

Toward an Anti-Stereotyping Approach for the European Court of Human Rights

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Abstract

The central tenet of this article is that stereotypes are both cause and manifestation of the structural disadvantage and discrimination of certain groups of people. Focusing on the gender case law of the European Court of Human Rights, this article explores what conception of equality the Court should embrace to adequately address the harmfulness of stereotypes. Since stereotypes are often the mechanisms that underlie discrimination, this article advances an anti-stereotyping approach that the Court could employ in its rulings. The proposed analysis consists of two phases: 'naming' and 'contesting' stereotypes. The whole argument is illustrated by *Konstantin Markin v Russia* and *Rantsev v Cyprus and Russia*, two recent cases in the area of gender equality.

Keywords: gender stereotypes – discrimination – transformative equality – European Court of Human Rights – Article 14 European Convention on Human Rights

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1. Introduction

There are ‘no grounds for complacency’ as regards the protection of human rights in Europe.¹ With these words Thomas Hammerberg, the Council of Europe Commissioner for Human Rights, calls attention to the persisting discrimination and marginalisation of—among others—women, minorities and people with a disability. The question is how to tackle these systemic equality- and discrimination-problems within the European legal framework. Part of the answer lies with the European Court of Human Rights (‘ECtHR’ or ‘the Court’)—which is, after all, widely celebrated as the most advanced human rights protection body.² This article explores the potential of the case law of that Court to tackle structural equality problems.

My point of departure is that the Court and its commentators should now focus on contesting the mechanisms that underlie inequality and discrimination, as legally mandated overt discrimination has largely disappeared in Europe. These mechanisms are often hidden from view and are connected to our unconscious mental processes.³ Those elusive mechanisms are called ‘stereotypes’. The central tenet of this article is that stereotypes are both cause and manifestation of the structural disadvantage and discrimination of certain groups of people. From this basis, I develop the argument that the Court needs to recognise and address stereotyping as a structural cause of discrimination. This general argument is illustrated and substantiated with a specific focus on *gender* stereotypes. Thus, I draw mainly on the Court’s gender case law, but at times I use examples from other areas of its discrimination case law.

Stereotypes are, in short, widely accepted beliefs about groups of people. The case law of the ECtHR provides us with plenty of examples, like: women have ‘a special social role associated with motherhood’;⁴ Muslim women are

1 Hammarberg, *Human Rights in Europe: No Grounds for Complacency, Viewpoints by Thomas Hammarberg Council of Europe Commissioner for Human Rights* (Strasbourg: Council of Europe Publishing, 2011).

2 Goldhaber, *A People’s History of the European Court of Human Rights* (New Brunswick: Rutgers University Press, 2007) at 189–90 (and the literature quoted there).

3 There is a rich body of American scholarship devoted to unconscious bias and its implications for equal protection law. Seminal articles include Lawrence, ‘The Id the Ego, and Equal Protection: Reckoning with Unconscious Racism’ (1987) 39 *Stanford Law Review* 317; and Hamilton Krieger, ‘The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity’ (1995) 47 *Stanford Law Review* 1161.

4 *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 19 (this stereotype was advocated by the Russian Constitutional Court in their judgment in the *Konstantin Markin* case).

oppressed;⁵ and homosexuals have only cursory relationships.⁶ Stereotypes such as these should be contested because they restrict people to supposed group characteristics, thus impairing their dignity and personal autonomy, as well as denying them certain rights on this basis. Gender stereotypes form the 'fortress of our tradition' that women all too often cannot escape.⁷ If we want to realise women's human rights, we must challenge gender stereotypes.⁸

Unfortunately, the Court's approach to stereotyping has been rather piecemeal so far. Only recently has the Court started to recognise stereotypes as one of the structural causes holding back the emancipation of disadvantaged groups.⁹ Various other legal systems, however, have recognised that structural change requires combating stereotypes.¹⁰ It is not the purpose of this article to offer a comparative perspective on the case law of the ECtHR, yet it will become clear that this project is grounded in the judicial and scholarly work on gender stereotyping that has been done elsewhere. Specifically, my project is inspired by the work of the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') and by American, Canadian and South African case law and scholarship. In those jurisdictions, in varying ways, stereotyping has been a central harm that equal protection law has sought to address.

Briefly stated, this article seeks to advance a legal methodology—drawing on the work of Cary Franklin, I refer to this methodology as an 'anti-stereotyping approach'¹¹—that uncovers and contests the patterns that lead to structural discrimination. This anti-stereotyping approach is a first

- 5 Compare *Dahlab v Switzerland* 2001-V; and *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8. The stereotype that Muslim women are oppressed is implicitly advocated by the Court in these judgments; see on this topic, for example, Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52.
- 6 This stereotype was refuted by the Court in *Schalk and Kopf v Austria* Application No 30141/04, Merits, 24 June 2010, at para 99: '[T]he Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.' Of course, stereotypes do not only surface in the gender context. Think of the case of *Aksu v Turkey* concerning a Turkish government-sponsored dictionary and another government-sponsored book that included suggestions that Roma are stingy, fraudulent and aggressive. *Aksu v Turkey* Application No 4149/04 and 41029/04, Merits, 27 July 2010.
- 7 Lippmann, *Public Opinion* (BN Publishing, 2007 (first published 1922)) at 36.
- 8 This is also the central message of Cook and Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010).
- 9 See *infra* Section 2.
- 10 Examples are the Inter-American, the South African and the Canadian legal systems. Paradigmatic cases include Inter-American Commission on Human Rights Case 11.625, *Morales de Sierra v Guatemala* Report No 4/01 (2001); 9 IHRR 190 (2002); South African Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; and Canadian Supreme Court, *R v Ewanchuk* [1999] 1 SCR 330 (*L'Heureux-Dubé J* concurring). For a discussion of these and other cases, see Cook and Cusack, *supra* n 8.
- 11 Franklin, 'The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law' (2010) 85 *New York University Law Review* 83.

attempt at creating a tool that the ECtHR could use to improve its reasoning to more fully protect specifically disadvantaged groups against stereotyping and other forms of structural discrimination. After this introduction, Section 2 describes the state of affairs in the Court's discrimination jurisprudence and places this article in a wider set of developments concerning the judicial approach to equality. Section 3 gives an account of stereotypes and their harm and elucidates the legal significance of stereotypes. Section 4 sets forth my anti-stereotyping analysis, which is specifically aimed at the ECtHR. The analysis will consist of two phases: namely 'naming' and 'contesting'. This analysis is meant to be suggestive rather than definitive: the aim is to raise the kinds of questions that the Court needs to ask in order to dismantle harmful gender stereotypes and to show how the Court could incorporate an anti-stereotyping approach in its legal reasoning. Section 5 illustrates this analysis with two recent gender cases: *Konstantin Markin v Russia*¹² and *Rantsev v Cyprus and Russia*,¹³ and puts forward some suggestions concerning other areas of the Court's gender case law that would benefit in particular from the approach this article advocates.

2. Developing Equality

There have been significant developments within the legal approach to equality and discrimination in the past decades. Increasingly, equality is approached holistically. The focus in this article lies on the developments in the case law of the European Court of Human Rights; nonetheless these developments are reflective of a broader legal trend. The purpose of this section is to locate my anti-stereotyping argument within a broader set of developments and, by quickly taking the reader through the anti-discrimination case law of the Court, to lay the groundwork for the anti-stereotyping analysis outlined in Section 4.

During the first decades of its existence, the ECtHR saw discrimination solely through a lens of *formal equality*. The hallmark of such an approach, sometimes called *de jure* equality, is that persons placed in similar situations must be treated in an equal manner and that no distinction can be made on a number of grounds of discrimination such as race and sex, without reasonable justification. In brief: women have the same rights as men. A landmark case in this context was *Abdulaziz, Cabales and Balkandi v United Kingdom* ('the ABC-case')¹⁴ from 1985. The case concerned the immigration rules of the United Kingdom (UK), which made a distinction between male and female

12 Application No 30078/06, Merits, 7 October 2010.

13 Application No 25965/04, Merits, 7 January 2010.

14 A 94 (1985); 7 EHRR 471.

immigrants: women whose spouses were legally resident in the UK were allowed to join their partner, while the reverse was not allowed. The UK submitted that this rule was intended to protect the domestic labour market: men would have a more positive impact on the labour market than women.¹⁵ The Court judged that this amounted to discrimination on the ground of sex and concluded that this was a violation of the European Convention on Human Rights 1950 ('the Convention'). Importantly, this was the first case in which the Court laid down the rule that when a State makes a distinction on the grounds of sex, the rule or practice in question must be subjected to an intensive scrutiny: the State must be able to advance 'very weighty reasons' for the distinction.¹⁶

Although formal equality serves its purposes, from a gender perspective it has serious shortcomings. These shortcomings are well documented in feminist legal literature. Feminists have pointed out that when the aim is to give women the same rights as men, the frame of reference is still masculine. This is problematic in several ways. What to do with issues in which women and men are not the same, like pregnancy? Why would women actually have to adapt to a masculine norm?¹⁷ And what to do with intersectional discrimination; meaning discrimination that cannot be reduced to just one ground but which is based on a combination of identities?¹⁸ In the end, formal equality is often too formalistic: such an approach puts too much emphasis on technical–legal concepts and does not take the historical and social reality of women and other non-dominant or vulnerable groups enough into account.¹⁹

Undoubtedly influenced by all the critique on formal equality, the Court has started to develop a *substantive conception of equality*.²⁰ This approach, also called *de facto* equality, takes as its starting point the reality of a rule or practice as it is experienced by a disadvantaged group. The question then becomes whether the effect of a rule is discriminatory, not whether a distinction has been made between different groups. The Court has slowly become aware that neutrally formulated rules can have a disproportionately burdening effect on vulnerable social groups. In other words; in the real world, neutral rules can

15 Ibid. at 75. The idea that men have a more positive impact on the labour market is of course also based on a stereotype. In this case the Court solves the issue with a call upon formal equality.

16 Ibid. at 78.

17 See, for example, West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (2000) 15 *Wisconsin Women's Law Journal* 149.

18 A seminal article is Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1990–1991) 43 *Stanford Law Review* 1241.

19 Nussbaum, 'Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism' (2007) 121 *Harvard Law Review* 4.

20 See generally O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 *Legal Studies* 211.

be discriminatory.²¹ A discriminatory intent is not a pre-condition for a finding of discrimination: discrimination can arise from a *de facto* situation. This understanding has gradually been embraced by the Court, but is most clearly articulated by the Grand Chamber in *D.H. and Others v Czech Republic* in 2007, incidentally a case which did not concern gender discrimination but segregation of Roma children in Czech schools. In that case the Court also suggested that, sometimes, positive action is expected from the authorities, in order to correct factual inequalities.²² Another aspect of a more substantive interpretation of equality is the awareness that different situations should not be treated equally, if the goal is to achieve a fair result.²³

However valuable an approach is that embraces substantive equality, even this approach has its limits. By emphasising the effects of a particular rule, the underlying structural causes of exclusion are not necessarily addressed and are often left untouched. The struggle against structural forms of discrimination is referred to as *transformative equality* by certain authors.²⁴ Equality as transformation is an ambitious project: it challenges the deeply ingrained gender roles and gendered ideology on which society is based. States are expected to make a radical reconsideration of those aspects of their legal, social and economic culture that hamper the equality and human dignity of women.²⁵ The aim is to disrupt the hierarchical legal and social *status quo*.²⁶ For the sake of terminological clarity, let me explain that I recognise that what is labelled here as transformative equality, many scholars would actually classify as substantive equality.²⁷ The reason this article employs a rather narrow conception of substantive equality and makes a distinction between substantive and transformative equality in this way, is that this corresponds better with the Court's current equality jurisprudence. The Court's approach

21 See, for example, Fredman, *Discrimination Law*, 2nd edn (Oxford/New York: Oxford University Press, 2011) at 177–89.

22 47 EHRR 3, at para 175.

23 See *Thlimmenos v Greece* 2000-IV; 31 EHRR 15.

24 Cook and Cusack, *supra* n 8 at 6 and 8; Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in Boerefijn et al. (eds), *Temporary special measures. Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All forms of Discrimination Against Women* (Antwerp: Intersentia, 2003) 111 at 115; and Holtmaat and Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Antwerp: Intersentia, 2011) at 26–7.

25 Cf Holtmaat, 'Article 5', in Freeman et al. (eds), *The Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: Oxford University Press, 2011) 141 at 144.

26 Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 *Canadian Journal of Woman and the Law* 1 at 35.

27 See, for example, Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248 at 250 ('A commitment to substantive equality involves examining the context of an alleged rights violation and its relationship to systemic forms of domination within a society. It addresses structural and entrenched disadvantage at the same time as it aspires to maximise human development!').

to substantive equality is characterised by an emphasis on (and an increasing willingness to embrace) positive equality duties.²⁸ This approach is a step in the right direction, but it does not necessarily ensure that the root causes of gendered disadvantage are addressed. If the Court wants to go to the roots of structural gender discrimination it should dismantle gender stereotypes, as well as be willing to go into the issue of States' positive obligations on the terrain of equality.

There are a few indications in the recent case law of the ECtHR that the Court is willing to embrace a conception of transformative equality based on an anti-stereotyping approach, though let it be noted that the Court has not yet applied this idea in a gender case (at least not expressly²⁹). None of the cases that are about to be mentioned concern gender. In *Alajos Kiss v Hungary* the Court speaks for the first time explicitly about the stereotypes from which people with intellectual disabilities suffer.³⁰ In that judgment, the Court shows itself conscious of the impact of historical discrimination. It seems that the Court suggests a general framework within which the 'very weighty reasons' test needs to be applied: a distinction requires very weighty reasons, says the Court, if it concerns certain groups in society that are particularly vulnerable due to significant past discrimination.³¹ This approach to disability-based discrimination is confirmed in *Kiyutin v Russia*, a case concerning a HIV-positive applicant.³² In this case, the Court makes a real effort to address the sources of prejudice against people living with HIV. The Court acknowledges that, as a result of ignorance of how the disease spreads and links to already existing racism, homophobia and misogyny, people living with HIV are subject to intensely harmful stigmatisation and therefore a particularly vulnerable social group.³³ The dissenters in *Aksu v Turkey*³⁴ continue this line in a case that concerns discrimination of Roma. This is the first time that (part of) the Court expands on the concept of stereotypes: 'Stereotypes are ready-made opinions that focus on peculiarities, and prejudices are preconceived ideas that lead to bias: they are dangerous because they reflect or even induce an implicit discrimination.'³⁵

28 A good example is *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009. See also Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 186–7.

29 Though *Konstantin Markin* comes close. *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010; see *infra* Section 4 and 5. See also *Petrovic v Austria* 1998-II; 33 EHRR 307 (Judges Bernhardt and Spielmann, dissenting).

30 Application No 38832/06, Merits, 20 May 2010.

31 *Ibid.* at para 42.

32 Application No 2700/10, Merits, 10 March 2011.

33 *Ibid.* at para 64.

34 Application No 4149/04 and 41029/04, Merits, 27 July 2010 (incidentally the same Chamber that decided *Alajos Kiss*). At the time of writing, this case has been referred to the Grand Chamber.

35 *Ibid.* at para 2 (Judges Tulkens, Tsotsoria and Pardalos, dissenting).

Promising as these cases are, a lot of work remains to be done before the ECtHR will take transformative equality on board. This is where this project is positioned. However, it is important to stress that the anti-stereotyping approach is not meant to substitute all other approaches to equality and discrimination. Exclusion on the basis of gender can affect both men and women, takes place in many different situations, and may take many different forms. Different methods are therefore required to combat gender exclusion and disadvantage. The three forms of equality (formal, substantial and transformative equality) are all useful, depending on the situation, and must coexist.³⁶ In order to address all aspects of inequality based on gender, we need a holistic approach.³⁷

3. (Gender) Stereotypes: Meaning and Adjudication

In this Section, the basics of stereotypes will be briefly set forward. Unfortunately, this will by force be a superficial account, as it is nearly impossible to do justice to the vast deal of (empirical) research that has been done into stereotypes by psychologists. To start, here are some remarks about stereotypes in general.

The most basic definition of stereotypes is that they are beliefs about the characteristics of groups of people.³⁸ According to standard psychology-texts, stereotypes can be both negative ('women are weak') and positive ('women are caring'), but they are predominantly negative.³⁹ However, Zanita Fenton argues that 'positive' stereotypes also have negative consequences, because what is constructed as positive depends on the point of view of the observer. Besides, while a stereotype does not have to be correct for a particular person, it does force that individual in a particular role or position, either ideologically or in reality.⁴⁰

Individuals employ stereotypes to simplify and make understandable the world around them, and as such stereotypes play an important and legitimate role in our lives.⁴¹ But, at the same time stereotypes are not neutral; they

36 Holtmaat and Naber, *supra* n 24 at 27.

37 *Ibid.*

38 Stangor, 'Volume Overview', in Stangor (ed.), *Stereotypes and Prejudice: Essential Readings* (Philadelphia: Psychology Press, 2000) 1 at 5.

39 See, for example, Stangor, 'The Study of Stereotyping, Prejudice and Discrimination Within Social Psychology: A Quick History of Theory and Research', in Nelson (ed.), *Handbook of Prejudice, Stereotyping and Discrimination* (New York/Hove: Psychology Press, 2009) 1 at 2.

40 Fenton, 'Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence' (1998–1999) 8 *Columbia Journal of Gender and Law* 1 at 13.

41 Stangor and Schaller, 'Stereotypes as Individual and Collective Representations', in Stangor (ed.), *supra* n 38 at 64, 73–5. It was Walter Lippmann, *supra* n 7 at 34–5, who first found the reason we stereotype in 'economy of effort'.

are not merely a short cut to reality.⁴² They are cultural phenomena: they are the social ideas and preconceptions that exist about a particular group. Stereotypes create 'in'—and 'out-groups': us versus them. This also serves a function, as this way we feel better about ourselves because we feel like we belong; stereotyping is thus a 'self-image management strategy'.⁴³

The rest of this paragraph will address gender stereotypes in particular. Gender stereotypes are often rooted in our subconscious. In that case, we are not aware that we base our actions on them. In the words of Rikki Holtmaat: 'Stereotypes tend to fixate gender identities and gender roles and make them appear as real, universal, eternal, natural, essential and/or unchangeable.'⁴⁴ To put it differently: when there is a stereotype at play, people tend not to ask further questions because stereotypes make gender patterns seem self-evident. Stereotypes make us lazy and blind us to gender inequality.

The harm of gender stereotypes is that they tie both men and women down to a particular identity. They place a certain mould on individuals, independent of what they are capable of, experience or desire. By means of gender stereotypes, men and women are not seen not as individuals, but are by default judged on the basis of a gender-group membership. It is important to emphasise that stereotypes often serve to maintain existing power relationships; they are control mechanisms. Stereotypes uphold a symbolic and real hierarchy between 'us' and 'them'.⁴⁵

Thus, stereotypes have important tangible and intangible effects. Based on the work of Nancy Fraser, Rebecca Cook and Simone Cusack call these *recognition* and *distribution-effects*.⁴⁶ Fraser considers misrecognition to be a cultural injustice. Misrecognition is a status injury, it is social subordination: 'to be denied the status of a full partner in social interaction, as a consequence of institutionalised patterns of cultural value that constitute one as comparatively unworthy of respect and esteem'.⁴⁷ In this context, Cook and Cusack observe that gender stereotypes can harm women by degrading them, diminishing their human dignity or otherwise marginalising them.⁴⁸ *Distribution-effects* concern the distribution of resources. It refers to

42 Lippmann, *ibid.* at 36.

43 Fein and Spencer, 'Prejudice as Self-Image Maintenance: Affirming the Self through Derogating Others', in Stangor (ed.), *supra* n 38 at 172, 186.

44 Holtmaat and Naber, *supra* n 24 at 57.

45 Fenton, *supra* n 40 at 11–7.

46 Cook and Cusack, *supra* n 8 at 59–68. See also Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (New York: Routledge, 1997); Fraser, 'Rethinking Recognition' (May–June 2000) *New Left Review* 107; and Fraser and Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London/New York: Verso, 2003).

47 Fraser, 'Rethinking Recognition' (May–June 2000) *New Left Review* 107 at 113–4.

48 Cook and Cusack, *supra* n 8 at 63–8.

socio-economic justice; the question is whether public goods are fairly allocated. Cook and Cusack identify two sorts of distribution-effects: women can be denied a benefit on the basis of a gender stereotype,⁴⁹ or saddled with a burden.⁵⁰ Recognition and distribution are closely linked. Sometimes that link is causal, as when the lack of the one leads to a lack of the other. But, that is not necessarily the case.

However, an important category of harm, which deserves to be mentioned separately, is still lacking here: *psychological effects*. People who belong to groups who are stereotyped are usually aware of the bad reputation of their group, and this creates diverse problems. They report psychological distress, unhappiness and depression.⁵¹ In addition, stereotypes can constrain behaviour and make people underachieve. This occurs when people experience 'stereotype threat': the pressure that people feel not to conform to a certain (negative) stereotype for fear that they will be judged or treated in terms of it.⁵² Stereotype threat causes anxiety, which in turn causes underperformance. Another effect of stereotypes is that people feel obliged to 'cover', conceptualised by Kenji Yoshino as a demand to hide a certain disfavoured identity.⁵³

To enumerate all the harmful effects of stereotypes is clearly beyond the scope of this article. What will be clear from the foregoing is that the Court will have to make a careful case-by-case assessment of the gender stereotypes that are at play, and their effects.

States' international commitment to gender equality cannot be reached without addressing the persistence of harmful gender stereotyping. This is explicitly recognised in the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW').⁵⁴ The legal basis for the obligation to address gender stereotypes is found in several binding international

49 See, for example, the case of *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8, which concerned a student who was denied entrance to the university as long as she refused to take off her headscarf.

50 An example of a case in which a stereotype imposed a burden on a woman is *Petrovic v Austria* 1998-II; 33 EHRR 307, concerning parental leave allowance. Austrian law provided that only mothers were entitled to receive such payments. By denying this form of social benefits to fathers, and thus enforcing the traditional gender role model, Austria imposed the task of looking after the children on mothers. See generally Cook and Cusack, *supra* n 8 at 61–3.

51 Stangor, *supra* n 39 at 7, and the literature quoted there.

52 Steele, *Whistling Vivaldi. And Other Clues to How Stereotypes Affect Us* (New York/London: WW Norton & Company, 2010) at 89.

53 Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2006). Covering demands stood central in quite a number of ECtHR cases. (In)famous are the headscarf cases: *Dahlab v Switzerland* 2001-V; *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8; and *Dogru v France* Application No 27058/05, Merits, 4 December 2008. See also *Alekseyev v Russia* Application Nos 4916/07; 25924/08 and 14599/09, Merits, 21 October 2010 (concerning a prohibition on gay marches in Moscow).

54 1979, 1249 UNTS 13.

documents,⁵⁵ but is perhaps most prominent in CEDAW's Articles 2(f) and 5. Article 5(a) of CEDAW stipulates that States take all appropriate measures to: 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.' The CEDAW Committee has clarified the link between the obligation to address gender stereotypes and the problem of structural discrimination. In General Recommendation No 25 the Committee observes: 'States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.'⁵⁶

That this is also important within the context of the ECtHR is clear: all States of the Council of Europe are party to CEDAW and none have made a reservation to Article 5(a).⁵⁷ The ECtHR stressed the importance of CEDAW in a recent ruling. In *Opuz v Turkey* the Court stated: 'when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law . . . the Court has to have regard to the provisions of more specialised legal instruments', such as CEDAW.⁵⁸

This brings me to the crucial question of the role of the Court. What can the ECtHR do to address, and ultimately help to eliminate, harmful gender stereotypes? It is suggested that the Court's role is twofold: in the first place the Court should not rely on harmful (gender) stereotypes in its own reasoning,⁵⁹ and, secondly, the Court should name gender stereotyping whenever it occurs on a national level and proceed against it as a particularly damaging form of discrimination. The rest of this article focuses on that second aspect of the

55 I am indebted to Simone Cusack for making this point. See, apart from the CEDAW Convention, Articles 6(b) and 8(b), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (*Convention of Belém do Pará*), (1994) 33 ILM 1534; Articles 2(2), and 4(d), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, OAU DOC CAB/LEG/66.6; Article 8(1)b, Convention on the Rights of Persons with Disabilities 2006, GA Res 61/106 Annex I, A/61/49 (2006), (Article 8(1)b discusses compounded stereotyping, including on the basis of sex); and Committee on Economic Social and Cultural Rights, General Comment No 16: The equal rights of men and women to the enjoyment of all economic, social and cultural rights (Article 3), 11 August 2005, E/C.12/2005/4; 13 IHRR 1 (2006) at paras 11 and 14.

56 CEDAW Committee, General Recommendation No 25: Article 4(1), Temporary Special Measures, A/59/38 Part I: CEDAW/C/2004/1/WP.1/Rev.1 (2004); 11 IHRR 909 (2004) at para 7.

57 The list of reservations to CEDAW is available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg.no=IV-8&chapter=4&lang=en#6> [last accessed 3 October 2011].

58 Application No 33401/02, Merits, 9 June 2009, at paras 185 and also para 164.

59 For an example of judicial reasoning that wrongfully relied on gender stereotypes and a condemnation of the CEDAW Committee thereof, see *Karen Tayag Vertido v The Philippines* (18/08) CEDAW/C/46/D/18/2008 (2010). See also on this topic Cusack and Timmer, 'Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v the Philippines*' (2011) 11 *Human Rights Law Review* 329.

Court's role. To be clear: this article does not propose that judges should try to eradicate all stereotypes from society. That would be neither feasible nor desirable, since some stereotypes do fulfil a legitimate function (namely making the countless amount of information we have to process in day-to-day life manageable) and, moreover, since it is inevitable that law relies on generalisations. However, there is a line between permissible generalisations and harmful stereotypes. When a gender stereotype halts the emancipation process States are under an obligation to address it on the basis of Articles 2(f) and 5(a) CEDAW, and then, this article argues, the Court should not let the use of such a gender stereotype pass by.⁶⁰

What does that mean that the Court can do concretely? On a practical level, the key role for judges seems to be to ensure that individuals, companies or States do not act on harmful stereotypes.⁶¹ Thus, the ECtHR can oblige States to individualise rules or practices, rather than to categorise and exclude on the basis of group membership by applying so-called 'blanket restrictions' on fundamental rights.⁶² On a more conceptual level, the Court can play a role in changing the way we speak—and thereby influence the way we think⁶³—about stereotypes and gender ideology. The following Section explicates how the Court can make sure that States do not discriminate on the basis of harmful gender stereotypes.

4. Analysis: Towards an Anti-Stereotyping Approach for the ECtHR

A. *Setting the Stage*

What could a judicial analysis that revolves around the anti-stereotyping principle look like in gender equality cases? This section will propose an anti-stereotyping analysis in two stages: in the first place, gender stereotypes should be named,⁶⁴ and subsequently they must be contested. By 'naming' I mean that the Court must determine the actual role of gender stereotypes

60 Whether a stereotype halts the emancipation process depends on the context in which the stereotype is used. Some scholars argue that stereotypes can have positive uses and that we should therefore take pause before denouncing them. See, for example, Suk, 'Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict' (2010) 110 *Columbia Law Review* 1. For this reason, the Court will have to assess stereotypes and their impact on a case-by-case basis. See *infra* Section 4B.

61 Cf Stangor, *supra* n 51 at 11.

62 The Court has in several cases condemned the use of blanket restrictions and applied the principle that rules should leave room for an individualized assessment. See *Hirst v United Kingdom* (No 2) 2005-IX; 42 EHRR 41; *Tănase v Moldova* Application No. 7/08, Merits, 27 April 2010; *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010; and *Kiyutin v Russia* Application No 2700/10, Merits, 10 March 2011.

63 Cf Boroditsky, 'Lost in Translation' *Wall Street Journal*, 24 July 2010.

64 Cook and Cusack also argue that the first step is to name stereotypes, *supra* n 8 at chapter 2.

in the context of a particular case. It will become clear that this analysis interprets factual context broadly. Under the header of 'contesting' I describe how the Court should proceed against gender stereotypes in its legal reasoning.

Before covering the actual analysis, let me clarify that in the second stage of the analysis I utilise the model of judicial review that Janneke Gerards has developed for equal treatment cases, based on the case law of the ECtHR and some other courts.⁶⁵ She has created a beautifully condensed account of how judges can apply the equality norm, which can be applied in cases of both *de jure* and *de facto* unequal treatment. To avoid repetitive scholarship and in order to make my anti-stereotyping analysis as concise as possible, it is expedient to utilise Gerards' model as a springboard.

Gerards suggests that the judicial review of the equality norm must be carried out in three phases. First there is a pre-phase in which the intensity of the review must be determined: strict scrutiny (the very weighty reasons test), intermediate review or marginal review? Theoretically,⁶⁶ this step is of less importance for gender cases at the ECtHR because the Court has already ruled that distinctions based on sex require an intensive review.⁶⁷ Then in the next phase, the Court must determine whether there is a sufficient cause of action; whether there has actually been an instance of unequal treatment that requires justification.⁶⁸ To assess this, the official line of the ECtHR is that a comparability test should be carried out: 'discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations'.⁶⁹ The comparability test seems to have become less important now that the Court adjudicates indirect discrimination cases increasingly often and, anyway, the Court almost never pays explicit attention to the comparability in cases that concern 'suspect' classifications (such as sex).⁷⁰ Instead of a comparability test, Gerards argues for a 'disadvantage test', which argument this article supports. The disadvantage test means that the complainant must prove that a rule or practice disadvantaged her compared to another person or group of persons.⁷¹ If it has been proven that the applicant suffered a genuine disadvantage, then the State must be able to justify this. This brings us to the final phase of Gerards' test, when the Court must determine whether there is a justification for the distinction. The ECtHR does so on the basis of two questions: does the distinction pursue a legitimate aim and is there proportionality between the means employed and the aim sought to be realised?

65 Gerards, *Judicial Review in Equal Treatment Cases* (Leiden and Boston: Martinus Nijhoff, 2005).

66 See *infra* Section 4C for some reflections on how the Court applies this test in practice.

67 See *supra* Section 2.

68 Gerards, *supra* n 65 at 660.

69 *D.H. and Others v Czech Republic* 47 EHRR 3, at para 175.

70 Gerards, *supra* n 65 at 130–3.

71 *Ibid.* at 669–75.

Now that Gerards' model of judicial review in equal treatment cases is briefly set forward, it is time to introduce my anti-stereotyping analysis.

B. First Phase: Naming

The main question that the Court has to consider is whether a rule or practice is based on harmful gender stereotypes.⁷² Cook and Cusack argue that '[n]aming wrongful gender stereotyping . . . is central to the effectiveness of efforts to eliminate this practice. Unless wrongful gender stereotyping is diagnosed as a social harm, it will not be possible to determine its treatment and bring about its elimination.'⁷³ In response to discrimination case law of the Supreme Court of Canada, Margot Young has made the point that the more entrenched a (gender) stereotype is the less likely judges are to detect it.⁷⁴ More generally, many scholars have pointed out that judges bring their own unacknowledged biases to bear on a case, which is all the more problematic since judges will often form part of the dominant group and will 'therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions.'⁷⁵ In order to avoid these pitfalls as much as possible, a rigorous judicial assessment of context is needed. Moreover, such an assessment not only serves to detect and name stereotypes, but also to appraise whether and, if so, to what extent they are harmful. Below is a discussion of some of the various contextual factors that the ECtHR should take into account.

(i) Historical context

Whether a stereotype is harmful depends to a large extent on the historical context in which it is used. In *Andrle v Czech Republic*⁷⁶ the Court showed itself well aware of this. The case concerned the Czech pension scheme, which provided for lower pensionable ages for women who have raised children than for men who have raised children. The rule was clearly based on the woman-homemaker/man-breadwinner stereotype. The Court held that it 'cannot overlook the fact that the measure at stake is rooted in specific

72 Along with Sophia Moreau, by 'based upon stereotypes' I mean either 'motivated by stereotypes' or 'publicly justified in terms of stereotypes.' Moreau, 'The Wrongs of Equal Treatment' (2004) 54 *University of Toronto Law Journal* 291 at 297. Thus, Moreau alerts the reader to the fact that stereotypes can play a damaging role both on the level of (the inner world of) motivations and (the outer world of) justifications.

73 Cook and Cusack, *supra* n 8 at 40.

74 Young, 'Unequal to the Task: 'Kapping' the Substantive Potential of Section 15' (2010) 50 *Supreme Court Law Review* 183 at 207–08.

75 Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 62. See also, for example, Young, *supra* n 74 at 207; Gerards, *supra* note 65 at 5; and Lawrence, *supra* note 3 at 380.

76 Application No 6268/08, Merits, 17 February 2011.

historical circumstances', namely the expectation that existed in then socialist Czechoslovakia that women worked full-time as well as fulfilling the 'traditional mothering role'.⁷⁷ In light of this historical context, the Court judged that the rule was not harmful, because the aim was 'to compensate for the factual inequality between men and women'.⁷⁸

In order to place a gender stereotype in its historical context and thus assess its harmfulness, the Court can ask itself various questions. Is there a history of gender discrimination vis-à-vis a particular right?⁷⁹ Alternatively, is there a history of discrimination in a specific sort of situation? Has the group concerned (be that women, homosexuals, women with a particular ethnic or religious background or transsexuals, etc.) been excluded from a particular right in the past? Is there a conceivable analogy between the current regulation and historical rules or practices that were discriminatory?⁸⁰ One way in which these kinds of questions have come up in the judgments of the Strasbourg Court—though not necessarily in the stereotype-context—is in cases where an abundance of international reports and other materials indicate a widespread equality problem in a certain State. Examples include cases concerning discrimination of Roma in Romania⁸¹ and domestic violence against women in Turkey.⁸²

(ii) Current effects

An anti-stereotyping approach also requires an awareness of the effects of a rule or practice—that is, judges need to perform a reality check. What are the effects of the challenged rule or practice on individual men and women? To make sure that it takes an intersectional approach to discrimination, the Court should ask what the effects are on particular groups of men and women, like women from a particular ethnic or religious background, or of a particular age and (dis)ability. The anti-stereotyping approach is not based

77 Ibid. at paras 53–5.

78 Ibid. at para 60. Whether the Court got it right here is doubtful. What the Court overlooks is that by maintaining this rule that was based on a gender stereotype, the stereotype is reaffirmed and legitimized in the present. In other words, the current effects might be harmful (see the next paragraphs below). Psychological research has evidenced that this sort of 'benevolent sexism' may play an important part in justifying and maintaining gender inequality. See, for example, Jost and Kay, 'Exposure to Benevolent Sexism and Complementary Gender Stereotypes: Consequences for Specific and Diffuse Forms of System Justification' (2005) 88 *Journal of Personality and Social Psychology* 498.

79 The Court emphasises the importance of historical discrimination in *D.H. and Others v Czech Republic* (2007); 47 EHRR 3; *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010; and *Kiyutin v Russia* Application No 2700/10, Merits, 10 March 2011 (though these three cases did not concern discrimination on the basis of sex).

80 Cf Lenhardt, 'Understanding the Mark: Race, Stigma, and Equality in Context' (2004) 79 *New York University Law Review* 803 at 892–93.

81 *Carabulea v Romania* Application No 45661/99, Merits, 13 July 2010 (see especially the dissenting opinion by Judges Gyulumyan and Power).

82 *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009.

on rigid-discrimination grounds, and invites research into the more complex reality in which human beings find themselves.

What kind of harm is caused to whom? Note that the Court has to investigate material (*distribution*) and social status (*recognition*) effects, as well as *psychological* effects, where appropriate. To find out the recognition effects the Court may ask what a particular rule implies about the status of a certain group. To get a sense of psychological effects, the Court might use materials submitted by third party interveners and the materials submitted by the applicants themselves. This points to the fact that the Court cannot do the hard work of combating gender stereotypes alone. The Court is dependent on others (the parties and third-party interveners) to gather sufficient information about the case and on that basis to create good law. Through an exploration of the historical context of a rule or practice, and its current effects, the Court must determine whether harmful gender stereotypes play a role in a case.

(iii) Unmasking the stereotype

In the final step of this first phase the Court will have to unmask the harmful stereotypes, in the sense that the Court has to make clear what the adverse consequences of these stereotypes are and what the State's international obligations are to combat gender stereotypes.

C. Second Phase: Contesting

Whenever the Court identifies a harmful gender stereotype, the Court should take a number of steps to combat it.

(i) Declaring Article 14 ECHR or Protocol 12 applicable

To trigger the analysis outlined below, a preliminary necessity is to declare Article 14 or Protocol 12 ECHR applicable. My argument is that if a given issue is deeply imbued with harmful stereotypes about certain vulnerable groups, this constitutes a presumption that the prohibition of discrimination (Article 14 or Protocol 12) applies.⁸³

The next steps are all developed with the model of judicial review as developed by Janneke Gerards in mind.⁸⁴

83 Incidentally, it is preferable to apply this article explicitly. In *Alajos Kiss* the Court used a discrimination analysis in an Article 3 Protocol No 1 case without explicitly involving Article 14; the result is somewhat confusing: see *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010, at paras 42–4. The case concerned a man who suffered from manic depression and was put under partial guardianship because of this condition. Hungarian law stipulated that he was automatically stripped from his voting rights. The Court ruled that it is a violation of Article 3 Protocol No 1.

84 See *supra* Section 4A.

(ii) Applying the very weighty reasons test

The general rule should be that when a regulation or practice is based on harmful gender stereotypes, the Court will automatically do an intensive review. This means that the very weighty reasons test ought to be applied and, consequently, the State should be left a very small, if any, margin of appreciation.⁸⁵

The rule that is proposed here ought not to make a lot of difference with the present case law, since the Court has to apply the very weighty reasons test anyhow when the State makes a distinction on the basis of sex or sexual orientation.⁸⁶ However, the practice of the Court has been less clear cut.⁸⁷ The Court has on several occasions watered down the very weighty reasons test by granting a margin of appreciation to the State in cases of gender discrimination. In *Andrle v Czech Republic*, for example, the Court pays lip service to the idea of the very weighty reasons test,⁸⁸ but then goes on to grant the State a decisively wide margin of appreciation because the case concerns an issue of social and economic strategy.⁸⁹

From an anti-stereotyping perspective, it is imperative that the Court consistently applies the very weighty reasons test in all cases. When a case is based on harmful gender stereotypes, not only the discrimination ground (sex) is suspect, but also the form (stereotypes) is suspect. This should lead the Court to be extremely critical in the fourth step of the contesting phase; the assessment of justifications (see below).

(iii) Drop the comparator and instead apply the disadvantage test

The comparability test should, as Gerards suggests, be exchanged for the more appropriate focus on disadvantage. The comparability test is not well suited to

85 The margin of appreciation in the sense that I refer to it here, is the margin that is left to the domestic authorities to determine whether their laws and policies are in accordance with the Convention. The Court tends to award a wide margin of appreciation in cases that concern socially/culturally sensitive subjects about which no consensus exists among the Member States. See generally, for example, Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff, 1996). See specifically about the link between the margin of appreciation and consensus (from a critical perspective): Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998–1999) 31 *New York Journal of International Law and Politics* 843.

86 In addition, it may be argued that since all the contracting States to the Convention are also parties to CEDAW, a consensus exists that harmful gender stereotypes should be eliminated. The Court uses the consensus-argument regularly to apply the very weighty reasons test: *Christine Goodwin* is well known in this context. *Christine Goodwin v United Kingdom* 2002-VI; 35 EHRR 18.

87 There is a wide array of scholarship documenting the lack of a coherent standard for the application of the margin of appreciation. See, for example, Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705.

88 *Andrle v Czech Republic* Application No 6268/08, Merits, 17 February 2011, at para 49.

89 *Ibid.* at paras 56 and 60.

cases that revolve around stereotypes,⁹⁰ because the way that gender stereotypes affect the autonomy of certain women and men is a harm that stands on its own: the disadvantage is not dependent on a comparison with another group of people. Sophia Moreau writes: ‘the reason this treatment amounts to a wrong . . . depends only on the fact that, considered in and of themselves, these individuals have been treated in an unacceptable way by the government: they have been denied a benefit in a manner that lessens their autonomy.’⁹¹ Let me elucidate this point with an example from the case law of the ECtHR. In *Aksu v Turkey* one of the complaints concerned a Turkish State-sponsored dictionary that defined ‘gypsy’ as, among other things, ‘stingy’.⁹² This constitutes a recognition-harm towards Roma. The harm lies in the fact that the dictionary includes derogatory stereotypes, and one cannot define the harm with an appeal to a comparator as there is no suitable comparator present. The same applies to cases of intersectional discrimination.⁹³ While in some cases there might be an appropriate comparator available, this means that—on the whole—the comparability test is not appropriate for stereotype cases.

The disadvantage test is not difficult to pass in stereotype cases. If during the first phase of an anti-stereotyping analysis, as outlined above, it turns out that a gender stereotype is harmful to the applicant and the group that she belongs to and that a rule or State practice is based on such a harmful stereotype, then that in itself is proof of disadvantage. In other words, when a case is based on harmful gender stereotypes, the Court can almost automatically decide that there is a disadvantage.

(iv) Harmful gender stereotypes cannot constitute a justification

I have just argued that when a case is based on harmful gender stereotypes the Court should always apply the very weighty reasons test and decide automatically that there is a disadvantage. This means that the first and second steps of the decision model in this anti-stereotyping analysis are virtually taken mechanically; therefore, the core of the judicial assessment of the anti-discrimination provision will concern the issue of justifications.⁹⁴

90 This point has been made both in relation to American and Canadian case law, which is significant since in both these jurisdictions courts have a wide experience adjudicating cases that concern discrimination on the basis of stereotypes. See, for example, Goldberg, ‘Discrimination By Comparison’ (2011) 120 *Yale Law Journal* 728 at 779–91 (United States); and Moreau, ‘Equality Rights and the Relevance of Comparator Groups’ (2006) 5 *Journal of Law and Equality* 81 (Canada).

91 Moreau, *supra* n 71 at 303.

92 Application No 4149/04 and 41029/04, Merits, 27 July 2010.

93 Cf Goldberg, *supra* n 90 at 757.

94 This is not as revolutionary as it might sound: firstly, it is well established that distinctions on the basis of sex require an intensive scrutiny from the Strasbourg Court and, secondly, diverse scholars have argued that the Court usually focuses on issues of justification, rather than

The goal of a stereotype-analysis is exposing and contesting the patterns that lead to structural discrimination. Such an analysis aims to render explicit and problematic what society experiences as 'natural'. This article argues that the Strasbourg Court should adopt a critical attitude towards the reasons and justifications States put forward for their actions. This is what Kenji Yoshino terms a '*reason-forcing conversation*'.⁹⁵ States ought to base their regulations and actions on rationally defensible grounds, not on gender stereotypes and prejudices.⁹⁶ This also means that the Court should keep asking questions; vague arguments, such as we need to preserve our 'culture'⁹⁷ or 'tradition',⁹⁸ are not sufficient as justifications. From an anti-stereotyping perspective, such arguments are even suspect: appeals to tradition and culture are often appeals to the popularity of stereotypes.⁹⁹ Gender stereotypes are articulated and validated in cultural practices and images.¹⁰⁰ The CEDAW Committee has acknowledged the link between culture and gender stereotypes explicitly in Article 5(a) CEDAW and commented in General Recommendation 23, on women in political and public life: 'In all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life.'¹⁰¹

For these reasons, an appeal to a stereotype cannot form a justification. Strong support for this assertion can be found in the existing case law. In the recent case of *Konstantin Markin v Russia* the Court states: 'To the extent that the difference was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to amount to sufficient justification for the difference in treatment, any more

on the question of whether there is a comparator present. See, for example, O'Connell, *supra* n 20 at 217–19; and Van Dijk et al. (eds), *Theory and Practice of the European Convention on Human Rights*, 4th edn (Antwerp: Intersentia, 2006) at 1041.

95 Yoshino, *supra* n 53 at 178.

96 This position is in some sense similar to Ronald Dworkin's point that certain reasons cannot provide adequate justifications for a curtailment of people's rights. Impermissible considerations are the ones that are based on 'external preferences'; Jeremy Waldron defines these as the 'views that people may have about the value of others or the worthiness of others' desires'. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977) at 234–39; and Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 *Journal of Legal Studies* 301 at 302.

97 *Parry v United Kingdom* Application No 42971/05, Admissibility, 28 November 2006.

98 *Karner v Austria* 2003-IX; 38 EHRR 528, at para 40.

99 Cf Dworkin, 'Rights as Trumps', in Waldron (ed) *Theories of Rights* (New York: Oxford University Press, 1985) 153 at 162.

100 Holtmaat and Naber, *supra* n 24 at 57. See also Raday, 'Culture, religion, and gender' (2003) 1 *International Journal of Constitutional Law* 663. Raday writes (at 671): 'The most globally pervasive of the harmful cultural practices . . . is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunity to participate in public life, whether political or economic.'

101 CEDAW Committee, General Recommendation 23: Political and public life (Article 7), 13 January 1997, A/52/38/Rev.1; 5 IHRR 7 (1998), at para 10.

than similar prejudices based on race, origin, colour or sexual orientation.’¹⁰² If you substitute the word ‘prejudices’ here for the more accurate ‘stereotypes’, this is exactly the approach this article is pleading for. Older cases should not be overlooked either: the Court has already determined that ‘negative attitudes’ towards a particular group cannot form a justification,¹⁰³ nor can arguments that only reflect ‘the traditional outlook’,¹⁰⁴ nor can an appeal to ‘cultural reasons’.¹⁰⁵

5. By way of Illustration: *Konstantin Markin v Russia, Rantsev v Cyprus and Russia and Beyond*

To illustrate the approach that I am arguing for, this Section will think through two major recent gender discrimination cases from an anti-stereotyping perspective: *Konstantin Markin* and *Rantsev*. One difference between these cases is that the Court recognised *Konstantin Markin* as a gender discrimination case, but did not recognise *Rantsev* as such. What these cases have in common is that both are on the face of it ‘successful’ gender equality cases, in the sense that the Court ruled in favour of the victim of discrimination, but that both leave something to be desired in the application of a gender analysis.¹⁰⁶ It is rewarding to discuss them together as these cases complement each other; *Konstantin Markin* concerns a question of formal discrimination and *Rantsev* concerns questions of positive obligations. Most important, though, is that both of these cases offer very promising transformative potential, but both fall short of realising this potential to the fullest. Focusing on the problem of stereotypes shows why. After these two case studies, this Section concludes by putting a few suggestions concerning other areas of gender case law that would benefit from the approach this article advocates.

A. *Konstantin Markin v Russia*

This case concerns Konstantin Markin who is a military serviceman and father of three children.¹⁰⁷ He and his wife divorced and decided that he would be the caretaker of their children, who were very young at the time, and that she would pay child support. Markin subsequently asked the relevant authority

102 *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 58. The next Section will contain more discussion of the *Konstantin Markin* case.

103 *L. and V. v Austria* 2003-I; 36 EHRR 1022, at para 52.

104 *Inze v Austria* A 126 (1987); 10 EHRR 394, at para 44.

105 *Zarb Adami v Malta* 2006-VIII; 44 EHRR 3, at paras 81–2.

106 Cf Bonthuys, supra n 26 at 4.

107 Some might doubt whether this case, which concerns a male applicant, is an appropriate illustration of the anti-stereotyping approach. I would point out that gender stereotypes that harm women can efficaciously be dismantled through focusing on cases with male

for three years parental leave allowance but his request was denied because according to the law leave of such duration could only be granted to military servicewomen. The Russian courts rejected Markin's complaint that this constituted discrimination. What makes this case particularly interesting in the context of an anti-stereotyping approach is the Russian Constitutional Court's justification for the rule that excludes military servicemen from parental leave. The Constitutional Court observed in its judgment: 'By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood.'¹⁰⁸ Relying on Article 14 taken in conjunction with Article 8 (the right to private and family life), Markin subsequently complained to the ECtHR that the refusal to grant him parental leave amounted to discrimination on account of sex. The First Section of the Court handed down its judgment in October 2010. However, Russia successfully requested a referral to the Grand Chamber and we are currently awaiting its decision.

From a gender perspective, some of the Chamber's judgment is worth applauding. First of all, the outcome is good: the Court finds a violation of the Convention. Also, the Court acknowledges that in most countries in Europe, both mothers and fathers can take parental leave, and the Court emphasises that 'men's caring role has gained recognition.'¹⁰⁹ Most significant from the point of view of this article is the fact that the Court dismantles an important stereotype on which the ruling against Markin by the Russian Constitutional Court was based, namely the woman-homemaker/man-breadwinner idea. The relevant paragraph is already quoted in Section 4, but it bears repeating that the Court held that 'the perception of women as primary child-carers and men as primary breadwinners' cannot 'amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation.'¹¹⁰

However, an anti-stereotyping approach reveals that the judgment also has serious shortcomings. Naturally, we will have to await the judgment by the Grand Chamber, but what the Court achieves with this judgment—assuming Russia will comply with its obligations under the Convention¹¹¹—is *greater*

applicants. Ruth Bader Ginsburg pioneered this line of attack in the equal protection cases that she brought to the US Supreme Court in the 1970s. See for an incisive account of Ginsburg's work, and the rich equality theory underlying it: Franklin, *supra* n 11.

108 *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 19.

109 *Ibid.* at para 49.

110 *Ibid.* at para 58.

111 *Konstantin Markin* and other cases in which the Court was critical of Russian legislation have generated such a storm of critique in Russia, that the President of the Russian Constitutional Court even talked of withdrawing from the ECHR. Ferris-Rotman, 'Russia Could Shun European Rights Court – Top Judge', 22 November 2010, available at: <http://www.reuters.com/article/2010/11/22/us-russia-court-rights-idUSTRE6AL5IW20101122> [last accessed 22 August 2011].

inclusion of men, but no amelioration of the situation of women in the Russian army. The Court overlooks the fact that not only (service)men are affected and burdened with stereotypes in this case, and that the woman-homemaker/man-breadwinner idea is not the only stereotype at issue here. The Russian Court based its finding on several interrelated stereotypes concerning military servicewomen, like military servicewomen do not play a crucial part in the army, and military servicewomen are less important than military serviceman. The Strasbourg Court should have named these stereotypes as well.

The Court fails to name and dislodge these other gender stereotypes, because it does not make an adequate context-assessment in *Konstantin Markin*. In order to name these stereotypes, the Court could have engaged in the kind of context assessment that is set out above, in Section 4.B. Obviously, this case is set within the context of gender norms and practices in the Russian military. While it is difficult to obtain comprehensive information regarding the position of women in the Russian army, the picture that emerges from the sources that are available is one of a thoroughly male-dominated institution in which female soldiers are kept in the 'carefully-labeled compartments' that are deemed fit for women by the Defence Ministry.¹¹² Since the early 1990's, when contract service was introduced in Russia as a supplement to the system of conscription that was becoming increasingly unpopular among young men, the number of women in the Russian military has risen to more than 100,000.¹¹³ Women now constitute approximately 10 percent of the armed forces in Russia.¹¹⁴ However, even while their number has grown, the situation of servicewomen has not very noticeably ameliorated.¹¹⁵ Military servicewomen are grossly underrepresented in leadership positions,¹¹⁶ they report extensive violations of their socio-economic rights,¹¹⁷ and they are frequently victim of sexual harassment.¹¹⁸ Women's limited prospects of promotion are partly the result of their supervisors' conviction that women's place, especially women with children, is in the family and that their 'family concerns would prevent them from carrying out their professional duties.'¹¹⁹ Political scientist Jennifer Mathers has observed that the 'sharp distinction between

112 Mathers, 'Women in the Russian Armed Forces: A Marriage of Convenience?' (Fall-Winter 2000) 18 *Minerva: Quarterly Report on Women and the Military* 129 at 139.

113 Mathers, 'Russia's Women Soldiers in the Twenty-First Century' (Spring 2001) 1 *Minerva Journal of Women and War* 8 at 9–11.

114 Ibid.

115 Smirnov, 'Women in the Russian Army' (2002) 43 *Russian Social Science Review* 61 at 62.

116 Ibid. at 62 and 67 See also Mathers, supra n 11 at 131.

117 Smirnov, supra n 115 at 67.

118 Christine Eifler, 'Das unterschätzte Potenzial: Soldatinnen in den russischen Streitkräften [The Underestimate Potential: Female Soldiers in the Russian Military]', (2006) *The Journal of Power Institutions in Post-Soviet Societies*, available at: <http://pipss.revues.org/index498.html> [last accessed 22 August 2011]; and Mathers, supra n 112 at 136.

119 Mathers, 'Women, Society and the Military: Women Soldiers in Post-Soviet Russia', in Webber and Mathers (eds), *Military and Society in Post-Soviet Russia* (Manchester and New York: Manchester University Press, 2006) 207 at 211. Based on empirical research with a sample

men's and women's work and the apparent ban on women performing a wide range of military duties has caused one officer to comment that there is a limit to the proportion of servicewomen which the Russian armed forces is able to employ'.¹²⁰

All of this demonstrates that the argument used by the Russian Constitutional Court, namely that the rules regarding parental leave are justified because of women's special role as mothers and their limited participation in the military, is unsound. This context assessment exposes the harm of that argument: gender stereotypes are precisely what limit women's participation in the military. As the Strasbourg Court acknowledges, the rules that are based on these gender stereotypes have the effect of putting military men who are also fathers with primary caretaking responsibilities in the intolerable position of having to choose between their profession and their family life, while servicewomen face 'no such choice'.¹²¹ Unfortunately, the Court neglects the other side of the coin, namely that, at the same time, these stereotypes restrict women's access to professional careers in the military, diminish the quality of these careers, and put the burden of domestic work on women.¹²²

So how would this case have turned out differently using an anti-stereotyping approach? The focus on stereotypes necessarily brings with it a contextual analysis and, with that, an awareness of the larger societal issues that are at stake. Because the Court neglects the context of this case—it does not make the link between the position of Konstantin Markin and the structural problems that women in the Russian army face—the Court fails to dislodge the underlying structures that are male-defined and excluding of women. In other words, the lack of a contextual analysis limits the transformative potential of this case.

In a rather unusual move, which suggests that the Court does aim for transformation, the Court suggests Russia adopt general measures to amend the Military Service Act.¹²³ If the majority had placed Mr Markin's complaint in the context of the systemic gender problems in the military, they might have pre-empted the criticism by dissenting Judge Kovler that 'this isolated case does not impose on the respondent State a legal obligation to implement appropriate general measures'.¹²⁴ The Court should have shown that the

of 993 military servicewomen, Smirnov states, *supra* n 115 at 67: 'In the military, women's promotion strongly depends on their family situation. Single mothers, married women, divorcees, and widows with children have fewer chances to occupy a high position, because their superior officers are firmly convinced that family concerns would prevent them from carrying out their official duties.'

120 Mathers, *supra* n 112 at 138.

121 *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 58.

122 Mathers, *supra* n 112 at 215.

123 *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 67.

124 *Ibid.* (Judge Kovler, dissenting).

predicament in which Mr Markin found himself was no ‘isolated case’, but, on the contrary, symptomatic of the structural problems that both men and women face in the army due to deeply embedded gender stereotypes. That way, the Court could have made a stronger case in favour of the much needed general measures that should not only entail legislative change to ameliorate the position of male military personnel, but more comprehensive measures aimed at improving the situation of women in the military.

B. *Rantsev v Cyprus and Russia*

The *Rantsev* case concerns a 20-year old Russian woman, Oxana Rantseva, who was the victim of sex trafficking and who eventually died under suspicious circumstances.¹²⁵ Rantseva was admitted to Cyprus on a so-called ‘artiste visa’. The visa was procured for her by an owner of a ‘cabaret’, and allowed Rantseva to work in that cabaret. It is general knowledge in Cyprus that these artiste visas are in practice a gateway into prostitution, even to the degree that the word ‘artiste’ has become synonymous with the word ‘prostitute’.¹²⁶ The sequence of events is as follows: after working for a few days at the cabaret, Rantseva left her apartment, leaving a note saying that she was going back to Russia. A few days later she was found by somebody who contacted the brother of the owner of Rantseva’s cabaret. That brother brought her to the police, alleging that Rantseva was illegally in Cyprus and that the police should hold her in the cell. He then left. The person in charge at the police station gave the order that the owner of the cabaret should be contacted and ordered to ‘collect’ Rantseva.¹²⁷ The brother of the owner came back to the station, picked up Rantseva and brought her to the apartment of one of his employees. They put Rantseva in a room on the sixth floor and allegedly left her alone. Sometime later, she was found lying dead on the street below the apartment. The Cypriot authorities started an investigation into her death, which, as the Strasbourg Court later concluded, was conducted in an unsatisfactory manner.

In many ways, *Rantsev* is a more complicated case than *Konstantin Markin*. The case concerns various private perpetrators, numerous authorities and several Articles of the Convention. The Court handed down a very thorough judgment on human trafficking in general, holding that trafficking as such falls under Article 4 (the prohibition of slavery, servitude and forced labour) of the Convention and that Cyprus and Russia violated this provision. The Court considers that

[t]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It

125 *Rantsev v Cyprus and Russia* Application No 25965/04, Merits, 7 January 2010.

126 *Ibid.* at para 83.

127 *Ibid.* at para 20.

treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere... There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention.¹²⁸

In addition, the Court followed international human rights treaties to determine the obligations that rest on State Parties' to prevent and punish trafficking. The Court referred extensively to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children¹²⁹ and the Anti-Trafficking Convention of the Council of Europe.¹³⁰ The present analysis will focus on those aspects of the case that are linked to gender stereotypes and will not encompass all facets of the case.

As for the first part of the anti-stereotyping approach, the naming stage, the crux of the problem in *Rantsev* is different from the one in *Konstantin Markin*. In *Konstantin Markin* the problem lies in the lack of contextual framing; in *Rantsev*, on the other hand, the Court does an impressive job of collecting background data and assessing the wider context of this case, namely the highly problematic 'artiste visa'-regime in place at that time in Cyprus, the appalling conditions in which the foreign women workers live and the exploitation that these women are subjected to. The Court uses an extensive amount of materials to establish that 'artistes' are often trafficked, exploited and abused and that the Cypriot government is well aware of these facts.

Despite this impressive context assessment, the shortcomings of the *Rantsev*-judgment are in a sense more far-reaching than the ones of *Konstantin Markin*. Whereas in the latter case the Court fails to name many of the gender stereotypes at issue, in *Rantsev* the Court ignores the gender-dimension to the case completely.¹³¹ Having collected all the evidence, the Court could have made a relatively easy case for indirect discrimination as the grand majority of the victims of the exploitative 'artiste visa'-regime are women.¹³² It is actually puzzling why the Court has not applied Article 14 in conjunction with Article 4, as it has determined in previous cases that

128 Ibid. at paras 281–2.

129 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime 2000, 2237 UNTS 319.

130 Council of Europe Convention on Action against Trafficking in Human Beings 2005, CETS 197.

131 As third party intervener, Interights did point out in its written submission that 'human trafficking for sexual exploitation is a form of violence against women'. Therefore, the argument that this case concerns an issue of gender had been made to the Court. Interights, 'Written Submission *Rantsev v Cyprus and Russia*, Application 25965/04', at paras 15–9, available at: <http://www.interights.org/rantsev/index.html> [last accessed 19 October 2011].

132 Cf *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009, at paras 192–200.

‘a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group . . . and that discrimination potentially contrary to the Convention may result from a *de facto* situation’.¹³³

The Court names ‘exploitation’ as the central harm of trafficking, but does not explore how this exploitation is gendered.¹³⁴ In other words, it neglects to ask what has been termed ‘the woman question’.¹³⁵ What does the Cypriot legislation and the actions of the Cypriot authorities imply about the status of women with an artiste visa? The Court overlooks the gender stereotypes that play a role in this case, possibly because the Cypriot and Russian authorities do not directly invoke stereotypes—as was the case in *Konstantin Markin*.

In *Rantsev*, exposing the operative gender stereotypes requires probing the artiste visa-regime. The rule that stipulates that the artiste visa is to be procured by the ‘artistic agents’ corresponds with the conduct by the Cypriot police in demanding that the owner of the cabaret collect Rantseva at the police station: both imply that the agents in this system are the (male) cabaret owners and not the women themselves—with the effect that women are made dependant on their exploiters.¹³⁶ Women with an artiste visa are seen as the (sexual) property of their employers. One report on trafficking in Cyprus refers to the ‘patriarchal social attitudes according to which a man’s desire for sex is considered a primal need that needs to be satisfied, and it is a woman’s responsibility to provide this satisfaction’.¹³⁷ The behaviour of the Cypriot police (in not letting Rantseva leave by herself even though she had done nothing illegal) is also in accordance with what one researcher of Cypriot stereotypes writes: ‘Russian and Rumanian women are seen as a source of disorder and danger’.¹³⁸ In Cyprus, women are often stereotyped as

133 *D.H. and Others v Czech Republic* 47 EHRR 3, at para 175; also quoted in *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009, at para 183. See also supra Section 2.

134 There is a lot of literature on the topic of gender and trafficking. See, for example, Sullivan, ‘Trafficking in Women: Feminism and New International Law’ (2003) 5 *International Feminist Journal of Politics* 67.

135 ‘In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women . . . Asking the woman question reveals the ways in which political choice and institutional arrangement contribute to women’s subordination.’ Bartlett, ‘Feminist Legal Methods’ (1990) 103 *Harvard Law Review* 829 at 837 and 843.

136 See also the materials quoted in *Rantsev v Cyprus and Russia* Application No 25965/04, Merits, 7 January 2010, at para 100.

137 Mediterranean Institute of Gender Studies, ‘Mapping the Realities of Trafficking in Women For the Purpose of Sexual Exploitation in Cyprus’, October 2007, at 18, available at: <http://www.medinstgenderstudies.org/wp-content/uploads/migs-trafficking-reportfinal.711.pdf> [last accessed 22 August 2011].

138 Vassiliadou, ‘Women’s Constructions of Women: On Entering the Front Door’ (May 2004) 5 *Journal of International Women’s Studies* 53 at 60. Myria Vassiliadou also relates (at 61) the following story of gender stereotypes in Cyprus: ‘[W]hen I escorted a Russian student to the Immigration Authorities after she had been forced to have sex with her Cypriot guardian, the immigration officer asked me (as I was translating) if the woman had been a virgin

either mothers¹³⁹ or sex symbols.¹⁴⁰ These gender stereotypes exist at the highest level of Cypriot society and authority: the former Minister of Justice of Cyprus purportedly said in 2003 that '[t]he dream of 45% of women is to become prostitutes.'¹⁴¹ Thus, quite apart from the considerable economic interest that Cyprus has in the sex industry, it becomes apparent why sex trafficking is not seen as a 'real' problem. This is deeply troubling, as the effects of these gender stereotypes are as damaging as they are wide-ranging.¹⁴² Oxana Rantseva did not survive her stay in Cyprus as an 'artiste'.

Which raises the question: what difference would adopting the anti-stereotyping approach make? If the Court manages to uncover the reasons that make women, more than men, vulnerable to sex trafficking, it can be more specific regarding the positive obligations that lay on the States to prevent trafficking, punish the perpetrators and protect the victims.¹⁴³ In other words, these positive obligations can be more narrowly tailored to address the specific needs of the female victims. If the Court neglects the underlying gender stereotypes that affect the supply and demand side of sex trafficking, it is treating the symptoms but not the disease.

To conclude, *Rantsev* sheds light on a number of important issues with regards to the anti-stereotyping approach. Firstly, one might say that this case reminds us of the limits to this approach. *Rantsev* illustrates that gender stereotypes are pernicious not least because they blind us to human rights abuses, but at the same time the facts of the case demonstrate that gender stereotyping is not the supreme and only problem affecting women's position in society. Economic exploitation, for example, is closely linked to gender stereotypes, but should not be conflated with the problem of stereotyping.

before the 'alleged rape'. I asked whether that made any difference to her case and he replied, "most of these common women are asking for it, you see. They are poor and they come here to lure our men. We must make sure they are decent, but they never are."

139 CEDAW Committee, Concluding Comments regarding Cyprus, 30 May 2006, CEDAW/C/CYP/CO/5 at para 17.

140 Mediterranean Institute of Gender Studies, *supra* n 137 at 22.

141 *Ibid.* at 7.

142 Cyprus itself has recognized the harmful effects of these stereotypes in its country report to the CEDAW Committee. In the words of the CEDAW Committee, *supra* n 139 at para 17: "The State party's report recognizes these stereotypes as the major obstacle for the advancement of women in Cyprus and as a root cause of women's disadvantaged position in a number of areas, including the labour market, political and public life, the highest levels of the education system and the media, as well as persistent violence against women, especially within the family."

143 The Mediterranean Institute of Gender Studies (MIGS), *supra* n 137 at 6, describes these reasons as follows: "Several factors make women more vulnerable than men to being trafficked. MIGS considers the persistent gender discrimination and dominant forms of patriarchy in both countries of origin and destination to be the most important ones. Relating to this, other factors include the feminization of poverty . . . , gender inequality and lack of access to the labour market, lack of education and professional opportunities in the country of origin . . . , and demand for sexual services in the destination countries."

Society has a powerful interest in exploiting women, as witnessed by the decade's long resistance to the plans to change the Cypriot artiste regime. The anti-stereotyping approach is an attempt at transforming the *status quo*, but is no cure-all. It bears that repeating that we need a holistic approach to gender equality. Secondly, *Rantsev* makes clear that in cases that do not concern direct discrimination, gender stereotypes are often implicit. Gender stereotypes played a role in *Rantsev* not so much at the level of justifications but at the level of motives, and while justifications are explicit by definition, motives often remain hidden from view. Therefore, uncovering gender stereotypes requires an active stand by the Court. This is a lot to ask, especially considering the Court's workload, but in cases such as this, where a large group of women is systematically exploited, the Court should do no less.

C. The Advantages of an Anti-Stereotyping Approach in Other Gender Cases

Above I have described the application of an anti-stereotyping approach vis-à-vis two case studies. In what other types of gender cases could my anti-stereotyping approach provide purchase? Although I do not have the requisite space here for a detailed analysis of more case law, I wish to describe two types of cases that would benefit in particular from the approach suggested by this article. The first strand of cases involves women from sexual, cultural and religious minority backgrounds. In recent years, the Court has been called upon to judge on a wide array of issues that fall under the umbrella of gender and diversity: whether a single lesbian mother should be allowed to adopt a child (*E.B. v France*¹⁴⁴) whether Muslim women should be able to wear a headscarf in state educational institutions if they so chose (*Dahlab v Switzerland*¹⁴⁵ and *Leyla Şahin v Turkey*¹⁴⁶), and whether forced sterilisation of Roma women constitutes discrimination (*V.C. v Slovakia*¹⁴⁷ and *I.G., M.K. and R.H. v Slovakia*¹⁴⁸), are but a few examples. These are complex cases in which the judges of the Court face the challenge to move beyond their own prejudices about 'the other' as well as beyond the traditional principles of discrimination law. Many commentators are of the opinion that the Court has failed herein.¹⁴⁹ If the Court were to view these cases through an anti-stereotyping

144 47 EHRR 21.

145 2001-V.

146 2005-XI; 41 EHRR 8.

147 Application No 18968/07, Admissibility, 16 June 2009.

148 Application No 15966/04, Admissibility, 22 September 2009.

149 There is a vast amount of critical literature on the Court's treatment of diversity issues. Thoughtful commentary includes Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge: Cambridge University Press, 2006) and Ringelheim *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Brussels: Bruylant, 2006)

lens, what would surface during the first phase of the analysis—‘naming’ stereotypes—is the intersectionality of these discrimination cases: they all concern discrimination on the ground of gender in combination with some other identity trait (sexual orientation, religion or ethnicity). At issue in the examples that I just mentioned are what Cook and Cusack term ‘compounded stereotypes’, which means ‘gender stereotypes that interact with other stereotypes, which ascribe attributes, characteristics or roles to different subgroups of women.’¹⁵⁰ Thus in *E.B.* the stereotype that lesbian women cannot be good mothers plays a role;¹⁵¹ in *Dahlab* and *Leyla Şahin* the stereotype that Muslim women who wear headscarves are victims of oppression;¹⁵² and in *V.C.* and *I.G., M.K. and R.H.* the stereotype that Roma women are not good mothers.¹⁵³ Recognition of the harm that these compounded stereotypes cause, would lead to a different kind of judicial discourse that goes to the core of the problem of structural gender inequality.

Another area of jurisprudence that could benefit from my anti-stereotyping approach is formed of cases that revolve around State regulations which are effectively stereotypes translated into law. Emblematic are the many cases wherein the Court is confronted with allegations of sex discrimination with respect to the distribution of social benefits. Apart from *Konstantin Markin*, examples from the Strasbourg Court’s docket include *Petrovic v Austria*,¹⁵⁴ *Wessels-Bergervoet v Netherlands*,¹⁵⁵ *Willis v United Kingdom*,¹⁵⁶ *Stec v United*

150 Cook and Cusack, *supra* n 8 at 25, see also 29–31.

151 *Ibid.* at 31. This stereotype is implicitly relied on by the French authorities when they consider that the applicant’s ‘lifestyle’ (meaning her homosexuality) disqualified her from adopting. *E.B. v France* 47 EHRR 21, at para 10 and 24–5. The Grand Chamber ruled that this constituted discrimination on the ground of the applicant’s sexual orientation, without, however, making the compounded stereotype explicit.

152 In these cases, the stereotype is propagated by the Court itself. See text accompanying *supra* n 5. See also Evans, *supra* n 5. Evans notes (at 72) that, paradoxically, we also see the stereotype of Muslim women as aggressor: ‘the Muslim woman as fundamentalist who forces values onto the unwilling and undefended.’

153 This stereotype is the implicit basis of the domestic authorities’ actions. It is related to other stereotypes such as ‘the Roma want to have many children only because they receive social benefits’. See Commissioner for Human Rights, Recommendation concerning certain aspects of law and practice relating to sterilisation of women in the Slovak Republic, 17 October 2003, CommDH(2003)12, at para 12 (also for more background on the widespread practice of forced sterilizing of Roma women in Slovakia).

154 1998-II; 33 EHRR 307 (male applicant complained that parental leave allowances were only available to mothers; the Court found no violation of the Convention).

155 2002-IV; 38 EHRR 793 (woman complained of a reduction in her pension because her pension was linked to her husband’s insurance status, while the reverse was not the case; the Court found a violation of Article 14 in conjunction with Article 1 Protocol No 1).

156 2002-IV; 35 EHRR 547 (man complained of the non-availability of a widow’s payment and a widowed mother’s allowance for a man; the Court found a violation of Article 14 in conjunction with Article 1 Protocol 1. With respect to the man’s complaint that he was denied a widow’s pension, the Court did not find a violation of the Convention).

Kingdom,¹⁵⁷ *Runkee and White v United Kingdom*,¹⁵⁸ and *Andrle v Czech Republic*.¹⁵⁹ In these cases the Court typically faces the dilemma of what kind of margin of appreciation it should afford to Contracting States: the subject matter (social benefits) warrants a wide margin, but distinctions on the ground of sex demand strict scrutiny and therefore a narrow margin. Application of the anti-stereotyping approach could bring recourse, as in one way or another all these cases turn on the woman-homemaker/man-breadwinner stereotype. Unfortunately, the Court has consistently failed to take such a perspective into account, resulting in an uneven application of the margin of appreciation; as well as an one-dimensional perspective of the problem (as the Court often only looks at the case from the perspective of the men/husbands, but fails to see the wider implications that these social benefits regulations have for women¹⁶⁰); and, finally, a failure to address the urgency of underlying discriminatory patterns, as equality is solely viewed as sameness (formal equality).¹⁶¹ In the most recent of this string of cases, for example, the Court observed: ‘changes in the perceptions of the roles of the sexes are by their nature gradual...the State cannot be criticized...for not having pushed for complete equalisation at a faster pace.’¹⁶² With this kind of reasoning, the Court legitimises harmful gender stereotypes and shies away from fostering rapid transformation. I would be keen to see what dividend an anti-stereotyping approach brings to this area of the Court’s case law.

6. Conclusion

The judicial approach to equality should be rethought if we want to tackle the structural causes of gender discrimination and oppression. This article has argued that stereotypes are at the heart of the structural problem of gender inequality, and that the European Court of Human Rights should view equality as a process of transformation in order to address this structural problem. Accordingly, this article is a first effort at creating an anti-stereotyping

157 2006-VI; 43 EHRR 1017 (two women and two men challenged the rule that the cut-off date to their reduced earnings allowance (to which they were entitled after suffering work-related injuries) was linked to the pension date which was 60 years for women and 65 years for men; the Grand Chamber found no violation of the Convention).

158 Application No 42949/98, Merits, 10 May 2007 (two men complained of the non-availability of a widow’s pension for men; the Court found no violation of the Convention. The men also complained about not receiving a widow’s payment; the Court, following its ruling in *Willis*, did find a violation of the Convention on this count).

159 Application No 6268/08, Merits, 17 February 2011. For a brief discussion of this case, see the text accompanying footnotes 73–75.

160 Cf Cousins, ‘Widow’s pension and gender equality: *Runkee and White v United Kingdom*’ (2008) 15 *Journal of Social Security Law* 90 at 96.

161 See, for example, Cousins, *supra* n 160; and Radacic, ‘Gender Equality jurisprudence of the European Court of Human Rights’ (2008) 19 *The European Journal of International Law* 841.

162 *Andrle v Czech Republic* Application No 6268/08, Merits, 17 February 2011, at para 58.

approach. This analysis is an attempt at radicalism; radical in the sense that it seeks to address the roots of the problem of gender discrimination.

A likely objection will be that an anti-stereotyping approach is incompatible with the valid desire of the Court not to lose legitimacy by appearing 'activistic'. The Court—so the argument runs—cannot afford to be too far ahead of its time. The Court's political legitimacy depends upon the manner in which the Court copes with the specific circumstances in which it operates, especially with its supranational position.¹⁶³ I acknowledge that, since stereotypes sometimes correspond to deeply held moral or religious beliefs—such as for example the stereotype that women should be mothers—an anti-stereotyping approach can run afoul of Member States' wishes in sensitive cases, such as the ones that concern abortion or same-sex marriage. In those kinds of cases the Court, mindful of its supranational position, usually prefers to show constraint, rather than oblige Member States down a path they are not ready for.¹⁶⁴

How, then, can the Court uphold an anti-stereotyping approach within a jurisdiction that is characterised by a diversity of legal systems and social traditions, without being seen as compromising its legitimacy? I want to suggest two answers to that question, which are related to each other. To start with, my anti-stereotyping approach can initially be seen as a procedural instrument. This does not entail letting go of the fundamental premise of this approach—namely that stereotypes are both cause and manifestation of the structural inequality that non-dominant groups suffer from, and that, therefore, States have an obligation to combat stereotypes. Rather, it means that my approach focuses primarily on the adjudicative process itself (the reasoning of the Court), and only secondarily on the outcome. At its most basic, my article is a plea that the Court should be continuously critical; the Court should be interrogative of the underlying social patterns and beliefs that have spawned the cases lodged before it. This brings me to my second point. I argue that the Court should problematise the 'naturalness' of stereotypes and I also argue for reason-forcing conversations: this means that the Court should require

163 Following Mitchell Lasser, Janneke Gerards calls those specific circumstances 'the problematic' of the Court. The problematic of the Court includes (among other factors) its supranational position, its case-load and the differences between the State Parties within the Council of Europe. Gerards, 'Judicial Deliberations in the European Court of Human Rights', in Huls, Adams and Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (The Hague: T.M.C. Asser Institute, 2008) 407 at 409–18.

164 Examples include *Schalk and Kopf v Austria* Application No 30141/04, Merits, 24 June 2010, at para 62: 'marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society' (concerning same-sex marriage); and *A, B and C v Ireland* Application No 25579/05, Merits, 16 December 2010, at para 241: 'the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life... exceeds the margin of appreciation accorded in that respect to the Irish State'.

domestic authorities to justify their actions and regulations on some other grounds than easy but harmful stereotypes.¹⁶⁵ The Court's active participation in such reason-forcing conversations will surely add to its legitimacy rather than erode it, as by adopting this approach the Court fosters transparency and accountability.

In conclusion, perhaps the most challenging question of all: is this not expecting too much from law? Can we expect our judges to change the *status quo*? For sure, eradicating the roots of gender discrimination is a project that is larger than law. Adopting an anti-stereotyping approach will not work miracles, but it will bring the judges of the European Court of Human Rights to the core of the problem of persisting gender inequality and discrimination. Through dismantling gender stereotypes, the Court can promote new and more equal lifeworlds.

165 See *supra* Section 4.C(iv).