth, or any other place in between, and the effective

naming-a-courts-failure-to-fully-recognize-and-acknowledge-judicial-gender-based-revictimisation/ accessed 10 May 2024.

⁷⁴⁹ This notion could be inferred from the Polish abortion ban in 2020, or the overturning of *Roe v Wade* in the United States. For more: Sanders, 281-283.

⁷⁵⁰ *Vo v France* App no. 53924/00 (ECtHR [GC], 8 July 2004), para. 80.

judicial remedies to follow it.⁷⁵¹ However, in a hypothetical approach it questioned whether the States would have breached their obligations under Article 2 had it been applicable.⁷⁵² In essence, the Court approached the issue by leaving the determination of fetus' rights to the States while acknowledging that the rights and interests of the mother limits those of the fetus, even though the fetus may benefit from a range of protective measures and mainly through its mother.⁷⁵³

In a similar manner, the Court remained “non-interventionist” with regards to the substantive obligations of States to grant access to abortion, but on the procedural level held that if, in its national legislation, a State had granted access to abortion then it shall guarantee that this right is not merely a theoretical one but is rather accessible in practice.⁷⁵⁴

In *A, B and C v Ireland*⁷⁵⁵ the three applicants sought out that the Court recognize the Irish abortion laws that only permitted abortions to be performed when the life of the mother was in danger, not any other interests or health concerns, meant a violation of their rights under Articles 3 and 8. All three of the applicants had traveled to England to have abortions performed but experienced serious health complications upon their return. According to Irish laws, voluntary termination of pregnancy was punishable by a life

⁷⁵¹ *Vo*, para. 82.

⁷⁵² *Vo*, para. 81.

⁷⁵³ *Vo*, para. 86.

⁷⁵⁴ Spyridoula Katsoni, “Towards a Feminist Interpretation of the ECHR’s Provisions on Access to Abortion” (*Volkerrechtsblog*, 21 September 2023) <https://voelkerrechtsblog.org/towards-a-feminist-interpretation-of-the-echrs-provisions-on-access-to-abortion/> accessed 11 May 2024; “*Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it*” *Tysiqc v. Poland* App no. 5410/03 (ECtHR, 20 March 2007) para. 106.

⁷⁵⁵ *A, B and C v Ireland* App no 25579/05 (ECtHR [GC], 10 December 2010).

sentence in prison, and the rationale behind was that the mother and the fetus had equal claims to protection.

For Article 3, the applicants argued that “the criminalization of abortion was discriminatory (crude stereotyping and prejudice against women), caused an affront to women’s dignity and stigmatized women, increasing feelings of anxiety” and that “the two options open to women – overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations – were degrading and a deliberate affront to their dignity”.⁷⁵⁶ Further, the applicants maintained on the grounds of Article 8 that the provisions concerned the most intimate part of their private lives, and the restrictions to access to safe and lawful abortions had infringed on their rights.⁷⁵⁷

The Court dismissed all applicants’ claims of Article 3, and then made a distinction between the first and second applicants, A and B, and the third applicant, C for an examination of the alleged violations of Article 8. The Court started by asserting that Article 8 did not, by its text, ensure a right to seek abortion, but it did provide a safeguard for the applicants’ private lives. With regards to the first and second applicants, the Court noted that within the context of the right to personal autonomy and to physical and psychological integrity, they sought to have abortions for reasons of health and well-being, and the restrictions in place therefore amounted to an interference with Article 8.⁷⁵⁸ The essential question for the Court was then whether the prohibition provided to be an unjust interference. On this point, the Court found that the State pursued a legitimate aim of

⁷⁵⁶ *A, B and C*, para. 162.

⁷⁵⁷ *A, B and C*, paras. 168-179.

⁷⁵⁸ *A, B and C*, para. 216

protecting the life of the fetus as well as the public morals in Ireland, and therefore did not find a violation.⁷⁵⁹ For the third applicant, however, the Court reasoned that since she had suffered from a rare form of cancer and she believed that if she were to go through with the pregnancy then that would lead to a relapse, this risk to her life caused by pregnancy clearly concerned the fundamental values and essential aspects of her right to respect for her private life.⁷⁶⁰ The Court further considered that the penalization of abortions caused a “significant chilling effect” on both the applicant and the doctors⁷⁶¹ and therefore the failure of public authorities to put into effect accessible and effective procedure in which the applicant could have assessed whether she qualified for a lawful abortion constituted a violation of Article 8.⁷⁶²

The judgment and the reasoning of the Court in this case is the furthest thing away from adopting a gender perspective, as it considered almost all possible factors except for the women’s choice. As such, public morals, the fetus’ rights, the risk of cancer, all had a weight on the judgment but the personal autonomy of the applicants. This is further evident from the Court making a distinction between the applicants, almost as if the first and second applicants, because their situation was not necessitated by the risk of fatality, do not deserve a consideration or that their say over their own body and well-being do not matter. This “non-interventionalist” approach therefore leaves the selfhood and the rights of women entirely up to the mercy of national legislations. However, one silver lining from the *A, B and C* decision was the acknowledgement by the Court in the context of the

⁷⁵⁹ *A, B and C*, para. 227.

⁷⁶⁰ *A, B and C*, para. 250.

⁷⁶¹ *A, B and C*, para. 254.

⁷⁶² *A, B and C*, para. 267.

third applicant that women's right to make informed decisions about their reproductive health is protected under Article 8, and that States have positive obligations to ensure that this right is effectively realized.

In *R.R. v Poland*⁷⁶³ the issue at hand concerned the reproductive freedom of the applicant, who was deliberately refused genetic tests during her pregnancy that would determine whether the fetus would be born with genetic abnormalities. The doctors purposely withheld this information from the applicant until the legal limit for termination of pregnancy had passed, and only when it was lawfully too late for an abortion that it was revealed the unborn carried genetic abnormalities and as a result was born with Turner's syndrome. The case was examined under Articles 3 and 8, and the Court found a violation on both accounts, which shows that the Court's approach to the procedural aspects of reproductive health, mainly the right of women to make informed decisions, is continuous.

However, it should be noted in both cases, the situation women were in coincided with the lawful abortion exceptions granted by national legislation, and the Court did not purely rely on the personal autonomy of the women in question. Another such approach can be seen in *P and S v Poland*⁷⁶⁴ where the case concerned a fourteen-year-old applicant who had been sexually assaulted and got pregnant as a result of it. According to national legislation, pregnancies that happen as a result of sexual violence are also one of the exceptions to the abortion restrictions, and even though the applicant had acquired a report from the Prosecutor certifying this fact, he had been repeatedly denied abortion by

⁷⁶³ *R.R. v Poland* App no 27617/04 (ECtHR, 26 May 2011).

⁷⁶⁴ *P and S v Poland* App no. 57375/08 (ECtHR, 30 October 2012).

hospitals. The Court again builds on its reasoning in *Tysiqc* and *R.R.* and holds that if States have regulations in place that allow abortions, then it also must make sure that that right is accessible in practice.

Further, the Court asserts in its examination under Article 3 that the applicant was in a state of great vulnerability, as in addition to the sexual abuse, she was further pressured, coerced, and manipulated, and the behavior of the public authorities only compounded her situation.⁷⁶⁵ The Court further asserted that the conduct of public authorities showed a “lack of profound understanding of her predicament”⁷⁶⁶ and was “marred by procrastination, confusion, and lack of proper and objective counselling and information”.⁷⁶⁷ All of these sentiments by the Court, even though it did not name it, actually refers to a gender perspective and the negative outcomes of its absence.

It is astounding that the Court, acknowledging that even minors are and should be capable of making decisions over their reproductive health and must have personal autonomy⁷⁶⁸, does not see it necessary to tackle the substantive question regarding the right to abortion. Further, having put emphasis on its case law on the procedural accessibility to abortion, the Court rejects the applicant’s claims that she was not provided with emergency contraception, or claims of discriminatory treatment. All of the restrictions in the abovementioned cases are some forms of expression of systemic gender discrimination, whether based on inherent misogyny or religious beliefs or a population

⁷⁶⁵ *P and S*, paras. 162-164.

⁷⁶⁶ *P and S*, para. 165

⁷⁶⁷ *P and S*, para. 167.

⁷⁶⁸ *P and S*, para. 109.

agenda of the State, and not merely one-time refusals or limitations to women's reproductive freedom.

In its most recent-to-date judgment concerning abortion, *M.L. v Poland*⁷⁶⁹, which concerns a situation similar to *R.R.* where the applicant was effectively denied getting an abortion because the fetus would be born with Down syndrome, the Court held onto its approach from the previous case law and emphasized that Article 8 did not entail a right to abortion.⁷⁷⁰ Further, the Court rejected the applicant's claims that her rights under Article 3 had been breached, the reasoning being that the circumstances the applicant had been in did not reach the minimum threshold of severity required.⁷⁷¹ However, the Separate Opinion of Judges Jelić, Felici and Wennerström demonstrate that the applicant indeed was in a vulnerable situation as the last-minute denial of her abortion and the following events caused her serious emotional suffering.⁷⁷²

The reason behind the Court's inconsistent application of Article 3 seems to be that in assessing individual vulnerabilities, the Court focuses on the parameters that are external to the pregnant persons' control, such as whether pregnancy was a result of rape, their age, or the health risks, or whether the fetus has a genetic abnormality.⁷⁷³ Regardless of the country of origin, the abortion debate seems to revolve around three possible situations: As such, when the woman is the victim of a sexual violence, when her health

⁷⁶⁹ *M.L. v Poland* App no. 40119/21 (ECtHR, 14 December 2023).

⁷⁷⁰ *M.L.*, paras. 93-94.

⁷⁷¹ *M.L.*, paras. 82-85.

⁷⁷² *M.L.*, Judges Jelić, Felici and Wennerström Separate Opinion, paras. 3-6.

⁷⁷³ Vanessa Sauls-Avolio, "Rewriting Reproductive Rights: Applying Feminist Methodology to the European Court of Human Rights' Abortion Jurisprudence" (2017) 6 (2) *Feminists@law* 1, 15.

or life is in danger, or when there is a risk of genetic abnormalities in the fetus. It seems like this type of approach is heavily influenced by the inherent bias that abortion can be only justified when the woman is not “culpable”. In the last two instances, the woman *wants* to have the baby but situations outside her control – one extremely ableist and pro-eugenics – prevents her from doing so. In the first instance, it is not “her fault” that she was “violated”, the public morals would deem it *okay* for her to have a termination of pregnancy. Even then, though, there is an appropriate and acceptable type of sexual violence, one that is heavily depended on the ideal of a perfect victim and revolves around rape myths. Regardless, when it had been the woman’s *choice* to have sexual intercourse but not want to have a baby, crisis emerges and suddenly she is the culprit who must bear the responsibility of her actions.

Equating discrimination with differential treatment, as the Court does, therefore is too narrow an approach.⁷⁷⁴ Finding a comparison group for differential treatment in a case as unique as reproductive health of women is impractical, wrongs of stereotyping or bias, in this case mainly religious bias, is in and of itself discriminatory and are not comparative in nature.⁷⁷⁵ Therefore, the Court’s approach to these cases shall cease to be less focused on differential treatment and more on the fact that women are denied or made difficult to exercise their rights to bodily autonomy.

⁷⁷⁴ Alexandra Timmer, “Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law” (2015) 63 (1) The American Journal of Comparative Law 239, 252.

⁷⁷⁵ Ibid.

3. Body Politics

Many other issues have come before the Court with regards to women's autonomy over body and bodily integrity. States, often times implicitly, exert and exercise control over women's bodies in order to carry out certain agendas. This had been the dormant issue in *Khamtokhu and Aksenchik v Russia*.⁷⁷⁶ The legislation categorically exempted women, juveniles, and elderly people from life imprisonment, which left men between the ages of eighteen and sixty-five as the only group that could be sentenced to this penalty.

The Court found that indisputably, there had been a difference in treatment on grounds of sex and age, and the question for the Court became whether this difference of treatment pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realized.⁷⁷⁷ The majority held that, on the question of age discrimination, the difference in treatment had been proportionate. For the minors, the Court reasoned that the provision was in line with the need to protect and rehabilitate juvenile offenders⁷⁷⁸, and for the elderly, the exemption secured a realistic prospect of release.⁷⁷⁹ In terms of gender, however, the majority referred to national and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the "needs for protection of pregnancy and motherhood", and cited "public interest" as a reasoning.⁷⁸⁰ The State had supplied its own argument in a similar manner

⁷⁷⁶ *Khamtokhu and Aksenchik v Russia* App no. 60367/11 (ECtHR [GC], 24 January 2017).

⁷⁷⁷ *Khamtokhu and Aksenchik*, para. 69.

⁷⁷⁸ *Khamtokhu and Aksenchik*, para. 80.

⁷⁷⁹ *Khamtokhu and Aksenchik*, para. 81.

⁷⁸⁰ *Khamtokhu and Aksenchik*, para. 82.

that “the sentencing exception was justified in view of [women’s] special role in society which related, above all, to their reproductive function”.⁷⁸¹

Despite the fact that the Court reiterated its reasoning in *Konstantin Markin*⁷⁸² that any justification for differential treatment that references traditions, general assumptions or prevailing social attitudes, or similar stereotypes based on race, origin, color or sexual orientation, still in the end allowed a measure that perpetuated the very same stereotypes. The Court’s presented aim of protecting women from the gender-based violence in prisons in actuality amounted to “judicial paternalism” as Judge Turković asserted in a Concurring Opinion, and also portrayed women a naturally vulnerable group.⁷⁸³ Further, by not addressing the case with a gender perspective and not making assessments based on the specific vulnerabilities of groups of women, such as pregnant women, the Court expanded these vulnerabilities to every women and therefore encouraged the State’s position that women’s primary role in the society being a means of reproduction.⁷⁸⁴ Moreover, this reasoning reproduces the gender stereotype that women are “defined from the outset through motherhood” and that they are the primary caregivers, assuming an essentialist view of womanhood.⁷⁸⁵

In *Carvalho Pinto de Sousa Morais v. Portugal*⁷⁸⁶ another stereotype regarding womanhood had been at play. The applicant had suffered from a gynecological condition

⁷⁸¹ *Khamtokhu and Aksenchik*, para. 47.

⁷⁸² *Konstantin Markin v Russia* App no. 30078/06 (ECtHR [GC], 22 March 2012) to be examined below.

⁷⁸³ *Khamtokhu and Aksenchik*, Judge Turković Concurring Opinion, para. 3.

⁷⁸⁴ Benedita Menezes Queiroz, “Who Fits the Stereotype? Gender Discrimination Within the ECHR” (2023) Catolica Global School of Law Working Papers No. 3/2023 <https://ciencia.ucp.pt/ws/files/88166005/88165933.pdf> 14.

⁷⁸⁵ Queiroz, 15.

⁷⁸⁶ *Carvalho Pinto de Sousa Morais v Portugal* App no. 17484/15 (ECtHR, 25 July 2017).

for which she needed to undergo surgery. After the surgery, however, she started to experience intense pain and a loss of sensation in the vagina, suffered from urinary incontinence, had difficulty sitting and walking, and could not have sexual relations, was further depressed and had suicidal thoughts. In the domestic proceedings, as a result of an appeal, the Supreme Administrative Court reduced the amount of the non-pecuniary compensation for the damage suffered and also the amount of the compensation for the payment of domestic work. The Supreme Administrative Court added in its reasoning that “the plaintiff’s complaints are not new and that the surgical procedure only aggravated an already difficult situation (...) 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”.⁷⁸⁷ The domestic court further argued that regarding the amount of compensation awarded that the applicant had not lost her capacity to take care of domestic tasks and considering the age of her children she “only needed to take care of her husband” and does not need to hire a full-time maid.⁷⁸⁸

The applicant thus complained before the ECtHR that she had been discriminated against on the grounds of sex and age. The Court found a violation of Articles 8 and 14, and held that the main issue to be determined was whether the domestic courts’ reasoning led to a difference of treatment.⁷⁸⁹ The Court emphasized that the assumption that sexuality is not important to a fifty-year-old woman reflected traditional ideas of “female

⁷⁸⁷ *Carvalho Pinto de Sousa Morais*, para. 16.

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Carvalho Pinto de Sousa Morais*, para. 51.

sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people”.⁷⁹⁰ Moreover to this point, the assertion that the applicant needed to take care of her husband showed the “prejudices prevailing amongst the judiciary”, in other words, pointed to a case of judicial stereotyping.⁷⁹¹ The Court then established a comparison between two other cases that the domestic court had ruled and the applicant’s case, noting that the domestic courts found that the men who were fifty-five and fifty-nine respectively who also could no longer have normal sexual intercourse due to medical malpractice suffered from self-esteem issues and that this situation had resulted in a “tremendous blow” and “severe mental trauma” for the men.⁷⁹² In view of these, the Court concluded that there had been a violation of Article 14 taken in conjunction with Article 8.

The statements made by the Court in this case has been greatly welcomed as the Court’s reasoning included strong points of feminist theory. However, it has also been a target of criticism, especially the comparison made with the two cases concerning medical malpractice on men. Judge Yudkivska argued in her strong Concurring Opinion that a comparison had been unnecessary, as the language of the judgments had been discriminatory in and of itself.⁷⁹³ In fact, the domestic judgments do not refer to any differences between the sexual needs of men and women, but explicitly and solely refers to women’s sexual life in a prejudiced manner. In other words, Judge Yudkivska asserted that the domestic courts equated women’s sexual life with procreation, and it was precisely

⁷⁹⁰ *Carvalho Pinto de Sousa Morais*, para. 52.

⁷⁹¹ *Carvalho Pinto de Sousa Morais*, paras. 53-54.

⁷⁹² *Carvalho Pinto de Sousa Morais*, para. 55.

⁷⁹³ *Carvalho Pinto de Sousa Morais*, Judge Yudkivska Concurring Opinion.

this point at which gender-based discrimination occurred. Judges Ravarani and Bošnjak in their joint Dissenting Opinion rejected that the issue was gender-related and that the Court failed to provide a comparison ground of “two sets of case-law that would show a difference in treatment based on gender”, and that the issue had been solely about the difference of age. In response, Judge Yudkivska held that the issue had been an intersection of age and gender. Judicial stereotyping had, in fact, affected the judicial assessment of evidence in the present case, and that should have been the sufficient grounds for finding a violation of Article 14. Further, seeking a comparator in discrimination law in effect obscures the unique disadvantage a group faces and reiterates the sameness/difference ideology that MacKinnon and feminist legal theorists had found to be an impediment of progress towards substantive equality.⁷⁹⁴

In this sense, *G.M. and Others v Moldova*⁷⁹⁵ presented a horrific intersection between personal autonomy, bodily integrity, reproductive freedom, and intellectual disabilities. *G.M. and Others* concerned the imposition of abortions and other contraceptive measures on women with intellectual disabilities. Between the years 1998 and 2007 three residents of a neuropsychiatric asylum had been sexually assaulted by the head doctor and during that time the applicants claimed that they had been subjected to forced abortions and then subsequently made to have intrauterine contraceptive devices (IUD's) implanted against their will, in order to prevent future pregnancies. All three applicants had lodged criminal complaints against the sexual violence and forced birth-

⁷⁹⁴ Lourdes Peroni and Alexandra Timmer, “Bah v UK: On Immigration, Discrimination and Worrisome Reasoning” (*Strasbourg Observes*, 12 October 2011); See: Catherine MacKinnon, “Towards a Feminist Theory of the State”, 216.

⁷⁹⁵ *G.M. and Others v Moldova* App no. 44394/15 (ECtHR, 22 November 2022).

control methods, but their claims were repeatedly rejected and undermined, the Prosecutor going as far as to say that “the pregnancies of the first and second applicants had been terminated in accordance with the law⁷⁹⁶ and with their consent; that, in the absence of medical records to the contrary, the third applicant had never been pregnant; and that the applicants had not been sterilized”.⁷⁹⁷ A separate criminal investigation, however, revealed that the head doctor had sexually assaulted a total of sixteen residents of the neuropsychiatric asylum including all three applicants.⁷⁹⁸

The applicants complained that their Convention rights had been violated under Article 8 as the Court’s standard clause for issues relating to bodily autonomy and integrity, but the Court reconceptualized the complaint to fall under Article 3, considering the nature of the medical interventions and the applicants’ vulnerability “resulting from such elements as their gender, disability and institutionalization”.⁷⁹⁹ The Court held that there had been a breach of Article 3 on both procedural and substantive grounds. The Court further reiterated States’ positive obligations to put in place appropriate and effective legal framework for combating involuntary sterilization by drawing an intersectional comparison between Roma women as a vulnerability ground and women with intellectual disabilities.⁸⁰⁰ This had been an important point to make, as the Court had judged on a case concerning intellectual disability and bodily integrity before⁸⁰¹, but

⁷⁹⁶ According to the Prosecutor, the Moldovan domestic law had not required the patient’s consent for the termination of a pregnancy until 2006, but in any case, the applicants did give consent. *G.M. and Others*, para. 28.

⁷⁹⁷ *G.M. and Others*, para. 24.

⁷⁹⁸ *G.M. and Others*, para. 36.

⁷⁹⁹ *G.M. and Others*, para. 89.

⁸⁰⁰ *G.M. and Others*, paras. 111-112.

⁸⁰¹ *X and Y v the Netherlands* App no. 8978/80 (ECtHR, 26 March 1985).

back then had only found a violation of Article 8 and had not considered such a situation as a particular form of vulnerability.

In such cases, the persistent problem is the authorities in question taking a paternalistic approach and erasing the agency of women, especially when mental health is in question. The State practices already show paternalism, as traditional beliefs and biases assume that intellectual disability is a sufficient reason for such practices of sterilization or forced contraception/abortion, justified as being both for the sake of the mother and the child. Such pro-eugenics ideas and stereotypes on the capabilities of people who are neurodivergent are reflected therefore in the regulation and practices of States.⁸⁰² Thus, it was important of the Court to acknowledge the “particular vulnerability” of the intersection of neurodivergence and gender creates, without taking a paternalistic or pathologizing tone, acknowledging the agency of women with intellectual disabilities. The Court notes in particular the systemic nature of such practices⁸⁰³ and emphasizes the existence of harmful stereotypes that “persons with mental disabilities should not procreate”.⁸⁰⁴

The issue, however, is the refusal of the Court to employ Article 14. Even though the Court seems to have started to adopt the phrase “particularly vulnerable” to mean

⁸⁰² Eva Servin and Emma Várnagy, “G.M. and Others v Moldova: Beyond Paternalism for Women with Intellectual Disabilities and Their Reproductive Rights” (*Strasbourg Observers*, 3 January 2023) <https://strasbourgobservers.com/2023/01/03/g-m-and-others-v-moldova-beyond-paternalism-for-women-with-intellectual-disabilities-and-their-reproductive-rights/#:~:text=This%20case%20concerns%20the%20imposition,them%2C%20between%201998%20and%202007> accessed 13 May 2024.

⁸⁰³ *G.M. and Others*, para. 90.

⁸⁰⁴ *G.M. and Others*, paras. 122-123.

intersectional and systemic oppression⁸⁰⁵, naming what those particular vulnerabilities are, what makes these people particularly vulnerable, and considering such a situation as discrimination on these intersecting grounds would have progressed the case law of the ECtHR better.



⁸⁰⁵ Lidia Carchilan, “G.M. And Others v Republic Of Moldova: At The Intersection of Gender, Disability, Institutionalisation, and Rape Survivor Status” (*Intersectional Rewrites Blog Symposium*, 2 February 2024) <https://intersectionalrewrites.org/g-m-and-others-v-republic-of-moldova-at-the-intersection-of-gender-disability-institutionalisation-and-rape-survivor-status/> accessed 13 May 2024.

4. Gender Stereotypes and Gender Identity

The concept of “gender identity issues” is used by the Court in context of trans people and their claims before Strasbourg, and its approach has evolved over time, in a way reflecting the evolution of the society’s understanding of trans people. In this respect, the Court’s approach to gender identity issues still holds the potential to grow, to shed itself off the binary-gender biases yet.

*Goodwin v UK*⁸⁰⁶ was the first instance where the Court actively recognized the States’ positive obligation to recognize a trans person’s gender identity. Before *Goodwin*, the Court had seen several cases relating to similar topics, all having to do with legal gender recognition of trans people. *Rees v The United Kingdom*⁸⁰⁷ was the first case in this respect, and the Court rejected his claims and granted the State a wide margin of appreciation. The following *Cossey v The United Kingdom*⁸⁰⁸, *X, Y and Z v The United Kingdom*⁸⁰⁹ and *Sheffield and Horsham v The United Kingdom*⁸¹⁰ were all also rejected on the same grounds as *Rees*.

A further notable thing in all of these cases was the usage of “transsexual” or “transsexualism” as terminology, which, being a clinical term that has historically been used to pathologize transgender persons, further signifies the Court’s approach to these issues. Moreover, in *Cossey* and *Sheffield and Horsham* the Court stated that “gender

⁸⁰⁶ *Goodwin v the United Kingdom* App no. 28957/95 (ECtHR [GC], 11 July 2002).

⁸⁰⁷ *Rees v the United Kingdom* App no. 9532/81 (17 October 1986).

⁸⁰⁸ *Cossey v the United Kingdom* App no. 10843/84 (ECtHR, 27 July 1990).

⁸⁰⁹ *X, Y and Z v the United Kingdom* App no. 21830/93 (ECtHR [GC], 22 April 1997).

⁸¹⁰ *Sheffield and Horsham v the United Kingdom* App no. 22985/93 23390/94 (ECtHR [GC], 30 July 1998).

reassignment surgery does not result in the acquisition of all biological characteristics of the other sex”⁸¹¹, demonstrating a binary gendered view and the refusal to fully accept transgender people.

In *Goodwin*, however, even though the same terminology and perspective had dominated the judgment, the Court for the first time found that not granting legal recognition to transgender persons amounts to a violation of the applicant’s rights under Article 8. The applicant, *Christine Goodwin*, is a trans woman who had to deal with systemic violations of her rights due to the failure of public authorities to change the official records accordingly after her gender reassignment surgery. *Goodwin* complained that she was not assigned a new social security number which indicated and confirmed her gender, and that she was therefore subjected to interpersonal bullying and harassment. She was also subjected to higher age limits reserved for men in terms of pension benefits, or using free buses, because the official records did not reflect her real gender.

One thing the Court emphasized in the judgment was the fact that the applicant was a “post-operative transsexual” whose “unsatisfactory situation” of living in an “intermediate zone as not quite one gender or the other is no longer suitable”.⁸¹² The Court further underlined that the situation is not merely an inconvenience for trans people but such conflict between social reality and law causes trans people to experience “feelings of vulnerability, humiliation, and anxiety”.⁸¹³ It is important to note that even though the Court has not fully abandoned the idea of an innate and unchanging, “true biological sex”,

⁸¹¹ *Cossey*, para 40; *Sheffield and Horsham*, para 56.

⁸¹² *Goodwin*, para. 90.

⁸¹³ *Goodwin*, para. 77.

it still held that there existed a need for legal gender recognition of trans people and that this situation, as was its case law since *Rees*, is no longer acceptable. However, the Court's emphasis on *Goodwin* being a "post-operative transsexual" frames this right to be specifically for trans people who fall within the clearly defined gender binary, is still therefore pathologizing on the grounds that it requires medical intervention and surgery as a condition for recognition.⁸¹⁴

In fact, compulsory sex reassignment or gender affirming surgeries often manifest as preconditions for legal gender recognition in national laws, and the Court does not exactly denounce this practice but rather focuses on the limits of margin of appreciation. In *Y.Y. v Turkey*⁸¹⁵, the Court held that the national law that poses the requirement for sterilization in order to access to sex reassignment violated the applicant's rights under Article 8 concerning one's right to personal development⁸¹⁶ and bodily autonomy⁸¹⁷. While this is an important decision by the Court, it still does not question the necessity of any kind of sex reassignment/gender affirming surgery or therapy as a precondition of legal gender recognition, but only questions the violating practices that is contained within.

This matter of compulsory medical intervention as a prerequisite for legal gender recognition was explicitly discussed in *A.P., Garçon and Nicot v France*⁸¹⁸ where the

⁸¹⁴ Pieter Cannoot, "The Pathologization of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition" (2019) 37 (1) Netherlands Quarterly of Human Rights 14, 26.

⁸¹⁵ *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015).

⁸¹⁶ *Y.Y.*, para. 57.

⁸¹⁷ *Y.Y.*, para. 65.

⁸¹⁸ *A.P., Garçon and Nicot v France* App no. 79885/12 52471/13 52596/13 (ECtHR, 6 April 2017).

French law at the time required persons who wished to change their registered gender marker to present proof of a persistent case of “transsexualism” as a disorder and an irreversible physical change. The Court addressed this notion by conceptualizing “irreversible change” as sterilization⁸¹⁹ and held that “making the recognition of transgender persons’ gender identity conditional on sterilization surgery or treatment – or surgery or treatment very likely to result in sterilization – which they do not wish to undergo” amounts to an impossible dilemma between Articles 8 and 3 where the recognition of trans people’s identity and their right to personal development and bodily autonomy depends upon them relinquishing and renouncing their right to bodily integrity.⁸²⁰

Crucial in this respect, the Court nevertheless upheld the condition of providing proof of a “gender identity disorder” and stated that States retained a wide discretion in this respect.⁸²¹ The Court further asserted that such a diagnosis was “aimed at safeguarding the interests of the persons concerned” on the grounds to ensure that they did not “embark unadvisedly on the process of legally changing their identity”.⁸²² It is evident that the Court takes on a paternalistic approach, disregarding the agency of trans people while simultaneously pathologizing them by holding onto the notion this being disorder.⁸²³

⁸¹⁹ *A.P., Garçon and Nicot*, para. 116

⁸²⁰ *A.P., Garçon and Nicot*, para. 131.

⁸²¹ *A.P., Garçon and Nicot*, para. 140.

⁸²² *A.P., Garçon and Nicot*, para. 141

⁸²³ Caroline Hansen, “Dismantling or Perpetuating Gender Stereotypes. – The Case of Trans Rights in the European Court of Human Rights’ Jurisprudence” (2022) 18 *The Age of Human Rights Journal* 143, 147.

Indeed, a disorder-oriented understanding of trans people means that their identity is externally validated and that their agency is not enough. This external validation generally comes in the form of prescriptive gender stereotypes, as it is expected of trans people to act in stereotypically “gender inappropriate behavior” such as young boys preferring to play with dolls or having tendencies to enjoy more “traditionally feminine activities” and for young girls to behave in the opposite manner, for example preferring “boys’ clothing or shorter hair”.⁸²⁴ Such stereotypes have been used in judgments, for example that the applicant behaved “like a boy”⁸²⁵ or that the applicant “always behaved like a girl”⁸²⁶ “physical appearance has always been very feminine”⁸²⁷ “dressed as a woman and was perceived by others as a woman”⁸²⁸ and so on.

The Court, by not acknowledging or denouncing these gender stereotypes, places expectations of conformity with the gender binary on trans persons and moreover creates a framework where the validity of a person’s gender identity depends on their physical appearance⁸²⁹, which is constructed by the patriarchal understandings of gender appearance.

⁸²⁴ Dean Spade, “Resisting Medicine/Remodeling Gender” (2003) 18 (1) Berkeley Women’s Law Journal 15, 24; Dean Spade, “Mutilating Gender” in Susan Stryker and Stephen Whittle (eds.) *The Transgender Studies Reader* (Routledge 2006), 320; Hansen, 147.

⁸²⁵ *Y.Y.*, para 9.

⁸²⁶ *A.P., Garçon and Nicot*, para. 8

⁸²⁷ *A.P., Garçon and Nicot*, para. 8

⁸²⁸ *A.P., Garçon and Nicot*, para. 35.

⁸²⁹ Hansen, 148.

C. Gender and Socio-economic Rights

Gender stereotypes do not only affect one's autonomy, but also their socio-economic rights, the roles and divisions of labor. Among many problems are the invisible labor of women inside the home, care work being seen as naturally “feminine”, the gender pay gap, economic dependency, welfare inequalities, limitations and restrictions on employment for women in certain jobs and services, now packaged as being in favor of women, and so on.

The first time an issue concerning gender stereotypes affecting the socio-economic lives of women came before the Court was in 1993 in the *Schuler-Zgraggen v. Switzerland*⁸³⁰ case. The applicant who had contracted tuberculosis and was unfit for work, applied for an invalidity pension and her benefits were later revoked because she had had a child. The reasoning behind it was that even though she had been deemed as still unfit for work, she was declared 60-70% fit for household work and that this improvement on her health along with the change in her family circumstances meant that she would not need the pension. The applicant's appeals were denied on the assumption that even if her health had not been impaired, the applicant would have been occupied “only as a housewife and a mother”.⁸³¹

The Court challenged the stereotypes used by public authorities in this case and stated that they adopted the “assumption that women gave up work when they gave birth

⁸³⁰ *Schuler-Zgraggen v. Switzerland* App no. 14518/89 (ECtHR, 24 June 1993).

⁸³¹ *Schuler-Zgraggen*, para. 29.

to a child” as a basis for their reasoning, thus introducing a difference of treatment based on the ground of sex.⁸³²

The Court’s stance that reliance on stereotypic gender roles meant a breach of Article 14 continued in the *Emel Boyraz v Turkey*⁸³³ decision where the applicant had been rejected from public sector employment on the grounds of gender. The applicant, having passed the relevant examinations and possessing the required qualifications (but for one) applied to become a security officer for a State-run company. She was later informed that she could not be appointed because she did not fulfil the requirements of “being a man” and “having completed military service”. Upon appealing this decision, she was granted to work but later the appellate decision was quashed, and in the end, she was dismissed. The justification given for such a requirement was that security officers had the task of protecting depots, switchyards, and transformer stations in rural areas far from city centers, against attacks and in case of fire and sabotage, plus the requirement to work day and night and to use weapons, including those with long barrels, and physical force in case of an attack, which meant that women were not suitable for the post of security officer.

The Court held that there had been a violation of Article 8, which also protected the private social life (*vie privée sociale*)⁸³⁴ in a broad sense, which included the work life, in conjunction with Article 14. In its reasoning the Court asserted that the mere fact that 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

⁸³² *Schuler-Zraggen*, para. 67.

⁸³³ *Emel Boyraz v Turkey* App no. 61960 (ECtHR, 2 December 2014).

⁸³⁴ *Özpınar v Turkey* App no 20999/04 (ECtHR, 19 October 2010) para. 45.

difference in treatment between men and women.⁸³⁵ Further, the Court underlined that 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.⁸³⁶

In terms of retirement, a general practice in a lot of States is to lower the age of retirement for women⁸³⁷, which had been portrayed as being in favor of women most of the time, but actually contains many intersectional stereotypes of gender and age. In *Moraru and Marin v Romania*⁸³⁸ the Court tackled this question. The two applicants had been working as public servants and were mandatorily made to retire at ages 60.5 and 61 respectively, which meant that they had only completed the minimum period of contribution for their pension scheme. Even though they appealed to the termination of their employment and expressed their want to continue to work, at least until the minimum age of retirement foreseen for men (65), they were rejected, and their claims were dismissed before the domestic courts.

ECtHR held that automatic termination of the employment contract constituted discrimination on the basis of gender and these provisions were not justified nor necessary.⁸³⁹ The Court based its analysis on Article 1 of Protocol 12, stating that the same standards developed by the Court in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12 in terms of

⁸³⁵ *Emel Boyraz*, para. 54.

⁸³⁶ *Emel Boyraz*, para. 55.

⁸³⁷ <https://genderdata.worldbank.org/en/indicator/sg-age-fupn-eq> Gender Data Portal.

⁸³⁸ *Moraru and Marin v Romania* App no. 53282/18 31428/20 (ECtHR, 20 December 2022).

⁸³⁹ *Moraru and Marin*, para. 123.

claims of discrimination.⁸⁴⁰ The Court then accepted that States enjoyed a margin of appreciation, but said doctrine did not justify the adoption of laws or practices that would violate the prohibition of discrimination that is manifestly without reasonable foundation.⁸⁴¹ Indeed, the government in this instance did not present any justification as to the difference in treatment between genders, except stating that the States had a wide margin of appreciation in this respect. In an earlier case *Stec*, the government had stated, along with claims to margin of appreciation, that such practices were for the benefit of women.⁸⁴² However, regardless of what the State deems is in the best interest of women, once again taking a paternalistic approach, such policies is detrimental to the welfare of women workers, as they lose pension benefits, like in the case, or are generally forced out of work and therefore face the risk of losing their economic independency, as well as prisoning them into domestic and care work in the progress.

With regards to gender stereotypes' effects on women's employment, retirement, or welfare benefits, it is notable that the Court did not defer to the doctrine of margin of appreciation and instead actively questioned the reasoning behind State practices, especially considering that States are more suitably placed to determine the general measures of socio-economic strategy, by naming and contesting the gender stereotypes at work.

⁸⁴⁰ *Moraru and Marin*, para. 100.

⁸⁴¹ *Moraru and Marin*, para. 105, also See: *Stec and Others v the United Kingdom* App no. 65731/01 65900/01 (ECtHR [GC], 12 April 2006) para. 52.

⁸⁴² *Stec and Others*, para. 49.

That being so, the Court, however, seemingly fails to acknowledge discrimination and stigmatization of poverty by relying on the margin of appreciation doctrine. In *Garib v the Netherlands*, the applicant who is a single mother of two children had been asked to vacate the property she had been renting, but the owner offered the applicant a different property in the same area, which had been better suited for her and her children. In the meantime, however, the district that this new property was located in had been designated as an area where it was not permitted to take up new residence without a permit as it was becoming an increasingly popular location, and because the applicant had been dependent on social benefits she did not meet the income requirement for the said permit.

The Court, while recognizing that there had been a restriction imposed on the applicant's "freedom to choose her residence", turned to the proportionality test and found the government's arguments that such a restriction's aim had been legitimate and deferred that it was within the State's margin of appreciation. The Joint Dissenting Opinion of Judges López Guerra and Keller, however, took a different approach. They asserted that since the measure in question was linked to the source of income, the issue was then implicitly interconnected to the "social origin and gender of the persons concerned", and that it could have also been considered that "the poor are a vulnerable group in and of themselves".⁸⁴³ They further asserted that this restriction based on income not only leads to the stigmatization of the poor, but also indirectly creates discrimination based on race

⁸⁴³ *Garib v the Netherlands* App no. 43494/09 (ECtHR, 23 February 2016) Judges López Guerra and Keller Joint Dissenting Opinion, para. 14.

and gender, “since the people most gravely affected by unemployment are immigrants and single mothers”.⁸⁴⁴

In a similar case of stigmatization of poverty’s intersection with gender, *Lăcătuș v. Switzerland*⁸⁴⁵, the Court found that criminalization of begging posed a violation to the applicant’s rights under Article 8. The applicant was of Roma origin, nineteen years-old at the time, illiterate, unemployed, and not a recipient of any social security benefits or support. Over the course of three years the applicant had been fined for a total of nine hundred Swiss Francs against which she had unsuccessfully contested, and having failed to pay the fines she was sentenced to a prison for five days. After the sentence, with no domestic remedy now in sight, the applicant applied to the ECtHR claiming that her rights under Article 8 and Article 14 had been violated. The government claimed that the interference with the applicant’s right under Article 8 pursued the legitimate aim of providing public order and safety as well as protecting the economic well-being and touristic prospect of the country alongside the rights and freedoms of others, such as shopkeepers, passers-by, customers, restaurant owners, and so on.⁸⁴⁶

The Court rejected the Government’s arguments by weighing the interests at the stake – noting that the State’s margin of appreciation is restricted when a particularly important facet of an individual’s existence (or identity) was at stake⁸⁴⁷ – by considering that the applicant had been in a “clearly vulnerable situation” and “had the inherent in

⁸⁴⁴ *Garib*, para. 18.

⁸⁴⁵ *Lăcătuș v. Switzerland* App no. 14065/15 (ECtHR, 19 January 2021).

⁸⁴⁶ *Lăcătuș*, para. 76-79.

⁸⁴⁷ *Parrillo v. Italy* App no. 46470/11 (ECtHR [GC], 27 August 2015) para. 169.

human dignity, to be able to convey her plight and attempt to meet her basic needs through begging”.⁸⁴⁸

This reasoning of the Court is questionable, as the systemic issue of poverty or social rights are not addressed but rather the focus is on individual freedom.⁸⁴⁹ A welcome assertion is made by the Court, naming the particular vulnerabilities of the applicant⁸⁵⁰ which had been one of the shortcomings of the Court’s intersectional perspective, however the applicant’s Roma origin was disregarded. In fact, by refusing to examine the case under Article 14 as well, as Judge Ravarani asserts in a Partly Concurring and Partly Dissenting Opinion, “(...) the question of indirect discrimination against the Roma population under the Genevese legislation prohibiting begging was different from that of the applicant’s individual ability to beg” and that had been a regrettable oversight by the Court.⁸⁵¹ The fact of the matter is that the applicant’s socio-economic status, along with her ethnicity and gender, all came together to create a unique, compounded or intersectional discrimination ground that worked against her, and the Court failed to investigate these effectively.

⁸⁴⁸ *Lăcătuș*, para. 107.

⁸⁴⁹ Corina Heri, “Beg Your Pardon!: Criminalisation of Poverty and The Human Right to Beg in *Lăcătuș v. Switzerland*” (*Strasbourg Observes*, 10 February 2021) <https://strasbourgobservers.com/2021/02/10/beg-your-pardon-criminalisation-of-poverty-and-the-human-right-to-beg-in-lacatus-v-switzerland/> accessed: 16 May 2024.

⁸⁵⁰ “(...) the fact that she was from an extremely poor family, was illiterate, was unemployed and was not in receipt of social benefits” *Lăcătuș*, para. 107.

⁸⁵¹ *Lăcătuș*, Judge Ravarani Partly Concurring and Partly Dissenting Opinion, para. 17.

D. Gender Stereotypes on Race and Ethnicity

Race and/or ethnicity are almost always a factor that operates as a distinct factor in the oppression that women face. One key point of intersectionality is that social categories overlap in such a way that it creates distinctive experiences and material outcomes.⁸⁵²

In *B.S. v Spain*⁸⁵³ the Court decided on a case concerning an applicant who was a migrant Nigerian sex worker. The applicant claimed that she had been repeatedly racially harassed, assaulted, and abused both physically and verbally by police officers, however the domestic courts dismissed her case. The applicant had been approached by the police officers as she had been (legally) carrying out sex work in the streets. The police officers first hit her multiple times as she tried to flee and then racially insulted her by saying “get out of here you black whore”. She was approached by the same police officers on a different day, physically assaulting her again. The applicant then lodged a complaint, but her case was dismissed on the basis of a lack of evidence. Ten days after these incidents, the applicant was approached and assaulted anew by the same police officers, went to the hospital to document her physical injuries and lodged a complaint again, only for her case to be dismissed this time as well. The applicant then sought relief before the Strasbourg Court on the basis that her rights under Article 3 regarding the ineffectiveness of public authorities and the ill-treatment she was subjected to by the police officers, and under Article 14 on the grounds that the attacks had been racially charged as her position as a

⁸⁵² Cassese, 2.

⁸⁵³ *B.S. v Spain* App no. 47159/08 (ECtHR, 24 July 2012).

black woman sex worker made her particularly vulnerable to discriminatory attacks.⁸⁵⁴ The applicant further asserted that other women in the same area carrying on the same activity but with a “European phenotype” had not been stopped by the police, demonstrating further the racial motivations present.⁸⁵⁵

The Court, finding that the assaults the applicant had been subjected to amounted to ill-treatment in the meaning of Article 3, further asserted that the State’s ineffectiveness in investigating the “racist overtones to a violent act” meant a breach of their positive obligations, both on substantial and procedural grounds.⁸⁵⁶ Although the Court does not explicitly use the term “intersectionality”, it is evident that it takes an intersectional approach to the case as it “considers that the decisions made by the domestic courts failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute”.⁸⁵⁷ Here, the Court regarded that the specific vulnerability of the applicant is shaped neither by her sex nor by her race, but an intersection of the two along with her profession as another vulnerable group.⁸⁵⁸

The same approach, however, was not taken by the Court in the *J.I. v Croatia*⁸⁵⁹ case. The applicant is a Roma woman who had been sexually abused multiple times by her father when she was little. Her father had been then imprisoned and the applicant, traumatized and suicidal, changed her identity and place of residence. However, the

⁸⁵⁴ *B.S.*, para. 52.

⁸⁵⁵ *B.S.*, para. 48.

⁸⁵⁶ *B.S.*, para. 58-59.

⁸⁵⁷ *B.S.*, para. 62.

⁸⁵⁸ Alexandra Timmer, “Racial Discrimination in Strasbourg (Part II): Intersectionality and Context” (*Strasbourg Observes*, 17 October 2012) <https://strasbourgobservers.com/2012/10/17/racial-discrimination-in-strasbourg-part-ii-intersectionality-and-context/> accessed 16 May 2014.

⁸⁵⁹ *J.I. v Croatia* App no 3589816 (ECtHR, 8 September 2022).

perpetrator continued to threaten the applicant through relatives when he was on prison leave, and because her calls to the police did not return any results the applicant had to change her residence again. The perpetrator followed the applicant at a bus stop the next time, and she had escaped by going into a shop and calling the police. Despite the perpetrator's persistent stalking, and the applicant's requests for protection, the applicant claimed that the public authorities had been dismissive, brusque, and arrogant because she was a person of Roma origin. The applicant lodged a constitutional complaint on the grounds that domestic authorities failed to protect her from intimidation and repeated victimization, and failed to effectively investigate the serious threats made against her life because of her Roma origin which then amounted to discrimination.⁸⁶⁰ Her complaints were rejected on procedural grounds, and the applicant then applied to ECtHR.

The Court first acknowledged that *J.I.* was a “highly traumatized young woman of Roma origin, who had been the victim of appalling sexual abuse by a close family member at a very early age”⁸⁶¹ and referencing *Volodina*, contended that “threats are a form of psychological violence, and that a vulnerable victim may experience fear regardless of the objective nature of such intimidating conduct”.⁸⁶² In the material case, the Court asserted that considering the applicant's previous physical suffering and excessive psychological trauma, the treatment she had been subjected to was inhuman under Article 3.⁸⁶³ However, the Court did not rule on the public authorities' failure to protect the applicant⁸⁶⁴ and

⁸⁶⁰ *J.I.*, para. 23.

⁸⁶¹ *J.I.*, para. 86.

⁸⁶² *J.I.*, para. 88.

⁸⁶³ *J.I.*, para. 89.

⁸⁶⁴ *J.I.*, para. 101.

moreover, dismissed the applicant's claim that the ineffectiveness of the police had been on account of her Roma origin due to lack of evidence.⁸⁶⁵

The Court then did not find a violation of Article 14 as even though the applicant was particularly vulnerable.⁸⁶⁶ However, as Judge Derenčinović in a Partly Dissenting Opinion argued, the Court failed to rule on the public authorities' failure to protect a particularly vulnerable victim from prolonged and repeated victimization, even though the fact of general and discriminatory passivity of law-enforcement authorities in the face of domestic violence has been accepted as creating a climate conducive to further proliferation of violence committed against victims in the Court's previous case law.⁸⁶⁷ In the case, "not a single risk assessment measure was conducted", the competent authorities were not proactive nor cooperative, and all measures taken were reactive (*ex post facto*) and were carried out in response to complaints by the applicant, rendering her stuck in the system, and her struggles invisible.⁸⁶⁸ Furthermore, the reason behind such dismissal was alleged repeatedly by the applicant to be racially motivated, but the Court, referring to a lack of evidence, rejected these claims, also rejecting its established practice that in cases concerning vulnerable victims the burden of proof fell on the State to prove that no discriminatory intent had been present. The refusal to investigate this case from these points and under Article 14 is regrettable on the part of the Court, as it was drawing a more gender-sensitive and intersectional case law.

⁸⁶⁵ J.I., para. 97.

⁸⁶⁶ J.I., para. 108.

⁸⁶⁷ J.I., Judge Derenčinović Partly Dissenting Opinion, para. 3.

⁸⁶⁸ J.I., Judge Derenčinović Partly Dissenting Opinion, para.11.

E. Gender Stereotypes and Religion

In terms of the debate on wearing religious clothing – or carrying religious items on one's person – what is most often overlooked is the fact that gender plays an essential role in this situation. For example, in *Dahlab v Switzerland*⁸⁶⁹ where the Court found the application inadmissible as being manifestly ill-founded, the applicant, who was a primary-school teacher who started to wear a headscarf after converting to the Islam religion was subsequently prohibited from teaching while wearing the scarf.

The Court held that the ban pursued the legitimate aim of ensuring religious neutrality and secularity in the State and in its education system, and not directed at the applicant being female (*son appartenance au sexe féminin*). However, as the applicant had put forward in her application, the prohibition imposed by the public authorities did affect her as a Muslim woman first and foremost, and the issue is essentially about gender, as a man belonging to the Muslim faith could continue to teach at public schools, practice his religion, and not be subjected to any form of prohibition.

In *Leyla Şahin v Turkey*⁸⁷⁰ and *S.A.S. v France*⁸⁷¹ too the issues had actually been primarily about the intersection of gender and religious beliefs. In *Leyla Şahin*, the applicant, a university student who, after a law prohibiting students to wear headscarves in class or during exams had to leave the country to pursue her education elsewhere. The Court, not finding a violation, referred to the aims being pursued by public authorities on

⁸⁶⁹ *Dahlab v Switzerland* App no. 42393/98 (ECtHR, 15 February 2001).

⁸⁷⁰ *Leyla Şahin v Turkey* App no. 44774/98 (ECtHR [GC], 10 November 2005).

⁸⁷¹ *S.A.S. v France* App no. 43835/11 (ECtHR [GC], 1 July 2014).

values of pluralism, respect of others, and in particular, equality before the law between men and women and the principle of secularism in Turkey, that the authorities had the margin of appreciation to determine that religious attire prohibited.

In a similar manner, the government in *S.A.S. v France* also argued that a religious-wear ban serves to protect public safety, ensures respect for the minimum set of value of an open and democratic society, and is a guarantee of “living together” (*vivre ensemble*). However, the Court in *S.A.S.* departs from its earlier reasonings and refuses these grounds as legitimate aim. What is notable in the Court’s judgment is the fact that in the earlier case law, it had reasoned that headscarves were “imposed on women by a religious precept that was hard to reconcile with the principle of gender equality” and that “wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination (...) in a democratic society”⁸⁷², but in the material case it held that States “cannot invoke gender equality in order to ban a practice that is defended by women”.⁸⁷³

However, the focus should not be on this either. The religion imposed covers and their inherent misogyny can be debated at length, and so can whether these bans infringe upon women’s freedoms. Framing the issue as western values and their imposition on cultural diversity and freedom of religion is not, and has never been, the solution. This situation can be analogous to the debates on sex work, and it could be helpful in understanding the approach that needs to be adopted. When one talks about women’s

⁸⁷² *Dahlab; Leyla Şahin*, para. 111.

⁸⁷³ *S.A.S.*, para. 119.

freedom to choose, they generally disregard the inherently misogynistic and patriarchal structures that underlie the choices, but punishing the women themselves can never be the solution. In fact, *Dahlab* had it right the first time: that the prominent issue in question is the fact that it is disproportionately women who are affected by such bans, because religious symbols are most visible on women. Therefore, it would have been exponentially more in line with the gender equality aims of the Court to tackle this issue as one of gender discrimination rather than freedom of religion.

F. Gender Stereotypes and Family

As mentioned above, in its traditional form, the family exists as a structure of oppression for women. Gender roles based on stereotypes work to separate and allocate responsibilities in the family, and is most prominent in the legislative and/or practical approaches to parental duties. In the context of parental leave, for example, gendered biases regarding the distribution of roles and biological stereotypes based on gender lie at the heart of regulations on parental leave.

The Court, in 1998, decided on a case concerning this very notion. In *Petrovic v Austria*⁸⁷⁴ the applicant, who was a student working part time, took parental leave to look after their child while his wife, a public servant, continued to work. The applicant complained that public authorities refused to pay him the parental leave allowance on the grounds that only mothers were entitled to receive such payments, and that this amounted to discrimination based on gender. The applicant particularly argued against the government's claims that the allowance was in fact not intended to protect mothers as it was not paid until eight weeks after the birth and until the right to receive maternity benefit had been exhausted, but to assist parents – whether mothers or fathers – who wished to take leave to look after their very young children.⁸⁷⁵

While the Court held that while the practice itself amounted to a difference in treatment on the grounds of sex⁸⁷⁶ and that maternity leave and associated allowances

⁸⁷⁴ *Petrovic v Austria* App no. 20458/92 (ECtHR, 27 March 1998).

⁸⁷⁵ *Petrovic*, para. 31.

⁸⁷⁶ *Petrovic*, para. 35.

were different from those of parental leave where both parents are “similarly placed”⁸⁷⁷, it still deferred to the margin of appreciation doctrine and lack of European consensus on the issue and did not find a breach of Articles 8 and 14.⁸⁷⁸ The stereotype at work behind the national legislation and practice was the assumption that women were the primary caregivers in the family due to their natural disposition, and that it was socially acceptable, even expected, of them to quit working after starting a family whereas fathers, the men, were positioned as the “breadwinners” and head of the family.

In their Joint Dissenting Opinion, Judges Bernhardt and Spielmann correctly identified that the Austrian legislation stemmed from the traditional distribution of family responsibilities between mothers and fathers and this, aside from being discriminatory, can also have “negative consequences for the mother; if she continues her professional activity and agrees that the father stay at home, the family loses the parental leave allowance to which it would be entitled if she stayed at home”.⁸⁷⁹

The important takeaway from the *Petrovic* judgment was that, the Court did admit that in a heterosexual family the mother and the father are similarly situated with regards to parental responsibilities, but prioritized the margin of appreciation of the States. In *Konstantin Markin v Russia*⁸⁸⁰, however, the Court took a bolder stance against the same

⁸⁷⁷ Maternity leave and the associated allowances are primarily intended to enable the mother to recover from the fatigue of childbirth and to breastfeed her baby if she so wishes. Parental leave and the parental leave allowance, on the other hand, relate to the period thereafter and are intended to enable the beneficiary to stay at home to look after the infant personally. While aware of the differences which may exist between mother and father in their relationship with the child, the Court starts from the premise that so far as taking care of the child during this period is concerned, both parents are “similarly placed” *Petrovic*, para. 36.

⁸⁷⁸ *Petrovic*, paras. 38-43.

⁸⁷⁹ *Petrovic*, Judges Bernhardt and Spielmann Joint Dissenting Opinion.

⁸⁸⁰ *Konstantin Markin v Russia* App no. 30078/06 (ECtHR [GC], 22 March 2012).

stereotypes that were at play in the earlier case law and held that “(...) states may not impose traditional gender roles and gender stereotypes (...)”⁸⁸¹, explicitly refusing the margin of appreciation doctrine. In the case, the applicant who worked as a military serviceman was denied parental leave on the grounds that only female military personnel were granted such a right. He argued that his rights under Articles 8 taken in conjunction with Article 14 were breached. The domestic courts argued that “by granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood”.⁸⁸²

The special role of women as mothers, or rather as reproductive units, in the States’ eyes, has been one of the longest standing gender stereotypes. In addition, the assertion here was the implication that women soldiers are disposable, and not really a part of the military.⁸⁸³ Further, the government argued that the refusal to allow parental leave to servicemen who served public interest and national security as “such a long absence from service would have a negative impact on servicemen’s military skills” and would negatively affect the society.⁸⁸⁴

The Court, finding that there had been a breach of the applicant’s rights on the grounds of Articles 8 and 14, held that “gender stereotypes, such as the perception of

⁸⁸¹ *Konstantin Markin*, para. 142

⁸⁸² *Konstantin Markin*, para. 34.

⁸⁸³ Alexandra Timmer, “The Special Social Role of Women”: The Strasbourg Court Does Not Buy It (*Konstantin Markin V. Russia*)” (*Strasbourg Observes*, 14 October 2010) <https://strasbourgobservers.com/2010/10/14/the-special-social-role-of-women-the-strasbourg-court-does-not-buy-it-konstantin-markin-v-russia/> accessed 16 May 2024.

⁸⁸⁴ *Konstantin Markin*, para. 115

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, color or sexual orientation”.⁸⁸⁵ It is highly important that the Court had specifically named the gender stereotypes in effect and denounced them, essentially overturning the margin of appreciation argument used in *Petrovic* by asserting that “the advancement of gender equality is today a major goal in the member States” and refuses the government’s submission by stating that “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” and “States are prevented from imposing traditions that derive from the man’s primordial role and the woman’s secondary role in the family”.⁸⁸⁶

More recently, in *Beeler v Switzerland*⁸⁸⁷ the Court once more denounced the gender stereotype model of homemaker woman-breadwinner man that affects parenting and care duties.⁸⁸⁸ The applicant had decided to leave his job after the death of his wife in order to raise and care for his two children, twenty-one months old and four years old at the time respectively. The applicant was granted widower’s pension upon these events, but the payment was terminated when the youngest child turned eighteen. He challenged this termination before domestic courts on the ground that the law only allows widows to continue to be eligible to the pension even after the children turn eighteen, and that constituted discrimination based on gender. The domestic courts agreed with the

⁸⁸⁵ *Konstantin Markin*, para. 143.

⁸⁸⁶ *Konstantin Markin*, para. 127.

⁸⁸⁷ *Beeler v Switzerland* App no. 78630/12 (ECtHR [GC], 11 October 2022).

⁸⁸⁸ *Queiroz*, 11.

applicant's claims but ultimately held that the choice had been the legislator's and despite repeated attempts to change the law in question before, it had never been done. The applicant then came before the ECtHR and claimed that such a provision violated his rights under Articles 8 and 14.

The Court held that the applicant's widower's pension payment was terminated "simply because he was a man" as in other respects he was in an analogous situation to a woman who would have remained eligible.⁸⁸⁹ The Court then referred to and built on its reasoning in *Konstantin Markin*, reiterating the gender stereotypes and prejudices at the heart of such provisions and how they can not constitute valid or legitimate reasons for difference in treatment.⁸⁹⁰ *Beeler* differentiated from *Konstantin Markin*, however, in the sense that the judgment's emphasis on paternal care of fathers, and more importantly, the reconceptualization of fatherhood as something distinct from the "male-breadwinner model".⁸⁹¹

The stereotype of women's primary role in a society being mothers has further reflections on domestic jurisprudence. In *Nurcan Bayraktar v Turkey*⁸⁹², the national legislation termed "the woman's waiting period" was under scrutiny. According to the law, divorced women are required to wait three hundred days in order to remarry or prove medically that they are not pregnant. The applicant appealed against this rule in the

⁸⁸⁹ *Beeler*, para. 101.

⁸⁹⁰ *Beeler*, paras. 95, 113.

⁸⁹¹ *Beeler*, paras. 108-110, 114; Alice Margaria, "Freeing Fatherhood from Breadwinning – Are We Ready For (Formal) Equality? *Beeler* V. Switzerland" (*Strasbourg Observes*, 24 January 2023) <https://strasbourgobservers.com/2023/01/24/freeing-fatherhood-from-breadwinning-are-we-ready-for-formal-equality-beeler-v-switzerland/> accessed 16 May 2024.

⁸⁹² *Nurcan Bayraktar v Turkey* App no. 27094/20 (ECtHR, 27 June 2023).

domestic courts on the grounds of it being discriminatory, but her complaints were rejected. The family court in particular reasoned that the provision in question was not discriminatory because it took into account “the innate biological differences between men and women, for example the ability to give birth, be sensitive and emotional that characterizes her as a mother”, and it further asserted that the provision concerned the interests of the unborn in knowing their lineage, and therefore the woman had to disclose her pregnancy.⁸⁹³

The Court found a violation of the applicant’s rights under Article 8 on the grounds that there were other methods of determining “bloodlines” and therefore the aim of the provision was not realistic, and further, having to undergo a medical examination in this capacity meant an exposure of the most intimate aspect of women’s private and social lives.⁸⁹⁴

The Court also directly addressed and refuted the claims made by public authorities by asserting that divorced women, because of their specific female biological characteristics, in particular their role as mothers and their ability to give birth, would have a duty to society to disclose any pregnancy before remarrying and would have to bear the disadvantage of the waiting period in order to protect the interests of any unborn child and other persons concerned reflects a traditional view of female sexuality – essentially linked

⁸⁹³ *Nurcan Bayraktar*, para. 8.

⁸⁹⁴ *Nurcan Bayraktar*, paras. 55-56.

to a woman's reproductive functions – and ignores its physical and psychological importance for a woman's personal development.⁸⁹⁵

For Article 14 in conjunction with Article 12, the Court reiterated that a differential treatment based on pregnancy amounts to direct discrimination on grounds of sex if it is not justified, and that in the present case, it was not.⁸⁹⁶ The Court further addressed the judicial stereotyping present in the domestic courts and stated that “the sexist stereotypes” (*les stéréotypes sexistes*) relied on by them, such as the idea of women being duty-bound to society by virtue of their potential role as mothers and their ability to give birth, “constitutes a serious obstacle in the realization of true material equality between genders, which, is one of the major objectives of member States”.⁸⁹⁷

Other cases concerning prejudice regarding a parent's sexual orientation or gender identity is the Court's decisions on the rights of trans parents. In *A.M. and Others v Russia*⁸⁹⁸, the Court delivered a judgment recognizing the rights of trans parents. The case concerned the applicant who lost her parental rights over her children subsequent to her transition. The State's rationale behind this was a reference to the possible negative impact on the children's mental health and development, without concrete evidence or research.⁸⁹⁹ The Court analyzed the case by depending on Articles 8 and 14 and recognized that the domestic courts depended solely on the expert reports that did not present a convincing account how the applicant's transition could have presented risks to the well-

⁸⁹⁵ *Nurcan Bayraktar*, para. 57.

⁸⁹⁶ *Nurcan Bayraktar*, paras. 81-88.

⁸⁹⁷ *Nurcan Bayraktar*, para. 89.

⁸⁹⁸ *A.M. and Others v Russia* App no. 47220/19 (ECtHR, 6 July 2021).

⁸⁹⁹ *A.M. and Others*, paras. 19-22.

being of the children⁹⁰⁰, which connotes to the stereotypical view that being transgender is a mental illness. Here, the Court noted that while expert reports and opinions are of relevance to the judicial decision-making, “it is equally beyond dispute that the courts should not forgo scrutiny of the reliability and quality of such findings”.⁹⁰¹ Further, in its assessment of the violation of Article 14 in conjunction with Article 8, the Court demonstrated that the applicant had been treated differently compared to cis-gender parents based on her gender identity, which is covered by the prohibition of discrimination set out in Article 14.⁹⁰²

A recent case concerning a similar topic is the case of *Savinovskikh and Others v Russia*⁹⁰³, where the Court judged on the issue of termination of a foster parent’s custody agreement due to the applicant’s gender identity as a transgender man. The foster-children of the applicant were taken away from his custody after the social services official came to find out that he underwent gender re-assignment procedures, and the official statement read that the main reason behind the termination of the foster care agreement was the applicant’s “transsexualism, since the children were initially placed in a traditional family”.⁹⁰⁴ The domestic courts, during the adjudication proceedings, referred to “transsexualism” as a “psychiatric disorder”, thereby confirming the stereotypical basis that they depended on.⁹⁰⁵ The Court, similarly to the above-mentioned case, determined that the reason of the termination of the foster care agreement relied on by public

⁹⁰⁰ *A.M. and Others*, paras. 54-55.

⁹⁰¹ *A.M. and Others*, para. 57.

⁹⁰² *A.M. and Others*, para. 76.

⁹⁰³ *Savinovskikh and Others v Russia* App no. 16206/19 (ECtHR, 9 July 2024).

⁹⁰⁴ *Savinovskikh and Others*, para. 19.

⁹⁰⁵ *Savinovskikh and Others*, para. 22.

authorities was evidently the gender identity of the applicant and no substantive research had been conducted whether the applicant was unfit for providing care for the children, which resulted in a violation of Article 8 of the Convention.⁹⁰⁶ However, curiously, the Court forwent examining the case under Article 14⁹⁰⁷, despite its findings on the public authorities' conduct relying on the gender identity and sexual orientation of the applicant. In any case however, it is notable that these judgments significantly strengthen the protection of trans rights, especially trans parents, under the Convention.

⁹⁰⁶ *Savinovskikh and Others*, paras. 71-78.

⁹⁰⁷ *Savinovskikh and Others*, paras. 91-93.

G. Gender Stereotypes and Sexual Orientation and Gender Identity (SOGI)

The Court's case law on sexual orientation and gender identity issues has shown a positive trend in terms of rights recognition, although improvements can always be made. The Court's tendency to scarcely use Article 14 and its persistent focus on Article 8 can be problematic, and further, the Court is especially lacking in taking an intersectional approach to SOGI issues.

In *Dudgeon v The United Kingdom*⁹⁰⁸ regarding the criminalization of same-sex relations, the Court found that there was a violation of Article 8 but did not find it necessary to examine the case in conjunction with Article 14. Without a doubt concerning the private life, the issue at hand arises from the fact that the domestic law prohibits and criminalizes the sexual conduct of consenting, adult males whereas the same provision is not imposed on heterosexual sexual conduct, and that this amounts to discrimination. The material case, however, was not solely about the state regulation of private and sexual lives of its citizens, but about the fact that the State enforced systemic discrimination against people based on their sexual orientation.

*Karner v Austria*⁹⁰⁹ was one of the first judgments in which Article 14 of the Convention was considered together with Article 8. The case concerned the applicant whose lease was terminated after the death of his partner who had been the one to rent the apartment. The national legislation did foresee that a relative or the "life partner" of the deceased could automatically succeed to the tenancy agreement, but this right had been

⁹⁰⁸ *Dudgeon v the United Kingdom* App no. 7525/76 (ECtHR, 22 October 1981).

⁹⁰⁹ *Karner v Austria* App no. 40016/98 (ECtHR, 24 July 2003).

interpreted by the domestic courts to be only applicable to unmarried heterosexual couples. The Court stated that if the applicant's sexual orientation had not been in question, it would have been possible for him to be considered as the life partner of the deceased person and accordingly he would have succeeded the immovable property in question. In this respect the Court found a violation under Article 14 as well as Article 8. Here, the Court's observation and recognition of discrimination based on sexual orientation was as it should be. In the case at hand, the inequality concerns inheritance, a person's home, and domestic life, and the basis of Austria's regulations again involves systemic discrimination on the basis of sexual orientation.

*Schalk and Kopf v Austria*⁹¹⁰ was also an important decision in ECtHR's sexual orientation jurisprudence as it had been the first time that the Court assessed the possibility of same-sex couples' rights to marriage under Article 12. Even though the Court rejected the applicants' claims that they were discriminated against by public authorities on the grounds of their sexual orientation, it still held as *obiter dictum* that the relationship of the applicants fell within the notion of a "family life" just as a different-sex couple's in the same situation would.⁹¹¹ However, considering as they were denied the right to marry and had no other way of having their relationship legally recognized, the Court could have recognized that the applicants' rights under Articles 8, 12 and 14 were breached.

The Court accepts that in order to examine a situation under Article 14, it would need a similarly situated comparison group, and in this case that group has been a

⁹¹⁰ *Schalk and Kopf v Austria* App no. 30141/04 (ECtHR, 24 June 2010).

⁹¹¹ *Schalk and Kopf*, para. 94.

“different-sex” couple. However, by leaving the right of marriage to States’ margin of appreciation, the Court clearly followed the narrative that the notion of marriage had exclusively been a heteronormative one.⁹¹² The Court, after a while, did find that under Article 8 the States had a positive obligation to ensure that some form of recognition and protection is afforded to same-sex couples.⁹¹³ The States have gradually started to accept legislations that granted same-sex couples some form of legal recognition under “civil unions”, and although this has a positive development, these types of unions foresee fewer rights compared to a marriage and therefore do not eliminate the discrimination same-sex couples face. In *Fedotova v Russia*⁹¹⁴ the Court acknowledged the fact that there had been a clear and ongoing trend towards the legal recognition and protection of same-sex couples⁹¹⁵, but followed this by asserting that no similar consensus can be found as to the form of recognition, or the content of the protection, leaving this to the States to determine.⁹¹⁶ The Court in this regard uses the margin of appreciation doctrine to avoid analyzing such different treatment.⁹¹⁷ As for the State arguments of protecting traditional values of marriage and family, a sentiment oft employed by anti-gender movements across the globe, the Court asserted that the concept of family was “necessarily evolutive”⁹¹⁸ and that granting legal recognition to same-sex couples do not “harm families constituted in

⁹¹² Serhii Melnykovich, “Sexualized and Gendered Bias in the ECtHR Jurisprudence: How the Bias Distorts the Access of People of Diverse Sexualities, Genders, and Sex Characteristics to Their Rights”, (LL.M. thesis, Lund University 2023) 18.

⁹¹³ *Oliari and Others v Italy* App no. 18766/11 36030/11 (ECtHR, 21 July 2015) and *Orlandi and Others v Italy* App no. 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017).

⁹¹⁴ *Fedotova and Others v Russia* App no. 40792/10 30538/14 43439/14 (ECtHR [GC], 17 January 2023).

⁹¹⁵ *Fedotova and Others*, paras. 171-175.

⁹¹⁶ *Fedotova and Others*, para. 189.

⁹¹⁷ Melnykovich, 26.

⁹¹⁸ *Fedotova and Others*, para. 208.

the traditional way or compromise their future or integrity”.⁹¹⁹ This was an important insertion on the Court’s part as it implicitly denounced a widely used prejudice and by accepting that it is evolutive, severed the concept of marriage from its heteronormative connotations, at least in theory and indirectly. At the end, while the Court found a violation of Article 8 in terms of State failure to provide recognition and protection for same-sex couples, it still refrained from tackling the main question of marriage and making an examination of Articles 8 and 12 in conjunction with Article 14.

In *Fretté v France*, the applicant complained that the dismissal of his request for adopting a child amounted to arbitrary interference with his private and family life because it was based exclusively on unfavorable prejudice regarding his sexual orientation. The Court, however, by referring to the margin of appreciation of the State and the best interests of the child, did not find a violation. Particularly, the Court relied on the justification given by the Government that the applicant’s “choice of lifestyle” that the Government claimed was a reference to the applicant’s sexual orientation albeit among other considerations has been the deciding factor⁹²⁰, and found that it appeared objective and reasonable.⁹²¹ Evidently, the State and later the Court relied on the stereotypes that homosexual people were bad influences in general, and the interest of the children demanded that they are “protected” from the homosexual lifestyle.

⁹¹⁹ *Fedotova and Others*, para. 212.

⁹²⁰ *Fedotova and Others*, para. 36

⁹²¹ *Fedotova and Others*, para. 43

Similar stereotypes had been at work in the case of *E.B. v France*.⁹²² The case concerned an applicant who was a single and lesbian women who wanted to adopt but her applicants were rejected by the State on the grounds that “a model of sexual difference was an important factor in a child’s identity” and that lack of a father figure to which the child could construct their identity were important factors.⁹²³ The trait of the applicant as a single, lesbian woman together created a prescriptive stereotype that she would not be able to fulfill the heteronormative and gender-differentiated familial roles.⁹²⁴ The Court held that, differing from *Fretté*, such a reasoning amounted to a violation of the applicant’s rights under Articles 8 and 14.

In terms of its shortcomings with regards to an intersectional approach, the case of *Caster Semenya v Switzerland*⁹²⁵ is a great example. Mokgadi Caster Semenya first came to worldwide attention with her performance in the 800 meters at the Berlin World Championships in 2009. While some of this attention focused on her success, much of it was centered on the fact that Semenya looked “masculine” and was faster than “other women”. While Semenya continued to win gold medals throughout her career, she was also subjected to a series of “gender verification” tests under regulations set out by the formerly the International Association of Athletics Federations (IAAF), now the World Athletics Association (World Athletics), which resulted in her being banned from competing. When these tests were leaked to the press, Semenya’s gender became part of a brutal discourse with headlines such as “Could This Women’s World Champion Actually

⁹²² *E.B. v France* App no. 43546/02 (ECtHR [GC], 22 January 2008).

⁹²³ *E.B.*, paras. 38-39.

⁹²⁴ Cook and Cusack, 31.

⁹²⁵ *Semenya v Switzerland* App no. 10934/21 (ECtHR, 11 July 2023).

Be a Man?”.⁹²⁶ At the background of *Semenya*’s ban was the DSD Regulations adopted by World Athletics, preceded by Hyperandrogenism Regulations, that targeted athletes with a specific case of intersex status.

The Court, before *Semenya*, had only addressed intersex issues in three cases, two of which were found inadmissible and one – *Y v France* – no violation.⁹²⁷ *Semenya* in this regard marked a significant step for intersex rights, particularly for the Court’s inclusion of sex characteristics (*caractéristiques sexuelles*) to fall within the scope and ambit of Article 14.⁹²⁸ Here, the Court found that Semenya’s situation was comparable to that of other female athletes and in that sense she was subjected to different treatment.⁹²⁹ It then pointed out that different treatment on the basis of sex characteristics and intersex status could only be justified on very weighty grounds and that the State’s margin of appreciation was narrow in this respect, as these constituted an important aspect of Semenya’s identity.⁹³⁰ The Court further examined the case under Article 3 and contended that while unnecessary and forced medical examinations and treatments damage human dignity,

⁹²⁶ “South African runner Caster Semenya’s muscular physique helped propel her to victory during the 800 meters at Wednesday night’s world track and field championships in Berlin. Now that physique, coupled with an ongoing gender verification test, is fueling suspicion that Semenya could be stripped of her medal because she is actually a he” William Lee Adams, “Could This Women’s World Champ Be a Man?”, *Time Magazine* (21 August 2009) <https://content.time.com/time/world/article/0,8599,1917767,00.html> accessed 10 February 2024; “Caster Semenya Has No Womb and Internal Testes. Does That Make Her a Man?”, *Queerty* (10 September 2009) <https://www.queerty.com/caster-semenya-has-no-womb-and-internal-testes-does-that-make-her-a-man-20090910> accessed 10 February 2024.

⁹²⁷ *P v Ukraine* App no. 40296/16 (ECtHR, 11 June 2019); *M v France* App no. 42821/18 (ECtHR, 26 April 2022) *Y V France* App no. 76888/17 (ECtHR, 31 January 2023).

⁹²⁸ “(...) victime d’une discrimination fondée sur le « sexe » au sens de l’article 14 de la Convention, ainsi que sur les caractéristiques sexuelles (notamment génétiques) (...)” *Semenya*, para. 158.

⁹²⁹ *Semenya*, paras. 160-162.

⁹³⁰ *Semenya*, para. 169.

because Semenya had not actually been subjected to such examinations and treatments the mere threat of such treatments did not reach the threshold required by Article 3.⁹³¹

The Court's reasoning, although containing important advancements, is flawed on several grounds. First, *Semenya* had alleged that she was also discriminated against male athletes for whom the eligibility criteria in question were not used to determine biological or so-called "sports sex", and further whose high testosterone levels were never made into a dispute.⁹³² If testosterone gave athletes a significant competitive edge, and there is a lack of scientific studies showing such a correlation save for a biased one with faulty datasets⁹³³, then applying the DSD Regulations to female athletes and those who have an intersex status is discriminatory especially since male athletes with naturally varying testosterone levels are not subjected to the same scrutiny. More on this point, the Regulations unfairly target women who do not meet the traditional femininity standards as such tests are only done to athletes who are found to be "suspect" of intersex status.⁹³⁴

In connection, *Semenya* further alleged that such regulations disproportionately affected athletes from the Global South, and that there had been a discrimination based on race and ethnicity as well.⁹³⁵ The Court rejected this claim as well, but if an intersectional perspective had been taken, it would have found that the unique intersection of being a

⁹³¹ *Semenya*, para. 215.

⁹³² *Semenya*, para. 129.

⁹³³ See: Roger Pielke, Ross Tucker and Erik Boye, "Scientific Integrity and the IAAF Testosterone Regulations" (2019) 19 The International Sports Law Journal 20-24.

⁹³⁴ "Semenya's story, in particular, illustrates how intersecting racialised, gendered, and sexual legacies that intertwine upon bodies like hers (pre-)mark some bodies more easily than others as the object of Western suspicions, suspicions that were institutionalised as a legitimate gender verification method by the suspicion-based gender verification system" Erikainen, 121.

⁹³⁵ *Semenya*, para. 159.

woman and being a black person creates a different form of marginalization, as discussed above with Crenshaw's theory on intersectionality. In this case, Black women's bodies have historically been marginalized and stereotyped as "less female".⁹³⁶ The patriarchal point of view that defined the framework for what being a woman looks like is further defined by colonial and white perspectives, and the Court should have taken into account this allegation especially considering the number of women of color athletes that had been subjected to similar treatments.⁹³⁷

The rationale behind sports categories was the belief that, according to a binary understanding of gender, women athletes were lacking in physicality compared to men, even though the historical context would make it evident that separate categories stemmed from men's fear of losing a public space where they could practice their masculinity, with the increase in women's participation in sports.⁹³⁸ In the light of such regulations that defined the boundaries of these categories depending on racial and gender stereotypes, this masculinity crisis had been reconceptualized into a paternalistic one that aimed to protect the fair competition and participation of women athletes, foregoing the fact that total and complete equality in sports is an oxymoron and that there are many such physical qualities that may pose as an advantage for certain athletes, definitely even more so than testosterone levels that these regulation take as a basis. Binary gender stereotypes that

⁹³⁶ Shirley Anne Tate, *Black Women's Bodies and the Nation: Race, Gender and Culture* (Palgrave Macmillan London 2015) 2.

⁹³⁷ While Venus Williams and Serena Williams are the most mediatic examples of this, Semenya has also become a negative focus in this sense. In the context of gender verification practices, Semenya, along with female athletes from the Global South such as Dutee Chand, Santhi Soundarajan, Francine Niyonsaba, Annet Negesa, and Margaret Wambui, were constantly questioned on the basis of their gender.

⁹³⁸ Michael A. Messner, "Sports and Male Domination: The Female Athlete as Contested Ideological Terrain" (1988) 5 (3) *Sociology of Sport Journal* 197, 199-200.

were created by both colonial and patriarchal ideas created a culture of oppression against women, especially ones with “unusual bodies”. In face of such an intersection of discrimination, it is necessary for the Court to adopt an intersectional approach to address these systemic issues comprehensively.



IV. Gender Perspective and Its Practical Implications: An Evaluation of the Responsibility of the Judges

Public authorities exist within a State where they have the power to create, enforce, and/or interpret laws. This section aimed to demonstrate how the conduct of the judiciary, and especially the judges, as public authorities and the wielders of State powers, affects the enjoyment of the fundamental rights and freedoms of persons. Notably, this section focused on how judges' gender-prejudiced approaches resulted in rights violations, and how adopting a gender conscious perspective could have ameliorated the adjudication process.

In this respect, State responsibility ensures that the power beheld by the public authorities is regulated especially *vis-à-vis* individuals and their rights. In other words, State responsibility dictates that the State power employed by public authorities are constrained and directed in a way that respects and upholds human rights.⁹³⁹ Recalling that, for Turkey, these responsibilities find their expression in the Constitution mainly. It is thus important to regard the Constitutional responsibilities on human rights protection and fulfillment in light of the international conventions and treaties that bestow such responsibilities, specifically on the topic of gender-based discrimination. The premise of this section had been that, even if an effective regulatory framework were to have been put in place, in other words, even if a State were to have abided by its substantive positive obligations, the interpretation and application of them by public authorities, especially by

⁹³⁹ Vladislava Stoyanova, *Positive Obligations Under the European Convention on Human Rights: Within and Beyond Boundaries*, (Oxford University Press 2023) 8.

the domestic courts could still pose a problem. It is, therefore, a question of positive procedural obligations.

The Constitutional Court of Turkey, in this respect, have stated that even though it did not have the power to issue a judgment in the stead of lower instance courts, it was still bound to assess whether they “have exercised their discretionary powers in a reasonable and prudent manner”.⁹⁴⁰ Acting in a contrary manner therefore would be a violation of the rights enshrined in the Constitution, most notably the personal inviolability, corporeal and spiritual existence of the individual. Positive obligations in this respect require that individuals shall enjoy effective procedural safeguards to exercise these rights.⁹⁴¹ Therefore, one of the positive obligations of a State is to establish effective mechanisms against interference to their rights, including judicial procedures that provide the necessary procedural safeguards that thereby ensure that judicial and administrative authorities render effective and fair decisions.⁹⁴² Fulfillment of such positive obligations is especially crucial, as demonstrated above, in the context of gender based violence cases with regards to interim measures.

European Court of Human Rights, similarly, holds that public authorities are responsible especially with regards to individuals who are victims of domestic violence where they, “in particular are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity”.⁹⁴³ In this respect, the

⁹⁴⁰ AYM, *N.Ö.*, B. No: 2014/19725, 19.11.2015, para. 55.

⁹⁴¹ AYM, *Cezmi Demir ve diğerleri*, B. No: 2013/293, 17.7.2014, para. 81.

⁹⁴² AYM, *Hüdayi Ercoşkun*, B. No: 2013/6235, 10.3.2016, para. 94.

⁹⁴³ *Opuz*, para. 159.

positive obligations of a State, in connection with Article 2 of the Convention, requires that they shall set in place an efficient and independent judicial system.⁹⁴⁴ Positive procedural obligations are further significant with regards to Articles 3 and 8⁹⁴⁵, and the applicants that come before the Court have in one way or another argue that responses by public authorities and especially by judicial systems are ineffective in the protection of their rights.⁹⁴⁶ It is therefore significant that the Court pays special attention to the role of the judiciary in gender-sensitive cases, which was solidified with its reference to the Istanbul Convention's Article 18 where it is prescribed that ensuring "(...) there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary (...)" is an obligation of the States.⁹⁴⁷

However, while the judiciary is positioned as one of the pillars that is tasked with the realization of human rights protection and fulfillment as a public authority, as this thesis has argued, it is a site of rights violations as well. While the legislative framework as well as the ethical codes relating to the special obligation of judges as State agents in the protection and fulfillment of human rights are solidified in case law, it also showcases their shortcomings and areas that need improvement, which this thesis has argued, can be achieved by the adoption of an intersectional gender-conscious perspective. Judicial complacency and passivity⁹⁴⁸, judicial stereotyping⁹⁴⁹ and gender-based discrimination⁹⁵⁰,

⁹⁴⁴ *Talpis*, para. 99.

⁹⁴⁵ Stoyanova, "Positive Obligations", 123ff.

⁹⁴⁶ Stoyanova, "Positive Obligations", 128.

⁹⁴⁷ *Kurt* para. 82.

⁹⁴⁸ *Opuz*, para. 191; *Talpis*, para. 131, 141; *Volodina*, para. 113.

⁹⁴⁹ *J.L.*, para. 141.

⁹⁵⁰ *Tkheldize*, para. 60.

refusal to grant interim measures and/or disregarding the applicants' claims⁹⁵¹, as demonstrated above, all result in gross rights violations and further help create a climate that is conducive to gender discrimination.

Judicial approach to cases concerning gender related issues should therefore be rethought if the structural causes of inequality and gender discrimination and oppression are to be dismantled.⁹⁵² A gender perspective in adjudication therefore will aim to dismantle the male-oriented interpretation of laws and cases and instead introduce the social experiences of marginalized groups around the question of gender into the legal discourse.⁹⁵³ It is important to note that an intersectional gender approach would not and does not guarantee that the outcome of cases would be different or better, but it would certainly ensure that gender stereotypes and prejudices are not encouraged and reciprocated on an institutional level.

Constitutional Court of Turkey in this regard demonstrated a complex approach overall, in that it proved to be capable of issuing decisions that took gender equality as their basis, and at the same time, wholly disregarded a gender-conscious approach and heavily relied on gender stereotypes. Established laws, especially constitutions, reflect a patriarchal perspective in its norms. Therefore, the courts, but especially constitutional courts that are tasked with the objective of safeguarding fundamental rights and freedoms shall be conscious of this and issue decisions accordingly. Moreover, in accordance with international and regional human rights texts, it is expected of the Constitutional Court of

⁹⁵¹ *A.Z.Ö.*, para. 64.

⁹⁵² Timmer, "Anti-Stereotyping Approach", 736.

⁹⁵³ Evola, Krstić, Rabadán, 174.

Turkey to take a gender perspective in its judicial reviews of norms and individual complaint cases. TCC, making references to such texts, have in the past shown that it recognizes its duty to realize gender equality. However, the practical outcomes rarely reflect this awareness. In fact, it is apparent that TCC continuously uses justifications such as public interest to disregard gender-based claims.

For the European Court of Human Rights, the situation is a bit more stable, to mean that even though its earlier case law demonstrated astounding usage of a male-oriented perspective and reasoning, in its latest case law the Court has been decidedly aware of the gender implications of its decisions. Despite its “genderless” approach, the Court has integrated several gender-conscious perspectives, the most recent and notable being the “particular vulnerability” criterion. However, considering that the Court is strict in its employment of this approach, and the fact that it still refrains from approaching the cases from a multi-dimensional and intersectional standpoint, it seems that eradicating gender inequalities are some ways ahead yet. Further, the Court’s practice of non-intervention and its pursuit of seeking a political balance with regards to States results in a heavy reliance on the margin of appreciation doctrine to the detriment of fundamental rights and freedoms of women. It is notable that the Court, in contrast to TCC, does not reproduce gender stereotypes, at least not in its recent judgments, but it still does not fully notice and denounce them.

CONCLUSION

“Feminist jurisprudence is an examination of the relationship between law and society from the point of view of all women”.⁹⁵⁴ It is not only an inquiry into the hazardous nature of the patriarchy-infused legal structure, but also an endeavor into the possibility of the creation of a better and more responsive legal system. In other words, a “non-patriarchal legal system” is possible.⁹⁵⁵

As discussed in the first chapter, judicial ethics will provide to be the guiding principle that will then make it possible to obligate judges to go beyond the written law and make considerations outside the traditional methods. Feminist legal methods will further provide the framework for how to ensure that the historically and systemically excluded groups and narratives will obtain their place within the dominant legal narratives. Feminist methods therefore show that it is possible to imagine a jurisprudence that is respondent to the specific and unique inequalities that appear at the intersections of gender and other grounds. Being mindful of the patriarchal construction of the legal system, this thesis argued for introducing a gender dimension to judicial decision-making where both the interpretation of existent laws and the specific merits of the cases that come before courts can be interpreted and regarded through a gender-conscious perspective.

One criticism to this suggestion of adopting a gender perspective method could be that including such a perspective would infringe on the neutrality of law and tip the

⁹⁵⁴ MacKinnon, "Developing Feminist Jurisprudence," Panel Discussion at the 14th National Conference on Women and Law, Washington, D.C. 1983 quoted in Wishik, 64.

⁹⁵⁵ Wishik, 67.

scales, as it were. However, the existent law is already not neutral in effect. Nor is it truly legitimate if the said legitimacy is dependent upon the subordination of women and at the expense of other social groups. The argument for the implementation of a gender perspective does not connote to favoring women or vying for special treatment, the legal system already does this for men. Adoption of a gender perspective in the judiciary will therefore only aim to dig up the forgotten and excluded narratives, and include their experiences in the judicial decision-making process.

This thesis tried to present an account of how a gender perspective in adjudication would greatly benefit the feminist cause of trying to establish a more just legal system for women and non-dominant social groups. In doing so, this thesis took issue with the usage of gender stereotypes in court proceedings and how this notion presents to be a barrier in access to justice. However, there are many other barriers in access to justice for women, especially with regards to socio-economic disparities and directly discriminatory legislation. As this thesis only approached the issue from the judiciary aspect, it would further be greatly beneficial to conduct studies on how other institutions in a legal system function to exclude non-dominant social narratives in order to achieve a more comprehensive analysis in this regard. Furthermore, as this thesis only analyzed judges and their conduct as a component of the judiciary, a more comprehensive study on the conduct of prosecutors and other actors of the judiciary should be done in order to fully understand the effects of stereotyping in such processes.

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