



# Human Rights Law Through the Lens of the Gender Perspective

# 7

Marco Evola, Julia Jungfleisch, and Tanasije Marinković

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Authors are listed in alphabetical order. Marco Evola authored Sects. 7.2.4, 7.2.7, 7.3.1–7.3.5; Julia Jungfleisch authored Sects. 7.2.1–7.2.3, 7.2.6 and 7.3.6; Sects. 7.2.5 and 7.2.8 are written by Tanasije Marinković.

M. Evola  
LUMSA, Department of Law, Palermo, Italy  
e-mail: [m.evola@lumsa.it](mailto:m.evola@lumsa.it)

J. Jungfleisch (✉)  
Saarland University, Faculty of Law, Saarbrücken, Germany  
e-mail: [jungfleisch@europainstitut.de](mailto:jungfleisch@europainstitut.de)

T. Marinković  
University of Belgrade, Faculty of Law, Belgrade, Serbia  
e-mail: [tanasje.marinkovic@ius.bg.ac.rs](mailto:tanasje.marinkovic@ius.bg.ac.rs)

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## Abstract

This chapter will provide an overview on several aspects of the gender perspective in Human Rights Law. The chapter will therefore look at the civil and political rights from a gender perspective, as well as social, economic and cultural rights of women, non-binary and LGBTIQ+ persons. The aim is to increase the students' awareness for the gender perspective in international human rights protection, by providing an overview of currently discussed issues in this area. Such issues include the prohibition of gender-based violence, contemporary forms of slavery and trafficking in persons, the freedom of religion, the right to private life, access to justice for women, women's (political) empowerment, the prohibition of economic and social discrimination, and women's right to education.

## 7.1 Introduction

Human rights are by their very nature subject to controversy and debate. Gender perspective in human rights renders this debate even more complex, given there is more than one version of gender equality. In addition, some of the well-known attacks on the values of human rights, coming from utilitarianism, communitarianism and cultural relativism, directly target gender equality. The chapter will look at the civil and political rights (Sect. 7.2) as well as social, economic and cultural rights (Sect. 7.3) from a gender perspective.

The covered aspects include: the prohibition of gender-based violence; the prohibition of slavery and trafficking in persons; the freedom of religion; the right to private life; the access to justice for women; women's empowerment; the prohibition of women's economic and social discrimination, and women's right to education.

### Learning Goals

The learning goals of this chapter are:

- Increased awareness of the gender perspective in international and comparative law of human rights protection.

(continued)

- Overview of currently discussed problem issues in the area of human rights from a gender perspective.
- Basis for own further engagement of the student with the gender perspective in human rights law.

## 7.2 Gender Perspective in Civil and Political Rights

### 7.2.1 The Prohibition of Gender-Based Violence with a Focus on the Istanbul Convention

Gender-based violence (GBV) occurs worldwide; its elimination is therefore part of the UN General Assembly's Agenda for Sustainable Development (Goal 5.2).<sup>1</sup>

The prohibition of GBV can be derived from several guarantees in general human rights treaties, such as the International Covenant on Civil and Political Rights.<sup>2</sup> Pursuant to Art. 2 (1) ICCPR, the right to life (Art. 6), the right to physical and psychological integrity (Art. 17) and the prohibition of torture and inhuman or degrading treatment (Art. 7) have to be respected and ensured by States Parties regardless of gender. As a consequence, these can be read as obliging the latter to protect women from GBV.

GBV against women has furthermore been qualified as discrimination against women. It mirrors a systematic inequality of women and a respective societal structure that supports this inequality, thereby disadvantaging women.<sup>3</sup> Even though the gender-specific Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>4</sup> does not contain any specific prohibition of GBV, the Committee on the Elimination of Discrimination against Women defines it in its General Comments and requires states to act upon it. GBV "[...] includes a host of harmful behaviors that are directed at women and girls because of their sex, [...]"<sup>5</sup> not only in the analogous but also in the digital world.<sup>6</sup>

<sup>1</sup>UN General Assembly (UNGA), Resolution A/RES/70/1, Transforming the world: the 2030 Agenda for Sustainable Development, [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E).

<sup>2</sup>ICCPR, 16 December 1966, UNTS vol. 999, p. 171.

<sup>3</sup>See e.g. Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendations No 19 on Violence against Women (1992) and No 35 on Gender-based Violence against Women, Updating General Recommendation No 19 (2017).

<sup>4</sup>CEDAW, General Recommendations supra note 3, stating that the prohibition of gender based violence is a principle of customary international law (para. 2).

<sup>5</sup>Heise et al. (2002), p. 6.

<sup>6</sup>Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, paras. 12ff.

In contrast to CEDAW, the three regional instruments; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para),<sup>7</sup> the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)<sup>8</sup> and the Council of Europe Convention on Violence against Women and Domestic Violence (Istanbul Convention)<sup>9</sup> explicitly define GBV. The Istanbul Convention, for example, sets forth in Art. 3 lit. a) that 'violence against women' is

*"[. . .] a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life; [. . .]". According to Art. 3 lit. d, 'gender-based violence against women' "shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately".*

A shortcoming of the Istanbul Convention is that it does not acknowledge that gender-based violence can also occur to men, e.g. violence against men because of their homosexual orientation<sup>10</sup> and it leaves non-binary persons outside its protection; "gender" in the sense of the Convention refers exclusively to women and men.<sup>11</sup> Since the Istanbul Convention does not have an individual complaints mechanism, the ECHR remains important for the effective implementation of the prohibition of GBV. The ECtHR uses the Istanbul Convention as a point of reference for interpreting the ECHR<sup>12</sup> and the case law of the Court is of importance for the application of the Istanbul Convention.<sup>13</sup> The prohibition of GBV has been read into the Articles 2, 3, 4, 6, 8, 13, 14 and Art. 1 Protocol 12 to the Convention by the ECtHR.<sup>14</sup>

<sup>7</sup>Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994.

<sup>8</sup>African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

<sup>9</sup>Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210.

<sup>10</sup>See the definition of victim in the Explanatory report to the Istanbul Convention, para. 45 (men can merely be victims of domestic violence), see also: Niemi and Sanmartin (2020), p. 81 f.

<sup>11</sup>Art. 3 lit. c Istanbul Convention, Explanatory Report, para. 44.

<sup>12</sup>E.g.: App. No. 41237/14, *Talpis v Italy* (ECtHR, 2 March 2017), para 129; App. No. 49645/09, *Bălșan v Romania* (ECtHR, 23 May 2017), para. 79; App. No. 47666/13, *Ž.B. v Croatia* (ECtHR, 11 July 2017) para 56; App. No. 62903/15, *Kurt v Austria* (ECtHR [GC], 15 June 2021) paras. 167 ff.

<sup>13</sup>Preamble of Istanbul Convention, supra note 10.

<sup>14</sup>A good overview gives the ECtHR Press Unit, Factsheet on Violence against women, available here: [https://www.echr.coe.int/Documents/FS\\_Violence\\_Woman\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf).

## 7.2.2 The Content and Scope of the Prohibition of GBV

The prohibition of GBV has several dimensions: firstly, the duty to respect, or as described by the ECtHR, negative obligations; secondly, the duty to protect, and thirdly, the duty to ensure, also a part of the aforementioned positive obligations. Said positive obligations entail: “(1) the obligation to criminalise harmful conduct, (2) the procedural obligation to investigate allegations of criminal conduct, (3) the obligation to take protective operational measures, (4) the obligation to adopt effective regulatory frameworks for general prevention and (5) the obligation to offer remedies.”<sup>15</sup> The Istanbul Convention follows a comparable threefold approach with regard to the positive obligations, the so called “three P approach”<sup>16</sup> which can be derived from Art. 1 of the Convention.

### 7.2.2.1 Negative Obligations

With regard to the negative obligations, the prohibition of GBV requires a state to refrain from gender-based violence (Art. 5 (1) Istanbul Convention). This comes into play e.g. in relation with ill treatment in detention,<sup>17</sup> police violence,<sup>18</sup> and expulsions.<sup>19</sup>

### 7.2.2.2 Positive Obligations

Positive obligations come into play where, not the state itself (including its organs, agents, etc.) commits an act of GBV, but rather where private individuals trigger the state’s duty to protect the victim. The ECtHR, for example, derives positive obligations to protect women from GBV from the right to life (Art. 2 ECHR) and the prohibition of inhuman and degrading treatment (Art. 3 ECHR), as well as the duty to protect the physical and psychological integrity of women from Art. 8 ECHR.<sup>20</sup> Art. 5 (2) of the Istanbul Convention speaks of the concept of “due diligence” instead of positive obligation, but according to the Explanatory report to the Istanbul Convention, the two terms can be used interchangeably.<sup>21</sup> With regard to the implementation of said positive obligations/ due diligence, states are granted a certain discretion.<sup>22</sup> Positive obligations cannot be interpreted in a way where they

<sup>15</sup>Stoyanova (2020a), p. 104.

<sup>16</sup>The three P’s stand for: Prevention, Protection and Prosecution.

<sup>17</sup>App. No. 52515/99, *Juhnke v Turkey* (ECtHR, 13 May 2008).

<sup>18</sup>App. No. 43347/09, *Ebru Dinçer v Turkey* (ECtHR, 29 April 2019).

<sup>19</sup>See case law on the Factsheet *supra note* 15; (Art. 59ff. Istanbul Convention) and example at 3.1.2.2.

<sup>20</sup>App. No. 87/1997/871/1083, *Osman v UK* (ECtHR, 28 October 1998); App. No. 55354/11, *Civek v Turkey* (ECtHR, 23 February 2016).

<sup>21</sup>See: Explanatory Report to the Istanbul Convention, para 58. For a detailed analysis of the relationship between positive obligations and due diligence and a critique on the interchangeable use of the concepts see Stoyanova (2020a), pp. 95–129.

<sup>22</sup>App. No. 33401/002, *Opuz v Turkey* (ECtHR, 9 June 2009) para. 129.

would impose “*an excessive burden on the authorities*”,<sup>23</sup> but only require the state to do what can reasonably be expected in the respective situation.

Positive obligations/due diligence with regard to the prohibition of GBV require the states, inter alia: to introduce legislation that criminalises GBV (see also Art. 4 Istanbul Convention, Art. 33–42 Istanbul Convention);<sup>24</sup> and to effectively apply and interpret the existing legal framework that criminalises the respective behaviour,<sup>25</sup> in all areas of law, not only criminal law.<sup>26</sup> States are furthermore required to conduct adequate investigations<sup>27</sup> into committed crimes and complaints of GBV<sup>28</sup> and convict perpetrators (Art. 45 (1) Istanbul Convention), as well as to ensure effective proceedings and adequate remedies (Art. 29f. Istanbul Convention; Art. 49–58 Istanbul Convention).

## 7.2.3 Fields of Application for the Prohibition of GBV

### 7.2.3.1 Domestic Violence

“Domestic violence as intimate-partner violence includes physical, sexual, psychological or economic violence between current or former spouses as well as current or former partners.”<sup>29</sup> In cases of domestic violence, the state has a duty to protect victims and to effectively and adequately investigate and prosecute the perpetrator with a “special diligence”:

#### Example

*“160. The Court considers that the circumstances of the attack on the applicant – which has the hallmarks of a form of gender-based violence – should have incited the authorities to react with special diligence in carrying out the investigative measures. Whenever there is a suspicion that an attack might be gender motivated, it is particularly important that the investigation is pursued with vigour.”*<sup>30</sup> ◀

In principle, more women than men are affected by domestic violence, but not exclusively, as has also been acknowledged by the ECtHR.<sup>31</sup>

<sup>23</sup> App. No. 35810/09, *O’Keefe v Ireland* (ECtHR, [GC], 28 January 2014), para. 144.

<sup>24</sup> With regard to sexual crimes see: App. No. 8978/80, *X and Y v the Netherlands* (ECtHR, 26 March 1985), paras. 23, 26; more general see: *O’Keefe v Ireland* supra note 25, para. 147.

<sup>25</sup> App. No. 57693/10, *Kalucza v Hungary* (ECtHR, 24 April 2012), paras. 68f.

<sup>26</sup> *Bălşan v Romania*, supra note 13, para 63.

<sup>27</sup> App. No. 12060/12, *M.C. and A.C. v Romania* (ECtHR, 12 April 2016) paras. 107–111.

<sup>28</sup> See e.g.: App. No. 3621/07, *Durmaz v Turkey* (ECtHR, 13 November 2014), paras. 54–68.

<sup>29</sup> Explanatory report to the Istanbul Convention, para. 42.

<sup>30</sup> App. No. 48756/14, *Tërshana v Albania* (ECtHR, 04 August 2020), paras. 153 and 160.

<sup>31</sup> *Opuz v. Turkey*, supra note 24, para. 132.

### 7.2.3.2 Crimes Committed in the Name of So-called “Honour”

Another aspect of GBV are crimes committed in the name of so-called “honour”. What these crimes have in common, is that they are committed mostly by a family member, or a person close to the family. The intent being to punish the victim for the lack of respect for, or in order to ensure her respect for “the sexual and social conduct that is the norm within the community.”<sup>32</sup> A typical example is the killing of a woman after the end of a relationship or her breakaway from the family in order to “restitute” the man’s, and respectively, the family’s so called “honour”.

Article 42 of the Istanbul Convention obliges states inter alia to exclude “honour crimes” from the justification grounds. Besides these legislative obligations of states, the well-founded fear of a person to become a victim of a “*crime committed in the name of so-called honour*” can, if substantiated, qualify as a persecution “*within the meaning of Art. 1, A (2) of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection*” (Art. 60 (1) Istanbul Convention) and thus lead to international protection. Equally, “*victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.*” (Art. 61 (2) Istanbul Convention). Even though Art. 59–61 of the Istanbul Convention add to a more gender sensitive (European) Refugee law, the absence of a regulation concerning “*internal flight alternatives*”, lead the ECtHR to refer to the said alternative as a reason for inadmissibility decisions in GBV related asylum cases,<sup>33</sup> creating a gap of (needed) protection.

### 7.2.3.3 Obstetric Violence

Finally, obstetric violence as an aspect of GBV is not per se new, but has only recently entered public and academic awareness. The Special Rapporteur defines obstetric violence as:

► **Definition** “[...] *violence experienced by women during facility-based childbirth.*”<sup>34</sup> She elaborates further, that “[s]uch violence is [also] experienced by women and girls when seeking other forms of sexual and reproductive healthcare, including gynaecological examinations, abortion, fertility treatments and contraception and in other sexual and reproductive health contexts.”<sup>35</sup>

<sup>32</sup> Grans (2018), p. 137.

<sup>33</sup> Citing ECtHR case law in this regard: Morondo Taramundi (2020), p. 254.

<sup>34</sup> UNGA, Report of the Special Rapporteur on violence against women, its causes and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence, A/74/137, para. 12.

<sup>35</sup> *ibid.* para. 9.

Obstetric violence can occur to every person giving birth, however, it is more likely to occur to persons belonging to a minority, migrants, persons with disability or persons who are living with HIV. In other words: “*women [or rather: persons] who experience intersectional discrimination on multiple grounds.*”<sup>36</sup> CEDAW and the Istanbul Convention oblige states “[...] to pursue, by all appropriate means and without delay, a policy of eliminating discrimination and gender-based violence against women, including in the field of health”.<sup>37</sup> This obliges states to effectively combat obstetric violence as a form of GBV, as stated and elaborated in detail by the Committee on the Elimination of Violence against Women in a recent case.<sup>38</sup>

### 7.2.4 Gender Dimensions of Contemporary Forms of Slavery and Trafficking in Persons

Assessing the laws on slavery and trafficking in persons from a gender perspective, puts into question the effectiveness of the protection the international system affords to women’s fundamental rights against the old and new forms of violence.<sup>39</sup> Although the international covenants regulating slavery and trafficking include male victims, the violations of human rights at stake possess special significance with reference to women. Slavery and trafficking stem from the patriarchal culture which commodifies women and subjugate them through the threat or use of violence. Slavery like practices such as enforced prostitution or forced marriages, and the slavery status in which many female household workers are kept, are marked by the conception of women as objects.

Furthermore, a gender-based analysis of the laws on slavery and trafficking highlights the recent phenomena related to the wider processes embedded in globalisation; the international division of labour, migration, and the feminization of poverty.

<sup>36</sup>Zampas et al. (2020), p. 253, (Addition in brackets added by the author).

<sup>37</sup>Report supra note 39, para. 10.

<sup>38</sup>CEDAW, Decision concerning communication 138/2018, CEDAW/C/75/D/138/2018.

<sup>39</sup>The Human Rights Council, *Accelerating efforts to eliminate violence against women: preventing and responding to violence against women and girls*, 1 July 2016, A/HRC/RES/32/19 defined violence “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women and girls of any age, including threats of such acts, coercion of arbitrary deprivation of liberty, whether occurring in public or private life”. On violence throughout women’s life see Henn (2016), pp. 183–215. See also UN Commission on Human Rights Special Rapporteur Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, 12 February 1997, UN Doc E/CN.4/1997/47.



### 7.2.4.1 Slavery and Slave-Related Practices

The elimination of slavery is provided for by the most important international covenants protecting human rights.<sup>40</sup> The legal definition of slavery is contained in the League of Nations Slavery Convention.<sup>41</sup> It establishes that “[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” (art. 1). The provision enshrines ownership as a main feature of slavery, and slavery-like practices, and covers the complete control a person exercises over their victims. Hence, establishing slavery entails considering the restrictions imposed on the freedom of movement, the control over the personal belongings of the involved individuals, the existence of consent and understanding on the nature of the relationships.<sup>42</sup>

This assessment is anchored in the rationale of the provision. It provides a legal avenue for addressing the new forms of slavery which departed from the “chattel slavery” model, but are marked by elements of control and ownership; the exploitation of domestic workforce and enforced prostitution.

The rules of the Slavery Convention were implemented by the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956<sup>43</sup> imposing on states parties the further obligation to abolish several practices which were identified as servile status. The Supplementary Convention comprehends among slave-related practices any institution or practice whereby: (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person (art. 1). These practices stem from legal arrangements, as well as cultural or religious stereotypes.

This is the legal framework against which to assess enforced prostitution and slavery like conditions of household workers.

Starting from the latter, it has to be observed that tens of thousands of women are domestic workers in private households. This part of the workforce is the most exploited in the world. Housemaids work more than the maximum time per day and

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<sup>40</sup> See art. 4 Universal declaration of Human Rights; art. 8 of the International Covenant of Civil and Political Rights (Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, United Nations Treaty Series, vol. 999, p. 171; entered into force on 23 March 1976); Article 7(2) (c) of the Rome Statute of the International Criminal Court, United Nations Treaty Series, vol. 2187, p. 3, entered into force 1 July 2002, stipulates that “enslavement” is a crime against humanity falling within the jurisdiction of the Court; art 4 of the European Convention of Human Rights.

<sup>41</sup> League of Nations Slavery Convention, United Nations Treaty Series, vol. 60, p. 254; entered into force on 9 March 1927; Rassam, pp. 303–352.

<sup>42</sup> Weissbrot (2002), p. 7.

<sup>43</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 (the Supplementary Convention), United Nations Treaty Series, vol. 226, p. 3; entered into force on 30 April 1957.

their salaries are lower than the minimum wage. Furthermore, they are often locked within their workplace and suffer physical and sexual violence.

### Example

In the case *Siliadin v France* the plaintiff, a girl who entered France aged 15, worked as housemaid seven days a week from 7.30 a.m. to 10.30 p.m. She received no pay and was obliged to sleep on a mattress on the floor of the baby's room. The Court argued that the girl was held in servitude but not slavery, pointing out that servitude "includes, in addition to the obligation to perform certain services for others [...] the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition. [...] servitude means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of slavery." In applying this assessment the Court focused on the plaintiff's working conditions and her lack of consent and argued that "she [...] was vulnerable and isolated, and had no means of living elsewhere than in the home of Mr and Mrs B [...] She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred. In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time As she had not been sent to school [...] the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B."<sup>44</sup> ◀

Enforced prostitution occurs when a person is obliged, under violence or menace, to supply sexual services in return of money.<sup>45</sup>

### Example

In *S.M. v Croatia* the Court dealt with an application lodged by a woman who alleged that a former police man had physically and psychologically forced her into prostitution. The Court stated that "the notion of forced or compulsory labour under Article 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context. Moreover, any such conduct may have elements qualifying it as "servitude" or "slavery" under Article 4, or may raise an issue under another provision of the Convention."<sup>46</sup> ◀

<sup>44</sup> App. Nos. 73316/01, *Case of Siliadin v. France* (ECtHR 26 July 2005), paras. 123–128.

<sup>45</sup> Weissbrodt (2002), p. 31; Barry (1995).

<sup>46</sup> App. Nos. 60561/14, *Case of S.M. v. Croatia* (ECtHR GC 25 June 2020), paras. 282–285.

Nowadays the root causes of women slavery are to be found in an extensive array of economic and social factors. Migration gives rise to several kinds of exploitation and female migrants represent the most vulnerable group of women exposed to slavery-like practices.<sup>47</sup> The confiscation of passports or travel documents, the captivity of domestic workers, forced prostitution or the enrolment in the sex industry are some of the practices affecting migrant women and leading to their exploitation combining old stereotypes with new forms of slavery.<sup>48</sup>

#### 7.2.4.2 Trafficking in Persons

The connection between vulnerability and exploitation marks also trafficking in persons which is one of today's most widespread forms of women's exploitation.<sup>49</sup>

In General Recommendation n. 38 the CEDAW Committee observed that a gender analysis of trafficking reveals several root causes, ranging from sex-based discrimination, globally dominant policies, globalised macroeconomic and political factors, the shrinking of the welfare state and discriminatory social and cultural norms engendering the oppression of women.<sup>50</sup>

This analysis relies on the idea that trafficking is a form of violence against women and as such a form of discrimination on grounds of sex so that it occurs not only in cases of sexual exploitation, but also in those activities which have not sexual purposes such as exploitative domestic work and forced marriage.

Trafficking challenges the international system of protection of human rights. Art. 6 CEDAW obliges states to take measures, "including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". Pursuant to this provision the CEDAW Committee pointed out that a life free from being trafficked must be recognized as a human right and appropriate conditions must be created for that right to be fully enjoyed by women and girls.<sup>51</sup> A definition of trafficking is provided for in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter Trafficking Protocol)<sup>52</sup> which supplements the United Nations Convention against

<sup>47</sup> Wijers and Lap-Chew (1997).

<sup>48</sup> On these forms of slavery-like practices see Weissbrot (2002), pp. 11 *et seq*; Bales and Robbins (2001), pp. 18–45.

<sup>49</sup> Obokata (2006).

<sup>50</sup> Committee on the Elimination of Discrimination against Women, *General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration*, CEDAW/C/GC/38, 20 November 2020, paras. 2–3.

<sup>51</sup> *Idem*, para. 4.

<sup>52</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime, Adopted by General Assembly resolution 55/25 of 15 November 2000, Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 49 (A/45/49), vol. I., 60, United Nations, Treaty Series, vol. 2237, p. 319, entered into force 25 December 2003.

Transnational Organized Crime<sup>53</sup> in order to prevent and combat trafficking, to protect the victims of trafficking and to promote cooperation among States Parties (art. 1).<sup>54</sup>

► **Definition** Art. 3 (a) of the Trafficking Protocol identifies trafficking through three elements.<sup>55</sup> The first is the action: recruitment, transportation, transfer, harbouring or receipt of persons. The second element is embodied by the means the provision lists: “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”.<sup>56</sup> The last feature is to be found in the purpose of exploitation.

The Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter the CoE Convention) makes use of the same legal elements to define trafficking (art. 4), but is wider in scope.<sup>57</sup> The Trafficking Protocol covers only transnational trafficking which is connected to organized crime, while the CoE Convention applies to national as well as transnational forms of trafficking in human beings, whether or not connected with organised crime (art. 2).<sup>58</sup> The CoE Convention rules bolster women’s protection since the vulnerability stemming from the threat or use or violence rises also in those cases in which individuals act without relying on the intimidating power of a criminal group.

Unlike the Trafficking Protocol and the CoE Convention the CEDAW pushes the focus on the phenomenon from the fight against crime and the management of migration to the protection of rights by imposing positive obligations on states parties with the aim of eradicating the legal, political and economic constraints making women vulnerable to trafficking and sexual exploitation.<sup>59</sup>

The prohibitions contained in the rules on slavery and trafficking aim at protecting human dignity which has been playing a crucial role in their evolutive

<sup>53</sup>United Nations Convention against Transnational Organized Crime Adopted by General Assembly resolution 55/25 of 15 November 2000, Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 49 (A/45/49), vol. I., 60, United Nations, Treaty Series, vol. 2225, p. 209, entered into force 29 September 2003.

<sup>54</sup>Gallagher (2001).

<sup>55</sup>Brewer and Southwell (2018), p. 3; Gallagher (2011), p. 29; Cerone (2007).

<sup>56</sup>For criticism on the clarity of the provision see Noll (2007), pp. 343–361.

<sup>57</sup>Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw 16 May 2005, Council of Europe Treaty Series - No. 197. Sembacher (2006).

<sup>58</sup>App. Nos. 60561/14, *Case of S.M. v. Croatia* (ECtHR 19 July 2018).

<sup>59</sup>Chuang (2012), p. 172. On the root causes and the obligations the CEDAW imposes on States Parties see Committee on the Elimination of Discrimination against Women, *General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration*, CEDAW/C/GC/38, 20 November 2020, para. 18.

and teleological construing.<sup>60</sup> This is the reason why the practice of the international bodies shows some uncertainties in defining the precise borders between trafficking, slavery, servitude and forced labour.<sup>61</sup>

### 7.2.5 Religious Freedom for and Against Women

The ECtHR has regularly held that freedom of religion is “*one of the most vital elements that [. . .] make up the identity of believers and their conception of life*” and that it entails freedom to hold religious beliefs and to practice religion. “*While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, [. . .] freedom to manifest one’s religion [. . .] in community with others*”.<sup>62</sup> This jurisprudential position has been buttressed by the legal doctrine. Hence, Mahlmann considers that “religion is not an ornamental side issue of human life”, but “a central existential concern”.<sup>63</sup> And this is true, both for men and women.

Religious freedom, especially in its communitarian dimension, has also become a political argument advanced by the supporters of multiculturalism, committed to strengthening the position of a cultural or religious minority within the larger society. Whilst being perfectly legitimate, this political action has been accompanied by the strengthening of power of cultural and religious leaders over dissidents in their groups; women are often those who bear the brunt of this.<sup>64</sup> Since gender is a social construct, gender identity is created by the norms of behaviour imposed by culture and religion. As a result, in traditionalist cultures and religions there is a “systematic domination of women by men, [. . .] women’s exclusion from public power, and [. . .] their subjection to patriarchal power within the family”.<sup>65</sup>

For instance, “the authoritarian and hierarchical features of Ibero-Catholic culture appear to be particularly hostile to women’s advancement” especially “when seen in light of the traditional sexism of Roman Catholic ethics and secular ideologies like machismo and marianismo”.<sup>66</sup> According to some scholars, the endurance of

<sup>60</sup>On the role of human dignity see De Sena (2019).

<sup>61</sup>(ILO, Report of the ILO Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IB), p. 41) paras. 77–78. See also Benjamin Whitaker, Report on Slavery. E/CN.4/Sub.2/1982/20/Rev.1, UN Sales No. E.84.XIV.1, 10 *et seq.* App. Nos. 25965/04, *Case of Rantsev v. Cyprus and Russia* (ECtHR 7 January 2010), para. 282. App. Nos. 21884/15, *Case of Chowdury and Others v. Greece* (ECtHR 30 March 2017), para. 93; App. Nos. 58216/2012, *Case of J. And Others v. Austria* (ECtHR 17 April 2017), para. 104; App. Nos. 60561/14, *Case of S.M. v. Croatia* (ECtHR GC 25 June 2020), para. 297, para. 308 *et seq.* On this issue see Stoyanova (2020b); Stoyanova (2017); Stoyanova (2012), pp. 163–194; Gallagher (2009), pp. 789–848; Fitzpatrick (2003), pp. 1143–1167.

<sup>62</sup>App. No. 14307/88, *Case of Kokkinakis v. Greece* (ECtHR, 25 May 1993), para. 31.

<sup>63</sup>Mahlmann (2009), p. 2473.

<sup>64</sup>Phillips (2005), p. 113.

<sup>65</sup>Raday (2003), p. 669.

<sup>66</sup>Htun (2000), pp. 191–192.

Latin-American harsh patriarchal systems, in the field of gender relations, is rivalled only in the Arab world.<sup>67</sup>

### Example

If sentencing women to death by stoning for the violation of offense of adultery, in some Islamic countries, may appear as an extreme example of persisting gender inequality, the 2009 Manhattan Declaration, signed by major Christian churches in the USA, bears witness to a fact that there is actually a widespread refusal of religious institutions to abide by the antidiscrimination norms in the western world too.<sup>68</sup> ◀

In response to these phenomena, the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) stipulates that states parties shall take all appropriate measures “to modify 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” (Article 5(a)).

Two groups of questions have particularly been in the focus of supranational and national decision makers, as well as the academic community, when it comes to religious freedom for and against women. Those are wearing of headscarves and full-face veils in public places (1), and the performance or assistance in abortion procedures (2).

#### 7.2.5.1 Wearing of Headscarves and Full-Face Veils in Public Places

In a number of cases, the ECtHR examined whether the measures prohibiting women from wearing a headscarves/burkas/niqab<sup>69</sup> infringed upon their freedom to manifest their religion, as guaranteed by Article 9 of the Convention. *Dahlab v. Switzerland* concerned a primary school teacher who was requested by the education authorities to stop wearing the Islamic headscarf in the school where she worked.<sup>70</sup> In *Leyla Sahin v. Turkey*, the applicant, a university student, complained of the Istanbul University regulation restricting the right to wear the Islamic headscarf and the disciplinary measure of suspension taken thereunder against her as a result of her failure to comply with the rules on dress.<sup>71</sup> *S.A.S. v. France* concerned the French law, stating that “no one may, in public places, wear clothing that is designed to conceal the face”, which was challenged by women who wished

<sup>67</sup> Chaney (1979), p. 32. Quoted in Htun (2000), p. 192.

<sup>68</sup> Mancini (2014), p. 35.

<sup>69</sup> Burka is “a full-body covering including a mesh over the face”, and the niqab “a full-face veil leaving an opening only for the eyes”.

<sup>70</sup> App. No. 42393/98, Case of *Dahlab c. Suisse* (ECtHR, 15 February 2001).

<sup>71</sup> App. No. 44774/98, Case of *Leyla Sahin v. Turkey* [GC] (ECtHR, 10 November 2005), paras. 16, 21, 24, 70.

to wear burka and niqab in public places.<sup>72</sup> In none of the cases above did the ECtHR find the violation of the right to religious freedom.<sup>73</sup>

### Example

In reaching the conclusion that public measures prohibiting women from wearing headscarves and full-face veils did not infringe upon their freedom to manifest their religion, the ECtHR relied on: the consideration that wearing of a headscarf might have some kind of proselytising effect on very young children, “seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality”;<sup>74</sup> the principle of secularism as the paramount value underlying the ban on the wearing of religious symbols in Turkish universities;<sup>75</sup> and, on the argument that the “barrier raised against others by a veil concealing the face breaches the right of others to live in a space of socialisation which makes living together easier”.<sup>76</sup> ◀

It is important to note, in this context, that the ECtHR was not convinced by the French Government’s submission regarding the legitimate aim pursued by the ban on full-face veils, in so far as it concerned respect for equality between men and women.<sup>77</sup> More concretely, the Court took the view that “a State Party could not invoke gender equality in order to ban a practice that was defended by women – such as the applicant – in the context of the exercise of the rights enshrined” in Article 9 of the Convention, “unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms”.<sup>78</sup> The Court also took the view that respect for human dignity could not “legitimately justify a blanket ban on the wearing of the full-face veil in public places”, since it was the expression of a cultural identity, which contributed to the pluralism that was inherent in democracy.<sup>79</sup>

No matter how pertinent these arguments are, it is undisputed that the value of cultural identity cannot trump the respect for human dignity. Here, a burka denies human dignity, specifically, the right to individual personality by rendering

<sup>72</sup> App. No. 43835/11, Case of *S. A. S. c. France* [GC] (ECtHR, 1 July 2014), paras. 28 and 76.

<sup>73</sup> For an opposite view of the United Nation Human Rights Committee that the prohibition on wearing in public of clothing designed to conceal the face violated the freedom of religion and the prohibition of discrimination, based on gender and religion, as guaranteed by the International Covenant on Civil and Political Rights, see section 3 of the chapter Gender Equality and Public Law, in this volume.

<sup>74</sup> *Dahlab c. Suisse*.

<sup>75</sup> *Leyla Sahin v. Turkey* [GC], para. 116.

<sup>76</sup> *S. A. S. c. France* [GC], para. 122.

<sup>77</sup> For the inconsistencies in the Convention Case-Law, see Marinkovic (2017), pp. 75–91; see also section 3 of the chapter Gender Equality and Public Law, in this volume.

<sup>78</sup> *S. A. S. c. France* [GC], para. 119.

<sup>79</sup> *Ibid.*, para. 120.

individuality invisible.<sup>80</sup> This is the case with women who do not wear a burka voluntarily, but under the pressure of the patriarchal cultural-religious practices within which they are born and raised. The position of the ECtHR is all the more questionable since under international law, the states are responsible to remove any inconsistency between international human rights of women and religious and customary laws, operating within their territories,<sup>81</sup> including those which are the expression of cultural identity. In this context, it is worthwhile remembering that the CEDAW stipulates that “the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (Article 1).

### 7.2.5.2 Performance or Assistance in Abortion Procedures

Dress codes are not the only case where religious norms may come in conflict with the right to dignity and autonomy of women. Other notable cases concern the attempts to read foetus rights, and not women’s, rights into mostly silent constitutions;<sup>82</sup> restricting women’s right to abortion (see *infra* 2.4). In Europe, the constitutional disputes surrounding abortion were clearly influenced by the mobilization of Catholic groups resisting women’s reproductive autonomy in the name of the sanctity of life. Consequently, “constitutions were called to play a role”, through judicial review of constitutionality, against legislative liberalization of access to abortion.<sup>83</sup>

#### Example

After the collapse of communism and under the influence of the Catholic Church, the Polish Constitutional Court considered that “the very nature of the recognition that human life is a constitutional value implies a necessary limitation on the rights of a pregnant women” and that “one cannot decide about having a child when the child is already evolving in the pre-natal phase”. Consequently, it held that the legalization of the acts, which occasioned “the death of the foetus” before it was 12 weeks old, was entirely arbitrary.<sup>84</sup> However, the German Federal Constitutional Court took a more balanced approach. It stated that “there is a

<sup>80</sup> Mahlmann (2009), pp. 2492–2493.

<sup>81</sup> Cf. An-Na’im, pp. 167–168.

<sup>82</sup> The exceptions are: the 1983 reform of the Irish Constitution, under which “the state acknowledges the right to life of the unborn” (Eight Amendment of the Constitution Act); and, the 2011 Fundamental Law of Hungary which provides that “the life of the foetus shall be protected from the moment of conception” (Article II).

<sup>83</sup> Rubio-Marin and Chang (2013), pp. 304–305.

<sup>84</sup> Constitutional Tribunal (Poland), decision dated 28 May 1997 (K. 26/96), in Dorsen et al. (2003), pp. 546–551.



right to life which is inviolable but that foetus is not a ‘completed person’ and is thus not fully protected”. The Court held that “abortion may be permitted in some cases, for which public insurance will not bear the cost”.<sup>85</sup> The French Constitutional Council took a position in favour of the right to life, but found no constitutional obstacles to accept the statutory scheme that permitted abortion after mandatory counselling.<sup>86</sup> ◀

The right to women’s reproductive autonomy is not secured even when abortion is allowed. Conservative Christian lobbies “advocate a thick conception of religious freedom, one that encompasses an almost unlimited right to conscientious objection”.<sup>87</sup> As a result, there has been a multiplication of refusals to deliver services, when the person considers them incompatible with his or her religion. This includes performing abortions or providing assistance and extends to many others actions (selling contraceptives, prescribing prenatal tests, providing reproductive health related information etc.).<sup>88</sup>

### Example

In Italy, the Constitutional Court partially decriminalized abortion in 1975, after which a law was enacted, in 1978, to regulate access to abortion services. However, nearly 70 percent of doctors in Italy refuse to perform abortion invoking conscientious objection, thereby denying many women reproductive health care.<sup>89</sup> This has led some authors to conclude that “conscientious objection has turned from an individual right rooted in the freedom of conscience and religion, into a politically motivated collective strategy to undermine the law”.<sup>90</sup> ◀

## 7.2.6 The Right to Respect for Private and Family Life in the Context of (Women’s) Reproductive Autonomy and Gender Affirming Surgery

Women’s reproductive autonomy, as having the power to decide and control contraceptive use, pregnancy, and childbearing, is explicitly qualified as a human right by the Maputo Protocol (a protocol to the African Charter on Human and People’s

<sup>85</sup>Dorsen et al. (2003), p. 553.

<sup>86</sup>*Ibid.*

<sup>87</sup>Mancini (2014), p. 36.

<sup>88</sup>*Ibid*; Luciani (2019), pp. 333–334.

<sup>89</sup>Mancini (2014), pp. 36–37.

<sup>90</sup>*Ibid.*, p. 37; *cf.* Luciani (2019), pp. 332–333.

Rights).<sup>91</sup> On the UN level, as well as the regional European and American level, the protection of said autonomy is guaranteed, not by a specific provision, but by a bundle of provisions, such as *inter alia* the right to life, the right to health, the right to education and the right to respect for private and family life.<sup>92</sup> It is also a Goal of the 2030 Agenda for Sustainable Development to ensure “*universal access to sexual and reproductive health and reproductive rights*” as part of achieving gender equality and women empowerment (Goal 5.6).

The right to respect for private and family life is secured by human rights catalogues on the international<sup>93</sup> as well as the regional level.<sup>94</sup> As a human right, the right to private life generally binds states and protects the individual from state interference, however, it also obliges the state to protect the individual from interference by private individuals.<sup>95</sup>

The right to respect for private and family life *inter alia* protects the development and realisation of a person’s personality. This includes a certain freedom from state driven surveillance, as well as the power of disposal over one’s own person and the shaping of one’s own life. Or as the ECtHR puts it: “*the right to personal autonomy and personal development.*”<sup>96</sup>

It goes without saying that the rights connected with reproductive autonomy, and especially the right to respect for private and family life apply also to persons with disabilities,<sup>97</sup> persons who belong to minorities<sup>98</sup> and minors.<sup>99</sup> In other words it

<sup>91</sup> Art. 14 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003, [https://au.int/sites/default/files/treaties/37077-treaty-charter\\_on\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf).

<sup>92</sup> See e.g.: Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 22 and No. 14.

<sup>93</sup> Art. 12 UNGA, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), (UDHR); Art. 17 ICCPR (supra note 2), Art. 16 Convention on the Rights of the Child, 20 November 1989, UNTS 1577, p. 3, (CRC); Art. 14 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, UNTS 2220, p. 3.

<sup>94</sup> Art. 5 American Declaration of the Rights and Duties of Man; Art. 8 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, (ECHR); Art. 7 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407 (CFR); Art. 11 (2) OAS, American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969; Art. 18 Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>95</sup> App. No. 27617/04, *R.R. v. Poland* (ECtHR, 26. May 2011), para. 184.

<sup>96</sup> App. No. 25579/05, *A, B, C v. Ireland* (ECtHR, 16 December 2010), para. 212.

<sup>97</sup> Articles 23 and 25 UNGA, Convention on the Rights of Persons with Disabilities, UNTS 2515, p. 3; CRPD, General Comment No. 3, paras. 23, 44, 64(b); CRPD Committee, General Comment No. 1, para. 41.

<sup>98</sup> E.g.: App. No 18968/07, *V.C. v. Slovakia* (ECtHR, 08. November 2011).

<sup>99</sup> See e.g.: CRC, General Comment No. 20 (2016), para 39.

applies to especially vulnerable persons and protects their (reproductive) autonomy.<sup>100</sup>

The right to respect for private life protects persons with regard to their gender identification, sexual orientation and their sexual life.<sup>101</sup> Part of the personal autonomy is therefore not only the right to determine one's gender, but also the decision for gender affirming surgery. In this regard, it is important to mention that the right to respect for private and family life furthermore protects the physical and psychological integrity of a person.<sup>102</sup>

### 7.2.6.1 Several Aspects of (Women's) Reproductive Autonomy

#### 7.2.6.1.1 Medically Assisted Procreation/In Vitro Fertilization

The decision to become parents is part of the private and family life. The ECHR therefore protects the decision to become parents through medically assisted procreation.<sup>103</sup>

The Inter-American Court explicitly decided that the prohibition of in vitro fertilization (IVF) violates inter alia the right to respect for private and family life.<sup>104</sup> Equally the ECtHR decided, that "*moral considerations or [...] social acceptability [...] are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique[...].*"<sup>105</sup> Even though the court accepts a wide margin of appreciation in this legislative field, at the same time it emphasises the fact that as medically assisted procreation is "*subject to a particularly dynamic development in science and law*",<sup>106</sup> states need to review their respective laws accordingly to this dynamic and adapt to it.

The decision to refuse fertility treatment that was previously agreed to has to be respected. The person concerned would otherwise have to undergo a forced pregnancy, violating especially their right to health.<sup>107</sup> Equally, the decision to withdraw the consent to the storage and use of embryos by one of the partners has to be respected, even if this ultimately hinders one of them becoming a (genetic) parent.<sup>108</sup>

<sup>100</sup> See e.g.: CESCR, General Comment No. 22 (2016), paras. 30, 31.

<sup>101</sup> App. No. 35968/97, *van Kück v Germany* (ECtHR, 12. June 2003), para. 69.

<sup>102</sup> App. No. no. 5410/03, *Tysic v. Poland* (ECtHR, 20 March 2007), para. 107.

<sup>103</sup> The ECtHR speaks of "genetic" parents, App. No. 44362/04, *Dickson v. the United Kingdom* (ECtHR, [GC], 04. December 2007), para. 66.

<sup>104</sup> Case No. 257, *Artavia Murillo et. al. v. Costa Rica* (Inter American Court of Human Rights [IACHR], 28 November 2012) para. 294.

<sup>105</sup> App. No. 57813/00, *S. H. and Others v. Austria* (ECtHR, [GC] 03. November 2011), para. 100.

<sup>106</sup> *Ibid.*, para. 118.

<sup>107</sup> CESCR, Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 22/2017, para. 11.2.

<sup>108</sup> App. No. 6339/05, *Evans v. the United Kingdom* (ECtHR [GC], 10 April 2007), paras. 90–92.

The question whether national laws that exempt same sex couples from IVF treatment are compatible with the ECHR has not yet been decided.<sup>109</sup> The ECtHR has consistently held that states must guarantee the rights they are obliged to grant under the ECHR in a non-discriminatory manner, in accordance with Article 14. The same applies to such rights which the state guarantees voluntarily, i.e. outside the obligatory rights catalogue enshrined in the ECHR. Thus, insofar as a state has equated same-sex marriage with different-sex marriage, at least the exclusion of married same-sex couples from IVF should be impermissible. If a state allows IVF for unmarried heterosexual couples, Art.14 ECHR arguably requires opening it up to unmarried same-sex couples as well. Besides the access to medically assisted procreation, the ECHR protects also from discriminatory consequences such a treatment might cause and prohibits discrimination on the basis of sex and the manner in which a person gets pregnant:

#### Example

“1. The applicant entered into an employment contract ten days after she had undergone in vitro fertilisation. When she subsequently went on sick leave on account of pregnancy-related complications, the relevant administrative authority re-examined her health insurance status and rejected her application for insurance as an employed person, concluding that her employment had been fictitious.[. . .] 84. In sum, the Court would reiterate that a refusal to employ or recognise an employment-related benefit to a pregnant woman based on her pregnancy, amounts to direct discrimination on grounds of sex, which cannot be justified by the financial interests of the State [. . .]. On the basis of the foregoing, the Court considers that the difference in treatment to which the applicant, as a woman who had become pregnant by means of in vitro insemination, had been subjected to, had not been objectively justified or necessary in the circumstances.”<sup>110</sup> ◀

#### 7.2.6.1.2 Contraception and Abortion

Whereas religious freedom covers the refusal to conduct an abortion as seen above, the right to respect for private and family life not only protects the decision to become a parent, it also protects the decision not to become one. Therefore, courts on the regional level and human rights mechanisms on the international level have found that an absolute ban on abortions<sup>111</sup> and contraception medicine<sup>112</sup> violates the human rights of the concerned (pregnant) persons. Even though a general right to

<sup>109</sup> App. No. 22612/15, *Charron and Merle-Montet v France* (ECtHR, 08. February 2018).

<sup>110</sup> App. No. 54711/15, *Jurčić v Croatia* (ECtHR, 04 February 2021), paras. 1 and 84.

<sup>111</sup> App. No. 57375/08, *P and S v Poland* (ECtHR, 30. October 2012), para. 96; CEDAW, *L. C. v. Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009 (25 November 2011), para 9. b) i).

<sup>112</sup> CEDAW, Summary of the inquiry concerning the Philippines, CEDAW/C/OP.8/PHL/1 para. 43.

abortion does not exist,<sup>113</sup> the right to respect for private life necessitates the access to legal abortions, at least for reasons of health and/or well-being.<sup>114</sup> This includes access to information about legal ways for abortions.<sup>115</sup> For the abortion, the consent of the pregnant person is necessary and the views of the person concerned have to be respected when deciding over the termination of the pregnancy.<sup>116</sup>

The right to respect for private and family life therefore necessitates in its procedural aspects that courts investigate whether “adequate and timely medical treatment” allowing an informed decision of the pregnant person whether to continue the pregnancy or not, has been granted to the pregnant person.<sup>117</sup> As it is the pregnant person that is primarily affected by the pregnancy, the father of the child does not have to be informed before or about the abortion, the right to private life of the pregnant person prevails.<sup>118</sup>

The legality of sterilization operations as a contraceptive medical treatment depends on the informed consent of the concerned person.<sup>119</sup> Sterilization operations conducted without such consent not only violate the right to respect for private life, but happen especially to persons infected with HIV,<sup>120</sup> persons belonging to minorities (especially Roma women in the European context<sup>121</sup> and indigenous women in South America<sup>122</sup>) or persons who have disabilities<sup>123</sup> and thus are also highly discriminatory.<sup>124</sup> States are required to ensure that no person is subjected to non-consensual sterilisation and that adequate investigations as well as compensation are guaranteed in cases where forced sterilisation was conducted.<sup>125</sup>

<sup>113</sup> App. No. 57375/08, *P and S v Poland* (ECtHR, 30. October 2012), para. 96.

<sup>114</sup> Human Rights Committee (HRC), *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, para. 7.7 f.; HRC, *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, para. 7.8.

<sup>115</sup> HRC, *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, para. 7.6.

<sup>116</sup> *Tysiack v Poland*, supra note 56, para. 117.

<sup>117</sup> E.g.: antenatal screening tests, where genetic disorders, that allow an abortion under the respective national law could have been detected: App. No. 33011/08, *A.K. v. Latvia* (ECtHR, 24. June 2014) paras. 93 f.

<sup>118</sup> App. No. 50490/99, *Boso v Italy* (ECtHR, 5. September 2002).

<sup>119</sup> App. No. 29518/10, *N.B. v Slovakia* (ECtHR, 12 June 2012), para. 73.

<sup>120</sup> E.g.: Case No. SA 49/2012, *Government of the Republic of Namibia v. LM and Others* (Namibia, Supreme Court 3 November 2014).

<sup>121</sup> E.g.: CEDAW, *Ms. A. S. v. Hungary*, CEDAW/C/36/D/4/2004.

<sup>122</sup> E.g.: Inter-American Commission on Human Rights (IACHR), Report No. 71/03. Petition 12.191. Friendly Settlement María Mamérita Mestanza-Chávez, (Peru: IACHR, 2003), accessed August 1, 2019, <https://www.cidh.oas.org/annualrep/2003eng/peru.12191.htm>.

<sup>123</sup> A case concerning persons with disabilities, but which was held inadmissible: App. No. 61521/08, *Gauer and others v France* (ECtHR, 23 October 2012).

<sup>124</sup> E.g.: Series C No. 336, *I.V. v. Bolivia* (IACHR, 30 November 2016), para. 248 f.

<sup>125</sup> App. No. 15966/04, *I.G. and Others v. Slovakia* (ECtHR, 13 November 2012) paras. 143–146, 169 ff.; App. No. 8759/05, *Csoma v Romania* (ECtHR, 15 January 2013), paras. 65–68; forced sterilisations are also gender-based violence and explicitly prohibited in the Istanbul Convention, Art. 39.

### 7.2.6.1.3 Giving Birth

Giving birth constitutes an intimate moment in a person's life. Therefore the right to respect for private life requires the consent of the person giving birth to the presence of medical students during birth.<sup>126</sup> Even though "the circumstances of giving birth incontestably form part of one's private life for the purposes of Article 8",<sup>127</sup> the obligation of the state to secure the health and life of the person giving birth and the child, can prevail over the right to respect for private life. This can allow a state to prohibit home births or render it impossible to be assisted by midwives during home births; factually hindering home births.<sup>128</sup> However, the state's duty to protect the life of the child does not automatically outbalance the birthing person's right to respect for private and family life. Precautionary measures to protect a new-born baby's health, such as a court order to return to the hospital, can therefore constitute a violation of Art. 8 ECHR.<sup>129</sup>

### 7.2.6.2 Legal Aspects of Gender Identification and Gender Affirming Surgery

As mentioned above the right to respect for private and family life protects the gender identification of a person. This right is impaired by national laws that require gender affirming surgery before granting legal gender recognition. On the international level, human rights mechanisms and institutions held that these laws violate various human rights of the persons concerned.<sup>130</sup> On the regional European level, this finding was the end of a development: in 2017 the ECtHR decided in *A.P., Garçon et Nicot v France*<sup>131</sup> that a compulsory sterilisation as a requirement for gender recognition violates the right to respect for private life. The German Federal Constitutional Court rendered a similar decision already in 2011:

#### Example

"The permanent nature and irreversibility of transsexual persons' perceived gender cannot be assessed against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender. The unconditional prerequisite of a surgical gender reassignment according to [the respective national law] constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate

<sup>126</sup> App. No. 37873/04, *Konovalova v Russia* (ECtHR, 9 October 2014) paras. 47 ff.

<sup>127</sup> App. No. 67545/09, *Ternovszky v. Hungary* (ECtHR, 14 December 2010) para. 22.

<sup>128</sup> App. No. 18568/12, *Pojatina v Croatia*, (ECtHR, 04. February 2019), paras. 89 ff.

<sup>129</sup> App. No. 43643/10, *Hanzelkovi v the Czech Republic* (ECtHR, 11 December 2014), paras. 79 f.

<sup>130</sup> CESCR, General Comment No. 22, para. 58; Méndez (2013), UN Doc. A/HRC/22/53 (2013), para. 78.

<sup>131</sup> App. Nos. 79885/12, 52471/13 and 52596/13, *A.P., Garçon et Nicot v France* (ECtHR, 06. April 2017), paras. 130–135.

health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality.”<sup>132</sup> ◀

In 2019 there was no need for the ECtHR to decide on whether the requirement of gender affirming surgery violated Art.8 ECHR, because the state concerned did not have “*quick, transparent and accessible procedures for gender recognition procedures*” and thus lacked the necessary regulatory framework which is required by Article 8 in order to ensure the respect for private life.<sup>133</sup> In 2021, the Court explicitly held that “*the refusal of the domestic authorities to legally recognise the applicants’ gender reassignment in the absence of gender reassignment surgery amounted to unjustified interference with their right to respect for their private life*”.<sup>134</sup>

### 7.2.7 Access to Justice for Women

The laws and the socio-economic mechanisms preventing women from having access to justice have been enhancing their subordination. The consciousness that the attainment of the objective of guaranteeing substantial equality entails the enactment of instruments enabling women to bring legal proceedings has been gaining ground in the international system of protection of fundamental rights.

The CEDAW Committee in General Recommendation n. 33 has highlighted that women face challenges entrenched in two situations. On the one side, women are empowered to bring legal actions before courts and tribunals, the challenge here being the law in force is based on traditional gender stereotypes and contains discriminatory rules. On the other side, women have no access to courts and tribunals due to economic, social and cultural factors.<sup>135</sup> In this vein the CEDAW Committee emphasized the existence of “a number of obstacles and restrictions that impede women from realizing their right to access to justice on a basis of equality, including a lack of effective jurisdictional protection offered by States parties in relation to all dimensions of access to justice. These obstacles occur in a structural context of discrimination and inequality owing to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically

<sup>132</sup> English press release to the Judgment of 11 January 2011, 1 BvR3295/07 (German Federal Constitutional Court).

<sup>133</sup> App. No. 29683/16, *X v. the Former Yugoslav Republic of Macedonia* (ECtHR, 17. January 2019), paras. 70 f.

<sup>134</sup> App. Nos. 2145/16 and 20607/16, *X and Y v Romania* (ECtHR, 19. January 2021), para. 168 (translation taken from the press release available at: <http://hudoc.echr.coe.int/eng-press?i=003-6910029-9279612>).

<sup>135</sup> Committee on the Elimination of Discrimination against Women, *General recommendation No. 33 on women’s access to justice*, CEDAW/C/GC/33, 3 August 2015, paras. 22 and 23. Trigoudja (2016), pp. 133–134.

ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. All these obstacles constitute persistent violations of women's human rights."<sup>136</sup>

As a consequence, access to justice entails eradicating discrimination through law reforms and providing for legal channels of judicial or quasi-judicial redress. International practice highlights two trajectories in the achievement of the said aims; the enactment of new instruments of protection of women's rights, and a gender sensitive assessment of existing provisions. In describing these trajectories, special attention will be paid to gender-based violence for its role in shaping the relationships between women and men.

### 7.2.7.1 The Enactment of New Substantial Laws of Protection

Removing the reasons for discrimination marks the provisions of the CEDAW which enshrines the right to access to justice through the obligations art. 2 (b) and art. 2 (c) envisage.<sup>137</sup> The first of the said provision obliges the States Parties to adopt appropriate legislative and other measures to prohibit all discrimination against women. The law aims at reforming existing rules to guarantee equality.

The undertaking art. 2 (b) displays is complemented by the obligation of result art. 2 (c), laying down reference to the judicial dimension of access to justice. The rule provides for the duty "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."

States are therefore called on to establish remedies and to guarantee their availability.

The CEDAW Committee pointed out that the right to justice is multidimensional since it encompasses justiciability, availability, accessibility, good quality, the provision of remedies for victims and the accountability of justice systems.<sup>138</sup> The recommendations the CEDAW Committee adopted in developing the content of the right to access to justice move from the need to give effect to the principle of equality by abolishing "any existing laws, procedures, regulations, jurisprudence, customs and practices that directly or indirectly discriminate against women."<sup>139</sup>

<sup>136</sup>Committee on the Elimination of Discrimination against Women, *General recommendation No. 33 on women's access to justice*, CEDAW/C/GC/33, 3 August 2015, para. 3. In para. 8. The Committee added that Discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms and gender based violence, which affects women in particular, has an adverse impact on the ability of women to gain access to justice on an equal basis with men. In addition, discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women.

<sup>137</sup>On the overlap between the two rules as regards access to justice for women see Byrnes (2012), p. 83.

<sup>138</sup>Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33 on women's access to justice*, CEDAW/C/GC/33, 3 August 2015, para. 1.

<sup>139</sup>*Idem*, para. 25.



In the same perspective of eradicating discrimination, an important step towards women's access to justice is to be found in several international conventions' provisions. Such provisions recognise that violence against women is a discrimination which has to be eradicated to suppress male domination.<sup>140</sup>

### 7.2.7.2 Gender-Based Assessment of Existing Substantial Laws

The assumption that violence embodies a gender discrimination influences the evolutive interpretation of several provisions of the ECHR.<sup>141</sup> Notwithstanding the low number of female plaintiffs,<sup>142</sup> the ECtHR has divined from art. 14 read in conjunction with 2, 3 and 8 of the Convention, a series of positive obligations intended to protect women against violence, domestic violence and rape. In *Opuz v. Turkey* the Strasbourg Court stated that art. 2 para.1 of the Convention "involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions."<sup>143</sup> In *M.C. v. Bulgaria* the ECtHR argued that "measures in the sphere of the relations of individuals between themselves" fall within the scope of positive obligations to punish rape arising from art. 3 and art. 8 of the Convention.<sup>144</sup>

### 7.2.7.3 The Enactment of New Procedural Laws of Protection

The practice on judicial or quasi-judicial redress is marked by the enactment of provision for legal avenues, encompassing an extensive set of measures.

The CEDAW Committee pointed out in General Recommendation n. 28 that pursuant to art. 2 (b) States are obliged to provide reparation to women whose rights under the Convention were violated "such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women."<sup>145</sup> Furthermore, the Committee in the already mentioned Recommendation

<sup>140</sup> See the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the Council of Europe Convention on Violence against Women and Domestic Violence (Istanbul Convention), the statutes of the ad hoc Tribunals for the former Yugoslavia and Rwanda Choudhry (2018); Koome (2012); Viseur Sellers (2009); Engle (2005).

<sup>141</sup> On the case law of the ECtHR see Radacic (2008).

<sup>142</sup> On the difficulties women face in bringing actions before the ECtHR see Palmer (1996), pp. 223–242; Tulkens (2007), pp. 423–445.

<sup>143</sup> App. Nos. 33401/02, *Case of Opuz v. Turkey* (ECtHR 9 June 2009), para. 128.

<sup>144</sup> App. Nos. 39272/98, *Case of M.C. v. Bulgaria* (ECtHR 4 December 2003), paras. 150–151.

<sup>145</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December, para 32.

n. 33, stated that the availability of justice systems entails that the States Parties ensure, “in cases of violence against women, access to financial aid, crisis centres, shelters, hotlines and medical, psychosocial and counselling services recommended.”<sup>146</sup> Moreover, the Committee divined from the accessibility of justice systems the need for establishing justice access centres providing “legal advice and aid, begin the legal proceedings and coordinate support services for women in several areas including violence against women.”<sup>147</sup> The Committee recommended the protection of women’s privacy, safety and other human rights during proceedings with reference to the good quality of justice systems.<sup>148</sup> Sexual violence in conflict, or post conflict situations, was also taken into consideration. The Committee argued it is necessary to adopt “institutional reforms, repeal discriminatory legislation and enact legislation providing for adequate sanctions, in accordance with international human rights standards, and determine reparation measures, in close cooperation with women’s organizations and civil society, to help to overcome the discrimination that preceded the conflict as regards the provision of remedies.”<sup>149</sup>

The Istanbul Convention lays down several provisions purporting the protection of women victims of violence: a) the training of professionals dealing with victims of all acts of violence (art. 15); b) women’s right to receive adequate information on available support services and legal measures (art. 19); c) States’ duty to provide victims with adequate civil remedies (art. 29) and compensation (art. 30); d) the prohibition of alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention (art. 48); e) carrying out investigations without undue delay (art. 49); f) the obligation to permit, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim only when it is relevant and necessary (art. 54); g) the protection of the rights and interest of victims at all stages of investigation and legal proceedings (art. 56) and finally; h) victims’ right to legal assistance and to free legal aid (art. 57).

#### **7.2.7.4 Gender-Based Assessment of Existing Procedural Rules**

The ECtHR has considered art. 2, 3 and 8 of the Convention as the source of positive obligations. Such positive obligations comprise: the enactment of criminal provisions and the adoption of operational measures in order to protect against violence; the setting in place of an efficient and independent judicial system with the aim of protecting vulnerable subjects; preventing vulnerable subjects from being subject to torture, inhuman or degrading treatment, and the guarantee of an effective

<sup>146</sup>Committee on the Elimination of Discrimination against Women, *General recommendation No. 33 on women’s access to justice*, CEDAW/C/GC/33, 3 August 2015, para. 16.

<sup>147</sup>*Idem*, para. 17.

<sup>148</sup>*Idem*, para. 18.

<sup>149</sup>*Idem*, para. 19.

system of investigation.<sup>150</sup> This interpretative approach contributes to the protection of women’s rights in a limited way; the ECtHR clearly stated that States enjoy a certain margin of discretion in fulfilling the positive obligations at stake. In *M.C. v. Bulgaria*, a case on rape, the ECtHR specified that “the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State’s margin of appreciation”.<sup>151</sup> Furthermore, in *Opuz v Turkey* the Court, ruling in a case of domestic violence, stated that “[n]ot every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”<sup>152</sup> This discretion could jeopardize the right to access to justice.

Furthermore, access to justice cannot be guaranteed only through the reform of the judicial system. Obstacles which stem from economic, cultural factors and gender stereotypes require to be removed.

### 7.2.8 Empowering of Women in the Political Sphere

Constitutionalism and citizenship have always been associated with furthering the egalitarian and rights-based vision of political justice. Yet, the birth of constitutionalism did not occur at the same time for men and women. While political equality started to become a reality for men with the late eighteenth-century American and French democratic revolutions, for women it was only in the first half of the twentieth-century.<sup>153</sup>

The empowering of women is usually identified with the introduction of female suffrage and gender quotas (1). However, for their empowering to be effective further positive state measures are needed in the public sphere, more specifically prohibition of sexism (2).

<sup>150</sup> App. Nos. 7510/04, *Case of Kontrova v Slovakia* (ECtHR 31 May 2007); App. Nos. 839/02, *Case of Maslova and Nalbandov v. Russia* (ECtHR 24 January 2008); App. Nos. 38478/05, *Case of Sandra Jankovic. v. Croatia* (ECtHR 5 March 2009); App. Nos. 2660/03, *Case of Hajudova v. Slovakia* (ECtHR 30 November 2010); App. Nos. 60561/14, *Case of S.M. v. Croatia* (ECtHR GC 25 June 2020); App. Nos. 41237/14, *Case of Talpis v. Italy* (ECHR 2 March 2017), paras. 99–106. On this case see De Vido (2017).

<sup>151</sup> App. Nos. 39272/98, *Case of M.C. v. Bulgaria* (ECtHR 4 December 2003), para. 150.

<sup>152</sup> App. Nos. 33401/02, *Case of Opuz v. Turkey* (ECtHR 9 June 2009), para. 129.

<sup>153</sup> Rubio-Marín and Chang (2013), p. 301; see also section 4 of the chapter on the Gender Equality and Public Law, in this volume.

### 7.2.8.1 Female Suffrage and Gender Quotas

The slow recognition of female suffrage was the result of widespread prejudices as to the inherent inequality and division of roles between women and men. Family and household were reserved for women, while the public sphere, especially political life, were the privileges of men. In addition to these stereotypes, various other “concerns” related to the culture and politics of the specific countries, were advanced to maintain the exclusion of women from the political realm.<sup>154</sup>

#### Example

The religiousness of women was used as an argument against female suffrage in an otherwise progressive Third French Republic. Women were denied political rights as they were considered too prone to clericalism; the cleavage between clericalists and anti-clericalists was a determining one in political life of France at the turn of the twentieth Century.<sup>155</sup> ◀

These factors combined, led to the commencement of the recognition of women’s political rights across Europe and North America in the first half of the twentieth century: Norway (1913); United Kingdom (1918); Germany (1918); Canada (1918); Poland (1918); United States (1920); Soviet Union (1924), and Spain (1931). The next milestone for the female suffrage came with the victory of progressive forces in World War Two, in recognition of women’s participation in the war, more specifically in France (1944), Yugoslavia (1945), Italy (1945), Romania (1946), Belgium (1948), and Greece (1952). Yet, in Switzerland, it was only in 1971 that men accepted to share the right to vote with women, demonstrating how strongly they cared for their privileges in the political sphere.<sup>156</sup> Furthermore, there were reverse waves in the recognition of female suffrage. In Spain, after the female suffrage was recognized under the Second Republic in 1931, it was suppressed in 1939 with Franco’s arrival to power. Female suffrage was restored only in 1978, three years after his death.<sup>157</sup>

Liberal feminist over emphasis on the “sameness” of men and women, and the appropriateness of gender-neutral approaches to overcome the discrimination based on sex or gender proved its limits.<sup>158</sup> Decades after the female suffrage was introduced in law, women were politically underrepresented in reality. The late arrival of women’s citizenship to the constitutional project required the introduction of gender quotas in electoral lists. Their function was to enhance equal opportunities for individuals and to ameliorate the position of disempowered groups. It became obvious, as difference feminists argued, that in order to treat men and women

<sup>154</sup> Duverger (1980), p. 115.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> Carrillo (2019), p. 236.

<sup>158</sup> Cf. Jackson (2016), p. 441.

equally, it is (sometimes) necessary to treat them differently (because of history, and/or physiology, and/or culture, and/or political economy).<sup>159</sup>

However, granting women effective political power through gender quotas did not enter the constitutional scene without resistance across the globe.<sup>160</sup> Political and judicial battles ensued, leading to negative reactions of constitutional courts and, at the end, their constitutional entrenchment.<sup>161</sup>

### Example

The recognition of the female suffrage in France did not lead to the gradual increase of the female representation. While in 1946 there were 42 women in the National Assembly, in 1962 there were only 8, and there was no more than 36 female deputies when the socialists came to power in 1981. These worrying figures led to the introduction of legislative quotas for women. However, that measure was struck down by the Constitutional Council, in 1982 and once again in 1999, with almost the same reasoning; it contradicted the constitutional principles of the indivisibility of sovereignty and equality before the law. To overcome the resistance of the constitutional judges, the Constitution was amended, first in 1999 and then in 2008. Hence, the new provision of the Fifth French Republic's Constitution stipulates that "statutes shall promote equal access of women and men to elective offices and posts as well as position of professional and social responsibility" (Article 1(2)).<sup>162</sup> In Italy, as in France, women were underrepresented in the political life. In response, measures of affirmative action were undertaken on the national and regional level. Nevertheless, in 1995 the Constitutional Court declared the gender quotas for the representative assemblies unconstitutional, being contrary to the principle of the universal character of political representation. The Court subsequently departed from this position, accepting the measures to promote female representation under the condition it applied only to the extent to which it concerned the opening of chances and not the guaranteeing of seats. It became obvious that a constitutional amendment was required to move from a formal to a substantive understanding of gender equality. After the 2003 reform, the Italian Constitution states that "any citizen of either sex is eligible for public offices and elected positions on equal terms" and that "to this end, the Republic shall adopt specific measures to promote equal opportunities between women and men" (Article 51(1)). Consequently, in another ruling, the Court confirmed that the new constitutional wording implied the principle of substantive gender equality.<sup>163</sup> ◀

<sup>159</sup> *Ibid*; cf. Wacks (2005), pp. 317–318.

<sup>160</sup> For a European perspective, see: Giegerich (2021), 05/21 EN, online via: [https://jean-monnet-saar.eu/?page\\_id=70](https://jean-monnet-saar.eu/?page_id=70).

<sup>161</sup> Rubio-Marin and Chang (2013), p. 309.

<sup>162</sup> Roman (2019), pp. 276–277.

<sup>163</sup> Luciani (2019), pp. 344–345.

### 7.2.8.2 Prohibition of Sexism

Although gender quotas have contributed to the empowering of women, there are still many spheres of public life in which they are not only marginalized, but also degraded and humiliated. The stereotyping of women and the use of misogynistic language have not been eradicated from public discourse, increasing calls for restrictions on the freedom of speech. Pornography, systemic sexual objectification and denigration of women and girls have led some authors to ask themselves rhetorically if women are human.<sup>164</sup> Radical feminists, such as Catharine MacKinnon and Andrea Dworkin, have even pledged for the definition of pornography as a practice of sex discrimination, seeing in it “graphic materials that subordinate women through sexually explicit pictures and words”,<sup>165</sup> and have advocated for a ban.

In response to these phenomena, the 2011 Council of Europe Convention on Combating Violence Against Women and Domestic Violence (Istanbul Convention) binds the states to “take the necessary measures 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” (Article 12(1)). More specifically, Istanbul Convention imposes obligations upon states to “encourage [...] media, with due respect for freedom of expression and their independence, to participate in the elaboration and implementation of policies and to set guidelines and self-regulatory standards to prevent violence against women and to enhance respect for their dignity” (Article 17(1)).

Since, the similar provision has been already present in Article 5(a) of 1979 Convention on the Elimination of all Forms of Discrimination Against Women (see section 2c supra), many countries have started regulating freedom of expression with a view to combat sexist remarks.

#### Example

In 2004 France modified the Law on the Freedom of Press, penalizing speech provoking hatred or violence, as well as discrimination on the ground of sex. In 2017 further legislation was adopted to prohibit discrimination on the grounds of gender identity and sexual identity. Finally, in 2018, the Criminal Code was amended to penalize sexist behaviour, defined as injuring a person’s dignity by degrading and humiliating acts, or creating intimidating, hostile or offending situation against another person. Criminal proceedings against French rapper Orelsan point to the complexity of the interpretation and application of the legislative provisions on the prohibition of the sexual discrimination. After he was convicted by the first instance court for his songs, among which one was poetically named *Suce ma bite pour la Saint-Valentin* (“Suck my dick for

<sup>164</sup> MacKinnon (2006), p. 42.

<sup>165</sup> *Ibid.*, p. 118.

Valentine’s Day”), Orelsan was acquitted on appeal. In reaching this decision, the appellate court took into account the value of artistic creation and nature of rap music. Here, the court particularly valued freedom of artistic creation; allowing for the expression of minority views, and reflecting a vibrant society. Such minority views hold their own place in a liberal democracy. Rap music was viewed by the court as often brutal, provocative, vulgar and violent in its nature, being the expression of a generation which considered itself as disillusioned and rebelled. The court, then, went on to examine whether Orelsan’s music was intended to harm women and to provoke discrimination against them, or to express the discomfort of one part of his generation. An exhaustive and non-truncated listening of his songs led the court to the conclusion that Orelsan did not identify himself with his characters, who are mediocre in their values, and that he did not claim for the legitimacy of their views.<sup>166</sup> ◀

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## 7.3 Gender Perspective in Economic, Social and Cultural Rights

### 7.3.1 Economic and Social Discrimination of Women

The previous paragraphs clarified that the feminization of poverty<sup>167</sup> and gender-based violence have strengthened women’s subordination to men. The connection between the two phenomena has to be evaluated against the framework of the laws protecting women’s economic and social rights.

The unequal distribution of wealth between men and women is a final outcome of several processes, ranging from the difficulties women face in accessing education and employment to “the structured relations of production and reproduction that govern the distribution and use of resources, benefits, privileges and authority within the home and society at large”.<sup>168</sup> Poverty exposes women to violence, since the lack of economic resources and the difficulties in acceding social protection oblige them to live in violent contexts.<sup>169</sup> Furthermore, the overrepresentation of women in informal, precarious and low-paid sectors<sup>170</sup> of the workforce widens the gap between men and women and exposes the latter to (sexual) harassment in the workplace. It has been rightly observed that the process is circular; violence

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<sup>166</sup>Roman (2019), pp. 268, 282–284.

<sup>167</sup>Jäterä-Jareborg (2016), pp. 31–34.

<sup>168</sup>Ertürk (2009), para. 27.

<sup>169</sup>Larking (2019), p. 307.

<sup>170</sup>Committee on Economic, Social and Cultural Rights, *General Comment No. 24 on States obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, Un Doc. E/C.12/GC/24, para. 9.

generates poverty in many cases by preventing women from acceding to education and employment, or obliges them to caring roles.<sup>171</sup>

This brief description illustrating the discrimination of women in economic and social fields makes it clear that equality entails dismantling those power structures which have been shaping economic and social organization.<sup>172</sup> The international system of protection of women's rights has not achieved such an outcome.

### 7.3.2 The ILO System

The Equal Remuneration Convention (1951) stipulates that States shall promote and ensure the principle of equal remuneration for men and women workers for work of equal value (art. 2).<sup>173</sup> The following Convention n. 111 of 1958 on employment and occupation envisages the adoption of special measures of protection or assistance which are to be deemed non-discriminatory in nature (art. 5).<sup>174</sup> Eventually, the Convention n. 156 of 1981 has fostered the promotion of effective equality of opportunity and treatment between women and men calling States to “make it an aim of national policy to enable individuals to engage in employment and exercise family responsibilities without being subject to discrimination (art. 3).<sup>175</sup>

### 7.3.3 The ICESCR

The ICESCR affords a limited protection to women's social and economic rights. The Covenant obliges States Parties to take steps with a view to progressively achieving full realization of the rights the Covenant enshrines (art. 2).<sup>176</sup> This obligation is somewhat restrained by further stating that the realizations are to be progressive, referencing “the maximum of [their] available resources.” All economic, social and cultural rights the Covenant sets forth are enjoyed by men and women, pursuant to the equal right art. 3 provides for. This provision has to be read in conjunction with art. 2 para. 2 which lists several grounds of prohibited

<sup>171</sup> Goldblatt (2019), p. 360.

<sup>172</sup> On economic and social rights see Chinkin (2014), pp. 134–160; Fredman (2013), pp. 217–241; Otto (2002).

<sup>173</sup> ILO Equal Remuneration Convention, 1951 (No. 100), United Nations Treaty Series, Vol. 165, p. 2181, entered into force on 23 May 1953.

<sup>174</sup> ILO Discrimination in respect of Employment and Occupation Convention, 1958 (No. 111), United Nations Treaty Series, vol. 362, p. 31, entered into force 15 June 1960.

<sup>175</sup> ILO Workers with Family Responsibilities Convention, 1981, (No. 156), United Nations Treaty Series, vol. 1331, p. 295, entered into force on 11 August 1983.

<sup>176</sup> International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976. 993-1 UNTS 14531.



discrimination, including sex. Pursuant to these provisions the right to equal treatment is not standing alone, but applies to the rights the Covenant establishes.

The equal right of men and women imposes a mandatory and immediate obligation to States Parties<sup>177</sup> to protect, respect and fulfil.<sup>178</sup> This latest obligation contains duties to provide, promote and facilitate. To comply with the obligation at stake, States are empowered to enact temporary measures in the first instance.<sup>179</sup>

### 7.3.4 The Conventions of the Council of Europe

The European Social Charter<sup>180</sup> and the Revised European Social Charter<sup>181</sup> adopted the same approach of the ICESCR in applying the principle of non-discrimination. The European Social Charter recognises: the right of men and women workers to equal pay for work of equal value (art. 4 (3)); the right of employed women to protection including the protection of maternity; the regulation of night work; the prohibition of employment of women workers in underground mining and in all other unsuitable works (art. 8), and the right of mothers and children to social and economic protection (art. 17).

The Revised European Social Charter widened the scope of the protection of fundamental economic and social rights. It provides for an express right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. The obligation lies with States Parties “to recognize the said right and to take appropriate measures to ensure or to promote its application” in the fields of “a) access to employment, protection against dismissal and occupational reintegration; b) vocational guidance, training, retraining and rehabilitation; c) terms of employment and working conditions, including remuneration; d) career development, including promotion” (art. 20). Moreover, the Revised European Social Charter aims at protecting dignity at work through the promotion of awareness, information and prevention of sexual harassment in the workplace (art. 26). It further imposes on States Parties the duty to take appropriate measures to guarantee the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers (art. 27). Eventually, art. E of Part V lists sex as a prohibited ground of discrimination in the enjoyment of the rights the Charter sets forth.

<sup>177</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 16 (2005). The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2005, E/C.12/2005/4, para. 16.

<sup>178</sup> *Idem*, para. 17.

<sup>179</sup> *Idem*, para. 15.

<sup>180</sup> Council of Europe European Social Charter, Turin 18 October 1961, CETS – No. 35.

<sup>181</sup> Council of Europe Revised European Social Charter, Strasbourg 3 May 1996, CETS No. 163.

### 7.3.5 The CEDAW

All the international conventions examined above seem to fail to ensure women emancipation. The rules reproduce the divide between public and private sphere since they do not affect the private relationships in which women experience labour segregation, exclusion from social assistance and violence.<sup>182</sup> Moreover, they adopt a male conception of rights, expressed through the use of male language,<sup>183</sup> and aim at extending these rights to women pursuant to the principle of non-discrimination. These do not take into consideration the specific condition of women and the related need for protection. There is no provision affecting the social division of labour, namely the clustering of women in specific labour fields and positions, and no regulation for the unpaid work of caring. No action is envisaged to remove those obstacles to the enjoyment of rights in the field of employment, occupation and social protection stemming from the work in the private sphere of families.

Most of the shortcomings arise from the adoption of a non-discriminatory approach. It is therefore not surprising that such a stance has not been followed in the drafting of the CEDAW, which aims at eliminating discrimination. To achieve the said targets, the Convention puts an end to the distinction between the public and private sphere. Discrimination against women falls within this scope when committed by any person, organization or enterprise. Art. 3 establishes the duty of taking appropriate measures in the economic and social fields to ensure the full development and advancement of women. In this vein the rules art. 11 envisages aim at tackling structural factors of inequality between women and men in employment and occupation. The provision is based “on recognition of the complex realities of women’s economic, family and employment situation”<sup>184</sup> and provides for a series of States’ obligations to eliminate discrimination. The aims of the rules enacted by art. 11 are to ensure substantial equality through the removal of direct and indirect discrimination affecting women, and preventing them from acceding to occupation. The provision distinguishes two sets of duties which relate to different obstacles to equality. The first set of rules (art. 11 para. 1) aim at granting women the same rights on the basis of equality between women and men. The provisions at stake cover the rights to work, equal employment opportunities, vocational training and retraining, equal remuneration and social security, and finally, free choice of protection and employment.

The second set of rules (art 11 para. 2) targets the prevention of discrimination women face because of marriage and maternity, guaranteeing their effective right to work. This section of the provision relates to structural factors of discrimination. These tend to be entrenched in a model of family relations, the distribution of roles within family, and the cultural stereotypes based on the said organization of society.

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<sup>182</sup>On this divide see Charlesworth and Chinkin (2000), p. 238.

<sup>183</sup>E.g. articles 1, 10, 13 and 19 of the European Social Charter and the Revised European Social Charter; Art. 1 para. 1 ICESCR; Chinkin (2014), p. 137.

<sup>184</sup>Raday (2012), p. 281.

The instruments art.11 envisages are connected to the provisions contained in art 1 to 5 of the CEDAW.

Moreover, the system of eradication of discrimination against women set out by art. 11 is strengthened by the provisions contained in art. 13. This imposes on States Parties the duty to “take all appropriate measures to eliminate discrimination against women in other areas of economic and social life”. The rule covers the right to self-employed economic activities, food, adequate housing, adequate standard of living, water and sanitation.<sup>185</sup>

Notwithstanding the improvement of the protection of women’s economic and social rights the CEDAW has achieved, the root causes of gender discrimination were not erased. Economic and social rights were not conceived for preventing violence against women. Furthermore, the crisis of the conception of labour rights as human rights<sup>186</sup> has undermined the effectiveness of the rights the international conventions lay down.

Moreover, liberalization has pushed several publicly funded social services to the realm of private business, affecting the poorest part of society.<sup>187</sup>

The shrinking of social protection stems also from the policies of loans pursued by the IMF and the World Bank, obliging the recipient States to cut down welfare protection.

The spreading of poverty does not only affect women’s rights, exacerbating their discrimination, but contributes to increased violence against women.<sup>188</sup>

### 7.3.6 Gender Education Gaps and Education as a Pathway Towards Equality

#### 7.3.6.1 The Right to Education

The right to education is enshrined in multiple human rights treaties on the international<sup>189</sup> and on the regional level.<sup>190</sup> It includes the right to primary education,<sup>191</sup>

<sup>185</sup> See Rudolf (2012), pp. 336–355.

<sup>186</sup> Alston (2005).

<sup>187</sup> Larking (2019), p. 307.

<sup>188</sup> Orford (1997), pp. 455–456.

<sup>189</sup> Art. 5 CERD, Art. 13 ICESCR, Art. 10 lit. h) CEDAW, Art. 17 CRC, Art. 4 lit. h) CRPD; Art. 30 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>190</sup> Art. 10 ECHR, Art. 13 ACHR and Art. 9 ACHPR.

<sup>191</sup> This includes grade levels for children between the age of four and twelve according to: International Standard Classification of Education (ISCED) 2011, para. 122, <http://uis.unesco.org/sites/default/files/documents/international-standard-classification-of-education-isced-2011-en.pdf>.

secondary education, including technical and vocational education, as well as higher education<sup>192</sup> and fundamental education.<sup>193</sup>

According to the Committee on CESCR, States are required to secure the “*availability, accessibility, acceptability and adaptability*”<sup>194</sup> of the respective education or all educational levels. This means that “*functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. [...] educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. [...] teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents. [...] education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.*”<sup>195</sup>

As the right to education is a human right, states have to respect, protect and ensure its enjoyment. The scope of these obligations depend on the level of education; whereas they merely have “to take steps” with regard to the realization of secondary, higher and fundamental education, States have to prioritize the introduction of compulsory, free primary education.<sup>196</sup> Therefore, a national educational strategy including the provision of secondary, higher and fundamental education already suffices, whereas states have a direct obligation to provide primary education.<sup>197</sup>

### 7.3.6.2 The Prohibition of Discrimination in Education

In 2013, around 60% of the 773 million illiterate people were women.<sup>198</sup> Until today, girls are more likely to drop out of school, or never to go to school at all.<sup>199</sup>

<sup>192</sup> Also defined as tertiary education: “[...] includes what is commonly understood as academic education but also includes advanced vocational or professional education. [...] Bachelor’s or equivalent level, Master’s or equivalent level, and doctoral or equivalent level, [...]” (ISCED 2011, para. 200).

<sup>193</sup> CESCR, General Comment No. 13 (1999), paras. 23, 24: “[...] The right to fundamental education extends to all those who have not yet satisfied their “basic learning needs”. [...] the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.”

<sup>194</sup> *Ibid.* para. 6.

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.* para. 10.

<sup>197</sup> *ibid.* para. 51 f.

<sup>198</sup> CEDAW, General Recommendation No. 36, para. 2.

<sup>199</sup> Even though the global trend goes towards parity, on the regional level the gap continues to exist: UNESCO Institute for Statistics (UIS) (2019).

The Covid 19-pandemic put over 11 million girls at the risk of dropping out of school.<sup>200</sup>

The right to education is of special importance as it is a prerequisite for the enjoyment of other human rights and (women's) participation in a democratic society, including, but not limited to, the right to work, the right to health (especially concerning reproductive rights)<sup>201</sup> or the freedom of expression.<sup>202</sup> Equal access to education reduces unwanted pregnancies and the mortality of young mothers.<sup>203</sup> Furthermore, women who have received at least a basic education are later able to shape their own lives and are more likely to participate in political life.<sup>204</sup> It is not only gender, but mostly intersectional discrimination that prevents girls from exercising their right to education by attending school. *“Such factors include barriers to access for girls and women from disadvantaged and marginalized groups, exacerbated by poverty and economic crises, gender stereotyping in curricula, textbooks and teaching processes, violence against girls and women in and out of school and structural and ideological restrictions to their engagement in male-dominated academic and vocational fields.”*<sup>205</sup> The necessary awareness of potential intersectional discrimination has been emphasized, for example, by the Inter-American Court of Human Rights in a case concerning girls whose parents were migrants.<sup>206</sup>

According to the CEDAW Committee, the right to education is a “tripartite human rights obligation”<sup>207</sup> which means that states firstly have to guarantee the “right of access to education” and ensure equal access. Secondly, they have to guarantee “rights within education”, concerning the treatment and opportunity of women in education. Thirdly, they have to ensure, “rights through education”, concerning the results of the education for the enjoyment of other human rights.

The gender gap in education is not only a violation of the state's obligations with regard to the right to education, it is also an economically expensive failure. Studies show that the gender gap in employment can cost the economy up to 15 percent of the GDP of the respective country.<sup>208</sup> The better women and girls are educated, the higher the likelihood that they participate in the labour market and contribute to the

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<sup>200</sup>For the situation in the context of the Covid 19-pandemic see: UNESCO (2020).

<sup>201</sup>See above Sect. 7.3.4.

<sup>202</sup>ICESCR, General Comment No. 13 para. 1; CEDAW, General recommendation No. 36, para. 1.

<sup>203</sup>Art. 10 h CEDAW requires the states to reduce the lack of education on health issues for women; on the positive outcomes of education and childbirth see: Bhalotra and Clarke (2013), p. 19.

<sup>204</sup>Currently, only 25.5% of the world's parliamentarians are female (<https://data.ipu.org/women-averages?month=4&year=2021>).

<sup>205</sup>CEDAW, General Recommendation No. 36 (2017), para. 4.

<sup>206</sup>Series C No. 130, *Girls Yean and Bosico v. Dominican Republic* (IACHR, 08. September 2005), paras. 134 and 244.

<sup>207</sup>CEDAW, General Recommendation No. 36 (2017), paras. 13–19.

<sup>208</sup>Cuberes and Teignier (2016), pp. 1–32.

growth of the respective state's economy.<sup>209</sup> It is therefore not only a legal obligation to provide equal education, but also in the economic and financial interest of the state. In order to ensure that the gender education gap is closed, the right to education is complemented by the prohibition to discriminate,<sup>210</sup> obliging states to enable equal access to education regardless of gender or other prohibited grounds of discrimination. This prohibition is reaffirmed in the 2030 Agenda for Sustainable Development (Goal 4) and enshrined in a separate UNESCO treaty; the Convention against discrimination in education of 1960.<sup>211</sup>

## 7.4 Conclusion

The chapter has shown several aspects of human rights, when interpreted and applied from a gender perspective. States are not only obliged to ensure gender equality by refraining from interventions, but also have positive obligations to adjust their legislation accordingly. This was witnessed in the context of GBV and the right to respect for private life.

Religious freedom “is one of the most vital elements that [...] make up the identity of the believers and their conception of life” (*Kokkinakis v. Greece*). However, controversies over wearing headscarves and full-face veils in public places, as well as performance and assistance in abortion procedures, bear witness to the fact how religious freedoms play for women, but also against them.

Furthermore, the rules on access to justice contained within international treaties grant states a wide margin of discretion in their implementation. As a consequence, judicial protection cannot dismantle the vicious circle of poverty, violence, and the distribution of labour in which women are kept. Besides judicial rights, political rights are another field where “asking the woman question” furthers and deepens the debate as to the meaning of equality. The late recognition of female citizenship

<sup>209</sup> See on this e.g.: OECD, Gender Equality in Education, Employment and Entrepreneurship: Final Report to the MCM 2012. <http://www.oecd.org/employment/50423364.pdf>, p. 3.

<sup>210</sup> See for example: Art. 10 CEDAW, Art. 2 (2) CRC read together with Art. 28, 29 CRC; Convention against Discrimination in Education 1960 and on the regional level: Art. 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; Art. 13 African Youth Charter; Art. 11 of the African Charter on the Rights and Welfare of the Child; Art. 13 African Youth Charter; Art. 11 of the African Charter on the Rights and Welfare of the Child; Art. 14 ECHR read in conjunction with Art. 2 of Protocol 1 (general prohibition of discrimination in Art. 1 Prot. 12); Art. E, 9, 10 and 17 of the European Social Charter; Art. 14 Istanbul Convention; Art. 14, 21 and 23 Charta of Fundamental Rights of the European Union; Art. 3, 13 and 16 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador; Art. 34, 49 and 50 of the Charter of the Organization of American States; Art. 6 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; Art. 9 and 16 Inter-American Democratic Charter; Art. 41 Arab Charta on Human Rights; Art. 31 ASEAN Human Rights Declaration (not legally binding).

<sup>211</sup> UNESCO, Convention against Discrimination in Education, 14 December 1960.

necessitated the introduction of gender quotas and prohibition of sexism for the equality between men and women to be effective.

The feminization of poverty, the privatization of public goods and services, and the distribution of labour have been bolstering men's domination, by creating new forms of women's sexual and labour exploitation. The stress on the management of migration flows has shaped the rules on trafficking marginalising the need for granting victims' rights.

The international standards of protection of women's economic and social rights have not been effective in ensuring equality. This is despite the importance of women's economic, social and cultural rights, not only to reach substantive gender equality, but also for states economies.

### Questions

1. Define the legal notion of slavery
2. Identify the elements of trafficking
3. Identify the obstacles women face in having access to justice
4. Why is a religious freedom both an essential component of identity of many women and a challenge to their dignity and autonomy?
5. How do female suffrage and gender quotas empower women and what are the legal controversies surrounding the introduction of gender quotas?
6. Why is the prohibition of sexism important and what are the legal challenges related to the implementation of this measure?
7. Mention the reasons for the failure of economic and social rights to eradicate women discrimination
8. Explain the term "gender-based violence" as used in the Istanbul Convention and explain its strengths and shortcomings.
9. What does the right to respect for private life entail with regard to reproductive rights?
10. How is/can gender equality be ensured when it comes to education?

### References

- Alston P (2005) Labour rights as human rights. The not so happy state of the art. In: Alston P (ed) *Labour rights as human rights*. Oxford University Press, Oxford, pp 1–24
- Bales K, Robbins PT (2001) No one shall be held in Slavery or Servitude: a critical analysis of international slavery conventions. *Hum Rights Rev* 2:18–45
- Bhalotra S, Clarke D (2013) Educational attainment and maternal mortality. <https://unesdoc.unesco.org/ark:/48223/pf0000225945>. Accessed 12 Sep 2021
- Byrnes A (2012) Art. 2. In: Freeman MA, Chinkin C, Rudolf B (eds) *The UN convention on the elimination of all forms of discrimination against women*. Oxford University Press, Oxford, pp 71–99
- Carrillo M (2019) Espagne. *Annuaire international de justice constitutionnelle XXXIV-2018 – Égalité, genre et constitution*, pp 223–239
- Cerone J (2007) Human trafficking in *Max Planck Encyclopedias of International Law*

- Chaney E (1979) *Supermadre: women in politics in Latin America*. University of Texas Press, Austin
- Charlesworth H, Chinkin C (2000) *The boundaries of international law*. Manchester University Press, Manchester
- Chinkin C (2014) Gender and economic, social and cultural rights. In: Riedel E, Giacca G, Golay C (eds) *Economic, social, and cultural rights in international law. Contemporary issues and challenges*. Oxford University Press, Oxford, pp 134–160
- Choudhry S (2018) Women's access to justice: a guide for legal practitioners. <https://rm.coe.int/factsheet-womens-access-to-justice/16808ff44e>. Accessed 12 Sep 2021
- Coomaraswamy R (1997) Report of the Special Rapporteur on violence against women, its causes and consequences. <https://digitallibrary.un.org/record/238264>. Accessed 12 Sep 2021
- Cuberes D, Teignier M (2016) Aggregate effects of gender gaps in the labor market: a quantitative estimate. *J Hum Cap* 10:1–32. <https://doi.org/10.1086/683847>
- De Vido S (2017) States' positive obligations to eradicate domestic violence: the politics of relevance in the interpretation of the European Convention on Human Rights. *ESIL Reflection* 6:1–11
- Duverger M (1980) *Institutions politiques et droit constitutionnel – I/ Les grands systèmes politiques*. Presses universitaires de France, Paris
- ECtHR, Factsheet on Violence against women. [https://www.echr.coe.int/Documents/FS\\_Violence\\_Woman\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf). Accessed 12 Sep 2021
- Engle K (2005) Feminism and its (dis)contents: criminalizing wartime rape in Bosnia and Herzegovina. *Am J Int Law* 99:778–816
- Ertürk Y (2009) Report of the Special Rapporteur on violence against women its causes and consequence: political economy of women's human rights. Human Rights Council. <https://digitallibrary.un.org/record/656877>. Accessed 12 Sep 2021
- Fredman S (2013) Engendering socio-economic rights. In: Hellum A, Aasen HS (eds) *Women's human rights. CEDAW in international, regional and national law*. Cambridge University Press, Cambridge, pp 217–241
- Giegerich T (2021) Gender equality and gender quotas for political participation in Europe: comparative, international and supranational perspectives. [http://jean-monnet-saar.eu/?page\\_id=70](http://jean-monnet-saar.eu/?page_id=70). Accessed 12 Sep 2021
- Goldblatt B (2019) Violence against women and social and economic rights: deepening the connections. In: Rimmer SH, Ogg K (eds) *Research handbook on feminist engagement with international law*. Edward Elgar Publishing, Cheltenham/Northampton, pp 359–371
- Grans L (2018) The Istanbul Convention and the positive obligation to prevent violence. *Hum Rights Law Rev* 18:133–155. <https://doi.org/10.1093/hrlr/ngx041>
- Heise L, Ellsberg M, Gottmoeller M (2002) A global overview of gender-based violence. *Int J Gynecol Obstet* 78:5–14. [https://doi.org/10.1016/S0020-7292\(02\)00038-3](https://doi.org/10.1016/S0020-7292(02)00038-3)
- Htun M (2000) Culture, institutions and gender inequality in Latin America. In: Harrison LE, Huntington SP (eds) *Culture matters*. Basic Books, New York, pp 191–192
- Jackson VC (2016) Feminisms, pluralisms and transnationalism: on CEDAW and national constitutions. In: Rubenstein K, Young KG (eds) *The public law of gender – from the local to the global*. Cambridge University Press, Cambridge, pp 437–464
- Jänterä-Jareborg M (2016) Women's human rights: international law in the intersection between socioeconomic conditions, culture, tradition and religion. In: Jänterä-Jareborg M, Tigroudja H (eds) *Women's human rights and the elimination of discrimination*. The Hague Academy of International Law, The Hague, pp 3–98
- Koome J (2012) Without these women, the tribunal cannot do anything: the politics of witness testimony on sexual violence at the international criminal tribunal for Rwanda. *J Women Cult Soc* 38:253–277
- Larking E (2019) Challenging gendered economic and social inequalities: an analysis of the role of trade and financial liberalisation in deepening inequalities, and of the capacity of economic and social rights to redress them. In: Harris S, Rimmer KO (eds) *Research handbook on feminist*



- engagement with international law. Edward Elgar Publishing, Cheltenham/Northampton, pp 306–322
- Luciani M (2019) Italie. *Annuaire international de justice constitutionnelle XXXIV-2018 – Égalité, genre et constitution*, pp 327–347
- MacKinnon CA (2006) *Are women human? – And other international dialogues*. The Belknap Press of Harvard University Press, Cambridge/London
- Mahlmann M (2009) Freedom and faith: foundations of freedom of religion. *Cardozo Law Rev* 30: 2473–2493
- Mancini S (2014) Strong religions and weak minorities: a cautionary tale from Europe. In: Basta Fleiner LR, Marinkovic T (eds) *Key developments in constitutionalism and constitutional law*. Eleven International Publishing, Den Haag, pp 33–47
- Marinkovic T (2017) Religion in public spaces – controversies in the European Court of Human Rights Case-Law. In: Brunkhorst H, Vujadinović D, Marinkovic T (eds) *European democracy in crisis – politics under challenge and social movements*. Eleven International Publishing, Den Haag, pp 75–91
- Méndez J (2013) Report of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment. [https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a.hrc.22.53\\_english.pdf](https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a.hrc.22.53_english.pdf). Accessed 12 Sep 2019
- Morondo Taramundi D (2020) Gender-based violence against women and international protection needs - the contribution of the Istanbul Convention. In: Peroni L, Niemi J, Stoyanova V (eds) *International law and violence against women: Europe and the Istanbul Convention*. Routledge, London, pp 241–265
- Niemi J, Sanmartin AV (2020) The concepts of gender and violence in the Istanbul Convention. In: Niemi J, Peroni L, Stoyanova V (eds) *International law and violence against women: Europe and the Istanbul Convention*. Routledge, London, pp 81–95
- Orford A (1997) Locating the international military and monetary interventions after the Cold War. *Harv Int Law J* 38:443–486
- Otto D (2002) Gender comment: why does the UN Committee on economic, social and cultural rights need a general comment on women? *Can J Women Law* 14:1–52
- Palmer S (1996) Critical perspectives on women's rights: the European Convention on Human Rights and fundamental freedoms. In: Bottomley A (ed) *Feminist perspectives on the foundational subjects of law*. Cavendish, London, pp 223–242
- Phillips A (2005) Dilemmas of gender and culture: the judge, the democrat and the political activist. In: Eisenberg A, Spinner-Halev J (eds) *Minorities within minorities: equality, rights and diversity*. Cambridge University Press, Cambridge, pp 113–134
- Radacic I (2008) Gender equality jurisprudence of the European Court of Human Rights. *Eur J Int Law* 19:841–857
- Raday F (2003) Culture, religion and gender. *I.CON* 1(4):669
- Raday F (2012) Art. 11. In: Freeman MA, Chinkin C, Rudolf B (eds) *The UN convention on the elimination of all forms of discrimination against women*. Oxford University Press, Oxford, pp 281–309
- Roman D (2019) France. *Annuaire international de justice constitutionnelle XXXIV-2018 – Égalité, genre et constitution*, pp 259–287
- Rubio-Marin R, Chang W-C (2013) Sites of constitutional struggle for women's equality. In: Tushnet M, Fleiner T, Saunders C (eds) *Routledge handbook of constitutional law*. Routledge, London, pp 304–305
- Rudolf B (2012) Art. 13. In: Freeman MA, Chinkin C, Rudolf B (eds) *The UN convention on the elimination of all forms of discrimination against women*. Oxford University Press, Oxford, pp 336–355
- Sembacher A (2006) The Council of Europe Convention on action against trafficking in human beings. *Tulane J Int Comp Law* 14:435–454
- Stoyanova V (2020a) Due diligence versus positive obligations - critical reflections on the Council of Europe Convention on violence against women. In: Niemi J, Peroni L, Stoyanova V (eds)

- International law and violence against women: Europe and the Istanbul Convention. Routledge, London, pp 95–129
- Trigoudja H (2016) Droits des femmes et non-discrimination: de l'affirmation des obligations internationales de l'Etat à un droit à l'autoprotection. In: Jänterä-Jareborg M, Tigroudja H (eds) Women's human rights and the elimination of discrimination. The Hague Academy of International Law, The Hague, pp 133–134
- Tulkens F (2007) Droits de l'homme, droits des femmes. Les requérantes devant la cour européenne des droits de l'homme. In: Caffisch L, Callewaert J, Liddell R, Mahoney P, Villiger M (eds) Liber Amicorum Luzius Wildhaber. Droits de l'homme—Regards de Strasbourg. Engel, Kehl, pp 423–445
- UNESCO (2019) Fact Sheet 56. New methodology shows that 258 million children, adolescents and youth are out of school. <http://uis.unesco.org/sites/default/files/documents/new-methodology-shows-258-million-children-adolescents-and-youth-are-out-of-school.pdf>. Accessed 12 Sep 2021
- UNESCO (2020) Addressing the gender dimensions of COVID-related school closures. <https://unesdoc.unesco.org/ark:/48223/pf0000373379>. Accessed 12 Sep 2021
- Viseur Sellers P (2009) Gender strategy is not luxury for international courts symposium: prosecuting sexual and gender-based crimes before internationalized criminal courts. *Am Univ J Gender Soc Policy Law* 17:301–325
- Zampas C, Amin A, O'Hanlon L, Bjerregaard A, Mehrtash H, Khosla R, Tunçalp Ö (2020) Operationalizing a human rights-based approach to address mistreatment against women during childbirth. *Health Hum Rights J* 22:251–264

## Further Reading

- Allain J (2010) *Rantsev v. Cyprus and Russia: The European Court of Human Rights and trafficking as slavery*. *Hum Rights Law Rev* 10:546–557
- Allain J (2013) *Slavery in international law: of human exploitation and trafficking*. Martinus Nijhoff, Leiden
- Barry K (1995) *The prostitution of sexuality*. New York University Press, New York
- Bassiouni MC (1991) Enslavement as an international crime. *N Y Univ J Int Law Polit* 23:445–517
- Brewer M, Southwell P (2018) Legal policy and framework on trafficking. In: Southwell P, Brewer M, Ben Douglas-Jones QC (eds) *Human trafficking and modern slavery. Law and practice*. Bloomsbury Publishing, Haywards Heath, pp 1–12
- Chuang J (2012) Art. 6. In: Freeman MA, Chinkin C, Rudolf B (eds) *The UN convention on the elimination of all forms of discrimination against women*. Oxford University Press, Oxford, pp 169–196
- De Sena P (2019) Slavery and new slavery: which role for human dignity?. [http://www.qil-qdi.org/wp-content/uploads/2019/12/02\\_New-Slavery\\_DE-SENA\\_FIN.pdf](http://www.qil-qdi.org/wp-content/uploads/2019/12/02_New-Slavery_DE-SENA_FIN.pdf). Accessed 12 Sep 2021
- Dorsen N, Rosenfeld M, Sajó A, Baer S (2003) *Comparative constitutionalism – cases and materials*. Thomson West, St. Paul
- Eskitaşcıoğlu İ (2019) Access to menstrual products is a constitutional right. *Period.: On period poverty and the (un)constitutionality of Tampon tax*. <https://verfassungsblog.de/access-to-menstrual-products-is-a-constitutional-right-period/>. Accessed 12 Sep 2021
- Fitzpatrick J (2003) Trafficking as a human rights violation: the complex intersection of legal frameworks for conceptualizing and combating trafficking. *Mich J Int Law* 24:1143–1167
- Fortas AC (2016) Droit international et genre. In: Jänterä-Jareborg M, Tigroudja H (eds) *Women's human rights and the elimination of discrimination*. The Hague Academy of International Law, The Hague, pp 3–98
- Gallagher A (2001) Human rights and the new UN protocols on trafficking and migrant smuggling: preliminary analysis. *Hum Rights Q* 23:975–1004

- Gallagher A (2009) Human rights and human trafficking: quagmire or firm ground? A response to James Hathaway. *Va J Int Law* 49:789–848
- Gallagher A (2011) *The international law of human trafficking*. Cambridge University Press, Cambridge
- Grossman N (2019) Feminist approaches to international adjudication. <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3350.013.3350/law-mpeipro-e3350>. Accessed 12 Sep 2019
- Haverkamp R, Herlin-Karnell E, Lernerstedt C (2019) *What is wrong with human trafficking? Critical perspectives on the law*. Hart Publishing, London
- Hellum A, Aasen HS (2013) *Women's human rights. CEDAW in international, regional and national law*. Cambridge University Press, Cambridge
- Henn EV (2016) Gender injustice, discrimination and the CEDAW: a women's life course perspective. In: Jänterä-Jareborg M, Tigroudja H (eds) *Women's human rights and the elimination of discrimination*. Brill/Nijhoff, Leiden/Boston, pp 183–215
- Lamont R (2013) Beating domestic violence? Assessing the EU's contribution to tackling violence against women. *Common Market Law Rev* 6:1787–1807
- Meix-Cereceda P (2020) Educational values in human rights treaties: UN, European, and African international law. *Hum Rights Rev* 21:437–461. <https://doi.org/10.1007/s12142-020-00599-6>
- Nanda P, Cherif Bassiouni M (1971) Slavery and the slave trade: steps toward eradication. *Santa Clara Law Rev* 12:424–442
- Noll G (2007) The insecurity of trafficking in international law. In: Chetail V (ed) *Globalization, migration and human rights: international law under review*. Bruylant, Bruxelles, pp 343–361
- Obokata T (2006) *Trafficking of human beings from a human rights perspective*. Martinus Nijhoff Publisher, Leiden
- Paulk LB (2014) Embryonic personhood: implications for assisted reproductive technology in international human rights law. *Am Univ J Gender Soc Policy Law* 22:781–823
- Peroni L (2018) The protection of women asylum seekers under the European Convention on Human Rights: unearthing the gendered roots of harm. *Hum Rights Law Rev* 18:347–370. <https://doi.org/10.1093/hrlr/ngy004>
- Pizzarossa LB (2018) Here to stay: the evolution of sexual and reproductive health and rights in international human rights law. *Laws* 3:1–17
- Scarpa S (2018) Contemporary forms of slavery. [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO\\_STU\(2018\)603470\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO_STU(2018)603470_EN.pdf). Accessed 12 Sep 2021
- Stoyanova V (2012) Dancing on the borders of article 4: human trafficking and the European Court of Human Rights in the Rantsev Case. *Neth Q Hum Rights* 30:163–194
- Stoyanova V (2017) Human trafficking and slavery reconsidered: conceptual limits and states' positive obligations in European law. Cambridge University Press, Cambridge
- Stoyanova V (2020b) The Grand Chamber Judgment in *S.M. v Croatia*: human trafficking, prostitution and the definitional scope of Article 4 ECHR. <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 12 Sep 2021
- Suzor N, Dragiewicz M, Harris B, Gillett R, Burgess J, van Geelen T (2019) Human rights by design: the responsibilities of social media platforms to address gender-based violence online. *Policy Internet* 1:84–103
- Wacks R (2005) *Understanding jurisprudence – an introduction to legal theory*. Oxford University Press, Oxford
- Weissbrot D (2002) *Abolishing slavery and its contemporary forms*. United Nations, New York/Geneva
- Westendorp I (2012) *The Women's Convention Turned 30*. Intersentia, Cambridge
- Whitaker B (1982) Report on slavery. <https://digitallibrary.un.org/record/33645?ln=fr>. Accessed 12 Sep 2021
- Wijers M, Lap-Chew L (1997) Trafficking in women, forced labour and slavery-like practices in marriage, domestic labour and prostitution. *Foundation Against Trafficking in Women*, Utrecht

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