Women and life imprisonment

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It is not clear why one should prohibit the imposition of life imprisonment on women, in circumstances where men could be sentenced to life imprisonment for the same offense. Yet there are some countries that do so. All of those that we could identify, except Albania, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia and Uzbekistan – were part of the former Soviet Union. In addition, Armenia, Bulgaria, Tajikistan and Ukraine prohibit the imposition of life imprisonment on women who were pregnant at the time of the commission of the offense or of the imposition of sentence.

One possible explanation is that the absolute prohibition of life sentences for women is linked to the idea that life imprisonment is a direct replacement for the death penalty and that historically these countries did not allow capital punishment for women either. The latter prohibition was not fully explained, as international law creates a specific exception that prohibits only the execution of pregnant women or women with small children. This is a sentiment which is reflected in the more narrowly targeted prohibition on life imprisonment for certain women in Ukraine after the abolition of the death penalty in that country.

The blanket prohibition on the imposition of life imprisonment for women was challenged before the ECtHR as discriminatory by two Russian men who were convicted of murder and given life sentences. In January 2017, in the case of Khamtokhu and Aksenchik v. Russia the Grand Chamber rejected their claim by 10 votes to 7.1 The arguments of the parties give an intriguing insight into the human rights issues at stake here and the underlying reasons for the Russian policy.2 On close reading it is apparent that the Grand Chamber was even more divided than indicated by the voting on the validity of the Russian justification for excluding women from ever facing the possibility of life imprisonment.

The human rights arguments of the applicants were straightforward. They contended that giving courts the discretion to impose life imprisonment on men, but not women (or children and older people), infringed against the prohibition on discrimination, in this instance on the basis of sex, in Article 14 of the ECHR. It followed, they argued, that the loss of liberty that their life sentences engendered was not lawful because of its discriminatory basis. In terms of Article 5(1)(e) of the ECHR loss of liberty following conviction can only be based on a lawful sentence.

The response of the Russian government was to argue that women differed from men in ways that justified their total exclusion. The differences they listed were “the special role of motherhood in society” and that women were “more psychologically vulnerable than men and were affected to a greater extent by the hardships of detention”. They added that, presumably for this reason, Russian legislation also “provided for more lenient conditions for women held in correctional colonies, while men were detained in harsher prison conditions”.3 The government could not refer to any international human rights standard that specifically excluded women from life sentences that could be imposed on men. However, it postulated that “international law instruments articulated a more humane attitude towards women, which did not amount to discrimination on account of sex” and that the prohibition on life imprisonment was of a piece

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1 Khamtokhu and Aksenchik v. Russia, ECtHR (Apps. 60367/08 and 961/11), January 24, 2017.
2 Khamtokhu and Aksenchik v. Russia, admissibility decision of May 13, 2014.
3 Ibid., § 24.
with this, as it was designed to achieve substantive rather than formal equality between men and women.4

In the Grand Chamber decision the main majority judgment accepted rather than endorsed the approach adopted by the Russian government towards female offenders, holding that “it was “not for the Court to reassess the evaluation made by the domestic authorities of the data in their possession [on female prison inmates in Russia and how they were treated] or of the penological rationale which such data purports to demonstrate”.

Three judges who concurred in the conclusion of the majority judgment, however, disagreed on this point. They all held, with the minority, that there was not sufficient justification, either in human rights law or in criminological knowledge about the differences in the pains of imprisonment between men and women, for reserving the possibility of life sentences for men only. Nevertheless, they did not vote for a finding of an infringement of Article 14 of discrimination on the basis of sex because in practice the outcome would have been that the Russian government would amend its law to include the women in the ambit of life imprisonment rather than to exclude men. Such an outcome would be “levelling down”, rather than “levelling up”. This was not the purpose of human rights intervention.

This approach led to some interesting wider reflections that the recognition of certain categories of persons on whom life imprisonment cannot be imposed may be a way of moving towards the gradual abolition of life imprisonment itself. As Judge Turković explained in his concurring opinion:

Although the Court was unable to discern an international trend either in favour of or against abolishing life imprisonment, it has identified exemption from life imprisonment as a progressive evolution of society in penological matters. Life imprisonment as the ultimate sanction gives rise to many of the same objections as the death sentence. Thus I fully agree with Judge Nußberger and Judge Mits [the other two judges who wrote concurring opinions] that it was important for the Court to look at this case from the broader perspective, taking into consideration the spirit of the Convention as a whole as an instrument advancing human rights. The right to human dignity has had an impact in that life imprisonment is now considered acceptable in Europe only under certain conditions. Serious arguments plead in favour of the abolition of life imprisonment. Gradual abolition, targeting groups that are more vulnerable to the harmful impact of life sentences, should be tolerated as a step towards its complete abolition in so far as that difference in treatment does not additionally harm those to whom life imprisonment continues to apply.5

When this concurring opinion is taken together with the dissenting opinion of Judge Pinto de Albuquerque, who argued that the solution to the dilemma of whether to impose life sentences on women as well, was to abolish life imprisonment completely, it becomes clear that restriction of the imposition of life imprisonment on certain categories of person, is a way towards critiquing the imposition of the penalty on anyone.

4 Ibid., § 21.

5 Khantokhu and Aksenchik v. Russia, January 24, 2017. Concurring opinion of Judge Turković, § 11.