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Does gender equality constitute one of the "underlying values of the ECHR" in the light of Article 17 ECHR?[1]

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Abstract
The main aim of this article is to answer the question whether gender equality actually constitutes one of the "underlying values of the ECHR" through the lens of Article 17 ECHR. Examining this issue requires taking into account the changing paradigm of militant democracy. The hypothesis posed by the author is that, despite the formal declarations of the European Court of Human Rights (ECtHR), gender equality does not alone justify the application of abuse clause. Moreover, this research claims that, due to its adverse impact on the rule of law principle, Article 17 ECHR is not an appropriate remedy to protect gender equality. The research relies on the analysis of the relevant ECtHR's rulings on Article 17 ECHR.
Keywords: Article 17 ECHR, European Convention on Human Rights, gender equality, militant democracy, Islam, European Court of Human Rights (ECtHR)

Czy równość płci stanowi jedną z „wartości leżących u podstaw Konwencji" w świetle art. 17 EKPC?

Streszczenie
Celem artykułu jest udzielenie odpowiedzi na pytanie, czy równość płci rzeczywiście stanowi jedną z „wartości leżących u podstaw Konwencji" w świetle art. 17 EKPC. Zbadanie tej kwestii wymaga wzięcia pod uwagę zmienności paradygmatu demokracji walczącej. Autorka stawia hipotezę, że pomimo formalnych deklaracji Europejskiego Trybunału Praw Człowieka (ETPC), równość płci, sama w sobie, nie uzasadnia stosowania art. 17 EKPC. Ponadto, ze względu na szkodliwy wpływ art. 17 EKPC na zasadę praworządności, przepis ten nie powinien być stosowany do ochrony równości płci. Artykuł opiera się na analizie orzecznictwa ETPC dotyczącego stosowania art. 17 Konwencji.

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Słowa kluczowe: Europejska Konwencja Praw Człowieka (EKPC), art. 17 EKPC, równość płci, demokracja walcząca, islam, Europejski Trybunał Praw Człowieka (ETPC)

The primary objective of this article is to answer the question whether gender equality actually constitutes one of the "underlying values of the ECHR", which may justify the application of the prohibition of abuse of rights clause of Article 17 ECHR. The second research question will touch the issue whether the potential recognition of gender equality as an "underlying value of the ECHR" within the meaning of Article 17 ECHR would be conducive to the construction of a reliable and consistent standard of its protection.

Simultaneously, the **hypothesis** posed by the author of this article relies upon the statement that the gender equality has not been considered as an independent "underlying value of the ECHR", which would *per se* justify an application of the prohibition of abuse of rights. The few judgments, in which the European Court of Human Rights (ECtHR) uses this type of formula, concern the specific context of a worldview stemming from Islam and Sharia law perceived by the ECtHR as a negation of the "values underlying democracy and the ECHR" itself. Hence, the reference to gender equality in such judgments has solely instrumental dimension, and only serves to reinforce a specific vision of democracy established by the ECtHR, sometimes implemented in contradiction with the principles of the rule of law and pluralism. Therefore, the author of this article consequently claims that due to its detrimental impact on the efficiency of human rights protection as well as incompatibility with the rule of law principle, Article 17 ECHR does not constitute an appropriate legal instrument to protect gender equality and shall not be applied in the matters involving it. This statement is all the more justified because the paradigm of the concept of militant democracy, closely linked to Article 17 ECHR, leads to a distorted understanding of the analysed principle.

This article will be based on the following structure:

- Gender equality within the ECtHR's jurisprudence;
- General remarks on Article 17 ECHR;
- Gender equality and the context of Article 17 ECHR.

Materials and methods

The article is prepared using of dogmatic method with the emphasis on the relevant judicial practice of the ECtHR regarding both gender equality and Article 17 ECHR (or widely speaking – militant democracy concept).

Therefore, this section will separately focus on two important factors, such as:

1) general perception of the gender equality within the case-law of the ECtHR;
2) specific role of Article 17 ECHR within the Strasbourg system of human rights protection as well as threats arising from its application.

It should be noted at this point that it is not the purpose of this article to conduct a separate, precise analysis on any of these factors. Instead, the remarks on these factors are of a general nature and will serve to better explore the relationship between them in

order to demonstrate whether gender equality is indeed one of the 'underlying values of the ECHR'. In particular, in the case of Article 17 ECHR, attention should be drawn, on the one hand, to the far-reaching inconsistencies arising from its application and, on the other hand, to the features limiting the applicability of this provision in cases involving gender equality. The main part of the article will serve to examine cases, where the gender equality principle has been recalled in the context of Article 17 ECHR or militant democracy to prove its instrumental role in this area. It will further be demonstrated that Article 17 ECHR is not suitable for the protection of gender equality, firstly because it distorts its meaning, and secondly because it is applied to different provisions than those most commonly used for the protection of gender equality.

Gender equality within the ECtHR's jurisprudence

It should be stressed here that the ECtHR's concern to preserve gender equality is an expression of a trend characteristic of the Council of Europe, as well as other international organisations (Alkiviadou, Manoli 2021: p. 3). In particular, for the Council of Europe, "gender equality means an equal visibility, empowerment, responsibility and participation of both women and men in all spheres of public and private life" (Council of Europe 2009: p. 1). Moreover, in its case-law the ECtHR has noticed the necessity to "have regard to the provisions of more specialized legal instruments" (ECtHR 2009: par. 164), among which one of the most important is the *Convention on the Elimination of All Forms of Discrimination Against Women* – CEDAW (Alkiviadou, Manoli 2021: p. 7).

Moreover, within its established judicial practice, the ECtHR has also been relying upon the definition of the discrimination against women, which has been derived directly from the Article 1 of the CEDAW. According to that definition, "discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (CEDAW – UN General Assembly 1979: art. 1; see also: ECtHR 2009: par. 186; Alkiviadou, Manoli 2021: p. 7). As a result, it shall be noted that the principle of gender equality is first and foremost evident in the wording of Article 14 ECHR and Article 1 of the Protocol No. 12 to the ECHR.

In relation to the ECHR, it shall be stated that "the principle of non-discrimination on grounds of gender is not a distinct principle in the European Convention, but merely a case of the general principle of non-discrimination" (Besson 2008: p. 657). However, according to the judicial practice of the ECtHR, sex does not only constitute a prohibited ground of discrimination, but it is also considered a suspect classification, which requires heightened scrutiny by the ECtHR during the assessment of the justification of a sex-based discrimination (ECtHR 1985: par. 78; Besson 2008: p. 665). Moreover, as expressed by the ECtHR itself, discrimination based on sex or sexual orientation requires "very weighty reasons to be justified" (ECtHR 2003: par. 45).

Due to the limited number of ratifications of the Protocol No. 12 ECHR by the States of the Council of Europe, an important role has still been played by Article 14 ECHR. However, it should not be forgotten that Article 14 ECHR does not have an independent character and can only be applied in conjunction with a substantive ECHR provision (ECtHR 1968: par. 9; Rainey et al. 2017: p. 128). Equal importance shall be attributed to the catalogue of substantive rights, which are associated with the protection of gender equality. These are most important cases indicated in *Factsheet – Gender equality* (ECtHR 2021b: p. 1–25):

- Prohibition of torture and inhuman or degrading punishment or treatment – Article 3 ECHR (see more: ECtHR 2009);
- Prohibition of slavery and forced labour – Article 4 ECHR (see more: ECtHR 2006);
- Right to a fair trial – Article 6 ECHR (see more: ECtHR 2013b);
- Right to respect for private and family life – Article 8 ECHR (see more: ECtHR 2016);
- Freedom of thought, conscience and religion – Article 9 ECHR (see more: ECtHR Grand Chamber 2005);
- Protection of property – Article 1 of the Protocol No. 1 to the ECHR (see more: ECtHR 2021a);
- Right to free elections – Article 3 of the Protocol No. 1 to the ECHR (see more: ECtHR 2012).

According to the ECtHR: "advancement of gender equality is today a major goal in the member States of the Council of Europe. [Therefore,] references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex" (ECtHR Grand Chamber 2012: par. 127; see also: Harris et al. 2018: p.779). Moreover, with the referral to the ECtHR's own words: "gender equality has been recognized as one of the key principles underlying the ECHR" (ECtHR 2013a: par. 110). The lastly cited judgment will be especially important as in this case ECtHR applied Article 17 ECHR in a direct manner. However, as it will be indicated in the latter part of this article, the relationship between gender equality and Article 17 ECHR seems much more complicated and dependent upon the context of the examined affair.

General remarks on Article 17 ECHR

By the virtue of Article 17 ECHR: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". The role of this provision is strictly related to protection of the basic institutions and values of a democratic regime. In relation to Article 17 ECHR, James Sweeney uses a term of "gatekeeper of the democratic rights" (Sweeney 2013: p. 151). As a consequence, this provision is aimed at "withdrawing from those who wish to use the Convention's guarantees the benefit of those rights because their aim is to challenge the values that the Convention is protecting"

(Oetheimer 2006: p. 66; Tulkens 2007: p. 54). Such observation fully corresponds with the judicial practice of the ECtHR, according to which: "the general purpose of Article 17 ECHR is [...] to prevent totalitarian or extremist groups from exploiting in their own interests the principles enunciated by the Convention (ECtHR 2021c: p. 8; ECtHR, 2004b).

Nevertheless, it shall be stated that the aforesaid remarks apply to the original function of Article 17 ECHR as well as to the original perception of the enemies of democracy. However, it is essential to underline that a paradigm for the application of Article 17 ECHR has significantly changed. Through this prism, it is worth recalling the opinion of Christian Joppke: "Only, if applied to Islam, 'pluralism' was not meant to endorse, but to restrict religious practice, following the model of 'militant democracy' that is assertive of democratic values and principles against presumed enemies of democracy" (Joppke 2013: p.103; Joppke 2015: p. 92). The existence of this new paradigm will also significantly affect the issue of relationship between gender equality and Article 17 ECHR.

Next, it is also necessary to look at the categories of rights, against which Article 17 ECHR cannot be applied, and those, against which it is most frequently applied. Such categories will be subsequently confronted with the rights that are usually used in cases concerning gender discrimination, especially in conjunction with Article 14 ECHR. Firstly, it ought to be stated that, according to the ECtHR's position, Article 17 ECHR cannot be invoked against application of the procedural rights arising from the ECHR, such as right to liberty and right to fair trial (ECtHR 1961: par. 7). Furthermore, Article 17 ECHR cannot be applied in relation to rights mentioned in Article 15 (par. 2) ECHR: i.e. Article 2, 3, 4 (par. 1) and 7 ECHR. Oppositely, Article 17 ECHR has been usually applied towards: freedom of expression (Article 10 ECHR) and freedom of association (Article 11 ECHR) (see: de Morree 2016: p. 75). As it has been underlined by Alasdair Mowbray, those rights combine to provide a democratic backbone to a Convention system (Mowbray 1999: p. 703). It shall be also stated that Article 9 ECHR falls within the scope of Article 17 ECHR, however only in cases, when the violation of Article 10 and 11 ECHR is also examined (ECtHR 2013a).

The judicial practice of the ECtHR reveals a tendency to systematically broaden the scope of the application of Article 17 ECHR (Wiczanowska 2019: p. 113–126; Woods 2014: p. 1552). This tendency combines two interrelated factors. Firstly, it might be associated with the above-mentioned change of the paradigm, which encompasses not only the activity of totalitarian movements and cases of Holocaust denials (De Coensel 2019: p. 288; Maussen, Grillo 2017), but also the functioning of the political parties and associations inspired by Sharia law with the ambit of Article 17 ECHR.[2] The second tendency is to move away from the necessity of "conduct aiming at the destruction of ECHR rights and freedoms" towards more liberal conditions, justifying the application of Article 17 ECHR. One of those conditions has been a formula regarding contradictions with "underlying values of the ECHR" (ECtHR 2004a). Undoubtedly this formula is much more vague that the notion of conduct, which "aims at destruction of the rights and freedoms set forth in the ECHR", as it barely seems possible to name all such values as well as to precisely

[2] This fragmentation will be continued through the next part of the analysis.

balance their importance with the necessity to protect human rights and freedoms in the concrete factual state.

Interestingly, according to Francoise Tulkens, Article 17 ECHR was misused during the time of the cold war, mostly within the decision of Communist Party of Germany (KPD) v the Federal Republic of Germany (Tulkens 2012: p. 3; Sudre 2006: p. 206). The author of this article reiterates that view due to the fact that a similar threat exists, but in relation to a different category of entities (parties and associations inspired by a Sharia law) in the current jurisprudence of the ECtHR. Such threat has been caused basically by a visible tendency of the ECtHR to accept any limitations for the categories of speeches, as well as operation of the associations referring to Sharia law as compliant with the ECHR under Article 17 without their appropriate examination. Moreover, such approach can easily lead to distorting the understanding of gender equality and replacing its real meaning with an instrumental one.

Gender equality and the context of Article 17 ECHR

As it has been already stated, "the prime reason for the existence of Article 17 ECHR is to give democracy the legal weapons to defend itself in order to prevent a repeat of history, particularly the atrocities committed in the past by totalitarian regimes attached to Nazi, fascist or communist ideas." (Cannie, Voorhoof 2010: p. 118). However, simultaneously it ought to be stipulated that currently the catalogue of those enemies encompasses Islam. In this context it is worth recalling the observations of Malthe Hilal-Harvald, who uses the term of "civilisational threat" while referring to the perception of Islam in the Western world (Hilal-Harvald 2020). This notion might be supplemented by Oliver Roy, who claims that with the arrival of substantial Muslim presence in the Western Europe, "Islam has become a mirror in which the West projects its own identity" (Roy 2007; Joppke 2009; qtd. in: Hilal-Harvald 2020: p. 1234). Moreover, through the prism of that tension, we shall be aware of the specific meaning carried by the headscarves, which will be vital at the latter stages of the analysis hereto. It is enough to mention that when in 1989 in French school three students were suspended due to rejection to remove their headscarves during a lesson, this case simply turned out to be the matter of a national interest (Hilal-Harvald 2020: p. 1235). In this context, O. Roy provides an appropriate explanation: "The 1980s were the turning point, just when militant *laïcité* seemed about to disappear for want of opponents, it reconstructed itself around a new enemy, Islam" (Roy 2007: p. 29; qtd. in: Hilal-Harvald 2020: p.1235).

Such tendency is also vividly visible within the jurisprudence of the ECtHR, especially cases that were examined at the beginning of the XXI century. The most landmark case in this regard is *Refah Partisi and others v Turkey*, especially the judgment of the ECtHR's Grand Chamber (ECtHR Grand Chamber 2003). This case was referring to the dissolution of the largest political party in Turkey. The decision of Turkish Constitutional Court was ruled as compatible with Article 11 ECHR, as according to the ECtHR: *Refah* constituted a serious threat to the secular regime in Turkey. As held by the ECtHR's Grand

Chamber: "a political party whose leaders incited violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy could not lay claim to the Convention's protection against penalties imposed on those grounds" (ECtHR 2021c: p. 29; ECtHR Grand Chamber 2003: par. 98). In this context, Samuel Issacharoff rightly claims that "there was no suggestion that *Refah*'s program was so imminent as to constitute a direct threat of the sort posted by an insurrectionary party". Moreover, this author claims that the Turkish authorities did not undertake criminal prosecution of the party leaders, but instead, those leaders were disqualified from organising an electorally based political party (Issacharoff 2015: p. 74). Especially the last statement clearly emphasises the political rationale standing behind the analysed judgment. This view is also supported by very categorical statement from the ECtHR that: "it is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia which clearly diverges from Convention values" (ECtHR Grand Chamber 2003: par. 123). Unsurprisingly, such language used by the ECtHR may constitute an insult for the Muslims (Issacharoff 2015: p. 73). However, what is particularly interesting from the perspective of the conducted analysis is the fact that the ECtHR was referring to "legal status of women", while explaining in which aspects the Sharia law diverges from the Convention values (ECtHR Grand Chamber 2003: par. 123). As a result, it shall be stated that *Refah Partisi* constituted the first case, in which ECtHR has been using gender equality (in particular women rights) as an argument to justify restrictive measures under Article 17 ECHR.

However, it shall be underlined that *Refah Partisi* is not the only such case. In this context, one should reiterate the judgment in the *Kasymakhunov and Saybatalov v Russia* (ECtHR 2013a), regarding the conviction of the members of terrorist organisation – *Hizb ut-Tahrir.* The aim of this organisation was to establish the worldwide Islamic rule based on Sharia, which might be imposed – if necessary – with recourse to violence. While examining such case, the ECtHR has directly applied the Article 17 ECHR, which resulted in *ratione materiae* incompatibility of the application and therefore – its inadmissibility. According to the ECtHR's words: "The Court has held that Hizb ut-Tahrir's aims are clearly contrary to the values of the Convention, notably the commitment to peaceful settlement of international conflicts and to the sanctity of human life" (ECtHR 2013a: par. 106). As a result, it shall be stated that among those values the ECtHR did not mention gender equality. However, in the latter part of the judgment it claims that: "some provisions of the Draft Constitution promote differences in treatment based on sex. […] These provisions are hard to reconcile with the principle of gender equality, which has been recognized by the Court as one of the key principles underlying the ECHR and a goal to be achieved by member States of the Council of Europe" (ECtHR 2013a: par. 110).

The next stage of this analysis will therefore be to verify the validity of the above-mentioned words of the ECtHR, as well as possible consequences arising from those words. At the outset, it shall be stressed that in fact they are a repetition of the formula stemming from the 8 years earlier, ECtHR's Grand Chamber judgment in the case of

Leyla Sahin v Turkey. Within the circumstances of the presented case, the female medical student was wearing a headscarf. As a consequence, the authorities of the university decided that students wearing headscarves may not be admitted to the lectures and examinations. Following that order, the applicant was excluded from the classes and not enabled to take certain examinations, because she refused to remove her headscarf. Moreover, she has also been suspended for one semester due to participation in the assembly, which aimed at protesting against the new rules on dressing (see: ECtHR Grand Chamber 2005).

The presented case was first heard by the Chamber, which ruled that the university regulations did not constitute a violation of Article 9 ECHR (freedom of religion and conscience). One year later such ruling has been uphold by the ECtHR Grand Chamber, which focused on three various factors as a rationale for its approach. According to Hilal Elver, those factors are as follows (Elver 2012: p. 77):

a) Possibility to rise in popularity for an Islamic party, which can create fully Islamic state in Turkey;
b) Impression of a headscarf as a source of gender inequality;
c) Perceiving headscarf as associated with intolerance and a threat to Turkish secularism.

From the perspective of the analysis hereto the greatest importance shall be attributed to the second circumstance. However, for a better understanding of the logics standing behind the judgment of Leyla Sahin and its link to the paradigm of militant democracy, all of those factors shall be shortly elaborated on. According to the first of the aforesaid reasons: "The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts… It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience" (ECtHR Grand Chamber 2005: par. 115). The last observation proves that the ECtHR is willing to accept an intervention in the ECHR rights without sufficiently convincing proof regarding the interference with the threat to democracy. The thesis that acceptance towards wearing headscarves in the university may give rise to appearance of an extremist Islamic party is quite difficult to defend. According to the third reason, the ECtHR stated that: "it considers the notion of secularism to be consistent with the values underpinning the Convention". Moreover, "an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention" (ECtHR Grand Chamber 2005: par. 114). Also this statement has been directly derived from the judgment of *Refah Partisi* (ECtHR Grand Chamber 2003: par. 93), which constitutes the proof to which extend the ECtHR judicial practice on Article 17 ECHR has affected the general approach of the Strasbourg Court. Therefore, despite any direct reference to the Article 17 ECHR within the judgment of Leyla Sahin, words regarding exclusion from the protection granted by Article 9 ECHR, evoke clear associations with this provision.

Finally, the most crucial for this analysis is the referral to the principle of gender equality. According to the ECtHR's Grand Chamber, the headscarf "appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality" (ECtHR Grand Chamber 2005: par. 111). In this context it is however important to recall the dissenting opinion of a judge F. Tulkens, who noticed that the judgment does not say what is the connection between the ban to wear headscarves and gender equality (Tulkens 2005: point 11). Moreover, within the same opinion, this judge claims that it is not the role of the ECtHR "to determine in a general and abstract way the signification of wearing a headscarf or to impose this viewpoint on the applicant." As Leyla Sahin claimed that she wore the headscarf of her own free will, the equality principle should remain under the control of those who are entitled to benefit from it (Tulkens 2005: point 12).

The last sentence might even suggest that the conclusions of the ECtHR Grand Chamber were contradictory to the principle of gender equality. The same view has been expressed by Ilias Bantekas and Lutz Oette, who stated that: "In *Refah Partisi and Others v. Turkey* and *Leyla Sahin v. Turkey*, the Court gave preference to the protection of Turkey's secular state when pitted against freedom of religion, freedom of association and women's rights" (Bantekas, Oette 2020: p. 252). Undoubtedly, in the case of Leyla Sahin, the argument of gender equality could be also used in favour of the applicant, alongside necessity to protect her freedom of religion. Similarly, the ECtHR has been using the argument that the ban of wearing headscarves was justified as a prevention from exerting pressure on students, who did not practice their religion or who belonged to another religion (ECtHR Grand Chamber 2005: par. 111). However, such protection should not mean depriving students belonging to a particular religion of their rights. As a consequence, according to judge F. Tulkens: "if wearing a headscarf really was contrary to the principle of the equality of men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private" (Tulkens 2005: point 12; Bribosia, Rorive 2004: p. 962). These words carry double force: not only due to apparent contradiction of the ECtHR's reasoning with the ECHR values, but also because of the fact that they are invoked by a female judge. Therefore, the conducted analysis confirms two clear conclusions. Firstly, within the ECtHR judicial practice regarding perception of Islam, gender equality is treated in a purely instrumental manner. Secondly, the approach undertaken and consistently repeated by the ECtHR might in fact jeopardise gender equality itself. Such notion has been confirmed by the statement of the various doctrine representatives, who claim: "With the ECHR endorsing the applicability of the principles of 'militant democracy' to Islam and Muslims, it is hard to see any limits to the anti-Muslim measures that might be adopted in Europe" (Macklem 2006; Fadel 2015: p. 37).

Simultaneously Mohammad Fadel claims that "post-9/11 decisions of the European Court of Human Rights have made it abundantly clear that not only can European states regulate Islamic dress in virtually any fashion they see fit, they are also authorized to regulate Islam, including its public dissemination, because Islam itself is viewed as being inconsistent with European public order" (Fadel 2015: p. 37). However, the author of this article claims that such tendency was visible even before the attacks from 11 September

2001, which can be confirmed through the decision of *Dahlab v Switzerland*. This case concerned primary school teacher who had been prohibited from wearing a headscarf while performing her teaching duties. Within this case, the ECtHR has ruled application to be inadmissible as manifestly ill-founded. According to the ECtHR: "it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality" (ECtHR 2001). In this regard, two important factors must be underlined. The first issue touches upon the burden of proof as according to the ECtHR's own words: "the arguments of the Federal Court regarding the adverse impact of wearing headscarf cannot be denied". Undoubtedly, in most of the situations the States authorities must themselves prove the fulfillment of the ECHR requirements of rights limitations. In this case, such relationship emerges as reversed as the ECtHR itself is stating that headscarves "might have proselytising effect", which is far from providing a compelling evidence that this effect will actually occur. Secondly, according to the statement of the Swiss Federal Court: "it is difficult to reconcile the wearing of a headscarf with the principle of gender equality […], which is a fundamental value of our society in a specific provision of the Federal Constitution […] and must be taken into account by schools" (ECtHR 2001). In this regard the Federal Court is citing the article of Sami Aldeeb *Musulmans en terre europeenne* (see: Aldeeb 1996: p. 42–49). In this context, we shall also agree with Camil Ungureanu, who stated that: the ECtHR's sweeping negative judgment concerning the Koran being at odds with gender equality, is at best, unfortunate, as the role of the ECtHR is not to "put on trials" books like Koran – the milestone of a hugely complex and changing religious tradition of practice and interpretation (Ungureanu 2012: p. 324).

Conclusions

In the judgment of Grand Chamber of *SAS v France* (ECtHR Grand Chamber 2014), the ECtHR has turned away from the perception of gender equality demonstrated in case *Dahlab v Switzerland* (ECtHR 2001). According to the ECtHR, French government could not "invoke gender equality in order to ban a practice that is defended by women… in the context of the exercise of the rights enshrined in those provisions" (ECtHR Grand Chamber 2014: par. 119). According to Fabienne Brestcher, this approach demonstrates a more nuanced understanding of gender equality (Bretscher 2019) that "enables each woman equally to have the freedom to develop her personality or identity as she sees fit" (Marshall 2015: p. 384). Despite this apparent change, the final conclusion was that French authorities did not violate Article 9 ECHR. Therefore, the judgment of SAS cannot change two main conclusions arising from the article hereto. These are as follows:

1) The gender equality protection does not serve as an "underlying value of the ECHR" through the prism of Article 17 ECHR as in the ECtHR's judicial practice on that provision, it had only instrumental role.

2) Attempt to protect gender equality by Article 17 ECHR may not only threaten human rights standards, but also gender equality itself. Such statement is justified through the notion that Article 17 ECHR and militant democracy concept separates the principle of gender equality from its actual beneficiaries. Therefore, gender equality and women's rights shall be protected solely through substantive ECHR provisions.

Additionally it ought to be stated that in the cases other than those regarding Islam and Sharia law, the probability that the ECtHR could apply Article 17 ECHR to the matters of gender equality is rather low. Firstly, Article 17 ECHR is mostly applied to freedom of expression and freedom of associations, which do not often constitute the legal basis of gender equality cases. Secondly, as it was indicated, Article 17 ECHR is most frequently applied to Holocaust denial cases and its usage in hate speech cases is rare (de Morree 2016: p. 52). This attitude has been accurately illustrated in the case of *Lilliendahl v Iceland* (ECtHR 2020), in which the applicant was convicted and fined for highly prejudicial comments made online in the context of a debate following the local authorities decision to strengthen education of LGBT matters at school. According to the ECtHR's reasoning: "the applicant's statement cannot be said to reach the high threshold for applicability of Article 17 [ECHR]... Although the comments were highly prejudicial, [...] it is not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention" (ECtHR 2020: par. 26). With a high degree of probability, the similar notion could be applied to cases on gender equality. However, it ought to be stated that in Lilliendahl application ultimately turned out to be inadmissible as manifestly ill-founded by the virtue of Article 10 ECHR.

To conclude, gender equality undoubtedly constitutes an important principle from the general perspective of the Strasbourg system and the goal to be achieved by the Council of Europe member states. However, it does not seem to constitute an "underlying value of the ECHR", which alone could justify application of Article 17 ECHR. In the context of abuse clause, it had been only used to amplify the new paradigm of militant democracy targeted against Islam and Sharia law. Moreover, such perception of the gender equality was highly detrimental to itself. Therefore, not to deprive the gender equality of its real meaning, it shall be protected only by the substantive ECHR provisions.

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