

Unmasking Gender Discrimination At The European Court Of Human Rights: Why Sexual Violence Jurisprudence Must Evolve

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Abstract

*This article examines how the European Court of Human Rights (ECtHR) addresses violence against women as a form of sex- and gender-based discrimination under Article 14 of the European Convention on Human Rights. Drawing on the evolving standards of the CEDAW Committee and the Council of Europe's Istanbul Convention, the paper situates violence against women - including domestic violence and sexual violence - within a structural discrimination framework. It highlights the Court's significant progress in recognising domestic violence as a form of discrimination, as demonstrated in landmark cases such as *Opuz v. Turkey*, *Eremia*, *Tkheldidze*, and *A and B v. Georgia*. However, the analysis reveals a persistent gap in the Court's treatment of rape and sexual violence, where it has yet to apply the same standards of investigating sexist and misogynistic motives that it requires in cases involving racist or homophobic hate crimes. Drawing on feminist legal scholarship, the paper argues that unmasking sexist motives in rape cases is essential to dismantling the patriarchal norms that hinder justice for sexual violence. The article calls for the ECtHR to align its anti-discrimination jurisprudence and require states to investigate and address the discriminatory motives of the perpetrators of rape and sexual violence cases, like it has done in relation to cases involving racist and homophobic violence. By doing so, the ECtHR can better fulfil its role in securing women's substantive equality and freedom from violence in practice.*

Keywords: *Discrimination, Gender-based violence, Sexist motives, Sexual violence.*

I. INTRODUCTION

Violence against women is widely recognized under international human rights law as a manifestation of sex- and gender-based discrimination. The Committee on the Elimination of Discrimination against Women (CEDAW) has long affirmed that gender-based violence constitutes a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. In its General Recommendation No. 19 (1992), CEDAW explicitly recognized that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men" (CEDAW GR No. 19, para. 1). This interpretation was reaffirmed and expanded in General Recommendation No. 35 (2017), which clarifies that States parties have a due diligence obligation to prevent, investigate, and punish acts of gender-based violence perpetrated by both State and non-State actors (CEDAW GR No. 35, paras. 9–10).

Similarly, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) reinforces this understanding by defining "violence against women" as "a violation of human rights and a form of discrimination against women" (Istanbul Convention, Art. 3(a)). The Convention obliges States to pursue comprehensive measures to prevent violence, protect victims, and prosecute perpetrators, acknowledging the structural nature of such violence and its roots in historically unequal power relations between women and men (Istanbul Convention, Preamble; Explanatory Report, para. 44).

Feminist legal scholars have consistently argued that violence against women must not be viewed solely as isolated or interpersonal incidents but rather as a systemic phenomenon that functions to maintain and reproduce gender hierarchies and patriarchal social orders. Catharine A. MacKinnon, for example, describes sexual violence as a crime of inequality and is a practice through which male dominance is maintained and reinforced in everyday life (MacKinnon, 2006, p. 14). Sandra Fredman similarly underscores that gender-based violence reflects the structural subordination of women and calls for an intersectional approach to understand how different forms of disadvantage compound the risk of violence (Fredman, 2011, pp. 178–180).

This recognition of violence against women as structural discrimination is now firmly embedded in international and regional legal frameworks, as well as in the evolving jurisprudence of human rights

bodies, which increasingly emphasize the State's due diligence obligations to address the underlying social and cultural patterns that perpetuate such violence.

II. Recognizing Gender-Based Discrimination in Domestic Violence Cases

Domestic violence is now widely recognized under international human rights law as a manifestation of gender-based discrimination. The European Court of Human Rights (ECtHR) has affirmed that when States fail to prevent and respond effectively to domestic violence, they perpetuate structural inequality and violate women's fundamental rights to life, dignity, and equal protection under the law. Through landmark cases, the Court has made clear that domestic violence is not a private matter but a systemic issue rooted in harmful stereotypes and power imbalances that States have a positive obligation to address. The ECtHR landmark ruling in *Opuz v. Turkey* (2009) was the first to find that state failure to prevent domestic violence amounted to a violation of Article 14 (non-discrimination) of the European Convention on Human Rights (ECHR), in conjunction with Article 2 (right to life) and Article 3 (prohibition of inhuman and degrading treatment). This was followed by key cases such as *Eremia and Others v. Moldova* (2013), *Talpis v. Italy* (2017) and *Volodina v. Russia* (2019), where the ECtHR found the violation of the right of prohibition of discrimination (Article 14) in relation to various types of violence against women. In *Eremia*, for example, the ECtHR found a violation of Article 14 in conjunction with Article 3 of ECHR, emphasizing that the authorities' passivity despite repeated acts of violence demonstrated a discriminatory attitude toward the applicant as a woman (para. 86-90).

The established scholarship highlights how international human rights instruments have strengthened the understanding that domestic violence is not simply private or isolated incident, but a human rights violation rooted in gender-based discrimination. As Holtmaat and Naber (2011, pp. 233-235) observe, the CEDAW Committee's interpretation of violence against women as structural discrimination rooted in cultural patterns and stereotypes requires States to tackle the systemic inequalities that enable such violence. This reinforces the idea that domestic violence must be treated as a human rights violation requiring proactive, structural measures. Fredman (2011) observes that the ECtHR's approach in *Opuz* reflects an evolving interpretation of substantive equality, where States are required to address both the outcomes and the structural causes of violence (Fredman, 2011, pp. 185-187). Additionally, feminist scholars such as McQuigg emphasize that while *Opuz* was groundbreaking, its principles must be consistently applied across all Council of Europe states, underscoring the need for more robust measures to ensure states fulfill their positive obligations to address gender-based violence as discrimination (McQuigg, 2017, pp. 88-90).

The principle that the failure of the authorities to prevent and address domestic violence against women constitutes discrimination has been reaffirmed and further expanded in cases such as *Tkheldidze v. Georgia* (2021) and *A and B v. Georgia* (2022). In these cases, the ECtHR not only acknowledged that gender-based discrimination in the state's ineffective measures to prevent domestic violence and killings as a result of domestic violence constituted the violation of Article 14 (prohibition of discrimination), but also the failure of the State to investigate discriminatory motive of the police that failed to respond to domestic violence claims of the victims, constituted discrimination.

More specifically, in *Tkheldidze*, the ECtHR emphasized the "pressing need" to investigate whether police inaction stemmed from gender-based discrimination and bias (para. 60). In *A and B v. Georgia*, the ECtHR found that the Georgian authorities failed to properly investigate whether the police response and inaction were motivated by gender-based discrimination. The Court noted the "pressing need to conduct a meaningful investigation into the response of law enforcement and their inaction, which might have been motivated by gender-based discrimination" (para. 44). Furthermore, it stressed that the criminal trial of the perpetrator did not examine whether the murder itself was driven by gender bias (para. 45), nor, during the civil case, it was examined whether police officers may have turned a blind eye to the complaints of domestic violence victim because they shared the same discriminatory attitudes (para. 45). Taken together, these developments show how the ECtHR has advanced the recognition of domestic violence as a form of discrimination. Crucially, in *A and B v. Georgia*, the Court went further by underlining that States must not only protect victims but also meaningfully investigate whether police inaction and even the perpetrator's motives were shaped by gender bias. By stressing the "pressing need" to examine whether the murder was driven by discriminatory attitudes and whether law enforcement's failure to act reflected the same bias, the Court affirmed that tackling domestic violence requires exposing and addressing its deep-rooted discriminatory motives. This marks an important step in ensuring that States fulfil their heightened duty to prevent and respond to gender-based violence as a violation of substantive equality.

III. The Jurisprudential Gap in Sexual Violence Cases

Despite these advancements in domestic violence jurisprudence described above, the ECtHR has not extended the same discrimination framework to cases of sexual violence. To date, the Court has not held that a state's failure to prevent or adequately respond to rape or other forms of sexual violence constitutes a violation of Article 14 (prohibition of discrimination). This gap contrasts sharply with its treatment of discriminatory motives in other contexts.

For instance, in cases involving racist or homophobic motives- such as *Nachova and Others v. Bulgaria* (2005, para. 160-161; 168), *B.S. v. Spain* (2012, para. 58-59), and *Identoba v. Georgia* (2015, para. 77-78) - the Court has held that failure to investigate discriminatory intent can amount to a violation of Article 14. In *Nachova*, the Grand Chamber made clear that where there is any suspicion that racial prejudice played a role in an act of violence, the State's procedural duty under Article 2 must be fulfilled without discrimination in line with Article 14. The Court stressed that authorities have an additional duty to take all reasonable steps to uncover whether ethnic hatred or prejudice motivated the violence, recognising that racially induced violence is especially destructive of fundamental rights (para. 160-161). Failing to distinguish such motives risks unjustified equal treatment of inherently different cases, undermining both victims' rights and broader societal trust in law enforcement.

Similarly, in *B.S. v. Spain*, the Court reiterated that this duty applies under Article 3 when allegations of degrading treatment are made. Even where evidence of racial motivation is difficult to prove, States must do everything reasonable to collect and secure evidence, investigate suspicious facts, and provide fully reasoned and impartial decisions (para. 58). This "best endeavours" obligation is not absolute but demands that all practical means be used to uncover any possible bias motive.

Finally, in *Identoba*, the Court extended these principles to homophobic violence, finding that Georgian authorities had failed to conduct a meaningful investigation into the homophobic hate speech and physical threats suffered by LGBT demonstrators. The failure to unmask the bias motive meant that hate crimes risked being treated the same as ordinary offences, amounting to official indifference and violating both Article 3 and Article 14. The Court has consistently underscored that proper recognition and investigation of discriminatory motives are essential to fulfilling States' positive obligations and ensuring victims' trust in the justice system.

However, despite these clear standards for investigating racist or homophobic motives, the Court has not made equivalent findings when it comes to sexist or gender-based discriminatory motives, particularly in cases involving sexual violence. As a result, the procedural obligation to unmask and address underlying sexist bias remains underdeveloped in the Court's case law, highlighting a significant gap in the protection against gender-based discrimination under Article 14.

IV. Importance of Recognition of Missed Sexist Motives

Recognizing sexist motives in acts of violence against women is essential to understanding and dismantling the pervasive system of patriarchal violence that sustains gender inequality. Kaufman argues that feminist theorists have long viewed seemingly discrete acts of violence against women as manifestations of a systemic patriarchal order that normalizes and legitimizes male domination (Kaufman, 2023, 511-517). By situating such violence within a broader ideological framework, it becomes clear that individual incidents are not isolated but rather deliberate expressions of a social structure that privileges male power (id. at 520-522).

Despite this, the hate crime paradigm has largely neglected gender-based violence. Dawson underscores that sex/gender-based violence motivated by hatred remains virtually invisible in hate crime laws and empirical research, despite clear parallels to other bias-motivated violence (Dawson, 2025, pp. 2-4, 6). As Dawson shows, this omission stems in part from the historical normalization of male violence against women and the reluctance of legal systems to name misogyny as an explicit bias motive (id. at 7-8).

Walters and Tumath (2014) have previously highlighted how rape, in particular, is shaped by gender hostility but rarely treated as a hate crime. They argue that framing rape as an act of gender-based animus could help confront deeply embedded misogynistic norms that trivialize or excuse sexual violence (Walters & Tumath, p. 563, 568-573). This argument echoes Carney's position that rape is "the paradigmatic hate crime" because it targets women on the basis of an immutable characteristic - their gender - yet is not prosecuted as such (Carney, 2001, pp. 315, 317-318).

The neglect of sexist motives in legal frameworks not only limits accountability but reinforces victim-blaming narratives that focus on women's behavior rather than perpetrators' gendered animus. As

Kaufman (2023, pp. 517–520) notes, the concept of patriarchal violence clarifies that these acts serve a wider ideological purpose: to discipline and subordinate women .

Scholars also draw parallels between sexist motives and other forms of bias recognized in hate crime law. For instance, Jennifer L. Woodson (2008) illustrates how hate crime statutes in the United States have historically expanded to protect victims of race and sexual orientation bias, yet gender remains inconsistently recognized or enforced (Woodson, 9 Geo. J. Gender & L. 543, 550–552). Dawson (2025, pp. 4–6) and Walters & Tumath (2014, p. 573) argue that such inconsistency undermines the core aim of hate crime regulation: to address crimes that create heightened harm and collective fear among targeted communities.

Therefore, recognizing sexist motives is vital for three reasons: first, it reveals the structural and ideological dimensions of gender-based violence; second, it strengthens the legal and policy frameworks that can respond to and prevent such crimes; and third, it shifts cultural and legal focus from blaming victims to holding perpetrators accountable for gender-based hatred. Naming and confronting the sexist motivations behind violence is an indispensable step toward dismantling patriarchal structures and achieving genuine gender equality.

V. CONCLUSION

The recognition of violence against women as a form of sex- and gender-based discrimination is firmly embedded in international and regional human rights law. Instruments such as CEDAW and the Istanbul Convention, reinforced by decades of feminist legal scholarship, establish that gender-based violence is not merely a private or isolated harm but a systemic practice that sustains patriarchal power relations. Responding effectively requires an understanding that such violence is rooted in structural inequalities and must be addressed through a lens of substantive equality.

The ECtHR's evolving case law on domestic violence reflects these principles. Landmark judgments such as *Opuz v. Turkey*, *Eremia, Tkheidze, and A and B v. Georgia* affirms that when States fail to prevent or respond adequately to domestic violence, they perpetuate inequality and violate women's right to non-discrimination under Article 14 of the Convention. Notably, as discussed in this article, in cases like *Tkheidze* and *A and B v. Georgia*, the Court emphasized the "pressing need" to investigate whether state inaction - and even perpetrators' actions - were motivated by gender bias. This signals a growing understanding that gender stereotypes and misogynistic attitudes are not peripheral but central to how violence against women persists.

However, there is a need to extend this progress to sexual violence, including rape. Despite well-established jurisprudence requiring States to investigate bias motives in cases involving racist or homophobic hate crimes – as seen in *Nachova, B.S.* and *Identoba* - the ECtHR has not applied the same standards to cases where there are credible indications that sexist or misogynistic bias motivated acts of sexual violence. Failing to unmask these motives not only conceals the structural nature of such violence but also perpetuates harmful victim-blaming narratives.

Bridging this gap is essential. Recognizing sexist motives in rape and sexual violence cases is not simply about labelling - it is about acknowledging how sexual violence functions as an instrument of structural gender inequality. The Istanbul Convention (Arts. 5 and 6) and CEDAW's General Recommendations Nos. 19 and 35 make clear that States have an obligation to tackle the underlying social and cultural patterns that enable such violence. The obligation to ensure that investigations expose any discriminatory motives should also stem from these requirements.

To close this gap, the ECtHR should:

- Affirm that States' failures to prevent and respond effectively to rape and sexual violence can amount to sex- and gender-based discrimination under Article 14, consistent with the international human rights instruments' well-established principles that gender-based violence is a form of discrimination that severely limits women's enjoyment of rights on a basis of equality.
- Require States to investigate and expose sexist and misogynistic motives in rape and sexual violence cases, applying the same rigorous standards already developed for uncovering racial or homophobic bias in *Nachova, B.S.*, and *Identoba*.

Strategic litigation and sustained feminist advocacy remain essential to push the Court to develop an anti-discrimination jurisprudence that is coherent and genuinely transformative. Only by fully recognising the structural nature of sexual violence - and by requiring States to unmask its sexist roots - can the ECtHR fulfil its mandate to secure women's substantive equality and freedom from violence in practice.

REFERENCES:

- [1] CEDAW Committee, "General Recommendation No. 19: Violence against Women," UN Doc. A/47/38, para. 1, 1992.
- [2] CEDAW Committee, "General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19," UN Doc. CEDAW/C/GC/35, paras. 9-10, 2017.
- [3] Council of Europe, "Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)," Art. 3(a), Preamble; Explanatory Report, para. 44, 2011.
- [4] C. A. MacKinnon, *Are Women Human? And Other International Dialogues*, Cambridge, MA: Harvard Univ. Press, 2006, p. 14.
- [5] S. Fredman, *Discrimination Law*, 2nd ed., Oxford, U.K.: Oxford Univ. Press, 2011, pp. 178-180.
- [6] R. Holtmaat and J. Naber, "Women's Human Rights and Culture: From Deadlock to Dialogue," in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, M. Freeman, C. Chinkin, and B. Rudolf, Eds. Oxford, U.K.: Oxford Univ. Press, 2011, pp. 233-235.
- [7] ECtHR, *Opuz v. Turkey*, App. No. 33401/02, Judgment, June 9, 2009, paras. 185-201.
- [8] ECtHR, *Eremia and Others v. Republic of Moldova*, App. No. 3564/11, Judgment, May 28, 2013, paras. 86-90.
- [9] S. Fredman, *Discrimination Law*, 2nd ed., Oxford, U.K.: Oxford Univ. Press, 2011, pp. 185-187.
- [10] R. McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights*, Abingdon, U.K.: Routledge, 2017, pp. 88-90.
- [11] ECtHR, *Tkheldidze v. Georgia*, App. No. 33056/17, Judgment, July 8, 2021, paras. 60, 71-77.
- [12] ECtHR, *A and B v. Georgia*, App. Nos. 73975/16 and 74031/16, Judgment, Feb. 10, 2022, paras. 44-45.
- [13] ECtHR, *Nachova and Others v. Bulgaria [GC]*, App. Nos. 43577/98 and 43579/98, Judgment, July 6, 2005, paras. 160-161, 168.
- [14] ECtHR, *B.S. v. Spain*, App. No. 47159/08, Judgment, July 24, 2012, paras. 58-59.
- [15] ECtHR, *Identoba and Others v. Georgia*, App. No. 73235/12, Judgment, May 12, 2015, paras. 77-81.
- [16] R. Kaufman, "Patriarchal Violence," *Buffalo Law Rev.*, vol. 71, no. 2, pp. 509-577, 2023.
- [17] M. Dawson, "Considering Sex/Gender-Based Violence as a Form of Hate: The Invisibility of Sex and Gender," *Trauma, Violence, & Abuse*, pp. 1-15, 2025.
- [18] M. A. Walters and J. Tumath, "Gender Hostility, Rape, and the Hate Crime Paradigm," *Modern Law Rev.*, vol. 77, no. 4, pp. 563-596, 2014.
- [19] K. M. Carney, "Rape: The Paradigmatic Hate Crime," *St. John's Law Rev.*, vol. 75, no. 2, pp. 315-356, 2001.
- [20] J. L. Woodson, "Hate Crime Regulation and Challenges," *Georgetown J. Gender & Law*, vol. 9, no. 3, pp. 543-560, 2008.
- [21] M. Segrave and L. Vitis, "Gender, Technology and Violence," *Annu. Rev. Criminol.*, vol. 1, pp. 466-468, 2017.
- [22] ECtHR, *Volodina v. Russia*, App. No. 41261/17, Judgment, July 9, 2019.
- [23] ECtHR, *Talpis v. Italy*, App. No. 41237/14, Judgment, Mar. 2, 2017, paras. 125-129.