

August 2018

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Recommended Citation

Eugenio Mantovani, Dr. Benny Spanier & Prof. Israel (. Doron, *Ageism, Human Rights, and the European Court of Human Rights: A Critical Analysis of the Carvalho v. Portugal Case (2017)*, 11 DePaul J. for Soc. Just. (2018)
Available at: <https://via.library.depaul.edu/jsj/vol11/iss2/3>

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AGEISM, HUMAN RIGHTS, AND THE EUROPEAN COURT OF HUMAN RIGHTS: A CRITICAL ANALYSIS OF THE CARVALHO V. PORTUGAL CASE (2017)

Eugenio Mantovani, Dr. Benny Spanier & Prof. Israel (Issi) Doron

Abstract: On July 25, 2017 the European Court of Human Rights (the ECtHR or “the Court”) gave its decision in the case of *Carvalho Pinto de Sousa Morais v. Portugal*. The Court found, in a majority ruling, that Portugal had violated Article 14 of the European Convention of Human Rights (ECHR), which prohibits discrimination, as well as Article 8, which protects the right of private and family life. The decision came after the Portuguese courts had reduced the compensation awarded for a medical malpractice that had left her seriously impaired in her physiological functions and in her sex life.

While the Court reached, in our view, a correct conclusion, what is less clear is the rationale that the Court adopted to address the case under article 14, and in particular, under the different categories of sex and age. This case, as this article will argue, raises an important human rights weakness within European jurisprudence: European human rights law still fails to detect ‘age’ as a distinct and unique discriminating factor, even when, as in the case of *Carvalho*, ageism, i.e. the process of systematic stereotyping and discrimination against people because they are old, is clearly and unambiguously portrayed.

Key Words:

European Court of Human Rights; Ageism; Elder Law; Law and Aging.

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I. BACKGROUND

The ECHR makes no explicit reference to the rights of older persons as such. In cases of discrimination, older persons find their way to the ECtHR under the "other status" category.¹¹ As for any other applicant, they must prove that they were discriminated against in one (or more) of the other articles in the ECHR.² They need to find "auspices" within the context of the Convention's general articles — and indeed in many cases they succeed.³

Although The Court has not expressly addressed the issue of elder rights as a distinct legal subject, it has showed sensitivity for the concrete conditions in which older persons live.⁴ The Court has decided cases concerning, for instance, death caused by poor hospital conditions;⁵ the disappearance of an Alzheimer patient from a nursing home;⁶ the involuntary transfer of residents from one care home to another;⁷ The Court has also dealt with cases concerning: old-age pensions and adequate standards of living,⁸ conditions and compatibility of continued detention with old age;⁹ the excessive length of proceedings;¹⁰ the choice of preferred death¹¹; and more. It is only in recent years, following the recognition of demographic ageing and its social implications, that European legal researchers have begun to study the human rights status of older persons as such.¹² Specifically, with regard to the system of the ECHR, three scholars in law and gerontology studies, Benny Spanier, Israel Doron, and Faina Milman-Sivan, conducted the first quantitative analysis of case law of the Court; they found that 1,503 out of 12,680 — approximately 12% — of all the judgments given by the Court between 2000 and 2010 involved

¹¹ ECHR, Prohibition of Discrimination, art. 14 (prohibiting discrimination based on one's "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" but not age).

² Spanier Benny et al., *Older Persons' Use of the European Court of Human Rights*, 28 J. CROSS CULTURAL GERONTOLOGY 407, 413 (2013).

³ *Id.* at 410-11.

⁴ In 2014, the press unit of the European Court of Human Rights published its first factsheet in this field. Eur. Ct. H.R., *Elderly People and the European Convention on Human Rights*, http://www.echr.coe.int/Documents/FS_Elderly_ENG.pdf.

⁵ *Volintiru v. Italy*, Eur. Ct. H.R. 8530/08 (2008) (concerned a daughter's complaint that her old mother did not receive adequate treatment in the hospital).

⁶ *Dodov v. Bulgaria*, Eur. Ct. H.R. 59548/00 (2008) (found a direct link between the failure to supervise and elderly person and her disappearance and held that the legal system as a whole failed to provide an adequate and timely response as required by the State's procedural obligations under Article 2).

⁷ *Louisa Watts v. UK*, Eur. Ct. H.R. 53586/09 (2010) (concerned the involuntary transfer of a 106-year-old applicant by local authorities to a new residential home and was declared inadmissible).

⁸ *Larioshina v. Russia*, Eur. Ct. H.R. 56869/00 (2002) (concerned an elderly woman claiming that old-age pension other welfare benefits were insufficient to maintain a proper standard of living).

⁹ *Sawoniuk v UK*, Eur. Ct. H.R. 63716/00 (2000) (case was deemed inadmissible and concerned an elderly prisoner complaining that his imprisonment is incompatible with to his advanced age).

¹⁰ *Jablonská v. Poland*, Eur. Ct. H.R. 60225/00 (2004) (concerned an 81-year-old's complaint that the length of proceedings regarding the annulment of a notarial deed had exceeded a reasonable time).

¹¹ *Pretty v. UK*, Eur. Ct. H.R. 2346/02 (2002) (denying a quadriplegic woman a guarantee that her husband would escape liability for his role in her assisted suicide).

¹² *E.g.* Israel Doron, *Older Europeans and the European Court of Justice*, 42 AGE & AGEING, 604 (2013); Barbara Mikolajczyk, *Is the ECHR ready for global ageing*, 17 THE INT'L J. OF HUM. RTS., 511 (2015).

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persons aged 60 or older.¹³ Regarding the Court's attitude to old age, this study found that decisions regarding old age and the rights of older persons were not an essential part of the Court's evolving jurisprudence.¹⁴ However, from a quantitative point of view, the ECtHR appears to have allowed entry to older persons and discussions of issues pertaining to them, even without making specific and direct reference to their rights as a unique and distinct social group under the ECHR.¹⁵

Within this general context in which, on one hand, older Europeans are not considered as a distinct and recognizable social group but in which, simultaneously, the Court de facto deals with the human rights of older applicants, the Carvalho case raised the question of the legal weight given to age in the framework of the ECHR and in the decisions of the Court.

II. THE CARVALHO CASE

There was no dispute regarding the facts of the case. Carvalho, a Portuguese national, was born in 1945. In 1993, she was diagnosed with Bartholinitis, a gynaecological disease, causing the applicant considerable pain. In May of 1995, Carvalho was admitted for a surgical procedure for the removal of the Bartholin glands.¹⁶ After being discharged, she began to experience intense pain and a loss of sensation in the vagina and urinary incontinence; she also had difficulty sitting and walking, and could not have sexual relations. After examination, Carvalho was informed the left pudendal nerve had been injured during the operation.¹⁷

Carvalho brought a civil action with the Lisbon Administrative Court against the hospital seeking damages of approximately €30,000 in pecuniary damages and €250,000 in non-pecuniary damage owing to the physical disability caused by the operation. The Lisbon Administrative Court identified both the medical malpractice and the causal link with the applicant's living conditions: As a consequence of the operation, Carvalho had difficulty walking, sitting, and having sexual relations — which, all together, made her feel “diminished as a woman.” She was also having suicidal thoughts and avoiding contact with members of her family and friends. The Lisbon Administrative Court awarded €2,000 in pecuniary damages and €80,000 in non-pecuniary damages.¹⁸

The hospital lodged an appeal to the Supreme Administrative Court against the judgment of the Lisbon Administrative Court. Carvalho lodged a counter-appeal arguing that she should have received approximately €250,000 in compensation.¹⁹ In October of 2014, the Portuguese Supreme Administrative Court upheld the first-instance judgment on the merits, but reduced the amount that had been allocated as pecuniary damage, setting the compensation for non-pecuniary

¹³ Spanier Benny et al., *Older Persons' Use of the European Court of Human Rights*, 28 J. CROSS CULTURAL GERONTOLOGY 407, 409-18 (2013); *See also* Spanier Benny et al., *In Course of Change? Soft Law, Elder Rights, and the European Court of Human Rights*, 34 L. & INEQ. 55, 72 (2016).

¹⁴ Spanier Benny et al., *Older Persons' Use of the European Court of Human Rights*, 28 J. CROSS CULTURAL GERONTOLOGY 407, 417 (2013).

¹⁵ *Id.*

¹⁶ Carvalho Pinto de Sousa Morais v. Portugal, Eur. Ct. H.R. 17484/17, 2 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659>.

¹⁷ *Id.*

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 3.

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damage at €50,000. In the judgment, the Supreme Administrative Court, while reaffirming the existence of a link of causality between the medical malpractice and the damage suffered thereof, stated:

"It should be noted, however, that the gynaecological condition from which the plaintiff suffers is old (existing at least since 1993) and that she had already undergone various kinds of treatment without any acceptable result and that it was that lack of results and the impossibility to resolve that condition otherwise that was the motivation for surgery. She already had unbearable pain and symptoms of depression before [surgery]. This means that the plaintiff's complaints are not new and that the surgical procedure only aggravated an already difficult situation, a fact which cannot be ignored when setting the amount of compensation.

Additionally, it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age".²⁰

Before the ECtHR, Carvalho complained that the Supreme Administrative Court's decision to reduce the compensation originally awarded as non-pecuniary damage discriminated against her in the fundamental right to private and family life, protected under Article 8 of the ECHR.²¹

Both the parties and all judges of the Court recognized that the circumstances of the case fell within the scope of Article 8. "The concept of private life," explained the Court, "also encompasses the right to 'personal development' or the right to self-determination and elements such as gender identification, sexual orientation and sex life, which fall within the personal sphere protected by Article 8."²² While the propriety of applying Article 8 was beyond question, the claim of discrimination divided the parties and the bench.

Carvalho claimed discrimination on the grounds of sex and age. On one hand, she complained about sex discrimination regarding compensation for men and women in similar situations.²³ The applicant recalled two cases decided by the Portuguese judiciary where male applicants were the victims of medical malpractice. In one case, decided in 2008, a man had been diagnosed with simple inflammation of the prostate; in the other, decided in 2014, the victim had been wrongfully diagnosed with cancer. As a consequence of the medical error, both plaintiffs, like Carvalho, suffered physical harm and had their sexual life was severely impaired. As Carvalho pointed out, however, the male plaintiffs were awarded a greater amount in non-pecuniary damages. Additionally, Carvalho contended that if she were younger, the national Court would have awarded her a higher amount.²⁴

The State retorted that the Supreme Administrative Court had neither disputed the seriousness of the damage nor depreciated the consequences on her private life as a woman. The Supreme Administrative Court took into account her pre-existing medical condition, first diagnosed in 1993, and the fact that the victim had undergone various kinds of treatments without any

²⁰ *Id.* at 4 (emphasis added).

²¹ *Id.* at 13.

²² Carvalho Pinto de Sousa Morais v. Portugal, Eur. Ct. H.R. 17484/17, 12 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659>.

²³ *Id.* at 13.

²⁴ *Id.*

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acceptable result.²⁵ The medical error in the surgery actually aggravated an already difficult situation; therefore, according to the State, the Supreme Administrative Court was correct in reducing the amount originally awarded.²⁶

The State also rejected Carvalho's sex discrimination claim, arguing that the fact that Carvalho was awarded a lesser amount in non-pecuniary damages than the male plaintiffs in the two cases cited by her was insufficient to show discrimination. According to the State, the situations in those cases were, from a medical point of view, different from Carvalho's. If the clinical conditions differ, reasoned the State, the compensation for the physical and moral impacts suffered should also differ.²⁷

The State also rejected the age discrimination claim, arguing that the allegedly discriminatory language used by the Supreme Administrative Court — "Additionally, it should not be forgotten that at the time of the operation the plaintiff was already 50 years old" — could be dismissed as an "unfortunate turn of phrase."²⁸

For the judges of the Court, the decision in the Carvalho case proved highly divisive, with two judges joining in a forceful dissenting opinion and two others submitting separate, equally resolute, concurring opinions.

III. THE MAJORITY RULING AND THE CONCURRING OPINIONS

The majority based its decision on the following key elements: The legal question, as framed by the Court, was "whether or not the Supreme Administrative Court's reasoning led to a difference of treatment of the applicant based on her sex and age, amounting to a breach of Article 14 in conjunction with Article 8."²⁹ In a more concrete manner, the Court framed the question as follows: "The question at issue here is not considerations of age or sex as such, but rather the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age."³⁰

On a factual level, the Court concluded that, "The wording of the Supreme Administrative Court's judgment when reducing the amount of compensation, in respect to non-pecuniary damage, cannot be regarded as an unfortunate turn of phrase."³¹ Rather, in the Courts view, "The applicant's age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds".³²

The Court laid out its ruling after quoting from two reports — the UN Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers and the concluding observations of the UN Committee on the Elimination of Discrimination against Women (CEDAW) — that, in the Court's view, highlighted the existence of sexist prejudices in the Portuguese judiciary. In

²⁵ *Id.* at 4 ("It should be noted, however, that the gynecological condition from which the plaintiff suffers is old (existing at least since 1993)").

²⁶ *Id.* at 14.

²⁷ *Id.*

²⁸ Carvalho Pinto de Sousa Morais v. Portugal, Eur. Ct. H.R. 17484/17, 14 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659>.

²⁹ *Id.* at 16-17.

³⁰ *Id.* at 17.

³¹ *Id.*

³² *Id.*

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both of these documents, the government of Portugal urged to address the prevailing gender-based stereotypes in the judiciary.

As a decisive factor in the decision, the Court pointed out the blatant contrast between the treatment received by the Carvalho, on the one hand, and the treatment reserved to the two male victims in the cases cited by Carvalho and mentioned in the previous section, on the other. In those cases, Portugal's Courts, having established that the fact that those men could no longer have normal sexual relations had resulted in a "tremendous shock," one which greatly affected their self-esteem, awarded a higher compensation amount for non-pecuniary damages, without any reference to their age, gender, or whether or not they had children.³³

The concurring opinions of Judges Yudkivska (Section President) and Motoc reinforce the argument of the majority that Carvalho's case should be framed as one involving sex discrimination and negative gender stereotypes. According to the Section President, Judge Yudkivska: "For centuries a woman's entire life was confined to the production of children and to their care. "Kinder, Küche, Kirche" as the only permissible areas for female activity. A woman was not respected as a human being. Her desires were ignored."³⁴ Hence, reflecting this historical context: "[i]n the present case, it is clear that outdated gender stereotypes have influenced a judicial decision and this in itself amounts to a violation of the applicant's Convention rights."³⁵

In the second concurring opinion, Judge Motoc clearly stated that, in her view, the Carvalho case is "another attempt by the Court to deal with the question of stereotypes in the field of gender."³⁶ Judge Motoc's opinion starts by providing a description of the Court's precedents in the area of gender discrimination and stereotypes.³⁷ Applying this precedent to Carvalho's case, Judge Motoc indicated that she viewed Carvalho as the victim of two stereotypes: the sexual stereotype, concerning physical and biological difference, and the gender role stereotype, ascribing a certain role and behaviour to women.³⁸ Judge Motoc's opinion condemned the traditional idea of female sexuality as being essentially linked to childbearing purposes, which she argued ignores its physical and psychological relevance for the self-fulfilment of women as people.³⁹

Judge Motoc rebuked the criticism of the dissenters — specifically, their charge that the Court failed to perform the test of comparability. She noted that, in cases involving negative stereotypes, the Court does not need to find a comparator. In stereotype cases, the Court focuses on the stereotype as it negatively affects the group to which the applicant belongs. This means naming the stereotype and contesting the harm that stereotypical treatment creates.⁴⁰

IV. THE DISSENTING OPINION

³³ Carvalho Pinto de Sousa Morais v. Portugal, Eur. Ct. H.R. 17484/17, 18 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659>.

³⁴ *Id.* at 21 (Yudkivska, G., concurring).

³⁵ *Id.* at 22.

³⁶ *Id.* at 26.

³⁷ *Id.* at 27-8 (Motoc, J., concurring).

³⁸ *Id.* at 28.

³⁹ Carvalho Pinto de Sousa Morais v. Portugal, Eur. Ct. H.R. 17484/17, 29 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659>.

⁴⁰ *Id.*

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In their joint dissenting opinion, Judges Ravarani and Bošnjak disagreed strongly with the methodology adopted by the majority. Specifically, the dissenters argued that, first, the majority failed to prove discrimination on the grounds of gender under the Court's own legal parameters of validity, so that the decision appears not to be legitimate, but rather engaging in "politics."⁴¹ Second, and more importantly, the dissent charged the majority with failing to recognize that the Supreme Administrative Court made the importance of the applicant's sexual life dependent on her age, not on her gender.

As for the first critique, it is important to note that the Court applies two different rationales to assess discrimination under article 14.⁴² One approach is more procedural, adopting a three-step test. The first step is to verify the existence of two relevantly comparable situations in which the applicant is found. The second step is to identify a difference in treatment that creates a disadvantage towards the applicant on the basis of suspect grounds. The third step consists of assessing the existence of a reasonable justification for the difference in treatment. This approach questions "certain classifications per se."⁴³ Examples of such classifications include sex, ethnicity, and disability, as members of these groups have historically been subject to prejudice, resulting in their social exclusion.

The other approach is more substantive. It looks at any difference in treatment that affects an applicant, and then questions its reasonableness and fairness. Under this approach, the Court does not look for a comparator. The Court instead is satisfied to verify that the treatment is based on a negative stereotype, prejudice, or assumption that adversely affects a group to which the applicant belongs. The use of the stereotype must be embedded or lead to a 'treatment' — i.e, it should be more than a mere expression, but rather a concrete action or inaction that, directly or indirectly, intentionally or unintentionally, constrains the individual's enjoyment of his human rights.⁴⁴

In their dissenting opinion, Judges Ravarani and Bošnjak describe what the Court, in their view, should have done. In their view, following the procedural approach, the relevant comparison was between women Carvalho's age who suffered from impairment in their sexual activities due to medical negligence and similarly situated men.⁴⁵ The comparable situations should have been further defined "in light of the subject matter and purpose of the measure which makes the distinction in question."⁴⁶ In regard to Carvalho's case, the dissent viewed the treatment as a factual decision concerning the amount of compensation for non-pecuniary damage. Thus, in their view, the Court should have assessed whether, as a general trend, women are treated differently from men "on the facts" — that is, whether or not they are generally awarded lower compensation for the relevant damage.⁴⁷ This would have meant looking for similar Court cases concerning the allocation of non-pecuniary compensation to men and to women, provided that the relevant circumstances of the cases were substantially similar.

⁴¹ *Id.* (Ravarani, J. and Bošnjak, J., dissenting).

⁴² See Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUMAN RIGHTS L. REV. 99-124 (2013).

⁴³ *Alajos Kiss v Hungary*, Eur. Ct. H.R. 38832/06, 12 (2010) (concerned a provision of Hungarian law that excluded people suffering from mental disabilities from voting in national elections).

⁴⁴ Paul Quinn, *The problem of stigmatizing expressions: The limits of anti-discrimination approaches*, 17 INT'L J. DISCRIMINATION & L., 28 (2017).

⁴⁵ *Carvalho Pinto de Sousa Morais v. Portugal*, Eur. Ct. H.R. 17484/17, 35 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659> (Ravarani, J. and Bošnjak, J., dissenting).

⁴⁶ *Id.* at 33.

⁴⁷ *Id.* at 36.

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Here, an insurmountable difficulty arises: No two situations are exactly comparable, because in every instance in which an adjudicating authority is called upon to estimate the amount of non-pecuniary damage, it must take into account and weigh carefully the specific circumstances of the case. The comparability test is fraught with idiosyncratic conditions and elements that are case specific and must be assessed to determine the adequate compensation for non-pecuniary damage.

Given this difficulty, it is unsurprising that in the dissent's view, the two cases involving male victims of medical malpractice were not comparable to Carvalho's case. As for the allegation of negative gender biased stereotype, the dissent suggested that the majority placed too much stock in the language employed by the Supreme Administrative Court, and wrongly concluded that negative gender biased reasoning was the main rationale guiding the decision of the Supreme Administrative Court.

The second argument of the dissenting opinion — that the majority failed to consider the allegation of age discrimination — was more clear-cut.⁴⁸ According to the dissent, it is clear from the impugned decision that the domestic Court did make the importance of the applicant's sexual life dependent on her age, not on her gender.⁴⁹ The dissent believed that, "For the assessment of discrimination, the judgment could have tried to assess comparable groups of persons in taking as distinctive criteria either age or gender."⁵⁰ In short, the dissent concluded that the majority plainly did not get the facts right. According to the dissent, the majority incorrectly read the decision of the Supreme Administrative Court as stating only that the "women's sexual life is less important than that of men,"⁵¹ thereby ignoring the more relevant discriminating factor: the age of the applicant.

V. CRITICAL PERSPECTIVE

At this stage, having described the facts of the case, and both the decision of the Court and its minority position, we would like to present a different perspective on the Carvalho case. This critical perspective is influenced by the contributions of a legal scholarship that engages in rewriting judgments as if we were judges.⁵² More modestly, in this section, the authors ask what alternative courses of action the Court could have pursued had Carvalho and the Strasbourg judge viewed the case in the context of age discrimination. This review is based on the critique, raised in the dissenting opinion and shared by these authors, that the majority ruling did not give adequate weight to Carvalho's age. As we argue, the ECtHR, in Carvalho, could have reached the same outcome based not on gender, but rather based on age.

As mentioned earlier, in cases involving allegations of discrimination, the Court can follow two approaches. The first is more procedural and consists of three steps: 1) identify the comparator; 2) establish a difference in treatment; and 3) assess the justifiability of the difference in

⁴⁸ *Id.* at 38-39.

⁴⁹ *Id.* at 40.

⁵⁰ *Id.* at 35.

⁵¹ Carvalho Pinto de Sousa Morais v. Portugal, Eur. Ct. H.R. 17484/17, 40-41 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659>.

⁵² DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 2-15 (Eva Brems eds, 2012).

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treatment. The second approach is more substantive and involves “naming and contesting” the alleged social group's stigma and stereotype.⁵³

Now, “if we were judges,” a preliminary step under both approaches would be to decide whether age is or could be recognized as “other status.” In *Carvalho*, both the majority and the dissent recognized age as other status for the purposes of Article 14. It should be acknowledged that this position has not always been so clear. In general, states have a wide margin to use age as a proxy to serve legitimate objectives, e.g., the age of consent to sexual relations.⁵⁴ However, the ECtHR has acknowledged that age-based treatments can nevertheless be questionable from a human rights perspective.⁵⁵ Legally speaking, then, the significance of age has been difficult to grasp. Arguably the main reason for this difficulty is the dynamic nature of age. Unlike other grounds such as gender, disability, or ethnic origin, age is not immutable, nor innate or inherent. Age is constantly changing, and no one has any control over it.⁵⁶ Thus, age barriers do not actually discriminate against another group (“them”), but make a distinction that concerns “us,” too, when we are that age.⁵⁷

A few observations have been raised within this context. First, as the Court has recognized, it is immaterial if the personal characteristic is immutable or not.⁵⁸ The “equal treatment” rationale, mentioned earlier, questions the reasonableness and fairness of any difference in treatment as long as it affects an applicant’s right under the ECHR. Second, the claim that because we all age, age barriers do not actually create differences between comparable groups, does not take into account the distinction, familiar to demographers, between an individual’s “age cohort” and “age group,” and between “cohort effects” and “age effects.”⁵⁹ Put simply, the difference boils down to this: A person aged 20 belongs to the age group 20 and to the age cohort 20, which is the cohort of the 20-year-old living in any year — whether it be 1960 or 1990. Now, the 20-year-old in 1960 is not living in the same conditions as a 20-year-old living in the 1990. This is the result

⁵³ See Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 99-124 (2013).

⁵⁴ *Dudgen v. U.K.*, Eur. Ct. H.R. 7525/76, 5 (1981), <http://ceere.eu/wp-content/uploads/2016/03/CASE-OF-DUDGEON-v.-THE-UNITED-KINGDOM.pdf>.

⁵⁵ *Schwizgebel v. Switzerland*, Eur. Ct. H.R. 25762/07, 16 (2010), http://www.aimjf.org/storage/www.aimjf.org/Jurisprudence_CEDU/CASE_OF_SCHWIZGEBEL_v._SWITZERLAND_Extracts.pdf (“The Court is of the opinion, by contrast, that the applicant may consider herself to have been treated differently from a younger single woman who, in the same circumstances, would be likely to obtain authorization to receive a second child with a view to its adoption. Accordingly, the applicant may claim to be a victim of a difference in treatment between persons in analogous situations”); see also, *Khamtokhu & Aksenich v. Russia*, Eur. Ct. H.R. 60367/08 961/11, 17 (2017) (“The Court notes that “sex” is explicitly mentioned in Article 14 as a prohibited ground of discrimination and that it has previously accepted that “age” is also a concept covered by this provision”); see *Nelson v. the United Kingdom*, Eur. Ct. H.R. 11077/84 (1986) (stating “The Commission recalls its constant case-law to the effect that age may constitute a “status” under Article 14.”).

⁵⁶ AGE AS AN EQUALITY ISSUE (Sandra Fredman and Sarah Spencer eds., Oxford: Hart Publishing, 2003).

⁵⁷ JOHN MACNICOL, AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS 25 (Cambridge University Press, 2006).

⁵⁸ See *Carson and Others v. UK*, Eur. Ct. H.R. 42184/05 (2010) 18-21; see also *Clift v. UK*, Eur. Ct. H.R. 7205/07, 15-16 (2010).

⁵⁹ Axel Gosseries, *What makes age discrimination special? A philosophical look at the ECJ case law*, 43 NETH. J. OF LEGAL PHIL. 59-80 (2014).

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of what demographers call the cohort effect: sexual habits, children-parent relationships, work and occupation, technology advancements, etc. change over time. The two cohorts have the same age but lived, live or are going to live in different cultural, economic, and social worlds. Accordingly, the 20-year-old today cannot actually claim that in 45 years he or she will be in a situation comparable to that of someone who is currently 65 years old. Third, it has been observed that age, just like race or ethnic origin or gender, cannot be hidden.⁶⁰ It is visible in the course of social interactions, and it may play a role in decision-making, such as in job interviews. For this reason, some national legislations, such as in the United Kingdom, prohibit discrimination on the grounds of age or the age one appears to have, i.e. the person's "apparent age."⁶¹ In conclusion, both the Court's case law and the arguments based on legal doctrine gravitate toward the recognition of age as a suspect ground of discrimination comprised under "other status".

Having clarified this preliminary issue, the first step under the aforementioned procedural approach would be to identify a suitable comparator. In this alternative age-based inquiry, the comparability would involve "women of the applicant's age impaired in their sexual activities due to medical negligence," on one hand, and "adult women younger than the applicant impaired in their sexual activities due to medical negligence," on the other.⁶² This would frame the question of discrimination as whether older women are treated differently from younger women, rather than whether older women are treated differently from men — which was how the majority in Carvalho framed the question.

Second, a judge would arguably need to show that older women are treated systematically differently. This would involve, for example, a showing that older women are awarded lower compensation for non-pecuniary damages compared to younger women. Accordingly, the plaintiff or the Court should identify two separate sets of decisions or cases — one concerning women of the same age group as the plaintiff, and the other concerning women who are younger than the plaintiff. This research, focused on age groups, would be feasible and more straightforward to conduct than researched focused on looking for cases involving men and women, who are, from a medical point of view, in less comparable situations.

As a third and final step, the Court would need to assess whether the difference in treatment/compensation has a reasonable justification. Note that the considerations under this heading would be very similar to those that a Court would develop to name and contest an ageist stereotype. Concretely, the Court would need to assess whether the use of the age of the applicant as a mitigating factor was reasonable. The assessment calls to the fore the assumption according to which sex life is less important when old. These authors suggest that, for this type of assessment, a sufficiently robust course of action would be as follows.

First, the Court could present some pieces of gerontological knowledge about sex in later life. For example, in a study on desire, activity, and intimacy in the older population, the majority of people interviewed showed significant presence of sexual desire, activity, and function, even in

⁶⁰ Olivier De Schutter. *Three Models of Equality and European Anti-Discrimination Law*, 57 N. IR. LEGAL Q. 1, 2 (2006).

⁶¹ Employment Equality (Age) Regulations 2006, SI 2006/1031 art. 1, ¶ 3 (3)(b); see JONATHAN HERRING, *OLDER PEOPLE IN LAW & SOCIETY* 36 (Oxford: University Press, 2009).

⁶² This alternative is in line with Judge Ravarani and Judge Bošnjak's dissent. Carvalho Pinto de Sousa Morais v. Portugal, Eur. Ct. H.R. 17484/17, 35 (2017), <http://hudoc.echr.co.e.int/eng?i=001-175659> (Ravarani, J. and Bošnjak, J., dissenting).

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later years.⁶³ More specifically, psychiatrists Gurrinder Karla, Alka Subramayam, and Charles Pinto found that a significant majority (72%) of participants aged 50-60 were sexually active, while a majority (57%) of the participants over the age of 60 were sexually active. Other studies found that, while there is a reduction in experiencing sex and in its frequency as people age, a significant majority of older persons continues to be sexually active.⁶⁴ This empirical reality goes against the stereotypical social bias, held by many young people, that older persons do not engage in sexual activity.⁶⁵

This is not to say that there is no decline in the level of sexual activity as people age; there is a decline, and the percent of people age 65-74 that are sexually active is lower than of younger age groups.⁶⁶ Nor does it mean that there is no gender difference, as older men are more sexually active than older women.⁶⁷ Rather, the point is that attitudes and perceptions about sexual relationships in old age are more important than the actual activity itself. Here again, evidence shows that, while there is a gender gap, and a general mode of decline with older age, in almost all age groups, the majority of men and women continue to believe that sex is an important part of life.⁶⁸ According to specialized literature, sexual intimacy in later life is a “policy blind spot.”⁶⁹ A study conducted across 15 European countries, called “Institutional Treatment, Human Rights and Care Assessment (ITHACA)”, refers to sex in later life as a key item to be monitored in their checklist of human rights in psychiatric and long term care institutions.⁷⁰ Some countries, like Sweden, protect the right of older people to move into residential care

⁶³ Gurrinder Kalra, et al., *Sexuality: desire, activity, and intimacy in the elderly*, 53 INDIAN J. OF PSYCHIATRY 300-06 (2011).

⁶⁴ Studies show that 83.7% of men and 61.6% of women between the ages of 57 and 64 are sexually active. Alan Altman, *Postmenopausal dyspareunia – a problem for the 21st century*, OBG MANAGEMENT (2009), <https://www.mdedge.com/obgmanagement/article/63486/menopause/postmenopausal-dyspareunia-problem-21st-century/page/0/1>.

⁶⁵ See e.g., Ashley E. Thompson et al., *Young Adults' Implicit and Explicit Attitudes Towards the Sexuality of Older Adults*, 33 CANADIAN J. ON AGING 259-70 (2014); see also, Israel Doron, *A Perspective on Ontario's Adult Guardianship Law: The Role of Law in Adjudicating Disputes Caused by Old Men Marrying Young Women*, 1 THE ELDER L. REV. 43-54 (2002).

⁶⁶ Studies show that 83.7% of men and 61.6% of women between the ages of 57 and 64 are sexually active. However, there is a decline as people age. Studies show that 67% of men and 39.5% of women between the ages of 65 and 74 are sexually active. Alan Altman, *Postmenopausal dyspareunia – a problem for the 21st century*, OBG MANAGEMENT (2009), <https://www.mdedge.com/obgmanagement/article/63486/menopause/postmenopausal-dyspareunia-problem-21st-century/page/0/1>.

⁶⁷ *Id.*

⁶⁸ Linda J. Waite et al., *Sexuality: Measures of Partnerships, Practices, Attitudes, and Problems in the National Social Life, Health and Aging Study*, 64 THE J. OF GERONTOLOGY 160 (2009) (stating that 76% of women and 93.8% of men between the ages 57 and 64 are sexually active or interested in sex).

⁶⁹ See Isabella Aboderin, *Sexual and Reproductive Health and Rights of Older Men and Women: Addressing a Policy Blind Spot*, 22 REPRODUCTIVE HEALTH MATTERS 185–90 (2014); see also Bethan Everett, *Ethically Managing Sexual Activity in Long-term Care*, 25 SEXUALITY & DISABILITY 21-27 (2007); see Lyba Spring, *Older Women and Sexuality – Are We Still Just Talking Lube?* 30 Sexual and Relationship Therapy 4-9 (2014).

⁷⁰ See e.g., J. Randall, et al., *Development of the ITHACA Toolkit for Monitoring Human Rights and General Healthcare in Psychiatric and Social Care Institutions for the ITHACA Project Group*, 22 EPIDEMIOLOGY & PSYCHIATRIC SCIENCES 241-54 (2013).

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together with their partner/spouse, irrespective of whether the spouse is in need of care.⁷¹ These references indicate that, while sexual intimacy in later life is statistically less frequent, older people nevertheless value sex in later life, and, for many of them, it is an essential part of their personhood, independence, and wellbeing.

Second, in order to decide if the decision to reduce compensation has been fair, as opposed to motivated by ageist stereotypes, the Court should address the concept of ageism. An alternative judgement could make reference to the concept of ageism and the growing attention and scientific knowledge around it. Since the late 1960s, there has been a growing body of conceptual, empirical, and methodological literature that captures, measures, and explains this social phenomenon.⁷² It started from the first definition of ageism and has expanded dramatically since then.⁷³ We know today, based on empirical research, that older persons experience biases, prejudices, and discrimination based solely on their old age. Similar to other "isms," such as sexism or racism, ageism transforms group identity and human fear for ageing and dying into daily practices that can humiliate and harm older persons solely based on their age.⁷⁴ In opposition to ageist practices and discourses, since the 1980s, a number of "soft" law instruments have been discussed and adopted at the international and regional levels.⁷⁵ In Europe, for instance, the Committee of Ministers of the Council of Europe, in 2014, released a specific recommendation on older persons' rights, with the aim of promoting older persons' protection in societies where ageism is rising.⁷⁶

Third and finally, a judge would connect ageism and gerontological knowledge about sex in later life. One could argue that the fact that, in general, older persons are less involved or interested in sex does not justify the legal categorization of all older persons as different with regard to sex life. Making a decision based solely on the fact that a person is a member of a group — in this case, older persons — generally deemed to be less interested in sex means taking a decision without consideration of the individual case. It is ageist. As gerontological empirical knowledge proves, such is the heterogeneity of older persons and of the ageing experience that generalizations based on old age should be taken with great caution. True, older persons are statistically less likely to engage in sexual activity. However, on the individual level, older persons are different in significant ways. They age very differently, and, for many of them,

⁷¹ See Hakan Jönson & Tove Harnett, *Introducing an Equal Rights Framework for Older Persons in Residential Care*, 56 THE GERONTOLOGIST 800-06 (2016).

⁷² See AGEISM: STEREOTYPING & PREJUDICE AGAINST OLDER PERSONS (Todd D. Nelson ed., 2004); see ERDMAN B. PALMORE, AGEISM NEGATIVE AND POSITIVE (1999); see Robert N. Butler, WHY SURVIVE? BEING OLD IN AMERICA (1971).

⁷³ See Thomas N. Iversen et. al, *A Conceptual Analysis of Ageism*, 61 NORDIC PSYCHOLOGY 4-22 (2009).

⁷⁴ See Todd D. Nelson, *Ageism: Prejudice Against Our Feared Future Self*, 61 J. OF SOC. ISSUES 207-21 (2005).

⁷⁵ See Vienna International Plan of Action on Ageing, U.N. Doc. A/RES/37/51 (Dec. 3, 1982); Madrid International Plan of Action on Ageing, U.N. Doc A/CONF.197/9 (2002); United Nations Principles for Older Persons, G.A. Res. 46/91 (Dec. 16, 1991); Organization of American States, Inter-American Convention on Protecting the Human Rights of Older Persons, O.A.S.T.S. No. A-70, June 15, 2015, http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-70_human_rights_older_persons.pdf; African Union, Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Older Persons, Jan. 31, 2016, https://au.int/sites/default/files/pages/32900-file-protocol_on_the_rights_of_older_persons_e.pdf.

⁷⁶ See Eur. Consult. Ass., *Recommendation CM/Rec(2014)2 of the Comm. of Ministers*, Doc. No. CM/Rec(2014)2, (2014), <http://www.refworld.org/docid/53fdc73e4.html>.

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sexual life remains significant, and they continue to be actively involved in it at their own pace. Thus, social norms, which seem to reserve sexual activity only for the young and vigorous, do not justify discrimination against older persons. Further, in addition to the unhappiness this social norm generates, the Court, in *Konstantin Martin v. Russia*, clarified that social norms cannot justify legal discrimination of certain groups.⁷⁷

Against this background, the Portuguese Supreme Administrative Court's argument that the significance of sex reduces with age reveals itself as based on ageist assumptions. With this finding in mind, our hypothetical Court would argue that:

"It might generally be reasonable to take into account a claimant's age when determining the amount of damages to be awarded, as it is evident that a younger claimant will probably have to live with a given injury for longer than an older claimant. It might even be reasonable, in a case involving a physical loss of ability to have sex, to consider whether or not a claimant is affected by the inability to have children. However, it was both irrational and degrading for the Administrative Court to speculate as to the applicant's sex life in general and to make any presumption in this respect based on a generalisation."⁷⁸

This is exactly what Section President, Judge Yudkivska wrote in her concurring opinion. Regrettably, she did not analyze the case as involving discrimination based on age, but rather looked at in the context of sex and gender.

VI. CONCLUSION

This article has analyzed and critically discussed the decision of European Court of Human Rights in the case of *Carvalho Pinto de Sousa Morais v. Portugal*, which concerned a case of discrimination in the enjoyment of the right to private and family life.

The analysis moved from the decision of the majority to view the case as another attempt by the Court to deal with the question of stereotypes in the field of gender. The analysis of the dissenting opinion, however, suggested otherwise — namely, that the importance of the applicant's sexual life was made dependent on the age and not, or not only, on the gender of the applicant.

Following this judicial analysis, the authors of this article attempted to imagine an alternative ruling, one which looked at the case in the context of age, as opposed to gender, discrimination. From this exercise, the main criticism of the *Carvalho* decision is that the Court gave too little weight to *Carvalho's* age; or, more specifically, that it failed to address the social construction given to age by the Portuguese courts.

⁷⁷ *Konstantin Martin v. Russia*, Eur. Ct. H.R. 30078/06 (2012) (rejected Russia's argument that the division between men (i.e. breadwinner) and women (nurturers) was socially accepted in the country with regards to the recognition of parental leave for male parents working in the army and stated that "states may not impose traditional gender roles and gender stereotypes").

⁷⁸ *Carvalho Pinto de Sousa Morais v. Portugal*, Eur. Ct. H.R. 17484/17, 25 (2017), <http://hudoc.echr.coe.int/eng?i=001-175659> (Yudkivska, J., concurring).

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The Court had a choice. It could have chosen to assess the discrimination on ground of gender, age, or both. For the dissenting judges, the majority's choice to base its decision only on gender discrimination was the wrong choice, as it proved that the Court had failed to show the existence of gender discrimination. Without having to agree with their result, it is our view that the dissenting judges were correct in their criticism regarding the majority's blindness towards the element of age and to ageism and the negative construction of the right to sexual life in later life in general.

In this sense, it is indeed disappointing to see how difficult it is for the Court of Strasbourg to accept that categorizations based on age can be, in certain contexts, questionable from a human rights perspective. What is more frustrating is how the Court ignores — or simply unaware of — the growing gerontological knowledge, empirical findings, and scientific insights about ageing experiences and about how prejudices, stigmas, and biases hinder the ability of older persons to enjoy their human rights. After all, European citizens are increasingly older citizens, and what these studies on ageing and ageism essentially say is that it is high time to acknowledge this reality and fuel the discussion.

Are we sure that a continent whose population is increasingly old is creating the right conditions for millions of individuals to spend their last years well? What do we mean by being old? What do we expect? How do we view and understand the experience of ageing and of being old? What limits do we put? It is high time that human rights law starts contributing, from its own standpoint and according to its own parameters, to the new reality of ageing societies and ageism. To do so, one must first acknowledge it. Going back to the Carvalho case, it is impressive to see how, in their concurring opinions, the majority goes far beyond formal legalistic literature, bringing in references to books, precedents, and human history in order to justify their decision regarding the discrimination of women based on gender. It is thus so disappointing that nothing similar was done with reference to old age or ageism. Hence, the bottom line is that, in our view, the Carvalho decision was a missed opportunity.