

## EUROPEAN COURT OF HUMAN RIGHTS

Konstantin Markin v. Russia, Application no. 30078/06

*Written submissions by the Human Rights Centre of Ghent University*

### EXECUTIVE SUMMARY

This case provides an important opportunity for the Court to strengthen its case law on the issue of sex discrimination and clarify what “the advancement of the equality of the sexes” in the Council of Europe means in the 21<sup>st</sup> century.<sup>1</sup> It is submitted that to achieve equality of the sexes we must understand the nature of gender stereotyping and the harm stereotypes do. These written comments focus on the CEDAW Committee’s approach to gender stereotypes, which is part of the Committee’s holistic perspective on gender discrimination. Other international legal materials that acknowledge the link between gender stereotypes and gender inequality are also discussed in this brief, as is the issue of intersectional discrimination. We respectfully hope that the Court will find this international law background relevant when deciding the present case.

### 1. INTRODUCTION

1. These written comments are prepared and submitted by the Human Rights Centre of Ghent University (Belgium), pursuant to leave granted by the President of the European Court of Human Rights on May 4 2011, in accordance with rule 44 §2 of the Rules of the Court. The Human Rights Centre is an academic centre. One of the Centre’s leading projects is “Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning.” The project is led by Professor Eva Brems and funded by the European Research Council. It is in the context of this project that these written comments are submitted for your consideration.

#### *The scope of these comments*

2. It is suggested that the legal issue in *Konstantin Markin v. Russia* is broader than formal discrimination on the grounds of sex, and encompasses the use of gendered stereotypes of military servicemen and military servicewomen. One stereotype that plays a role in this case is the traditional idea that women are responsible for household and children and the main task of men is to work outside of the home. Another stereotype that plays a role is the idea that fighting and military service is something for men and not for women. This submission will focus on the issue of gender stereotypes and the Contracting Parties’ international obligations to address these stereotypes. Part Two explicates the nature of gender stereotypes relying on (empirical) research done by psychologists, Part Three focuses on the CEDAW

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<sup>1</sup> ECtHR, *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, App. No. 9214/80; 9473/81; 9474/817 (1985), par. 78.

Committee's approach to gender stereotypes, Part Four gives a brief overview of other international legal materials that address the link between gender stereotypes and gender inequality, and Part Five makes the argument that this is a case that concerns intersectional discrimination. This analysis draws on a substantial body of international law and scholarship.

## 2. UNDERSTANDING GENDER STEREOTYPES

*What are stereotypes?*

3. Stereotypes are beliefs about the characteristics of groups of individuals.<sup>2</sup> “[A] stereotype presumes that all members of a certain social group possess particular attributes or characteristics . . . or perform specified roles”.<sup>3</sup> By means of stereotypes, men and women are not seen not as individuals, but are by default judged on the basis of a group membership. Stereotypes that are applied to men or women *because* they are men and women are gender stereotypes.

*The link between gender stereotypes and discrimination*

4. In the context of the work of this Court, gender stereotypes become problematic when they operate to deny individuals their human rights.<sup>4</sup> This is the case when gender stereotypes reflect and/or induce sex discrimination. Gender stereotypes are related to discrimination in two ways: they can cause discrimination and they can be discriminatory in themselves.<sup>5</sup> In the first sense, stereotypes serve to perpetuate gender inequality and subordination, as for example when the police send a woman back to her battering husband because they view domestic violence as a “family matter with which they cannot interfere”.<sup>6</sup> In the second sense, gender stereotyping constitutes a form of sex discrimination. This is for example the case when a law provides that “a married woman may only exercise a profession or maintain employment where this does not prejudice her role as mother and homemaker”.<sup>7</sup> Often gender stereotypes do both: they can be cause and manifestation of discrimination at the same time.

*The harm of gender stereotypes*

5. **Stereotypes act as control mechanisms:** they limit individuals in their options.<sup>8</sup> What gender stereotypes do is justify the status quo.<sup>9</sup> Gender-role stereotypes can make cultural divisions of labor –

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<sup>2</sup> Charles Stangor, “Volume Overview”, in: Charles Stangor (ed.) *Stereotypes and Prejudice: Essential Readings* (Philadelphia: Psychology Press, 2000), p. 5.

<sup>3</sup> Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010), p. 9.

<sup>4</sup> *Id.* at 20.

<sup>5</sup> Rikki Holtmaat & Jonneke Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue*, (Antwerp: Intersentia 2010), p. 29-30.

<sup>6</sup> ECtHR, *Opuz v. Turkey*, App.No. 33401/02 (2009), par. 195.

<sup>7</sup> Inter-American Commission on Human Rights, *Morales de Sierra v. Guatemala*, Case 11.625 (2001), par. 2.

<sup>8</sup> Susan T. Fiske, “Controlling other people: The Impact of Power on Stereotyping”, *American Psychologist* (June 1993), p. 621-628, there 623.

<sup>9</sup> John T. Jost & Aaron C. Kay, “Exposure to benevolent sexism and complementary gender stereotypes: Consequences for specific and diffuse forms of system justification”, *88 Journal of Personality and Social Psychology* (2005), p. 498-509.

such as men do the fighting and earn a living, women care for the children and the home - seem not only fair, but also natural and inevitable.<sup>10</sup> The harm of stereotyping men and women in traditional gender roles is that this leads to a lack of support for people (both men and women) who do not fulfill traditional roles, as when certain social benefits are denied men or women on the basis of stereotypes; it limits people to particular roles; and leads to men's greater power and authority and women's dependency.<sup>11</sup> This way, gender stereotypes can occasion economic harm, psychological harm (people who are stereotyped often underachieve and report depression) and harm to the human dignity.<sup>12</sup> In the specific context of the armed forces, including the Russian armed forces, gender role stereotypes obstruct women's military careers.<sup>13</sup> Gender-role stereotypes construct men or women as inferior in certain spheres of life. In other words, **gender stereotypes induce and justify gender inequality**. This account of the harm of gender stereotypes is no different in cases of so-called positive discrimination or benevolent sexism (the kind that rewards women for conforming to traditional gender roles): psychological research suggests that benevolent sexism may play a significant role in justifying and maintaining gender inequality.<sup>14</sup>

### *Stereotypes and the legal process*

6. In the domain of law, stereotypes are often translated into laws and regulations and/or used as rationalization for these regulations. As a result, there are two things to be especially alert to: blanket restrictions on fundamental rights on the basis of general assumptions about the social groups that the restrictions apply to and justifications of differences in treatment between social groups.

- *Blanket restrictions*: When stereotypes are transformed into law, this often takes the form of blanket restrictions on what groups of individuals can do. What stereotypes and blanket restrictions have in common is that both are based on certain assumptions about groups of individuals. This Court has on several occasions condemned the use of blanket restrictions, which leave no room for "an individualized assessment based on the facts of a particular case".<sup>15</sup>

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<sup>10</sup> *Id.* at 499.

<sup>11</sup> Janet K. Swim & Lauri L. Hyers, "Sexism", in: Todd D. Nelson (ed.), *Handbook of Prejudice, Stereotyping, and Discrimination* (New York: Psychology Press, 2009), p. 413.

<sup>12</sup> *Id.* at p. 422-423 and Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010), p. 59-70.

<sup>13</sup> In general see Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge: Cambridge University Press, 2001). About the Russian military particularly, see Jennifer Mathers, "Women, society and the military: women soldiers in post-Soviet Russia", in: Stephen L. Webber & Jennifer G. Mathers (eds.), *Military and society in post-Soviet Russia* (Manchester, Manchester University Press, 2006), p. 207-227; Jennifer G. Mathers, "Russia's women soldiers in the twenty-first century", 1 *Minerva Journal of Women and War* (2007), p. 8-18; and Aleksandr I. Smirnov, "Women in the Russian Army", 43 *Russian Social Science Review* (2002), p. 61-71.

<sup>14</sup> Peter Glick & Susan T. Fiske, "An ambivalent alliance: Hostile and benevolent sexism as complementary justifications for gender inequality", 56 *American Psychologist* (2001), p.109-118; and John T. Jost & Aaron C. Kay, "Exposure to benevolent sexism and complementary gender stereotypes: Consequences for specific and diffuse forms of system justification", 88 *Journal of Personality and Social Psychology* (2005), p. 498-509, there 499.

<sup>15</sup> ECtHR, *Kiyutin v. Russia*, App. No. 2700/10 (2011), par. 72-73. See also ECtHR, *Alajos Kiss v. Hungary*, App. No. 38832/06 (2010), par. 42-44.

- *Justifications*: Another way stereotypes often play a role in the legal process is when they are invoked as justification for an act of disparate treatment.<sup>16</sup> This Court has on several occasions ruled that justifications that are grounded in prejudice or stereotypes are insufficient: neither "negative attitudes" towards a particular group,<sup>17</sup> nor arguments that only reflect "the traditional outlook",<sup>18</sup> nor an appeal to "cultural reasons"<sup>19</sup> can constitute convincing reasons for a difference in treatment in the sense of Article 14 of the Convention.

#### *The positive role that courts can have*

7. There are a number of things that courts can do to ensure that harmful gender stereotypes are not validated, in addition to avoiding stereotyping in their own reasoning.<sup>20</sup> In the first place, in order to be able to address the wrong of stereotyping, it is important that judgments **name the problem of stereotyping and recognize the harm** that is done through gender stereotyping.<sup>21</sup> Important to the case at hand is to ensure that Contracting States do not act on gender stereotypes and that **gender stereotypes are not permitted to function as justification** for a difference in treatment between men and women.<sup>22</sup>

### 3. THE CEDAW COMMITTEE'S APPROACH TO GENDER STEREOTYPES

#### *CEDAW contains an obligation to address harmful gender stereotypes: Art 5(a)*

8. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) contains an obligation for States Parties to address harmful gender stereotypes. **Art 5(a) CEDAW** requires 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". The international legal basis to address gender stereotypes is broader than this article from the CEDAW Convention, but due to the limited space these written submissions will focus on the work by the CEDAW Committee.<sup>23</sup>

<sup>16</sup> An example is the case of ECtHR, *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, App. No. 9214/80; 9473/81; 9474/817 (1985), par. 75, where the United Kingdom tried to justify a discriminatory immigration rule by referring to the "statistical fact" that "men were more likely to seek work than women".

<sup>17</sup> ECtHR, *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 31417/96 and 32377/96 (1999), par. 90; ECtHR, *L. & V. v. Austria*, App. Nos. 39392/98 and 39829/98 (2003), par. 52.

<sup>18</sup> ECtHR, *Inze v. Austria*, App. No. 8695/79 (1987), par. 44.

<sup>19</sup> ECtHR, *Zarb Adami v. Malta*, App. No. 17209/02 (2006), par. 81-82.

<sup>20</sup> This was the issue in the most recent decision by the CEDAW Committee under the Optional Protocol to CEDAW (which allows individual complaints). See *Karen Tayag Vertido v. The Philippines*, Comm. No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010) (CEDAW).

<sup>21</sup> Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010), p. 39-45.

<sup>22</sup> *Id.* at 124-128

<sup>23</sup> See, apart from the CEDAW Convention, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (*Convention of Belém do Pará*), Articles 7(e) and 8(b), 9 June 1994; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* 11 July

### ***The work of the CEDAW Committee is relevant to this case***

9. In its most recent General Recommendation, the CEDAW Committee observes: “*The principle of equality between men and women, or gender equality, entails the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.*”<sup>24</sup> The present case should be resolved taking account of this international law background as formulated by the CEDAW Convention and Committee. The notion that CEDAW is not applicable in this case because the applicant is male should be refuted at the outset: the CEDAW Committee speaks of “all human beings, regardless of sex”. Furthermore, it is important to be aware that stereotypes of men can harm both men and women and *vice versa*.<sup>25</sup> Gender role stereotypes lock women into the home and men out of it, consequently both sexes are disadvantaged. This Court has made clear that it takes CEDAW into account when considering the scope of sex discrimination.<sup>26</sup> Also important in this respect is that all the Contracting States of the Council of Europe are party to CEDAW and none have made a reservation to article 5(a).<sup>27</sup>

### ***The CEDAW Committee’s holistic approach to discrimination***

10. In its General Recommendation No. 25, the CEDAW Committee has explained that three obligations are central to achieving the object and purpose of the Convention: “Firstly, States parties’ obligation is to ensure that there is no direct or indirect discrimination against women . . . Secondly, States parties’ obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States parties’ obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.”<sup>28</sup> Article 5 is the pillar beneath this third obligation.

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2003, 2nd Ordinary Session of the Assembly of the African Union, AHG/Res. 240 (XXXI) (*entered into force* 25 Nov. 2005), Articles 2(2), and 4(d); the Convention on the Rights of Persons with Disabilities, *adopted* 13 Dec. 2006, G.A. Res.61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2006) (*entered into force* 3 May 2008), Article 8(1)b (which discusses compounded stereotyping, including on the basis of sex); the Committee on Economic Social and Cultural Rights, *General Comment No. 16: The equal rights of men and women to the enjoyment of all economic, social and cultural rights (Article 3)*, 2005, par. 11 and 14 and *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, 2009, par. 20.

<sup>24</sup> CEDAW Committee, *General Recommendation 28 on the Core Obligations of States Parties under Article 2*, 47th Session 2010, par. 22.

<sup>25</sup> Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010), p. 68-70; Nancy Levit, “Feminism for Men: Legal Ideology and the Construction of Maleness”, 43 *UCLA Law Review* (1996) p. 1037-1116, there 1054-1079.

<sup>26</sup> ECtHR, *Opuz v. Turkey*, App. No. 33401/02 (2009), par. 164 and 185-187.

<sup>27</sup> The list of reservations to CEDAW is *available at*

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#6](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#6).

<sup>28</sup> CEDAW Committee, *General Recommendation 25 on article 4, paragraph 1*, 20th Session 2004, par. 6-7.

*More than just formal equality: transforming the structural causes of discrimination*

11. Clearly, States Parties' obligations on the ground of CEDAW extend further than a purely formal legal obligation to treat women and men equally.<sup>29</sup> To guarantee equal treatment and ensure that there is no sex discrimination is just the first of three central obligations that States have under CEDAW. The third obligation, to address laws and societal structures that perpetuate gender-based stereotypes, has been called "transformative equality".<sup>30</sup> The object of transformative equality is to "dislodge the underlying norms and structures that create and reinforce a rigid and hierarchical status quo."<sup>31</sup> In other words, **equality as transformation aims to eliminate the root causes of gender discrimination** and gendered disadvantage. The CEDAW Committee recognizes that "[t]he position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed."<sup>32</sup> This requires "a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns."<sup>33</sup>

*The CEDAW Committee's Concluding Observations on Russia's country report*

12. In its most recent *Concluding Observations* on the periodic reports submitted by the Russian Federation, of July 2010, the CEDAW Committee emphasized that it is concerned "at the persistence of practices, traditions, patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life. In this respect, the Committee is concerned at the State party's repeated emphasis on the role of women as mothers and caregivers".<sup>34</sup> The Committee is of the opinion "that a shift from a focus on women primarily as wives and mothers to individuals and actors equal to men in society is required for the full implementation of the Convention and the achievement of equality of women and men."<sup>35</sup>

#### 4. OTHER INTERNATIONAL LEGAL MATERIALS

13. There is a rich body of materials that is developed by both international organizations and international courts acknowledging and addressing the link between gender stereotypes and gender inequality.

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<sup>29</sup> *Id.* at par. 6.

<sup>30</sup> See e.g., Sandra Fredman, 'Beyond the dichotomy of formal and substantive equality. Towards new definitions of equal rights', in: I. Boerefijn, F. Coomans, J. Goldschmidt, R. Holtmaat & R. Wolleswinkel (eds.), *Temporary special measures. Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of all Forms of Discrimination Against Women*, Antwerp/Oxford/New York: Intersentia 2003, p. 111-118; and Rikki Holtmaat & Jonneke Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Antwerp: Intersentia 2010), p. 26.

<sup>31</sup> Elsje Bonthuys, "Institutional Openness and Resistance to Feminist Arguments: the Example of the South African Constitutional Court", 20 *Canadian Journal of Woman and Law* (2008), p. 35 (citations omitted).

<sup>32</sup> CEDAW Committee, *General Recommendation 25 on article 4, paragraph 1*, 20th Session 2004, par. 10.

<sup>33</sup> *Id.*

<sup>34</sup> CEDAW Committee, *Concluding Observations*, Forty-sixth session July 2010, CEDAW/C/USR/CO/7, par. 20.

<sup>35</sup> *Id.* at par. 21.

- The **Parliamentary Assembly of the Council of Europe** has criticized the persistence of sexist stereotypes in the media and has acknowledged that the fight against gender stereotypes is “a means of preventing gender-based violence and promoting the effective achievement of equality between women and men”.<sup>36</sup>
- The **European Court of Justice** has recently condemned the perpetuation of “a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties”.<sup>37</sup>
- In the *Morales de Sierra* case the **Inter-American Commission on Human Rights** denounced the idea that men and women have separate roles in marriage, recognized that laws that institutionalize gender stereotypes harm the autonomy of women and that stereotyped notions about the roles of men and women have the effect of “inhibiting the role of men with respect to the home and children, and in that sense depriving children of the full and equal attention of both parents.”<sup>38</sup> Thereby the Commission endorses the argument that a model of parental responsibilities based on gender stereotypes does not serve the best interests of the child.
- In the case of *Case of González et al. (“Cotton Field”) v. Mexico* the **Inter-American Court of Human Rights** held: “subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices . . . The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.”<sup>39</sup>

## 5. INTERSECTIONAL DISCRIMINATION

### *The meaning of intersectional discrimination*

14. Related to the point about gender stereotypes, we want to suggest that this case is one that revolves around so-called intersectional discrimination; meaning discrimination based on several grounds that interact with each other, and produce specific types of discrimination.<sup>40</sup> Widely acknowledged in academic scholarship on equality and discrimination,<sup>41</sup> intersectionality is also officially recognized by the CEDAW Committee as a pertinent concept for understanding the scope of State Parties’ obligation to eliminate discrimination. The Committee states that: “States parties must legally recognize and

<sup>36</sup> PACE, Recommendation 1931 (2010), *Combating sexist stereotypes in the media*, available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1931.htm>.

<sup>37</sup> ECJ, Case C-104/09, *Roca-Álvarez v. Sesia Start España ETT SA* (2010), par. 36.

<sup>38</sup> Inter-American Commission on Human Rights, *Morales de Sierra v. Guatemala*, Case 11.625 (2001), par. 44.

<sup>39</sup> Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, (2009), par. 401.

<sup>40</sup> T. Makkonen, T. 2002. ‘Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore.’ Report 1102, Institute for Human Rights, Åbo Akademi University, 2002; available at <http://web.abo.fi/instut/imr/norfa/timo.pdf>.

<sup>41</sup> A seminal article is Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour”, 43 *Stanford Law Review* (1990-1991), p. 1241-1300. In the European context see Dagmar Schiek & Anna Lawson (eds.), *European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, (Farnham: Ashgate, 2011).

prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.”<sup>42</sup>

*Discrimination at the intersection of sex and military status*

15. In the present case, the difference in treatment that the applicant complains of cannot be reduced to either military status or sex, but is rather the result of a mix of these two grounds. Whether this Court makes an intersectional analysis of the grounds of discrimination or two separate analyses, is not solely of technical interest. The problem is that when discrimination on the basis of sex and discrimination on the basis of military status are disaggregated, the stereotypes concerning military servicewomen will recede to the background. If one set of comparisons concerns men and women in general, and the other set of comparisons concerns soldiers and civilians, then nowhere in this equation can the concerns of military servicemen and – even less so – servicewomen be recognized directly.

## 6. CONCLUSION

16. The CEDAW Committee approaches discrimination holistically. Such an approach aims at more than purely formal equality and seeks to combat the structural causes of discrimination. Gender stereotyping is one of these structural causes of discrimination. The deeply rooted female-caregiver/male-breadwinner stereotype limits the life-choices and the human dignity of both men and women. These written comments have argued that it is important to name gender stereotypes and recognize their harm. It is respectfully submitted that States should be held accountable when they discriminate on the ground of sex and perpetuate gender inequality on the basis of gender stereotypes.

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<sup>42</sup> CEDAW Committee, *General Recommendation 28 on the Core Obligations of States Parties under Article 2*, 47th Session 2010, par. 18.