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Gender equality in the EU in human rights context

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Introduction

Outline

Recent developments in human rights law (2017-2018), related to the material scope of EU gender equality law:

1. Gender stereotyping
2. Employment
3. Face veil bans
4. Conclusion



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1. Gender stereotyping

Traditional Gender Stereotypes.

<u><i>Feminine.</i></u>	<u><i>Masculine.</i></u>
<i>Not aggressive.</i>	<i>Aggressive.</i>
<i>Dependent.</i>	<i>Independent.</i>
<i>Easily influenced.</i>	<i>Not easily influenced.</i>
<i>Submissive.</i>	<i>Dominant.</i>
<i>Passive.</i>	<i>Active.</i>
<i>Home-oriented.</i>	<i>Worldly.</i>
<i>Easily hurt emotionally.</i>	<i>Not easily hurt emotionally.</i>
<i>Indecisive.</i>	<i>Decisive.</i>
<i>Talkative.</i>	<i>Not at all talkative.</i>
<i>Gentle.</i>	<i>Tough.</i>
<i>Sensitive to other's feelings.</i>	<i>Less sensitive to other's feelings.</i>
<i>Very desirous of security.</i>	<i>Not very desirous of security.</i>
<i>Cries a lot.</i>	<i>Rarely cries.</i>
<i>Emotional.</i>	<i>Logical.</i>
<i>Verbal.</i>	<i>Analytical.</i>
<i>Kind.</i>	<i>Cruel.</i>
<i>Tactful.</i>	<i>Blunt.</i>
<i>Nurturing.</i>	<i>Not nurturing.</i>

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- My claim: combatting gender stereotyping is essential to achieve (substantive/transformational) gender equality
- Stereotyping creates and reinforces inequality and discrimination. Invidious circle that perpetuates itself:

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graph TD
    A[Discrimination] --> B[Justification of discrimination]
    B --> C[Cause of further discrimination]
    C --> A
  
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- Courts and human rights bodies can help break this cycle by naming stereotypes and exposing their harm

Combatting gender stereotyping: priority for CEDAW, CoE, and EU

- Istanbul Convention, Art 12(a) & see CEDAW Art 5(a)
- 'Gender stereotypes are preconceived social and cultural patterns or ideas whereby women and men are assigned characteristics and roles determined and limited by their sex.'
(Council of Europe – Gender Equality Strategy 2018- 2023)
- 'Across all priority areas, attention will be paid to the role of men, dismantling gender stereotypes and promoting non-discriminatory gender roles.'
(European Commission, Strategic Engagement for Gender Equality 2016-2019, p. 9)

ECtHR *Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC) (I)

- What came before: ECtHR *Konstantin Markin v. Russia* (2012) (GC)

78. On the one hand, the Court has repeatedly held that **differences based on sex require particularly serious reasons by way of justification** and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, **any more than similar stereotypes** based on race, origin, colour or sexual orientation



ECtHR *Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC) (II)

78. ... On the other hand ... it is **not its role to decide what is the appropriate term of detention** applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court ...

79. An additional factor relevant for determining the extent to which the respondent State should be afforded a margin of appreciation is the **existence or non-existence of a European consensus**.

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ECtHR *Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC) (III)

82. ... the Court has taken note of various European 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** The Government provided statistical data showing a considerable difference between the total number of male and female prison inmates They also pointed to the relatively small number of persons sentenced to life imprisonment

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ECtHR *Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC) (IV)

82. ... In the particular circumstances of the case, the available data ... provide a sufficient basis for the Court to conclude that there exists a **public interest** underlying the exemption of female offenders from life imprisonment by way of a general rule.

...

86. It therefore appears **difficult to criticize the Russian legislature** for having established, in a way which reflects the evolution of society in that sphere, the exemption of certain groups of offenders from life imprisonment. Such an **exemption represents**, all things considered, **social progress in penological matters** ...

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ECtHR *Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC) (V)

Concurring opinion of Judge Turkovic

6. In the present case **the Court was faced with a real dilemma**. The Government have indicated that in the event of a finding of a violation, **levelling down** would be a preferable remedy

Concurring opinion Judge Sajó

'One could argue that the most serious crimes women commit differ from those committed by male offenders ...'

Female crime is far less common than male crime; therefore there can be less need for deterrence.'

'... the same period of **imprisonment for a woman is more painful than for a man, perhaps because, typically, a woman is deprived of the possibility of giving birth to a child, and in particular raising a child** ...'

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Alexandru Enache v. Romania, 3 October 2017 (I)

68. However, with regard to the question whether during the first year of the child's life an imprisoned father is in a comparable situation to that of an imprisoned mother the Court considers that ... the measure allowing a stay of execution of a custodial sentence has the primary aim of safeguarding the best interests of the child in order to ensure that it receives the appropriate attention and care during the first year of its life. Whilst there may be differences in their relationship with their child, both the mother and the father can provide this attention and care.... Furthermore, the Court observes that entitlement to a stay of execution of sentence continues up to the child's first birthday and therefore extends beyond the period following the mother's pregnancy and the birth.

69. ... the applicant can claim to be in a situation comparable to that of a female prisoner.

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Alexandru Enache v. Romania, 3 October 2017 (II)

76. The Court also takes into consideration the Government's submission that the aim of the statutory provisions in question was to take account of specific personal situations, including pregnancy of female prisoners and the period preceding the baby's first birthday, having regard in particular to the special ties which exist between the mother and child during that period ... The Court considers that this aim can be regarded as legitimate for the purpose of Article 14 of the Convention and that the arguments advanced by the Government cannot be considered manifestly ill-founded or unreasonable. It is willing to consider that, in the specific area concerned by the present case, these considerations can constitute a sufficient basis for justifying the difference in treatment of the applicant.

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Alexandru Enache v. Romania, 3 October 2017 (III)

77. The Court accepts that **motherhood has specific features which need to be taken into consideration, sometimes by means of protective measures, ...** It notes for example that **Article 4 § 2 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women** expressly provides that adoption by States Parties of special measures aimed at protecting maternity shall not be considered discriminatory ... and that similar provision is made in norms of international law It considers that these findings are also valid where a woman is deprived of her liberty.

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Carvalho Pinto de Sousa Morais v. Portugal (1)

Supreme Administrative Court reduced damages, *inter alia*, because:

§.16: ' ... **considering the age of her children, she [the plaintiff] probably only needed to take care of her husband**; this leads us to the conclusion that she did not need to hire a full-time maid ... 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.**'

Carvalho Pinto de Sousa Morais v. Portugal (2)

§.52... The question at issue here is ... the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That **assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes** and thus ignores its physical and psychological relevance for the self-fulfilment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality in the specific case of the applicant.

- Conclusion regarding case law ECtHR: not consistent.

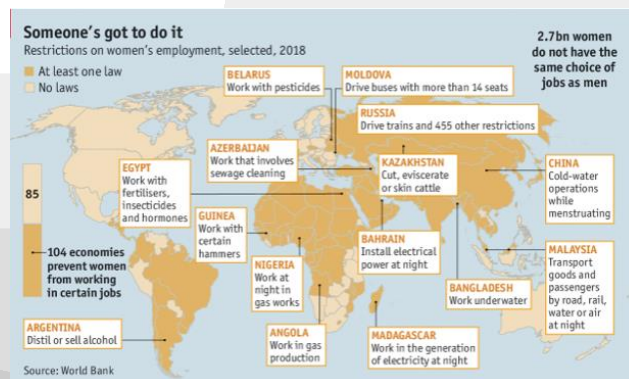
Other development:

- Initiative Gender Equality Commission (GEC) CoE: **Draft Recommendation on Preventing and Combatting Sexism**

<https://www.coe.int/en/web/genderequality/drafting-committee-sexism-recommendation>

- Possible adoption next meeting GEC; 5-7 December 2018

2. Employment



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Access to employment

ECTHR, *Hülya Ebru Demirel v. Turkey* (2018) (1)

- Background: Very few ECTHR cases on sex discrimination in employment



- Demirel was refused a post as security officer at a State-run electricity company, because she was not a man and had not completed military service.
- Government's justification: '*the nature of the duties of the post, which involved using firearms and working at night*' (*Demirel*, par. 18 32).

ECtHR, *Hülya Ebru Demirel v. Turkey* (2018) (2)

- ECtHR refers to its reasoning in *Boyraz v. Turkey* (2014) - the facts of *Boyraz* and *Demirel* are largely the same
- No reference to EU law
- Is the Convention (Art 8) applicable?
Par. 44: ... a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant's dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life.

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ECtHR, *Hülya Ebru Demirel v. Turkey* (2018) (3)

- 51:...the Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and **very weighty reasons** would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention
- 53. As regards the question of whether the difference in treatment between women and men was objectively and reasonably justified ... the main consideration in these explanations is that the activities of security officers **carried certain risks and responsibilities as the security officers had to work at nights in rural areas and since they had to use firearms and physical force in case of an attack** on the premises they were guarding. It appears that the administrative **authorities considered that women were unable to face those risks and assume such responsibilities**. There is, however, no explanation in the submissions of the administrative authorities or the Government as to this purported inability..

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ECtHR, *Hülya Ebru Demirel v. Turkey* (2018) (4)

54. The Court is aware that there may be legitimate requirements for certain occupational activities depending on their nature or the context in which they are carried out. However, in the instant case, neither the administrative authorities nor the Twelfth Division of the Supreme Administrative Court substantiated the grounds for the requirement that only male staff be employed in the post of security officer ... The Court, for its part, also takes the view that the mere fact that security officers in Batman had to work on night shifts and in rural areas and might be required to use firearms and physical force under certain conditions could not in itself justify the difference in treatment between men and women.

56. In sum, it has not been shown that the difference in treatment pursued a legitimate aim.

Conclusion: violation Art 14 j 8



Of firearms and weak women: compare CJEU cases

Case 222/84 *Johnston* (1986)

C-285/98 *Kreil* (2000)

- 'genuine and determining occupational requirement' (nowadays Art 14(2) Gender Recast Directive 2006/54) – must be interpreted strictly (*Johnston*)
- Legitimate to 'protect a woman's biological condition and the special relationship which exists between a woman and her child.'
- Blanket ban on women for general protective purposes not proportionate.

Compare CEDAW, Medvedeva v. Russia (2016)

Issue: Woman's application to become helmsperson-motorist on a boat owned by a private company was rejected because of Labour Code provision

CEDAW Committee:

11.3 The Committee is of the view that the introduction of such legislation **reflects persistent stereotypes concerning the roles and responsibilities of women and men in the family and in society that have the effect of perpetuating traditional roles for women as mothers and wives and undermining women's social status and their educational and career prospects.**



Future development to watch: ECSR equal pay cases

- University Women of Europe (UWE) filed complaint to ECSR against the 15 states (nos. 124-138/2016)
 - wage gap
 - women in decision-making positions in private companies
- Articles 1 (the right to work), 4 (right to a fair remuneration), 20 (Right to equal opportunities and equal treatment in employment and occupation without sex discrimination) and E (non-discrimination) of the Charter
- ECSR declared **complaints admissible** on 4 July 2017 – Governments had argued lack of substance of complaint, but this will be considered under the merits

3. Face veil bans



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Face veil bans

Compare

- ECTHR, *SAS v. France* (2014)
+ *Belkacemi and Oussar v. Belgium, Dakir v. Belgium*
(11 July 2017)
- CJEU, C-157/15 *Achbita* (2017) & C-188/15 *Bouagnaoui*
(2017)
- HRC, *Hebbadj v. France & Yaker v. France* (2018)

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ECtHR, *SAS v. France* (2014)

- Ban on wearing face veils in public spaces
- Blanket ban is unnecessary for the protection of public safety, especially because less restrictive alternatives are available
- 119. ... a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms
- But: 'vivre ensemble' is a legitimate aim

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CJEU, C-157/15 *Achbita* & C-188/15 *Bougnaoui* (2017)

- Private sector employees wearing headscarves (more comparable to ECtHR *Eweida v. UK*)
- Achbita at 38: “[a]n employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.” (§ 38)
- The ECJ is more critical in the case of *Bougnaoui*, where it does not accept that customers’ wishes trump employees’ right to manifest their religion.

To

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HRC, *Hebbadj v. France & Yaker v. France* (2018) (1)

Art 18 ICCPR: Freedom of Religion

- Public safety or order: blanket ban not proportionate
- HRC does not accept 'living together' argument of the Government

Art 26 ICCPR: Non-Discrimination

7.13: ...from the text of the Act, the debate preceding its adoption and its implementation in practice, the Committee observes that the Act is applied mainly to the full-face Islamic veil, which is a form of religious observance and identification for a minority of Muslim women.

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HRC, *Hebbadj v. France & Yaker v. France* (2018) (2)

7.15: The Committee further notes that the blanket ban on the full-face veil introduced by the Act appears to be based on the **assumption that the full-face veil is inherently discriminatory and that women who wear it are forced to do so**. While acknowledging that some women may be subject to family or social pressures to cover their faces, the Committee observes that the wearing of the full-face veil **can also be a choice** — or even a means of staking a claim—based on a religious belief, as in the author's case. The Committee further considers that the ban, far from protecting fully veiled women, **could have the opposite effect of confining them to the home, impeding their access to public services and exposing them to abuse and marginalization**.

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HRC, *Hebbadj v. France & Yaker v. France* (2018) (3)

7.17 In the light of the foregoing, the Committee considers that the criminal ban introduced by article 1 of Act No. 2010-1192, disproportionately affects the author as a Muslim woman who chooses to wear the full-face veil and introduces a distinction between her and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable. The Committee hence concludes that this provision and its application to the author **constitutes a form of intersectional discrimination based on gender and religion**, in **violation of article 26** of the Covenant.

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Conclusions

- Coherence sometimes lacking:
 - within legal systems
 - between legal systems (EU and HR law)
- Building bridges between different systems (EU and HR bodies)
- Combating gender stereotyping central to achieve gender equality in all areas

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Discussion



THANK YOU!

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