Differences in Application of Proportionality Test by the Russian Constitutional Court and European Court of Human Rights in the Konstantin Markin Case

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Abstract

The first critical case that created serious tensions between the European Court of Human Rights (ECtHR) and the Russian Constitutional Court was Konstantin Markin v Russia, which by its nature was "non-political". In Markin, the ECtHR openly criticized the Constitutional Court's reasoning for the first time during this country's interactions with the ECtHR. The main issue at stake in Markin was whether the Russian laws providing parental leave rights to mothers serving in the military were discriminatory in regard to male military fathers who did not enjoy identical rights. Both courts were required to evaluate whether the different treatment and limitations of a human right were allowed on the basis of the argument that the defence and security of the country as a public interest was at stake. The ECtHR found this practice to be discriminatory. By contrast, the Constitutional Court, in its earlier decision of 2009, had declared the application of Markin inadmissible. Accordingly, the Constitutional Court deemed the Russian legislation that was at issue to be non-discriminatory. The ECtHR selected the proportionality test for its evaluation of the limitations imposed on Markin. The Constitutional Court, in its turn, did not use any of the tests that are considered to be possible alternatives to the proportionality test. It started to apply the proportionality test, which is widely used in constitutional adjudication, but the test was not fully applied. No balancing between the private interests of a minority representative and a public interest to be protected by the imposition of such a limitation was performed. The overall objective of this article is to attempt to answer the two following research questions: were the starting grounds used for legal analysis applied with respect to the Markin case by the two courts comparable, and were the judicial reasoning techniques used by the Constitutional Court in line with the minimal standards applicable to the interpretation of human rights law?

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1 Introduction

A serious tension exists between the Russian Federation and the Council of Europe (CoE).[1] A driving force for this is Russia's annexation of the Crimea in 2014.[2] This act raised concerns in the CoE, resulting in firm reactions.[3] These reactions were met with counteractions by Russia.[4] These strained relationships went beyond areas controlled by the executive authorities. Similar tensions were observed in the interactions of the European Court of Human Rights (ECtHR) with the Constitutional Court of the Russian Federation (hereafter, the Constitutional Court). The Constitutional Court is considered to be the authority responsible for the constitutional review and settlement of constitutional disputes and for interpreting the Constitution of the Russian Federation adopted in 1993 (hereafter, the Constitution).[5] These two judicial authorities have been

1 The Russian Federation became the 39th member state of the CoE on 28 February 1996. Although it was accepted as a member of this regional organization, at the stage of signature of the Statute of the CoE there was no consensus regarding suitability of the Russian Federation to the CoE membership. Provost 2015, p. 290.

2 For evaluation of the Crimea's annexation by Russia, from the perspective of different provisions of international law, see Hilpold 2015.

3 The Parliamentary Assembly of the Council of Europe (PACE), in its Resolution 1990 (2014), adopted in reaction to Russia's acts regarding the Crimea, suspended certain rights of the Russian Federation (voting rights of Russia in PACE, the right to be represented in PACE's leading bodies and the right to participate in election observation missions). http://website-pace.net/documents/10643/110596/20140410-Resolution1990-EN.pdf/57ba4bca-8f5f-4b0a-8258-66ca26f7117b. Accessed 8 April 2018. It is worth noting that not all European reactions were intense. The mildness of responses, as noted by Malksoo, "can be interpreted as the perennial primacy of economic and other pragmatic interests over concerns with the rights situation". Malksoo 2012a, p. 167.

4 In certain circumstances, Russian reactions were political in nature. Several cases decided by the ECtHR (including but not limited to *Kononov v. Latvia, Republican Party of Russia v. Russia, Ilaşcu and Others v. Moldova and Russia*, and *Sutyagin v. Russia*) were referred to as politically motivated by the Russian political elite. See Malksoo 2012c, p. 365. However, Russia has taken real measures too. It suspended payment of part of its contribution to the CoE budget. This was mentioned in the statement of the Ministry of Foreign Affairs of Russia, where it was noted that this suspension would continue "until full and unconditional restoration of the credentials of the delegation of the Federal Assembly of the Russian Federation in PACE". http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2805051. Accessed 8 April 2018.

5 Art. 125 of the Constitution of the Russian Federation adopted in the national referendum of 12 December 1993 (as amended) and Art. 1 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation of 21 June 1994 (N 1-FKZ) (as amended).

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communicating with each other,[6] although not always openly.[7] In the initial years after Russian recognition of the ECtHR's jurisdiction in 1998,[8] the relationship between the ECtHR and the Constitutional Court developed smoothly.[9] Sometimes, however, it reached a critical point.[10]

The first critical case was *Konstantin Markin v Russia*, which, by its nature, was "non-political".[11] In 2010, the ECtHR's First Section openly criticized the Constitutional Court's reasoning in *Markin* for the first time during this country's interaction with the ECtHR.[12] The First Section concluded that Russia had violated provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the Convention).[13] In addition to this general finding, it specifically noted that "the Constitutional Court based its decision on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests".[14]

In 2012, after a referral of the First Section judgement in *Markin* to the Grand Chamber of the ECtHR, the Grand Chamber upheld the general finding of the First Section on the existence of a violation of the Convention.[15] Although the Grand Chamber in its judgement attempted to soften the openly critical wording

6 On judicial engagement of these courts, see Bowring 2018b, pp. 207-212.

7 It is worth noting that the Russian courts are generally not enthusiastic about using ECtHR case law. Starzhenetskii 2012, p. 352. The same is partially true of the use of international legal instruments. This situation is not always to be explained by the subjective attitude of the Russian judiciary towards international human rights law. It can also be linked to strict traditionally monist judicial practices of the USSR's courts.

8 Russia signed the Convention and several other major CoE conventions in 1996. The Convention was ratified in 1998. During a two-year period, Russia implemented some legal reforms to bring its legislation in line with the CoE standards. Abramova 2018, p. 23.

9 The president of the Constitutional Court, Justice Zorkin, claimed that the Constitutional Court in more than 50 cases based its argumentation on case law developed by the ECtHR. Pomeranz 2012, p. 20.

10 The final point in these uneasy relationships was Judgement No. 21-P of the Constitutional Court adopted on 14 July 2015, where the Constitutional Court noted that Russia is not obligated to enforce the ECtHR judgements delivered against Russia if such enforcement violates provisions of the Constitution.

11 Malksoo 2012a, p. 162.

12 Pomeranz 2012, p. 18; Malksoo 2012b, p. 836.

13 The European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

14 *Konstantin Markin v. Russia* (Application no. 30078/06), First Section, 7 October 2010, p. 17, para. 57 (*Markin*, First Section Judgement).

15 *Konstantin Markin v. Russia* (Application no. 30078/06), Grand Chamber, 22 March 2012 (*Markin*, Grand Chamber Judgement).

used by the First Section against the Constitutional Court,[16] this did not prevent a far-reaching criticism of the ECtHR by the Constitutional Court subsequently.[17]

The main issue at stake in *Markin* was whether the Russian laws providing parental leave rights to mothers serving in the military were discriminatory vis-à-vis male military fathers who did not enjoy identical rights.[18] The Grand Chamber found this practice to be discriminatory. By contrast, the Constitutional Court, in its earlier decision of 2009, had declared the application of *Markin* inadmissible. Accordingly, the Constitutional Court deemed the Russian legislation that was at issue to be non-discriminatory.[19]

Considering its effects on the relationship between Russia and the ECtHR, the *Markin* case has already been discussed from different perspectives.[20] One aspect that has received little attention, however, is the legal reasoning of the Constitutional Court compared with that applied by the ECtHR. To give a general idea of the details of the *Markin* case at different adjudicatory levels, the second section of this article briefly discusses the factual and procedural background to the case. The third section provides an illustration of the core issues assessed and decided by the Constitutional Court and the ECtHR from a comparative perspective. This is done to illustrate that the starting points of the two courts, although somewhat at variance in certain respects (e.g. in the application of comparative or international law), were identical and comparable. The provision of this illustration is intended to show the tests that were fully or partially used by the courts. When we consider the core issues that were discussed by the courts, it becomes clear that they both applied (or at least tried to apply) a balancing of rights versus public interests.[21] For convenience purposes, issues that were fully or partially addressed by the two courts are categorized as two core issues.[22]

16 Bowring 2018b, p. 207.

17 See, for instance, the reaction of the president of the Constitutional Court, Justice Zorkin. He was referring to progressive developments in the relationship between the Russian judiciary and the ECtHR until the delivery of the *Markin* judgement by the First Section. Specifically, Justice Zorkin was questioning the right of the ECtHR to request the application of general measures involving amendments to national laws. Zorkin emphasized that the limit of compromise with the ECtHR is national sovereignty and the protection of national interests and national institutions. Russia should protect its sovereignty (as other European countries do) from "doubtful" decisions. https://rg.ru/2010/10/29/zorkin.html. Accessed 9 April 2018. In 2012, Zorkin "softened his argumentation" by stating that "sovereignty cannot outweigh human rights". Antonov 2014, p. 2.

18 Pomeranz notes that in the *Markin* the ECtHR "elevated social right – the right to parental leave – to a broader question of civil rights regarding equal treatment of sexes". Pomeranz 2012, p. 18.

19 Decision of the Constitutional Court of the Russian Federation delivered on 15 January 2009 (N 187-O-O) regarding inadmissibility of Konstantin Markin's application (*Markin*, Constitutional Court Judgement).

20 See, for instance, Malksoo 2012b and Vaypan 2014.

21 I am using the expressions "balancing" and "proportionality" interchangeably. That can be subject to criticism. There is a view that only the last component of the proportionality analysis (proportionality *stricto sensu*) requires balancing. Other components "are means-ends tests". Porat 2009, p. 246.

22 The Grand Chamber addressed issues beyond discrimination. However, these issues are not discussed in this article, as they are irrelevant to the issue of discrimination that is selected for the performance of comparative assessment of two court judgements.

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These core issues include the general issue of discrimination and potential limitations in specific areas of regulation (Section 3.2.1) and the correlation between social traditions and the scope of a human right (Section 3.2.2).

Once these core issues are determined, an analysis will proceed in the fourth section by identifying the means of legal reasoning and interpretation used by the two courts. In that section, it will be argued that the *Markin* case was about limiting human rights on the basis of the need to ensure national defence interests. The major reasoning tool used by the ECtHR was the proportionality test. The Constitutional Court's reasoning, in its 2009 decision, it will be argued, lacked a full application of the proportionality test.[23] Furthermore, the Constitutional Court failed to use any other alternatives to proportionality reasoning for the interpretation of a specific constitutional right.[24] This discussion will be followed by a concluding section. An overall objective of this article will be an attempt to answer the two following research questions: *were the starting grounds used for legal analysis applied with respect to the* Markin *case by the two courts comparable, and were judicial reasoning techniques used by the Constitutional Court in line with minimal standards applicable to the interpretation of human rights law*?

23 The proportionality test as it is understood here is a balancing test intended to balance the human rights of an individual vis-à-vis public interests and the rights of others. According to Möller, this test "is used to determine whether an interference with a prima facie right is justified. It thus only comes into play when it has been established that there is an interference with a right, i.e. if a person's autonomy has been limited". Möller 2012, p. 180.

There is no unanimous view on the origins of the proportionality test. However, a majority view holds that it originated in German administrative law and migrated to other countries. This test is widely applied in constitutional adjudication of civil law countries. It found a place for itself in common law countries too. Furthermore, the same test is used in "treaty-based regimes" that include the WTO, EU and the Convention framework. Sweet and Mathews 2009, p. 173. For a general overview of this test see also Barak 2012, Pulido 2013 and Alexy 2014.

Cristoffersen argues that linking the development of the proportionality analyses practised by the ECtHR by some authors to German origins is "counterintuitive". This principle was known to humanity for more than 3000 years, and the proportionality used by the ECtHR "does not correspond to German law". Christoffersen 2009, pp. 34-35.

24 "Alternative standards include: the categorical analyses used for enforcing the rights of the First Amendment to the United States Constitution; the analyses linked to the existence of an absolute inalienable core of rights *(Wesensgehalt)*, the so-called internal theories of rights endorsed by some German constitutional doctrine and used by some case law for adjudicating the constitutional rights of the Basic Law; the British unreasonableness test ["Wednesbury reasonableness" standard]; and some of the equality tests used in United States constitutional law." Pulido 2013, p. 508. For a more detailed critical overview of different alternatives to the proportionality test, see Barak 2012, pp. 493-527.

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2 Factual and Procedural Background

Konstantin Markin, who was serving in the military as a radio intelligence operator, applied for parental leave until his youngest son turned three.[25] In accordance with Section 13, Article 11, of the Federal Law of the Russian Federation on the Status of Military Personnel, this request was not granted.[26] The respective provision of the law guaranteed this right only to military servicewomen. Markin, who went many times through the military courts, eventually applied to the Constitutional Court, where he stated that such a regulation provided in the legislation was not in line with the provisions of Articles 19 (Sections 2 and 3),[27] 38 (Section 2)[28] and 55 (Section 3)[29] of the Constitution and was discriminatory in its nature because it was granted only to servicewomen.[30]

After reviewing Markin's application, the Constitutional Court declared the case inadmissible.[31] In its relatively brief reasoning, the Constitutional Court noted that military service is considered to be a specific form of public service, implemented to guarantee the defence and security of the state. Therefore, this type of service should be qualified as a service for ensuring the public interest.[32] The Federal Legislature has the discretionary power to regulate this area of administration by imposing certain restrictive measures that would consider the specificity of the field.[33] Consequently, according to the Constitutional Court, the restrictions applied by law with respect to Markin were not discriminatory.

After the Constitutional Court delivered its decision of inadmissibility, Markin filed an application to the ECtHR. The First Section of the ECtHR decided

25 Markin divorced his wife after she gave birth to their third child. In accordance with their agreement, all children, including the newborn son, were to stay with the father. The mother would pay child maintenance after their divorce. *Markin*, Grand Chamber Judgement, pp. 3-4, para. 11, 19-23.

26 *Markin*, Constitutional Court Judgement, p. 2.

27 Art. 19 (Section 2-3) of the Constitution reads as follows:

> 2. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned.
>
> 3. Man and woman shall enjoy equal rights and freedoms and have equal possibilities to exercise them.

28 Art. 38 (Section 2) of the Constitution states that "[c]are for children, their upbringing shall be equally the right and obligation of parents".

29 Art. 55 (Section 3) of the Constitution provides a limitation clause on general possible instances for restricting human rights:

> 3. The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.

30 *Markin*, Constitutional Court Judgement, p. 3.

31 *Markin*, Constitutional Court Judgement.

32 Ibid., p. 3.

33 Ibid., pp. 3-4.

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his case on 7 October 2010 and declared that Russia had violated Article 14 of the Convention taken in conjunction with Article 8. It decided that finding a violation was sufficient and did not award non-pecuniary damages.[34] The First Section also provided the respondent state with a recommendation on the implementation of general measures for the elimination of shortcomings in the legislation that led to the discriminatory treatment between male and female military service members.[35] The First Section emphasized that

> its judgements serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[36]

Russia requested that the judgement of the First Section be referred to the Grand Chamber. The Grand Chamber, in its judgement of 22 March 2012, upheld the general conclusion of the First Section regarding the existence of a violation of Article 14 taken in conjunction with Article 8 of the Convention.[37] In addition, the Grand Chamber decided that non-pecuniary damages should also be paid to the applicant by the respondent state.[38]

After the delivery of the Grand Chamber judgement in 2012, Markin's case once more came before the Constitutional Court, in 2013.[39] In light of the fact that the Constitutional Court and ECtHR had answered an identical question in the *Markin* case differently, the local court in which Markin applied for enforcement of the ECtHR judgement requested the opinion of the Constitutional Court to clarify this unclear situation.[40] The Constitutional Court, in its ruling, emphasized that in such unclear situations the local court should suspend court proceedings and apply to the Constitutional Court for clarification.[41]

34 *Markin*, First Section Judgement, pp. 21-22.
35 Ibid., p. 20, para. 67.
36 Ibid., p. 11, para. 39.
37 *Markin*, Grand Chamber Judgement, p. 48.
38 Ibid.
39 It was the first case in the Constitutional Court's practice where it expressed its views regarding the potential collisions between conclusions of the ECtHR and case law of the Constitutional Court. However, the Constitutional Court in this judgement did not determine the exact rules applicable to such situations. It noted that it is possible to have such contradictory views, and "an *ad hoc* resolution of conflicts on a case-by-case basis" option is the preferred method for resolving these. Vaypan 2014, pp. 130-131.
40 Constitutional Court Judgement 2013, p. 7.
41 Ibid., p. 14. Eventually, Mr. Markin, after the delivery of the 2013 judgement, received his compensation. Bowring 2018a, p. 29.

3 Comparing the Adjudicatory Reasoning

3.1 General

The ECtHR and the Constitutional Court do not have identical roles and judicial functions.[42] The former is a regional human rights court responsible for the interpretation and application of the Convention. The other is the highest domestic court, which functions in a national jurisdiction and interprets the national Constitution. When it comes to the role played by the Convention in the interpretation exercise applied by the Constitutional Court, its status changes from that of a major starting point to a secondary-level legal instrument. In its constitutional interpretations, the Constitutional Court rarely uses the Convention.[43] In other words, the ECtHR and the Constitutional Court have different legal instruments (sources) that they use as a starting point for interpretative purposes.

However, the core question in the *Markin* case was the applicability of the limitations to constitutional rights in the Russian context and the evaluation of certain restrictions to the Convention rights in the ECtHR context. Both the Constitutional Court and the Grand Chamber of the ECtHR were responsible for evaluating the potential scope of human rights at stake vis-à-vis the restrictions imposed by the government authorities. As will be argued in this section, there was conceptual uniformity of the issue under the review of these two courts. Even if they function at different levels and two differing legal instruments guide their work, the core issue of non-discrimination and the more general requirement of human rights adjudication require them to have similar or even identical reasoning techniques. This statement does not exclude the possibility of reaching different results by using the same reasoning techniques. It is possible for two courts to look at a similar matter (the scope of a right, which was not an absolute right) from different perspectives and come to opposing conclusions. However, such opposing conclusions should be reached by applying identical means of adjudicatory reasoning. In all cases, such means should be reasonable.

42 Some authors claim that these two bodies are functioning in two "parallel worlds". Issaeva et al. 2011, p. 81. Mavrin, who is the deputy president of the Constitutional Court, described the existing situation differently, after the delivery of the *Markin* judgement by the First Section. He noted that this judgement of the ECtHR has created a "new legal reality" that involves a contradiction between a judgement of the ECtHR and a decision of the Constitutional Court. Mavrin S P Judgements of European Court of Human Rights and Russian Legal System, p. 1 (On file with author).

43 The same statement is true of general courts too. General courts very rarely engage in discussion of circumstances of the case in light of the Convention and judgements of the ECtHR. Antonov 2014, p. 9.

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3.2 Core Issues Addressed

3.2.1 General Issue of Discrimination and Potential Limitations in Specific Areas of Regulation

In its decision on inadmissibility, the Constitutional Court confirms that the status of military servicemen is treated differently from that of military servicewomen. However, it is interesting that this differentiation of treatment when analysed by the Constitutional Court is evaluated in accordance with one criterion alone. In civilian life, Russian legislation recognizes the right of fathers to a parental leave that may last up to three years.[44] This is not the case with respect to military personnel. The Constitutional Court took the difference that exists between the regulation of the status of military personnel and civilians as granted and natural owing to the "specificity of the legal status of military personnel" and the constitutional provisions that allow the limiting of rights and freedoms.[45] In other words, the starting point for its analysis of the two different elements that would include a difference in treatment – (i) military status and (ii) Markin's gender – was limited to the element of gender alone.

When the Constitutional Court briefly evaluated Markin's status as a military serviceman, it referred to the respective constitutional provisions without going into an interpretative exercise in detail. Article 55 of the Constitution provides that

> [t]he rights and freedoms of man and citizen *may be limited by the federal law* only *to such an extent to which it is necessary* for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, *for ensuring defence of the country and security of the State*.[46]

On the basis of this constitutional provision, the Constitutional Court, without providing further analysis, stated that the absence of the right to parental leave for military servicemen is justified for two reasons:

> firstly, … the special legal status of the military, and, secondly, … the constitutionally important aims justifying limitations on human rights and freedoms in connection with the necessity to create appropriate conditions for efficient professional activity of servicemen who are fulfilling their duty to defend the Fatherland.[47]

Furthermore, according to the Constitutional Court, "non-performance of military duties by military personnel *en masse* must be excluded as it might cause

44 Labour Code of the Russian Federation of 30 December 2001 (N 197-FZ), Art. 256.
45 *Markin*, Constitutional Court Judgement, p. 6.
46 Emphasis added. Constitution, Art. 55, Section 3.
47 Translation of the excerpt is taken from the *Markin*, Grand Chamber Judgement, p. 7, para. 34.

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detriment to the public interests protected by law".[48] Granting this right to female military personnel only is justified by two factors. The first factor was the limited participation of women in Russian military forces. Their social role as mothers, according to the Constitutional Court, had to be considered as the second factor.[49] Consequently, it concluded that the absence of a guarantee under the federal law of parental leave for military servicemen could not be considered a violation of constitutional rights.

The Grand Chamber generally noted that not every difference in treatment should be considered as discrimination.[50] To be able to state that discrimination does exist, it is necessary to establish that "other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory".[51] According to the Grand Chamber,

> 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.[52]

It also stated that the member states of the CoE do have a certain margin of appreciation regarding determination of need and scope of differentiated treatment. Such a margin of appreciation is also applicable to the defence forces.[53] However, in all cases, the last word on this matter should lie with the ECtHR.[54]

The Grand Chamber underlined the difference between maternity leave and parental leave. In the eyes of the Grand Chamber, the fact of being "similarly placed" was rather obvious. It clarified its position regarding the similarity of the positions of military servicemen and servicewomen by indicating that, in contrast to maternity leave that has an objective of ensuring the recovery of the woman and the breastfeeding of a child, parental leave's main objective is to provide an opportunity for a parent to take care of a child.[55] In the implementation of this task (taking care of children), both men and women are "similarly placed".[56] Here, the Grand Chamber provides an answer to one of the elements to be addressed, which is the difference in treatment due to gender. With respect to the second element, that is, membership of the military, the ECtHR accepted the general possibility of imposing extra restrictions on military personnel that would be impermissible with respect to civilians.[57] However, such restrictions are not to be

48 Ibid.
49 Ibid.
50 Ibid., p. 35, para. 125.
51 Ibid.
52 Ibid.
53 Ibid., p. 36, para. 128.
54 Ibid., p. 36, para. 126.
55 Ibid., p. 37, para. 132.
56 Ibid., p. 38, para. 132.
57 Ibid., p. 38, para. 135.

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interpreted in a way that the Convention does not guarantee rights and freedoms to the military personnel: "[T]he Convention does not stop at the gates of army barracks …"[58] Such restrictions should conform to the necessity test requirements of the second paragraph of Article 8 of the Convention.[59] The general interpretative approach of the ECtHR with respect to Article 8 of the Convention, when the question of restricting individual rights is considered, guarantees a narrow margin of appreciation for states. Similarly, the ECtHR noted that the respondent state is under an obligation to illustrate "particularly serious reasons" to justify the lawfulness of restrictions:[60]

> In particular, there must be a reasonable relationship of proportionality between the restrictions imposed and the legitimate aim of protecting national security. Such restrictions are acceptable only where there is a real threat to the armed forces' operational effectiveness. Assertions as to a risk to operational effectiveness must be "substantiated by specific examples".[61]

The ECtHR argued further that this statement is also justified by the failure of the respondent state to provide the ECtHR with statistical data to support its position. It noted that no statistical research or expert study was ever performed to determine the potential number of servicemen who may use the right of parental leave in the Russian army.[62] For substantiation by specific examples, such research would be necessary.

In sum, by applying the proportionality test and reasoning, the ECtHR noted that in the military sector, the restriction of rights and freedoms could be justified.[63] However, such restrictions should not lead to discriminatory

58 Ibid., p. 39, para. 136.

59 According to Art. 8, para. 2 of the Convention: "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."

60 *Markin*, Grand Chamber Judgement, p. 39, para. 137.

61 Ibid.

62 Ibid., p. 41, para. 144.

63 In the EctHR context, the proportionality test functions as one of the guiding principles. In its practice, the EctHR has been actively using several principles to provide general guidance in decision-making. These principles, in addition to proportionality, include subsidiarity, margin of appreciation and the principle of the "Fourth Instance". Hart 2010, pp. 552-553.

The first serious consideration of the limitation clauses provided in the Convention where the EctHR applied proportionality analysis was *Handyside v. the United Kingdom* (1976). Sweet and Mathews 2009, pp. 202-203. Another important case where the EctHR relied on this principle was *Sunday Times v. the United Kingdom* (1979). Christoffersen 2009, p. 39. Today, the EctHR practice of applying the proportionality test is similar to one applied by the German Constitutional Court. It uses this test with respect to Arts. 8-11 and 14 of the Convention. Sweet and Mathews 2009, pp. 202-203. Evaluation of the proportionality of interference in human rights under the Convention is assessed by the EctHR depending on the nature of a "case, the background circumstances, the right in question and the type of interference concerned". Greer 1997, p. 15.

treatment. The legitimate aim of national security can be achieved by using alternative means, such as those used in other CoE countries.[64] As the Constitutional Court did, the Grand Chamber also referred to the very same Article 1 of ILO Convention #111, which provides that distinction, exclusion or preference relating to inherent requirements should not be regarded as discrimination.[65] It noted that the treatment of servicemen applied in Russia could not be considered as an inherent requirement of service. Such treatment was not providing a differentiating approach. Instead, this treatment was excluding one category from the application of a certain right based on gender.[66] In other words, the ECtHR was saying that instead of a blanket exclusion of servicemen from the right to parental leave, the respondent state could have a legislative framework granting parental leave to both male and female personnel with restrictions based on certain criteria. Such criteria could include the position held by an applicant, his or her role in military service and the involvement of the service member's respective military unit in actual operations.[67]

3.2.2 Correlation Between Social Traditions and the Scope of a Human Right

As noted previously, in its decision on the inadmissibility of Markin's application, the Constitutional Court stated that an exceptional parental leave right guaranteed for servicewomen was provided by legislators owing to "the special social role played by women in society".[68] This situation derives from Article 38 of the Constitution, which recognizes an obligation of a state to protect maternity, childhood and family.[69] Accordingly, the decision of the legislature should not be deemed contradictory to Article 19 of the Constitution, which guarantees equality between man and woman.[70] An analysis of the Constitutional Court did not provide further details on the special role played by women in society.

The approach of the Grand Chamber with respect to the reference to tradition in a certain country was highly critical of the Constitutional Court's view. It stated that "the difference in treatment cannot be justified by reference to traditions prevailing in a certain country".[71] It went on to cite its established case law that

> 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 … States are prevented from imposing traditions that

64 *Markin*, Grand Chamber Judgement, p. 42, para. 147.
65 Art. 1 (Section 2) of ILO Convention #111 adopted on 25 June 1958 states that "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".
66 *Markin*, Grand Chamber Judgement, p. 43, para. 148.
67 See Ibid., p. 19, para. 75, where the ECtHR discussed alternative means of regulation of the parental leave rights of military personnel.
68 *Markin*, Constitutional Court Judgement, p. 6.
69 The Constitutional Court referred to Section 1 of Art. 38 of the Constitution, which reads as follows: "Maternity and childhood, the family shall be protected by the State".
70 *Markin*, Constitutional Court Judgement, p. 7.
71 *Markin*, Grand Chamber Judgement, p. 40, para. 142.

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> derive from the man's primordial role and the woman's secondary role in the family.[72]

The ECtHR compared "gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners" to "stereotypes based on race, origin, colour or sexual orientation".[73] After stating its position on the general attitude to be taken with regard to the use of traditions in justifying the differentiated treatment of genders, it argued that there is no convincing proof that would confirm that Russian society, in general, is not ready for the equal treatment of the two genders. Russian society had already become familiar with the notion of parental leave in civilian life.[74] Therefore, the same acceptance could presumably exist with respect to military personnel.

4 Assessing the Comprehensiveness of Constitutional Reasoning

Although both courts may have used different priorities in performing their analyses of relevant issues, they focused their attention on identical matters. On the basis of an assessment of the views of these courts it may be claimed that major grounds that were used as starting points for judicial analysis in both courts were comparable. They may even be called identical owing to two elements that form the core of the dispute. Such elements covered evaluation (i) of absence or existence of discrimination due to gender and military status and (ii) of the scope of potential restrictions that a state may impose on an individual right. From this perspective, both decisions were about the identification of a scope of right and evaluation of the limitations applied by the state authorities to such a right. In other words, to reach this goal, both decisions were required to go through a proportionality test or one of the tests used as an alternative to proportionality.[75]

In certain aspects, the scope of evaluation by the Constitutional Court varied from the scope of assessment performed by the ECtHR. Two core categories of issues discussed in the previous Section were not addressed by both courts through the same prism. Using different prisms for reasoning by these two courts

72 Ibid., p. 36, para. 127.
73 Ibid., p. 41, para. 143.
74 Ibid., p. 40, para. 142.
75 Tsakyrakis notes that the ECtHR, with a title of proportionality, uses balancing "both as a method of interpretation and as a method of adjudication". Tsakyrakis 2009, p. 475. The wording of the proportionality assessment for these balancing purposes used by the ECtHR follows the terminology of each respective Article providing the restriction from the Convention. As noted by Contreras, the ECtHR generally seeks establishment of three doctrinal requirements when there is a question of validity of restrictions of human rights protected by the Convention. These are "a) the restriction must have been 'prescribed by law' (or established 'in accordance with the law'); b) the domestic restricting measure must have pursued one or more 'legitimate aims' under the European Convention; c) and every interference with the exercise of a right must be deemed 'necessary in a democratic society'. The last doctrinal requirement involves the application of the principle of proportionality in the assessment and review of the restricting measures". Contreras 2012, pp. 37-38.

is partially justifiable owing to their differing judicial roles and authorities. Additionally, the ECtHR paid more attention to the analysis of international and regional developments and the formation of consensus in the CoE hemisphere, whereas these matters were left almost entirely unattended by the Constitutional Court. The Constitutional Court referred to only one general provision in the text of the ILO Convention to argue that the treatment of Markin was not discriminatory. It rarely uses international legal instruments to justify its reasoning. A decision of the Constitutional Court in *Markin* was not a judgement on the merits but a decision on the inadmissibility of a constitutional application. Therefore, as the Constitutional Court often does in inadmissibility decisions, the opinion was not detailed or lengthy. Hence, in this context, the failure to use comparative or international material for justificatory purposes is not an important criticism.[76]

A major problem that overshadows the reasoning of the Constitutional Court relates mainly to the application of its test for evaluating restrictions to human rights and, finally yet importantly, how it identifies the place of tradition existing in society as an element justifying the restriction of human rights. When all these aspects are evaluated, it becomes clear that the justification of the Constitutional Court contained two major weak points. The first weakness can be linked to deficiency relating to the form of the decision concerning the definition of the general notion of discrimination and providing a detailed analysis of the situation in light of different treatment based on gender and military status ("external deficiency").[77] In other words, the Constitutional Court did not provide the detailed reasoning that would help a reader understand why such different treatment of military servicemen was not discriminatory. In contrast to the Constitutional Court, the Grand Chamber was very cautious in providing a detailed analysis of these issues (such as the difference between maternal and parental leave, the application of parental leave to civilian men, the scope of the application of parental leave in the military, the definition of discrimination, differentiating it from difference in treatment, etc.). Formal justice requires constitutional adjudicators to be descriptive in their reasoning. To reach this requirement of justice, the Constitutional Court could easily accommodate an approach applied by the ECtHR.

The second weakness concerns the application of the proportionality test to human rights restrictions ("internal deficiency"). The Constitutional Court considered a human right at stake as something that is not absolute in its nature.

76 There is no unanimous approach regarding the advantages of the use of comparative law in national or international adjudication. In the ECtHR context, three major problems raised in connection with the use of comparative law include "cultural bias of comparative research, translation of legal terms and law 'cherry picking'". Dzehtsiarou 2010, p. 110. Another aspect that is subject to heavy criticism is the use of European consensus. The ECtHR has been acting inconsistently when it refers to this concept. Ibid., p. 130.

77 Here, in fact, the constitutional right to non-discrimination is evaluated by the Constitutional Court as a non-absolute right (that is, a relative or qualified right). For discussion of absolute and relative rights, see Barak 2012, pp. 27-37.

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This may be acceptable as a starting point from the perspective of the ECtHR.[78] However, the justification was lacking when the starting point was subject to further scrutiny in light of the criteria of restrictions. The Constitutional Court did not provide comprehensive reasoning to show that indeed military servicemen's rights could be restricted under the Constitution. Mere references to state interests, specificities of the regulation of the defence field and references to the limited number of military servicewomen in the Russian military were not supported with further justifications required by a comprehensive proportionality test.[79]

In *Markin*, the Constitutional Court had to answer the questions raised from the perspective of several articles of the Constitution. Article 19 of the Constitution declares the equality of the rights of women and men. Furthermore, this Article prohibits discrimination based on gender, on the one hand, and imposes a positive legal obligation to guarantee gender equality in Russia, on the other. The Constitution does not contain a specific limitation clause in the text of Article 19 that could be used to limit the scope of this right.[80] However, the text of the Constitution contains a general provision that provides for the possibility of limiting constitutional rights in certain circumstances. According to Article 55 of the Constitution, rights and freedoms can be limited by federal law only to the extent that it is necessary to protect the basics of constitutional structure, morality, health, rights and lawful interests of other persons to ensure defence of the country and the security of the state.[81] In other words, with this wording in Article 55, the Constitution explicitly asks the Constitutional Court to apply a similar test, which the Convention requires the ECtHR to apply when evaluating a certain issue under Article 8.

The limitation applied with respect to the applicant was introduced with the Federal Law of the Russian Federation. The introduction of such a limitation from a procedural perspective was in line with the requirements of Article 55 of the Constitution. The federal legislature, as the Constitutional Court noted, has the right to legislate in this area and impose certain limitations on the status of military personnel, limitations that may not be imposed on civilians. Nonetheless, using Barak's wording,

78 As Greer points out, human rights may be limited by the interpretation given to them. However, when rights enshrined in the Convention are considered, it should also be kept in mind that the Convention itself places certain extra limitations on the rights that are guaranteed. Greer 1997, p. 5.

79 As noted by Möller, "[w]hat matters is whether the policy is objectively justifiable, not whether the persons who made it had the right considerations on their minds." Möller 2012, p. 182.

80 It is necessary to differentiate two terms that are used in the constitutional theory of rights. The first is the scope of the constitutional right, which is used for identification of boundaries and the content of rights. The second is the extent of the protection of the constitutional right that identifies limitations that may be applicable to rights. Barak 2012, p. 19. The content of a constitutional right is subject to regulation under constitutional levels, whereas the extent of its protection is the subject matter of regulation at the sub-constitutional level. Ibid., p. 24.

81 Constitution, Art. 55, Section 3.

> A limitation on a constitutional right by law (statutory or common law) will be constitutionally permissible if, and only if, it is proportional. The constitutionality of the limitation, in other words, is determined by its proportionality.[82]

The Constitutional Court here was under an obligation to check the existence of proper reasons and justifications, which were used for limiting a constitutional right to equality.[83] Once any constitutional adjudicator recognizes that there is a limitation on a constitutional right, it is under an obligation to test such a limitation by applying the four subcomponents[84] of proportionality:

> According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.[85]

To perform an analysis of proportionality an adjudicator is required to pass through a three-stage inquiry in reasoning, where the scope of a constitutional right is identified, justifications (based on aforementioned subcomponents) are evaluated and the remedy is determined.[86] The Constitutional Court, after identifying the constitutional right prohibiting discrimination based on gender, did not go further with the application of subcomponents of proportionality to the limitation of this right. It just identified the general criterion of limitation by referring to Article 55 of the Constitution, which provides a possibility of using the *defence and security of the state* as grounds for the public interest in the limitation of constitutional rights. However, no balancing between the private

82 Barak 2012, p. 3.
83 Ibid., p. 4.
84 Different titles for components may be used in academic writings. Sometimes components are not called components but rules of proportionality. Klatt and Meister, for instance, state that proportionality contains four major rules, "namely legitimate ends, suitability, necessity, and proportionality in its narrow sense. The first stage examines whether the act pursues a legitimate aim; suitability, whether the act is capable of achieving this aim; necessity, whether the act impairs the right as little as possible; and the balancing stage, whether the act represents a net gain, when the reduction on enjoyment of rights is weighed against the level of realization of the aim". (references omitted) Klatt and Meister 2012, p. 8. For a detailed analysis of components of the proportionality test, see also: Möller 2012, pp. 181-204. Alexy refers to proportionality as a principle and notes that it consists of three sub-principles that include "the principle of suitability, of necessity, and of proportionality in the narrower sense". Alexy 2014, p. 52.
85 References omitted. Barak 2012, p. 3.
86 Ibid., p. 8.

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interest of a minority representative and a public interest to be protected by the imposition of such a limitation was performed. Similarly, no tests that could be recognized as alternatives to the proportionality test were used. Such a situation leaves the statements and conclusions reached open to the critique. This critique is about an absence of detailed analysis, which may mean there was also an absence of proper rationalization for a legal decision.[87]

5 Conclusion

The ECtHR and Constitutional Court were facing similar challenges in evaluating the relevant circumstances of *Markin*. Both courts were trying to answer a question about whether allowing parental leave for military servicewomen while prohibiting its exercise by military servicemen was discriminatory. Both were required to deal with a qualified right, which was not absolute in nature owing to the limitations provided by the Convention and Constitution. Eventually, both courts were required to evaluate whether different treatment and limitation of a human right were allowed on the basis of the argument that the defence and security of the country as a public interest was at stake. Therefore, the grounds used for legal analysis applied by the two courts were comparable and even identical at the conceptual level.

The same question may be answered in radically different ways by two different courts. Such differences may be stimulated by many circumstances that are so broad that they may cover even the ideological background of the judges involved. However, the principle of the rule of law requires that each and every court provide its rationale when a specific decision is delivered. The requirement for this rational reasoning cannot be compromised. This requirement asks a judicial authority to justify its judgements.[88] In the majority of cases, courts have discretion in their selection of reasoning tools. However, a complete absence of reasoning tests is not tolerable when the limitation of rights is at stake.

The ECtHR selected the proportionality test for its evaluation of the limitations imposed on Markin. The Constitutional Court, in its turn, did not use any of the tests that are considered to be possible alternatives to the proportionality test. It started to apply the proportionality test, which is widely used in constitutional adjudication, but stopped short of fully applying it. The Constitutional Court started its analysis by referring to several major elements of the proportionality test provided by the Constitution. Such elements included the possibility to limit human rights by federal law, applying different regulations to different statuses of military personnel, and the possibility for the government to refer to defence of the country as a legitimate aim. Here, the Constitutional Court, in fact, touched mainly on the first (legitimate aim) subcomponent of the

87 As Klatt and Meister point out, the proportionality's major effect, if it is applied correctly, is to discipline and rationalize judicial decision-making practice. Klatt and Meister 2012, p. 8.

88 The principle of the rule of law requires constitutional adjudicators to observe certain values to prevent arbitrariness in their judgements. To ensure this situation, such judgements "should be justifiable and, indeed, justified with plausible reasons". Pulido 2013, p. 513.

proportionality test but did not continue its analysis with a detailed overview of the suitability of the measure, its necessity and proportionality in the narrow sense. Mere references to the possibility of limiting constitutional rights owing to the "special legal status of the military, and, … constitutionally important aims justifying limitations …"[89] were insufficient to satisfy the minimal requirements applicable to the adjudication of a case relating to the limitation of constitutional rights.

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89 Translation of the excerpt is taken from the *Markin*, Grand Chamber Judgement, p. 7, para. 34.

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