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UDC 342.724-055.2(4)

CERIF: S 112

DOI: 10.51204/Anali_PFBU_24301A

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*THE RIGHTS OF MINORITY WOMEN BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: CRITICAL REVIEW IN LIGHT OF THE PRACTICE OF THE UN HUMAN RIGHTS COMMITTEE AND OTHER INTERNATIONAL HUMAN RIGHTS BODIES***

Women from ethnic, national, religious, and cultural minorities face distinct legal challenges in their struggle for gender equality. They are at constant risk of multiple discrimination as minority women, particularly with regard to their identity and religious rights. This is evident in matters of inheritance, wearing religious items in public, and issues related to sexual and domestic violence. International approaches to this problem are fragmented, with the ECtHR, UN HRC, and other international human rights bodies taking different approaches. This article will critically discuss the status of minority women's rights in the jurisprudence of the ECtHR and will reflect on what the Court could learn from the practices of the UN HRC and other international human rights bodies.

Key words: *Double burden. – Minority women. – Intersectional discrimination. – Religious female identity. – Right to self-identification.*

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** The views expressed in this article are exclusively those of the author and do not represent the Court or any other body or institution with which the author has been affiliated, such as the UN HRC. The author would like to thank Dr. Elena Brodeala and Dr. Silvia Suteu for their valuable comments on the previous version of the article. She also would like to thank Ms. Mélissa Foucaud and Mr. Étienne Fritz for their outstanding research assistance.

1. INTRODUCTION

Being part of a minority group, whether national, ethnic, religious, or cultural, frequently impacts the enjoyment of certain rights, particularly those related to identity, or one's equal status and opportunities. Issues of gender equality, intertwined with one's minority status, began to emerge at the international level in the second half of the 20th century, which coincided with the rise of affirmation of multiculturalism and respect for diversity. In this context, the European Court of Human Rights (ECtHR, or Strasbourg Court) and other international human rights bodies, such as the Inter-American Court of Human Rights (IACtHR), the United Nations Human Rights Committee (UN HRC, or the Committee) or the Committee on the Elimination of Discrimination against Women (CEDAW), have started being confronted with complex questions related to on gender equality and the rights of persons belonging to minority groups.

Some of these cases involved discrimination related to both gender and minority status and oftentimes required determining whether the actions of States violated the rights of women belonging to a minority group, as safeguarded by the European Convention on Human Rights (ECHR, or the Convention), the American Convention on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW), and other international documents. As Ravnbøl (2010, 26) notes:

> The language of CEDAW goes beyond the traditional gender-neutral formulated equality-norm and establishes a legal norm that recognises how women's disadvantaged positions in society requires special measures in order to have *de facto* equality. CEDAW can thus function as a legal tool for minority women to comprehensively redress the gender-based discrimination they experience in society.

Unlike the CEDAW, the ECHR only contains a general prohibition of discrimination, having no special provision on gender equality. Furthermore, while the ICCPR contains a general provision guaranteeing individual or group rights of persons belonging to an 'ethnic, religious or linguistic'

minority, this is not the case with the ECHR.[1] In addition, there is no internationally codified norm that protects the rights of minority women within the context of their gender and minority status.

In practice, the combination of both minority and gender statuses creates a *double burden* to their bearer, in particular in multinational States with a large number of immigrants or refugees. Indeed, '[i]n ways similar to migrant, refugee and minority women, indigenous women suffer from both gender discrimination and colonial perceptions of their cultures' (Xanthaki 2019, 11). Unfortunately, but not surprisingly, a woman belonging to a minority group is more vulnerable to discrimination than a man from the same group, both from outside the group and within, due to her perceived inferiority within the group. For example, there is a profusion of cases concerning the question of whether Muslim women can be exempted from laws that would force them to remove religious clothing. These women often face obstacles in accessing justice concerning their right to self-identification, and their particular rights as persons belonging to a minority. Frequently, their voices are silenced or ignored by political decision makers, or by democratic laws that were adopted by a majority.

The ECtHR, as well as the UN HRC and other international bodies, has examined cases concerning the religious freedom of individuals belonging to various minorities. Some of these cases regarded the right of women to wear religious clothing, such as headscarves or full-face veils,[2] while others covered the rights of men to wear religious symbols,[3] e.g. Sikh or Jewish men who may be required to remove their head covering in the same way that Muslim women would. However, cases concerning the rights of men and women belonging to a minority are very different in number and

[1] More precisely, Article 27 ICCPR reads as follows: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

[2] *Exemli causa*: *Dahlab v. Switzerland*, ECtHR, Application No. 42393/98, 15 February 2001; *Leyla Şahin v. Turkey*, ECtHR (Grand Chamber), Application No. 44774/98, 10 November 2005; *S.A.S. v. France*, ECtHR (Grand Chamber) Application No. 43835/11, 1 July 2014; *Ebrahimian v. France,* ECtHR, Application No. 64846/11, 26 November 2015; *Hebbadj v. France*, UN HRC, Communication No. 2807/2016, 17 July 2018, CCPR/C/123/D/2807/2016; *Yaker v. France*, UN HRC, Communication No. 2747/2016, 17 July 2018, CCPR/C/123/D/2747/2016.

[3] *Hamidović v. Bosnia and Herzegovina*, Application No. 57792/15, 5 December 2017; *Mann Singh v. France*, Application No. 24479/07, 13 November 2008; *Mann Singh v. France*, UN HRC, Communication No. 1928/2010, 19 July 2013, CCPR/C/108/D/1928/2010.

substance. Cases involving minority women are much more often brought before international jurisdictions than those involving minority men and go beyond the display of religious symbols. Thus, as highlighted by the United Nations Special Rapporteur on freedom of religion or belief, Professor Nazila Ghanea, '[s]ynergies between FORB [freedom of religion or belief] and women's rights to equality are coherent to the human rights project in itself, necessary to the protection of both FORB and women's equality, and provide the only way of effectively addressing intersectional concerns in the global community' (Ghanea 2021, 92).

In the European context, the focus often lies on the conduct of State authorities in situations concerning gender and minority discrimination, and – if a case reaches the ECtHR – the focus moves to whether States enjoy a wide margin of appreciation. The Court adjudicates gender discrimination cases under its living instrument doctrine. However, when considering cases involving both gender equality and the rights of religious minority groups, the Court puts great emphasis on the margin of appreciation doctrine. Indeed, as noted by Elkayam-Levy:

> [T]he Court did not elaborate in any of its statements about the inherent and complex conflict of gender equality and religious freedoms, and merely stated that the wearing of headscarf is 'difficult to reconcile' with the principle of gender equality. Regrettably, the Court preferred to make use of the Margin of Appreciation doctrine to deem questions of religious aspirations of women as not fitting to its supervision and oversight. These observations are extremely concerning especially in light of the special status the Court enjoys worldwide as a source of inspiration which resonate in numerous international and national decisions concerning human rights issues (2014, 1215).

The Court thereby contributes to enhancing the power of State authorities to prioritise important societal values, such as common or public interests, or societal concepts such as 'living together"', over individual interests.

Despite the importance placed by the Court and High Contracting Parties to the Convention on achieving gender equality,[4] and keeping in mind the Court's requirement that States must present '*very weighty reasons*' to justify

[4] See also ECtHR (Grand Chamber), *Konstantin Markin v. Russia*, Application No. 30078/06, 22 March 2012, para. 127.

differential treatment of women and men,[5] a certain level of discrepancy exists in its approach to the rights of women from minority groups. Namely, while the Court often grants States a narrow margin of appreciation in gender equality cases,[6] this is not often the case in judgments concerning the rights of minority women. This represents a notable difference to the approach taken by the UN HRC in these matters.[7] Against this background, this article argues that the approach of the ECtHR to the protection of minority women could be strengthened by borrowing from the practice of the UN HRC and other international bodies. The particular focus of this article lies in the intersection between the rights of women and the rights of persons belonging to minority groups, as well as between the protection against discrimination and the substantive rights guaranteed by the ECHR. A deeper analysis of the rights of women belonging to national, ethnic, religious, and cultural minorities is necessary to identify the best approach to protecting their rights, as well as to challenging gender inferiority and combating discriminatory practices, which are sometimes supported by national laws.

Furthermore, a clarification about the scope of this article has to be made. While the article might contribute to better understanding of the unfortunate fragmentation of international human rights law on these issues and add to the growing and much-needed literature on this more general topic,[8] this is not its primary purpose. The article's primary focus is also not to add to the wide literature critically discussing some of the judgments examined throughout the text (such as the ones on full face veils). Rather, by building on the author's experience as an ECtHR judge and member of the UN HRC, this article reflects on certain more general aspects of the ECtHR's case law on minority women and how this could be enhanced by considering the practice of other human rights bodies, particularly the UN HRC,[9] but also the

5 ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Application No. 9214/80, 9473/81, 9474/81, 28 May 1985, para. 78.

6 ECtHR, *Emel Boyraz v. Turkey*, Application No. 61960/08, 2 December 2014, para. 51.

7 See Jelić, Mühler 2022, 20–21 for a comparative overview of the margin of appreciation.

8 See e.g. Ajevski 2015; Brems, Ouald-Chaib 2018.

9 As it has been stated by Nazila Ghanea, the United Nations Special Rapporteur on freedom of religion or belief, 'the UN Human Rights Committee is best placed within the UN system to address synergies concerning women, equality, and FORB [freedom of religion or belief]. Indeed the UN Human Rights Committee has been able to address women's equality very effectively in a number of its General Comments. However, it has not yet taken the opportunity to focus attention on synergies between women's rights to equality and FORB' (Ghanea 2021, 91).

CEDAW and the IACtHR. In this sense, the article is in line with the broader ambition to bring together reflections of both practitioner and academic and identify gaps in the protection of women's human rights and solutions for its improvement.

The article proceeds as follows. Section 2 discusses some of the most common challenges faced by minority women in exercising their rights as outlined in the ECtHR case law. Section 3 then moves to analyse in greater depth the approach of the ECtHR in cases regarding intersectional discrimination suffered by minority women. It shows that in these cases the ECtHR is rather reticent to find violations of the general prohibition of discrimination enshrined in Article 14 of the ECHR and argues for a change in this approach to better address the nature of the violation of minority women's rights. In Sections 3 and 4, the article further argues that the ECtHR's approach in cases involving the discrimination of minority women could be enriched by borrowing from the UN HRC and other international bodies, particularly the CEDAW and the IACtHR.

2. CHALLENGES TO MINORITY WOMEN'S RIGHTS AND THE CASE LAW OF THE ECTHR

Protecting the rights of women belonging to national, ethnic, religious, and cultural minorities presents numerous challenges. Some challenges stem from the fact that national laws do not recognise the need for additional protection for minority women, who suffer a double burden as women within a minority group. Other challenges are reflected in national practices that limit the exercise of certain rights in order to balance conflicting interests. Examples of this include cases concerning the exercise of freedom of religion through the display of religious symbols.[10] In such cases, States often disregard the rights of women within minority groups for the sake of upholding shared social interests or the rights of others, as seen in the *S.A.S. v. France* case.[11]

As highlighted in Brems (2021), '[a] manifest finding from the [ECtHR] case law analysis is the gender blindness of the Court in cases of applicants claiming the right to gender-specific religious practice'.

[10] See Brems 2021 for an in-depth analysis of the ECtHR case law concerning women and religion.

[11] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014.

The problem often arises when some religions introduce differences in the treatment of men and women, such as prescribing particular clothing that secular laws do not allow. Attempts to solve this problem (such as policies banning burqas) can create even greater disparity when women are forced to choose between complying with the law and complying with their religion. In general, the Court's stance has been unfavourable toward religion in such situations. It has not accepted arguments from women that they are acting of their own accord when adhering to religious restrictions.[12]

In the *S.A.S.* case, the applicant complained of the violation of Articles 8 and 9 (right to private life and the freedom of religion) due to a prohibition of the full-face veil in France, which she argued she wore based on her free will, without any external constraints. The Grand Chamber accepted France's national policy of 'living together' – which implied being able to see each other's face – as a legitimate aim and decided with caution that there was no violation of the applicant's rights. Despite the fact that the central point of the case was a minority woman's religious right, the Court followed the approach established for a majority Muslim woman in Turkey and granted the respondent State a wide margin of appreciation, like in *Leyla Sahin v. Turkey* where it emphasised the prevalence of the principle of secularism, the value of pluralism, and respect of the rights of others. In analysing the case, Brems noted:

> In *SAS* however, the Grand Chamber recognized that the applicant could claim indirect discrimination, in that 'as a Muslim woman who for religious reasons wishes to wear the full-face veil in public, she belongs to a category of individuals who are particularly exposed to the ban in question and to the sanctions for which it provides'. However, it ultimately dismissed the claim by referring to the reasons that lead to the finding of absence of violation of article 9 ECHR. Arguably, the reasoning building on the intersectional reference person of the 'Muslim woman who...' is nevertheless an important step forward toward intersectionality reasoning regarding women and religion. However, there has been no follow– up to this, as regrettably in none of the three cases of this type in the corpus that came after *SAS* (*Ebrahimian*, *Osmanoglu* and *Lachiri*) did the applicants make an argument of gender discrimination. It can thus be concluded that the Court, partly as a result of framing by the applicants, has in several cases had a blind

[12] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014.

> spot for intersectionality, and in particular for the gendered interests that were at stake [...] [D]econstructing harmful intersectional stereotypes would be an appropriate way for the ECtHR to address the intersectional dimensions of cases involving women and religion (Brems 2021).

This case exposed the more complex issue of protecting minority rights within a democratic system without creating a direct conflict between the elected representatives of the majority (majority rule) and the judiciary. Nevertheless, challenges to the rule of the majority at the national level can be found in the ECtHR case law as further discussed in Section 4.

Through such firm positions of the ECtHR in cases like *S.A.S.*, questions over whether, for example, wearing a religious symbol such as a veil or burka demonstrates religious identity or is a means of religious practice are pushed aside. Although a wide range of issues fall within this pattern (including the preservation of identity, the demonstration of religious identity, religious practice, education, health care – which encompasses reproductive health, inheritance rights, property rights, employment, political participation, and protection from violence), international norms are modest, and the case law has yet to be adequately developed.

Limits to the freedom of thought, conscience, and religion are evident in more cases concerning Article 9 of the Convention. The Court will hear Article 9 cases concerning the treatment of women, even if no women have objected.[13] Furthermore, it does not seem to allow for exceptions to requirements that women claim on religious grounds.[14] The Court has also declined to intervene in the workings of religious organisations, even when they could impact women.[15] The absence of a minimum common standard among States on these issues creates legal complexities at the national level. Similarly, the lack of a European consensus as a guiding principle for judgments creates difficulties at the international level. This is a challenge *per se*.

However, it seems that States are satisfied with the *status quo*. It is likely that States expect the decisions of domestic courts to remain unchallenged, while relying on the ECtHR's willingness to apply a wide margin of

[13] *Staatkundig Gereformeerde Partij v. the Netherlands*, ECtHR, Application No. 58369/10, 10 July 2012.

[14] ECtHR, *El Morsli v. France*, Application No. 15585/06, 4 March 2008.

[15] ECtHR, *Williamson v. the United Kingdom*, Application No. 27008/95, 17 May 1995; ECtHR, *Karlsson v. Sweden*, Commission (dec.), Application No. 12356/86, 8 September 1988.

appreciation to these issues. Unfortunately, one could wonder where human rights are situated in all of this. It can appear that State authorities look at the issue from the perspective of the majority, and thus fail to adopt a holistic approach to rights and freedoms, concrete circumstances, and the situation at hand.

Other challenges faced by minority women stem from the conflict between the rules of universally applicable State laws established by the majority, and the distinct rules and traditions of the minority. An example of specific conflicts between national laws, notably between Sharia law and Greek civil law in family matters as previously mentioned, could be observed in the case of *Molla Sali*.[16] In this case the Court found a dual violation: of Article 14 of the Convention and Article 1 of Protocol No. 1. It concluded that there was no objective or logical justification for differential treatment between the beneficiary of a will created in accordance with the Civil Code by a testator of non-Muslim and of Muslim faith. The Court found that States were not obligated to create a specific legal system to grant privileges to religious groups under the principle of the freedom of religion.[17] However, if a State had established such a system, it was required to apply the criteria fairly, without discrimination toward any group or members of that group. Denying a religious minority, the ability to voluntarily choose to follow ordinary laws was not only discriminatory, but also violated their right to self-identification, which is crucial in safeguarding minority interests. The right to choose also included the right to opt out of one's minority status, which must be respected by both the State and other members of the minority. No treaty or instrument compelled anyone to submit to a minority protection regime against their wishes.[18]

The double burden faced by minority women such as in *Molla Sali* raises questions over the appropriate legal approach to deal with intersectional cases and the increased obstacles minority women encounter when seeking

[16] ECtHR (Grand Chamber), *Molla Sali v. Greece*, Application No. 20452/14, 19 December 2018.

[17] See Brems (2021), 'The Court's willingness to embrace freedom from religion arguments as opposed to freedom of religion arguments is revealing in the first place regarding a negative attitude to religion, or more specifically Islam. In combination with an argument that situates the harm from (Islamic) religion in its attitude toward women, this contributes to an image of Muslim women as helpless victims in need of liberation.'

[18] With the same ultimate goal of empowering minority women's autonomy and self-identification, the Court ruled in *Muñoz Díaz v. Spain* that denying recognition of a Roma marriage for the purpose of determining eligibility for a survivor's pension violates the ECHR. ECtHR, *Muñoz Díaz v. Spain*, Application No. 49151/07, 8 December 2009.

resolution over various issues. In what follows, this article discusses in greater depth the issue of intersectional discrimination in the ECtHR case law regarding minority women, arguing that the protection of Article 14 of the ECHR against such discrimination should be strengthened. As highlighted in Brems (2021):

> The key part in most of the Court's judgments and decisions, is its reasoning under the question whether a certain rights restriction (e.g. under article 9) or unequal treatment (under article 14) is necessary and proportionate in relation to a particular legitimate aim. This is the sphere in which the Court has developed most of its recurring lines of reasoning, modes of interpretation and analytical tools. In this framework, the Court has a lot of room to develop new frames and lenses. At the same time, this is the part of the judgment that is decisive toward the outcome in most cases on the merits. Hence it is submitted that this is an appropriate environment for the Court in which to develop an intersectional analysis.

3. MINORITY WOMEN, INTERSECTIONAL DISCRIMINATION, AND ARTICLE 14 OF THE ECHR

The prohibition of discrimination, as enshrined in Article 14 of the ECHR, is the standard for safeguarding the rights of minority women in an intersectional context. These cases are complex due to the many forms that discrimination can take, which present judges with the challenge of deciding whether violations should be examined separately or cumulatively. This complexity is highlighted by Chow (2016, 466), who observed that '[t]he acknowledgement of the overlapping and relational dynamics of multiple forms of discrimination was a strong indication of intersectional thinking'. This involves the issue of addressing discrimination against women belonging to a minority group, as *sui generis* discrimination:

> [...] in the context of the UN human rights treaty bodies, the need to incorporate alternative perspectives to address the simultaneous effects of gender and race on women was identified as early as the late 1990s. However, subsequent efforts to incorporate intersectional perspectives were not without difficulties. The primary reason was because the UN human rights treaties were drafted in a way that compartmentalized issues concerning women, race and other

> social categories. Apart from CEDAW, where issues of minority women clearly come into scope, it was unclear at the time that the gender-neutral language used in other conventions (such as CERD) warranted the committees placing a special emphasis on minority women. It was even thought that such an emphasis would lead to competing mandates between treaty bodies (Chow 2016, 465),

and

> The elaboration of special frameworks for specific groups as minorities and women provide protection where general human rights law is inadequate. However, it must be borne in mind that within this process of special rights protection ensured in separate treaties/declarations exists a risk of reproducing a tendency within human rights law of isolation (ghettoisation) of subjects of rights in 'special' categories with special measures. This indirectly opens a door for reluctant states to avoid responsibility either by claiming lack of resources to deal with the 'special' problem, avoiding ratification, or presenting significant reservations as have been seen with regard to CEDAW and its Optional Protocol. Thereby, an inherent paradox appears within the framework on special rights. The very measures meant for inclusion and protection of groups traditionally excluded from the law may in practice unintentionally reproduce the isolation of the group within international human rights law. This is a problem that becomes even more complex in the case of Romani women and minority women in general. On the one hand minority women fall into two categories of specific rights, minority and women's rights, in addition to general human rights law. On the other hand, they are often excluded from these rights discourses because the women specific law does not specifically address the minority issue and vice versa, and general human rights law has vague provisions on women and minorities. Consequently, minority women on many occasions become subjects out of place within international legal human rights (Ravnbøl 2010, 26),

and

> The neglect/exclusion of minority women's human rights issues is only one empirical example of the pitfalls that may arise in a thematically separated human rights system because in reality people do not live 'single-issue' lives (Ravnbøl 2010, 43).

Instances of intersectionality[19] have prompted critiques of existing anti-discrimination laws and their application. A pioneer in these critiques is Kimberlé Crenshaw, who argued that the prevailing concept of sex discrimination typically relies on the experiences of white women, while the standard of race discrimination is often drawn from the experiences of the most advantaged Black individuals (Crenshaw 1989, 150). Consequently, the definitions of race and sex discrimination encompass only a limited range of experiences, which do not include instances of bias against Black women.[20] Similar critiques were expressed regarding discrimination based on other factors that intersect with sex discrimination (such as ethnicity, age, and sexual orientation), with scholars questioning the extent to which human rights law is properly equipped to deal with the issue of intersectionality.[21] In fact, Chow (2016, 454–455) noted that '[t]he limitation of intersectionality is exemplified in the works of the UN human rights treaty bodies in the context of minority women. Many often cultural and religious practices are deemed „harmful" and discriminatory, but the women who practice them may not agree that these practices are discriminatory. This raised difficult issues regarding whether human rights law could properly accommodate their multiple identities (both as women and as members of their cultural group)'. Scholars therefore agree that discrimination against minority women must be assessed as a common violation that is specific to the experiences of other women belonging to the given minority.[22] From a practical point of view, it is important to acknowledge that women from minority groups form part of smaller

[19] See Chow (2016, 457 ff.) for further developments on the concept of intersectionality.

[20] *Ibid.* For more reflections on the development of intersectionality as a field of study, see Cho, Sumi, Kimberlé Williams Crenshaw, Leslie McCall (eds.). 2013, *Intersectionality: Theorizing Power, Empowering Theory*, *Signs* 38(4).

[21] See Theilen 2023; Atrey, Dunne 2020; Xenidis 2020; Atrey 2019.

[22] Fredman correctly explains that intersectional discrimination does not equate to 'simply adding two [or more] kinds of discrimination together'. Rather, by building on Crenshaw's work, she shows that intersectional discrimination results from the synergy – or the cumulative effect – of different grounds of discrimination. Using the example of Black women, Fredman shows that the disadvantage they suffer due to the intersectional discrimination based on race and sex 'is not the same as that experienced by white women or black men' (Fredman 2011, 140).

segments within the population, which are themselves often very diverse. Thus, there is no single way of handling cases under the larger framework of 'women from minority groups'. Rather, a case-by-case analysis requires legal mechanisms that go beyond pure anti-discrimination norms.

When analysing substantive rights within the unique context of women from minority groups, other legal mechanisms, aside from anti-discrimination legislation, come into play. An exemplary case in this regard is *J. I. v. Croatia*.[23] The Court's findings regarding Article 3 that 'the applicant was [a] highly traumatized young woman of Roma origin, who had been the victim of appalling sexual abuse by a close family member at a very early age'[24] emphasised the essential combination of the applicant's age, gender, and ethnicity, which contributed to the Court's assessment of her vulnerability. Therefore, the Court decided to grant a narrower margin of appreciation and impose a broader positive obligation on the State to protect the applicant's substantive rights and allow her access to legal remedies. However, in contrast to this commendable approach, the Court has been less willing to narrow the margin of appreciation in other sensitive cases concerning religious rights, such as those involving the disclosure of burqas or full-face veils. Brems (2021) pointed out that '[w]omen practicing a minority religion (or a minority praxis of a majority religion), are typical intersectional rights holders'.

In cases concerning the rights of minority women, the Court has often favoured one approach over another by using the principle of *jura novit curia*, whereby acting as a master of characterisation of the law.[25] Considering the ancillary nature of Article 14, it is important to highlight that the presence of this principle in the Court's assessment is crucial for reinforcing the discriminatory nature of a breach of substantive rights, in particular where the applicant failed to invoke Article 14 in her application. In such situations, highlighting a general and unjustified differentiation in treatment directed at certain minority groups offers a more comprehensive picture of the circumstances and allows for a better assessment of an applicant's individual situation in relation to the alleged violation of a substantive right. This contrast is most evident when comparing the gendered wearing of religious symbols with cases of sexual abuse: in the former, general State measures

[23] ECtHR, *J.I. v. Croatia*, Application No. 35898/16, 8 September 2022.

[24] *Ibid*., para 86.

[25] *Molla Sali v. Greece*, para. 85; ECtHR (Grand Chamber), *Abdi Ibrahim v. Norway*, Application No. 15379/16,10 December 2021, para. 136. See Möschel (2022) for further development on the *jura novit curia* principle in the ECtHR case law.

target the combination of 'women + Muslim'; in the latter, the immediate legal concern is not on discrimination as a characteristic, but rather on the ill-treatment that the person suffered. Bond (2005, 6) explains:

> Women who inhabit the interstices, who live intersectionality on a daily basis, do not simply experience gender discrimination that is complicated by another form of discrimination. This limited understanding of intersectionality amounts to a 'gender-plus' formulation of discrimination, in which women may experience gender discrimination that is merely compounded by another form of discrimination. This 'additive' understanding of discrimination is limited and does not reflect the ways in which race and gender discrimination, for example, are mutually reinforcing and result in a form of discrimination that is fundamentally different from race discrimination, gender discrimination, and race + gender discrimination.

An illustrative case is *J.I. v. Croatia* mentioned above, in which the link with the applicant's rights as a member of a minority group could be treated solely under the prism of substantial rights. In this case, the Court identified the applicant, who was a victim of a horrendous sexual assault by a close family member at a very early age, as a deeply traumatised young woman of Roma ancestry.[26] The victim's inferiority and vulnerability are evident in this case. The Court found that there was a violation of Article 3 of the Convention due to the severe trauma she suffered and her feelings of helplessness in the face of future victimisation. The police's failure to comprehend the significance of her charges fell contrary to domestic law.[27] While the discrimination aspect was not favoured by the Court's findings, it recognised the double burden that may fall on women belonging to minority groups: first, the Court clearly identified the applicant's suffering from domestic violence, which is shared by one in three women in Europe;[28] second, the Court showed readiness to accept that her Roma origin might have prevented her from accessing an effective legal remedy. However, it rejected this claim due to a lack of evidence.

[26] *J.I. v. Croatia*, para. 86.

[27] *Ibid.,* para. 89.

[28] European Commission 2022.

In some cases where the victim is a woman from a minority group, overlooking the discriminatory aspect of the case cannot be justified, such as in *V.C. v. Slovakia*.[29] This application concerned the sterilisation of a Roma woman without her informed consent, while she was giving birth. The unanimous Court ruling found a violation of Articles 3 and 8 of the ECHR.[30] Nevertheless, it considered an analysis under Article 14 to be unnecessary.[31] The very strong dissenting opinion of Judge Mijović highlighted the existence of a discriminatory State policy and argued that intersectional discrimination was at the heart of the case.[32] Bond (2005, 4–5) elucidates this perspective:

> The forced or coercive sterilization of Roma women in Slovakia violates a number of women's rights, including the right to liberty and security of the person, the right to found a family, the right to the highest attainable standard of health, and the right to sexual non-discrimination. Patriarchal attitudes within the medical community contribute to the widespread notion that women do not and should not make autonomous decisions regarding their own reproductive lives.

and

> Targeted for discrimination on the grounds of both race and gender, Romani women in Slovakia provide a compelling illustration of intersectional human rights abuses.

Judge Mijović has rightly disagreed with the majority's decision not to investigate this facet of the case under Article 14. It seems pertinent to underline the importance of analysing Article 14 in future gender discrimination cases, where the circumstances indicate the existence of a double burden, multiple discrimination, and/or majoritarian rule. To conclude, '[t]he experience of the Romani population in Slovakia illustrates the need for intersectional remedies in human rights practice. Individuals do not experience compartmentalized forms of human rights abuses that may be neatly packaged as 'gender discrimination' or 'race discrimination'. As the example of Romani women demonstrates, women and others who

[29] *V.C. v. Slovakia*, ECtHR, Application No. 18968/07, 8 November 2011, para. 180. See Rubio-Marín, Möschel 2015 for a possible scholarly explanation of the reason why the ECtHR overlooked Article 14.

[30] *V.C. v. Slovakia*.

[31] *Ibid.*, para. 180.

[32] Dissenting Opinion of judge Ljiljana Mijović regarding *V.C. v. Slovakia*.

experience multiple forms of human rights abuses operating simultaneously cannot fully benefit from a remedial system that artificially fragments human rights violations.'[33]

4. THE MAJORITY RULE AND THE RIGHTS OF MINORITY WOMEN: LESSONS FROM THE UN HRC

Protecting minority rights often requires judges to challenge decisions taken by the majority in a democratic legislative process. Democratic decisions taken by the majority are the bedrock of our democracies, and this is not to be challenged. Nonetheless, it is not unrealistic to advocate and appeal for far-reaching judicial interventionism to protect individual rights when they are neglected by the rules adopted by the majority. However, the judicial review of politically sensitive and divisive issues must be extremely careful. As stated by Elkayam-Levy (2014, 1177), 'this is a debate on states' recognition and respect of minority groups' traditions and the inevitable collision with democratic values. The issue raises questions of whether and how states should accommodate or set limits to religious, cultural, ethical and other beliefs. The complexity deepens as democratic countries protect conflicting ideals; for instance, freedom of religion and freedom to manifest one's religion versus freedom from religion, secularism and gender equality'.

Safeguarding minority rights is a contentious issue in democratic legal systems with a separation of powers, involving a conflict between majority decision-making and protecting the interests of minority groups. This creates the challenge in reconciling conventional methods of protecting the individual human rights of citizens with the necessity of additional protections of specific rights inherent to minority groups and the identities of individuals belonging to these group.

Safeguarding human rights through individual lawsuits is the standard in contemporary legal protection. At the same time, minority rights are an integral part of human rights oversight. Recognising the importance of a system that upholds both human and constitutional rights, it is clear that a watchdog is needed to prevent the abuse of majority rule.

[33] *Ibid.*, 9.

In this context, '[i]ntersectionality in the treaty body practice sought to identify and unravel different configurations of inequality in specific social settings affecting individuals belonging to simultaneous memberships' (Chow 2016, 471–472).

Intersectional cases are challenging in part because they involve diverse minority populations that are at great risk of isolation, marginalisation, and discrimination. Consequently, the situation of women from national, ethnic, religious, and sexual minorities is often misunderstood by democratically elected legislatures. The recent ECtHR case of *Abdi Ibrahim v. Norway* concerned the rights of a mother belonging to a cultural minority and the interplay with the State's adoption policy.[34] The general policy on the adoption of children, which reflects the majority rule in Norway, actually limited the rights of a mother belonging to a minority group with respect to her and her biological child's cultural and religious identity. The Grand Chamber found that the respondent State had failed to take due account of the different cultural and religious backgrounds of the mother and the adoptive parents, which resulted in the severance of mother-child ties. This case highlights the importance of considering the cultural and religious backgrounds of minority women when making decisions that affect their lives, their choices, and their families.

The conflict between majority rule and the individual rights of women from minority groups surfaced in the full-veil ban in France, as seen in two landmark cases: *Yaker v. France* before the UN HCR, and *S.A.S. v. France* before the ECtHR, as mentioned above. The two bodies came to different conclusions.

As discussed in Section 2, in *S.A.S.* the ECtHR found no violation of the applicant's religious rights. Its interpretation, which considered the support by the majority in parliament and the public for the full-veil ban, gave a wide margin of appreciation to the respondent State in defining its standards of 'living together', as an element of the 'protection of the rights and freedoms of others'.[35] The Grand Chamber did not examine the core of the ban on religious symbols and items, including clothing, overlooking questions as to whether these are manifestations of one's religion, the manner of its exercising, or both, or as it pertains to women's minority rights. The partly dissenting Judges Nussberger and Jäderblom, and the majority,

[34] ECtHR (Grand Chamber), *Abdi Ibrahim v. Norway*, Application No. 15379/16, 10 December 2021.

[35] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014, para. 157.

acknowledged the limited authority of the supranational judge, who has a narrower scope to challenge established societal structures without the risk of intensifying tensions within the society of a Member State.[36]

When examining the Court's decision in *S.A.S. v. France*, critics have pointed out the contrasting approach taken by the UN Human Rights Committee in *Hebbadj v. France* and *Yaker v. France*.[37] The Committee refrained from granting the State a large margin of appreciation in interpreting Covenant rights (Jelić 2020, 82). In the *Yaker* case, the Committee adopted a more rigorous stance on the exception to the right to exercise one's religion in public, diverging from the ECtHR's broader 'living together' approach. The Committee required the State to identify the 'rights of others' that were at risk and sought to balance the arguments for and against the ban on full-face veils.[38] Undoubtedly, the Committee delved deeper into the complexities of this ban, particularly its impact on women from France's largest identifiable minority. The Committee found that the prohibition of wearing burqas in public violated the freedom to manifest one's religion, as protected under Article 18 of the ICCPR, and the right to equality before the law, as protected under Article 26 of the ICCPR (Jelić, Mühler 2022, 20).

Scholars have sought to explain the divergent solutions of these two bodies. For example, Cleveland (2021, 225) shows that the UN HRC 'traditionally has taken a more protective approach to manifestations of religion'. She also demonstrates that the UN HRC's approach might have been influenced by its role as an international, rather than European body. Indeed, as Cleveland shows, one could imagine what would happen if a very conservative majoritarian Muslim State would argue that for them 'living together' would actually require concealing women's faces (Cleveland 2021, 226). And, of course, there are factual differences between the two cases, as, for example, the two applicants in the UN HRC cases were actually fined and prosecuted by France (Cleveland 2021, 226). In addition, while the Human Rights Committee's solution may be more precise from a legal perspective, it is essential to consider its role and authority, in comparison to that of an international judicial body such as the ECtHR, to fully understand the diverging jurisprudence.

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[36] Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom in *S.A.S v. France*, para. 16.

[37] See views adopted by the Human Rights Committee in CCPR/C/123/D/2747/2016. See also Cleveland 2021.

[38] Human Rights Committee (2018) CCPR/C/123/D/2747/2016, para. 8.10.

Regarding the ECtHR, it should be emphasised that the mandate of the Court is to resolve human rights disputes and prevent their escalation. When *S.A.S.* was decided in 2014, the seventeen judges of the Grand Chamber, while promoting both tolerance and enforceability of the Court's judgments, made a cautious decision not to intervene in a case involving a blanket ban on full-face veils. They expressed doubt as to the necessity of such a ban but considered domestic constitutional principles and relied on the minor fine imposed for non-compliance, finding that France had acted within its margin of appreciation. Right or wrong, this judgment illustrates the Court's awareness of its role as a public international law body with a significant influence on domestic constitutional and societal order.

In contrast, the approach of the Court in cases related to other issues related to minority women seems to be changing. In more recent cases of systematic discrimination against a minority group that disproportionately affects women's rights, such as *J.I. v. Croatia* (2022) or *Molla Sali v. Greece* (2020), the Court chose to use all its powers to address and remedy the discrimination and restore the affected rights. Therefore, one would hope that the ECtHR will find inspiration in the UN HRC's approach when it will be faced again with questions related to the religious clothing of minority women.

Keeping into account the institutional and jurisprudential differences between the UN HRC and the ECtHR, one might wonder whether transplanting the approach of the former into the latter's case law would be feasible. Yet, the argument here is not to blindly adopt the UN HRC's approach in its entirety,[39] but rather to call for considering elements from the UN HRC case law that might enrich the ECtHR's jurisprudence and enhance the protection of minority women and other vulnerable groups in our societies. One such element would be the strict interpretation of the conditions under which States could restrict freedom of religion in cases involving religious clothing, which, in the European system, would narrow the margin of appreciation.

Another factor that should be taken into account is that the case law of the UN HRC contributes to setting international standards on the protection of minority women. This, in turn, as ECtHR Judges Nussberger and Jäderblom showed in their partly dissenting opinion in *S.A.S.,* is a factor to be taken into account in determining European consensus, and hence how wide the

[39] In fact, the approach of the UN HRC in the two discussed cases has in itself subject to criticism by scholars. See Zalnieriute, Weiss 2020.

margin of appreciation of States is.[40] As Judges Nussberger and Jäderblom explained, at the time that *S.A.S.* was decided (i.e. 2014) the UN HRC already had case law to suggest that restrictions on women's religious clothing might infringe on their rights.[41] Yet, the Court chose to ignore this aspect, as well as the European consensus on the issue of banning full-face veils.[42] It is not uncommon for separate opinions to be reflected in the Court's later case law, in light of subsequent national, European, and international developments. The 2018 UN HRC decisions in *Hebbadj v. France* and *Yaker v. France*, along with more recent developments in its relevant case law, provide the Court with compelling arguments and methods of interpretation to change its jurisprudence and enhance the protection of minority women, such as those of Muslim faith.

5. LESSONS FROM OTHER INTERNATIONAL HUMAN RIGHTS BODIES

The preceding analytical review of the ECtHR's approach demonstrates the challenges faced when dealing with cases involving the rights of minority women and intersectional discrimination. In addition, the previous discussion of the different approaches of the ECtHR and the UN HCR to the issues of religious clothing of Muslim women highlighted the fragmentation of international human rights law in that regard. Nevertheless, we are at a critical juncture, where efforts should be directed toward a cohesive strategy for addressing these or similar issues, due to the need for a unified legal response. As Bond (2005, 8) aptly observes:

> Despite these and other gains in incorporating intersectionality into human rights practice, the human rights community has a long way to go before intersectional human rights are fully recognized by the institutions charged with protecting those rights. In addition to changing the theoretical approach to human rights, human rights institutions must alter organizational structures in order to facilitate intersectional analysis. For years, many U.N. institutions and NGOs have

[40] Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom in *S.A.S. v. France*, para. 19.

[41] *Ibid.*

[42] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014, para. 156.

> structured themselves so that separate departments or divisions address human rights violations based on, for example, race and gender. Rigid structural divisions within an organization often dictate that minority rights or rights related to race and ethnicity and women's rights issues are addressed by separate divisions within the organization. This substantive fragmentation, however, means that intersectional abuses often go unaddressed. The result for victims of these abuses is that they receive, at best, partial redress for the violations they suffer.

The absence of a world court for human rights acts as a barrier to this objective. Moreover, the UN Treaty Bodies face their own systemic challenges. From a comparative perspective, it is evident that both the UN Treaty Bodies and the Inter-American Court of Human Rights (IACtHR) take a more progressive approach toward safeguarding minority women's rights than the ECtHR, in particular in acknowledging intersectionality in minority/gender discrimination cases. Ravnbøl emphasises:

> However, in order to adequately address the human rights concerns of minority women, and other subjects who experience discrimination and human rights abuse on multiple grounds, it is necessary to have a systematic approach to intersectionality that takes the different structural, political and representational dimensions into consideration. It is not sufficient to use the concept fragmented in a few reports, often without any definition, as this will make intersectionality merely another theoretical concept with little effect for changing practice. On this basis, effective appropriation of intersectionality into contemporary international human rights practices is one step in the direction of ensuring a comprehensive approach to the human rights of minority women. This would ensure that international practices on race/ethnicity and gender matters also give special and systematic attention to problems of interrelated grounds of discrimination (in the areas of programming, monitoring, interpreting, implementing, etc.). In other words, a mainstreaming attitude could develop around the issue of intersectionality, bearing in mind the methodological implications and difficulties of mainstreaming (Ravnbøol 2010, 41).

and

> Intersectionality must be approached comprehensively (in all its forms) and practically (in the work of the organisations) [...] the concept serves to include perspectives on multiple grounds of identity into contemporary legal and political human rights discourses in order to give attention to often overlooked areas of minority and women's concerns, where certain categories within these groups face different human rights problems (Ravnbøl 2010, 45).

The CEDAW has published General Recommendations on the rights of indigenous and minority women[43] that focus on discrimination against women belonging to minority groups and ask States to take measures to address their specific needs. For example, CEDAW's General Recommendation No. 39[44] on indigenous women and girls emphasises the limited legal capacity of these women under their indigenous laws and the conflict of laws between community and State law.[45] Furthermore, the CEDAW has also found violations of the right to health for women belonging to Afro-descendant minority groups. For example, in *Da Silva Pimentel Teixeira v. Brazil,* the Committee found that the intersection of the petitioner's race and gender led to her ill-treatment.[46] The UN's intersectional approach is reflected in its guidance on intersectionality and its recognition of the inextricable link between the discrimination against women and other factors affecting their lives, such as their minority status. This guidance is useful to other treaty bodies and human rights courts, notably to the ECtHR, when dealing with related cases.

The IACtHR has dealt with cases related to the specific needs of teenage girls who have been victims of child marriage, live in rural areas, have limited economic resources, and belong to traditionally excluded and discriminated groups, including indigenous and Afro-descendent communities.[47] It has

[43] In General Recommendation No. 28 (general States obligations) and General Recommendation No. 33 (access to justice), the CEDAW confirmed that discrimination against women was inextricably linked to other factors that affected their lives. Also, 'General Recommendation No.35, [...] recognises the intersecting discriminations that render some women especially vulnerable to forms of gender-based violence and seeks repeal of all criminal laws that disproportionately affect women' (Chinkin, 2022, 5 ff).

[44] CEDAW General Recommendation No.39 (2022) on the rights of Indigenous Women and Girls.

[45] *Ibid*., para. 21.

[46] Committee on the Elimination of Discrimination against Women (2011) CEDAW/C/49/D/17/2008 para. 7.7.

[47] Inter-American Commission on Human Rights (2019), para. 109.

recognised the importance of measures that provide assistance for these girls, who face multiple forms of discrimination. For example, in *Gonzales Lluy et al. v. Ecuador*,[48] the IACtHR emphasised the need to protect the rights of girls belonging to ethnic minorities or the LGBTQ community, those who are migrants or refugees, are homeless, have disabilities, or have HIV/AIDS.

Both the UN and IACtHR have called on States to undertake measures to address discrimination against women belonging to minority groups and to attend to their specific needs. Affirmative action measures should be considered in order to prevent future cases of women and girls who face multiple forms of discrimination based on their gender, race, nationality, ethnicity, religion, or culture.

In general, there are more similarities than differences between the approaches of the ECtHR, UN Treaty Bodies, and IACtHR toward gender and minority related cases, despite a great divergence regarding the wearing of religious symbols (Jelić 2020). It is the author's belief that courts and other bodies should aim at finding solutions which strengthen women's choices on how they live their lives. Strengthening the autonomy of minority women and their wish to preserve their minority identity should guide solutions to the conflict between minority culture and institutions, on the one hand, and State laws, serving the interests of the majority, on the other. This should be reflected in legislation, administrative decisions, good practices regarding services and administration, as well as in ensuring access to remedies for the violation of rights against women in the public and private spheres.

> A critical perspective on general human rights law shows how it is characterised by a prevailing masculine language that appears to operate with a dichotomy between public/private as being equal to male/female. The man is regarded as the provider of the household and thus placed in a public sphere of law, economics, cultural and political production (*himself* and *his* formulations in for example Universal Declaration of Human Rights (UDHR) Article 25). The woman on the other hand is presented as the household's care-taker, mother and spouse, and thus placed in a private sphere of home and family (in marriage and family provisions as in for example ECHR Article 12). Even though general human rights law does not exclude private life, the main emphasis is on protection of the individual in public life. This placing of woman's concerns in a private

[48] *Gonzales Lluy et al. v. Ecuador,* IACtHR, Application No. 102/13, 1 September 2015.

> sphere along with an emphasis on public life-concerns has been criticised by various legal feminist scholars. They argue that it reflects an underlying androcentric structure in human rights law that fails to redress the systemic subordination of women in society as human rights violations, what is best exemplified by the weak implementation mechanisms and toleration of reservations to CEDAW. Thus, international human rights law can be argued to be constitutive and reproductive of a male-dominant discourse where the public/private divide becomes a screen to avoid women's issues (Ravnbøl 2010, 23).

6. CONCLUSION

The awareness, advocacy, and struggle for women's rights have seen progress in many countries, while international human rights interventions, both judicial and quasi-judicial, have advanced the protection of women against discrimination and violations of their basic rights. The living instrument doctrine developed by the Strasbourg Court is valuable for the protection of gender equality. However, the rights of women belonging to national, ethnic, religious, and cultural minorities face additional challenges compared to other women. They frequently face numerous layers of discrimination due to the double burden connected to their gender as well as their ethnic, national, religious, or cultural identity. The intersectionality of their identities often leads to multiple forms of marginalisation, limiting their opportunities and placing them at greater risk of violence, discrimination, exclusion, and assimilation. Thus, '[i]n the era of multiculturalism and globalization, awareness to such risks is fundamental to the development of modem society and role that international human rights tribunals play in this complex ecosystem' (Elkayam-Levy 2014, 1222).

We still face more challenges than achievements in this area, considering the fragmented case law on sensitive gender and religious identity issues. The limitation of international judicial power in protecting minority rights against the majority-elected legislature can be seen in the ECtHR's case law on face veils and burqas, where a wide margin of appreciation was granted to States. Nevertheless, we still need to see in practice how far a judge can go in declaring that an elected legislation was wrong, which is particularly sensitive for an international judge.

To conclude, the human rights of women belonging to national, ethnic, religious, and cultural minorities remain vulnerable and modestly protected. The lack of definitive norms and underdeveloped case law

require urgent attention at all levels of the decision-making process, and most importantly, from the judiciary. Women from minority backgrounds often face intersectional discrimination that limits their life opportunities and equal rights before the law. These women are often at greater risk of violence, discrimination, marginalisation, and inequality than other women. Representation and participation in decision-making processes, particularly those of interest to minority women, and recognition of the intersectionality of their identities would mark crucial steps toward ensuring that women from minority backgrounds can fully enjoy their basic human rights. Finally, by ensuring such participation, the rule of law and democracy would be strengthened. It is also high time to appeal to all human rights bodies to learn more from each other's practices, avoiding unnecessary fragmentation of the law concerned. In that regard, the ECtHR could reconsider its standards – such as the margin of appreciation it applies in cases related to minority women – in light of relevant cases of the UN HRC and other international bodies.

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Article history:
Received: 10. 6. 2024.
Accepted: 5. 9. 2024.