

*Challenges in the Jurisprudence of the ECtHR on Women's Rights Issues:  
An Analysis of Abortion and Domestic Violence Cases before the Strasbourg court*

European Court of Human Rights in Strasbourg, France, 2020. Source: © Council of Europe.



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*Challenges in the Jurisprudence of the ECtHR on Women's Rights Issues:  
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by Roza Cseby  
Women's Rights Team  
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# Table of Contents

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Sr. No.	Topic	Page No.
1.	INTRODUCTION	1
2.	REPRODUCTIVE RIGHTS AND THE ECtHR	5
3.	DOMESTIC VIOLENCE AND THE ECtHR	12
4.	CONCLUSION	20

# 1. INTRODUCTION

This article examines some of the key judgments of the European Court of Human Rights (ECtHR) concerning women's rights, in particular, those relating to reproductive rights and domestic violence. It provides a non-exhaustive analysis of the main challenges the Court encounters in its handling of women's rights issues. This analysis does not seek to offer a biased perspective, but rather, its primary objective is to shed light on contemporary challenges confronting the Court. In doing so, this article will consider various landmark decisions from the ECtHR, such as *Osman v. UK* (1998), *Opuz v. Turkey* (2009), *Kurt v. Austria* (2021) or *G.M. and Others v. The Republic of Moldova* (2022). The intention is to foster awareness and stimulate critical thinking, and consequently contribute to the advancement of legal protections for women in Europe.

To better understand this analysis, a brief overview of the European Court of Human Rights (ECtHR) and its role in protecting human rights, in particular women's rights, will be provided. The ECtHR (hereinafter referred to as "the Strasbourg Court" or "the Court") is the judicial organ of the Council of Europe<sup>1</sup> responsible for upholding human rights as outlined in the European Convention on Human Rights (ECHR), hereinafter referred to as "the Convention". The Court has an interpretative authority of the ECHR. The Convention, adopted in 1950 and in effect since 1953, was the inaugural and fundamental treaty of the Council of Europe.<sup>2</sup> To become a member of the Council of Europe, a state must ratify the Convention. Any individual within the jurisdiction of a Council Member State can file a complaint with the ECtHR if they believe their rights under the Convention have been violated. This is possible only after exhausting all available domestic remedies in the relevant jurisdiction.<sup>3</sup>

The relevance of the Court lies in its competence to issue binding decisions for the Council of Europe's 46 Member States, which are then incorporated into domestic laws and regulations. Additionally, the ECtHR's legal precedents are frequently referenced by other regional tribunals, treaty-monitoring bodies, and domestic courts, establishing human rights standards not only within Europe but also beyond. This makes the ECtHR a crucial platform for shaping interpretations on human rights legislations. As questions around women's reproductive health and gender equality are often deeply contested, the ECtHR arguably has a significant role to play in fostering public awareness on this subject. Reproductive rights and the right to be free from gender-based discrimination and violence in particular are integral to achieving the full participation of women in European society.<sup>4</sup>

As far as women's rights are concerned, the Court has consistently emphasised in its case law that achieving gender equality is a significant objective for the Member States of the Council of Europe.<sup>5</sup>

1 Founded in 1949, the Council of Europe stands as the foremost human rights organisation on the continent. Across its 46 Member States, the organisation has established a unified legal framework, primarily centred around the European Convention on Human Rights (ECHR). The Council is separate from the European Union, and its membership extends beyond the 27 EU Member States to include nations like Albania, Armenia, Azerbaijan, Georgia, Turkey, and Ukraine. Since March 2022, the Russian Federation is no longer a member of the Council. See <https://www.coe.int/en/web/about-us/who-we-are>.

2 Lebret, A. 'The European Court of Human Rights and the Framing of Reproductive Rights' (22 March 2021) *Droits fondamentaux*, 18(2020). <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3779251](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3779251)> Accessed 20 December 2023 (Lebret, A. (2021)).

3 Evans, J. 'Gender Mainstreaming at the European Court of Human Rights: The Need for A Coherent Strategy in Approaching Cases of Violence Against Women and Domestic Violence' (27 February 2023). *University of Miami Inter-American Law Review*, 54(1). <<https://repository.law.miami.edu/cgi/viewcontent.cgi?article=2654&context=umialr>> Accessed 20 December 2023 (Evans, J. (2023)).

4 Evans, J. (2023).

5 Radacic, I. 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008). *European Journal of International Law*. [www.ghrd.org](http://www.ghrd.org)

For example, the Court underscored in the ruling of the case *Konstantin Markin v. Russia* (2012) that

*[T]he advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention. [...] In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.<sup>6</sup>*

Furthermore, it strengthened this ambition in 2017 by adopting the Council of Europe's Convention on Preventing and Combating Violence Against Women, also known as the Istanbul Convention. This was the first legally binding international instrument dedicated to preventing and combating violence against women and girls at the international level.<sup>7</sup>

In the first chapter, the article analyses the challenges faced by the Court in terms of reproductive and abortion rights, which are then contextualised by highlighting two important cases in this regard, *Tysiac v. Poland* (2007) and *A, B & C v. Ireland* (2010). Similarly, in the second chapter, the article focuses on the challenges faced by ECtHR pertaining to domestic violence in light of three particular cases, *Kurt v. Austria* (2019), *Y and Others v. Bulgaria* (2022), and *Landi v. Italy* (2022).

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*Law*, 19(4). <<https://doi.org/10.1093/ejil/chn044>> Accessed 20 December, 2023.

6 ECtHR. 'Group of abortion rights cases against Poland declared inadmissible' (8 June 2023). Press Release issued by the Registrar of the Court. ECHR 173 (2023).

7 European Parliament. 'EU accession to the Council of Europe Convention on preventing and combating violence against women ('Istanbul Convention')' (15 December 2023). *Legislative Train Schedule, European Parliament*. <<https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-eu-accession-to-the-istanbul-convention>> Accessed 20 December 2023.

## 2. REPRODUCTIVE RIGHTS AND THE ECtHR

This chapter will evaluate how the ECtHR approaches issues relating to reproductive rights, more specifically abortion, and the legal stance the Court usually takes on these matters. The main challenges identified, which will be elaborated upon in the next paragraphs, are as follows:

The delicate balance between the ECtHR's duty to uphold universal human rights principles and the respect for states' sovereignty in domestic affairs;  
The broad margin of appreciation and the "fair compromise" concept;  
The Court's reluctance to prioritise or contextualise reproductive rights, ignoring the reproductive vulnerability of women in some cases;  
The minimalist strategy to avoid dissent, focusing on the identification of procedural responsibilities of states rather than substantive obligations, and  
The Court's missed opportunity to engage with the UN and regional human rights standards on sexual and reproductive health rights (SRHR).

The aforementioned challenges arise partly from the fact that the European Convention on Human Rights does not explicitly recognise a right to safe and legal abortion. Thus, interpretation of existing rights in the context of abortion cases has been left to the discretion of the European Court of Human Rights which examines potential violations by disaggregating established human rights based on the circumstances necessitating abortion. Such rights include the right to respect for private and family life (Article 8), the prohibition of torture (Article 3), and the right to life (Article 2), among others.<sup>8</sup> The emergence of the issue of abortion within the international reproductive rights framework was slow and gradual. The concept of the right to freely and responsibly determine the number and spacing of children was initially introduced in Paragraph 16 of the Proclamation of Tehran during the First UN World Human Rights Conference in 1968. Later on, it evolved from being a right jointly held by parents to becoming a fundamental right for every woman to manage her own fertility. This concept was further affirmed in 1979 by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in Article 16. Nevertheless, prior to 1985, the topic of abortion was never openly addressed in official documents. The UN Conference on Women in Nairobi adopted recommendations for safe abortion in 1985, and it was only in 1995, at the Fourth World Conference on Women in Beijing, that the first call for the decriminalisation of abortion occurred.<sup>9</sup>

In cases dealing with the topic of abortion, the Court balanced conflicting rights, primarily focusing on three main issues. The first one is the conflict between the right to life of the foetus and the woman's right to a private life. In the first ever abortion case before the ECtHR, *Brüggemann and Scheuten v. Federal Republic of Germany* of 1977, the Court rejected the absolute right to life for the foetus, and instead prioritised the woman's rights. The second opposition relates to the conflict between the putative father and family life on one hand and the woman's autonomy on the other, i.e. the man's right to paternity against the woman's right to control her body. The Court consistently judged that the man cannot prevent a woman from freely deciding on abortion, as the decision primarily concerns the woman and her body. Lastly, the third issue is regarding state regulation vs. women's rights, i.e. the state's right to regulate abortion within domestic law against women's rights. In this case, the Court's

8 Cosentino, C. 'Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence' (13 July 2015). *Human Rights Law Review*, 15(3). <<https://doi.org/10.1093/hrlr/ngv013>> Accessed 20 December

9 Cosentino, C. (2015).



rulings are inconsistent as it considers the various circumstances in which women's rights had been violated, domestic abortion laws, ethical concerns, democratic nature of the debate, and international legislative support. Due to all these factors, the Court is usually reluctant to interfere with states' sovereignty on this delicate matter.<sup>10</sup>

In the following sections, the paper will further explore the aforementioned conflict between state regulation and women's rights by studying two examples from case law: *Tysiacy v. Poland* (2007) and *A, B & C v. Ireland* (2010). This will help to understand and explain the difficulties ECtHR is dealing with in more detail.

## 2.1. TYSIAC V. POLAND (2007)

The case revolves around Ms. Alicja Tysiacy's (the Applicant) inability to access a legal abortion in Poland. In 2000, during her third pregnancy, multiple doctors had concluded that the pregnancy posed a risk to her eyesight. Despite seeking termination, her request was not adequately processed. The Applicant's request was denied at a state hospital, and her pregnancy was not terminated. After childbirth, her eyesight deteriorated significantly, and she faced the risk of going blind. In spite of complaints and legal proceedings against the involved doctors, investigations and disciplinary proceedings were discontinued. The Applicant, now visually impaired, is unemployed, receiving a disability pension, and raising her three children alone.<sup>11</sup>

The Applicant claimed violations of Article 8 (right to respect for private and family life) and Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention. Additionally, she argued a lack of effective remedy (Article 13) and discrimination (Article 14) in the realisation of her rights conferred by Article 8. Regarding inhuman or degrading treatment, the Court found that the facts of the case did not disclose a breach of Article 3, holding that the Applicant was aware of the impact of the pregnancy on her eyesight. Furthermore, the Court established that it was not necessary to examine the complaint under Articles 13 and 14. Instead, it found that only the right to private life had been violated and dismissed the applicant's complaint on other rights due to the lack of adequate information and procedural mechanisms undertaken by the Applicant.<sup>12</sup>

However, the Court did not make any reference to reproductive rights, nor did it acknowledge that having effective access to legal abortion is a matter of gender equality and women's dignity, rather than merely a question relating to procedures of clinical interventions in general.<sup>13</sup> Leuret (2021) articulated similar criticism of the ECtHR. Even though the Court had acknowledged Ms. Tysiacy's vulnerability, her knowledge of the risks should not have prevented the Court from finding a breach of Article 3. Leuret further emphasised that the Court deliberately neglected to address the crucial question of the conventional protection of the right to abortion. Instead, it focused on procedural<sup>14</sup> issues within the

<sup>10</sup> Cosentino, C. (2015).

<sup>11</sup> *Tysiacy v. Poland* Application no. 5410/03 (ECtHR, 24 September 2007) (*Tysiacy v. Poland* (2007)).

<sup>12</sup> *Tysiacy v. Poland* (2007) para. 1-5.

<sup>13</sup> Oja, L. and Yamin, A. E. "WOMAN" IN THE EUROPEAN HUMAN RIGHTS SYSTEM: HOW IS THE REPRODUCTIVE RIGHTS JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS CONSTRUCTING NARRATIVES OF WOMEN'S CITIZENSHIP? (2016). *Columbia Journal of Gender and Law*, 1 (Oja and Yamin (2016)). <<https://journals.library.columbia.edu/index.php/cjgl/article/view/2751/1256>> Accessed 20 December 2023.

<sup>14</sup> Procedural law pertains to the regulations governing the legal process, detailing the steps cases take through the legal system, starting from the initial filing of a complaint to their ultimate resolution. In contrast, substantive law encompasses the set of rules that outline the rights and obligations of individuals and organisations, defining acceptable and prohibited behaviour along with

context of Article 8, emphasising the importance of enabling a pregnant woman to be heard and have her views considered. This avoidance of a more explicit stance on abortion rights could be attributed to the broader socio-political context in Poland.<sup>15</sup>

In this case, the Court outrightly distanced itself from tackling reproductive rights, in particular women's right to an abortion. This apathy has led some commentators to argue that the Court's stance further reinforces gender stereotypes and limits women's agency in society.<sup>16</sup> Additionally, the conservative interpretations of the separate opinion of Judge Bonello explicitly reject any abstract or fundamental human right to abortion. Meanwhile, Judge Borrego Borrego criticised the Court for lacking objectivity, implying a preference for a more permissive approach to abortion in Poland, and challenging the State's compliance with its positive obligations.<sup>17</sup> Thus, Judge Borrego Borrego completely disregarded the autonomy argument and was of the opinion that the ECtHR gave too much credit to the "fears" of the Applicant.<sup>18</sup>

## 2.2. A, B & C V. IRELAND (2010)

The case involves three Applicants (Ms. A, Ms. B, and Ms. C) who, in 2005, travelled from Ireland to England in order to obtain legal abortions as they were not entitled to the procedure under Irish law. They filed complaints under Article 8 of the Convention, arguing that the prohibition of abortion for health reasons in Ireland violated their right to private life. The first Applicant noted the challenges she faced due to poverty, alcoholism, and custody issues, while the second Applicant cited the risk of ectopic pregnancy when arguing for access to legal abortion. The third Applicant, a cancer survivor, feared the impact of pregnancy on her health, and lacked information on the consequences of giving birth in her situation due to Irish legal constraints. All three of the applicants experienced difficulties such as financial struggles, secrecy, and post-abortion complications.<sup>19</sup>

The first two Applicants filed complaints under Articles 3 (prohibition of torture), 8 (right to respect for private and family life), 13 (right to an effective remedy), and 14 (prohibition of discrimination) of the Convention, challenging the prohibition of abortion in Ireland by invoking health and well-being reasons. The third Applicant complained under Articles 2 (right to life), 3, 8, 13, and 14, basing her argument on the lack of legislative implementation of Article 40.3.3<sup>20</sup> of the Constitution. She argued that in the absence of a robust legal framework, she was unable to establish her right to a lawful abortion in Ireland, particularly in cases involving a risk to her life. The Court dismissed claims of violation of Article 2 in the third Applicant's case, as well as those filed under Articles 3 and 14 (discrimination) in all three cases. Furthermore, the Court found no violation of the right to private life (Article 8) regarding Applicants A and B, asserting that

corresponding penalties. See <https://juristopedia.com/substantive-law-vs-procedural-law/>.

15 Lebret, A. (2021).

16 Carpenter, T. 'Silenced: Women's Voices and the European Court of Human Rights. International Studies Undergraduate Honors Theses' (2019). *Seattle University*. <<https://scholarworks.seattleu.edu/intl-std-theses/12>> Accessed 20 December 2023 (Carpenter, T. (2019)).

17 *Tysiac v. Poland* (2007).

18 Lebret, A. (2021).

19 *A, B & C v. Ireland* Application no. 25579/05 (ECtHR, 16 December 2010) (*A, B & C v. Ireland* (2010)).

20 Article 40.3.3 of the Constitution of Ireland, often referred to as the Eighth Amendment, was an amendment added in 1983. It recognised the equal right to life of the unborn and the mother, effectively giving the unborn a constitutionally protected right to life.



[...] *having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons [...] exceeds the margin of appreciation accorded in that respect to the Irish State.*<sup>21</sup>

The ECtHR only considered a violation of the right to private life (Article 8) regarding applicant C, arguing that the authorities did not fulfil their positive obligation to safeguard the third Applicant's right to private life effectively. This failure is attributed to the lack of a legislative or regulatory framework that would have facilitated an accessible and effective procedure for the third Applicant to determine her eligibility for a lawful abortion in Ireland under Article 40.3.3 of the Constitution.<sup>22</sup>

This judgment was also the subject of much criticism, for example by Oja and Yamin (2016), who firstly contended that the Court gave the Irish Government an excessively broad margin of appreciation. They also disagree with the characterisation of abortion as being a solely private matter, and with the Court's ignorance of the social and economic implications of international travel, as well as reminding of the associated challenges to a woman's exercise of reproductive autonomy. Additionally, the Court's minimalist procedural perspective did not articulate nor confront the gender stereotypes grounded in ideological beliefs, which seep into and become ingrained in legislation; thus, contributing to institutionalised discrimination against women.<sup>23</sup> Lebret (2020) also criticises the Court's restrained procedural perspective as it fails to assert substantive obligations regarding reproductive health under the right to private life. He emphasises that when the right to health is at risk, it should not be compromised by states' ethical or moral sensitivities.<sup>24</sup> Moreover, Cosentino condemns the ECtHR for deviating from its customary legal and case-law-based approach, in which it has taken a consistent stance that the Convention does not grant an absolute and non-derogable right to life for the foetus. He also criticises the Strasbourg Court for deferring to Ireland's national legislation on abortion, based on the sensitivity of moral and ethical issues, while highlighting a potential hypocrisy of allowing women to travel abroad for abortion.<sup>25</sup>

### 2.3. OVERVIEW OF THE JURISDICTIONAL CHALLENGES OF THE ECtHR IN ABORTION CASES

The case studies under scrutiny were selected to highlight the challenges before the ECtHR in order to understand how the Court could better improve its protection of women's rights and fundamental freedoms in the Member States of the Council of Europe. Regarding the *Tysiac v. Poland* and *A, B & C v. Ireland* cases, the literature is broadly unanimous on the criticisms and identified challenges facing the Court. The "normative motherhood narrative"<sup>26</sup> persists in both cases, constituting one of the biggest obstacles to the Court's proper contextualisation and recognition of reproductive rights as human rights. The ECtHR thus neglects to identify and investigate the inherent harm caused

21 *A, B & C v. Ireland* (2010) para. 241.

22 *A, B & C v. Ireland* (2010).

23 Oja and Yamin (2016).

24 Lebret, A. (2021).

25 Cosentino, C. (2015).

26 The concept of normative motherhood depicts women as having "motherhood" assigned to them as an inherent attribute of womanhood, irrespective of their individual choices or abilities.

to women as a result of this dominant narrative.<sup>27</sup> The ECtHR's failure or reluctance to conceptualise reproductive rights is also evident in its lack of consideration for discrimination and disregard for the right to health.<sup>28</sup> Consequently, abortion is never framed in the context of women's access to a crucial service pertaining to their entitlement to manage their bodies and lives. It is rather considered under the privacy doctrine, with abortion being handled by the Court as a "moral" issue, instead of a women's rights issue.<sup>29</sup> Furthermore, by using the Article 8 injunction of privacy as a reason for the Court to practise non-interference with the domestic affairs of Member States, the ECtHR tacitly allows them to block abortions within their jurisdiction.<sup>30</sup>

The principle of subsidiarity, which asserts that human rights protection is primarily the responsibility of national authorities, can create tension when juxtaposed with the ECtHR's role in upholding the ECHR on an international level. The challenge lies in harmonising these principles to ensure effective human rights protection while respecting the cultural and social contexts of its Member States. The idea of "margin of appreciation" and the pursuit of a "fair compromise," aiming to strike a balance between domestic and international considerations, ultimately pose challenges, which is evident in the Court's inconsistent rulings on reproductive rights. Additionally, the Court tends to avoid challenging the more restrictive national laws, focusing instead on procedural duties of states rather than addressing substantive obligations.<sup>31</sup>

In summary, the Court's handling of these specific abortion cases reinforces harmful stereotypes, exhibits a limited understanding of women's experiences, and neglects various dimensions of reproductive rights. To transform dominant narratives, the ECtHR needs to identify and challenge these stereotypes, fostering a more encompassing construction of women's identities. In this sense, Oja and Yamin (2016) suggest a transformative approach that explicitly frames abortion as a women's rights issue intersecting with gender, health, and power. Moreover, the ECtHR needs to become more interventionist, challenging states' legislation directly, rather than limiting judgments to identifying gaps between laws and their implementation.<sup>32</sup>

As far as recent judgments of the ECtHR in abortion related cases are concerned, there is a significant positive trend that favours women's rights protection. In cases such as *R.R. v. Poland* (2011), *P. and S. v. Poland* (2012), *S.F.K. v. Russia* (2022), and *G.M. and Others v. the Republic of Moldova* (2022), the Court ruled that the respective states have violated Article 3 of the ECHR, as well as Article 8 in the first two cases. The Court stressed the importance of having a legal and procedural framework that allows pregnant women to access reliable information about the foetus's health. It also emphasised the need for effective access to information on lawful abortion conditions and procedures.<sup>33</sup> Additionally, the Court reaffirmed the reproductive autonomy of women, particularly those with disabilities, and made progress in adopting a gender-sensitive approach, addressing forced abortions for the first time in the cases of *S.F.K. v. Russia* and *G.M. and Others v. the Republic of Moldova*.

27 Oja and Yamin (2016).

28 Lebret, A. (2021).

29 Oja and Yamin (2016).

30 Carpenter, T. (2019).

31 Lebret, A. (2021).

32 Cosentino, C. (2015).

33 Smyth, R. 'S.F.K. v. Russia and G.M. and Others v. Moldova: The Promise and Pitfalls of ECtHR Forced Abortion Jurisprudence' (2023) *Strasbourg Observers* (Smyth, R. (2023)). <<https://strasbourgobservers.com/2023/02/17/s-f-k-v-russia-and-g-m-and-others-v-moldova-the-promise-and-pitfalls-of-ecthr-forced-abortion-jurisprudence/>> Accessed 20 December 2023.

Nevertheless, in the cases of *S.F.K. v. Russia* (2022) and *G.M. and Others v. Moldova* (2022), challenges arose regarding women's rights due to conservative influences upon the Court's stance on abortion. For instance, both ECLJ and Ordo Iuris, closely affiliated conservative lobby groups, submitted third-party interventions to these cases opposing abortion access and LGBTQI+ rights. The Court's missed opportunity to engage with the UN and regional human rights standards on sexual and reproductive health rights (SRHR) still persist. For example, there is a lack of acknowledgment or adherence to international human rights standards, such as UN Committee on Economic, Social and Cultural Rights General Comment No. 22 and thematic reports by the UN Special Rapporteur on the right to health, covering topics like sexual and reproductive health, informed consent, and legal restrictions.<sup>34</sup>

Alarming, in 2023, a number of abortion rights cases against Poland were declared inadmissible by the Court. Eight Polish women presented their case to the European Court of Human Rights after a decision by the Polish Constitutional Tribunal in 2020 rendered abortion illegal in nearly all situations. However, the Court argued that the Applicants in the case did not provide convincing medical evidence to demonstrate a genuine risk of being directly impacted by the 2020 legislative amendments. Moreover, the Court found that the consequences of the legislative amendments were considered too distant and abstract for the Applicants to claim victimhood under the ECHR.<sup>35</sup> This ruling highlights the difficulties associated with granting Member States a too broad margin of appreciation, which results in the neglect of the reproductive vulnerability of women.

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34 Smyth, R (2023).

35 A.M. and Others v. Poland Application no. 4188/21 (ECtHR 2023).

### 3. DOMESTIC VIOLENCE AND THE ECtHR

This chapter focuses on understanding the main challenges the European Court of Human Rights encounters when dealing with cases related to domestic violence. It further examines the legal position of the ECtHR and how it approaches this issue. The following points will be elaborated upon further:

Insufficient state reaction: the failure of states to address domestic violence cases effectively and adhere to the principles outlined in the *Osman* test. Additionally, the Court's dismissal of the violation of Article 2 in light of the *Osman* test, which leads to the problematic practice of victim-blaming; The disproportionate burden the Court places on applicants by obliging them to provide statistical evidence to prove a violation of Article 14 (prohibition of discrimination) in conjunction with Article 2 (right to life); and Inconsistencies in the judgments of the Court in terms of Article 14 (prohibition of discrimination).

While the Court has made notable progress in addressing violence against women, maintaining a consistent gender perspective in its practices remains imperative.<sup>36</sup> One of the initial instances of the ECtHR addressing domestic violence was the *Opuz v. Turkey* case in 2009. In this landmark judgement, the Court declared for the first time that domestic violence constitutes discrimination based on sex under Article 14 of the ECHR. Furthermore, the Court established state obligations towards victims of domestic violence and highlighted the influence of gender stereotypes on the adequate respect of women's rights.<sup>37</sup> It relied upon international instruments, including the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to define the scope of discrimination by incorporating Article 1 of the CEDAW in its decision<sup>38</sup> which asserts 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 [...]"<sup>39</sup> However, inconsistencies arose in the subsequent judgments of the Court, such as in *Y and Others v. Bulgaria* (2022) and *Landi v. Italy* (2022), when no violation of Article 14 was found. Such rulings effectively rejected domestic violence as representing an instance of discrimination based on sex under Article 14, signalling a departure from previous judgments, including the *Opuz* case.<sup>40</sup>

In the *Opuz* case, the ECtHR referred to the legal principles (*Osman* test) established in the 1998 case of *Osman v. UK*. The *Osman* test imposes a positive duty on the state to protect individuals from the criminal acts of third parties where the concerned authorities were aware of a real and immediate risk to the life of an identified individual and yet failed to take reasonable measures within their powers to avoid that risk.<sup>41</sup> Similarly, in 2021, the Grand Chamber highlighted in its *Kurt v. Austria* judgement that there is a need for a nuanced application

36 Evans, J. (2023).

37 Murphy, S. 'Domestic Violence as Sex Discrimination: Ten Years since the Seminal European Court of Human Rights Decision in

38 Alkiviadou, N. and Manoli, A. 'The European Court of Human Rights Through the Looking Glass of Gender: An Evaluation.'

39 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by the United Nations General Assem-

40 Christoforidou, S. *Landi v. Italy: proving discrimination with statistics in cases of domestic violence*. (26 August 2022). Strasbourg Observers. <[https://strasbourgobservers.com/2022/08/26/landi-v-italy-proving-discrimination-with-statistics-in-cas-](https://strasbourgobservers.com/2022/08/26/landi-v-italy-proving-discrimination-with-statistics-in-cas)

41 Murphy, S. 'Domestic Violence as Sex Discrimination: Ten Years since the Seminal European Court of Human Rights Decision in *Opuz v. Turkey*.' (29 July 2019). *International Law and Politics*, 51(1347).

of the Osman test in domestic abuse cases, considering the specific context and dynamics of such violence. The Grand Chamber emphasised the requirement for an immediate response from authorities in domestic violence cases, considering the cyclical nature and escalating patterns often observed. Nevertheless, in several subsequent domestic violence cases, including those of *Y and Others v. Bulgaria* and *Landi v. Italy*, authorities consistently fell short of the standards established in the *Kurt* judgement for handling such cases. This poses an ongoing challenge for the Court.<sup>42</sup>

In the following parts, the paper will analyse three cases of the ECtHR: *Kurt v. Austria*, *Y and Others v. Bulgaria*, and *Landi v. Italy* to contextualise and clarify the identified challenges.

### 3.1. KURT V. AUSTRIA (2021, GRAND CHAMBER)

The case involved a woman in Austria who, along with her son, endured instances of domestic violence perpetrated by her spouse, leading to the tragic murder of their son. Ms. Senay Kurt, the Applicant, alleged that Austrian authorities failed to protect her and her children from her violent husband and thus violated the Articles 2 (right to life), 3 (prohibition of torture), and 8 (right to respect for private and family life) of the Convention.<sup>43</sup> Ms. Kurt had previously sought and obtained a barring order in 2010, and her spouse had a criminal conviction in 2011. The Applicant had filed for divorce and reported to the police instances of rape and violence perpetrated by her spouse in 2012. Despite the obtention of another restraining order and more criminal proceedings in his name, the Applicant's spouse killed his son and then committed suicide on the premises of the school his son attended in May 2012.<sup>44</sup>

The Court ultimately found that the authorities acted promptly in response to the Applicant's reports, despite there being a history of violence and a barring order. The authorities' decision not to hold the alleged perpetrator in pre-trial detention was deemed reasonable, given the available information. The Court underscores the necessity of a real and immediate risk for triggering positive obligations under Article 2 and thus ruled on July 4th, 2019 that there has been no violation of this article.<sup>45</sup> In September of 2019, the Applicant requested the transfer of the case to the Grand Chamber<sup>46</sup> under Article 43 of the Convention (which prescribes the conditions for case referrals to the Grand Chamber) and a videoconference hearing subsequently took place on June 17th, 2020. The Grand Chamber held by ten votes to seven that there had been no violation of Article 2. It agreed with the Austrian government that, based on the information available to the authorities at the time, there was no immediate and credible threat of harm to the Applicant's son beyond the areas covered by a barring order. The assessment by the authorities recognised a non-lethal risk related to domestic violence, primarily targeting the

42 McQuigg, R. 'The Osman test in the context of domestic abuse: *Y and Others v Bulgaria*' (1 October 2022) *European Human Rights Law Review*, 2022 (5). <<https://pure.qub.ac.uk/en/publications/the-osman-test-in-the-context-of-domestic-abuse-y-and-others-v-bu>> Accessed 20 December, 2023.

43 *Kurt v. Austria* Application no. 62903/15 (ECtHR, 4 July 2019) (*Kurt v. Austria* (2019)).

44 Weinberger, L. M. 'Kurt v Austria: A Missed Chance to Tackle Intersectional Discrimination and Gender-Based Stereotyping in Domestic Violence Cases.' (2021) *Strasbourg Observers*. <<https://strasbourgothers.com/2021/08/18/kurt-v-austria-a-missed-chance-to-tackle-intersectional-discrimination-and-gender-based-stereotyping-in-domestic-violence-cases/>> Accessed 20 December 2023 (Weinberger, L. M. (2021)).

45 *Kurt v. Austria* (2019).

46 After a Chamber judgment is issued, parties can request the case to be referred to the Grand Chamber, but this is only granted in exceptional circumstances. A panel of judges from the Grand Chamber evaluates these requests. Cases may also be sent to the Grand Chamber if a Chamber decides to relinquish it, which is also rare. This happens when the case raises significant questions about interpreting the Convention or when there's a risk of conflicting with a previous Court judgement. See [https://www.echr.coe.int/documents/d/echr/50Questions\\_ENG](https://www.echr.coe.int/documents/d/echr/50Questions_ENG).



## Applicant.<sup>47</sup>

In his concurring opinion, Judge Hüseyinov<sup>48</sup> raised concerns about how the Court uses the Osman test in cases of domestic violence. He highlighted that domestic violence is a unique social issue and suggested that the Osman test might not be the best fit for all cases, especially those ending in fatalities. In such cases, where violence can be an ongoing problem, he argued that the responsibility to prevent harm and provide protection should exist even if the threat to life is not imminent. He thus supports Judge Pinto De Albuquerque's position in the *Valiuliene v. Lithuania* (ECtHR, 2013) case. Their view indicates that requiring proof of an immediate risk in domestic violence cases might be impractical and insufficient for the due-diligence obligations of states outlined in international agreements.<sup>49</sup> Furthermore, in another dissenting opinion to the Grand Chamber's ruling, Judge Elósegui<sup>50</sup> further concludes that a violation of Article 2 occurred in the case of Ms. Kurt due to the inadequate measures taken by the State to address the risk of domestic violence. He also argued that the authorities failed to recognise the family as a unit and neglected to conduct a comprehensive risk assessment. He emphasised that the judgement should have considered the concept of "women's inferiority", as highlighted by Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in its third-party comments<sup>51</sup>, along with the power imbalances between men and women commonly at play in instances of domestic violence. Additionally, similarly to Judge Hüseyinov, he underscored the importance of taking into account the cycle and the spiral of violence in evaluating the actual and immediate risk in such cases.<sup>52</sup>

In her critique, Weinberger, who participated in the third-party intervention in the *Kurt v. Austria* case, agrees with the criticism of the aforementioned judges. She adds that the authorities overlooked the risks to the Applicant's children by failing to identify significant aggravating risk factors such as the father's gambling addiction, his mental health issues, his economic dependence on the Applicant, the Applicant's job loss, and the father's previous suicidal intents, along with homicidal threats. She asserts that the Court wrongfully denounced the victim's delay in reporting rape and strangulation by her husband, implying that if she had not been aware of the immediate danger, the authorities would not have been either. The Court's stance overlooks the complexities of domestic violence, where power dynamics, tactics of intimidation, emotional abuse, and fear can hinder victims from promptly and effectively reporting instances of abuse. Weinberger argues that the Chamber engaged in victim-blaming by downplaying the Applicant's concerns and overestimating the merit of the culprit's cooperation with authorities. While in theory, the Court might have established a gender-sensitive approach in its precedent case law, the unfolding of this particular judgment revealed the challenge of translating the principles of the Osman test into practice. The seven dissenting judges agreed that, if the established general principles had been adequately applied to the case before them, an Article 2 (right

47 Kurt v. Austria Application no. 62903/15 (Grand Chamber 15 June 2021) (Kurt v. Austria (2021)).

48 Kurt v. Austria (2021), Huseynov J.

49 Kurt v. Austria (2019).

50 Kurt v. Austria (2021), Elósegui J.

51 Third-party intervention under Article 36 § 2 of the Convention allows states and individuals not involved in a case to present their views and arguments to the Court. This helps the Court gain a broader perspective on the issues at hand. Third-party intervention can be initiated by the Court itself or by the interested party. The role of third parties is to provide impartial and objective legal or factual points that can assist the Court in making a well-informed decision. See [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewjy5OT5hoaEAXUBSaQEHeLRiQQFnoECBkQAQ&url=https%3A%2F%2Fwww.echr.coe.int%2Fdocuments%2Fd%2Fechr%2Fpd\\_third\\_party\\_intervention\\_eng-pdf%3Fdownload%3Dtrue&usg=AOy-Vaw0yVFGvmSEAp9L924lysWjD&opi=89978449](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewjy5OT5hoaEAXUBSaQEHeLRiQQFnoECBkQAQ&url=https%3A%2F%2Fwww.echr.coe.int%2Fdocuments%2Fd%2Fechr%2Fpd_third_party_intervention_eng-pdf%3Fdownload%3Dtrue&usg=AOy-Vaw0yVFGvmSEAp9L924lysWjD&opi=89978449).

52 Kurt v. Austria (2021).



to life) violation should also have been found, thus placing responsibility on the Austrian authorities to assess and address the real and immediate risk to the life of the Applicant's son.<sup>53</sup>

### 3.2. Y AND OTHERS V. BULGARIA (2022) AND LANDI V. ITALY (2022)

The recent judgments of the ECtHR such as *Y and Others v. Bulgaria* (2022) and *Landi v. Italy* (2022) signalled a departure from those made previously in domestic violence cases, especially the landmark case of *Opuz 2009* which established that domestic violence constitutes discrimination based on sex under Article 14 of the ECHR and shifted the burden of proof to authorities when events were within their knowledge. However, in these recent cases, the Court appeared to reverse its previous approach, instead placing a disproportionate burden on the applicants by obliging them to provide statistical evidence to prove that the authorities treated them in a way that violated Article 14 in conjunction with Article 2 (right to life) (Christoforidou, 2022). In both cases, the Court ruled that there had been a violation of Article 2 of the Convention but no violation of Article 14 read in conjunction with Article 2.

The *Y and Others v. Bulgaria* (2022) case revolves around a Bulgarian woman (Ms. V) who had been killed by her husband (Mr. V) after enduring months of harassment from her spouse. The case was brought to the Court against the Republic of Bulgaria by three Bulgarian nationals related to the victim (Ms. Y, Ms. X, and Ms. Z, hereafter referred to as "the Applicants") on February 15th, 2018. The Applicants raised questions about whether the authorities were obligated to take reasonable operational measures to protect Ms. V's life in accordance with Article 2 of the Convention. Additionally, they questioned whether the alleged failure of the authorities was indicative of general societal complacency towards violence against women and was thus discriminatory (under Article 14 of the Convention in conjunction with Article 2).<sup>54</sup>

Leading up to her death, Ms. V had reported instances of threats and harassment perpetrated against her by Mr. V. These reports were met with inadequate police response and a lack of charges on various occasions. For example, in November 2016, Ms. V reported that the tires of her car had been slashed, and alleged that Mr. V had threatened her. In response, the police investigation focused solely on the slashed tires, leading to no criminal proceedings and no investigation into the allegations put forward by Ms. V against her spouse. In February 2017, Ms. V complained about Mr. V chasing and threatening her. Despite Ms. V's friend confirming the incident, no charges were filed by the authorities, citing lack of evidence. Furthermore, Ms. V obtained a protection order in June 2017 which Mr. V violated, culminating in Ms. V's fatal shooting on August 18th, 2017 and Mr. V's subsequent arrest. Mr. V was convicted of aggravated murder and unlawful firearm possession. He received a prison sentence of 13 years and 4 months and was ordered to pay damages to Ms. V's daughters.

In support of the alleged violation of Article 14, the Applicants argued that the Bulgarian law inadequately addresses domestic violence, referring in particular to the lack of comprehensive statistics, delayed adoption of preventive programmes, and the Constitutional Court's decision preventing the ratification of the Istanbul Convention. They claim that recent amendments on the conditions of domestic violence to the Criminal Code were insufficient, and that the judiciary had demonstrated complacency in handling domestic violence cases. The Court acknowledged the prevalence of domestic violence against women in Bulgaria but found that there was insufficient evidence to establish a general and discriminatory

<sup>53</sup> Weinberger, L. M. (2021).

<sup>54</sup> *Y and Others v. Bulgaria* Application no. 9077/18 (ECtHR, 22 March 2022) (*Y and Others v. Bulgaria* (2022)).

passivity by the authorities.<sup>55</sup>

In the case *Landi v. Italy* (2022), the Applicant, Ms. Annalisa Landi, lodged an application against the Italian Republic by claiming that the respondent State had failed to take protective measures for her and her children following instances of domestic violence inflicted upon them by her partner, resulting in the murder of their one-year-old son and an attempted murder on the Applicant herself. The Applicant contended that this amounted to a violation of Articles 2 (right to life) and 14 (prohibition of discrimination) of the Convention.

Ms. Landi lived with her partner, N.P., who had a history of mental health issues including bipolar disorder. The relationship was marked by violent episodes, leading Ms. Landi to file a complaint in November 2015. In response to these incidents, various interventions occurred, including psychiatric evaluations of N.P. Despite the evidence of violence, threats, and N.P.'s apparent mental health issues, the Italian legal system only suggested protection measures, such as applying a restraining order to keep N.P. away from the family, which were ultimately not enforced. In September 2018, N.P. attacked Ms. Landi and their children with a knife, resulting in the death of one child and the attempted murder of Ms. Landi. Legal proceedings followed, leading to N.P.'s conviction on the counts of murder, attempted murder, and mistreatment. He was sentenced to twenty years in prison.<sup>56</sup>

For the alleged violation of Article 14, the Applicant argued that the lack of legislative protection and the inadequate response from authorities to her domestic violence complaints constitutes gender-based discrimination. The Applicant further contended that despite the State enacting laws to combat domestic violence, they were not implemented effectively, which resulted in the authorities failing to effectively protect victims, thereby discriminating against women. While noting the Italian authorities' failure to investigate the Applicant's case adequately, the Court did not find evidence of discriminatory intent and questioned the evidence of widespread judicial passivity or discriminatory measures brought forward by the Applicant. Consequently, the Court deemed the Applicant's claim as manifestly ill-founded, and the allegation of violating article 14 of the ECHR in conjunction with Article 2 was rejected.<sup>57</sup>

As noted by Christoforidou (2022), the lack of statistical evidence proving systemic failure to protect domestic violence victims led the Court to find no violation of Article 14 in both cases. By adopting this approach, the Court shifted the burden of proof to the Applicant to provide other forms of evidence, such as reports from NGOs or international observers, making it challenging for applicants to support their claims of discrimination. In other words, in these judgments, the ECtHR asserted that the systemic nature of discrimination could only be established with statistical evidence presented by the applicant. Therefore, the passivity of the public prosecutor in the *Landi v. Italy*, for example, is evaluated not based on the specific circumstances of a case, but rather on the existence of systemic discrimination supported by statistical evidence, limiting the scope of Article 14 in conjunction with Article 2 in domestic violence cases.<sup>58</sup>

In conclusion, the rulings in *Landi v. Italy* and *Y and Others v. Bulgaria* represent a U-turn in the

55 *Y and Others v. Bulgaria* (2022).

56 *Landi v. Italy* Application no. 10929/19 (ECtHR, 7 April 2022) (*Landi v. Italy* (2022)).

57 *Landi v. Italy* (2022).

58 Christoforidou, S. 'Landi v. Italy: proving discrimination with statistics in cases of domestic violence' (26 August 2022) *Strasbourg Observers*. <<https://strasbourgobservers.com/2022/08/26/landi-v-italy-proving-discrimination-with-statistics-in-cases-of-domestic-violence/>> Accessed 20 December 2023.

approach of the ECtHR towards domestic violence cases when compared to the precedent set by *Opuz v. Turkey*. Despite the recognition that victims of domestic violence are inherently vulnerable, especially under the Istanbul Convention, these recent cases diverge by placing a disproportionate burden on the applicants to present statistical evidence and observations from NGOs to prove that the authorities treated them in a manner that violates Article 14 in conjunction with Article 2. Consequently, the ECtHR has created a new and challenging precedent for those alleging discrimination in cases of domestic violence.<sup>59</sup>

### 3.3. OVERVIEW OF THE JURISDICTIONAL CHALLENGES OF DOMESTIC VIOLENCE CASES OF THE ECtHR

The analysis of the recent judgments of the ECtHR in domestic violence cases reveals a significant gap in the protection of victims or survivors of domestic violence from serious harm or death. Many cases brought before the ECtHR, including all those analysed in this article, involve long-term abuse that culminated in fatalities. This could be the result of insufficient state reaction, or the failure of domestic jurisdictions to provide adequate protection against life-threatening harm,<sup>60</sup> in spite of the principles of the Osman test, which were further clarified in *Kurt v. Austria (2021)*. Moreover, in relation to this case, when the Court stated that there was no breach of Article 2, it essentially engaged in victim-blaming, allowed unjustified underestimations of risks, and unfairly assigned the responsibility for safety to women and children. Weinberger argues that this not only affects legal processes, but also goes against global commitments to eradicate wrongful gender stereotyping. She proposes essential changes, such as implementing consistent evaluations of risks, fostering collaboration between authorities and schools, and providing sensitivity training for the judiciary in order to effectively tackle domestic violence.<sup>61</sup>

The other two cases analysed here demonstrate a concerning shift in the Court's approach to domestic violence. These judgments reverse the precedent established by the 2009 *Opuz v. Turkey* case, applied to many subsequent domestic violence cases such as *T.M. and C.M. v. the Republic of Moldova (2022)*, *Halime Kiliç v. Turkey (2016)*, *Talpis v. Italy (2017)*, and *Bălşan v. Romania (2017)*. In these judgments, the Court extended the vulnerable groups approach to Article 14 which prohibits discrimination in conjunction with other ECHR rights. The Court found that the States had failed in their positive obligation under Article 14 to protect the applicants from discrimination, considering the vulnerability of the victims within the broader framework of gender-based violence. This approach reinforces the idea that states must act beyond merely refraining from perpetuating direct discrimination and actively work to prevent and address discriminatory practices in the context of domestic violence.<sup>62</sup>

Nevertheless, in recent cases, the Court placed a disproportionate burden of proof on the victims. This raises concerns about permitting Member States to avoid judicial scrutiny of systemic discrimination in future domestic violence cases, since those attempting to prove a violation of Article 14 in specific circumstances are now faced with additional challenges. In *Landi v. Italy (2022)*, the Court considered the passivity of the public prosecutor to be discriminatory only if it was "systemic".<sup>63</sup> However, this systemic nature could only be established with statistical evidence presented by the applicant.

59 Christoforidou, S (2022).

60 Evans, J. (2023).

61 Weinberger, L. M. (2021).

62 Arnardóttir, O.M. 'Vulnerability under Article 14 of the European Convention on Human Rights. Innovation or Business as Usual?' (15 December 2017) *Oslo Law Review*, 4(3). <https://doi.org/10.18261/issn.2387-3299-2017-03-03>. Accessed 20 December 2023.

63 *Landi v. Italy (2022)* para. 106

Therefore, the passivity of the public prosecutor is evaluated, not based on the specific circumstances of a case, but rather on the existence of systemic discrimination supported by statistical evidence, limiting the scope of Article 14 in conjunction with Article 2 in domestic violence cases.<sup>64</sup> These judgments are likely to have an impact on the victims' ability to get through the preliminary stages of lodging a complaint at the ECtHR, since it will be more difficult for them to meet these requirements and establish the burden of proof.

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<sup>64</sup> Christoforidou, S (2022)  
[www.ghrd.org](http://www.ghrd.org)

## 4. CONCLUSION

This article identified several potential challenges that the European Court of Human Rights encounters in cases related to abortion and domestic violence. Firstly, there is a difficulty in maintaining the delicate balance between the ECtHR's duty to uphold universal human rights principles and the respect for states' sovereignty in domestic affairs. In other words, the ECtHR will continue to confront its judges' hesitancy to override national sovereignty and domestic legislation when confronted with notoriously patriarchal or conservative Member States, such as Poland or Russia. When the Court tackles a conflict between the legal frameworks of national sovereignty and an individual complaint, especially in cases involving women challenging patriarchal norms related to reproductive choices, the ECtHR judges must balance these concerns. This balancing act may involve leaning towards protecting national sovereignty to preserve harmonious cooperation with Member States. Another challenge thus ensues, namely the granting of a very broad margin of appreciation to national authorities in abortion cases and the pursuit of a 'fair compromise', i.e. striking a balance between domestic and international considerations. This has led to some inconsistent rulings on reproductive rights by the Court, as outlined in this article.

Secondly, there is the Court's reluctance to prioritise or contextualise reproductive rights, leading to their ignorance of the reproductive vulnerability of women in abortion cases. This manifests in the Court's tendency to focus on the procedural rather than substantive responsibilities of states. Furthermore, in its recent judgments on abortion-related cases, the Court missed the opportunity to engage with UN and regional human rights standards on sexual and reproductive health rights. This approach could limit the development of a comprehensive reproductive autonomy framework within the European human rights system.

In cases related to domestic violence, one of the main challenges identified is the insufficient reaction of the state authorities, their failure to address domestic violence cases effectively and adhere to the principles outlined in the Osman test. Moreover, in its recent case law, the Court has placed a disproportionate burden of proof on applicants, which can ultimately limit the scope of Article 14 (non-discrimination) in conjunction with Article 2 (right to life). Additionally, it has led to inconsistencies in the Court's decisions, especially in terms of Article 14. As a result, as demonstrated in the section on domestic violence (chapter 2), the Court's jurisprudence can take unexpected turns, underscoring the Court's own difficulties and insufficiencies.

Comprehending the motivations of these rulings is vital in preventing the occasional regression in the judicial history of the Court. It is also an imperative step in the better promotion and improvement of gender equality, improving legal protection, guiding advocacy efforts, and fostering accountability. This article provided a non-exhaustive analysis of the Court's involvement in these specific instances. However, there are other dimensions to this issue, such as the underrepresentation of women on the Court's bench, or the Court's susceptibility to politicisation due to its reliance on Member States' cooperation, both of which play a part in the complex landscape of gender equality jurisprudence within the Court.



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