5. Russia, domestic violence, and barriers to sex discrimination cases at the European Court of Human Rights, 1998–2021

Valerie Sperling and Lisa McIntosh Sundstrom[1]

5.1 INTRODUCTION

Women in Council of Europe (CoE) countries face pervasive discrimination.[2] Encountering national police and judges who often refuse to recognize such discrimination, many rights activists have exhausted their domestic appeals and turned to their last hope: the European Court of Human Rights (ECtHR, or the Court). However, between 1998, when the ECtHR started functioning as the sole full-time organ of the European Convention on Human Rights (ECHR),[3] and 9 July 2021, the ECtHR found only 43 violations of Article 14 of the ECHR entailing sex discrimination. Our study of gender discrimination cases in Russian and Turkish courts, and at the ECtHR from those countries, suggests that there are numerous obstacles to bringing gender discrimination cases to court, both domestically and internationally, and identifies a con-

[1] The authors thank the University of British Columbia, the Francis A. Harrington Public Affairs Fund at Clark University, and the Social Sciences and Humanities Research Council of Canada (Insight Grant #435-2013-0880) for supporting travel costs and research assistance associated with this project. We thank Lukas Pomerville for research assistance, and the editors of this volume for their constructive contributions to the chapter.

[2] As also acknowledged by the CoE's Committee of Ministers in the preamble of Recommendation CM/Rec(2019)1 on preventing and combating sexism: https://rm.coe.int/cm-rec-2019-1-on-preventing-and-combating-sexism/168094d894.

[3] See Protocol 11 to the Convention: https://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf.

stellation of factors that have made rare legal victories possible in this area.[4] In this chapter, we examine the barriers confronted by those who have used national and international law to fight domestic violence as a form of gender discrimination in Russia. We examine domestic violence cases in particular, as this is the area of sex-based discrimination in which the Court has the best-established case law. For its part, Russia constitutes an illuminating case study, as it was a site of increasing public contestation over domestic violence law during the decade before Russia's membership in the CoE came to an end. Below, we briefly review the ECtHR's judgments on gender discrimination cases from Russia and on domestic violence cases in general, and then elaborate on the Russian domestic and international factors that account for both the success and failure of domestic violence cases at the ECtHR.

5.2 ECTHR JUDGMENTS ON RUSSIAN SEX DISCRIMINATION CASES

Russia—a member of the CoE until its expulsion in March 2022, following Russia's full-scale invasion of Ukraine—was not the only CoE country to exhibit significant gender inequality, but it is one that failed to generate many ECtHR cases on that basis. This is not for lack of citizen interest in submitting applications to the Court. Russia ratified the ECHR in 1998, and when it ceased to be party to the ECHR on 16 September 2022, 17,450 applications remained pending to be decided by the Court. Despite Russia's exit from the CoE and the Convention, the Court continued to accept eligible Russian applications regarding ECHR violations that took place up to 16 September 2022 and will continue to rule on them until all applications have been decided.[5]

Very few Russian cases have dealt with gender discrimination. By mid-2021, the ECtHR had issued judgments on only six sex discrimination cases from Russian applicants, and the overall verdict was mixed, with three findings of Article 14 violations and three rejections of Article 14 claims. One striking fact, however, is that five of these six judgments concerned the violation of a man's rights, not a woman's. *Konstantin Markin v. Russia*,[6] finding violations of both Article 8 (right to enjoyment of private life) and Article 14, set an

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[4] McIntosh Sundstrom et al. (2019).

[5] Council of Europe, Russia ceases to be party to the European Convention on Human Rights (*Council of Europe Newsroom*, 16 September 2022) https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights accessed 14 May 2023.

[6] *Konstantin Markin v. Russia*, ECtHR, Application No. 30078/06, 22 March 2012.

important precedent for all Member States regarding equal parental leave for men in the military. In July 2021, *Gruba and Others v. Russia* found similar forms of discrimination against male employees of various local departments of the Russian Ministry of the Interior.[7] *Khamtokhu and Aksenchik v. Russia*[8] addressed sentencing guidelines that permitted life imprisonment only for men, claiming violations of Articles 5 and 14, with the ECtHR disagreeing that Article 14 had been violated. Two additional child custody cases from male applicants unsuccessfully claimed violations of Article 14 in conjunction with Article 8: *Leonov v. Russia*,[9] which claimed a Russian judge's discriminatory preference for placing young children exclusively with their mothers; and *Petrov and X. v. Russia*,[10] in which the applicant, seeking physical custody of a child, similarly argued that his rights had been violated in the Russian domestic court process. It was not until July 2019, more than 20 years after Russia ratified the ECHR, that the Court issued its first judgment on discrimination against women in that country. This was a ground-breaking judgment in a domestic violence case, *Volodina v. Russia*,[11] on which we elaborate below. Subsequently, in a 2021 judgment joining four applicants' cases, *Tunikova and Others v. Russia*,[12] the Court made a similar ruling finding violations of Articles 3 and 14.

5.3 DOMESTIC VIOLENCE CASES BEFORE THE ECTHR

Given the widespread popularity of making claims to the ECtHR from Russia, and despite the ongoing prevalence of gender-based discrimination in that country, the relative paucity of gender discrimination cases that were brought successfully from Russia to the Court may seem puzzling. However, there are a variety of reasons why so few Russian gender discrimination cases emerged at the ECtHR. These include domestic and international barriers to activists, lawyers, and regular citizens recognizing gender-based discrimination as such or taking it seriously. Additionally, there are considerable psychological

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[7] *Gruba and Others v. Russia*, ECtHR, Application Nos. 66180/09, 30771/11, 50089/11, 22165/12, 6 July 2021.

[8] *Khamtokhu and Aksenchik v. Russia*, ECtHR, Application Nos. 60367/08 and 961/11, 24 January 2017.

[9] *Leonov v. Russia*, ECtHR, Application No. 77180/11, 10 April 2018.

[10] *Petrov and X. v. Russia*, ECtHR, Application No. 23608/16, 4 February 2019.

[11] *Volodina v. Russia*, ECtHR, Application No. 41261/17, 4 November 2019.

[12] *Tunikova and Others v. Russia*, ECtHR, Application Nos. 55974/16, 53118/17, 27484/18, and 28011/19, 14 December 2021.

and material costs of going public with a case, especially, but not only, when physical or sexual violence is involved. Those who do bring a case confront a discriminatory law enforcement and legal system and a labyrinthine and lengthy process of international adjudication.[13] Examining cases of domestic violence helps bring these obstacles into focus.

ECtHR case law clearly demonstrates that domestic violence, if not taken seriously by national police or courts, constitutes a violation of human rights under the ECHR. If police remain inactive after a woman attempts to file charges, especially if she is subsequently killed or badly hurt, that official negligence would constitute a violation of Articles 2, 3, or 8, and a claim could be made that the violation occurred in conjunction with Article 14 on discrimination. While a case associated with domestic violence was brought to the ECtHR as early as 1979 (*Airey v. Ireland*),[14] and others, such as *Kontrová v. Slovakia*[15] and *Bevacqua and S. v. Bulgaria*,[16] have raised the issue without claiming Article 14 with regard to sex discrimination,[17] it was the landmark case *Opuz v. Turkey*[18] that appears to have turned the tide on this subject.[19]

Opuz concerned repeated domestic violence against the female applicant, Nahide Opuz, as well as the eventual murder of her mother by Opuz's husband, despite Ms. Opuz's repeated complaints and calls to the police for help. The ECtHR concluded that Articles 2 and 3 had been violated because the Turkish State had not done enough to protect Opuz and her mother. The Court additionally found that Article 14 had been violated because men were unlikely to be the victims of such attacks—and if they were, they would not encounter the same lack of response from law enforcement that Opuz had experienced. The *Opuz* Decision was followed over the next ten years by other judgments from applicants claiming Article 14 violations in addition to Articles 2 and/or 3, in which the Court found that Article 14 had been violated, including: three

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13 McIntosh Sundstrom et al. (2019).

14 Council of Europe. 2015. *Equal access to justice in the case-law on violence against women before the European Court of Human Rights.* https://edoc.coe.int/en/gender-equality/6690-equal-access-to-justice-in-the-case-law-on-violence-against-women-before-the-european-court-of-human-rights.html accessed 2 April 2024, p. 16.

15 *Kontrová v. Slovakia*, ECtHR, Application No. 7510/04, 24 September 2007.

16 *Bevacqua and S. v. Bulgaria*, ECtHR, Application No. 71127/01, 12 June 2008.

17 CoE (2015) (n 14), p. 8.

18 *Opuz v. Turkey*, ECtHR, Application No. 33401/02, 9 September 2009.

19 See more in Işıl Karakaş, Chapter 3 in this book.

Moldovan cases: *Eremia and Others v. the Republic of Moldova*;[20] *Mudric v. the Republic of Moldova*;[21] *T.M. and C.M. v. the Republic of Moldova*;[22] two Turkish cases: *M.G. v. Turkey*[23] and *Halime Kiliç v. Turkey*;[24] an Italian case: *Talpis v. Italy*;[25] a Romanian case: *Bălşan v. Romania*;[26] and a Russian case: *Volodina v. Russia*.[27]

Volodina v. Russia[28] fell within this decade-long pattern of ECtHR case law on violence against women. Volodina's application described repeated instances of domestic violence in which she had been beaten, kidnapped, and assaulted multiple times by her ex-boyfriend. She had made at least seven reports to police about this abuse, to no avail. Given this failure on the part of law enforcement, Volodina's application claimed a violation of Article 14 (for sex-based discrimination) in conjunction with Article 3. The ECtHR deemed Volodina's complaint admissible and communicated it to the Russian government in January 2018.[29] Given the striking degree of police inaction that characterized the *Volodina* case, the absence of a Russian law on domestic violence, and Russia's 2017 partial decriminalization of first-time battery, the ECtHR found violations of Articles 3 and 14. A later case filed by the same applicant (*Volodina v. Russia (no. 2)*) complained that the Russian State had failed to protect her against continuing cyber-harassment from her former partner, and had failed to investigate these crimes effectively. However, in that second case, the applicant only claimed, and the Court only found, a violation of Article 8, without connection to Article 14.[30]

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[20] *Eremia and Others v. the Republic of Moldova*, ECtHR, Application No. 3564/11, 28 August 2013.

[21] *Mudric v. the Republic of Moldova*, ECtHR, Application No. 74839/10, 16 July 2013.

[22] *T.M. and C.M. v. the Republic of Moldova*, ECtHR, Application No. 26608/11, 28 April 2014.

[23] *M.G. v. Turkey,* ECtHR, Application No. 646/10, 22 June 2016.

[24] *Halime Kiliç v. Turkey*, ECtHR, Application No. 63034/11, 28 September 2016.

[25] *Talpis v. Italy*, ECtHR, Application No. 41237/14, 18 September 2017.

[26] *Bălşan v. Romania*, ECtHR, Application No. 49645/09, 23 August 2017.

[27] *Volodina v. Russia*, ECtHR, Application No. 41261/17, 4 November 2019.

[28] *Ibid.*

[29] Emails from Vanessa Kogan to authors (29 June 2018 and 12 July 2018).

[30] *Volodina v. Russia (No. 2)*, ECtHR, Application No. 40419/19, 14 September 2021.

5.4 BARRIERS TO DOMESTIC VIOLENCE CASES IN RUSSIA

Although domestic violence is widespread in Russia, a range of obstacles suppresses the number of cases that might emerge in local courts before making their way to the ECtHR after exhausting the applicants' domestic remedies—not only in Russia but in many CoE States.[31] First, as in most countries, women are reluctant to go to the police with cases of violence committed against them. A 2011 study by the Russian Federal Statistics Service and the Russian Ministry of Health revealed that 20 percent of Russian women had been subjected to physical violence, and that although 74 percent of them had told someone about the incident, only 10 percent of that number had taken their complaint to the police.[32] This recalcitrance may reflect the fact that some police do not take domestic violence complaints against women seriously. A Moscow-based anti-violence activist reported in 2012 that police could respond dismissively to domestic violence complaints, remarking, "Come see us after he's *killed* you".[33] Indeed, in July 2019, a Russian female police officer was jailed for responding in that fashion to a phone call in 2016 from a woman reporting her ex-boyfriend's ongoing abuse. In brushing off the caller's complaint, the police officer apparently said, "if he kills you, we'll come and report the corpse, don't worry". The victim, Yana Savchuk, was killed less than an hour later.[34]

Several dramatic cases of domestic violence in Russia increased public awareness of the issue in the five years before Russia's expulsion from the CoE. These include: the murder and dismemberment of Anastasia Yeshchenko, a St. Petersburg student, by her professor in 2019; the State's prosecution of the teenaged Khachaturian sisters who killed their father in 2018 after enduring years of his abuse; and the grisly attack on Margarita Gracheva by her husband, who cut off her hands with an ax in 2017. These cases drew public and media attention to law enforcement's failures to prevent and effectively

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31 CoE (2015) (n 14).

32 *Volodina v. Russia*, ECtHR, Application No. 41261/17, 4 November 2019, para. 42.

33 Sperling (2015), p. 183.

34 Russian cop jailed for ignoring murdered domestic violence victim's pleas. *The Moscow Times* (Moscow, 12 July 2019) www.themoscowtimes.com/2019/07/12/russian-cop-jailed-for-ignoring-murdered-domestic-violence-victims-pleas-a66394 accessed 27 July 2021.

counter domestic violence—a sad fact that could, understandably, discourage victims from turning to the police for help.[35]

Other aspects of the Russian legal system may also explain the low number of domestic violence cases that reach the local courts. For example, non-fatal domestic violence cases in Russia are generally prosecuted in a procedure called "private prosecution", where the individual victim initiates the legal proceedings, collects the evidence, and presents it before a judge, interviews the witnesses, and so on. They often need to prosecute these cases while still living with their abuser, since "restraining orders" mandating that the abuser stay away from the victim have not been established by law.[36] Lawyers have also thus far failed to get Russian courts to apply witness protection-type programs to domestic violence victims.[37] The lion's share of private prosecutions on domestic violence ends with the case being dropped.[38]

While these obstacles can explain the lack of domestic violence cases brought by women from the wider population, it is unclear why we have not historically seen Russian women's rights activists strategically promoting more court cases before the ECtHR. One of our key findings in that regard is that there has been considerable separation in Russia between human rights organizations and feminist organizations, and that this plays an important role

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[35] Andrew Higgins, Russian professor, found with bag of severed arms, admits he killed student. *The New York Times* (New York, 11 November 2019) www.nytimes.com/2019/11/11/world/europe/russia-professor-napoleon-murder.html accessed 27 July 2021; Russia domestic abuse: My husband chopped off my hands. *BBC* (London, 15 November 2018) www.bbc.com/news/av/world-europe-46213534/russia-domestic-abuse-my-husband-chopped-off-my-hand accessed 27 July 2021; "It Was Their Lives or His" leading women's rights Attorney Mari Davtyan explains the domestic violence case that's bringing Russians out into the Streets. *Meduza* (Riga, 26 June 2019) https://meduza.io/en/feature/2019/06/27/it-was-their-lives-or-his accessed 27 July 2021.

[36] Elisabeth Duban, Mari Davtyan, and Valentina Frolova. 2020. Council of Europe. *Research on preventing and combating violence against women and domestic violence including in situations of social disadvantage in the Russian Federation*. https://rm.coe.int/publication-research-on-vaw-and-dv-in-situations-of-social-disavantage/16809e4a04 accessed 2 April 2024, pp. 34–5. See also Johnson (2009), pp. 30–1; ANNA National Centre for the Prevention of Violence. Violence against Women in the Russian Federation: Alternative Report to the United Nations Committee on the Elimination of Discrimination against Women, 46th Session, Examination of the 6th and 7th Reports Submitted by the Russian Federation. United Nations. 2010. https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/annancpv_russianfederation46.pdf accessed 2 April 2024.

[37] McIntosh Sundstrom et al. (2019), p. 53.

[38] ANNA (2010) (n 36), p. 11.

in hindering the emergence of gender discrimination case applications—on domestic violence or otherwise—from women to the ECtHR. In Russia, human rights groups receive nearly all the training on how to bring cases to court, both domestically and internationally, and also conduct the bulk of the country's training on this subject, doing so exclusively for the activists and lawyers in their own networks. This "network problem" tends to exclude lawyers and activists working on women's rights from training offered to human rights organizations or information sessions on the ECtHR. By the same token, feminist groups lack the requisite expertise in ECtHR litigation to successfully pursue cases at the Court.[39] In 2014, the few lawyers we interviewed in Russia who had received training on taking cases of gender discrimination to court had almost exclusively received that training abroad. For instance, two Russian feminist lawyers (one in Moscow and one in St. Petersburg) attended a women's human rights institute in Bulgaria, where they learned about case law on gender discrimination and how to formulate cases correctly for both the ECtHR and the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW), which hears cases on discrimination against women but lacks the enforcement power of the ECtHR.[40]

One important exception to the lack of overlap between women's rights and human rights networks in Russia is the human rights group Stichting Justice Initiative (SJI). SJI had attempted to bring a particularly brutal domestic violence case from Chechnya to the ECtHR in 2012. The case concerned a woman named Shema Timagova who had been attacked and gravely wounded by her ex-husband, who had disabled her after striking her with a shovel and, in a later incident, an ax. Timagova's ex-husband was fined only $500, and spent a mere nine months in jail.[41] When the Court found Timagova's case inadmissible without even issuing an admissibility decision, SJI brought it to CEDAW, making the argument that by treating Timagova's ex-husband "with disproportionate lenience, and by perpetuating gender stereotypes in the way it treated Timagova's complaints", the Russian State had failed to meet its commitment to protect women from discrimination.[42] CEDAW ruled in Timagova's favor in April 2019, seven years after submission.[43] Having been frustrated at the

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[39] McIntosh Sundstrom et al. (2019), pp. 112–13.

[40] *Ibid.*, p. 113.

[41] *Ibid.*, pp. 79–80.

[42] Stichting Justice Initiative, CEDAW Committee Issues first decision on domestic violence in Russia (12 April 2019) www.srji.org/en/news/2019/04/cedaw-committee-issues-first-decision/ accessed 27 July 2021.

[43] *S.T. v. Russia* (25 February 2019) Communication No. 65/2014 CEDAW/C/72/D/65/2014.

ECtHR with the Timagova case in 2012, SJI was rewarded with a victory at the ECtHR in *Volodina v. Russia* in July 2019, and then in *Tunikova and Others v. Russia* in 2021. The fact that Volodina's case was taken to the ECtHR by a human rights rather than a women's rights group highlights the division of labor described by the network problem. Setting aside the experience of this particular human rights group, the prevailing separation between Russia's human rights and women's rights networks created a setting in which there are precious few lawyers and organizations working on sex discrimination cases. This, too, limited the number of such cases that might come to the domestic court system and the ECtHR.

5.5 INTERNATIONAL BARRIERS TO DOMESTIC VIOLENCE CASES

While a variety of obstacles at the national level have prevented Russian domestic violence cases from reaching local courts and the ECtHR, it is also true that relatively few gender discrimination cases of any type, from any CoE Member States, have been heard at the ECtHR. This suggests that factors at the international level have also served as barriers to the emergence of positive rulings on gender discrimination cases from Russia (prior to its exit from the CoE) and other CoE States at the ECtHR. These obstacles include a perceived reluctance on the part of the Court to rule on Article 14 violations, and the need to demonstrate discrimination with statistical data which may be beyond the power of applicants and their lawyers to collect.

5.5.1 Reluctance to Rule on Article 14

Based on their experiences submitting applications to the ECtHR, and on the Court's case law, several Russian human rights lawyers we interviewed in 2014 formed the impression that the ECtHR was reluctant to find violations of Article 14 on discrimination, with respect to sex or any other category. They also noticed that when applicants argued that Article 14 had been violated in addition to another article, the judges would often rule only on the main article, leaving aside the Article 14 claim. One lawyer suspected that the Court's judges feared "opening Pandora's box"—discrimination violations on the basis of gender, race, sexual orientation, and otherwise, being so plentiful in so many States that if they all ended up at the ECtHR, the Court would be overwhelmed.[44]

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[44] McIntosh Sundstrom et al. (2019), pp. 143–5. The Court's approach of streamlining the number of Convention articles considered in order to economize

Judges working at the ECtHR, however, saw the situation with Article 14 claims differently. Attending the conference on which this volume was based gave us the opportunity to pose this question directly to two judges, neither of whom believed the Court was reluctant to find violations of Article 14 due to the risk of an overwhelming caseload. Judge Iulia Motoc (Romania) acknowledged that Article 14 was known as the "Cinderella of the Convention"—the poor, ignored stepchild—but did not think the Court was reluctant to find violations of Article 14 "because we are afraid of all [the possible] cases". Rather, Judge Motoc believed the reason for "a certain reluctance" on Article 14 stemmed from insufficient case law on the subject: "The vicious circle of our Court is, if you don't have enough case law, enough solid case law, you are going sometimes to face this problem of … finding a violation of an article. And I think … we can apply this to a majority of gender issues".[45] Judge Armen Harutyunyan (Armenia) agreed that this was not a matter of "reluctance" as a means to avoid a flood of cases, but rather that finding an Article 14 violation—or a violation of Article 18 (which limits the restriction of the rights and freedoms permitted under the ECHR)—was fairly uncommon because these are "very strong" articles, and that their use required "200 percent certainty" of the causal link establishing that, in the case of an Article 14 claim, discrimination had taken place.[46] This may be because the implications of a discrimination decision are larger than those of a decision finding a violation of one of the main articles. The fact that the judge mentioned Article 18 in the same context gives credence to this interpretation.[47]

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its analytical efforts is stated in the case *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, ECtHR, Application No. 47848/08, 17 July 2014, para. 156. For a comprehensive study of the ECtHR's reticence to find Article 14 discrimination violations with particular (but not exclusive) regard to cases of racism-based violence, focusing on the high standards of evidence required in such cases, see Mačkić (2018), especially Chs. 5–7.

[45] Conference transcript, Women's Human Rights in Twenty-First Century: Developments and Challenges under International and European Law (European Court of Human Rights, Strasbourg, France, February 2020) 2: 14.

[46] Interview with Armen Harutyunyan, Judge, European Court of Human Rights (Strasbourg, France, 13 February 2020).

[47] Not all ECtHR judges agree on this issue. ECtHR Court Judge Giovanni Bonello, for instance, penned an impassioned article on the Court's standard of proof and evidentiary rules, in which he argued that the standard of proof on the applicant has been set unreasonably high in cases making Article 14 claims regarding racist violence: Bonello (2009), pp. 66–80. Studies of racism-based discrimination cases at the ECtHR likewise document and endeavor to explain the relative rarity of judgments finding Article 14 violations. Ruth Rubio-Marín and

There is thus a discrepancy between what some Russian human rights lawyers and ECtHR judges believe are the reasons for the relatively low number of Article 14 violations found. Whatever the judges' reasoning, it is clear that ECtHR decisions not to rule on Article 14 violations create an impression among lawyers, victims, applicants, and, possibly, governments in States where sex discrimination (including domestic violence) is not taken seriously, that those governments can go on ignoring it. By contrast, the power of the ECtHR in ruling on Article 14 claims is evident. The Court's positive judgment on Articles 2, 3, and 14 in *Opuz v. Turkey* set an important precedent which led to significant policy changes in Turkey, such as the establishment of protection orders under Law 6284 in 2012,[48] and internationally by encouraging the submission of domestic violence cases to the ECtHR. Indeed, following the *Volodina* Decision in Russia, the Russian government began to seriously consider the passage of a feminist-informed law on domestic violence for the first time in many years, but since then, and especially with the turn toward heightened conservative values among the Russian leadership and the repression of feminist advocates following Russia's full-scale invasion of Ukraine in 2022, no such law has made legislative progress.[49]

5.5.2 Substantiating Discrimination: The Need for Statistics

Our Russian interviewees with experience in submitting applications to the ECtHR also felt that it was particularly challenging to convince the Court that discrimination had occurred in any given case. To do so, they explained, an applicant must show that they were subjected to unfair treatment based on their membership in an identifiable social group and that this group had suffered discrimination relative to other societal groups. Our interviewees believed

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Mathias Möschel argue that the Court is reluctant to rule that cases of race-based violence (such as the involuntary sterilization of Roma women) constitute discrimination because judges' standard for such violations is too high, requiring evidence of an "organized [discriminatory] policy" and of individuals' explicit intention to discriminate: Rubio-Marín and Mathias Möschel (2015), p. 898, while Marie-Bénédicte Dembour finds that the ECtHR's failure to find Article 14 violations results from the Court being embedded in European society, which itself has not come to terms with its colonial past, and where cultural racism remains pervasive: Dembour (2010), pp. 45–66.

[48] McIntosh Sundstrom et al. (2019), pp. 117, 193, 217.

[49] Evgeniia Kuznetsova and Elizaveta Antonova, V Zakon o Domashnem Nasilii Vpishut Izgnanie Vinovnogo Iz Doma. *РБК* (Moscow, 19 October 2019) www.rbc.ru/politics/19/10/2019/5da86f069a794727e0706c92 accessed 27 July 2021; Johnson (2023), 1053.

that providing systematic data played a central role in demonstrating a pattern of bias to the Court. However, it may be particularly hard to prove that gender-based discrimination plays a causal role in cases of domestic violence directed at women. One Russian human rights lawyer who had brought many successful cases to the ECtHR noted, "If a woman is beaten, it's quite difficult to argue that she was beaten because of the hatred of all women", whereas, when it comes to homophobic or racist violence, there is potentially more evidence that would enable an applicant to point to a pattern of discrimination that applies to the group.[50] In other words, most people regard incidents of violence against women as the result of an individual conflict, rather than as the outgrowth of a patriarchal ideology, while they might more easily understand gay-bashing as the result of homophobia. This makes the requirement to demonstrate a pattern of State discrimination all the more critical to a successful Article 14 case on domestic violence.

The ECtHR's first positive judgment on Article 14 in a domestic violence case, *Opuz v. Turkey*, appeared to illustrate the importance of presenting systematic evidence to document a pattern of gender discrimination. Turkish feminists were able to do that in *Opuz*. Having collected data on gender discrimination in Turkey, they submitted it to the ECtHR to show that there was a pattern of violence against women in Turkey as well as discriminatory State failure to prevent or prosecute that violence.[51] The ECtHR's findings of gender-based discrimination in an important judgment on domestic violence from Moldova is another case in point, where the applicant presented a report providing statistics and patterns of domestic violence in the State.[52] The report itself was written by the Moldovan National Statistics Bureau "with assistance from" several UN institutions, including UN Women. The Court relied upon this report—as well as on a UN Special Rapporteur's report on violence against women that was used in a previous ECtHR case, *Eremia v. Moldova*[53]—to, as the Court put it, "support the impression that the authorities do not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women".[54] Following the *Opuz* case, two domestic violence judgments in 2016—*Halime Kiliç v. Turkey*

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[50] McIntosh Sundstrom et al. (2019), p. 132.

[51] *Opuz v. Turkey*, ECtHR, Application No. 33401/02, 9 September 2009, paras. 91–106.

[52] *T.M. and C.M. v. the Republic of Moldova*, ECtHR, Application No. 26608/11, 28 April 2014.

[53] *Eremia and Others v. the Republic of Moldova*, ECtHR, Application No. 3564/11, 28 August 2013.

[54] *T.M. and C.M. v. the Republic of Moldova*, ECtHR, Application No. 26608/11, 28 April 2014, para. 62.

and *M.G. v. Turkey*—that incorporated statistical data and third-party research reports on relevant gaps in Turkish law and law enforcement behavior, also resulted in positive judgments on Article 14 for gender discrimination.

Another ECtHR case on domestic violence, *Bălşan v. Romania*, also bolsters the notion that cases incorporating data showing widespread indifference to women suffering from domestic violence are more likely to win positive judgments on Article 14. In *Bălşan*, statistics were introduced to show that most people in Romania viewed domestic violence as "normal", and that relatively few reported domestic violence incidents resulted in criminal investigations.[55] Likewise, the *Volodina* case[56] took a page from *Opuz*'s book by citing multiple reports with data to support the argument that Volodina's experience with Russian law enforcement was far from unique, and hence represented a case of sex-based discrimination.

The picture is mixed, however, on whether such systematic statistical evidence is indeed required in order for ECtHR judges to rule in favor of applicants on Article 14 in domestic violence cases. A little over a year after the *Opuz* judgment, the ECtHR found a violation of Article 8, but declined to find violations of Articles 2, 3, and 14 in a Croatian domestic violence case, *A. v. Croatia*,[57] arguing that insufficient evidence (along the lines of the statistics and reports presented in *Opuz*) had been provided to support finding violations on those articles.[58] By contrast, in a 2017 domestic violence case, *Talpis v. Italy*, the ECtHR ruled that Article 14 had been violated despite the lack of relevant, systematic statistics demonstrating widespread police failure to provide protection to women subjected to domestic violence in the case. On this point, ECtHR Judge Motoc explained that because "Italy was not so bad in terms of statistics regarding gender violence", the Court did not require such statistics. The *Talpis* case was a "very clear example … where we don't need these statistics",[59] perhaps because Talpis's husband had not only assaulted his wife repeatedly and attempted to murder her, but he had also killed her son—an outcome that could have been prevented by a more engaged police response, such as the issuance of a protection order, earlier in the process.[60]

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[55] *Bălşan v. Romania*, ECtHR, Application No. 49645/09, 23 August 2017, para. 37.

[56] *Volodina v. Russia*, ECtHR, Application No. 41261/17, 4 November 2019.

[57] *A. v. Croatia*, ECtHR, Application No. 55164/08, 14 October 2010.

[58] *Ibid*., para. 97.

[59] Conference transcript, Women's Human Rights in Twenty-First Century: Developments and Challenges under International and European Law (European Court of Human Rights, Strasbourg, France, February 2020) 2: 24.

[60] *Talpis v. Italy*, ECtHR, Application No. 41237/14, 18 September 2017.

One could conceivably conclude, based on the outcome of *Talpis v. Italy*, that the inclusion of data substantiating a pattern of discrimination toward victims of domestic violence might no longer be necessary in order to achieve a positive outcome on Article 14 claims. However, two partly dissenting opinions in *Talpis* questioned whether an Article 14 violation was appropriate, in part because insufficient data had been presented. Judge Tim Eicke's opinion noted that the Court, in finding a violation of Article 14 in *Talpis*, contradicted the logic it had employed in declining to find an Article 14 violation in *A. v. Croatia* seven years earlier. As Eicke wrote, the Court's judgment in *A. v. Croatia* highlighted the fact that the applicant had not "submitted any reports in respect of Croatia of the kind concerning Turkey in the *Opuz* case. There is not sufficient statistical or other information disclosing an appearance of discriminatory treatment of women who are victims of domestic violence on the part of the Croatian authorities."[61]

Eicke's dissent in *Talpis* further referred to an earlier ECtHR decision in a domestic violence case, *Rumor v. Italy*,[62] in which statistics indicating systematic sex-based discrimination had not been presented. In *Rumor*, the Court concluded that Articles 3 and 14 had not been violated because the Italian authorities had taken "all reasonable measures" to protect the applicant from further harm,[63] and that the Italian State had "put in place a legislative framework allowing them to take measures against persons accused of domestic violence and that that framework was effective …".[64] Eicke argued that to prove a violation of Article 14, Talpis would have had to present data showing that either the Court's "decision in Rumor had been wrong (or, at the very least, premature) or that changes in the legislative and policy environment in Italy had changed sufficiently since 2014 to enable the Court to conclude that, whereas the Italian system was compliant with Article 14 then, it was not so compliant in 2017".[65]

Judge Robert Spano's dissenting opinion in *Talpis* likewise found that the case for an Article 14 violation had not been made. Spano noted that based on previous similar ECtHR judgments such as *Opuz* and *Eremia*, decisions finding Article 14 violations would be "reached where the actions of the authorities … amount to repeatedly condoning such violence and reflect a discriminatory

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61 *Ibid*., Partly Concurring, Partly Dissenting Opinion of Judge Eicke, para. 18.

62 *Rumor v. Italy*, ECtHR, Application No. 72964/10, 27 August 2014.

63 *Ibid*., para. 62.

64 *Talpis v. Italy*, ECtHR, Application No. 41237/14, 18 September 2017, Partly Concurring, Partly Dissenting Opinion of Judge Eicke, para. 20, citing *Rumor v. Italy*, s 76.

65 *Ibid*., para. 21.

attitude towards an applicant as a woman".[66] These conditions, Spano argued, had not been met in *Talpis*, where the case contained "insufficient evidence to show general and discriminatory passivity of the kind previously established in the Court's case law".[67]

Given the fact that in some domestic violence cases, the absence of statistical data proving a generalized disregard for women's safety on the part of law enforcement seemed to discourage a positive finding on Article 14, erring on the side of including such information seems worthwhile. Even in a case like *Talpis*, where the problem was less a matter of systematic passivity over domestic violence than an egregious failure to protect the victim and her son in a particular instance, the absence of statistics was sufficient to compel two of the seven judges considering the case to register separate, dissenting opinions. In States where statistics on the protection of victims of domestic violence are encouraging, the decision about presenting them may be more complex—after all, if State statistics and policies addressing domestic violence show improvement over time, they may not substantiate the applicant's argument. However, in States where there remains systematic passivity by the law enforcement system, providing relevant statistical data in support of an ECtHR case appears necessary.

5.6 THE MAGIC FORMULA: ACTIVISTS, LAWYERS, AND COLLABORATION BETWEEN WOMEN'S RIGHTS AND HUMAN RIGHTS INSTITUTIONS

Although it may seem strange that there were so few sex discrimination cases brought by women from Russia to the ECtHR during the period of its membership in the CoE—or so few positive decisions on sex-based discrimination at the ECtHR in general—their paucity is less puzzling in light of the obstacles to initiating such cases in domestic courts and in taking them to and through the ECtHR. What, then, explains the instances in which, against all odds, women overcome the barriers to bringing sex discrimination cases both to the complex and often patriarchal domestic legal systems and then to the often equally frustrating judicial institutions that populate the international legal space? What needs to be in place in order to persuade the ECtHR to rule on sex discrimination cases from a particular country, establishing precedents that then help women in that country and in other States gain redress for the discrimination to which they have been subjected? By exploring lawyers' and activists' expe-

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[66] *Talpis v. Italy*, ECtHR, Application No. 41237/14, 18 September 2017, Partly Dissenting Opinion of Judge Robert Spano, para. 18.

[67] *Ibid.*

riences with domestic courts and the ECtHR, and particularly the Court's case law on domestic violence, we derived what we call the "magic formula" for success in bringing sex discrimination cases into the domestic courts and then strategically litigating them at the ECtHR.

First, activism requires activists—applicants who are willing to endure the long legal process at the domestic and international levels. Second, these activists need lawyers who recognize gender discrimination and possess the knowledge and skills to litigate it in court, both at home and abroad. When the home country in question is not a fully fledged democracy, the ingredients for successful cases often require support from beyond State borders. For instance, resources are required in order to train lawyers interested in pursuing gender discrimination litigation, and to enable applicants, activists, and lawyers to gather systematic country-level data documenting a pattern of discrimination. However, typical feminist or human rights activist groups lack the resources for that kind of data-gathering, and their governments may not collect or share the necessary data with them. While such data may not need to be part of every single case claiming an Article 14 (gender-based discrimination) violation, the case law within the time frame of our research demonstrates that the inclusion of such data—at least in domestic violence cases—helps rather than hurts an applicant's chances.

Third, our research suggests that gender discrimination is most likely to be addressed when human rights and feminist institutions collaborate. When the ECtHR ruled that gender discrimination had occurred, in a series of nine domestic violence cases up to mid-2021 from Turkey, Moldova, Italy, Romania, and Russia, starting with *Opuz v. Turkey* in 2009, the Court typically quoted the UN's CEDAW Convention, or the newer CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) that aims to prevent and combat violence against women. In eight of these nine judgments, the Court referred briefly or more extensively to the CEDAW Convention, the Istanbul Convention,[68] or both, as well as mentioning the UN Special Rapporteur on Violence against Women in five out of nine judgments. Other research suggests that the tendency of the Court to integrate other human rights conventions in the area of gender-based violence is a route for it to deepen and clarify its interpretation on questions where the content of the ECHR itself is unclear.[69]

As per this pattern, in the first *Volodina v. Russia* decision, the ECtHR's judges drew on the UN's CEDAW Convention to argue that domestic violence

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[68] The exception is *T.M. and C.M. v. the Republic of Moldova*, ECtHR, Application No. 26608/11, 28 April 2014.

[69] Strand (2020), p. 979.

was a form of discrimination that falls disproportionately on women.[70] The Court referred to the Istanbul Convention as well, both to define violence against women, and to note that Russia was one of only two Member States that had not yet signed it.[71] Such references to international women's rights conventions in ECtHR judgments acknowledge and promote the idea that "women's rights are human rights". Similarly, we think it important for human rights groups and women's groups to blend their expertise and bring cases forward to combat gender discrimination in all its manifestations. This kind of collaboration could be encouraged by European institutions that fund training on how to bring cases to international venues like the ECtHR.[72]

CoE bodies can also support each other and thereby improve gender equality outcomes. As noted, the Istanbul Convention has influenced ECtHR decisions, and the Court's case law "played an important role in the negotiations" for the Istanbul Convention, the preamble of which notes that the ECtHR's "growing body of case law … sets important standards in the field of violence against women".[73] Although this piece of the history of the Istanbul Convention would suggest that its framers see eye to eye with ECtHR judges on States' obligations regarding the prevention and punishment of violence against women, the group of experts responsible for State compliance with the Convention has also seen fit at times to further increase the Court's awareness on the subject. In January 2020, the Group of Experts on Action Against Violence Against Women and Domestic Violence (GREVIO), which is tasked with monitoring the implementation of the Istanbul Convention, submitted its first set of written observations[74] on an important ECtHR domestic violence case, *Kurt*

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[70] *Volodina v. Russia*, ECtHR, Application No. 41261/17, 4 November 2019, para. 110.

[71] *Ibid*., para. 60.

[72] It is worth noting that the Council of Europe itself has taken steps to promote training on human rights issues more broadly via the no-cost, on-line HELP—Human Rights Education for Legal Professionals—program which includes courses on gender equality and the use of CoE instruments to address gender discrimination, as well as on violence against women and women's access to justice (see https://www.coe.int/en/web/genderequality/help-online-course-on-access-to-justice-for-women accessed 27 July 2021). Aimed at lawyers, prosecutors, and judges as well as non-lawyer professionals working in the field of gender equality, such initiatives constitute forward progress in making the ECtHR more available to women seeking justice in the face of gender discrimination.

[73] CoE (2015) (n 14), p. 36.

[74] GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence) (2020).Third Party Intervention by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) pur-

v. Austria.[75] GREVIO's third-party intervention in *Kurt* was intended to affect the Court's deliberations on the case, and sheds light on the potential value of cooperation between international human rights and women's rights bodies.

Like *Talpis v. Italy*, *Kurt v. Austria* arose as the result of a domestic violence situation in which a woman was abused by her husband, who eventually murdered the couple's son. Senay Kurt, having endured years of violence, announced her intention to file for divorce in May 2012. Within a week, her husband killed the couple's son while the boy was at school. Kurt had obtained a "barring order" from police which banned her husband from the couple's home, but the order did not cover the children's school (which was not notified of the situation). Nor were the children listed as endangered persons in the police report.[76] Kurt's ECtHR application charged that Austrian law enforcement's failure to protect her son's life violated Article 2 of the ECHR. She did not raise an Article 14 claim, and neither did the ECtHR judges add one on their own.[77] The ECtHR concluded that the relevant Austrian authorities could not reasonably have anticipated that Kurt's husband would commit the murder, and thus held that no violation had occurred.[78] GREVIO's third-party intervention, by contrast, suggested that both the Austrian authorities and the Court lacked an understanding of the dynamics of domestic violence, and that a more gender-sensitive lens on the case could have produced a different outcome.

GREVIO's third-party intervention focused on several elements identified by the Istanbul Convention as critical to the effective prevention of domestic violence and its proper investigation. In particular, it highlighted the fact that it is important for State authorities to duly understand the elevated risk of an abuser's "deliberate murder" of children "as a form of revenge" when women take steps to end a relationship, and noted that the Austrian authorities' risk assessment failed to take into account several "red flags" present in the

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suant to article 36 paragraph 2 of the European Convention on Human Rights: Application no. 62903/15, Kurt v. Austria, Transmitted by GREVIO to the European Court of Human Rights on 21 January 2020, GREVIO/Inf(2020)3. 2020. https://rm.coe.int/grevio-inf-2020-3-third-party-intervention-kurt-v-austria/pdfa/16809987e9 accessed 2 April 2024.

[75] *Kurt v. Austria*, ECtHR, Application No. 62903/15, 4 November 2019.

[76] *Ibid.*, para. 17, pp. 27–29, 57.

[77] ECtHR judges have the prerogative to find violations of ECHR articles that applicants do not include; see *Radomilja and Others v. Croatia*, ECtHR, Application Nos. 37685/10 and 22768/12, para. 121.

[78] The case was reconsidered by the ECtHR's Grand Chamber, which endorsed the Court's earlier decision that no violation had occurred. See *Kurt v. Austria*, ECtHR, Application No. 62903/15, 15 June 2021.

Kurt case, such as the husband's daily threats to kill Kurt and the children.[79] GREVIO's aim in penning this critique was to advance the "cross-fertilization between the Istanbul Convention and the European Convention on Human Rights"[80] and to spur the Court to find against Austria and other States in similar cases.[81] GREVIO also contributes to the ECtHR's case law by providing data on violence against women, collecting such data from governments that have signed the Istanbul Convention.[82]

GREVIO and the ECtHR thus appear to have developed a fruitful collaboration at the nexus of women's rights and human rights. Before submitting their observations on *Kurt v. Austria*, GREVIO had met twice with ECtHR judges for an "exchange of views", first, in 2017, to "establish sustainable cooperation",[83] and then to discuss the "creation of synergies between their respective mandates" two years later.[84] When GREVIO has completed the first round of its baseline evaluation reports on signatory States' compliance with the Istanbul Convention,[85] it will be in an ongoing position to offer further commentary on the ECtHR's decisions in cases of violence against women, thereby helping support the Court's commitment to combat sex discrimination. Precisely through this kind of exchange of expertise, the ECtHR will be able to develop consistent principles to assess sex discrimination violations in particular cases, and work to support the Council of Europe's wider mandate to promote gender equality.

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79 GREVIO (2020) (n 74), pp. 3–6.

80 *Ibid*., p. 3.

81 *Ibid*., p. 9.

82 See GREVIO. 2016. *Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)*. 2016. https://rm.coe.int/16805c95b0 accessed 2 April 2024. Citizens of those Council of Europe states that have not signed the Istanbul Convention are therefore at a disadvantage in terms of providing relevant statistics to support an ECtHR case on violence against women.

83 Council of Europe, *1st General Report on GREVIO's Activities* (April 2020) 46 https://rm.coe.int/1st-general-report-on-grevio-s-activities/16809cd382 accessed 27 July 2021.

84 Council of Europe, GREVIO exchanges views with European Court of Human Rights (27 June 2019) www.coe.int/en/web/istanbul-convention/-/grevio-exchanges-views-with-european-court-of-human-rights accessed 27 July 2021.

85 Council of Europe, Istanbul Convention: Provisional timetable for the first (baseline) evaluation procedure: 2016–2023. www.coe.int/en/web/istanbul-convention/timetable accessed 27 July 2021.

5.7 CONCLUSION

While collaboration between CoE bodies like GREVIO and the ECtHR can clearly help to further women's rights in national contexts where those rights are violated, the ability to draw on international resources to help address national problems is a privilege that is unevenly distributed, even within the CoE. Countries like Russia and Hungary declined to ratify the Convention on Preventing and Combating Violence Against Women and Domestic Violence, while Turkey—after whose largest city the "Istanbul" Convention was unofficially named—withdrew from the Convention in 2021, and Poland moved closer to doing the same. A devastating consequence of Russia's 2022 full-scale invasion of Ukraine was its exit from membership in the CoE; that departure removed all Russian citizens' access to the ECtHR as a human rights court of last resort, and left victims of gender-based violence in particularly vulnerable circumstances. The wave of conservative populism sweeping across parts of the world previously believed to have been more democratically inclined further reminds us that the struggle for achieving and consolidating women's rights is not a linear one. It requires ongoing, repeated iterations of the assertion of women's right to equality of opportunity and equal treatment under the law, and persistent activism in the face of an anti-feminist, conservative backlash. The infringement of women's rights in CoE States, even as the 21st century wears on, highlights the ongoing importance of increasing international institutional support for national-level activism against domestic violence, and makes clear that creating cross-border connections among local grassroots activists remains crucial to the defense and promotion of women's human rights.

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