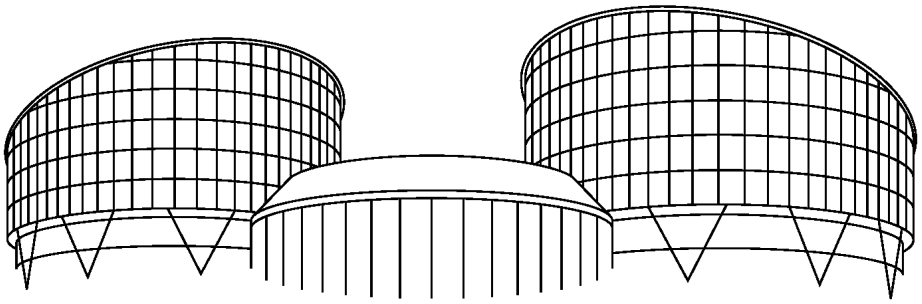

EUROPEAN COURT OF HUMAN RIGHTS

COUR EUROPÉENNE DES DROITS DE L'HOMME

Judicial Seminar 2020

The Convention as a Living Instrument at 70

Background Document

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Introduction

"*The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions*." *Tyrer v United Kingdom* 25 April 1978, § 31, Series A no. 26

It was more than 40 years ago that the first explicit reference to the Convention as a living instrument appeared in the Court's case-law in the judgment of *Tyrer v. United Kingdom*[1]. In that case, decided in 1978, the Court had to decide whether the corporal punishment of juveniles ordered by a domestic court amounted to degrading punishment within the meaning of Article 3. The punishment in question was "birching". "Birching" had been a common punishment used on juveniles and prisoners which consisted of being hit by a bundle of twigs bound together. Judicial corporal punishment of adults and juveniles had actually been abolished in England, Wales and Scotland in 1948 and in Northern Ireland in 1968. However, the facts of the case had taken place on the Isle of Man, which is a dependency of the Crown with its own government, legislature and courts and its own administrative, fiscal and legal systems. The United Kingdom argued that judicial corporal punishment could not be considered degrading because it 'did not outrage public opinion'. The Court rejected this argument. It noted that the public acceptance of an act was not an aspect which determined whether it was degrading or not. The Court noted that it was influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. In finding a breach of Article 3, the judgment relied on an interpretation of the Convention as living instrument in the light of present-day conditions.

Not long after *Tyrer*, the Court dealt with the case of *Marckx v. Belgium*[2], concerning the difference in treatment of children from so-called 'legitimate' and 'illegitimate' families. While admitting that at the time when the Convention was drafted, it was regarded as permissible to make this distinction, it noted that, "*the domestic law of the great majority of the member States of the Council of Europe has evolved and it continues to evolve, in company with the relevant international instrument*."

Another early case was *Dudgeon v United Kingdom*[3]. Considering the prohibition of homosexuality in Northern Ireland, the Court noted that "*as compared with the era when that legislation was enacted, there is now a better understanding, and in consequence, an increased tolerance of homosexual behaviour to the extent that it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied*".

The living instrument doctrine has been further refined in later case-law as follows:

[1] no. 5856/72, 25 April 1978, § 31.
[2] no. 6833/74, 13 June 1979, § 41.
[3] no. 7525/76, 22 October 1981, § 60.

"[…] the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. […]"[4]

To see whether or not the rights and freedoms enshrined in the Convention should evolve, the Court may have regard to developments in domestic legal systems which show a common approach or a developing trend between the Contracting States in a given area. This is called the search for a "European consensus" or an "emerging trend".

Consensus is the basis of the evolution of Convention standards, going beyond what may have been in the minds of the drafters of the Convention when they adopted the text. The existence of a common ground helps the Court to interpret Convention notions, to update them, and to decide whether a State's margin of appreciation should be wide or narrow. While the consensus-result is neither binding nor dispositive of the outcome, it is one of the indicative factors for the Court's decision-making. As a general rule, where there is a large degree of consensus, the State's margin of appreciation may be limited. Conversely, where there is an absence of consensus, the margin of appreciation enjoyed by the national authorities may be correspondingly wide.

The Court may also take into account the evolution of norms and principles of international law in order to interpret the provisions of the Convention. As the Court has stated on many occasions, the Convention cannot be interpreted in a vacuum and must be interpreted in harmony with other rules of international law, of which it forms part. In the case of *Magyar Helsinki Bizottság v. Hungary* [GC] no. 18030/11, 8 November 2016, the core question was whether Article 10 of the Convention could be interpreted as guaranteeing the applicant NGO a right of access to information held by public authorities. The Grand Chamber of the Court, by majority, held that there had been a violation of Article 10. A high degree of consensus had also emerged at the international level. In reaching its decision, it took into account the fact that the right to seek information was expressly guaranteed by Article 19 of the International Covenant on Civil and Political Rights 1966 and the existence of a right of access to information had been confirmed by the United Nations Human Rights Committee on a number of occasions. In addition, Article 42 of the European Union Charter of Fundamental Rights guaranteed citizens a right of access to certain documents. The adoption of the Council of Europe Convention on Access to Official Documents, even though it had only been ratified by seven member States at the time, denoted a continuous evolution towards the recognition of the State's obligation to provide access to public information.

[4] *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 146, 12 November 2008. See also *Öcalan v. Turkey* [GC], no. 46221/99, § 163, 12 May 2005, and *Selmouni v. France* [GC], no. 25803/94, § 101, 28 July 1999.

We now take for granted the fact that the European Convention on Human Rights is to be interpreted in light of present-day conditions, taking into account sociological, technological and scientific changes as well as evolving standards in the field of human rights. Previous openings of the judicial year have discussed the role of consensus in the European Court of Human Rights and its case-law (2008) and the limits of the evolutive interpretation (2011). However, as we celebrate the 70th anniversary of the European Convention it is time to look afresh at the living instrument doctrine and examine how it is used by the Court to maintain the effectiveness of the Convention. The current document focuses on three key areas: Gender Equality (A), The Environment (B), and Science and Technology (C).

A. Gender Equality[5]

"... [T]he advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention ... In particular, 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." (*Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, 2012)

Gender equality has been 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[6]. The cases selected below are by no means exhaustive. Nevertheless, they show the breadth of issues which can be raised under varied Articles of the Convention, such as questions of gender identity, domestic violence, gender stereotypes, gender and discrimination.

1. Domestic Violence

In *Opuz v. Turkey*, no. 33401/02, 09 June 2009, the applicant alleged that the Turkish authorities had failed to protect the right to life of her mother, who had been killed by her husband. Further, that they had been negligent in the face of the repeated violence, death threats and injury to which she herself had been subjected by him. The Court held that there had been a violation of Article 2 concerning the murder of the applicant's mother and a violation of Article 3 concerning the State's failure to protect the applicant. It also held (for the first time in a domestic violence case) that there had been a violation of Article 14 in conjunction with Articles 2 and 3. In this respect, the Court observed in particular that

[5] See the Court's Factsheets on Gender equality
https://www.echr.coe.int/Documents/FS_Gender_Equality_ENG.pdf

[6] *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 115, ECHR 2005-XI.

domestic violence affected mainly women, while the general and discriminatory judicial passivity in Turkey created a climate that was conducive to it. The violence suffered by the applicant and her mother could therefore be regarded as having been gender-based and discriminatory against women. The Court stated "in interpreting the provisions of the Convention and the scope of the State's obligations … the Court will also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW, as well as giving heed to the evolution of norms and principles in international law through other developments."

Talpis v Italy, no. 41237/14, 02 March 2017 concerned multiple incidents of domestic violence by the applicant's husband. The most serious of which resulted in the death of her son as he tried to protect the applicant from the husband's blows. The applicant complained to the authorities, but no investigation took place until seven months after her initial report, by which time she mitigated her allegations leading the judge to close the file concerning the violence. The Court found violations of Article 2, Article 3 and Article 14. It further found that the police underestimated the gravity of the violation through their inertia to respond within an appropriate time frame and effectively endorsed the violence. Consequently, the applicant, as a woman, had been a victim of discrimination prohibited by Article 14.

In *Bălşan v. Romania*, no. 49645/09, 23 May 2017, the Court therefore considered that the violence to which Ms Bălșan had been subjected had been gender-based violence, which is a form of discrimination against women. Despite the Government's adoption of a law and national strategy on preventing and combating such abuse, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors, as found in Ms Bălșan's case, indicated that there had been insufficient commitment to address domestic violence in Romania. Consequently, there had been a violation of Article 14, read in conjunction with Article 3.

In *Volodina v Russia*, no. 41261/17, 09 July 2019, the applicant experienced a sustained period of domestic abuse by her ex-partner over two years. The applicant had reported this treatment to the police on several occasions, but a criminal investigation was never opened, and key evidence was not secured. The Court found that physical and psychological domestic abuse including a single blow or verbal threat constituted inhuman or degrading treatment. The Court reiterated that the prohibition of ill treatment under Article 3 covers all forms of domestic violence without exception. Consequently, the police service had a positive duty to investigate domestic violence with 'special diligence'. Further, the Court found that in circumstances when the Claimant withdrew some of her complaints, these were still valid and there remained a need to take positive action. The Chamber also found a violation of Article 14. Reiterating the established case law which holds that a disproportionate negative effect on a certain group can constitute discrimination for the purposes of Article 14, the Court found domestic violence disproportionately affects women in Russia. Moreover, by tolerating for many years a climate which was conducive to domestic violence, the Russian authorities failed to create conditions for substantive gender

equality that would enable women to live free from fear of ill-treatment or attacks on their physical integrity and to benefit from the equal protection of the law.

2. Gender discrimination

a) Gender stereotypes

In *Petrovic v. Austria*, no. 20458/92, 27 March 1998, the applicant was denied parental leave allowance by local authorities on the basis that only mothers were entitled to it. He alleged that this amounted to a violation of Article 8 and Article 14. The Court considered there to be a lack of European consensus on the topic adding that welfare measures such as parental leave were "primarily intended to protect mothers and to enable them to look after very young children" (§ 40) and that, since the material time, Austria had gradually adopted legislation recognizing parental leave allowance for fathers also.

In *Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012, the applicant, a male-employee of the Russian armed forces, complained about the refusal by the Russian authorities to grant him parental leave. The national law granted three years' parental leave to military women and civilians in the same situation. The Court held that there had been a violation of Article 14 in conjunction with Article 8 as there were no reasonable and objective reasons to grant women in the military parental leave, but not to men. Evolving from the position expressed in *Petrovic v. Austria*, the Court held that, while certain restrictions in granting parental leave to an employee of the armed forces could be justifiable (for example, when a person cannot be replaced because their particular hierarchical position or involvement in active military actions), the sex of a person cannot be a factor to justify denying the right to parental leave.

In *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, 25 July 2017, the applicant, a 55 old woman, was the victim of a medical error with gynaecological complications that made it very difficult to have sexual relations. The applicant sued those responsible in court and received compensation for her moral suffering. However, the Portuguese Supreme Administrative Court reduced this compensation. The Court found a violation of Article 14 in conjunction with Article 8. In particular, the Court noted that the Portuguese Courts lowered the compensation for the moral suffering of the applicant on "the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age". In the Court's view "[t]hat assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people" (§ 52).

b) Sentencing policy

In *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, 24 January 2017, the Russian law excluded women from being sentenced to life imprisonment. The applicants, two men, complained that this represented a discrimination based on sex and age, being in breach of Article 14 in conjunction to Article 5. The Court found no discrimination based on

sex. Although the Court considered that men and women were in a comparable situation, it held that excluding women from life imprisonment was proportional to a legitimate aim, namely respecting "the principles of justice and humanity which required that the sentencing policy take into account the […] 'physiological characteristics' of various categories of offenders" (§ 70). With regard to upholding the analysed gender distinction, the Court relied on "various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood" (§ 82). The Court finally noted: "Since the delicate issues raised in the present case touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State." (§ 85)

In *Ēcis v. Latvia*, no. 12879/09, 10 January 2019, the applicant complained that men and women convicted of the same crime were treated differently when it came to the prison regime applied to them, in particular with regard to the right to prison leave, which meant he had not been able to attend his father's funeral. He relied on Article 14 (prohibition of discrimination), in conjunction with Article 8 (right to respect for private and family life), Article 5 (right to liberty and security) and Article 10 (freedom of expression). The Court concluded that while some differences in treatment could be justified, a blanket ban on males leaving prison, even to attend a funeral, did not help the goal of meeting the particular needs of female detainees. The refusal to assess Mr Ēcis's request to attend the funeral owing to a prison regime which was based on his sex had had no objective and reasonable justification and he had therefore suffered discrimination and a violation of his Convention rights.

c) Right to social benefits

In *Schuler-Zgraggen v. Switzerland*, no. 14518/89, 24 June 1993, after being declared unfit to work, the applicant was granted an invalidity pension. A few years later, she gave birth and her pension was cancelled on the ground that her family circumstances changed. The cancellation was based on the idea that women would always stay at home after giving birth and the pension could not be granted to non-working women. The Court found a violation of Article 14 in conjunction with Article 6 § 1 on the ground that the competent national court, the Federal Insurance Court, based its decision solely on the "assumption that women gave up work when they gave birth to a child". In this judgment the Court also set the principle that "advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention" (§ 67).

J.D. and A v. the United Kingdom, nos. 32949/17 and 34614/17, 24 October 2019 (not yet final) included a complaint that new rules on housing benefit in the social housing sector

(informally known as "the bedroom tax") were discriminatory based on gender. The tax caused a reduction in rental subsidy if occupants had more bedrooms than they were entitled to under the legislation, with the aim of incentivising them to move house. One of the applicants was a victim of domestic violence and lived in a specially adapted home, including a panic room, as part of a scheme whose aim was to allow victims of domestic violence to remain in their homes. The Court noted that the regulation's aim to encourage people to move was in conflict with the scheme's goal of allowing victims of gender-based violence to stay in their homes. The impact of treating this applicant, or other people within the scheme, in the same way as others subject to the new housing benefit rules was therefore disproportionate as it did not correspond to the legitimate aim of the measure. In the context of domestic violence States also had a duty to protect people from threats from others, including in situations where an individual's right to the enjoyment of his or her home free of violent disturbance was at stake.In conclusion the Court found that the second applicant had suffered a violation of her rights under Article 14 in conjunction with Article 1 of Protocol No. 1.

d) Family Names

The Court has referred to the Convention as a living instrument in two cases where it found a violation of Article 14 in relation to family names.

First, in *Burghartz v Switzerland*, no. 16213/90, 22 February 1994, the applicant challenged the lack of an option for husbands to take their wife's surname, when this option was available to women. The government argued that the difference was justified because the default provision was for the parties to take the husband's name as their family name. The Court held that the difference of treatment complained of lacked an objective and reasonable justification and accordingly contravened Article 14 taken together with Article 8.

In *Unal Tekeli v Turkey*, no. 29865/96, 16 November 2004, the applicant challenged the prohibition on women using their surnames as the family name where this option was available for men. The government tried to justify its position on the basis that there was a need to reflect family unity through the husband's name. In finding a violation of Article 14, the judgment reasoned, "the Court notes the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing" (§ 61). The Court cited in support of its position a number of international legal instruments within the UN and the Council of Europe and referred to the fact that Turkey was the only Member State which retained discriminatory provisions on the family name.

3. Women's political participation

In *Staatkundig Gereformeerde Partij v. the Netherlands*, no. 58369/10, 10 October 2012, the applicant (SGP) was a political party that based its doctrine on Christian-Protestantism. In accordance to its religious beliefs, SGP excluded women from its membership and from

running for office. After several organisations supporting women's rights brought civil proceedings against SGP, they modified the statute to admit women among its members but did not allow them to run for public office. In 2010, the Dutch Supreme Court required the State to take steps to ensure that SGP opens its lists of candidates for election to women. SGP complained that the decision of the Supreme Court was in breach of Articles 9, 10 and 11 for depriving its individual members of their right to freedom of religion, their right to freedom of expression and their right to freedom of assembly and association. The Court found this application inadmissible for being manifestly ill-founded. The Court held that democracy is the only model endorsed by the drafters of the Convention, and therefore the only model compatible with it. It then added that political parties must respect the principles of democracy and the equality of sexes as an important objective of the member states of the Council of Europe.

4. Gender identity[7]

In *Rees v. the United Kingdom*, no. 9532/81, 17 October 1986, a female-to-male transsexual complained that the United Kingdom law did not confer on him a legal status corresponding to his actual condition. The Strasbourg Court held that there had been no violation of Article 8. The changes demanded by the applicant would have involved fundamentally modifying the system for keeping the register of births, which would have had important administrative consequences and imposed new duties on the rest of the population. Furthermore, the Court attached importance to the fact that the United Kingdom had borne the costs of the applicant's medical treatment. However, the Court was conscious "of the seriousness of the problems affecting transsexuals and of the distress they suffer" and recommended "keeping the need for appropriate measures under review, having regard particularly to scientific and societal developments" (§ 47). The Court also held that there had been no violation of Article 12. It found that the traditional concept of marriage was based on union between persons of opposite biological sex. States had the power to regulate the right to marry.

The *Cossey v. the United Kingdom*, no. 10843/84, 27 September 1990, the Court maintained its position from *Rees v. the United Kingdom* in finding no violation of Article 8 or Article 12.

B. v. France, no. 13343/87, 25 March 1992, saw the Court conclude for the first time that there had been a violation of Article 8 in a case concerning the recognition of transsexuals. A male-to-female transsexual complained of the refusal of the French authorities to amend the civil-status register in accordance with her wishes. The Court held that there had been a violation of Article 8, taking into consideration factors distinguishing the case from *Rees v. the United Kingdom* and *Cossey v. the United Kingdom*, particularly the differences between the United Kingdom and the French civil status systems. Whilst there were major obstacles

[7] See the Court's Factsheet on Gender identity issues
https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf

in the United Kingdom preventing birth certificates from being amended, in France these were intended to be updated throughout the life of the person concerned. The Court agreed that in France many official documents revealed "a discrepancy between legal sex and apparent sex of a transsexual" (§ 59), which also appeared on social-security documents and payslips. The Court accordingly held that the refusal to amend the civil status register had placed the applicant "daily in a situation which was not compatible with the respect due to her private life" (§ 63).

In the case of *Sheffield and Horsham v United* Kingdom no. 22985/93, 04 September 1998, the Court was not persuaded that it should depart from its *Rees v United Kingdom* (see above) and *Cossey v. United Kingdom* (see above) judgments concerning the legal recognition of transsexuals. The Court commented "Transsexualism continues to raise complex scientific, legal, moral and social issues in respect of which there is no generally shared approach among the Contracting States" (§ 58). The Court held that there had been no violation of Articles 8, 12 and 14. However, it reaffirmed "that the area needs to be kept under permanent review by the Contracting States" due to "increased social acceptance and recognition of the problems which post-operative transsexuals encounter" (§ 60).

The Court reversed its approach in *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002. The applicant complained of the lack of legal recognition of her changed gender and in particular of her treatment in terms of employment and her social security and pension rights and of her inability to marry. The Court held that there had been a violation of Article 8, owing to a clear and continuing international trend towards increased social acceptance of transsexuals and towards legal recognition of the new sexual identity of post-operative transsexuals. The Court also held that there had been a violation of Article 12. It was "not persuaded that it [could] still be assumed that [marriage] must refer to a determination of gender by purely biological criteria" (§ 100). The Court held that it was for the State to determine the conditions and formalities of transsexual marriages but that it "finds no justification for barring the transsexual from enjoying the right to marry under any circumstances" (§ 103).

L. v. Lithuania, no. 27527/03, 11 September 2007, concerned the failure to introduce implementing legislation to enable a transsexual to undergo gender-reassignment surgery and change his gender identification in official documents. The Court held that there had been a violation of Article 8. Lithuanian law recognised transsexuals' right to change not only their gender but also their civil status. However, there was a gap in the legislation in that there was no law regulating full gender-reassignment surgery. This legislative gap had left the applicant in a situation of distressing uncertainty with regard to his private life and the recognition of his true identity. Budgetary restraints in the public-health service might have justified some initial delays in implementing the rights of transsexuals, but not a delay of over four years. Given the limited number of people involved, the budgetary burden would not have been unduly heavy. The State had therefore failed to strike a fair balance between the public interest and the applicant's rights.

In *Schlumpf v. Switzerland*, no. 29002/06, 08 January 2009 the applicant's health insurers refused to pay the costs of her sex-change operation on the ground that she had not complied with a two-year waiting period before gender reassignment surgery, as required by the case-law. The Court held that there had been a violation of Article 8. The waiting period had been applied mechanically without having regard to the age (67) of the applicant, whose decision to undergo an operation was likely to be affected by that delay, thus impairing her freedom to determine her gender identity.

In *Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014, the applicant was born a male and married a woman. The applicant underwent male-to-female gender reassignment surgery and changed her first names. Her request to be registered as female at the local registry office was refused. The applicant complained that she could not have her official documents changed to indicate her female gender unless her wife consented to the marriage being turned into a civil partnership, or unless the couple divorced. The Court held that there had been no violation of Article 8. It stated "In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one" (§ 75). It found that it was not disproportionate to require the conversion into a civil partnership as a precondition to legal recognition of an acquired gender as that provided legal protection for same-sex couples which matched that of marriage. The minor differences between these two legal concepts were not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation under Article 8. In addition, such a conversion would not have any implications for the applicant's family life as it would not affect the paternity, care, custody, or maintenance of the child. The Court further considered that no separate issue arose under Article 12 and found that there had been no violation of Article 14.

Y.Y. v. Turkey, no.14793/08, 10 March 2015, concerned the refusal by the Turkish authorities to grant authorisation for gender reassignment surgery on the grounds that the person requesting it was not permanently unable to procreate. The applicant – who was registered at the time of the application as female – complained of an infringement of his right to respect for his private life. He notably submitted that the discrepancy between his perception of himself as a man and his physical constitution had been established by medical reports and complained of the refusal by the domestic authorities to put an end to that discrepancy on the grounds that he was able to conceive. After several years, the Turkish courts granted the application and authorised the surgery. The Court held that there had been a violation of Article 8 in denying the operation for many years. The Court emphasised that the possibility for transsexuals to have full enjoyment of the right to personal development and physical and moral integrity could not be regarded as a controversial question.

In *A.P. Garçon and Nicot v. France*, no. 79885/12, 6 April 2017, three transgender persons of who wished to change their sex and forenames on their birth certificates were prevented

from doing so by the French courts. The applicants submitted that the authorities had infringed their right to respect for their private life by making recognition of sexual identity conditional on undergoing an operation involving a high probability of sterility. The Court held that there had been a violation of Article 8 on account of the obligation to establish the irreversible nature of the change in their appearance. It further held that there had been no violation of Article 8 on the obligation to prove that the applicants actually suffered from gender identity disorder or on account of the obligation to undergo a medical examination. In its judgment, the Court noted that although there was no consensus among the European States, there were clear law reforms in eleven States, including France, and similar reforms were being discussed in other States Parties to legally recognised pre-operative transgender people. This indicated that a trend had emerged in Europe changing the understanding of transgenderism

Most recently, *X v. 'the former Yugoslav Republic of Macedonia',* no. 22457/16), 17 January 2019 concerned a denied application for a transgender person to change the gender reference on their official documents. The Ministry of Justice dismissed the application on the grounds that there was no official document showing the applicant had undertaken genital surgery, despite there being no statutory provision that regulated the matter. The Court found a violation of Article 8 on account of the lack of a regulatory framework ensuring the right to respect for the applicant's private life.

B. The Environment[8]

Even though the European Convention on Human Rights does not as such enshrine a right to a healthy environment, the Court has developed a significant body of case-law in environmental matters. This is because the exercise of certain Convention rights may be undermined by pollution and exposure to environmental hazards.

There Court has developed important case-law under the right to life and the action needed to be taken by a State to prevent deaths linked to environmental disasters.

Where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, 8 July 2003; and *Fadeyeva v. Russia*, no. 55723/00, 9 June 2005). Furthermore, the adverse effects of the environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (see, among other authorities, *Lopez Ostra v. Spain* no. 16798/90, 9 December 1994). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or psychological effects. There would be no arguable claim under Article 8 if the

[8] See the Court's Factsheet on "Environment and the European Convention on Human Rights" https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf

detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city (see *Dzemyuk v. Ukraine*, 42488/02, § 78, 4 September 2014). Conversely, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *López Ostra*, cited above, § 51, and *Tătar v. Romania*, no. 67021/01, § 85, 27 January 2009). The State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention.

1. Environmental Law and Victim Status

In *Balmer-Schafroth e.a v. Switzerland* [GC], no. 22110/93, 26 August 1997, the applicants lived in villages situated in the vicinity of a nuclear power plant. They complained of having been denied access to a court regarding the decision of the Federal Council to grant the nuclear power plant an extension of its operating license. The Court held that Article 6 § 1 was not applicable because the connection between the Federal Council's decision and the domestic law rights invoked by the applicants (life, physical integrity, property) had been too tenuous and remote. The applicants could not show a 'serious, specific and imminent danger' ("the Balmer Test") affecting them personally, but rather a general danger in relation to all nuclear power plants; and many of the grounds they relied on were related to safety, environmental and technical features inherent in the use of nuclear energy. To the extent that the applicants' claim was thus about the dangerous nature of nuclear energy in general, the Court held that regulating the use of nuclear power was a policy decision for each State.

See also *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, 6 April 2000.

In *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, 27 April 2004, the applicants brought proceedings against plans to build a dam that would create nature reserves and flood a few small villages. They submitted that they had not had a fair hearing because they were prevented from taking part in the proceedings, whereas the Spanish government had been able to submit observations to the Constitutional Court. Since the applicants had set up an association for the specific purpose of defending its members' interests before the courts and those members were directly concerned by the dam project, the Court held that the applicants could claim to be victims within the meaning of Article 34 (right to individual application). However, given the specific details of the case, the Court held that there had been no violation of Article 6 § 1. This case is of additional significance as the Court accepted that, for the purpose of the exhaustion of domestic remedies, the applicants could institute and participate in the domestic proceedings via the NGO.

See also *Collectif Stop Melox and Mox v. France*, no. 75218/01, 12 June 2007.

In *L'Erablière asbl v. Belgium*, no. 49230/07, 24 February 2009, the applicant was a non-profit entity campaigning for the protection of the environment, contesting government

permission to expand a waste collection site. The claim was not allowed by the Conseil d'État on procedural grounds: it had not included a statement of the facts explaining the background to the dispute. The applicant association alleged that the inadmissibility decision of the Conseil d'État amounted to a violation of its right of access to a court. The Court reiterated that for Article 6 (right to a fair trial) to be applicable, there must be a dispute with a sufficient link to a civil right (and not concerning the mere existence of a law or a court decision affecting third parties). An association defending the specific interest of the members could assert this right. In the present case, increasing the capacity of the waste collection site could directly affect the private life of the members of the applicant association, and its aim was limited to the protection of the environment in one region. Consequently, the Court held that the association had standing, and found a violation of Article 6 § 1 because the limitation on the right of access to a court imposed had been disproportionate to the requirements of legal certainty and the proper administration of justice.

Bursa Barosu Başkanlığı and Others v. Turkey, no. 25680/05, 16 June 2018 concerned the failure to enforce numerous judicial rulings setting aside administrative decisions authorizing the construction and operation of a starch factory on farmland in a district of Bursa by a U.S. company. The applicants were the Bursa Barosu Başkanlığı (Bursa Bar Association) and the Association for the Protection of Nature and the Environment, as well as 21 individuals who lived in the area of the factory. The Court firstly noted that the application was admissible in respect of only six of the applicants, namely those who had participated actively in the domestic proceedings seeking the annulment of the impugned administrative decisions and who could therefore claim to be victims, within the meaning of Article 34 (right of individual application). In respect of these six applicants, the Court held that there had been a violation of Article 6 § 1 of the Convention, finding in particular that, by refraining for several years from taking the necessary measures to comply with a number of final and enforceable judicial decisions, the national authorities had deprived them of effective judicial protection.

2. Environmental Disasters and the Right to Life

In *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004, the applicant's dwelling was built on land surrounding a large rubbish tip used jointly by four district councils. A methane explosion occurred at the tip and the refuse eruption engulfed the house of the applicant, who lost nine close relatives. The applicant complained that no measures had been taken to prevent an explosion despite an expert report having drawn the authorities' attention to the need to act preventively. The Court held that there had been a violation of Article 2 on account of the lack of appropriate steps to prevent the accidental deaths. It also held that there had been an Article 2 violation, on account of the lack of adequate protection by law safeguarding the right to life. The Court observed that the Turkish Government had not provided the applicant with information about the risks he ran by living there or taken the necessary practical measures to avoid the risks to people's lives. A further violation of

Article 1 and Article 13 as regards the complaint under the substantive head of Article 2 and a violation of Article 13 as regards the complaint under Article 1 of Protocol No. 1.

In *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, the applicants' town, situated in the mountain district, was devastated by a mudslide. Eight people were killed, including the first applicant's husband. As a result of the disaster, the applicants sustained injuries, psychological trauma and lost their homes. The applicants alleged that the Russian authorities had failed to mitigate the consequences of the mudslide and to carry out a judicial enquiry into the disaster. The Court held that there had been a violation of Article 2 of the Convention under its substantial limb, on account of the Russian authorities' failure to protect the life of the first applicant's husband, and, the applicants and the residents of the town from mudslides which devastated their town. There had indeed been no justification for the authorities' failure to implement land-planning and emergency relief policies in the hazardous area of the town concerning the foreseeable risk to the lives of its residents. The Court also held that there had been a violation of Article 2 of the Convention under its procedural limb, on account of the lack of an adequate judicial enquiry into the disaster. The question of Russia's responsibility for the accident in the town had indeed never as such been investigated or examined by any judicial or administrative authority.

In *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012, the applicants lived near a river and water reservoir and were affected by a heavy flash flood in the region. They submitted that the authorities had put their lives at risk by releasing the water without any warning and failing to maintain the river channel, and that there had been no adequate judicial response. The Court held that Russia had failed in its positive obligation to protect the applicants' lives under the substantive limb of Article 2. It further held that there had been a violation of Article 2 in its procedural aspect, since the judicial response had not secured the full accountability of the officials or the authorities in charge. There were also violations of Articles 8 and 1 of Protocol No. 1 (protection of property), since the responsible officials and authorities had failed to do everything in their power to protect the applicants' rights under these provisions. However, there was no violation of Article 13 (right to an effective remedy) since the applicants could bring civil proceedings to claim compensation and the Russian law allowed for criminal proceedings.

3. Participatory Rights

In *Guerra and Others v. Italy*, no. 14967/89, 19 February 1998, the applicants lived near a chemical factory producing fertilisers. Accidents due to malfunctioning had already occurred in the past, the most serious one in 1976 when an explosion allowed several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, to escape. The applicants alleged in particular that the lack of practical measures to reduce pollution levels and major-accident hazards, had infringed their right to respect for their lives and physical

integrity. They also complained that the relevant authorities' failure to inform the public about the hazards and about the procedures to be followed in the event of a major accident had infringed their right to freedom of information. The Court held that there had been a violation of Article 8 of the Convention, finding that the Italian State had not fulfilled its obligation to secure the applicants' right to respect for their private and family life. It reiterated in particular that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. In the instant case the applicants had waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in a town particularly exposed to danger in the event of an accident at the factory. Having regard to its conclusion that there had been a violation of Article 8, the Court further found it unnecessary to consider the case under Article 2 (right to life) of the Convention also.

In *Roche v. the United Kingdom* [GC], no. 32555/96, 19 October 2005, the applicant was discharged from the British Army. 20 years later he developed high blood pressure and later suffered from hypertension, bronchitis and bronchial asthma. He was registered as an invalid and maintained that his health problems were the result of his participation in mustard and nerve gas tests conducted by the Army. The applicant complained in particular that he had not had access to all relevant and appropriate information that would have allowed him to assess the risks of those tests. The Court held that there had been a violation of Article 8 of the Convention finding that the United Kingdom had not fulfilled its positive obligation to enable the applicant to have access to information which would allow him to assess the risks of the tests. The Court observed in particular that an individual, such as the applicant, who had consistently pursued such disclosure independently of any litigation, should not be required to litigate to obtain disclosure.

In *Tătar v. Romania*, no. 67021/01, 27 January 2009, the applicants alleged in particular that the process (involving the use of sodium cyanide in the open air) used by a company in their gold mining activity, near their home, put their lives in danger. In January 2000 an environmental accident had occurred at the site releasing cyanide-contaminated water into the environment. The Court held that there had been a violation of Article 8 of the Convention, finding that the Romanian authorities had failed in their duty to satisfactorily assess the risks that the mining might entail, and to take suitable measures in order to protect those concerned. The Court recalled in particular that pollution could interfere with a person's private and family life by harming his or her well-being, and that the State had a duty to ensure the protection of its citizens by regulating the authorising, setting-up, operating, safety and monitoring of industrial activities, especially activities that were dangerous for the environment and human health. It further noted that, in the light of what was currently known about the subject, the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. It observed that the absence of certainty with regard to current scientific and technical knowledge could not justify any

delay on the part of the State in adopting effective and proportionate measures. The Court also pointed out that authorities had to ensure public access to the conclusions of investigations and studies, reiterating that the State had a duty to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues.

See also *Giacomelli v. Italy*, no. 59909/00, 2 November 2006.

Brincat and Others v. Malta, nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014, concerned ship-yard repair workers who were exposed to asbestos which led to them suffering from asbestos related conditions. The applicants complained in particular about their or their deceased relative's exposure to asbestos and the Maltese Government's failure to protect them from its fatal consequences. The Court held that there had been a violation of Article 2 (right to life) of the Convention in respect of the relative who had died, and a violation of Article 8 of the Convention in respect of the remainder of the applicants. It found in particular that, in view of the seriousness of the threat posed by asbestos, and despite the margin of appreciation left to States to decide how to manage such risks, the Maltese Government had failed to satisfy their positive obligations under the Convention, to legislate or take other practical measures to ensure that the applicants were adequately protected and informed of the risk to their health and lives. Indeed, at least from the early 1970s, the Maltese Government had been aware or should have been aware that the ship-yard workers could suffer from consequences resulting from the exposure to asbestos, yet they had taken no positive steps to counter that risk until 2003.

4. Pollution

In *Lopez Ostra v. Spain*, no. 16798/90, 9 December 1994, applicant's town had a heavy concentration of leather industries. She complained of the municipal authorities' inactivity in respect of the nuisance (smells, noise and polluting fumes) caused by a waste-treatment plant situated a few meters away from her home which led to health issues (Article 8). The applicant also submitted that these matters were of such seriousness and had caused her such distress that they could reasonably be regarded as amounting to degrading treatment (Article 3). Even though the applicant had since moved out of the home and the waste plant had closed, the Court recognised that the applicant's family had suffered for years by living close to the waste plant. Since serious pollution can impact an individual's well-being and prevent one from enjoying one's home, the right to private and family life was found to have been violated. Nonetheless, the conditions suffered did not amount to degrading treatment, and hence no violation of Article 3.

In *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, 8 July 2003, the applicants, all of whom lived or had lived close to Heathrow airport, submitted that United Kingdom Government policy on night flights at Heathrow airport had given rise to a violation of their rights under Article 8 of the Convention. They alleged in particular that their health had suffered as a result of regular sleep interruptions caused by night-time planes. In this case

the Court observed that the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention. However, the Grand Chamber held that there had been no violation of Article 8 of the Convention, finding in particular that the United Kingdom had not overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole. The Court found that there was an economic interest in maintaining a full service of night flights, that only a small percentage of people had suffered by the noise, that the housing prices had not dropped, and that the applicants could move elsewhere without financial loss.

In *Dubetska and Others v. Ukraine*, no. 30499/03, 10 February 2011, the applicants complained that their health, house and living environment had been damaged as a result of a State-owned coal mine operating nearby. They complained that the Ukrainian authorities had done nothing to remedy the situation. The Court held that there had been a violation of Article 8 of the Convention, on the basis that the Ukrainian authorities had been aware of the adverse environmental effects of the mine and factory but had neither resettled the applicants, nor found a solution to diminish the pollution to safer levels. Moreover, despite attempts to penalise the factory owner and to bring about the applicants' resettlement, for 12 years the authorities had not found an effective solution to the situation. The Court also held that by finding a violation of Article 8, it established the Ukrainian Government's obligation to take appropriate measures to remedy the situation.

See also *Fadeyeva v. Russia*, no. 55723/00, 9 June 2005 and *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006.

Di Sarno and Others v. Italy, no. 30765/08, 10 January 2012 concerned the state of emergency in relation to waste collection, treatment and disposal over a period of five months in which rubbish piled up in the streets. The applicants complained that by omitting to take the necessary measures to ensure the proper functioning of the public waste collection service and by implementing inappropriate legislative and administrative policies, the State had caused serious damage to the environment in their region and placed their lives and health in jeopardy. The Court held that, since the collection, treatment and disposal of waste were hazardous activities, the State had a duty to adopt reasonable and appropriate safety and environmental measures. In this case, there was a violation of the substantive aspect of Article 8. Italy was unable to ensure the proper functioning of the waste collection, treatment and disposal service for an extended period of time, resulting in an infringement of the applicants' right to respect for their private lives and their homes. This failure could not be justified by the margin of appreciation doctrine. Yet, there was no violation of Article 8 in its procedural aspect: the government had commissioned and published reports that informed residents of potential risks of continuing to live in the area. Lastly, the Court found a violation of Article 13 (right to an effective remedy) due to the

absence of effective remedies in the Italian legal system that allowed for redress for the damage sustained.

In *Jugheli and Others v. Georgia*, no. 38342/05 13 July 2017, the application was made by three Georgian nationals who complained that a thermal power plant located in close proximity to their homes had endangered their health and well-being. The "Tboelectrocentrali" power plant was located approximately four metres from the block of flats where the applicants lived in Tbilisi. The power plant first started operation in 1939 and according to the applicants, while operational, the plant's potentially dangerous activities were not subject to the relevant regulations, as a result of which it produced air pollution which negatively affected their health and well-being. Their claims for compensation in the Georgian courts were all rejected. The Court ruled that the State had failed to protect them from the power plant's pollution and as such, had breached Article 8.

Recently, in *Cordella and Others v. Italy*, nos. 54414/13 and 54264/15, 24 January 2019, 180 applicants complained about the effects of toxic emissions from the Ilva steelworks in Taranto on the environment and on their health. The Court found a violation of Article 8 and, crucially, ordered the respondent State to organise a clean-up of the natural environment which had been affected. The Court found a further violation of Article 13 due to the persistence of a situation of environmental pollution endangered the health of the applicants and, more generally, that of the entire population living in the areas at risk. Lastly, the Court considered that these applicants had not had available an effective remedy enabling them to raise with the national authorities their complaints concerning the fact that it was impossible to obtain measures to secure decontamination of the relevant areas.

C. Science and Technology[9]

The progress made in technology and science has been unprecedented over the life of the Convention. Significant advances continue to occur and with increasing frequency. In this area, the Court is often asked to take into consideration technically complex developments, such as in cases relating to bulk interception of data, and other cases which raise sensitive ethical considerations, from example in relation to artificial procreation.

The Court has had to interpret "correspondence", provided for in Article 8 of the Convention, to include emails, even though internet and email were not envisaged at the time of the drafting. In addition, questions concerning access to information and freedom of expression via the internet (Article 10), monitoring of private electronic communications and access to content including in a work environment (Article 8) and even right to

[9] See the Court's Factsheet on New technologies
https://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf

education using digital tools of communication (Article 2 of Protocol 1) have been examined by the Court.

1. The Internet

a) Freedom of Expression on the Internet

In *Ahmet Yildirim v. Turkey* [GC], no 3111/10, 18 March 2013, a court took the decision to block access to a Google Site which insulted the memory of a Turkish President. As a result of the decision, access to all other sites hosted by the service was blocked. The applicant complained that he was unable to access his own, unrelated, website because of this measure. The Court held that there had been a violation of Article 10, finding that the effects of the measure in question had been arbitrary and the judicial review of the blocking of access had been insufficient to prevent abuses. The Court noted that the Internet has now become one of the principal means of exercising the right to freedom of expression and information. The Court also reiterated in particular that a restriction on access to a source of information was only compatible with the Convention if a strict legal framework was in place regulating the scope of a ban and affording the guarantee of judicial review to prevent possible abuses.

In *Delfi A.S. v. Estonia*, no. 64569/09, 16 June 2015, the applicant was an Estonian public limited company which owned one of the largest internet news sites in the country. It published an article concerning a ferry company which had changed its route causing ice to break where cheaper and faster connections by ice roads were planned. The article received a number of highly offensive and threatening posts targeting the ferry company and its owner. The owner of the ferry company sued Delfi and successfully obtained a judgment against it in June 2008. The Estonian court found that the comments were defamatory, and that Delfi was responsible for them. Relying on Article 10, Delfi complained that the Estonian civil courts found it liable for comments written by its readers. The Grand Chamber considered that the offensive comments posted on Delfi's news portal, amounting to hate speech or incitement to violence, did not enjoy the protection of Article 10 and thus the freedom of expression of the authors of the comments was not at issue. The Court observed further, that Delfi had sufficient control over the portal so as to render them beyond that of a passive, purely technical service provider. Further, steps taken by Delfi to prevent or remove the defamatory comments once published had been insufficient. The Court ruled that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the portal's freedom of expression. Accordingly, there had been no violation of Article 10 of the Convention.

Cengiz and Others v. Turkey, nos. 48226/10 and 14027/11, 01 December 2015, concerned the wholesale blocking of access to YouTube, a website enabling users to send, view and share videos. The applicants complained of an infringement of their right to freedom to

receive and impart information and ideas. The Court held that there had been a violation of Article 10, finding that the interference resulting from the application of the impugned provision of the law in question did not satisfy the requirement of lawfulness under the Convention and that the applicants had not enjoyed a sufficient degree of protection. The Court also observed that YouTube was a single platform which enabled information of specific interest, particularly on political and social matters, to be broadcast and citizen journalism to emerge. The Court further found that there was no provision in the law allowing the domestic courts to impose a blanket blocking order on access to the Internet, and in the present case to YouTube, on account of one of its contents.

Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no 22947/13, 02 February 2016, concerned the liability of a self-regulatory body of Internet content providers and an Internet news portal for vulgar and offensive online comments posted on their websites. The applicants complained about the Hungarian courts' rulings against them which obliged them to moderate the contents of comments made by readers on their websites, arguing that that had gone against the essence of free expression on the Internet. The Court held that there had been a violation of Article 10. It reiterated in particular that, although not publishers of comments in the traditional sense, internet news portals had to, in principle, assume duties and responsibilities. However, the Court considered that the Hungarian courts, when deciding on the notion of liability in the applicants' case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate websites' right to respect for its commercial reputation.

b) Access to information on the Internet

Internet access for prisoners has also been the subject of article 10 violations. In *Kalda v. Estonia*, no. 17429/10, 19 January 2016, a prisoner complained about the authorities' refusal to grant him access to three Internet websites, containing legal information, run by the State and by the Council of Europe. The applicant complained that the ban under Estonian law on his accessing these specific websites had breached his right to receive information via the Internet and prevented him from carrying out legal research for court proceedings in which he was engaged. The Court held that there had been a violation of Article 10, finding that the refusal to grant the applicant access to legal information had breached his right to receive information. The Court noted that Contracting States are not obliged to permit prisoners to access the Internet. It found, however, that if a State was willing to allow prisoners access, as was the case in Estonia, it had to give reasons for refusing access to specific sites. In the specific circumstances of the applicant's case, the reasons, namely the security and costs implications, had not been enough to justify the interference with his right to receive information.

Most recently, access to the Internet has been the subject of a case concerning the right to education. In *Mehmet Reşit Arslan and Orhan Bingöl v. Turkey*, nos. 47121/06, 13988/07

and 34750/07, 18 June 2019, the applicants, who had previously received life imprisonment for membership of an illegal armed organisation, complained of being prevented from using a computer and accessing the Internet. They submitted that these resources were essential in order for them to continue their higher education and improve their general knowledge. The Court held that there had been a violation of Article 2 of Protocol No. 1 (right to education). It found that the domestic courts had failed to strike a fair balance between their right to education on the one hand and the imperatives of public order on the other.

2. Retention of Personal Data

Violations of Article 8 have been found regarding multiple types of personal data. The applicant in *Malone v. the United Kingdom*, no. 8691/79, 02 August 1984 was charged with a number of offences relating to dishonest handling of stolen goods. The complaint concerned the interception of his postal and telephone communications by or on behalf of the police, and the monitoring of his telephone calls. The Court held that there had been a violation of Article 8, as regards both interception of communications and release of records of metering to the police, because they had not been in accordance with the law.

In *Rotaru v. Romania* [GC], no. 28341/95, 04 May 2000, the applicant complained that it was impossible to refute what he claimed was untrue information in a file on him kept by the Romanian Intelligence Service (RIS). He had been sentenced to a year's imprisonment in 1948 for having expressed criticism of the communist regime. The Court held that there had been a violation of Article 8, finding that the holding and use by the RIS of information about the applicant's private life had not been in accordance with the law. The Court observed that public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. It further noted that no provision of domestic law defined the procedure to be followed for collecting and storing data. In this case there Court also held that there had been a violation of Article 13 (right to an effective remedy) of the Convention because it was impossible for the applicant to challenge the data storage or to refute the truth of the information.

P.G. and J.H. v. the United Kingdom, no. 44787/98, 25 September 2001 concerned in particular the recording of the applicants' voices, following their arrest on suspicion of being about to commit a robbery. The Court held that there had been a violation of Article 8 concerning the use of covert listening devices. Noting that there existed no statutory system to regulate the use of covert listening devices by the police, the Court found the interference with the applicants' right to a private life was not in accordance with the law.

S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, 4 December 2008, concerned the indefinite retention in a database of the applicants' fingerprints, cell samples and DNA profiles after criminal proceedings against them had been terminated by an acquittal in one case and discontinued in the other case. The Court held that there had been a violation of Article 8, finding that the data retention had constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded

as necessary in a democratic society. The Court considered in particular that the use of modern scientific techniques in the criminal-justice system could not be allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. The Court noted "the strong consensus existing among the Contracting States in this respect is of considerable importance and narrows the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere. The Court considers that any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance in this regard" (§ 112). Finally, the Court interpreted Article 8 to include protection from destruction of personal data.

In *L.H. v. Latvia*, no. 52019/07, 29 April 2014, the applicant alleged in particular that the collection of her personal medical data by a State agency without her consent had violated her right to respect for her private life. The Court recalled the importance of the protection of medical data to a person's enjoyment of the right to respect for private life. It held that there had been a violation of Article 8, finding that the applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on competent authorities and the manner of its exercise. The Court noted in particular that Latvian law in no way limited the scope of private data that could be collected by the State Agency, which resulted in it collecting medical data on the applicant relating to a seven-year period indiscriminately and without any prior assessment of whether such data could be potentially decisive, relevant or of importance for achieving whatever aim might have been pursued by the inquiry at issue.

Monitoring of an employee's computer use can constitute a violation of Article 8 as in *Bărbulescu v. Romania* [GC], no. 61496/08, 05 September 2017. This case concerned the decision of a private company to dismiss an employee (the applicant) after monitoring his electronic communications and accessing their contents. The applicant complained that his employer's decision was based on a breach of his privacy and that the domestic courts had failed to protect his right to respect for his private life and correspondence. The Grand Chamber held that there had been a violation of Article 8, finding that the Romanian authorities had failed to strike a fair balance between the interests at stake. In particular, the national courts had failed to determine whether the applicant had received prior notice from his employer of the possibility that his communications might be monitored; nor had they had regard either to the fact that he had not been informed of the nature or the extent of the monitoring, or the degree of intrusion into his private life and correspondence.

In *Ben Faiza v. France*, no. 31446/12, 08 February 2018, surveillance measures had been taken against the applicant in a criminal investigation into his involvement in drug-trafficking offences. The applicant alleged that these measures (both the installation of a geolocation device on his vehicle and the court order issued to a mobile telephone operator to obtain records of his incoming and outgoing calls, together with the cell tower pings from his telephones, thus enabling the subsequent tracking of his movements) had constituted an interference with his right to respect for his private life. The Court held that there had been

a violation of Article 8 as regards the geolocation of the applicant's vehicle by means of a GPS, finding that French law did not indicate with sufficient clarity to what extent and how the authorities were entitled to use their discretionary power. The applicant had therefore not enjoyed the minimum protection afforded by the rule of law in a democratic society. The Court further held that there had been no violation of Article 8 concerning the court order issued to a mobile telephone operator to obtain the list of cell towers pinged by the applicant's phone for subsequent tracking of his movements. The court order had constituted an interference with the applicant's private life but was in accordance with the law. Further, the order had been aimed at establishing the truth in the context of criminal proceedings and had thus pursued the legitimate aims of preventing disorder or crime. The Court also considered that the measure had been necessary in a democratic society because it was aimed at breaking up a major drug-trafficking operation.

3. Interception of communication

The case of *Roman Zakharov v. Russia*, no 47143/06, 4 December 2015 concerned the system of secret interception of mobile telephone communications in Russia. The applicant, an editor-in-chief of a publishing company, complained in particular that mobile network operators in Russia were required by law to install equipment enabling law-enforcement agencies to carry out operational-search activities and that did not have sufficient safeguards under Russian law. The Court held that there had been a violation of Article 8, finding that the Russian legal provisions governing interception of communications did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse. The Court stated "especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures" (§ 229). Moreover, the effectiveness of the remedies available to challenge interception of communications was undermined by the fact that they were available only to persons who were able to submit proof of interception and that obtaining such proof was impossible in the absence of any notification system or possibility of access to information about interception.

4. Mass surveillance

In *Szabó and Vissy v. Hungary*, no. 37138/14, 12 January 2016, the applicants complained that they could potentially be subjected to unjustified and disproportionately intrusive measures within the Hungarian legal framework on secret surveillance for national security purposes which was prone to abuse. The Court held that there had been a violation of Article 8. It accepted that it was a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies, including massive monitoring of communications, in pre-empting impending incidents. However, the Court

was not convinced that the legislation in question provided enough safeguards to avoid abuse. It noted "Given the technological advances … the potential interferences with email, mobile phone and Internet services as well as those of mass surveillance attract the Convention protection of private life even more acutely" (§ 53). Notably, the scope of the measures could include virtually anyone in Hungary, with new technologies enabling the Government to intercept masses of data easily concerning even persons outside the original range of operation. Furthermore, the ordering of such measures was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary and without any effective remedial measures, let alone judicial ones, being in place. The Court further held that there had been no violation of Article 13 (right to an effective remedy) of the Convention taken together with Article 8, reiterating that Article 13 could not be interpreted as requiring a remedy against the state of domestic law.

In *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, 13 September 2018, (case pending before the Grand Chamber), applications were lodged after revelations by Edward Snowden (former contractor with the US National Security Agency) about programmes of surveillance and intelligence sharing between the USA and the United Kingdom. The case concerns complaints by journalists, individuals and rights organisations about three different surveillance regimes: (1) the bulk interception of communications; (2) intelligence sharing with foreign governments; and (3) the obtaining of communications data from communications service providers. Complaints have been made under Articles 8, 6, 10 and 14.

Another pending case before the Grand Chamber on the question of the bulk interception of communications is *Centrum för rättvisa v. Sweden*, no. 35252/08, 19 June 2018. In that case, the applicant foundation believes in particular that there is a risk that its communications through mobile telephones and mobile broadband have been or will be intercepted and examined by way of signals intelligence.

5. Biotechnology

In *Evans v. United Kingdom* [GC], no. 6339/05, 10 April 2007, the applicant, who was suffering from ovarian cancer, underwent in-vitro fertilisation (IVF) with her then partner before having her ovaries removed. The embryos were created and placed in storage. When the couple's relationship ended, her ex-partner withdrew his consent for the embryos to be used. National law required that the eggs be destroyed. The applicant complained that this preventing her from ever having a child to whom she would be genetically related. The Court ruled that the issue of when the right to life began came within the State's margin of appreciation. The Grand Chamber found that the embryos created by the applicant and her former partner did not have a right to life. It therefore held that there had been no violation of Article 2. The Grand Chamber further considered that, "given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the

attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention".

In *S.H. and Others v. Austria* [GC], no. 57813/00, 3 November 2011, two Austrian couples wished to conceive a child through IVF. One couple needed the use of sperm from a donor and the other, donated ova. Austrian law prohibits the use of sperm for IVF and ova donation in general. The Court noted that, although there was a clear trend across Europe in favour of allowing gamete donation for in-vitro fertilisation, the emerging consensus was still under development and was not based on settled legal principles. Austrian legislators had tried, among other things, to avoid the possibility that two women could claim to be the biological mother of the same child. They had approached carefully a controversial issue raising complex ethical questions and had not banned individuals from going overseas for infertility treatment. The Court concluded that there had been no violation of Article 8. However, it underlined the importance of keeping legal and fast-moving scientific developments in the field of artificial procreation under review.

In *Parrillo v. Italy* [GC], no. 46470/11, 27 August 2015, a ban under Italian Law "no. 40/2004", prevented the applicant from donating to scientific research embryos obtained from an in vitro fertilisation. Under Article 1 of Protocol No. 1 (protection of property), the applicant complained that she was unable to donate her embryos to scientific research and was obliged to keep them in a state of cryopreservation until their death. The applicant also considered that the prohibition amounted to a violation of her Article 8 rights. The Court, which was called upon for the first time to rule on this issue, held that Article 8 was applicable in this case under its "private life" aspect, as the embryos in question contained the applicant's genetic material and accordingly represented a constituent part of her identity. The Court considered at the outset that Italy was to be given a wide margin of appreciation on this sensitive question, as confirmed by the lack of a European consensus and the international texts on this subject. Noting, lastly that there was no evidence that the applicant's deceased partner would have wished to donate the embryos to medical research, the Court concluded that the ban in question had been necessary in a democratic society. In consequence, the Court held that there had been no violation of Article 8. With regard to Article 1 of Protocol No. 1, the Court considered that it did not apply to the present case, since human embryos could not be reduced to "possessions" within the meaning of that provision.

6. Surrogacy

The cases of *Mennesson and Others v. France*, no. 65192/11, 26 June 2014, and *Labassee v. France*, no. 65941/11, 26 June 2014 concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment. The applicants complained that they were unable to obtain recognition in France

of parent-child relationships that had been legally established abroad. In both cases the Court held that there had been no violation of Article 8 concerning the applicants' right to respect for their family life. However, it held in both cases that there had been a violation of Article 8 concerning the children's right to respect for their private life. It considered that the contradiction of recognition between the United States and France undermined the children's identity. The Court further noted that the case-law completely precluded the establishment of a legal relationship between children born as a result of lawful surrogacy treatment abroad and their biological father. This overstepped the wide margin of appreciation left to States in the sphere of decisions relating to surrogacy.

The case of *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24 January 2017, concerned the placement in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract entered into with a Russian woman by an Italian couple (the applicants) due to the lack of biological relationship. The applicants complained, in particular, about the child's removal from them, and about the refusal to acknowledge the parent-child relationship established abroad by registering the child's birth certificate in Italy. The Grand Chamber found that there had been no violation of Article 8. Having regard to the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, the Grand Chamber held that a family life did not exist between the applicants and the child. The Grand Chamber also accepted that the Italian courts, having concluded in particular that the child would not suffer grave or irreparable harm as a result of the separation, had struck a fair balance between the different interests at stake, while remaining within the margin of appreciation available to them.

In 2019, the Court gave an *advisory opinion* requested by the French Court of Cassation concerning the recognition in domestic law of a legal parent-child relationship between, on the one hand, a child born through a gestational surrogacy arrangement abroad using the gametes of the intended father and a third-party donor and, on the other, the intended mother, knowing that the legal relationship with the intended father has been recognised (Request No. P16-2018-001, 10 April 2019, Grand Chamber).

The Court held that the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother". However, the child's right to respect for private life within the meaning of Article 8 does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law

ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.

Annex

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List of Cases

- *A.P. Garçon and Nicot v. France*, no. 79885/12, 6 April 2017
- *Ahmet Yildirim v. Turkey* [GC], no 3111/10, 18 March 2013
- *Alexandru Enache v. Romania*, no. 16986/12, 3 October 2017
- *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, 6 April 2000
- *B. v. France*, no. 13343/87, 25 March 1992
- *Balmer-Schafroth e.a v. Switzerland* [GC], no. 22110/93, 26 August 1997
- *Bărbulescu v. Romania* [GC], no. 61496/08, 05 September 2017
- *Ben Faiza v. France*, no. 31446/12, 08 February 2018
- *Big Brother Watch and Others v. the United Kingdom,* nos. 58170/13, 62322/14 and 24960/15, 13 September 2018
- *Brincat and Others v. Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014
- *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008
- *Burghartz v Switzerland*, no. 16213/90, 22 February 1994
- *Bursa Barosu Başkanlığı and Others v. Turkey*, no. 25680/05, 16 June 2018
- *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, 25 July 2017
- *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, 01 December 2015
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002
- *Collectif Stop Melox and Mox v. France*, no. 75218/01, 12 June 2007
- *Cordella and Others v. Italy*, nos. 54414/13 and 54264/15, 24 January 2019
- *Cossey v. the United Kingdom*, no. 10843/84, 27 September 1990
- *Csoma v. Romania*, no. 8759/05, 15 January 2013
- *Demir and Baykara v Turkey*, no. 34503/97, 12 November 2008

- *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012
- *Dubetska and Others v. Ukraine*, no. 30499/03, 10 February 2011
- *Dudgeon v United Kingdom*, no. 7525/76, 22 October 1981
- *Ēcis v. Latvia*, no. 12879/09, 10 January 2019
- *EB v. France [*GC], no.43546/02, 22 January 2008
- *Fadeyeva v. Russia*, no. 55723/00, 9 June 2005
- *Gas and Dubois v. France*, no. 25951/07, 15 March 2012
- *Giacomelli v. Italy*, no. 59909/00, 2 November 2006
- *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, 27 April 2004
- *Guerra and Others v. Italy*, no. 14967/89, 19 February 1998
- *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, 8 July 2003
- *Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014
- *Harroudj v. France*, no. 43631/09, 04 October 2012
- *Hirst v United Kingdom* [GC], no.74025/01, 06 October 2006
- *I.G., M.K. and R.H. v. Slovakia*, no. 15966/04, 13 November 2012
- *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, 24 October 2019
- *Jugheli and Others v. Georgia*, no. 38342/05 13 July 2017
- *Kalda v. Estonia*, no. 17429/10, 19 January 2016
- *Kearns v France*, no. 25951/07, 10 January 2008
- *Keegan v. Ireland*, no. 16969/90, 26 May 1994
- *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, 24 January 2017
- *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012
- *Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012
- *L. v. Lithuania*, no. 27527/03, 11 September 2007
- *L.H. v. Latvia*, no. 52019/07, 29 April 2014
- *L'Erablière asbl v. Belgium*, no. 49230/07, 24 February 2009
- *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006
- *Lopez Ostra v. Spain*, no. 16798/90, 9 December 1994

- *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no 22947/13, 02 February 2016
- *Malone v. the United Kingdom*, no. 8691/79, 02 August 1984
- *Marckx v. Belgium*, no. 6833/74, 13 June 1979
- *Mehmet Reşit Arslan and Orhan Bingöl v. Turkey*, nos. 47121/06, 13988/07 and 34750/07, 18 June 2019
- *O'Keeffe v. Ireland* [GC], no. 35810/09, 28 January 2014
- *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, no. 44460/16, 7 June 2018
- *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004
- *Opuz v. Turkey*, no. 33401/02, 09 June 2009
- *Parrillo v. Italy* [GC], no. 46470/11, 27 August 2015
- *P.G. and J.H. v. the United Kingdom*, no. 44787/98, 25 September 2001
- *Rantsev v. Cyprus*, no.25965/04, 07 January 2010
- *Rees v United Kingdom*, no. 9532/81, 17 October 1986
- *Roche v. the United Kingdom* [GC], no. 32555/96, 19 October 2005
- *Roman Zakharov v. Russia*, no 47143/06, 4 December 2015
- *Rotaru v. Romania* [GC], no. 28341/95, 04 May 2000
- *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 04 December 2008
- *S.H. and Others v. Austria* [GC], no. 57813/00, 3 November 2011
- *Sheffield and Horsham v United Kingdom*, no. 22985/93, 04 September 1998
- *Staatkundig Gereformeerde Partij v. the Netherlands*, no. 58369/10, 10 October 2012
- *Schlumpf v. Switzerland*, no. 29002/06, 08 January 2009
- *Schuler-Zgraggen v. Switzerland*, no. 14518/89, 24 June 1993
- *Szabó and Vissy v. Hungary*, no. 37138/14, 12 January 2016
- *Talpis v Italy*, no. 41237/14, 02 March 2017
- *Tătar v. Romania*, no. 67021/01, 27 January 2009
- *Tyrer v. United Kingdom*, no. 5856/72, 25 April 1978
- *Unal Tekeli v Turkey*, no. 29865/96, 16 November 2004,
- *V.C. v. Slovakia*, no. 18968/07, 08 November 2011
- *Valentina Viktorovna Oglobina v. Russia*, no. 28852/05, 26 November 2013

- *Volodina v Russia*, no. 41261/17, 09 July 2019
- *Y.Y. v. Turkey*, no.14793/08, 10 March 2015
- *X and Others v. Austria* [GC], no. 19010/07, 19 February 2013
- *X v. 'the former Yugoslav Republic of Macedonia'*, no. 22457/16), 17 January 2019