

판례평석

A Study on Discrimination based on Gender in Parental Leave

— The Relevance of the Proportionality Test to the ECtHR's
Jurisprudence on Gender-Based Unequal Treatment
and the Prohibition of Discrimination under
Article 14 ECHR —

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I Abstract I

The principle of the proportionality represents a general principle of law. Its main aim is to protect the citizen from arbitrary and improper state action and in this respect it acts as a standard of justification for interventions by the authorities. Even if this principle is not explicitly standardized in most national constitutions of the Member States of the EU or in the ECHR, it is derived from the principles of democracy and the rule of law and is generally recognized in the law of the ECHR. The levels of the

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proportionality are first divided according to the legitimate aim of the legally relevant measure, then to its suitability for achieving the aim, followed by its necessity and finally the proportionality test in the narrow sense, the appropriateness of the measure. The prerequisite for the scope of application of Art. 14 of the ECHR is that persons in comparable or legally similar situations have been treated differently. The list of possible grounds for discrimination in Art. 14 of the ECHR is by no means exhaustive, but merely exemplary. Art. 14 of the ECHR also applies when states have granted rights beyond their obligations under the Convention, which fall within the scope of an article of the Convention. According to the ECtHR, unequal treatment according to the criteria just listed constitutes discrimination in the sense of a violation of Art. 14 of the ECHR if it lacks an objective and reasonable justification. The principle of gender equality and the related prohibition of discrimination under Article 14 of the ECHR is too important in a pluralistic and tolerant European society to justify its violation merely by referring to the margin of appreciation of the member states. In order to achieve results in line with interests in the future, the case law of the ECtHR can build on the argumentation structure in the case of *Konstantin Markin v. Russia*. The only aspect requiring improvement is the control density of appropriateness and necessity, which should be taken seriously.

Key Words : The principle of the proportionality, Art. 14 of the ECHR, ECtHR's Jurisprudence, the principles of democracy and the rule of law, the Cases *Petrovic v. Austria* and *Markin v. Russia*.

I . Introduction

The principle of proportionality is of great importance not only in the field of law, but also in other major fields of research.¹⁾ One example is the 'golden section', which is regarded as particularly perfect and aesthetic in the field of art and architecture due to its special proportions. No such mathematical formulas can be found in law. Yet also here, the proportionality test in the form of argumentation is indispensable for a fair judgment.

The subject of this thesis is a critical comparison of the reasoning used by the European Court of Human Rights²⁾ in reaching its judgments in the cases of *Petrovic v. Austria* and *Konstantin Markin v. Russia*. Special attention will be paid to explaining elements of the principle of proportionality. On the one hand, the aim of the study is to analyze the role played by the proportionality considerations in the two decisions. These findings will then be used to explore how important a strict proportionality test is for the ECtHR's jurisprudence on gender inequality and the prohibition of discrimination under Article 14 of the European Convention of Human Rights³⁾ in order to achieve results that are in line with the interests at stake.

The cases of *Petrovic v. Austria* and *Konstantin Markin v. Russia*

1) Nolte, G., *Thin or Thick? The Principle of Proportionality and International Humanitarian Law, Law & Ethics of Human Rights*, 2010.

2) Hereinafter referred to as the ECtHR.

3) Hereinafter referred to as ECHR.

are relevant for comparative analysis with regard to the research questions outlined above not only because they both deal with the issue of the right to paternity leave generated different final decisions, but also precisely because they differ substantially in the nature and scope of the proportionality considerations in the reasons for the judgment. These cases thus provide a particularly clear illustration of the influence that a strict proportionality test had on the respective rulings. Building on this, it is possible to examine what role the proportionality test should generally play in the ECtHR's jurisprudence on Article 14⁴⁾ of the ECHR in order to do adequate justice to the prohibition of discrimination which they embody.

The main part of the study can be divided into four sections. Firstly, the general principle of the proportionality will be outlined. This principle serves as the basis of this thesis and is essential for a more in-depth examination of the research questions. The second section deals with a concise introduction of the cases and of Art. 14 of the ECHR in order to provide an initial overview. Thirdly, the court's reasoning in both cases is then analyzed in detail from a critical perspective, and assigned to the respective elements of the principle of proportionality. This analysis is carried out in parallel for each element of the proportionality test. This means that both cases are not analyzed separately and in an independent process.

4) Article 14. 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, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Instead of this, for each individual point of the proportionality test, both cases are considered at the same time, so that similarities and differences in the judgments can be analyzed in close proximity to each other. At the same time, the relevance of the respective elements of the proportionality test to the judgments in the two cases will be worked out in this context. Based on these findings, the fourth section concludes by discussing and evaluating the differences, similarities and particularities of the proportionality analysis in the two cases.

The conclusion of this study summarizes the research findings and aims to answer the question of how important a strict proportionality test is for the ECtHR's jurisprudence on gender inequality and the prohibition of discrimination under Article 14 of the ECHR in order to achieve interest-based judgments. Personal reflections on the results are also made at this point.

II. Main part

1. The general principle of proportionality

The principle of proportionality represents a general principle of law.⁵⁾ Its main aim is to protect the citizen from arbitrary and improper state action and in this respect it acts as a standard of

5) Iliopoulos-Strangas, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, Mohr Siebeck GmbH & Co. KG., 1999, S. 415 ff.

justification for interventions by the authorities.⁶⁾ Even if this principle is not explicitly standardized in most national constitutions of the EU Member States or in the ECHR, it is derived from the principles of democracy and the rule of law. It is also generally recognized in the ECHR.⁷⁾ The methodology of the concrete examination of the proportionality is not always carried out in a uniform way in court practices, and is relatively controversial.⁸⁾ In the following, the classical four-step structure of the proportionality test will serve as the basis for this work. This structure originated in the doctrine and jurisprudence of German public law and has since been adopted by a large number of national and international courts.⁹⁾ The levels of the proportionality are first divided according to the legitimate aim of the legally relevant measure, then to its suitability for achieving the aim, followed by its necessity and finally the proportionality test in the narrow sense.¹⁰⁾

2. Art. 14 of the ECHR and the Case introduction

1) Art. 14 of the ECHR

According to its wording, Art. 14 of the ECHR guarantees the enjoyment of the rights and freedoms recognized in this Convention

6) *ibid.*, 419.

7) Marauhn/Mehrhof, in: Dörr/Grote/Marauhn (Hrsg.), EMRK/GG Konkordanzkommentar, 2013, S. 401 Rn. 44.

8) Huscroft, G., Miller, B., Webber G., (Editor), *Proportionality and the Rule of Law*, Cambridge, 2014, p. 2.

9) Saurer, J., *Der Staat*, Duncker & Humblot GmbH, 2012, S. 3 ff. (4).

10) Tischbirek, A., *Die Verhältnismäßigkeitsprüfung*, Mohr Siebeck, 2017, S. 2.

without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The prerequisite for the scope of application of Art. 14 of the ECHR is that persons in comparable or legally similar situations have been treated differently.¹¹⁾ Furthermore, Art. 14 of the ECHR only applies if the facts in issue fall within the scope of one or more of the substantive provisions of the Convention and its Protocols or if the issue before the court is closely connected with the exercise of a guaranteed right.¹²⁾ The list of possible grounds for discrimination in Art. 14 of the ECHR is by no means exhaustive, but merely exemplary.¹³⁾ Art. 14 of the ECHR also applies when states have granted rights beyond their obligations under the Convention, which fall within the scope of an article of the Convention.¹⁴⁾ This principle is relevant to the two cases still to be analyzed.

According to the ECtHR, unequal treatment following the criteria previously listed constitutes discrimination in the sense of a violation of Art. 14 of the ECHR if it lacks an objective and reasonable justification.¹⁵⁾

11) ECtHR, *Clift v. United Kingdom*, 13.07.2010, in: BeckRS 2010, p. 145076 (para. 66).

12) ECtHR, *Okpiz v. Germany*, 25. 10. 2005, in: DStR 2006, p. 1404 (para. 30).

13) Fredman, S., *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, *Human Rights Law Review*, Vol. 16(2), 2016, pp. 273-275.

14) Meyer-Ladewig/Lehner, in: Meyer-Ladewig/Nettesheim/von Raumer, EMRK Art. 14 Rn. 8.

15) ECtHR, *Pretty v. United Kingdom*, 29.04.2002, in: NJW 2002, p. 2851(para. 88).

2) Petrovic v. Austria

Antun Petrovic, an Austrian citizen, applied to the Austrian Labor Office for maternity leave benefits in 1989. This application was rejected by the Labor Office on the grounds that, according to the applicable law, only mothers were entitled to such benefits.¹⁶⁾ An appeal against this decision was dismissed. The person concerned then filed a constitutional complaint with the Austrian Constitutional Court. This also was unsuccessful, especially since the underlying norm was deemed to be constitutional. *Petrovic* then brought an action before the ECtHR, claiming that the failure to grant parental leave violated Article 14 of the ECHR (prohibition of discrimination) in conjunction with Art. 8 of the ECHR (right to respect for family life).¹⁷⁾ The court first clarified that Art. 8 of the ECHR does not impose an obligation on states to grant financial support, such as parental leave benefits.¹⁸⁾ However, if a state grants financial support of this kind, this is done with the intention of promoting the well-being of the family, which constitutes support for respect for family life within the meaning of Art. 8 of the ECHR.¹⁹⁾ The ECtHR then unanimously declared Art. 14 in conjunction with Article 8 of the ECHR to be applicable.²⁰⁾ As a result, the complaint was not upheld and a violation of Art. 8 in conjunction with 14 of the ECHR

16) On the basis of Section 26 (1) of the Austrian AIVG as amended in 1977.

17) ECtHR, *Petrovic v. Austria*, 27.03.1998, 20458/92, para. 20.

18) *ibid*, para. 26.

19) *ibid*, para. 27.

20) *ibid*, para. 29.

was denied.²¹⁾

3) Markin v. Russia

Konstantin Markin served in the Russian military. After his divorce from his wife, their three children, including a newborn, lived with him. *Markin* asked his superior to grant him three years of paternity leave. This request was not granted, but he was allowed special leave for a period of three months. He appealed against this decision to the local military court. The military court dismissed the complaint. According to the court, only 'female' military personnel were entitled to take three years of maternity leave under the relevant law²²⁾, whereas such an option was not even provided for 'male' military personnel if his children were without maternal supervision; in that case, however, a military member was entitled either to terminate his employment relationship prematurely for family reasons or to take three months of special leave. Subsequently, he appealed to the Constitutional Court, arguing that the relevant provisions of the Military Service Law were inconsistent with those in the Russian Constitution. This complaint was also rejected. Finally, the complainant turned to the ECtHR, alleging a violation of Article 8 of the ECHR (right to respect for private and family life) in conjunction with Article 14 of the ECHR (prohibition of discrimination).²³⁾ The ECtHR first reiterated that Art. 8 of the ECHR does not grant a

21) *ibid*, para. 43.

22) Based on Section 11(13) of the Russian Military Service Code as amended in 2006.

23) ECtHR, *Markin v. Russia*, 22.03.2012, 30078/06, para. 76.

right to parental leave.²⁴⁾ On the other hand, the possibility for one parent to stay at home with the children and receive parental leave benefits promotes or "reorganizes" family life, so that Art. 14 of the ECHR in conjunction with Art. 8 of the ECHR are also applicable in this case.²⁵⁾ As a result, the complaint was upheld and a violation of Art. 8 in conjunction with 14 ECHR was affirmed.²⁶⁾

3. Elements of the proportionality test in the respective judgments

The structure of the proportionality is not always carried out by the case law of the ECtHR and certainly not with explicit designation of the respective points of the test.²⁷⁾ Instead, it often examines the individual elements in a different order or even simultaneously.²⁸⁾ Nevertheless, in its argumentation patterns, there are always individual explanations of the individual elements of the proportionality test according to the above-mentioned scheme. These must be identified and contrasted in the aforementioned judgments.

1) Legitimate aim

The first step of the proportionality is legitimate aim. In both cases, a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR was

24) *ibid.*, para. 129.

25) *ibid.*, para. 130.

26) *ibid.*, para. 152.

27) Oreschnik, B., *Verhältnismäßigkeit und Kontrolldichte*, Springer, 2019, S. 197.

28) Uwer, D., *Medienkonzentration und Pluralismussicherung im Lichte des europäischen Menschenrechts der Pressefreiheit*, Berlin, Humboldt-Univ., Diss., 1998, S. 145 ff.

alleged. According to Art. 8 II²⁹⁾ of the ECHR, the exercise of the right to respect for private and family life may be interfered with only to the extent that the interference is provided for by law and is necessary in a democratic society for national security or public safety, for the economic well-being of the state, for the prevention of disorder, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The second half-sentence of Article 8 II of the ECHR lists legitimate aims in this sense.³⁰⁾

a) Petrovic v. Austria

The ECtHR begins its remarks on the compatibility of the subject matter of the dispute with Art. 8 and 14 of the ECHR by clarifying that an objective and reasonable justification is lacking if the Austrian law in question does not pursue a legitimate aim and if it is furthermore not proportionate.³¹⁾ However, the court does not specifically state whether such a legitimate aim actually exists. This is highly critical in the context of the proportionality test, as all further points are established on it.

29) Article 8. II. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30) Grabenwarter/Pabel, Europäische Menschenrechtskonvention, 7. Auflage. 2021, § 22 Rn. 43.

31) ECtHR, *Petrovic v. Austria*, 27.03.1998, 20458/92, para. 30.

b) Markin v. Russia

Here also the ECtHR emphasizes in its findings on the compatibility of the subject matter of the dispute with Article 8 in conjunction with 14 ECHR that there is no objective and reasonable justification if the Russian military law in question does not pursue a legitimate aim and that it is also not proportionate.³²⁾ The court addresses several objectives under consideration in its judgment.

Firstly, the Russian government submitted that the different treatment of female and male soldiers in matters of maternity leave was intended, to counteract the numerical inferiority of women in the Russian military, thereby overcoming the traditional social stigmatization of women in the military.³³⁾ While the court did not explicitly endorse this aim as legitimate, further consideration of this aspect makes it clear that this aim was at least implicitly recognized as legitimate within the meaning of Article 8 of the ECHR.

Furthermore, the Russian government argued that unequal treatment on the basis of the Military Code protected the "special biological and psychological bond between mother and newborn child". The presence and care of the mother is therefore especially important in the first year of the child's life.³⁴⁾ This can be interpreted to mean that the physical and mental health of the newborn child should be protected, which would constitute a legitimate aim within the meaning of Article 8 of the ECHR. Again, the ECtHR did not explicitly endorse

32) ECtHR, *Markin v. Russia*, 22.03.2012, 30078/06, para. 125.

33) *ibid*, para. 116.

34) *ibid*, para. 116.

the aim. On the basis of the further discussion of the argument, an implied endorsement must be assumed.

Finally, the Russian government argued that the unequal treatment would avoid negative effects on the military strength and operational capability of the armed forces and thus ensure the military's effectiveness.³⁵⁾ The ECtHR expressly approved this aim as a legitimate interest in Russia's national security.³⁶⁾

2) Suitability

A means has to be suitable for achieving the aim if it is at least potentially conducive to the fulfillment of the aim in the first place.³⁷⁾

a) Petrovic v. Austria

Since the court had already failed to establish any (legitimate) aim of the measure, it was also unable to assess whether the means was suitable for that aim.

b) Konstantin Markin v. Russia

aa) Suitability with regard to "positive discrimination"

In this regard, the ECtHR found that such a differentiation of parental leave regulations in the Russian military according to gender would lead precisely to the perpetuation of gender stereotypes anchored in society and would therefore also be detrimental to the

35) *ibid*, para. 113.

36) *ibid*, para. 134.

37) Pache, E., *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der Europäischen Gemeinschaften*, NVwZ 1999, 1033 ff. (1036).

careers of Russian women in the military.³⁸⁾ This means is thus in no way unsuitable to counteract the numerical inferiority of women in the Russian military in order to overcome the traditional social stigmatization of women in the military.

bb) Suitability with regard to the best interests of the child

In this regard, the court found that no scientific studies had revealed that newborns form such a special biological and psychological bond with their mothers in the first months of life which they do not also form with their fathers.³⁹⁾ In this relationship, therefore, mothers and fathers are equal. This means that the remedy is in no way conducive to safeguarding the welfare of the child and is therefore not suitable.

cc) Suitability with regard to the military's striking power

The ECtHR recognizes that the use of parental leave by military personnel results in their inability to serve, at least temporarily. Restricting the number of those entitled to parental leave to women would therefore be potentially conducive to a higher operational capability of the Russian military and thus suitable for ensuring its effectiveness.

3) Necessity

A remedy is necessary if no equally suitable means are apparent that would less intensively impair the protected interest.⁴⁰⁾

38) ECtHR, *Markin v. Russia*, 22.03.2012, 30078/06, para. 141.

39) *ibid*, para. 132.

40) Kirk, J., *Constitutional Guarantees, Characterisation and the Concept of Proportionality*, *Melbourne University Law Review* 21(1), 1997. p. 7.

a) Petrovic Case

In the absence of an established aim, it was also not possible to comment on the necessity of the measure.

b) Markin Case

The ECtHR lists several possible alternative regulations. On the one hand, it refers to relevant legal provisions in the Netherlands, Germany,⁴¹⁾ or the United Kingdom, which stipulate that parental leave requested by military personnel (regardless of gender) is not to be granted immediately, but may be refused under certain circumstances if significant reasons of national security are required. The ECtHR did not mention whether those alternative means would also be equally effective. It is true that such regulatory alternatives would have a less intensive impact on the interest of male military personnel being granted maternity leave. However, because there is discretion when assessing important national security reasons for a possible denial of the request, there is still the possibility that some male military personnel would be unable to serve as a result of being granted parental leave, which would have a negative impact (albeit marginal) on the operational capability of the force as such. Such regulations would therefore not be equally suitable for ensuring the military's effectiveness, so that the necessity of the chosen means must be affirmed.

On the other hand, this applies if the individuals cannot easily be replaced in view of their hierarchical position, have rare technical

41) Based on § 3 of the Ordinance on Parental Leave for Soldiers of 04.12.1990.

qualifications, or are currently participating in or aiming to participate in military actions. Even with this regulatory option, there is still discretionary authority for denying leave time, so such a remedy would not be equally appropriate based on the above, so necessity still exists.

4) Proportionality in the narrow sense

The proportionality in the narrow sense is also called appropriateness,⁴²⁾ and is seen by not a few as being the heart of the proportionality test.⁴³⁾ In terms of content, a weighing takes place between the intensity of the impairment of the legally protected interests of the person concerned on the one hand and the weight of the legitimate aim pursued on the part of the state on the other.⁴⁴⁾

Furthermore, in the context of the examination of reasonableness, the case law of the ECtHR has always taken into account a certain margin of appreciation of the member states.⁴⁵⁾ On the basis of this, the ECtHR varies its density of control, depending on the Convention right and the individual circumstances concerned, in order to guarantee a minimum degree of Member State sovereignty against interference by international protective bodies.⁴⁶⁾ The greater the

42) Kirk, J., Constitutional Guarantees, Characterisation and the Concept of Proportionality, *Melbourne University Law Review* 21(1), 1997, p. 8.

43) Tsakyrakis, S., Proportionality: An assault on human rights?, *International Journal of Constitutional Law*, 2009, pp. 468-474.

44) Arai-Takashi, Y., Proportionality, in: *The Oxford Handbook of International Human Rights Law*, 2013, p. 452.

45) ECtHR, *Handyside v. United Kingdom*, 7.12.1976, 5493/72 para. 47.

46) Grabenwarter/Pabel, *Europäische Menschenrechtskonvention*, 2021, §18 Rn. 20.

margin of appreciation granted, the more restrained the examination of the encroachment.⁴⁷⁾ The extent of the margin of appreciation depends on the concrete circumstances of the individual case.

a) Petrovic v. Austria

The Court did not comment on the intensity of the interference or on the weight of the purpose pursued. It merely dealt with the margin of appreciation. In this regard, it stated that at the relevant time there was no widespread agreement in the Convention States with regard to statutory regulations on maternity leave benefits. In addition, only a few member states had such provisions for fathers at that time. Without determining how wide the margin of appreciation was in the present case, the court immediately found that it had not been exceeded and that the unequal treatment was therefore justified.⁴⁸⁾

b) Konstantin Markin v. Russia

aa) Intensity of the impairment

In this regard, the ECtHR first dealt with Russia's objection that the military regulations in question allowed exceptions, according to which men were also entitled to parental leave under certain circumstances.⁴⁹⁾ However, the ECtHR countered that the government could only file a judgment making an exception to this practice. Based on this, the ECtHR concluded that the Russian government was thus not able to plausibly demonstrate that soldiers would be evaluated

47) Oreschnik, B., *Verhältnismäßigkeit und Kontrolldichte*, Springer, 2019, S. 198.

48) ECtHR, *Petrovic v. Austria*, 27.03.1998, 20458/92, para. 42.

49) Based on Article 32 of the Presidential Decree on Military Service of 16.09.1999.

on a case-by-case basis and could indeed go on maternity leave if their particular situation required it.⁵⁰⁾ For these reasons, there was no reduction in the intensity of the interference.

Finally, the ECtHR also clarified that, contrary to the view of the Russian government, by signing the service contract, the complainant could not also voluntarily waive his right not to be discriminated against, because this could not be accepted on the basis of the fundamental meaning of the prohibition of discrimination under Article 14 ECHR with regard to the public interest. It follows from these statements that the ECtHR considered the intensity of the impairment to be high.

bb) Weight of the legitimate aim pursued

The decisive factor behind the weight of the aim pursued is its utility, in particular its abstract significance, actual danger and effective implementation in the individual case.⁵¹⁾

The ECtHR addressed the Russian government's claim that a parental leave regulation without a corresponding gender restriction would severely jeopardize the military's operational capability because male personnel are far more numerous. Otherwise, it must be expected that many more soldiers would take parental leave, which would make them unfit for service. The ECtHR did not share this prognosis. In fact, there was no concrete evidence that the Russian authorities were in a position to determine the number of military

50) ECtHR, *Markin v. Russia*, 22.03.2012, 30078/06, para. 150.

51) Kirk, J., *Constitutional Guarantees, Characterisation and the Concept of Proportionality*, Melbourne University Law Review 21(1), 1997, p. 9.

personnel who would actually declare their willingness to take a three-year parental leave. A fortiori, it was not possible to prove the extent to which this would weaken the army's effectiveness. The mere reference to the fact that all male military personnel were of "procreative age" was not sufficient for this aim. In the opinion of the ECtHR, there is therefore no substantiated comparative material that could justify an intensive threat to the aim pursued.

The ECtHR also raised concerns about the effectiveness of the measure. Women doing military service also generally find themselves in higher hierarchical positions, have special technical skills, or are actively participating in military actions. Indeed, the complainant had a specific job in radio surveillance, an area of the Russian military where women are typically employed.⁵²⁾ Consequently, women may be as difficult, if not more difficult, to replace than men. Their inability to serve due to maternity leave also weakens the military's power, so the measure must be classified as not very effective.

cc) Margin of Appreciation

First of all, the ECtHR clarified that each state has the independent competence to make regulations on its own military organization. In principle, it has a wide margin of appreciation in this respect. Nevertheless, the Court held that such a general and automatic restriction, made purely on the basis of gender, exceeded an acceptable margin of appreciation of the State, which could justify the differential treatment.⁵³⁾

52) ECtHR, *Markin v. Russia*, 22.03.2012, 30078/06, para. 149.

4. Impact of the proportionality considerations in the cases

1) Influence of the Proportionality Test on Judgment

a) Petrovic v. Austria

In this case, as explained above, the proportionality test was very brief and incomplete. For example, the court made no mention of legitimate aim, suitability and necessity. Reasonableness was limited to the partial aspect of the margin of appreciation, without any weighing of interests. The core elements of the proportionality test thus hardly played a role in the judgment.

b) Konstantin Markin v. Russia

As explained above, a detailed and in-depth proportionality test was applied in this case. For example, several possible aims of the measure were identified and assessed, some of which already failed on the grounds of appropriateness. The fact that several aims were dealt with, and that these aims partly failed on the grounds of appropriateness, which is relatively rare,⁵⁴⁾ underlines how intensively the court examined proportionality. Even in the context of the proportionality, the court's focus was on balancing the intensity of the interference against the weight of the aim, and not solely on the margin of appreciation as in Petrovic v. Austria. The core elements of the proportionality test thus played a key role in the judgment.

53) ECtHR, Markin v. Russia, 22.03.2012, 30078/06, para. 128.

54) Arai-Takashi, Y., Proportionality, in: The Oxford Handbook of International Human Rights Law, 2013, p. 452.

2) Influence of the proportionality test on the quality of the argumentation

a) Petrovic v. Austria

The ECtHR made it clear at the beginning of its reasoning that there was no objective and reasonable justification if the Austrian law in question neither pursued a legitimate aim nor was proportionate. Nevertheless, at no stage of its decision-making did it address what the specific aim was, and certainly not whether it was proportionate. For this reason, the argumentation is fundamentally deficient. The mere reference to a wide margin of appreciation may be valid, but it does not disguise the lack of a legitimate aim. If the ECtHR had consistently applied its own previously established review standard, it would have had to affirm a violation of Articles 14 in conjunction with 8 of the ECHR for lack of a legitimate aim. Judges *Bernhardt* and *Spielmann* took a similar position in their joint special opinion when they agreed with the judgment in its finding that unequal treatment on the basis of gender requires "weighty reasons" in view of the equality of the gender, which in their view were not present.⁵⁵⁾ Irrespective of whether this reasoning is considered valid or not, weighing elements of the proportionality, in particular with regard to the intensity of the interference, can at least be found in their statements.⁵⁶⁾ It remains to be said that the lack of explanations

55) Special Opinion Bernhardt/Spielmann, in: ECtHR, *Petrovic v. Austria*, 27.03.1998, 20458/92.

56) Special Opinion Bernhardt/Spielmann, in: ECtHR, *Petrovic v. Austria*, 27.03.1998, 20458/92. Accordingly, such a regulation would not only have a

regarding the proportionality in *Petrovic v. Austria* led to an argumentation that was neither plausible nor valid.

b) Markin v. Russia

Here, the ECtHR dealt intensively with all the objections raised by the Russian government. This allowed the court to examine several aims pursued within the framework of the proportionality, thereby respecting the legislative will as much as possible. Even though the ECtHR did not explicitly name the individual levels of the proportionality test and examined them incompletely in some cases, it was still possible to find explanations of all four major elements of the proportionality test, which led to improved comprehensibility and internal logic. This can also be seen in the special opinions, which, while partially rejecting the judgment in the result, did not produce any objections to the substantive reasoning of the court in the context of justifying the unequal treatment within the meaning of Articles 14 in conjunction with 8 of the ECHR.⁵⁷⁾ In summary, the comprehensive and more in-depth explanations of the proportionality in *Markin v. Russia* resulted in a high-quality argumentation.

detrimental effect on men who were denied parental leave benefits, but also on women who were granted them, because they would lose the parental leave benefits if they resumed their gainful employment while the father stayed at home, without them remaining in the family. This would reinforce existing gender stereotypes.

57) See, for example, Special Opinion Popovic, in: ECtHR, *Markin v. Russia*, 22.03.2012, 30078/06. The judge dissenting from the outcome of the judgment merely questions the ECtHR's reasoning regarding the complainant's status as a victim, not regarding a lack of justification for the interference.

5. Significance of the Proportionality Test for Gender Discrimination under Article 14 ECHR

At this point, based on the differences, similarities and particularities of the proportionality analysis in the two cases, it is now possible to assess the importance of the proportionality considerations for interest-based outcomes and effective protection against sex discrimination in the sense of Article 14 ECHR. At the same time, criticism of the principle of proportionality will be addressed.

First of all, it is important to point out the legal idea of Articles 8-11, according to which interventions must be 'necessary in a democratic society'. This idea is also reflected in the preamble, where it is stated that the maintenance of the fundamental freedoms covered by the ECHR is also essentially based on a truly democratic political regime. Thus, the ECHR as a whole is based on democratic principles and the rule of law.⁵⁸⁾ This has also been confirmed by the ECtHR in its constant jurisprudence, according to which it has often emphasized that the guiding principle of the democratic constitutional state with a European character is characterized by pluralism, tolerance and the spirit of openness. These values are fundamentally important, especially in the context of gender equality within the meaning of Article 14 of the ECHR, and play out fully in an examination of the proportionality. Pluralism is reflected, for example, in the examination of legitimate purpose. This is particularly evident

58) Logemann, A., Grenzen der Menschenrechte in demokratischen Gesellschaften, Nomos, 2004, S. 291.

in the judgment in *Markin v. Russia*, when the ECtHR addressed several possible aims associated with the means. This testifies to the fact that, in the context of the proportionality test, the court can grasp and take into account all possible interpretations of a law that come into consideration and not, as *Miller*, for example, criticizes,⁵⁹⁾ disregard them from the outset. The spirit of openness is reflected in the proportionality test in the examination of necessity, where alternative regulatory options are considered. Nevertheless, it can be criticized that the examination of necessity falls short in the case law of the ECtHR,⁶⁰⁾ as evidenced by the lack of consideration of the equal suitability of alternative means in the case of *Markin v. Russia*. Finally, the test of Balancing is characterized by tolerance. By weighing the intensity of the impairment against the weight of the aim pursued, the mutual interests of those treated unequally on the basis of gender and of the respective governments can be taken into account. In particular, the opening of a margin of appreciation testifies to the special tolerance of the ECtHR with regard to the sovereignty of the individual states. At the same time, that margin of appreciation in order to achieve results that are in line with the interests at stake must not be seen, as in *Petrovic v. Austria*, as a pretext to dispense with the remaining elements of the proportionality test. This was also recognized by Judge *Pinto de Albuquerque* when

59) Miller, B., Proportionality's blindspot: "Neutrality" and Political Philosophy, in *Proportionality and the Rule of Law* (edited by Huscroft G., Miller B., and Webber G.), 2014, p. 370.

60) Arai-Takashi, Y., Proportionality, in: *The Oxford Handbook of International Human Rights Law*, 2013, p. 458.

he described the approach of the Court in *Petrovic v. Austria* as "manifestly outdated."⁶¹⁾

The implementation of a strict proportionality test is thus, according to the above explanations, indispensable to comprehensively and effectively guarantee the gender discrimination prohibition from Article 14 ECHR.

III. Conclusion

In summary, the proportionality considerations in *Petrovic v. Austria* and *Markin v. Russia* differed substantially in nature and scope, which ultimately led to a different quality of argumentation patterns. While the first decision disregarded almost all essential aspects of the proportionality test, with the exception of considerations of margin of appreciation in the context of balancing, the second judgment was characterized by extensive and in-depth weighing. As a result, the reasoning in this case was much more cogent, rational and comprehensible, and observing the basic structure of the proportionality test played a decisive role, without, however, being explicitly referred to as such in the judgment. This thesis thus argues that the implementation of a strict proportionality test is essential for a comprehensive and effective guarantee of the gender discrimination prohibition from Article 14 of the ECHR. In this regard, the judgment

61) Special Opinion Pinto de Albuquerque, in: ECtHR, *Markin v. Russia*, 22.03.2012, 30078/06.

in *Petrovic v. Austria* proved to be a poor example, while *Konstantin Markin v. Russia* was demonstrably a good example.

The principle of gender equality and the related prohibition of discrimination under Article 14 of the ECHR is too important in a pluralistic and tolerant society to justify its violation merely by referring to the margin of appreciation of the member states. The construct of the proportionality test is not unjustifiably derived directly from the principles of democracy and the rule of law. In this respect, it represents a suitable and proven means of justification testing. The case law of the ECtHR can build on the argumentation structure in the case of *Markin v. Russia*. The only aspect requiring improvement is the control density of appropriateness and necessity, which should be taken seriously.⁶²⁾

62) Clerico, L., Proportionality and Balancing, in: Oxford Handbook of Constitutional Law in Latin America, Oxford University Press, 2017, p. 2.

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〈초록〉

육아휴직에 있어서의 성차별에 관한 연구

- 젠더에 기인한 불평등 대우에 관한 유럽인권재판소의
판례 비교 분석 및 유럽인권협약 제14조에 따른
차별 금지에 대한 비례성 테스트 -

전 형 준*

비례성의 원칙은 법의 중요한 일반원칙 중 하나이다. 이 원칙의 주요 목표는 자의적이고 부적절한 국가 행동으로부터 시민을 보호하는 것이고, 이러한 측면에서 국가의 개입을 정당화하는 기준으로도 작용한다. 이 원칙이 회원국 대부분의 헌법이나 유럽인권협약에서 명시적으로 표준화되어 있지 않더라도 민주주의와 법치주의의 원칙에서 파생된 것으로, 일반적으로 유럽인권협약에 의해 인정된다. 비례성 심사는 먼저 법적으로 관련된 조치의 정당한 목적성에 따라, 그 다음에는 목적 달성을 위한 적합성, 그 다음으로 필요성과 마지막으로 소위 조치의 적절성이라는 좁은 의미의 비례성 심사로 나뉜다. 유럽인권협약 제14조의 적용범위에 대한 전제조건은 첫째, 유사하거나 법적으로 유사한 상황에 있는 사람들이 다르게 대우받았다는 사실이다. 유럽인권협약 제14조의 차별 근거 리스트는 절대적인 것이 아니라 단지 예시적인 것이며, 제14조는 국가가 협약 조항의 범위에 속하는 협약에 따른 의무를 넘어서는 권리를 부여한 경우에도 적용된다. 유럽인권재판소에 따르면, 나열된 기준에 따른 불평등한 대우에 객관적이고 합리적인 정당성이 없는 경우 유럽인권협약 제14조 위반이라는 의미에서 차별을 구성한다. 유럽인권협약 제14조에 따른 차별 금지는 회원국의 판단재량의 원리만으로 위반을 정당화하기에는 너무 중대한 문제이다. 유럽인권재판소의 판

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례 중 Petrovic v. Austria와 Konstantin Markin v. Russia는 위의 원칙과 관련한 중요한 논쟁의 구조를 보여준다. 심각하게 받아들이고 개선해야 할 점은 위 판례 비교 분석에서 보듯이 성차별과 관련된 비례성 심사(적절성, 적절성과 필요성과 관련하여 밀도 있게 심사하여야 한다는 점이다.

주제어 : 비례성의 원칙, 유럽인권협약 제14조, 유럽인권법원의 판례분석, 민주주의 원칙 및 법치주의, *Petrovic v. Austria* 및 *Markin v. Russia* 판례.

