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MEN IN THE AGE OF (FORMAL) EQUALITY: THE CURIOUS CASE OF KHAMTOKHU AND AKSENCHIK

Equality before the criminal law and protection of persons with restricted personal liberty in the European states diverge. The European Court of Human Rights has been engaged in establishing and protecting standards and principles for fair pre-conviction proceedings. However, when it comes to sentencing, sex and gender equality, and non-discrimination in sentencing, the European Court faces its own limitations. It has established that there is no consensus in matters of (un) equal treatment of men and women in criminal sentencing in Europe, but has failed to address a more significant issue – is exemption of an entire sex justifiable and reasonable, even in the absence of the afore consensus at European level. This analysis attempts to answer the following questions that arose from this case: Does formal equality eliminate discrimination? When should formal equality yield to achieve genuine equality? Is gender equality attainable and how do we regulate it?

Key words: *Discrimination. – Formal and substantive equality. – Life imprisonment. – Margin of appreciation. – Sex and gender.*

1. INTRODUCTION

In principle, differentiation based on personal characteristics, innate or acquired, should not be regarded as discrimination (Vojin Dimitrijević *et al.* 2006, 115).¹ However, in a time when the search for equality between men and women is the main driving force of some of the major social and

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¹ Translated by the author.

legislative changes – personal characteristics, particularly those related to sex and gender, play the role of key determinants.

It has been established that in practice the principle of equality is expressed through the principle of non-discrimination (Dimitrijević *et al.* 2006, 111).² The European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention or the Convention) regulates the prohibition of discrimination in two articles: one that protects freedom from discrimination, regarding rights protected by the Convention (Article 14), and another that is distinctly wider in its scope, calling for non-discrimination regarding ‘any rights set forth by law’ and introduces a general prohibition of discrimination (Article 1 of Protocol No. 12).³

However, this general prohibition of discrimination under the European Convention is particularly at stake when the European Court of Human Rights (the European Court or the Court), in its subsidiary role, is requested to enquire into a particular case of alleged sex and/or gender discrimination. As Gerards (2018, 495–496) notices, reconciling diversities of the legal cultures of the Council of Europe (CoE) Member States with the notion of universality of human rights is very difficult for the European Court to achieve, especially when the facts of the case are difficult to refute and argumentation appears to be very powerful and persuasive in favor of the alleged discrimination. The jurisprudence of the European Court provides several cases that very well depict the realm of equality between men and women in the CoE Member States and how the Court responds to these issues in reality.

For the foregoing reasons and complexities, special attention should be paid to the curious case of two Russian citizens, who, after had been sentenced to life imprisonment, alleged before the European Court discriminatory sentencing policy adopted in Russia on a basis of gender and age.⁴ The case will be subject of the following paragraphs. In the first part we present the facts of the case and reasoning of the European Court thereof. In the second part we visit equality as perceived in doctrine and European law, so as to revisit the Court’s case analysis in the third part. The last part of the analysis contains concluding remarks and some recommendations.

² Translated by the author.

³ See *Sejdić and Finci v. Bosnia and Herzegovina* App. nos. 27996/06 and 34836/06 (ECtHR 22 December 2009) para 53. Yet, for the Court meaning of the term “discrimination” is the same in both these provisions. (see para. 55 of the judgment).

⁴ *Khamtokhu and Aksenchik v. Russia* App. nos. 60367/08 and 961/11 (ECtHR 24 January 2017). The applicants in this case questioned equality on the basis of both gender and age, but the subject of this analysis will be only the alleged discrimination on a basis of gender.

2. FACTS OF THE CURIOUS CASE

2.1. Introductory remarks

Pursuant to Article 57 of the Russian Criminal Code, life imprisonment may be imposed for particularly serious offences against life and public safety. However, it may not be imposed on women, persons who were under 18 years of age at the time they committed the offence or men who were 65 or older at the time of sentencing. The offender sentenced to life imprisonment may be pronounced eligible for early release after the first 25 years if he has fully abided by the prison regulations throughout the last three years.⁵ The Constitutional Court of Russia had consistently rejected as inadmissible complaints regarding the alleged incompatibility of the foregoing legislation with the constitutional protection against discrimination.⁶

In 2008 and 2010 the Russian courts found two men guilty of committing certain crimes and sentenced them to life imprisonment: Aslan Khamtokhu (1970-), who was found guilty for multiple offences, including escape from prison, attempted murder of police officers and state officials, and illegal possession of firearms, was sentenced to life imprisonment in June 2008, and Artyom Aksenchik (1985-), who was found guilty on three counts of murder, was sentenced to life imprisonment in April 2010 (the applicants). They are both Russian citizens, and are serving their life sentences in the Yamalo-Nenetskiy Region. Also, they both unsuccessfully filed complaints about the discriminatory sentencing regime with the domestic courts.

2.2. Parties' Submissions

In October 2008 and February 2011, respectively, these two men lodged their applications against Russia before the European Court. Their

⁵ *Ibid*, paras. 15–16. The Relevant Domestic Law section of the judgment provided an explanation of the applicable legislation in criminal matters in Russia. Pursuant to the 1960 Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) capital punishment could not be imposed on anyone below the age of 18 or on a woman who was pregnant either at the time of the offence or at the time of judgment, and that the alternative to the death sentence was 15 years imprisonment. Subsequently, in April 1993 the Code was updated and the exemption from capital punishment was extended to all women, to young offenders and offenders aged 65 and over. Thereafter the 1997 Criminal Code of Russia provided for up to 20 years imprisonment, life imprisonment and capital punishment, but women, young offenders below the age of 18 and offenders aged 65 and over were exempted from both life imprisonment and capital punishment. By way of a pardon, capital punishment could be commuted to life imprisonment, i.e. to 25 years imprisonment. Eventually, in 2009 the Constitutional Court of Russia imposed an indefinite moratorium on capital punishment.

⁶ *Ibid*, para. 18.

claim was that the different and less favourable treatment, under the applicable criminal legislation, of the group they belonged to, as opposed to those exempted from life imprisonment, constituted unjustified discriminatory treatment based on gender and age, in breach of Article 14 of the Convention, taken together with Article 5 of the Convention. They pointed out, however, that “they were not seeking universal application of life sentences to all offenders, including women, and men aged under 18 or over 65. Rather, they claimed that, having decided that imprisonment for life was unjust and inhuman with respect to those groups, the Russian authorities should likewise refrain from subjecting men aged 18 to 65 to life imprisonment.”⁷

The applicants further elaborated their complaint:⁸ for them, undisputedly, the imprisonment was an ordeal, but it was an ordeal for both men and women, which both included individuals of varying degrees of vulnerability, and therefore, the difference in sentencing of male and female perpetrators had no objective or reasonable justification. For the applicants motherhood and fatherhood played equally important roles in child care and upbringing, and not even national laws made any difference in that regard. In their view, the Government’s assertion that women were more psychologically vulnerable than men and were affected to a greater degree by the hardships of detention was also unfounded. While they did not contest “the physiological characteristics of certain categories of women” and at specific times (during pregnancy, breastfeeding or childrearing), for the applicants this did not constitute reasonable and objective justification for the approach accepted in Article 57 of the Criminal Code. The applicants believed that exclusion of all female offenders, but only on the basis of their alleged special role played in the society in regard to their reproductive function and childrearing, even when and where all other circumstances were identical with that of males, did not pursue any legitimate aim: it should be a judge who should take into account gender-based distinctions in exercising sentencing discretion, otherwise the proportionality between the means employed and intended aim would be lacking. Additionally, there was an emerging international trend towards abolition of life imprisonment and there were 25 countries worldwide that did not have recourse to life imprisonment in their legislation. Nevertheless, even assuming that a life sentence could remain the appropriate form of punishment in certain circumstances, a “high degree of individualisation of punishment should be part of contemporary sentencing policy and that individualisation should be used as a general principle instead of institutionalised gender- and age-related discrimination.”⁹

⁷ *Khamtokhu and Aksenchik* (fn. 4), para 33.

⁸ *Ibid.* Detailed argumentation of the applicants can be read in paragraphs 34–41.

⁹ *Ibid.*, para. 41.

The Government¹⁰ did not consider the applicants victims of any violation of the Convention since their convictions had been “lawful” within the meaning of Article 5 of the Convention. What the applicants in fact sought was a change in the domestic criminal law that would allow others, including women, to be given harsher sentences, while their personal situation would not change. In the Government’s view, finding a violation of Article 14 of the Convention would not constitute grounds for reviewing individual sentences or for completely abolishing life imprisonment in Russia. Russian legislation had established, by way of a general rule, that life imprisonment could be imposed for particularly serious crimes against life and public safety, whereas exclusion of the three categories – on a basis of sex and age – was an exception to the said rule, and did not infringe upon rights of the majority of convicted prisoners.¹¹ In the Government’s opinion discrimination could only be invoked in cases of unjustified restrictions, and it reminded that the CoE Member States should be allowed a margin of appreciation in deciding of the appropriate length of prison sentences for particular crimes. Additionally, the Government relied on the Constitutional Court’s consistent case-law in regard to Article 57 of the Criminal Code, which affirmed that different treatment in sentencing, based on sex and age, was based on the principles of justice and humanity, taking into account the “physiological characteristics of various categories of offenders.”¹² Overall, the Government believed that, given the biological, psychological, sociological and other specific features of female offenders, “sentencing them to life imprisonment and their incarceration in harsh conditions would undermine the penological objective of their rehabilitation.”¹³ In reality, in Russia the exception concerned only a small number of convicted persons, and as of 1 November 2011 only 1,802 offenders had been sentenced to life imprisonment, while of the total number of 533,024 prisoners (only) 42,511 were female.¹⁴

¹⁰ *Khamtokhu and Aksenchik* (fn. 4) for more detailed argumentation of the Russian Government see paragraphs 42–48.

¹¹ *Ibid*, 43–46; The Government added that only six Council of Europe Member States had abolished the life imprisonment, whereas in Russia life imprisonment was the penalty for the most serious crimes, always accompanied by alternative penalties and never applied automatically.

¹² *Ibid*, para. 44; The Government also added that the Russian Constitutional Court had previously established that a different retirement age for men and women was justified not only by physiological differences between the sexes, but also by the special role of motherhood in the society, which did not amount to discrimination, but rather served to reinforce effective, rather than formal, equality. (para. 47).

¹³ *Ibid*, para. 48.

¹⁴ *Ibid*, para. 45. The Russian authorities also relied on international instruments that called for special care of pregnant offenders, and scientific studies that showed that very often women were the principal caregivers of children before their incarceration and

The Equal Rights Trust intervened as the third party. It submitted that, with the exception of provisions relating to juvenile offenders, blanket rules that exempted particular groups from life imprisonment could not be justified under Article 14 of the Convention. It believed that a blanket exemption of all women from certain sentences was not temporary and did not pursue any objective related to the equality of opportunity or treatment. It proposed that in order to comply with Article 14 of the Convention, Russia should adopt an individualised approach to sentencing.¹⁵

2.3. The European Court's Assessment and Decision

The Court¹⁶ first established that the issue before it fell within the ambit of Articles 5 and 14 of the Convention. It repeated its position that life imprisonment, as a type of sentence, is lawful and at the discretion of the state, and then cited its settled case-law and adopted standards in discrimination cases,¹⁷ which, thereafter, it applied in the present case.

Firstly, the Court concluded that the applicants were in an analogous situation to all other offenders who had been convicted of the same or comparable offences, but that exemption of female offenders amounted to a difference in treatment on the basis of sex. Secondly, it accepted the Government's position that "the difference of treatment was intended to promote the principles of justice and humanity which required that the sentencing policy take into account the age and 'physiological characteristics' of various categories of offenders" and, as such, pursued legitimate aim in the context of sentencing policy.¹⁸ Thirdly, in regard

that up to 90% of those women had a history of domestic abuse that contributed to their criminal conduct and contributed to their vulnerability. The Government added that in addition to Russia, Albania, Armenia, Azerbaijan, Belarus and Uzbekistan also did not sentence women to life imprisonment, while, at the time, the Ukrainian Parliament had adopted, at first reading, a draft law exempting women from life sentences.

¹⁵ *Ibid.* For more detailed argumentation of the third party see paras. 49–52.

¹⁶ *Khamtokhu and Aksenchik* (fn. 4). For more details of the Court's reasoning and cited jurisprudence see paragraphs 53–88.

¹⁷ *Ibid.* For the Court "in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention." (para. 64, emphasis added by author).

¹⁸ *Ibid.*, para. 70.

to proportionality, the Court noted that life imprisonment in Russia was not mandatory or automatic for any offence, but reserved for only a few particularly serious offences, could be pronounced only after very careful scrutiny of the case by the domestic courts and a conclusion that it is the only punishment that “befits” the crime.¹⁹ Additionally, the offenders, including the applicants, were entitled for early release after the first 25 years. In conclusion, altogether this does not render imposition of life imprisonment an excessive measure.

Thereafter, operating within the lines of the doctrine of margin of appreciation, and searching for the existence or non-existence of an European consensus, the Court invoked the International Covenant on Civil and Political Rights (Article 6(5)), United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; Article 4), UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Preamble, rules 5, 10, 31, 48), Committee of Ministers of the CoE Recommendation Rec(2006)2 on the European Prison Rules (recommendations 13, 34.3) and the European Parliament’s Resolution of 13 March 2008 (recommendation 14), which are all instruments that on call individual states to provide special measures for gender-specific healthcare for all female prisoners, protection of female prisoners from gender-based violence, and protection of pregnant, breastfeeding and menstruating women and mothers with young children in prisons. The Court concluded that on the basis of the particular circumstances of the case, available data and international instruments, “there exists public interest underlying the exemption of female offenders from life imprisonment by way of a general rule” in Russia.²⁰

The Court added that there were some other states, in addition to Russia, that exempted women from imposition of a life imprisonment by way of a general rule (Albania, Azerbaijan and Moldova), some states that exempted only pregnant women (Armenia and Ukraine), and some states in which life imprisonment was limited because of the requirement of reducibility of a sentence, and that, in the absence of common ground, this area should still be regarded as one of evolving rights, with no established consensus, in which states must enjoy a wide margin of appreciation. Russia, in the light of all circumstances, did not overstep its margin of appreciation, and its legislation is not contrary to the international instruments in this sphere, nor with legislation of other states. Moreover, exemption of certain groups of offenders represents “social progress in penological matters.”²¹ While it would clearly be possible for Russia to

¹⁹ *Ibid*, paras. 71–72.

²⁰ Khamtokhu and Aksenchik (fn. 4), para. 82.

²¹ *Ibid*, para. 86.

exempt from life imprisonment all categories of offenders, in pursuit of its aim of promoting the principles of justice and humanity, it is not required to do so under the Convention as currently interpreted by the Court. The Court was satisfied that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued, and concluded that the impugned exemptions did not constitute a prohibited difference in treatment for the purposes of Article 14, taken in conjunction with Article 5. In reaching this conclusion, the Court had taken “full account of the need to interpret the Convention in a harmonious manner and in conformity with its general spirit.”²²

In the light of the above considerations, on 24 January 2017 the Grand Chamber of the Court, by ten votes to seven, found that there had been no violation of Article 14 of the Convention, taken in conjunction with Article 5, in respect of the difference in treatment on the basis of sex. The judgment also contained concurring opinions of four judges, the joint partly dissenting opinion of five judges, and a dissenting opinion of one judge.

3. EQUALITY AS SEEN IN DOCTRINE AND IN EUROPEAN LAW

Comparative studies show that European law, in general, “demands that all citizens face an equal threat of investigation and prosecution”, as it perceives pre-conviction phase as the greatest threat to equality before the criminal law, unlike its cousin from the other side of the Atlantic which “generally demands that all citizens face an equal threat of punishment” (James Whitman 2009, 119–36). But, as Whitman (2009, 140–1) also notices, this does not mean that Europe completely succeeds in achieving pre-conviction equality in procedure, nor that equal punishment is of secondary importance – on the contrary: it is noted that the European approach is such that continental courts in fact make careful, systematic and comprehensive efforts to consider the personality of the perpetrator throughout the criminal justice system and individualization in punishment is accepted (Whitman 2009, 146, 153). Still, Whitman underlines that for the sociologists of criminal law “there will always be some lurking threat to equal treatment” in the criminal proceedings when there is demand for individualization, and that this is unavoidable (2009, 121–2).

Moving on to the notion of equality, it has been recognized that the right to equality is a “central commitment in human rights law” (Charilaos Nikolaidis 2015, 34; Sandra Fredman 2016, 712). Here we differentiate between formal equality, which requires that all people be

²² *Ibid*, para. 87.

treated identically in all circumstances, and substantive equality, which recognizes that all people are not equal (Davis 2009, 12). International law permits states to treat unequally those who are unequal, usually groups with particular status – women, people with disabilities, ethnic minorities, etc. (Fredman 2016, 713), and to adopt policies that are discriminatory on their face, mostly because of the recognized particularities of their histories, politics or economies, for which they may need to pursue regimes of “unequal” treatment for unequal matters (Davis 2009, 12). Yet, in both McKean (1982, 23) and Davis (2009, 12) in the case of choice of a different treatment, such treatment must be proportional to the specific individual circumstances, and in order to be legitimate, it must be reasonable and not arbitrary; then the onus of showing that those particular distinctions are justifiable is on those who make them, i.e. on the states.

In equal treatment cases the European Court operates in a complex context (Gerards 2017, 1) as it is asked to deliver binding judgments from the position of a judicial authority that should respect national sovereignty and national values, having to balance the need for uniform and effective rights protection with the respect for diversity (Gerards 2018, 495) and the objective to provide consistent protection of individual fundamental rights (Gerards 2017, 2). In this the Court applies the doctrine of margin of appreciation (for a more comprehensive analysis see Zysset 2017, 139–54).

As defined in Harris *et al.* (2014, 14), the margin of appreciation doctrine implies that states are allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative and judicial actions in the area of Convention rights. As further elaborated by Gerards (2018, 498), margin of appreciation provides the states with certain discretion in “determining the reasonableness of interference with the Convention rights” so that the Court can relatively easily accept reasons and arguments submitted by the governments, unless they are “clearly unconvincing or disclose arbitrary decision-making” (Gerards 2018, 498–9). According to Gerards (2018, 499–500), this doctrine is thus flexible, but applies only to the review of the reasonableness, and should therefore be applied with great care.

However, practice shows that the Court fails to apply margin of appreciation doctrine consistently, with acceptable deference to the national authorities (Gerards 2018, 501) as it depends on existence of a consensus or common ground of the CoE Member States on the approach to the problem in question (Wildhaber *et al.* 2013, 248). When there is no European consensus, the Court will have a wider margin of appreciation (and often the violation will not be found), but where the Court affirms existence of the European consensus, margin of appreciation will be

narrow, and the Court will, by applying evolutive interpretation of the Convention, find a violation thereof (Wildhaber *et al.* 2013, 248; Candia 2017, 600). Even though widely accepted, Wildhaber *et al.* (2013, 256) argues that there is no indication that consensus is binding, while Gerrards (2018, 506–15) adds that in practice this doctrine actually does not demonstrate the objectives it should theoretically, and that the Court is moving to use other instruments to give the shape of its subsidiary role and effective protection – case-based review and incrementalism – as judicial strategies in dealing with diverging standards and the creation of general principles.

Finally, Čahojová and Bitterová (2018, 27–8) explain the test that the European Court has developed for sex-based discrimination claims. The Court first examines whether the case at hand falls within the scope of substantive rights, guaranteed by the Convention, and whether persons in a comparable situation are treated differently or similarly based on prohibited grounds. This also requires a comparator against which the applicants are discriminated. Then the Court shifts assessment to a possible justification for different treatment. The requirement for the justification of different treatment is cumulative, which means that if the state wishes to succeed in justification of its own action, it must fulfil the requirements: the legitimate aim and proportionality of measures to achieve the legitimate aim simultaneously. If the state fails to fulfil one of the requirements, the Court usually finds a violation. In cases in which discrimination is alleged based on sex, the Court is asked to perform a higher degree of scrutiny of the circumstances, subject-matter, background and a consensus (Ivana Radačić 2008, 843–4; Čahojová and Bitterová 2018, 29) since “the advancement of the equality of the sexes is...a major goal in the member States of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention,”²³ and “references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.”²⁴ However, even in this regard the Court leaves the states margin of appreciation, and seeks to establish a European consensus to determine whether the exemption is justifiable and reasonable.²⁵

The European Court has already dealt with different and changing sentencing regimes among CoE Member States, with cases covering the difference in treatment of child offenders on account of their age

²³ *Petrovic v. Austria*, App. 20458/92, (ECtHR 27 March 1998) para. 37; *Konstantin Markin v. Russia* App. 30078/06 (ECtHR, Grand Chamber, 12 March 2012) para. 127.

²⁴ *Konstantin Markin* (fn. 23), para. 127.

²⁵ *Petrovic* (fn. 23), para. 38.

differences, and consequent ineligibility for remission,²⁶ the difference in juvenile sentencing on a basis of sex,²⁷ and the difference in early release prospects of life prisoners and others when life imprisonment is the mandatory penalty for some offences.²⁸ In all these cases the applicants were male offenders, but only in Khamtokhu and Aksenchik the Court delved into the problems of unequal sentencing and discrepancies arising from differences in sex.

4. REVISITING THE CURIOUS CASE

Throughout most of the history of the European Court its jurisprudence on equality was based on a formal conception of equality, and only recently has the Court begun to “give equality more substantive content” (O’Connell 2009, 129). The case of Khamtokhu and Aksenchik came before the European Court after it had established and confirmed its position that equality of sexes is one of the major goals to be achieved and preserved in the Council of Europe, as well as that stereotypical and traditional views should be abandoned. Moreover, this position was affirmed in one case against Russia where the issue was unequal treatment of men and women in regard to parental leave in the army which was, by way of a general rule, permitted only to women, but was eventually found discriminatory (above in fn. 23: Konstantin Markin v. Russia). Indeed, the Court found a violation of Article 14 in conjunction with Article 8 of the Convention in that case. The fact that the Court recognized that the mother and the father play equal roles in the early stages of a child’s life,

²⁶ *Nelson v. the United Kingdom* App. 11077/84 (Commission, decision 13 October 1986). In this case the applicant (age 15 at the time of commencement of a nine-year prison sentence for attempted murder) complained that due to his age at the time of arrest and trial, and the location thereof, he had been denied the possibility of remission, even though he was entitled to parole. He also complained of difference in sentences in England and Wales, which were more lenient and where children were entitled to remission for the same offences, unlike in Scotland, where he had been tried and sentenced.

²⁷ *A.P. v. the United Kingdom* App. 15397/89 (Commission, decision, 8 January 1992 (striking-out)). In this case the applicant (boy, aged 14) complained of different sentencing of male and female juveniles. The applicant and respondent state concluded a friendly settlement, but from the facts of the case we learn that during a certain period of time only boys aged 14 and older could be sentenced to imprisonment, while girls of the same age were exempted from such punishment. In the meantime, the UK amended the law and abolished the critical punishment in regard to 14-year old boys.

²⁸ *Kafkaris v. Cyprus* App. 21906/04 (ECtHR, Grand Chamber, 12 February 2008). In this case the applicant (sentenced to life imprisonment for premeditated murder) complained of his discriminatory compared to other life prisoners released by the discretionary decision of the President of the Republic, applied on a case-to case basis, as well as him and other convicts who were not serving life sentence. The Court established no discriminatory treatment in either of the applicant’s complaints.

i.e. that motherhood should no longer be given priority over fatherhood, is an important recognition by the Court. Hence, even though positions of Markin, Khamtokhu and Aksenchik were not comparable, it was reasonable to expect that the Court's reasoning in Markin would also be of certain importance and value for Khamtokhu and Aksenchik. However, the reasoning of the Court and the outcome in the case were contrary, and the question arose whether the Court was right.

It is argued that, in principle, the Court took the right approach in the case of Khamtokhu and Aksenchik, in line with their complaints and the established line of its cases, but that the outcome largely owes to the applicants' mistake in submitting one request. Namely, unlike in the case of Konstantin Markin, where he had (successfully) charged that "the refusal to grant him parental leave amounted to discrimination on grounds of sex"²⁹ without further requests, Khamtokhu and Aksenchik carried on with the request to the Russian authorities to abolish life imprisonment in respect to men aged 18 to 65. Indeed, no one can guarantee that the Court would have taken a different direction had the applicants left out the second part of their request. But, it is argued that this was strategically a mistake, and that by leaving only the first, substantively tenable and defensible submission, the applicants would have been more successful.³⁰ In this way the latter request prevailed, and the Court was already at the outset of the case-deliberation clear regarding the direction in which it was going, and that its subsidiary role and restricted powers in regard to domestic legislation were about to "save" it from delving into this socially and legally complicated issue. Ordering Russian authorities to abolish life imprisonment completely (leveling up) or to extend it to women (leveling down) was not within the Court's power, but a sole recognition that the adopted approach to sentencing was discriminatory had more prospects of success (compare with Konstantin Markin).

Nevertheless, a more substantive issue remains problematic, and that is the conclusion that discrimination of men in regard to life

²⁹ *Konstantin Markin* (fn. 23), para. 76.

³⁰ According to the information from the Department for the Execution of Judgments of the European Court of Human Rights, in addition to being acknowledged that he was discriminated against by the Court judgment, we read that in execution of the individual measure Konstantin Markin was paid (on time) non-pecuniary damages and legal costs and expenses, awarded by the Court. Moreover, in June 2014 the Russian Government submitted a draft law providing for parental leave and child allowance to be granted upon request to single male serviceman for consideration by the State Duma. Even though there were no further developments reported to and by the Execution Department, according to numerous media reports this draft law was welcomed as a step further in respect of establishing equality between men and women in Russia. The status of execution available at <https://hudoc.exec.coe.int/eng#%7B%22fulltext%22:%5B%22230078/06%22%5D,%22EXEIdentifier%22:%5B%22004-13956%22%5D%7D>, last visite July 31, 2019.

imprisonment, or more precisely – exemption of women from it, was justified and proportional.

In the application of its discrimination test the Court established that the exemption of female offenders amounted to a difference in treatment on the grounds of sex. But, without questioning it, the Court accepted the Government's position that this difference in treatment was intended to promote the principles of justice and humanity (which required that the sentencing policy take into account the physiological characteristics of women, in addition to age) and therefore pursued a legitimate aim in the context of sentencing policy. While, undoubtedly, each state is in the best position to know which sentencing policy best befits its societal needs, it is strange, to say the least, that the Court unconditionally accepted the position of the Russian Government without questioning it in a wider context – namely, whether it was aligned with the quest for formal equality of men and women, and then whether it was rightful to impose life imprisonment only on men only because of their assumed strength to endure the harshness of such a penalty.

Yet, even more subtle question followed.

Coming to the issue of proportionality, the Court made margin of appreciation part of it (Gerards 2018, 501–2). Without firstly distinguishing between male and female offenders, mothers and fathers, motherhood and fatherhood, and when and why it was justified to make exemptions in sentencing regimes, the Court started seeking consensus amongst the CoE Member States in regard to exempting women from life imprisonment, and then jumped right into the line of the international instruments that protect female offenders, to come to the conclusion that there was an underlying public interest in the exemption of female offenders from life imprisonment, and that such a choice was considered a social progress in penological matters.

As for the first quest, it was interesting that the Court established that, basically, all former Soviet states exempted women from life imprisonment. However, it would have been even more logical and helpful had the Court investigated other CoE Member States sentencing regimes and established how many other states in Europe, if any, differentiated by sex when sentencing, whether their legislation exempted women offenders from certain sentences (including life imprisonment), and what was the rationale behind it. Normally, the Court conducts such research, particularly when a sensitive issue is at stake, as it was in this case. It failed to do it now and, in the absence of complete data, its conclusion that there was little common ground amongst CoE Member States in regard to imposition of life imprisonment on women on a basis of only one block of the European states, is hardly credible.

As for the second quest, the effort of the Court to examine the international instruments that protect the rights of female offenders was directly in response to both the applicants' gender-related arguments and the Government's position, but it is submitted that in its conclusion the Court was wrong. Enumerated international instruments³¹ deal with the recommendations to the individual states and their obligations to provide special measures for gender-specific healthcare to all female prisoners, measures of protection of female prisoners from gender-based violence, and the protection of pregnant, breastfeeding, or menstruating women and mothers with young children in prisons. No instrument prohibits life imprisonment as such and no instrument calls for exempting women from life imprisonment, or from any type of prison sentence. They only regulate or recommend in what way individual circumstances of certain vulnerable groups of female offenders should be taken care of by domestic authorities when those women are serving their sentences. Therefore, exemption of these groups of women could be justified, but it is difficult to accept that on the basis of the same concerns there was a public interest for the exclusion of *all* women, or much less to impose life imprisonment only on men.

In conclusion, even though it appears that the applicants largely contributed to how the Court approached their problem, it must be noted that the Court's analysis was not comprehensive either, and that it indeed treated the respondent state overly deferentially (Čahojová, Bitterová 2018, 30) without providing reasonable justification for such an approach.

5. CONCLUDING REMARKS

The case of *Khamtokhu and Aksenchik* was a textbook example of discrimination, but it also revealed some traits of the equality-related cases that were not so visible at first glance – how the case of discrimination should be argued, and how it should be argued before the European Court.

The applicants should be more prudent in their discrimination submissions and claims. While it was clear that the main concern of *Khamtokhu and Aksenchik* was to establish that they were discriminated against, only one sentence enabled the Court to decide contrariwise. Yet, even when it appears that the applicants do not argue their cases (strategically) well, the Court is in a position to assess the cases from the perspective of a master of its own procedure, rules and the complete

³¹ *Khamtokhu and Aksenchik* (fn. 4), see the list under Relevant International Instruments section, paras. 27–31.

freedom in policing the conduct of its own proceedings (as established and repeated in its long line of jurisprudence) and examine the cases in accordance with the very substance of the applicants' submissions. The Court was particularly called on to take this approach when the importance of the right in question exceeds the form in which the applicants are complaining. Equality and human dignity are of such importance that formalities should not prevail.

Also, this case revealed that consensus should not be binding, and that a lack thereof on the issue of imposition of life imprisonment on men, while women remain exempt, does not justify such a choice of sentencing regime, and that justice cannot be achieved in such a conditions.

Consequently, cases such as this one, which in fact deal with sex and gender differentiation, evidently require a more nuanced approach, particularly if the applicants offer credible arguments, as it was in this case. But, despite this clear requirement, the Court failed to address differences in question properly, by completely disregarding what the applicants submitted. What used to be ground for justification of different treatment in the very recent past of our society, and in the meantime became recognized as a formal ground for *non-discrimination* by the Court itself,³² once again became justification for discriminatory treatment. Even though different in its nature, motherhood and fatherhood are equally important. Also, even though both men and women have their weaknesses and strengths, none of that should be considered as grounds for discrimination or exemption from equal treatment because tradition or deeply embedded practices dictate so. These can only be grounds for individualization of treatment, which is the only way to attain genuine equality in gender issues. By not treating equally those who are "similarly placed", the Court seriously jeopardizes equality as such, and it is unlikely that there will ever be public interest for such a treatment.

³² *Konstantin Markin* (fn. 23), paras. 132–133, 151. "... the Court concludes that, as far as the role of taking care of the child during the period corresponding to parental leave is concerned, men and women are 'similarly placed'... It follows from the above that for the purposes of parental leave the applicant, a serviceman, was in an analogous situation to servicewomen. It remains to be ascertained whether the difference in treatment between servicemen and servicewomen was objectively and reasonably justified under Article 14... In view of the foregoing, the Court considers that the exclusion of servicemen from the entitlement to parental leave, while servicewomen are entitled to such leave, cannot be said to be reasonably or objectively justified. The Court concludes that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex."

REFERENCES

- Candia, Gonzalo. 2017. Interpretation of Regional Human Rights Conventions and Originalism: Different Context, Same Myths. *DPCE Online* 3: 597–606. <http://www.dpceonline.it/index.php/dpceonline/article/view/431>, last visited July 30, 2019.
- Čahojová, Kristína, Nikoleta Bitterová. 2018. Life Imprisonment from the Perspective of Gender Equality: Who Has Really Won the Case?. *Common Law Review* 15: 27–30.
- Davis, Megan. 2009. International Human Rights Law, Women’s Rights and the Intervention. *Indigenous Law Bulletin* 10: 11–14.
- Dimitrijević, Vojin, Dragoljub Popović, Tatjana Papić, Vesna Petrović. 2006. *Međunarodno pravo ljudskih prava*. Belgrade: Belgrade Centre for Human Rights.
- Fredman, Sandra. 2016. Substantive Equality Revisited. *International Journal of Constitutional Law* 3: 712–738.
- Gerards, Janneke. 2018. Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights. *Human Rights Law Review* 3: 495–515.
- Gerards, Janneke. 2017. The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination. *The European Convention on Human Rights and the Principle of Non-Discrimination*, ed. Marco Balboni. Naples: Editoriale Scientifica. Forthcoming.
- Harris, David, Michael O’Boyle, Colin Warbrick. 2014. *Law of the European Convention on Human Rights*. 3 ed. Oxford: Oxford University Press.
- Kapotas, Manos. 2014. A Tale of Two Cities: Positive Action as “Full Equality” in Luxembourg and Strasbourg. 188–214. *Human Rights Law in Europe: The Influence, Overlap and Contradictions of the EU and the ECHR*, ed. Kanstantsin Dzehtsiarou, Theodore Konstadinides, Tobias Lock, Noreen O’Meara. Abingdon, New York: Routledge, 2014, Routledge Research in Human Rights Law.
- McKean, Warwick. 1983. *Equality and Discrimination under International Law*. Oxford: Oxford University Press.
- Nikolaidis, Charilaos. 2015. *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts*. 1st ed. Abingdon, New York: Routledge, 2015, Routledge Research in Human Rights Law.

- O’Connell, Rory. 2009. Substantive Equality in the European Court of Human Rights?. *Michigan Law Review First Impressions* 107: 129–133.
- Radačić, Ivana. 2008. Critical Review of Jurisprudence: An Occasional Series. Gender Equality Jurisprudence of the European Court of Human Rights. *The European Journal of International Law* 4: 841– 857.
- Whitman, James Q. 2009. Equality in Criminal Law: The Two Divergent Western Roads. *Journal of Legal Analysis* 1:119–165.
- Wildhaber, Luzius, Arnaldur Hjartarson, Stephen Donnelly. 2013. No Consensus on Consensus? The Practice of the European Court of Human Rights. *Human Rights Law Journal* 7–12: 248–263.
- Zysset, Alain. 2017. *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*. Abingdon, New York: Routledge, 2017, Routledge Research in Human Rights Law.

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