

## **“Regardless of their sex” or “biological differences”. An analysis of the European Court of Human Rights’ case law on women in prison**

*“Independientemente do seu sexo” ou “diferenças biológicas”. Uma análise da jurisprudência sobre mulheres em situação de privação de liberdade do Tribunal Europeu dos Direitos Humanos*

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## Abstract

In recent years, a growing attention for the specificities of female detention has spurred the adoption of a consolidated corpus of international soft-law tools, as well as reports on the conditions of incarcerated women. This momentum has not been paralleled by court decisions focusing on gender as a key issue in determining potential violations to prisoners' rights, neither at a domestic nor at an international level.

The paper will explore the gap between said legislation and policies and their implementation, particularly focusing on the case law of the European Court of Human Rights. The perspective adopted by this Court in interpreting the gender specificities of women in prison seems to be uncritically grounded in the vulnerability paradigm and the protection of motherhood. We will attempt to decode this normative ideology and to read it in context, and in comparison with the consolidated case law of the Court on the legal notion of vulnerability in prison, as well as with its case law on gender topics and the prohibition of discrimination. The analysis will highlight the most critical aspects of the traditional interpretation of gender equality in prison, as well the need to reconsider gender as a relevant issue in the protection of prisoners' rights.

**Keywords:** Women studies; Prison studies; Human rights law; International law; ECtHR law.

## Resumo

Nos últimos anos, uma atenção crescente às especificidades da detenção feminina estimulou a adoção de um corpus consolidado de ferramentas internacionais de *soft law*, bem como relatórios sobre as condições das mulheres encarceradas. Esse momento não se refletiu nas decisões dos tribunais para que o gênero fosse tratado como uma questão-chave na determinação de possíveis violações dos direitos das pessoas em situação de privação de liberdade, nem em nível doméstico nem internacional.

O artigo explorará a lacuna existente entre esta legislação e as políticas e sua implementação, com foco especial na jurisprudência do Tribunal Europeu dos Direitos Humanos. A perspectiva adotada pela Corte na interpretação das especificidades de gênero das mulheres em situação de privação de liberdade parece estar acriticamente fundada no paradigma da vulnerabilidade e na proteção da maternidade. Tentaremos decodificar essa ideologia normativa e lê-la em contexto e em comparação com a jurisprudência consolidada da Corte sobre a noção legal de vulnerabilidade na prisão, bem



como com sua jurisprudência sobre tópicos de gênero e sobre a proibição de discriminação. A análise destacará os aspectos mais críticos da interpretação tradicional da igualdade de gênero na prisão, bem como a necessidade de reconsiderar o gênero como uma questão relevante na proteção dos direitos das pessoas em situação de privação de liberdade.

**Palavras-chave:** Estudos sobre mulheres; Estudos prisionais; Normas de Direitos Humanos; Lei internacional; Legislação do TEDH.



## Introduction

The topic of gender in the International legal arena offers an interesting challenge. Feminist jurisprudence has contributed to decoding and disrupting “the gender bias of apparently neutral systems of rules”<sup>1</sup> in domestic law and regulations. The same is true for the growing attention devoted to the interconnections between nation state and gender<sup>2</sup>. International law, however, seems immune to the discourses that expose the gender bias in the legal domain.

As an area of public action, international law reinforces the idea of the law as an abstract and autonomous entity, separated from political, economic, and social systems, operating on a purely rational basis and destined to achieve universality, neutrality, and objectivity<sup>3</sup>. One very relevant exception is Charlesworth, Chinkin and Wright (1991), the first attempt at a feminist critique of international law. The purpose of their work was to prove that “the structures of international lawmaking and the content of the rules of international law privilege men; if women’s interests are acknowledged at all, they are marginalized. International law is a thoroughly gendered system”<sup>4</sup>. To be more specific, a male gendered system.

It is always fascinating to challenge naturalistic fallacies, especially when they are tied to and incorporated into the legal methodology. Female imprisonment is heavily charged with naturalistic fallacies embedded in both doctrine and case law, especially when it comes to the dogma of gender separation, motherhood and the absolute vulnerability paradigm. In this paper I will use qualitative research methods to explore possible bias in international law and specifically in international courts case law<sup>5</sup>. In particular, I will focus on the legal reasoning adopted by an international regional court,

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<sup>1</sup> H. Charlesworth, C. Chinkin and S. Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 1991.

<sup>2</sup> See, among others, A. Vianna e L. Lowenkron “The Dual Production of Gender and State: Interconnections, materialities and languages”, *Cadernos Pagu*, 51, 2017.

<sup>3</sup> A topic notably explored by N. McCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1978.

<sup>4</sup> Charlesworth, C. Chinkin and S. Wright, cited, at 614–15.

<sup>5</sup> Interestingly enough, the ECtHR’s case law has not yet been called to decide a case of transgender persons in prison. See for an account on transgender imprisonment, S. Ciuffoletti - A. Dias Vieira, “Section D: a Tertium Genus of Incarceration? Case-study on the Transgender Inmates of Sollicciano Prison”, *Journal of Law and Criminal Justice*, December 2014, Vol. 2, No. 2, pp. 209-249 and S. Ciuffoletti, “Carcere e Antidiscriminazione. Prime prove di tutela a fronte della (dimidiata) riforma dell’ordinamento penitenziario”, *Genius*, 2019-2. The only relevant case could be *X v. Turkey*, Corte Edu, no. 24626/09, 9 October 2012 concerning protective confinement in case of vulnerable prisoners.



the European Court of Human Rights (ECtHR), in assessing the gender specificities of female prisoners.

When I first started to analyse gender specific issues in prison, I took for granted the idea that female imprisonment is ‘inherently different’. This impression was reinforced by the human rights international and regional soft-law tools specifically targeting the condition of women in prison. When, as L’Altrodiritto<sup>6</sup>, we started to challenge the inhuman and degrading treatment of prisoners in Italy, we devoted special attention to the drafting of legal applications for female prisoners, pointing out their specific needs when claiming a violation of Article 3 of the Convention.

When evaluating inhuman and degrading prison conditions, one has to pay special attention not only to the specific case, but also to gender identity and to the needs connected with this dimension of the self. Throughout this whole experience, I was confronted with the lack of gender-oriented assessment by domestic authorities. I searched for International legal precedents in the vast case law concerning prisoners’ right in front of the ECtHR in order to substantiate gender-sensitive and -oriented claims, only to discover that an astonishingly small number of cases dealt directly with these issues. Indeed, the analysis of the relevant European case law on women in prison shows a tendency towards biologically oriented or gender-blind interpretations.

Interestingly enough, The ECtHR has built its own case law on gender equality based on the idea that “equality of sexes is one of the major goals in the Member States of the Council of Europe”<sup>7</sup>. Amidst the debate over sex and gender as either completely different or totally interrelated notions<sup>8</sup>, the Court bases its reasoning on a literal interpretation of Article 14 – Prohibition of discrimination, which expressly includes sex among the prohibited grounds of discrimination. Therefore the Court tends to use the term ‘sex’<sup>9</sup>. Yet Article 14 provides an open-ended list of grounds of discrimination, insofar

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<sup>6</sup> L’Altro diritto is a center for research and documentation on prison, deviance and marginality (<http://www.altrodiritto.unifi.it/>), working along with ADIR, an interuniversity center based at the University of Florence, providing free legal advice to Italian prisoners and legal clinics for the protection of prisoners’ rights (<http://www.adir.unifi.it/>).

<sup>7</sup> *Abdulaziz, Cabales and Balkandali v. UK* (1985), European Commission of Human Rights, Series A, No. 94, § 78.

<sup>8</sup> For a critique of the binary view of sex/gender see, e.g., J. Butler, *Gender Trouble: Feminism and Subversive Identity*, Routledge, New York, 1990, and Id., *Bodies that Matter: On the Discursive Limits of Sex*, Routledge, New York, 1993. For ease of reference this article uses the terminology ‘gender’, ‘gender equality’, ‘gender-oriented’ (as the most commonly used terms), except when referring to the Court’s Art. 14 case law, which makes direct reference to the word ‘sex’.

<sup>9</sup> ARTICLE 14 ECHR - Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,



as it ends with the phrase “or other status”. Thus the Court could start discussing ‘gender’ equality, for example in the highly contested case of *Leyla Şahin v. Turkey*, where it claimed that: “Gender equality – [is] recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe”<sup>10</sup>.

In recent case law concerning the definition of gender equality, many steps indicate that the Court is embracing a more sociological view of gender, acknowledging the gendered dimension of the law and stating 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”<sup>11</sup>. Some examples of this shift can be found in the evolving case law in matters of domestic violence<sup>12</sup>. However, the case law of the European Court concerning female imprisonment seems to be much more static when it comes to equality law and gender discrimination.

I will start my analysis by presenting the International human rights legal sources (both hard-law and soft-law sources) governing the issue of prison in their gendered dimension. Then I will focus on the case law on female detention. I will present three categories of cases, the first concerning detention conditions, the second concerning antidiscrimination and equality law, the third concerning a case of ill-treatment in prison.

The detention-conditions case concerns a pregnant mother who gave birth and breastfed her baby in prison (*Korneykova and Korneykov v. Ukraine*<sup>13</sup>). This case raises the issue of a violation of Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment) and illustrates the Court’s hermeneutic effort to include gender issues into its legal reasoning.

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religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>10</sup> *Leyla Şahin v. Turkey*, [GC] no. 44774/98, 10 November 2005. The case concerned the prohibition for a student to wear the Islamic headscarf at university. The Court decides for a non violation. The regulations on the Islamic headscarf were not directed against the applicant’s religious affiliation, but pursued the legitimate aim of protecting order and the rights and freedoms of others, equality before the law of men and women and were manifestly intended to preserve the secular nature of educational institutions.

<sup>11</sup> *Konstantin Markin*, [GC], no. 30078/06, § 127. The wording of the Court keeps on wavering between “sex” and “gender”. Usually, referring to Article 14, the Court consider and make direct reference to the word “sex”, but I think that an analytical account of the use of both terms would be relevant in order to assess the dynamic nature of the Court’s case law.

<sup>12</sup> See the landmark judgment, *Opuz v. Turkey*, no. 33401/02, 9 June 2009d. See also *Talpis v. Italy*, no. 41237/14, 2 March 2017.

<sup>13</sup> *Korneykova and Korneykov v. Ukraine*, no. 56660/12, 24 March 2016.



Another group of cases introduces the topic of gender discrimination in criminal or penitentiary law. In these cases, applications were lodged by male prisoners in order to challenge the discriminatory nature of positive measures especially designed for women in prison. These measures concern the practice and law of sentencing—*i.e.* in a case of life sentence (*Khamtokhu and Aksenchik v. Russia*<sup>14</sup>) and in one of access to stay of execution of sentence due to parental duties and rights (*Alexandru Enache v. Romania*<sup>15</sup>)—and the blanket ban on prison leave for male prisoners (*Ēcis v. Latvia*<sup>16</sup>). In line with the trend in International human rights treaties governing the issue of female detention (and with only one exception), the Court will detect the specificities of female detention in the heavily charged areas of motherhood, breastfeeding, and essential vulnerability.

One last case concerning a gynecological examination imposed on a detainee without her free and informed consent will serve to illustrate the differential approach to violence against women within the Court's case law.

### **1. Human Rights Framework for Women in Prison (on paper). Are Women's Rights Really Human Rights?**

Traditionally, general International Human Rights treaties adopt a universalistic approach to human rights and are therefore considered gender neutral. As already mentioned above, this neutrality is only apparent, since international law is a gendered system due to the male organizational and normative structure of the international legal system<sup>17</sup>. Charlesworth, Chinkin and Wright offer an interesting perspective, demonstrating how the traditional public/private dichotomy based on gender<sup>18</sup> allows issues of particular importance for women to be ignored or underestimated. Their analysis also deconstructs traditionally accepted notions in International legal instruments—such as torture and

<sup>14</sup> *Khamtokhu and Aksenchik v. Russia*, [GC], nos. 60367/08 and 961/11, 24 January 2017.

<sup>15</sup> *Alexandru Enache v. Romania*, Application no. 16986/12, 3 October 2017.

<sup>16</sup> *Ēcis v. Latvia*, application no. 12879/09, 10 January 2019.

<sup>17</sup> As illustrated in Charlesworth, C. Chinkin and S. Wright, cited, at 615 and 625-634.

<sup>18</sup> See also Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy", in S. I. Benn & G. F. Gaus eds., *Public and Private in Social Life*, St. Martin's Press, New York, 1983 and L. Imray, A. Middleton, "Public and Private: Marking the Boundaries" in E. Garmanikow and J. Purvis, (eds), *The Public and the Private*, St. Martin's Press, New York, 1983.



human dignity—decodifying the male, rather than truly human context in which they are embedded.

For the purpose of this study, it is important to note that general International Human Rights treaties are neither gender neutral nor prison oriented. One interesting exception is represented by the ICCPR (U.N. International Covenant on Civil and Political Rights): Article 6(5) expressly refers to pregnant women, stipulating that death penalty shall not be carried out on pregnant women<sup>19</sup>. This provision paved the way for the motherhood-oriented paradigm for the protection of women in prison.

As a matter of fact, the general framework of international legal instruments for the protection of women in prison is designed to consider female specificity in a motherhood/biologically-oriented perspective, reading all other sociological aspects of female imprisonment under the lens of the universal nature of human rights in prison. Therefore, it could be argued that women in prison should be able to enjoy the protection of human rights, albeit with restrictions that are unavoidable in a closed environment<sup>20</sup>. This framework should work based on specific anti-discrimination provisions, as is the case with many international tools<sup>21</sup>, in order to reduce potential gender inequalities in the protection of prisoners and their rights. This legal structure, based on the fallacy of

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<sup>19</sup> U.N. International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49) Article 6(5): “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”.

<sup>20</sup> Several international soft-law instruments confirm the statement that prisoners continue to enjoy all rights compatible with detention. Principle 5 of the United Nations Basic Principles for the Treatment of Prisoners (1990) states: ‘Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and [...] United Nations covenants’. The United Nations Standard Minimum Rules for the Treatment of Prisoners (1957) affirms in Rule 57 that ‘the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation’. The same principle has been reaffirmed by Rule 2 of the European Prison Rules 2006: ‘Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody’. More specific is Principle VIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008)8: ‘Persons deprived of liberty shall enjoy the same rights recognized to every other person by domestic law and international human rights law, except for those rights which exercise is temporarily limited or restricted by law and for reasons inherent to their condition as persons deprived of liberty’. And in the Kampala Declaration on Prison Conditions in Africa (1996) the second Recommendation on Prison Conditions declares ‘that prisoners should retain all rights which are not expressly taken away by the fact of their detention’. Furthermore, those regional instruments demand, in various formulations, that the suffering inherent in imprisonment shall not be aggravated by the regime in prison. Rule 5 of the European Prison Rules 2006 even specifies: ‘Life in prison shall approximate as closely as possible the positive aspects of life in the community’. This, along with the fact that these soft law principles have largely been affirmed in the international and regional case law on the main human rights conventions contribute to make a case for the hardening of soft law in this context.

<sup>21</sup> Such as Art. 3 ICCPR, Art. 3 ICESCR, Art. 2 ACHPR, Art. 1 ACHR, Arts 1 and 2 ASEAN Human Rights Declaration, Art. 14 ECHR, but also Art. 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).





the universality of human rights, rests on a highly problematic premise: identical treatment in prison means treatment tailored to the needs of the male prison population.

International treaties specifically designed for the protection of women's rights appeal to the anti-discrimination dimension of human rights and women's rights. In particular, the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) makes no reference to women in prison, but constitutes a basis for implementing positive measures in order to guarantee the full development of women<sup>22</sup>. Again, these provisions aim at rights protection based on the protection afforded to the dominant group (Article 3: "...on a basis of equality with men").

General international tools for the protection of prisoners' rights used to include instruments specifically designed for women in prison. The 2015 UN Standard Minimum Rules for Prisoners (the Mandela Rules)<sup>23</sup>, the 2006 European Prison Rules (EPR, drawn up by the Council of Europe)<sup>24</sup>, and the 1990 UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules). The EPR and the Mandela Rules contain provisions relevant to women in prison. First of all, allocation: female prisoners must be detained separately from men according to Rule 18.8 EPR<sup>25</sup> and Rule 11 Mandela Rules<sup>26</sup>. This separation dogma<sup>27</sup> is tied to the notion of vulnerability, assumed as a *status quo* in the interpretation of the relationship between men (aggressor) and women (victim) in prison.

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<sup>22</sup> See Article 3: U.N. Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

<sup>23</sup> Introduced for the first time in 1955 and last reviewed in 2015, when they were dubbed "the Mandela Rules".

<sup>24</sup> Adopted for the first time in 1973.

<sup>25</sup> Rule 18.8: "In deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain:

a untried prisoners separately from sentenced prisoners;

b male prisoners separately from females; and

c young adult prisoners separately from older prisoners"

<sup>26</sup> Separation of categories, Rule 11: "The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus: (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate;"

<sup>27</sup> See A.Dias Vieira, S. Ciuffoletti, Section D: a Tertium Genus of Incarceration? Case-study on the Transgender Inmates of Sollicciano Prison, *Journal of Law and Criminal Justice*, December 2014, Vol. 2, No. 2, pp. 209-249 ISSN: 2374-2674 pp. 209-249, p. 2010: "The social space of the prison, along with the military and with public toilets, is regarded as one of the sites in which mandatory binary sex segregation has persisted throughout history", directly referring to Cohen, David S. "Keeping Men 'Men' and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity." *Harvard Journal of Law & Gender* 33.2 (2010): 509-553 and Id., "The Stubborn Persistence of Sex Segregation." *Columbia Journal of Gender & Law* 20.1 (2011): 51-140.



Interestingly enough, in the 2006 version of the EPR, this absolute separation dogma has been mitigated by exceptions “in order to allow prisoners to participate jointly in organised activities, but these groups shall always be separated at night unless they consent to be detained together and the prison authorities judge that it would be in the best interest of all the prisoners concerned” (Rule 18.9 EPR).

This slight softening of the absolute gender separation rules appears crucial, if we consider the fact that in prison institutes designed for men, women are often allocated in separated sections with considerably little access to activities and treatment offered to men.

The two instruments mentioned above take a biological-differential approach to all other aspects of female imprisonment, addressing the “special needs” of women in prison: female hygiene (EPR, 19.7: “Special provision shall be made for the sanitary needs of women”), women’s special needs (EPR, Women, Rule 34.1: “In addition to the specific provisions in these rules dealing with women prisoners, the authorities shall pay particular attention to the requirements of women such as their physical, vocational, social and psychological needs when making decisions that affect any aspect of their detention”; Rule 34.2: “Particular efforts shall be made to give access to special services for women prisoners who have needs as referred to in Rule 25.4”), labor, nursing and children (EPR, Rule 34.3: “Prisoners shall be allowed to give birth outside prison, but where a child is born in prison the authorities shall provide all necessary support and facilities”, and Mandela Rules, Rule 28: “In women’s prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate”), prison staff (Mandela Rules, Rule 81: “1. In a prison for both men and women, the part of the prison set aside for women shall be under the authority of a responsible woman staff member who shall have the custody of the keys of all that part of the prison. 2. No male staff member shall enter the part of the prison set aside for women unless accompanied by a woman staff member. 3. Women prisoners shall be attended and supervised only by women staff members. This does not, however, preclude male staff members, particularly doctors and teachers, from carrying out their professional duties in prisons or parts of prisons set aside for women”; EPR, Rule 81.3: “Staff who are to work with specific groups of prisoners, such as foreign nationals,



women, juveniles or mentally ill prisoners, etc., shall be given specific training for their specialised work” and Rule 85: “Men and women shall be represented in a balanced manner on the prison Staff”), solitary confinement (Mandela Rules, Rule 45.2: “2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply”), instruments of restraint (Mandela Rules, Rule 48.2: “Instruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth”).

Interestingly enough, in terms of childcare, Rule 29<sup>28</sup> of the Mandela Rules refers generically to a child staying in prison with his or her “parent”, avoiding the usual reference to the mother and opening up to the possibility of considering the father in prison as a responsible parent, who can be entitled to take care of his child in prison.

The first international instrument specifically conceived to address the issue of women in prison, drawing from the general international tools that we have just examined, are the Bangkok Rules (BR)<sup>29</sup>. These rules, intended to complement the U.N. Standard Minimum Rules (now Mandela Rules), develop a new perspective, while trying to interpret the phenomenon of women in prison, describing the desirable treatment for women in prison.

In the Preliminary Observation, the BR rejects the illusion of the universality of human rights in prison, even when paired with principles of non-discrimination law:

The Standard Minimum Rules for the Treatment of Prisoners apply to all prisoners without discrimination; therefore, the specific needs and realities of all prisoners, including of women prisoners, should be taken into account in their application. The Rules, adopted more than 50 years ago, did not, however, draw sufficient attention to women’s particular needs. With the increase in the number of women prisoners worldwide, the need to bring more clarity to considerations that should apply to the treatment of women prisoners has acquired importance and urgency.

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<sup>28</sup> Rule 29: “1. A decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned. Where children are allowed to remain in prison with a parent, provision shall be made for: (a) Internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent; (b) Child-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists. 2. Children in prison with a parent shall never be treated as prisoners.”

<sup>29</sup> GA Res. 65/299 (16 March 2011). United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).



This shifting paradigm in the protection of female prisoners' rights requires to abandon the "equal protection" strategy and to describe pragmatically what the needs of women in prison are: not "special" needs, compared to the ones universally recognized for men, but the needs that are part of the common experience of everyday life in female prison institutes. In this respect it is very important that, concerning personal hygiene, Rule 5 states that "The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge". But, surprisingly enough, self-care needs are not mentioned. This is particularly interesting, since in the Mandela Rules a special rule is designed to address this issue, i.e. Rule 18.2: "In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be able to shave regularly". The explicit reference to the "special" needs of men in terms of shaving is not unnecessary or superfluous, since it deals with an issue of security (the possession and use of razor blades in the cell) affirming that the notion of "self-respect" deserves a special consideration and can overcome generic security reasons. Now this consideration does not equally apply to women, who can be prevented from possessing and using blades to shave themselves<sup>30</sup>.

One very particular legal feature of the BR is that they make no reference to the separation rule. On the contrary, on the issue of allocation, the BR specifically refer to the principle of allocating women close to their homes or places of social reintegration, in order to facilitate communication with their families and services and enhance their social rehabilitation.

While this constitutes a shift in perspective, at the same time it could have been useful to use the new legal framework of the BR to expand on the separation rule (which is not only established in the Mandela Rules, to which the BR constitutes a mere complement), but it is strictly followed at a global scale and it is continuously reaffirmed based on the vulnerability-oriented approach. The BR could have stressed the complex relationship between the principle of separation and the principle of allocating prisoners close to their families. It would have been interesting to consider options such as

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<sup>30</sup> According to the experience with *Altrodiritto*, we have directly experienced an order by the Prison Administration forbidding the possession of blades in the cell only for female prisoners due to security reasons.



encouraging “governments to compensate in situations where a woman is imprisoned far from home, e.g. by refunding visitors’ travel expenses, or allowing for extra visiting or Skype time”<sup>31</sup>.

One very important tool, within the European penitentiary space, are the recommendations issued by the European Committee for the Prevention of Torture (also CPT) on the treatment of female prisoners<sup>32</sup>. The specific relevance of this body can be traced back to its monitoring activity, carried out in order to evaluate and discover situation of torture and inhuman or degrading treatment based on a case by case assessment. In this perspective, ‘torture and inhuman or degrading treatment’ may be defined differently in the case of women in prison.

Taking a highly pragmatic approach, the CPT report opens with the claim that women in prison: “are characterised by having particular needs and vulnerabilities which differ from those of men”, thus reformulating the issue of vulnerability. Men in prison are vulnerable, no less (or more) than women, but for different reasons. Particularly, the vulnerability of women in prison does not stem ontologically (or biologically) from the fact of being weaker even in the free society, but from the “fact that women are far fewer in number” and this “poses a variety of challenges for prison administrations, often resulting in less favourable treatment as compared to imprisoned men<sup>33</sup>”. The response to this issue should not be found in the general “equal protection” clause, but rather in a “substantive equality” approach<sup>34</sup>.

Concerning allocation, the CPT opens up to the possibility of experiences of shared accommodation unit<sup>35</sup> (such as the case of Denmark). Another practical concern is

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<sup>31</sup> P. Hein van Kempen, M. Krabbe, Women in prison: a transnational perspective, in .P Hein van Kempen, M. Krabbe (Eds.), Women in Prison. The Bangkok Rules and Beyond, Intersentia, Cambridge, 2017, p. 32.

<sup>32</sup> Firstly drafted in 2010 and then reviewed last time in 2018: CPT/Inf(2018)5, available at: <https://rm.coe.int/168077ff14>

<sup>33</sup> Ivi, p. 1.

<sup>34</sup> See ibidem: “The growing recognition of the benefits of fully embracing substantive gender equality in all areas of policy-making should extend to the prevention of ill-treatment in prison. Greater efforts are therefore needed in order to ensure a gender-sensitive monitoring of prisons, attuned to the potential compounding of problems women face in prison.”

<sup>35</sup> Ivi, p. 2: “The CPT has encountered some specific situations in which prisons permit men and women to share an accommodation unit in pursuit of “normalcy”, i.e. promoting conditions of living that approximate as far as possible those in the community, with prisoners taking responsibility for their own lives. Nevertheless, great care should be taken in establishing and following the criteria for assigning both male and female prisoners to

such units, and in ensuring rigorous supervision of relations between the inmates concerned. Clearly, persons likely to abuse others, or who are particularly vulnerable to abuse, should not be placed in such a unit. Whatever the arrangements, it is essential that proactive measures be taken to prevent sexual exploitation where male and female prisoners come into contact in a prison environment”.



the issue that “protective reasons” could constitute the basis and justification for a *de facto* solitary confinement<sup>36</sup> (see also, *mutatis mutandis*, Ciuffoletti, 2020).

Another very important issue addressed by the CPT report concerns access to activities. In this respect, the CPT stresses the fact that all too often:

female prisoners are offered activities deemed “appropriate” for them (such as sewing or handicrafts), and are excluded from far more vocational training reserved for men. The small number of women may mean that it is not considered viable to establish a workshop exclusively for them. However, such a discriminatory approach can only serve to reinforce outmoded stereotypes of the social role of women<sup>37</sup>.

The CPT also stresses the need and importance of mixed-gender activities, supported with adequate supervision.

As for personal hygiene, the CPT affirms that the failure to provide women in prison with items such as adequate quantities of essential hygiene products, such as sanitary towels and tampons, and safe disposal arrangements for blood-stained articles, as well as ready access to sanitary and washing facilities, can amount, in itself, to degrading treatment. A differentiation in terms of access to washing facilities may also be necessary.

Concerning reproductive rights (e.g. conception, contraception, abortion), an issue which is completely absent in the BR, the CPT states that, by virtue of the principle of equal access to healthcare between imprisoned and free individuals:

The contraceptive pill, for whatever reason it has been prescribed, should not be withheld from women wishing to take it. A woman’s right to bodily integrity is not diminished by virtue of her imprisonment. Where the abortion pill and/or other forms of abortion at later stages of a pregnancy are available to women in the outside community, they should be available under the same conditions to women in prison.

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<sup>36</sup> Ivi, p. 3: “The lack of capacity or of appropriate specialised facilities for women, the requirement to separate detention categories (remand/sentenced; short/long sentences; preventive detention), or the fact that an establishment holds only one woman, may result in a woman being accommodated for extended periods in a detention unit subject to an unduly restrictive regime, or she may *de facto* be subjected to a regime akin to solitary confinement. In such cases, the authorities should seek to transfer the woman to appropriate accommodation; if such transfer is not possible, the authorities should make the necessary efforts to provide the woman with purposeful out-of-cell activities and appropriate human contact”.

<sup>37</sup> Ibid.



## 2. ECtHR and Women in Prison—Consonance and Dissonance.

The European Court of Human Rights' (ECtHR) case law on prisoners' rights shows the ability of the Court to position itself as a judicial tool for the effective protection of rights by force of interpretive methods and strategy. As a matter of fact, prisoners' rights are not a specific focus of the Convention, yet since the beginning of its activity, the Commission (before the Court) received and decided a high number of applications by European prisoners. This seems to be connected to the role of international courts to provide a forum for minorities' rights in pluralistic societies. Specifically, for minorities and vulnerable individuals subject to state-power authority.

As shown by Van Zyl Smit and Snacken,<sup>38</sup> the early cases to reach the Commission and the Court never passed the threshold of the Commission, because of the theory of the inherent limitations. According to this theory, the rights of persons in a particular legal situation (prisoners, but also mental patients, military personnel, officials) are more limited than those of others. As a consequence, detention entails the loss of a number of rights considered inherently incompatible with the *status detentionis*. The issue, then, is to define what is 'inherently' incompatible from a normative standpoint. As Mireille Delmas-Marty puts it, "it is not the exercise of the relevant rights which is restricted, but the content of the rights themselves"<sup>39</sup>. Therefore, in the process of establishing whether a national law or a practice is consistent with the Convention (*i.e.* answering these three questions: is there an interference with a right; is the interference prescribed by national laws; is the interference or restriction necessary in a democratic society to attain one of the aims which are set out in the Convention and is it proportionate), the analysis of the legitimate limitations to the rights was simply not conducted. The process stopped in light of the inherent nature of the limitations.

However, the Court's stance changed rather drastically at the turn of the millennium. The Court became "noticeably more prepared to make findings in respect of the full range of conduct prohibited in Article 3"<sup>40</sup>. In several major cases, the Court strengthened the protection of prisoners' rights. In 1996, in the case of *Aksoy v. Turkey*,

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<sup>38</sup> D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy: Penology and human rights*, Oxford: Oxford University Press 2009.

<sup>39</sup> M. Delmas-Marty and C.Chodkiewicz (Eds.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992, p. 216.

<sup>40</sup> D. Van Zyl Smit and S. Snacken, *cit.* p. 33.



it found for the first time that the treatment of a prisoner “had been so harsh that it amounted to torture”. In 1997, in the case of *Aydin v. Turkey*, the rape of prisoners by an official was also held to constitute torture.

The real turning point in the case law concerning prisoners’ rights came with the introduction of the ‘dignity perspective’. As pointed out by Tulkens, the Court has moved from “the stage of ignorance of the general conditions of detention to that of recognising the right of any detainee to conditions that respect human dignity”<sup>41</sup>. Building on this development, the decade from 2000 to 2010 has, in this respect, seen a genuine increase in the number of proceedings in Strasbourg related to prison life. The right to human conditions of detention was established in a judgment regarding the right to health in prison. As noted by Tulkens<sup>42</sup>, the right to protect health and the right to decent conditions find their “common matrix” in *Kudła v. Poland*<sup>43</sup>, where the Grand Chamber summarised the obligations of the state in these terms:

Article 3 requires that the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.

In *Kudła v. Poland*, for the first time, the Court recognises that Article 3 guarantees the right to be “held in conditions that are compatible with respect for dignity”. The reasoning of the Court in *Kudła* marks a qualitative leap, overcoming the indirect protection adopted so far and consecrating a new right, the right to conditions of detention respectful of human dignity.

This approach to interpretation—by which the Court has updated the possibilities of the text to construct a category-based protection for detainees—was accompanied by an incorporation of the doctrine by other bodies of the European Council, and particularly soft case law deriving from the activity of the CPT. This approach is part of a more general trend to take into account external sources in European case law. As revealed by Belda, a common European detention law is being progressively built under the leadership of

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<sup>41</sup> F. Tulkens, “Droits de l’homme en prison”, in J.-P. Céré (dir), *Panorama européen de la prison*, L’Harmattan, coll. “sciences criminelles”, 2002, p.39

<sup>42</sup> F. Tulkens, *Les prisons en Europe. Les développements récents de la jurisprudence de la Cour européenne des droits de l’homme*, *Déviante et Société* 2014/4 (Vol. 38)

<sup>43</sup> *Kudła v. Poland*, no. 30210/96, 26 October 2000.





European judges. The "basic tools" used<sup>44</sup> are a range of instruments with normative constraints, then assimilated into law under the Convention.

Another interesting line of reasoning concerning international prison soft-law instruments is the so-called process of "hardening of the soft law" in the prison field. As argued by P. Pinto de Albuquerque in his partly dissenting opinion in *Muršić v. Croatia*, [GC], no. 7334/13:

In the *continuum* between hard law and soft law, several factors may harden the text. Like a *degradé normatif*, the gradual normativity of the text increases with the number of these factors that are present and decreases with their absence. In this gradualist logic, it is ultimately up to the Court to decide "how much weight" to attribute to these hardening factors of soft law. 28. Soft European human rights law may be hardened by certain factors that relate either to the rule-making procedure or to the rule-application procedure. These are "building bricks in a wall of normativity."

According to this view, the hardening of prison soft law is particularly visible in Europe and concerns specifically the norms deriving from the activity of the CPT. This is the case for requirements regarding the surface area per inmate that must be available in collective cells and the ongoing interpretative work on overcrowding and detention conditions contrary to Article 3 of the Convention.

As of today, the ECtHR is seen as a fundamental and practical tool for European prisoners (and not only for them<sup>45</sup>) in order to see their rights upheld, even against national policies, practices and legislation violating conventional rights. However, this entire hermeneutic undertaking seems to be rather gender-neutral. Indeed, when we consider women in prison, the ECtHR's case law shows very few interventions. On the specific issue of detention conditions and the violation of Article 3 of the Convention, which prohibits torture and inhuman or degrading treatment, only a very recent judgment seems to take into account the gender specificities of the applicant whom, interestingly enough, is a mother with a child.

The judgment in *Korneykova and Korneykov v. Ukraine*<sup>46</sup> concerned the case of a pregnant mother who gave birth and breastfed her baby in prison. In 2012 the first applicant, who was in her fifth month of pregnancy, was taken into police custody on

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<sup>44</sup> As opposed to the "methodological tools" represented by methods of interpretation.

<sup>45</sup> If we consider the dimension of the legal dialogue, particularly between the international regional courts. See, A.M. Slaughter, "A Typology of Transjudicial Communication", 29, *University of Richmond Law Review*, 1994; Id., "A Global Community of Courts", 44, *Harv. Int'l L. J.*, 2003; Id. *A New World Order*, Princeton University Press, Princeton, 2004.

<sup>46</sup> *Korneykova and Korneykov v. Ukraine*, no. 56660/12, 24 March 2016.



suspicion of robbery and subsequently detained pending trial. She gave birth to her son, the second applicant, while in detention. In her application to the Court the first applicant (the mother) complained that she had been shackled to her bed during her stay in the maternity hospital, that her conditions of detention and the food she received as a breastfeeding mother were inadequate, and that she had been held in a metal cage during the six court hearings she had attended both before and after giving birth. She also complained that her son had not received proper medical care. All of these complaints were examined under Article 3 of the Convention on all of these complaints.

In the reasoning of the decision, among the relevant international instruments, the Court includes the CEDAW, as well as the BR and the recommendations of the World Health Organisation (WHO)<sup>47</sup>. Significantly, when citing the BR, the Court fails to mention the name ‘Bangkok Rules’ and uses the extended name ‘United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders’ instead, thus showing a dubious familiarity with this instrument. As a matter of fact, this appears to be the first judgment in which the Court uses this instrument. Significantly, the Court makes reference to the CPT 10th General Report [CPT/Inf (2000) 13] on women in prison, specifically citing the recommendations on “Ante natal and post natal care”.

As for the security measures taken in the maternity hospital, the Court adopts the interpretive practice of individual assessment and states that while handcuffing is not *per se* a measure entailing a violation of Article 3, the measure of “handcuffing or shackling of an ill or otherwise weak person is disproportionate to the requirements of security and implies an unjustifiable humiliation, whether or not intentional<sup>48</sup>”. Moreover, drawing on the recommendation of the CPT in the above-mentioned report<sup>49</sup>, the Court states that: “in the circumstances of the present case, where the impugned measure was applied to

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<sup>47</sup> These recommendations have been adopted following WHO Joint Interregional Conference on Appropriate Technology for Birth (Fortaleza, Brazil, 22-26 April 1985). According to the recommendations, the healthy newborn must remain with the mother whenever both their conditions permit it. The WHO 2013 recommendations on postnatal care of the mother and newborn also state that the mother and baby should not be separated and should stay in the same room 24 hours a day.

<sup>48</sup> *Korneykova*, cited, §111. See also, inter alia, see, *Okhrimenko v. Ukraine*, no. 53896/07, § 98, 15 October 2009, and *Salakhov and Islyamova v. Ukraine*, no. 28005/08, §§ 155 and 156, 14 March 2013.

<sup>49</sup> CPT 10th General Report [CPT/Inf (2000) 13]: “27. It is axiomatic that babies should not be born in prison, and the usual practice in Council of Europe member States seems to be, at an appropriate moment, to transfer pregnant women prisoners to outside hospitals.

Nevertheless, from time to time, the CPT encounters examples of pregnant women being shackled or otherwise restrained to beds or other items of furniture during gynaecological examinations and/or delivery. Such an approach is completely unacceptable, and could certainly be qualified as inhuman and degrading treatment. Other means of meeting security needs can and should be found”.



a woman suffering labour pains and immediately after the delivery, it amounted to inhuman and degrading treatment”.

Regarding the conditions of detention suffered by the applicants, the Court reiterates that:

in accordance with Article 3 of the Convention, the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.<sup>50</sup>

The Court, then, discusses the issue of children detained with their mother, pointing out the particularly problematic issue of whether it should be possible for babies and young children to remain in prison with their mothers. As the CPT puts it:

One particularly problematic issue in this context is whether - and, if so, for how long - it should be possible for babies and young children to remain in prison with their mothers. This is a difficult question to answer given that, on the one hand, prisons clearly do not provide an appropriate environment for babies and young children while, on the other hand, the forcible separation of mothers and infants is highly undesirable.<sup>51</sup>

On this respect and according to its consolidated case law on the best interest of the child, the Court takes into account the relevant provision of the WHO, according to which a healthy newborn must remain with the mother and introduce a positive obligation for states to: “create adequate conditions for those requirements to be implemented in practice, including in detention facilities”<sup>52</sup>.

On this very aspect, the Court finds another violation of Article 3 concerning prison conditions, setting prisoner’s rights into a gender-oriented perspective and following the recommendations of the CPT concerning sufficient and wholesome food corresponding to the needs of a breastfeeding mother in detention, the daily outdoor walks with her baby and concludes that:

the cumulative effect of malnutrition of the first applicant, inadequate sanitary and hygiene arrangements for her and her newborn son, as well as insufficient outdoor walks, must have been of such an intensity as to induce in her physical suffering and mental anguish amounting to her and her child’s inhuman and degrading treatment.<sup>53</sup>

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<sup>50</sup> *Korneykova*, cited, §128.

<sup>51</sup> CPT 10th General Report, cited, §28.

<sup>52</sup> *Korneykova*, cited, §131.

<sup>53</sup> *Ivi*, § 47.



The Court also finds a violation of Article 3 for the absence of medical care for the child in prison and for the first applicant's placement in a metal cage during the hearing. Again this is a situation which had already been taken into account in the Court's case law, in the case *Svinarenko and Slyadnev v. Russia*<sup>54</sup>, where this measure was considered in itself "an affront to human dignity" in breach of Article 3. In this case, the Court goes on identifying the specificity of the situation of a woman in an advanced stage of pregnancy and, subsequently, that of a nursing mother separated from her baby in the courtroom by metal bars. All the decisions of violation of Article 3 of the Convention are held unanimously.

This case represents the first time the Court had to deal with the conditions of detention of a woman and shows a level of gender sensitiveness that appears in line with the very dynamic approach of the CPT's tools. At the same time, it is important to note that the case also presents a situation, that of motherhood, which seems to be one deserving the maximum protection and raising so few issues that all the 4 decisions of violation of Article 3 are taken unanimously.

So far, another group of cases illustrates the attitude of the ECtHR in respect to women in prison. Again, these are very recent cases concerning gender equality, with applications lodged by male prisoners in order to challenge the discriminatory nature of positive measures especially designed for women in prison. This group of cases shows a different approach to gender-oriented prison policies. The first two judgments (of which, one is a Grand Chamber judgment) are profoundly rooted in an essentialist understanding of "female nature", while the third and last one propose a different view.

The first judgment, *Khamtokhu and Aksenchik v. Russia*<sup>55</sup>, is an anti-discrimination case and serves as the first case in which the Court is called upon to decide on the conventional admissibility of the differential approach, based on gender, of national (in this case Russian) criminal legislations and policies. The two male applicants were sentenced to life imprisonment under Article 57 of the Russian Criminal Code, which provides that a sentence of life imprisonment may be imposed for certain particularly serious offences. However, such a sentence cannot be imposed on women, persons under 18 at the time the offence was committed, or over 65 when the verdict was delivered.

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<sup>54</sup> [GC], nos. 32541/08 and 43441/08, § 138, ECHR 2014.

<sup>55</sup> *Khamtokhu and Aksenchik v. Russia*, [GC], nos. 60367/08 and 961/11, 24 January 2017.



In their applications to the European Court, the applicants alleged that, as adult males serving life sentences for criminal offences, they had been discriminated against as compared to other categories of convicts who are exempt from life imprisonment by operation of law. They relied on Article 5 (right to liberty and security) taken in conjunction with Article 14 (prohibition of discrimination) of the European Convention on Human Rights.

The case involved not only legal considerations related to gender equality, but also the evaluation of gender differentiated criminal policies, which emerged at the time as a completely new topic to be dealt with. As a consequence, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber on 1 December 2015.

The issue is particularly relevant since it involves a topic—life imprisonment—which is crucial within the most recent European case law. Indeed, it is through the most recent case law concerning life-long sentences that the Court expanded the concept of social rehabilitation or resocialisation by connecting it inextricably with human dignity<sup>56</sup>. In *Murray*<sup>57</sup>, the Court specified that the deprivation of liberty can be compatible with human dignity only if it is aimed towards rehabilitation. Therefore, the Court had to consider the gender-based policy (as well as the age-oriented one) in view not of one generic prison benefit or measure, but in the context of a specific penological choice which has relevant consequences in terms of potential rights infringement.

At a comparative level, as regards gender-related distinctions, the Court notes that only Albania, Azerbaijan and Moldova impose a blanket ban on life imprisonment for women. Therefore, it seems clear that a consensus exists in Europe not to differentiate such relevant sentencing practice on the basis of gender.

The Court goes on to cite the relevant international sources, among which are the CEDAW and the Bangkok Rules (this time dubbed as such), particularly referring to the notion of vulnerability of women (directly citing the beginning of the Preamble of the BR: “Considering that women prisoners belong to one of the vulnerable groups that have specific needs and requirements ...”) and the protection of motherhood. This selection of

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<sup>56</sup> *Vinter v. U.K.*, [GC], nos. 66069/09, 130/10 and 3896/10, §113. See, S. Ciuffoletti-Pinto de Albuquerque, “A question of space. Overcrowding, dignity and resocialization from Strasbourg to Italy”, in *La protection des droits des personnes détenues en Europe, La Revue Européenne des Actes de conférences*, 21 avril 2016, 14-15 juin 2016, Revue trimestrielle des droits de l’homme, available at: <https://journals.openedition.org/revdh/4230?file=1>

<sup>57</sup> *Murray v. the Netherlands*, no. 10511/10, §101.



international sources help us define the scope of the gender specificities as understood by the Court within this case. The vulnerability perspective and the biological difference between men and women seem to be the standpoint from which the issue is examined.

As said, this decision is based on Article 14 in connection with Article 5, therefore the hermeneutic strategy and construction needs to follow a strict procedure. According to the Court's settled case-law in anti-discrimination cases, in order for an issue to arise under Article 14, a three steps analysis needs to be undertaken.

First of all, according to a classic view of anti-discrimination law, in order to be relevant under Article 14, the differential treatment must be based on an identifiable, objective or personal characteristic, or "status", by which individuals or groups are distinguishable from one another. This is a classic feature of anti-discrimination law. The so-called grounds or discrimination factors (traditionally conceived as an open category, including *sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*) operate a double level of conversion of social phenomena into legally relevant factors. On the one hand, these factors associate the concept of discrimination with a specific individual characteristic, on the other hand, they build (with a real *fictio iuris*) a social reality divided into (competing) groups.

As Lippert-Rasmussen points out<sup>58</sup>, discrimination involves the incorporation of the individual within a relevant social group. Here we find that tension between the individual and the social group which is peculiar to the anti-discrimination legal context. If, in fact, the right not to suffer discrimination is perfect individual right, anti-discrimination laws offer the picture of a social space organized in related groups (cognate groups) which are recognized as such by the rest of the affiliates, based on the theory according to which the *self* is necessarily socially built<sup>59</sup> and on social theories of identity (individual and collective), recognition and belonging<sup>60</sup>. Yet, in this process of legal

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<sup>58</sup> K. Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*, Oxford University Press, Oxford, 2014.

<sup>59</sup> Cfr. J. Butler, "Giving an Account of Oneself", in *Diacritics* Vol. 31, No. 4 (Winter, 2001), pp. 22-40.

<sup>60</sup> See, *inter alia*, Epstein, A.L., *Ethnos and identity: three studies in ethnicity*, London 1978; Festinger, L., *A theory of cognitive dissonance*, Stanford, Ca., 1957 (tr. it.: *Teoria della dissonanza cognitiva*, Milano 1973); Goffman, E., *Encounters: two studies in the sociology of interaction*, Indianapolis, Ind., 1961 (tr. it.: *Espressione e identità*, Milano 1979); Lévi-Strauss, C. (a cura di), *L'identité*, Paris 1977 (tr. it.: *L'identità*, Palermo 1980); Mauss, M., "Une catégorie de l'esprit humain: la notion de personne, celle de 'moi'", in *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, 1938, LXVIII; Mead, G.H., *Mind, self and society from the standpoint of a social behaviorist*, Chicago 1934; Parsons, T., "The position of identity in the general theory of action", in C. Gordon e K. Gergen (eds.), *The self in social interaction*, New York 1968, pp. 11-23.



conversion, the reference group loses any *substratum* of solidarity, coherence, sense of identity, shared history, language or culture. In short, the notion of 'related group' does not require any evaluation of a person's awareness of belonging to that group in order to be legally ascertained. In other words, the individual is immediately perceived as belonging to the group, irrespective of their own self-perception. The result of this operation, therefore, is that individual consciousness is never taken into account.

Secondly, there must be a difference in the treatment of persons in analogous or relevantly similar situations. Thirdly, such 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 realized"<sup>61</sup>.

Since it is not disputed that exemption for women from life-long sentencing amounts to a difference in treatment on grounds of sex, the Court proceeds to examine whether this difference of treatment pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In this respect, the consolidated ECtHR's case law offers clear directives. On the one hand, differences based on sex require particularly serious reasons by way of justification, therefore establishing an aggravated duty of justification. On the other hand, references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation<sup>62</sup>.

The Court reiterates these principles, but seems to neglect them in the present case. Based on the international instruments protecting pregnancy and motherhood in prison and defining the abstract vulnerability of women as a whole, and on statistical data provided by the Government (simply showing a considerable difference between the total number of male and female prison inmates), the Court concludes that: "there exists a public interest underlying the exemption of female offenders from life imprisonment by

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<sup>61</sup> *Khamtokhu and Aksenchik*, cited, §64.

<sup>62</sup> See *Konstantin Markin*, [GC], cited, § 127; *X and Others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013; *Vallianatos and Others*, [GC], nos. 29381/09 and 32684/09, § 77; and *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014.



way of a general rule”<sup>63</sup>. According to the Russian Government, the public interest underlying the sentencing exception should be understood as:

justified in view of their special role in society which related, above all, to their reproductive function. The Russian Constitutional Court had previously held 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 society, and did not amount to discrimination but rather served to reinforce effective, rather than formal, equality.

The ECtHR seems ready to accept this view, apparently denying the consolidated case law on gender equality.

In order to accept this view and in light of the limited consensus among the legal systems of the Contracting States in this area, the Court makes a direct reference to the wide margin of appreciation granted to states in matters concerning penal policies. This seems to completely contradict the analysis conducted on the legislations which exempt female offenders from life-long sentences: of the thirty-seven member states of the Council of Europe in which convicted offenders can be sentenced to life imprisonment, only in Albania, Azerbaijan and the Republic of Moldova (in addition to Russia) the criminal law generally exempt female offenders from this sentence. There is no disparity, but a clear consensus for avoiding such differential approaches in sentencing. Nevertheless the Court asserts the contrary, based on the need to expand the margin of appreciation in an area—gender equality—in which usually the discretion of states is narrow (“differences based on sex require particularly serious reasons by way of justification”).

The reason for the Court’s departure from its previous case law concerning gender equality and the necessity to broaden the margin of appreciation for states lies in an inherent risk connected with anti-discrimination law, the so called “levelling-down” objection, *i.e.* solving a discriminatory situation by levelling down the protection afforded to the dominant group<sup>64</sup>. We can argue that the Court was afraid that Russia would have implemented a decision of violation of Article 14 by removing the preferential treatment from those who had hitherto been eligible for it. And the Government used exactly this threat, when it claimed that:

<sup>63</sup> *Khamtokhu and Aksenchik*, cited, §82.

<sup>64</sup> See D. Réaume, “Dignity, Equality and Comparison”, in D. Hellman and Sophia Moreau (eds.), *Discrimination Law*, Oxford University Press, Oxford, 2013 and H. Sheineman, “The Two Faces of Discrimination”, in D. Hellman and Sophia Moreau (eds.), *op.cit.*, pp. 37 e ss.





what the applicants sought was a change in the Russian criminal law which would allow others, including women, young offenders and offenders aged 65 or over, to be given harsher sentences, while the applicants' personal situation would remain the same. The Government pointed out that a finding of a violation of Article 14 would not constitute a ground for reviewing individual sentences or for completely abolishing life imprisonment in Russia.<sup>65</sup>

While the concern of an international court about the domestic execution and implementation of its judgments is understandable, levelling-down solutions are not an option for states since they are not permissible under the Convention. As provided for in Article 53 of the Convention, the implementation of a judgment of the Court should not abolish, restrict or limit existing rights in the domestic legal order.

The same notion of anti-discrimination needs to be re-assessed in this respect. As shown by Réaume<sup>66</sup>, perceived discrimination entails not only a differential treatment, but also the view that a specific good or service is strictly connected to the dignity of the person. Anti-discriminatory claims are not formulated based on strictly egalitarian arguments, but rather through an assessment of the intrinsic quality of a good or service, which does not arise from the abstract knowledge that other groups benefit from it. This is particularly clear in cases of institutional discriminations (see the legal discussion regarding voting rights' laws, or even the legislation on access to social benefits for different categories of individuals).

The majority decision of non-violation of the Convention (taken almost unanimously regarding the positive discrimination on the ground of age) is adopted by ten votes to seven and is followed by 6 separate opinions. Three of these opinions (concurring opinions of Judge Nußberger, Judge Turković, and Judge Mits) share a common idea: they concur in the decision of non-violation for fear of levelling down. Judge Nußberger's concurring opinion begins as follows: "Sometimes 'better is the enemy of good' – this is a famous saying of Voltaire. In the case of *Khamtokhu and Aksenchik v. Russia* the better solution would be to find a violation of Article 5 taken in conjunction with Article 14 of the Convention as argued by the minority". Judge Turković states that:

The minority rightly criticise the majority for carrying out a scant analysis of equality and gender issues and for avoiding a discussion of possible stereotypes and their implications (see paragraphs 45-48 of the judgment). In my opinion, the Court should not refrain from naming different forms of stereotyping and should always assess their invidiousness. It is impossible to

<sup>65</sup> *Khamtokhu and Aksenchik*, cited, §42.

<sup>66</sup> D. Réaume, *cited*, pp. 16.



change reality without naming it. For this reason, in the present case it should be acknowledged that the respondent State's reasoning regarding the legislation exempting women from life imprisonment portrays women as a naturally vulnerable social group and is therefore one that reflects judicial paternalism. In spite of this acknowledgment, I have voted with the majority. I find this to be a "hard case" which requires broader contextual analysis relying on the principles enshrined in the Convention as a whole.

Two other separate dissenting opinions, on the contrary (joint partly dissenting opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström, and Kucsko-Stadlmayer and dissenting opinion of Judge Pinto de Albuquerque) voted for a violation of Article 14 in conjunction with Article 5, pointing out the inconsistencies of the majority decision in terms of discussion and analysis of the issue from a gender-oriented perspective (considering that women's alleged "natural vulnerability", their "special role in society" and their "reproductive function" as well as statistics on the female population in prison could not constitute particularly weighty and convincing data to justify a difference in treatment on grounds of sex). Judge Pinto de Albuquerque criticizes the absolute vulnerability paradigm, adopted by the Russian Government and subscribed by the Court:

Nonetheless, and without minimising the fundamental importance of the fight against discrimination suffered by women on grounds of their sex, that protection should not serve as a pretext for constantly viewing women as victims which would be damaging to their cause and would end up being counterproductive. One of the main pitfalls facing the protection of this category is precisely the perpetuation of age-old prejudices regarding the nature or role of women in society. Perpetuating such thought patterns may turn out to be just as dangerous as the social disadvantages affecting women as compared with men since they contribute to maintaining the belief that there is an innate difference in aptitude between the sexes. For that purpose Article 5 of the CEDAW imposes a duty on the States Parties to take all appropriate measures "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"<sup>67</sup>.

We could argue that almost all of these separate opinions (5 out of 6) agree on the fact that the majority should have found an unreasonable and disproportionate discrimination. Only one separate concurring opinion is not only convinced of the non violation, but puts forward a strictly essentialist and biologically driven view of the issue, radicalizing the opinion of the majority with a twofold strategy. On one side by necessarily

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<sup>67</sup> *Khamtokhu and Aksenchik*, cited, Dissenting opinion of Judge Pinto de Albuquerque, p. 50.



linking the fact of being a woman with motherhood, on the other side by referring to biological differences and specificities to be found in the “female brain”:

I find that the same period of imprisonment for a woman is more painful than for a man, perhaps because, typically, a woman is deprived of the possibility of giving birth to a child, and in particular raising a child. This may sound like a simple gender stereotype, although many people would argue that there are biological differences and specificities of the female brain. But in a society where women are expected to have children and are raised in a social environment in which they are conditioned to believe that their happiness comes from having children they will suffer from the lack of fulfilment of this socially imposed expectation. Whatever the reasons, the already high suicide rates prove to be even higher.

Though formulated in the context of a separate opinion, this consideration forms part of a judicial decision and seems to legitimise a pseudoscientific theory of the “female brain”.

This decision was immediately followed by a new case, *Alexandru Enache v. Romania*<sup>68</sup>. The applicant, who had been sentenced to seven years’ imprisonment, filed two applications for a stay of execution of sentence. He argued, in particular, that he wanted to look after his child, who was only a few months old. However, his applications were dismissed by the domestic courts on the grounds that the stay of execution laid down in Article 453 § 1 (b) of the former Code of Criminal Procedure for convicted mothers up to their child’s first birthday had to be interpreted strictly and that the applicant could not request its application by analogy.

While the Court is ready to acknowledge that the situation of an imprisoned father is comparable to that of the mother, since “whilst there may be differences in their relationship with their child, both the mother and the father can provide this attention and care<sup>69</sup>”, the persuasive authority of the previous Grand Chamber judgment brings the Court to a finding of non violation of Article 14, in connection with Article 8 of the Convention (respect for privacy and family life).

Following the idea that 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 decision makes direct and frequent reference to *Khamtokhu and Aksenchik*. Specifically, on the legitimate justification of the differential treatment, the Court recognizes the fact that the Romanian provision is envisaged for the protection of

<sup>68</sup> *Alexandru Enache v. Romania*, Application no. 16986/12, 3 October 2017.

<sup>69</sup> *Ivi*, §68.



the best interest of the child, understood as directly tied to the particular relationship between mother and child in the first months after the birth.

The *ratio* of the norm seems to reiterate a biological paradigm rooted in breastfeeding as the justification for any prison policies concerning parenthood. This seems to deny the case law of the Court emphasizing the equality of both parents when childcare is at stake and the importance of fathers from the child's earlier age formulated in the landmark case on gender equality, *Konstantin Markin v. Russia*<sup>70</sup>. In that case, concerning parental leave in the military service, the Court affirmed that it could not accept that justification for the gender-differential treatment could lie in the "special social role of women in the raising of children". Contemporary European societies had moved towards a more equal sharing of responsibility between men and women in the upbringing of children, and men's caring role had gained recognition. Therefore:

an unjustified differentiation between men and women, in the sense that it is not based on an actual factual disadvantage but on a preconceived idea of the supposed weaknesses of the latter as compared with the former, would have the effect not of reducing inequalities but perpetuating, or even exacerbating them.<sup>71</sup>

What seems to be true for women in the society of free, astonishingly enough, does not apply to the closed, institutional environment where female captives live<sup>72</sup>. The legal understanding of the phenomenon of female imprisonment seems to reaffirm the connection between female gender and the traditional roles ascribed to women as mothers, child-bearers, breast-feeders.

Interestingly enough, one separate concurring opinion (concurring opinion of Judge Yudkivska) disagrees with the majority even when it comes to acknowledging that

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<sup>70</sup> *Konstantin Markin v. Russia* [GC], no. 30078/06. Under Russian law civilian fathers and mothers are entitled to three years' parental leave to take care of their minor children and to a monthly allowance for part of that period. The right is expressly extended to female military personnel, but no such provision is made for male personnel. The applicant, a divorced radio intelligence operator in the armed forces, applied for three years' parental leave to raise the three children from his marriage, but his application was refused on the grounds that there was no basis for his claim in domestic law. Dismissing that complaint, the Constitutional Court held that the prohibition on servicemen taking parental leave was based on the special legal status of the military and the need to avoid large numbers of military personnel becoming unavailable to perform their duties. It noted that servicemen assumed the obligations connected with their military status voluntarily and were entitled to early termination of service should they decide to take care of their children personally. The right for servicewomen to take parental leave had been granted on an exceptional basis and took into account the limited participation of women in the military and the special social role of women associated with motherhood. The applicant lodged an application to the ECtHR claiming the violation of Article 14 in conjunction with Article 8 of the Convention.

<sup>71</sup> *Khamtokhu and Aksenchik*, cited, Dissenting opinion of Judge Pinto de Albuquerque, §11.

<sup>72</sup> The reference is to the classical text G.M. Sykes, *The Society of Captives, A Study of a Maximum Security Prison*, Princeton University Press, Princeton, 1958,



a father in prison is in a comparable position to a mother: “Whilst both men and women engage in reproduction, only women have the capacity to become pregnant and give birth, and this difference has its physical, psychological and emotional dimensions<sup>73</sup>”. And again, as in the remark about the “female brain”, the separate opinion seeks validation in vaguely formulated and uncritically reported scientific facts that are taken as givens, without referring to secondary sources or scientific literature:

The reproductive difference undoubtedly justifies legal recognition of a separate sphere for women that relates to childbirth. Much of scientific literature is written about mother-infant attachment, and infant’s dependence on a mother. A strength [*sic!*] emotional bond is developed during 9 months of pregnancy; this bond pushes a child to seek direct physical contact precisely with a mother. Fœtus is affected by sounds of mother’s heartbeat, and after the birth this mother’s heartbeat calms a baby. Mothers and infants are aligned literally at the level of the nervous system; touching by a mother and sounds of her heart are sources of comfort and safety feeling for a baby; that is why being with a mother after the birth is vitally important for a child and serves his/her best interests. Any father, however wonderful he might be, cannot provide these elements<sup>74</sup>.

The separate opinion then continues on this course, citing “the *attachment theory*, developed by the prominent British psychologist and psychoanalyst John Bowlby<sup>75</sup>” as a “guidance for accessing the best interest of a child” (while forgetting to mention more recent developments in that theory regarding the role of fathers<sup>76</sup>), thus indissolubly tying the best interest of the infant to the mother as a special and unique care-giver.

The paradigm of parenthood in prison reflects an archaic notion of responsibility and care as biologically driven. The breast-feeding paradigm seems to be the only possible area of protection of the child’s best interest. In this sense, cases of children imprisoned with their father are almost nonexistent. One noteworthy exception is Bolivia, in which children are legally allowed to live with both their mother and father in prison until the age of 6. In Europe, Denmark is the only country known to allow male prisoners to have

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<sup>73</sup> *Alexandru Enache v. Romania*, cited, concurring opinion of Judge Yudkivska.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, the separate opinion forgets to situate Bowlby’s theory in time. Here is a reminder of the main research by Bowlby, in the period of the 50’s and 60’s of the last Century: J. Bowlby (1958). The nature of the child’s tie to his mother. *International Journal of Psychoanalysis*, 29, 1–23; Id. (1969). *Attachment and loss: Attachment* (Vol. 1). New York: Basic Books (2<sup>nd</sup> revised ed., 1982); Id. (1973). *Attachment and loss: Separation* (Vol. 2). New York: Basic Books; Id. (1979). *The making and breaking of affectional bonds*. London: Tavistock Publications; Id. (1988). *A secure base*. New York: Basic Books.

<sup>76</sup> See, for an historical literature review, I. Bretherton, (2010) ‘Fathers in attachment theory and research: a review’, *Early Child Development and Care*, 180: 1, 9 - 23



their children living in prison with them. This only applies if the father is scheduled to be released by the time the child is 3 years old<sup>77</sup>.

The other separate dissenting opinion (joint partly dissenting opinion of Judges Pinto de Albuquerque and Bošnjak) advances another important point in concluding for a violation of Article 14 in conjunction with Article 8. The opinion refers to and criticizes the theory of rights as “cake slices”<sup>78</sup> in the context of anti-discrimination law, to extend the protection of rights does not entails a depreciation of those same rights or of the possibilities to effectively exercise them. As the two dissenting judges argued:

We are strongly convinced that the motherhood in general and women in the vulnerable period after giving birth in particular would not be protected to any lesser extent if the law provided for a suspension of sentence for fathers of newborn children, if their particular circumstances so warrant... Ensuring both fathers and mothers have an opportunity to make their case before a judge poses no serious risks or threats to the judicial system or to broader goal of fairness in the Romanian society. If anything, it will do the opposite. It will ensure both men and women are seen as primary caregivers and that fathers are equally important in the lives of their children. This will indirectly contribute to promoting, rather than hindering, gender equality in Romania.

The last step in this very uncertain line of case law is the decision *Ēcis v. Latvia*<sup>79</sup>, concerning blanket ban on prison leave for male prisoners in closed prisons. Under the Latvian penitentiary system, all male prisoners convicted of serious crimes had to be placed in closed prisons at the maximum-security level and were not entitled to prison leave until they were moved to a partly-closed prison (a transfer they might become eligible for only after serving half of the imposed sentence). In contrast, female prisoners who had been convicted of the same crimes were placed in partly-closed prisons from the very beginning of their sentence. The applicant (convicted of murder and sentenced to twenty years’ imprisonment), was placed at the medium-security level in a closed prison, his father died and he requested permission to attend the funeral. His request was denied,

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<sup>77</sup> See, J. Rosenberg, *Children Need Dads Too: Children with Fathers in Prison*, Quaker United Nations Office, 2009, Wolleswinkel (2002) ‘Imprisoned Parents’ in Willems (ed.) *Development and Autonomy Rights of Children: Empowering Children, Caregivers and Communities* (Intersentia: Antwerp/ Oxford/ New York) pp. 191-207. See also, Boswell, G. (2002) ‘Imprisoned Fathers: The Children’s View’ in the *Howard Journal* Vol. 41, No. 1, pp 14 – 26, Clarke, L., O’Brien, M., Godwin, H., Hemmings, J., Day, R.D., Connolly, J & Van Leeson, T (2005) “Fathering behind bars in English prisons: imprisoned fathers’ identity and contact with their children” (*Men’s Studies Press*), Dyer, Wm. J. (2005) “Prison, fathers, and identity: a theory of how incarceration affects men’s paternal identity” (*Men’s Study Press*), Lanier, C. S. (1993) ‘Affective states of fathers in prison’ in *Justice Quarterly*, Vol. 10, No. 1.

<sup>78</sup> Derived by the notion of distributive justice as articulated by J. Rawls, *A theory of Justice*, Harvard University Press, 1971.

<sup>79</sup> *Ēcis v. Latvia*, application no. 12879/09, 10 January 2019.



as only prisoners serving their sentence at the medium, or minimum, security level in partly-closed prisons were eligible for such leave. The applicant complained that he had been discriminated against on the grounds of his sex with respect to the applicable prison regime that had led to the refusal.

The decision on this case (taken by a majority including Judge Nußberger as President and Judge Mits, i.e. the same Judges who drafted the separate concurring opinion in *Khamtokhu and Aksenchik*, voting for non-violation to avoid the levelling-down objection) reverts the findings in the two previous judgments. While once again the categories of male and female prisoners convicted of the same or comparable offences are in an analogous or relevantly similar position, this time the majority concluded for a violation of Article 14 due to the lack of an objective justification for the differential treatment. While the Government argues that female prisoners, in general, are less violent and less prone to aggression towards other inmates or prison staff, whereas male prisoners are more predisposed to inter-prisoner violence and attempted prison-breaks, thus posing bigger threats to prison security and staff, the Court does not accept the logical consequence that “all male prisoners, when compared to women who have committed exactly the same offences, are so much more dangerous that no individualised assessment is even purposeful”<sup>80</sup>.

In order to avoid the risk of levelling down, the Court expressly states that it “fully shares the Government’s proposition that there is no objective need to subject women prisoners to conditions that are stricter than necessary”<sup>81</sup>. It emphasises, however, that this principle is equally applicable to male prisoners. And in order to mark the difference between this case and life-long sentence the Court notes that, even if Article 8 of the Convention does not guarantee a detained person an unconditional right to leave prison in order to attend the funeral of a relative, the domestic authorities are called upon to assess each such request on its merits. That is to say, that levelling down is not admissible in this area, since depriving women of access to the judicial assessment for prison leave would constitute a violation of Article 8 of the Convention.

Finally, the Court notes that current European prison policies focus on the rehabilitative function of imprisonment, and while this principle applies “regardless of the crime committed or the duration of the sentence imposed, it also applies irrespective of

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<sup>80</sup> *Ivi*, §90.

<sup>81</sup> *Ivi*, §91.



the prisoner's sex". The Court also points out that "the maintenance of family ties is an essential means of aiding social reintegration and rehabilitation of all prisoners, regardless of their sex"<sup>82</sup>.

An older case concerns the issue of violence perpetrated against a female detainee: *Juhnke v. Turkey*<sup>83</sup>. The case concerned, in particular, the applicant's complaint that she had been subjected to a gynecological examination against her will. She relied on Articles 3 (prohibition of inhuman or degrading treatment), 5 (right to liberty and security) and 8 (right to respect for private and family life). She also complained under 6 § 1 (right to a fair trial), under Article 13 (right to an effective remedy). Lastly, she alleged that the treatment to which she was subjected by the authorities had been motivated by her sex and political opinions, in breach of Article 14 (prohibition of discrimination).

█ The Court dismissed the case under Article 3, as the applicant's allegation that she had been forced to have a gynecological examination seemed unsubstantiated. The Court decided to examine the issue under Article 8 and found that there had been an interference with the applicant's private life, in that the examination had been imposed on her without her free and informed consent and consequently represented a violation of Article 8.

A partly dissenting opinion by Judge David Thór Björgvinsson clearly denounced the bias in the majority judgment. The Court described a situation in which a gynecological examination was imposed upon the applicant while in police custody, without her free and informed consent. The Court then had to decide whether this situation falls under the scope of Article 3: prohibition of inhuman or degrading treatment. The government explained that the main reason for imposing the examination was "to avoid possible false accusations of sexual violence against the security forces and that the medical reports prepared after such examinations constituted evidence that could be used to refute defamatory allegations"<sup>84</sup>. As Judge Björgvinsson remarked, this was not the first time that Turkey used this 'justification' in similar cases. As this claim does "not justify the fact that female detainees may, as a matter of course, be subjected by the authorities to the kind of medical treatment at issue"<sup>85</sup>, then the question arises:

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<sup>82</sup> Ivi, §92.

<sup>83</sup> *Juhnke v. Turkey*, no. 52515/99, 13 May 2008.

<sup>84</sup> Ivi, §61.

<sup>85</sup> Ivi, Partly dissenting opinion by Judge David Thór Björgvinsson, joined by Judge Garlicki.





whether the treatment attains the level of severity required by Article 3. Regard must be had here to the whole psychological and physical nature of the intervention. In this case the authorities persuaded the applicant, who was in a very vulnerable situation, to give “consent” that was not “free and informed”, “consent” to a treatment that in all likelihood was entirely repugnant to her. I believe that a gynaecological examination in such situations gives rise to feelings of inferiority and degradation and that, without any rationally acceptable justification, it will be understood by the subject as being aimed exclusively at debasing and humiliating her. I accordingly believe that the kind of treatment the applicant was subjected to in this situation was degrading and, as such, aroused feelings of fear, anguish and inferiority capable of humiliating and debasing her. Therefore I find that Article 3 of the Convention has been violated.

This case illustrates the Court’s ineptitude in adjusting the notion of human dignity and that of inhuman and degrading treatment to individually assessed needs and, ultimately, to build a case law that takes into account the complex and gendered nature of violence.

## Conclusion

From an analysis of the international legislation and soft law instruments designed for the protection of women in prison, we can draw the conclusion that a phenomenon which has historically been overlooked due to the disproportionate male/female *ratio* in the global prison population is now gaining attention. This is true not only in the anti-discrimination field and in matters relating to the protection of children, motherhood, pregnancy, and breast-feeding, but also in other areas, specifically the sociology of female detention, as well as the right to an adequate prison regime based on a thorough individual assessment.

As the CPT rightly puts it in its report, the issue is not simply represented by the lack of activities designed for women, but rather by the absence of “meaningful activities” and the proposal of activities ‘deemed’ appropriate for them. The EPR, Rule 35.1, demands an adequate prison regime for women.

In order to put these provisions into effect, a consistent domestic and international case law is needed, a jurisprudence which will put into context the personal and private troubles of women in world prisons. Surprisingly, this case law is rather scarce.



Specifically considering the ECtHR—one of the most effective judicial tools for the protection of European prisoners—its case law has paid little attention to the specificities of women in prison and has dealt with this issue mainly in the area of anti-discrimination law. So far, the European Court has been asked to talk ‘about women’ by European male prisoners.

This has led to a jurisprudence mainly concerned with establishing the legitimacy of positive prison measures for women in Europe from an anti-discrimination perspective. We have, thus, discovered that prison policies designed by national legislations are primarily designed (and justified) in order to protect the biological dimension: motherhood, pregnancy, breast-feeding.

At the same time, our analysis has shown the potential force of attraction that positive discrimination measures designed for women could have, if interpreted not as a way to protect a *per se* vulnerable category (women as such, thus reiterating traditional female roles), but rather as measures which are inherently tied to human dignity, rehabilitation, and social reintegration. As such, these measures could and should be extended to the ‘other’ genders in order to pave the way for an advancement in the protection of prisoners’ rights at a global level. The fight for the effectiveness of rights needs to be fought day by day, in order to create a better future for women, transgender, men held in the prisons of the world.

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**The author is solely responsible for the writing of this article.**

