

A Right to a Male Curfew

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Abstract

This article explores the case for a right to a male curfew. It argues the epidemic of male violence and harassment against women in public spaces is a major breach of women's human rights. This generates an obligation on the state to protect women. The article substantiates that claim and explains why a male curfew would be a reasonable way for the state to fulfil its obligations and is therefore required unless an alternative can be found.

Keywords

Curfew; Human Rights; Autonomy; Protection; Harassment

Introduction

This article will make the case for a human right to a male curfew. To be clear this is a stronger claim than suggesting that a male curfew could be permitted under human rights law, but rather argues it is required under human rights law. Male violence against women in public spaces is a breach of women's human rights, generating a right for women to be protected from that violence. It will be argued there is a legal duty on the state to protect women from violence and harassment in public places and that a curfew is the only way to fulfil this responsibility effectively.

I accept straight away that many readers will find the proposal of an all-male curfew deeply unsettling, as indeed I do, and may find it impossible to accept. Nigel Farage has described the proposal as "deranged".² The challenge of this article for such readers is that there is a duty on the state to provide effective protection for women and it is a duty that must

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² Quoted in Arwa Mahdawi, 'Angry at the Idea of a Curfew for Men? Think of all the Ways Women are Told to Adapt' *The Guardian*, 13 March 2021. Available at: <https://www.theguardian.com/commentisfree/2021/mar/13/men-curfew-sarah-everard-women-adapt-violence> (last accessed 3 June 2024).

be met. If any readers are not convinced by the proposed curfew solution, it is for them to find an effective alternative.

The argument will be structured in this way. First the article will set out the current evidence of the harms faced by women in public at night. Second, the article will set out the positive obligations that a state has to protect women from harassment and violence under the European Convention on Human Rights (ECHR). Third it will look at how the state might meet its duties and argue that a curfew is the most effective one. Fourth, it will explore potential challenges to the argument put forward in this article.

The Social Context

There is an epidemic of male violence against women. The Office of the United Nations High Commissioner for Human Rights has said:

Every day, OHCHR offices around the world receive reports of violence against women: – intimate-partner violence; gender-motivated killings, including so-called “honour crimes”; sexual and gender-based violence; use of sexual violence as a weapon of war; forced marriages; acid attacks; so called “corrective” rape of lesbians; trafficking of young women; physical and psychological abuse of migrant and domestic workers; torture in detention, forced sterilisation– these are just some examples. Violence against women comes in many different forms. Violence against women and girls harm families and communities and is a major cause of death and disability.³

An important feature of this is the abuse of women in public spaces. Looking at the UK, statistics presented by the Office for National Statistics showed that over 80% of women felt unsafe in a park or open space at night and around 50% felt unsafe in a quiet street, even if close to home, or on public transport.⁴ Even among those aged 16-34 nearly half of women felt unsafe using public transport. The study also asked women if they had experienced “catcalls, whistles, unwanted sexual comments or jokes” from a stranger in the previous year and nearly 40% said they had. Nearly a quarter report a feeling they were being followed; over 20% being insulted or shouted at by a stranger. Less than fifty per cent of women had not experienced any form of harassment in public in the previous year.

³ Office of the United Nations High Commissioner for Human Rights, *Violence Against Women* (United Nations, 2020).

⁴ Office for National Statistics, *Perceptions of Personal Safety and Experiences of Harassment* (ONS, 2022).

UN Women in their study of women's experience in the UK found 71% of women of all ages had experienced some form of sexual harassment in a public space, with that rising to 86% of those aged 18-24 (and only 3% of that age group saying they had not experienced any form of harassment).⁵ A study by Girlguiding found 53% of girls aged 11-21 did not feel safe outside on their own, with the figure being 58% in the North of England.⁶

In addition to looking at the issue as a matter of broad statistics, it is important to appreciate what this means in practice for individual women. Claudia, a student aged 19, writes:

It's the everyday things women go through that breeds this fear of being alone at night – catcalls on the street, men twice my age staring, vulgar comments at the pub with my friends. These are things that every woman has experienced, and so, when it comes to being alone in a public space at night, I've found I'm naturally more fearful... Just the thought of walking past a group of men at night is enough to have my heart beating.⁷

It is quite clear that the issue of safety in public at night is a major issue for many women. The research cited demonstrates that a large number of women are being severely impacted in the freedom of movement; many women are regularly fearful of suffering violence in public spaces; and that many women do in fact suffer abuse and violence in public. That, I argue, raises major human rights claim, which will be discussed next.

The Positive Obligations to Protect

Historically, human rights operated as a constraint on the state. In other words, they prevented the state from acting in ways which infringed important human interests. However, in recent decades, it has been widely accepted that human rights can also impose positive obligations on the state.⁸ There are three primary reasons for this.

⁵ UN Women, *Prevalence and Reporting of Sexual Harassment in UK Public Spaces* (United Nations 2021). UN Women is a United Nations Organisation promoting the empowerment of women. Available at: <https://www.unwomen.org/en/about-us> (last accessed 3 June 2024).

⁶ Girlguiding, *Research Briefing: It Happens all the Time: Girls' and Young Women's Experiences of Sexual Harassment* (Girlguiding, 2022).

⁷ Rachel Obordo and Jedidajah Otte, "I Stick to Well-lit and Busy Areas": Women Share their Fears of Walking alone at Night' *The Guardian* 11 March 2021. Available at: <https://www.theguardian.com/lifeandstyle/2021/mar/11/i-stick-to-well-lit-and-busy-areas-five-women-share-their-fears-on-walking-alone-at-night> (last accessed 3 June 2024).

⁸ Hugh Breakey, 'Positive Duties and Human Rights' (2015) 63 *Political Studies* 1198.

First, some rights in their nature require positive action. The right to health, for example, can only be met by the state providing or facilitating health services for its citizens. Indeed, a broad range of social and economic rights fall into this category.⁹ If human rights only ever worked to prevent the state behaving in certain ways, their impact would be greatly reduced, indeed some rights, such as the right to health, would become extremely limited and people's interests in their health would not effectively be protected. By requiring positive acts of the state, rights can be an effective way of ensuring citizen's core needs are met.

The second is that an interference in a person's rights can come not just from the state but from other citizens. While a negative right might prevent a person's rights being interfered with by the state, a positive right on the state to protect individual citizens from other citizens is required to protect the right fully. It is that latter sense which is the primary focus of the discussion in this paper.

Third, recognising positive human rights obligations on the state is particularly important for women. As women are disadvantaged in a wide range of ways within society, without positive interventions from the state these will go without remedy. Positive obligations flowing from human rights are an important part of promoting gender equality.¹⁰

In short, in order to protect women's rights to life and bodily and psychological security and liberty in public spaces more is needed than simply the state itself not killing or harming women. The state has a duty to protect women from others.¹¹ The detail of this will be set out by reference to the different rights under the ECHR, although similar points could be made using other human rights documents.¹²

Article 2

Article 2 provides:

⁹ Sandra Fredman and Meghan Campbell, *Social and Economic Rights and Constitutional Law* (Edward Elgar, 2016).

¹⁰ Elif Ceylan Özsoy, 'Critical Feminist Law-Making: Imitative Spaces and Improvised Coalitions' (2022) 48 *Australian Feminist Law Journal* 265.

¹¹ Jonathan Herring, *Domestic Abuse and Human Rights* (Intersentia, 2022), which develops these arguments in the context of domestic abuse.

¹² E.g. Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (Council of Europe, 2014) [The Istanbul Convention]; United Nations, *Universal Declaration of Human Rights* (United Nations, 1948).

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Under Article 2 the state has the obligation to protect a person from a threat to their life.¹³ There are two key aspects of this. First, the law has a general duty to ensure there are effective criminal law provisions to prevent homicide. Second, there can be specific obligation to protect people who pose a known threat.¹⁴

In our context it is the first of these aspects which is more important. According to *Menson v UK* (2003), this imposes:

a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against a person backed up by law enforcement machinery for the prevention of suppression and punishment of breaches of such provisions.¹⁵

This duty requires the state to put in place sufficient laws to protect women's lives.

In fact, the number of killings of women in public spaces is low. There were 198 women victims of homicide for England and Wales in the year ending 2022. In only 7 cases was a woman killed by a stranger.¹⁶ These statistics will become relevant when we consider whether the state is required to impose a male curfew to fulfil its Article 2 duty. It may be the rarity of public killings of women mean that Article 2 obligations alone are insufficient to justify a male curfew, but once other rights are brought in the case for a curfew becomes stronger.

¹³ *Kongrovà v Slovakia* (Application no. 7510/04).

¹⁴ *Osman v UK* (1998) 29 EHRR 245.

¹⁵ Application no. 47916/99, 6 May 2003.

¹⁶ Office for National Statistics, *Homicide in England and Wales* (ONS, 2023).

Article 3

Article 3 provides:

No one shall be subject to torture or to inhuman or degrading treatment or punishment.

Article 3 is an absolute right. There are no circumstances in which a breach of it is justified nor is a derogation from it permitted. Even in time of war or other national emergency it must be respected.¹⁷

It is widely accepted that rape and serious sexual assault would constitute torture, inhuman or degrading treatment and so are covered by Article 3.¹⁸ The 2020 Crime Survey estimated that 1.6 million people had been the victim of rape or sexual assault by penetration at some point in their adult lives. More than one in twenty women had experienced rape in their lifetime. However,

For the years ending March 2017 and March 2020 combined, the most common location for rape or assault by penetration to occur was in the victim's home (37%), followed by the perpetrator's home (26%). The assault had taken place in a park, other open public space, car park or on the street for 9% of victims.¹⁹

Although a minority of sexual assault are in public space, even at 9% that is a significant level of sexual violence. For the year ending September 2022 there were 70,663 reported rapes, but we know around 5 in 6 rapes are not reported.²⁰ That suggests there may have been 434,978 rapes per year. If 9% are in public places, that is 38,158 rapes in public places a year, some 105 each day. And that is only discussing rape: sexual assault will be much higher.

But I suggest Article 3 can have wider application than serious sexual offences. 'Inhuman treatment' in Article 3 includes actual bodily harm or intense physical or mental suffering.²¹ 'Degrading treatment' includes conduct which humiliates or debases an individual; or shows a lack of respect for, or diminishes, human dignity. It also includes conduct which arouses feelings of fear, anguish, or inferiority capable of breaking an individual's moral and

¹⁷ *Chahal v the United Kingdom* [1997] 23 EHRR 79.

¹⁸ *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11.

¹⁹ Office for National Statistics, *Nature of Sexual Assault by Rape or Penetration, England and Wales: year ending March 2020* (ONS, 2022).

²⁰ Rape Crisis, 'Rape and Sexual Assault Statistics'. Available at: <https://rapecrisis.org.uk/get-informed/statistics-sexual-violence/> (accessed 3 June 2024).

²¹ *Ireland v the United Kingdom* 2 EHRR 25.

physical resistance.²² This is why the fear of assault women face in public spaces raises serious human rights issues. In *Valiuliene v Lithuania*, it was held:

... Treatment has been considered ‘degrading’ when it was such as to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance.²³

The Court went on to explain that an assessment of whether conduct falls within Article 3 ‘depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.’²⁴ This means that just because a form of conduct is not degrading treatment for one person does not mean that it cannot be so for another.²⁵ In *Dorđević v. Croatia*²⁶ a vulnerable man was harassed and abused by a group of children. His inability to protect himself was emphasised in finding a breach of Article 3. The continued harassment had caused physical injuries, feelings of fear and helplessness and these were all sufficient to fall within the remit of Article 3. This is important because it makes it clear that street harassment may have little impact on some women, but nevertheless fall within Article 3 for other women. Given the prevalence of rape and serious sexual assault, unwanted sexual remarks in public can have a profound impact on a large number of women and be part of their degrading treatment. This generates a powerful obligation on the state to protect women, something this article suggests a curfew would do.

Of course we do have criminal sanctions against rape, although as the Victims Commissioner has pointed out these are of limited effectiveness as a deterrent:

In the year to December 2021, there were 67,125 rape offences recorded – an all-time high. Yet the number of completed rape prosecutions plummeted from 5,190 in 2016-17 to just 2,409 in 2020-21. The numbers of convictions almost halved (2,689 in 2016/17 compared to 1,409 in 2020/21). Only 5% of rapes that were given an outcome by the police in the year ending December 2021 resulted in a charge.²⁷

²² *Wieser v. Austria* Application no. 2293/03, [36]; *Dorđević v Croatia* (2012) EHRR 1640, [95].

²³ Application 33234/07, [66], discussed in Ronagh McQuigg, ‘The European Court of Human Rights and Domestic Violence: *Valiuliene v. Lithuania*’ (2014) 18 *The International Journal of Human Rights* 756.

²⁴ Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart, 2010), ch 2.

²⁵ *Mudric v Moldova* Application no. 74839/10; *Talpis v Italy* Application no. 41237/14.

²⁶ *Dorđević v Croatia*, n 22 above, [96].

²⁷ The Victims Commissioner, *The Distressing Truth is that if you are Raped in Britain Today, Your Chances of Seeing Justice are Slim* (Victims’ Commissioner, 2022).

Clearly the deterrent effect of a rape prosecution is currently of limited impact and more proactive steps must be taken to protect women from sexual assault, which is a major invasion of their Article 3 rights. Similarly, there are recognised gaps in harassment in public place and unwanted sexual remarks, which are either outside the law or do not get prosecuted.²⁸

Article 8

Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 is a qualified right. It is possible to justify an interference in the rights contained in the first paragraph, on the basis of the grounds set out in the second paragraph. Cases under Article 8, therefore, often involve a two-stage process. First, there is a determination of whether the right under Article 8(1) has been infringed. If so, the court should proceed to the second stage which is an assessment of whether the interference is justified under Article 8(2). This will require an assessment of whether the interference was prescribed by the law, whether the interference was necessary in the interests of one of the listed, legitimate, aims and, finally, whether the interference was necessary in a democratic society in pursuance of the legitimate aim. Any interference with a right must be shown to have been in response to a pressing social need to act for that purpose and to be a proportionate response to that purpose.²⁹ Proportionality thus becomes a 'vehicle for conducting a balancing exercise' by requiring a balance between the nature and extent of the interference against the reasons for interfering.³⁰ In general, in determining the issue of proportionality whether the measures taken are 'necessary in a democratic society', the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purpose

²⁸ Crown Prosecution Service, *Street-Based Sexual Harassment* (CPS, 2022).

²⁹ *Silver v United Kingdom* 5 EHRR 344, [97].

³⁰ David Feldman, *Civil Liberties and Human Rights* (Oxford University Press, 2017), 57.

of paragraph 2 of Article 8,³¹ In making this assessment, the Court will afford the national authorities a margin of appreciation, in recognition of the fact that they are better placed to the primary judgment as to the needs of the parties involved and the appropriate balance to be struck between them.³²

First, the word 'respect' is significant. It requires more than mere toleration or an ensuring that the rights are not breached. The word respect implies a positive duty to ensure these rights are given the weight they deserve. This can include requiring the state to take proactive steps to ensure the protection of rights.

Second, Article 8 is not restricted to what might typically be considered part of privacy or family life, but 'the concept of private life covers the physical and moral integrity of the person'.³³ In *X and Y v The Netherlands*³⁴ the lack of effective protection under the criminal law against sexual assault for a mentally ill woman was said to amount to an infringement of her right to private life. Mental health and stability is said to be part of a person's moral integrity.³⁵ It goes even further than this because the ECtHR has stated that Article 8 is concerned with protecting a person's physical and psychological integrity,³⁶ and their right to identity and personal development.³⁷

With these points in mind, despite it being initially perceived as a paradox, interference on women's freedom to move freely around in public spaces is a breach of their Article 8 rights. The terror induced, even where the walk does not lead to actual attack, is an interference in their psychological security. The low-level harassment, particularly when put in the context of the wider negatives social messages sent against women in pornography and "everyday sexism", is significant. There is, therefore, a duty on the state to prevent this in a proportionate way. It will be argued later that a curfew is an appropriate way to meet the obligations imposed by this duty.

³¹ *Olsson v Sweden (No. 2)* (1992) 17 EHRR 134, [68].

³² *Dorđević v. Croatia*, n 22 above.

³³ *X and Y v the Netherlands* (1986) 8 EHRR 235.

³⁴ *ibid.*

³⁵ *Bensaid v The United Kingdom* [2001] 33 EHRR 10.

³⁶ *Pretty v UK* (2002) 35 EHRR 1, [61].

³⁷ *Bensaid v The United Kingdom*, n 35 above, [45].

Article 5

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law....”

There then follows a list of circumstances in which a person may be detained by the authorities. As with the other rights, there is a positive obligation on the State to not only refrain from impeding rights, but to avoid protection of the right to liberty from everyone, even if the source of the interference is another citizen.³⁸ This is an enhanced obligation where vulnerable people are impacted.³⁹ The European Court of Human Rights has not yet had the opportunity to explore this application of this positive obligation in the context of violence in public. Drawing on the development of the law in relation to domestic abuse, however, it seems perfectly plausible to claim that for the many women for whom fear of attacks or harassment means they avoid public places, this is a clear breach of their freedom of their right to liberty under Article 5. Of course, a curfew will also impede the rights of men to access public spaces, and we will be returning to that shortly.

Article 14

Article 14 provides:

The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 prohibits discrimination in relation to the rights guaranteed by the Convention. The Article is not a free standing one. It can only be used in conjunction with one of the other rights in the ECHR. So, one cannot use it to claim that in the abstract you have been discriminated against on the grounds of, say, one's sex. Rather it must be shown that, for example, your Article 8 rights have been interfered with in a way which is discriminatory on the grounds of

³⁸ *El-Masri v The Former Yugoslav Republic of Macedonia* Application No. 39630/09, [239].

³⁹ *Storck v Germany* [2005] ECHR 406, [102].

sex.⁴⁰ Even if the claim does not fall precisely within the terms of a right, it has been held that Article 14 can be relied upon if it is within the 'ambit' of another right.⁴¹

It is, therefore, important to see violence and harassment against women in public spaces as a cause of discrimination. The ECtHR are very likely to accept such a perspective. For example, in *Opuz v Turkey*⁴² the ECtHR made it clear that a state's failure to respond adequately to domestic violence amounted to sex discrimination.⁴³ It was emphasised that women were far more likely to be subject to domestic violence and so a systematic failure to respond to the issue disproportionately impacted on women. In *Volodina v Russia*⁴⁴ the court addressed the burden of proof in a discrimination claim involving domestic abuse. It explained that generally the applicant must show there has been a difference in treatment and the government then has burden to show the difference can be treated. However, it added:

Within the context of violence against women, if it has been established that it affects women disproportionately, the burden shifts onto the Government to demonstrate what kind of remedial measures the domestic authorities have deployed to redress the disadvantage associated with gender and to ensure that women can exercise and fully enjoy all human rights and freedoms on an equal footing with men. The Court has repeatedly held that the advancement of gender equality is today a major goal in the member States of the Council of Europe and that a difference in treatment that is aimed at ensuring substantive gender equality may be justified, and even required, under Article 14 of the Convention.⁴⁵

It went on to discuss the kinds of evidence which will place a burden of proof on a state:

In domestic-violence cases, the Court has referred to reports by international and local human-rights organisations, periodic reports by the CEDAW Committee, and statistical data from the authorities and academic institutions to establish the existence of a prima facie indication that domestic violence affects mainly women and that the general attitude of the local authorities – such as the manner in which

⁴⁰ *Petrovic v Austria* (2001) 33 EHRR 307, [22].

⁴¹ *Dorđević v Croatia* Application, n 22 above, [157].

⁴² *Opuz v Turkey* (2010) 50 EHRR 28. For a detailed discussion see Shazia Choudhry and Jonathan Herring, 'Opuz v Turkey' in Loveday Hodson and Troy Lavers (eds) *Feminist Judgements in International Law* (Hart, 2019).

⁴³ Mandy Burton, 'The Human Rights of Victims of Domestic Violence: *Opuz v. Turkey*', [2010] *Child and Family Law Quarterly* 131; Patricia Londono, 'Developing Human Rights Principles in Cases of Gender-based Violence: *Opuz v Turkey* in the European Court of Human Rights' (2009) 9 *Human Rights Law Review* 662.

⁴⁴ Application no. 41261/17.

⁴⁵ *ibid*, [111].

the women are treated at police stations when they report domestic violence and judicial passivity in providing effective protection to victims – creates a climate that is conducive to domestic violence.⁴⁶

Once this kind of evidence has been introduced:

the applicant does not need to prove that she was also a victim of individual prejudice. If, however, there is insufficient evidence corroborating the discriminatory nature of legislation and practices or of their effects, proven bias on the part of any officials dealing with the victim's case will be required to establish a discrimination claim. In the absence of such proof, the fact that not all of the sanctions and measures ordered or recommended have been complied with does not in itself disclose an appearance of discriminatory intent on the basis of sex.⁴⁷

There would be close parallels to applying this kind of approach to street violence and harassment, where likewise women are statistically more likely to receive this abuse, and its impact and nature is highly gendered. These are important comments in the context of the safety of women in public spaces. They demonstrate that the burden of proof lies on the state to show what steps it has taken to ensure that women's rights under Articles 2, 3, 5 and 8 of the ECHR are not infringed in a discriminatory way.

It is clear that street violence and harassment disproportionately impact on women. The studies cited earlier demonstrate that far more women are nervous in public places and suffer harassment in public places than men do, and this has a wider impact on the lives of women generally who are deterred from public places and transportation. Further, the forms of harassment that women might suffer on the street may be dismissed as "trivial" or "a joke" but these must be put in their wider context and this explains why they are of a different nature from equivalent cases where a man is subject to comments in public. For women, the street harassment is echoing and reinforcing the negative messages in pornography, wider portrayal of women in the media, domestic abuse, and violence against women generally. So, if a woman walking in public is told a man would like to "sleep with her" (or, more likely, words to that effect) this repeats the messages within pornography that women are available for men's sexual enjoyment, regardless of their consent. The remark is made in the context of a society

⁴⁶ *ibid*, [113].

⁴⁷ *ibid*, [114].

in which rape largely goes unpunished and men are generally physically stronger than women. By contrast if a woman were to say such a thing to man, none of that context would usually apply. It is, more likely something he would joke about with his mates, than perceive as a terrifying incident.

It is also important to note that the impact of restrictions on women's access to public spaces increases impact of patriarchy. It combines with economic challenges, domestic abuse, and discrimination in the workplace to exclude women from public goods. In this sense it sustains the patriarchal impact on women.

Bringing the Human Rights Claims Together

Violence, abuse, and harassment against women in public spaces engages many of the human rights within the ECHR. These claims are heightened given the gendered nature of their impact and the protection from discrimination under Article 14. The state's duties fall into two categories: a general duty that is owed to everyone, or everyone whose rights are endangered; and a specific duty that is owed to individuals. This article has focused on the former and requires the state to take reasonable,⁴⁸ or adequate,⁴⁹ or effective⁵⁰ steps to protect women from street harassment and violence.⁵¹ The European Court has made it clear that where the victim is vulnerable, there is a particularly heavy obligation on the state to intervene.⁵² In *Talpis v Italy*⁵³ the ECtHR stated:

In that connection it reiterates that children and other vulnerable individuals – into which category fall victims of domestic violence – in particular are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.⁵⁴

The court, however, accepted that the obligations:

must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and

⁴⁸ *Z v UK* [2001] 2 FCR 246.

⁴⁹ *A v UK* [1998] 3 FCR 597, [24].

⁵⁰ *Z v UK*, n 48 above, [73].

⁵¹ *E v UK* [2002] 3 FCR 700.

⁵² *Balşan v. Romania* Application No 49645/09.

⁵³ *Talpis v Italy* [2017] ECHR 075.

⁵⁴ *ibid*, [99].

the operational choices which must be made in terms of priorities and resources.⁵⁵

There is a duty on the state to put in place laws which ensure that citizens' rights are protected. This means there must be effective laws to deter abuse crimes,⁵⁶ effective civil law remedies for those facing abuse, and an effective mechanism for law enforcement.⁵⁷

The basic right to protection from violence and abuse is also found in the Istanbul convention. Article 4, paragraph 1 states:

Parties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.

This right is not restricted to the state refraining from committing violence itself. It imposes positive obligations on the state to enact and give effect to laws that protect women from violence. As Article 5 paragraph 2 of the Istanbul Convention states:

Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

Meeting the Human Rights Obligations

Having established the existence of the right to protection from street harassment and violence, the key question is how the state is to meet its obligations. Clearly a primary way of the state fulfilling its responsibilities is to have in place criminal offences to protect women from abuse. For example, Article 2 was said to impose 'a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against a person backed up by law enforcement machinery for the prevention of suppression and punishment of breaches of such provisions.'⁵⁸ This requires an effective legislative and administrative framework.⁵⁹ There may well be the case that new specific offences, such as

⁵⁵ *Mastromatteo v Italy* Application No. 37703/97.

⁵⁶ *Valiulienė v Lithuania* Application no. 33234/07, [75].

⁵⁷ *Vosylius v United Kingdom* (2013) 57 EHRR SE20.

⁵⁸ *Menson v United Kingdom* [2003] EHRR CD220.

⁵⁹ *Oneryildiz v Turkey* (2005) 41 EHRR 20, [89].

against misogyny, should be created (something not considered by this article). But given the lack of full effectiveness of the current offences it is unlikely any such new offence will provide adequate protection.

Civil remedies might provide a solution in the context of some forms of violence against women, such as domestic abuse. Violence in public spaces is commonly from strangers and so civil remedies are no use as the perpetrator cannot be identified. The state is, therefore, left in the position of being under a duty to protect women from violence, having tried traditional forms of criminal offences without success. Something must be done. Doing nothing leaves a “context of impunity”⁶⁰ something the ECHR has made clear is unacceptable. If the current criminal sanctions are failing to protect women, a further response is required. Given that the vast majority of street violence, assaults and harassment against women is undertaken by men, the option of a curfew on all men must be seriously considered.

Generally, the response to such a proposal has been negative, with it being quickly argued that the imposition of a male curfew would infringe the rights of men (under Article 5 and 8) in a way which could not be justified. In particular, the point is made that many men whose rights would be infringed would not have undertaken violence, assault or harassment of women. I disagree and think a curfew would be proportionate and will explain why in the next section.

Balancing rights: Proportionality

The idea of proportionality is summarised by Lord Reed in *Bank Mellat v HM Treasury* It is necessary to determine:

- (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
- (2) whether the measure is rationally connected to the objective,
- (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
- (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the

⁶⁰ *Kilic v Turkey* Application no. 63034/11.

latter.... In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.⁶¹

I am going to focus on the first and fourth of these criteria when considering whether a male curfew is a proportionate intervention to the issue of safety of women in public. I take it the second would be satisfied without debate: clearly there is a rational link between the objective of protecting women and a male curfew. The third issue is always a challenge as one has to prove a negative proposition: in this context, that there is no less interventionist intervention that can adequately protect women. Much thought and effort has gone into making public spaces safe for women and, so far, none has been effective.⁶² As the core claim here is that the state is required to protect women's rights, the option of doing nothing is not available. Women's rights to protection require such an intervention. If it can be shown that there are other ways of protecting women that work as well as male curfew, they should be used. Those who reject a curfew must propose an alternative which is at least as effective as a male curfew.

Core to the first and fourth elements of proportionality is the gravity of the wrong done to women. The greater the wrong done by violence, abuse, and harassment in public spaces, the more easily the breach of other's human rights can be justified. I have already said much about the extent and severity of breach of women's human rights by men's public behaviour, but I will add some further observations.

It is crucial to understand violence, abuse and harassment of women in public as part of violence against women. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention),⁶³ in its preamble, explains:

recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;

Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social

⁶¹ [2013] UKSC 39, [74].

⁶² For a sample of the countless projects which have for many years sought to make streets safer see the discussions in United Nations, *Making Cities Safer for Women* (United Nations, 2022); HM Government, *Safer Streets for Women* (HM Government, 2021); Action Aid, *Making Streets Safer* (Action Aid, 2023)

⁶³ Ronagh McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge, 2017); Kevät Nousiainen, 'The Istanbul Convention and the EU: Converging Standards on Violence against Women?' (2016) *European Equality Law Review* 2443.

mechanisms by which women are forced into a subordinate position compared with men;

...Recognising that women and girls are exposed to a higher risk of gender-based violence than men;

....

Aspiring to create a Europe free from violence against women and domestic violence,...

This is not the place to undertake a full analysis of the Convention,⁶⁴ but this is a striking opening. It requires us to see what might be dismissed as “banter”, “inappropriate joke”, or a “a little touch” in its broader context.⁶⁵ Such behaviour, and importantly, the fear of such behaviour, let alone acts which are very clearly serious harms, play an important role in restricting women’s access to public spaces, and breaching their rights. The breach of rights the state has a duty to prevent is a very serious one indeed.

But, what about the rights of men, which a curfew will necessarily breach? These will include rights to liberty, under Article 5 and rights to respect for private and family life under Article 8. Further a male curfew would be seen as discriminatory on the grounds of sex, against men. As already indicated many readers will believe that the rights of men outweigh the right of protection for women. I would make the following points:

First, and most importantly, we are dealing with the allocation of a public good: access to public spaces free from actual and feared assault, abuse and harassment.⁶⁶ Currently that access is not fairly shared. Enjoyment of public spaces free from fear is largely the preserve of men.⁶⁷ We need to find a way of sharing this public good between men and women equally. Currently, despite many good schemes and efforts, we have not found a way of doing that. A curfew, although it might be seen as restricting the movement of men, might also be seen as an allocation of access to public spaces. It is seeking to find a way of allocating that resource in a non-discriminatory way. Doing nothing is discriminatory against women, perpetuating the discrimination in liberty that has existed for all time. Even if a curfew is discriminatory against men, there is nothing unfair about that given the history and certainly is less unfair and less

⁶⁴ Shazia Choudhry, ‘When Women’s Rights are *Not* Human Rights – the Non- Performativity of the Human Rights of Victims of Domestic Abuse within English Family Law’ (2019) 72 *Modern Law Review* 1075.

⁶⁵ Kimberley Fairchild, ‘Context Effects on Women’s Perceptions of Stranger Harassment’ (2010) 14 *Sexuality and Culture* 191.

⁶⁶ Fiona Vera-Gray, *The Right Amount of Panic: How Women Trade Freedom for Safety* (Policy Press, 2018).

⁶⁷ Holly Kearl, *Stop Street Harassment: Making Public Places Safe and Welcoming for Women* (Praeger, 2010).

discriminatory than the current position. Understood that way it is misguided to see this as an issue of balancing women's rights and men's rights. MSP Jenny Jones⁶⁸ has written:

Perhaps, instead of a curfew, I could have offered the more moderate proposal that men are only allowed to walk along well-lit busy roads in the evening, even if this adds another 10 minutes to their journey? Or if this is not acceptable, that they always pay for door-to-door cabs even if they are on a tight budget – although this can occasionally carry its own risks? Perhaps we should discuss the clothes men wear, or whether they drink too much when out with friends? Any of this sound familiar?

Second, it should be recalled the right under Article 3 is an absolute one. Unlike many of the other rights mentioned in the European Convention, there are no circumstances in which it is permissible for the state to infringe this right. This makes it clear that the rights of another party cannot justify an infringement of someone's Article 3 rights. In other words, the state cannot justify its failure to protect a victim's Article 3 rights by referring to men's right to respect for private life. Men's rights may be used to determine whether a protection is reasonable or not, but they do not impact on the actual rights of women to protection.

Third, street assault, abuse, and harassment is caused by and reinforced by patriarchy.⁶⁹ As the state upholds and maintains patriarchy, it has responsibility for it and so is under a duty to mitigate its effects and declare its wrongfulness.⁷⁰ Patriarchy is a major source of inequality and impacts women's position within society to a significant state. As already mentioned, Article 14 and the discrimination issue enhance the obligation on the state to intervene.⁷¹ As we have seen in the context of domestic abuse, the rights of men have not been accepted as reasons justifying a limit on what can be expected of the state to protect women. This point is important because it is a powerful response to the "not all men" argument that might be used in this context.

The "not all men" argument will suggest that while restricting the rights of men who have committed offences against women would be an appropriate way of protecting women's

⁶⁸ Ciara Fullarton, 'Sarah Everard: SNP MP Calls for Male Curfew in Areas Where Women Murdered' *The National*, 14th March 2021 <https://www.thenational.scot/news/19159524.sarah-everard-snp-mp-calls-curfew-men-areas-women-murdered/> (last accessed 3 June 2024).

⁶⁹ Fiona Vera-Gray, 'Men's Stranger Intrusions: Rethinking Street Harassment' (2016) 58 *Women's Studies International Forum* 9.

⁷⁰ Michelle Madden Dempsey, *Prosecuting Domestic Violence*, (Oxford University Press, 2009) describes how effective prosecution of domestic violence can exhibit the characteristics of a feminist state.

⁷¹ Cheryl Hanna, 'Health, Human Rights, and Violence against Women and Girls: Broadly Redefining Affirmative State Duties after *Opuz v. Turkey*' (2011) 34 *Hastings International and Comparative Law Review* 127.

rights to public spaces, the proposed curfew is over-broad because it penalises men who do not, and never would, harm women in the ways discussed in this paper. This argument is weak for two reasons. First, all men have benefited, significantly, from patriarchy. If they are required to suffer a bit in an attempt to respond to its impact, it is hardly unfair on them. It simply readjusts the allocation of power within society.⁷² This is just as true for a “non-abusing man” as an abusing one. As Michael Flood puts it:

Men’s violence serves a political function, of subordination. There are ways in which all men benefit from some men’s violence against women. And many men collude or are complicit in some men’s violence.⁷³

Second, restricting the curfew to only men who have been convicted of abuse is depriving it of its impact. A woman seeing a man at night or spoken to by him will not know whether he is safe or not. As a primary concern is ensuring access to public spaces without fear, this will be undone by a more limited curfew.

Problems

Apart from the arguments based on men’s rights, there are other, stronger concerns that may be raised about the proposal of a male curfew. The major one is that a male curfew may simply increase the problem of domestic abuse. If men are required to stay at home, will this exacerbate the incidence of domestic abuse. Indeed, we have some evidence from COVID-19 that such concerns must be taken seriously. In fact, the lesson from the COVID-19 lockdowns is a little mixed.⁷⁴ While calls for help to agencies involved in domestic abuse have increased, it is not clear that female homicides have increased.⁷⁵ Further, it seems that domestic abuse between ex partners decreased during lock down,⁷⁶ even if levels of abuse with current partners may have increased. Nevertheless, there must be serious concerns that a male curfew will lead to increased levels of domestic abuse. The response to this should be more effective legal domestic abuse protection in terms of policing and civil remedies, with

⁷² Michael Flood, ‘Involving Men in Ending Violence against Women: Facing Challenges and Making Change’ (2016) 12 *Graduate Journal of Social Science* 12.

⁷³ *ibid.*

⁷⁴ Emily Leslie and Riley Wilson, ‘Sheltering in Place and Domestic Violence: Evidence from Calls for Service during COVID-19’ (2020) 190 *Journal of Public Economics* 104241.

⁷⁵ Gunes Asik and Efsan Nas Ozen, ‘It Takes a Curfew: The Effect of Covid-19 on Female Homicides’ (2021) *Economics Letter* 200. Contrast José. Castillo and Bernard. Moscoso, ‘COVID-19 Pandemic and Violence: Contagions and Curfew Policy on Female Homicides’ (2022) 9 *Violence and Gender* 170.

⁷⁶ Ria Ivandić, Tom Kirchmaier and Ben Linton, *Changing Patterns of Domestic Abuse during Covid-19 Lockdown* (Centre for Economic Performance, 2021).

more extensive provision of refuges.⁷⁷ The failures to tackle domestic abuse sufficiently should not be seen as an excuse not to tackle abuse in public places effectively.

A second concern would be about enforceability. In the novel *After Dark*⁷⁸ this was done with electronic tagging for all men, although as the novel shows that is not fool-proof and comes with its own difficulties. Nevertheless, there are examples of male curfews in the past, at least at a short-term level, which have proved enforceable and had some success.⁷⁹ Curfews are used as a form of punishment currently and are enforced with a reasonable degree of success.⁸⁰

A third issue is that a male curfew would require a clear distinction to be drawn between men and women. The contentions over, for example, access to women only spaces give some indication of the issues likely to arise if a male curfew were to be imposed. Gender non-conforming people and trans women could be discriminated against if such a policy were imposed without appropriate recognition of their gender identity. Clearly there are major and complex issues here, although they are part of a broader debate over definitions of gender within society.

Conclusion

This lack of safety in public spaces is a worldwide issue.⁸¹ Indeed, safety in cities and human settlement is one of the UN's sustainable Development Goals.⁸² Responding to the issue by creating male curfews is not as bizarre as it sounds. Internationally, the problem of male violence against women in public spaces has led to the concept of "safe cities" where women have equal rights to access public spaces within cities and freedom of movement around it, free from threats of sexual harassment or violence. In some areas of the world, this has led to areas specifically set aside for women, such as the Sabarmati Riverfront in Ahmedabad.⁸³ I do accept there are some serious difficulties with the problem of a male curfew. As already indicated, there are challenges over how to enforce it in a way which does not exacerbate

⁷⁷ Jonathan Herring, *Domestic Abuse and Human Rights*, n 11 above.

⁷⁸ Jayne Cowie, *After Dark* (Penguin, 2022).

⁷⁹ Lesley Yarranton, 'The City that Banned Men' Daily Mail <https://www.dailymail.co.uk/news/article-29619/The-city-banned-men.html> (last accessed 3 June 2024); Dallas Scholes, 'Curfew for Men Aims to Curb Attacks on Women' Deseret News at <https://www.deseret.com/1991/11/20/18952766/y-curfew-for-men-aims-to-curb-attacks-on-women> (last accessed 3 June 2024).

⁸⁰ E.g. Criminal Justice Act 2003, s. 246.

⁸¹ Darshini Mahadevia and Saumya Lathia, 'Women's Safety and Public Spaces: Lessons from the Sabarmati Riverfront, India' (2019) 4 *Urban Planning* 154.

⁸² Number 11. United Nations, *The Seventeen Goals: Sustainable Development* (United Nations, 2022).

⁸³ *ibid.*

problems with domestic abuse; whether it is enforceable; and whether its policing would increase discrimination against gender-non-conforming women and trans women.

Nevertheless, the key argument of this article is that women have a right to access public spaces and the state has a duty to take steps to provide it. Currently access to public spaces is provided in a highly discriminatory way, especially at night. The state has a duty to protect women from violence, abuse and harassment in public; and to share access to state goods such as public spaces in a non-discriminatory way. A male curfew would be an effective way of doing that. It may discriminate unfairly against men, but no more than the current situation unfairly discriminates against women. Many will oppose a male curfew, but those doing so must produce an alternative way of protecting women's rights and ensuring equal access to public spaces.