The Right to Respect for Private and Family Life: New Case-Law on Art. 8 of the European Convention on Human Rights

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I. INTRODUCTION

Art. 8 of the European Convention on Human Rights reads as follows:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

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

This is one of the most interesting and of the most variegated guarantees of the European Convention. Undoubtedly it will give rise to new and unforeseen developments in the future. Art. 8 ECHR

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protects four notions, private life, family life, home and correspondence. The four notions differ, yet they are interconnected and overlapping. Their common denominator (their "Leitmotiv") is the protection of the private sphere. The interdependence of the four notions explains why the practice of the Strasbourg organs has hardly brought about exact definitions. The Court has found for instance that telephone tapping constitutes an interference with the right to respect for private life, correspondence, and home[1]. In other respects, it seems to assume that there exists a more or less combined "private and family life" or "private life and home"[2]. In the following article, I shall follow this approach and describe the Strasbourg case-law empirically, without categorizing it too strictly. In early 1992, I attempted to describe the jurisprudence in respect of art. 8 ECHR which had been built up until then[3]. I now wish to sketch the most recent developments of the past two years. It is a great pleasure and honor to dedicate this article to my friend Thomas Buergenthal, with whom I have had the privilege to sit in the Administrative Tribunal of the Inter-American Development Bank from 1989 to 1994.

II. PRIVATE LIFE

1. Homosexuality: Modinos case

In the *Dudgeon* and *Norris* cases, the Court decided that the legal prohibition of private consensual homosexual acts between adults violated art. 8 ECHR. Such acts constituted "an essentially private manifestation of the human personality"[4]. Given the change of

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1 Eur. Court H.R., *Klass Case*, Judgment 6.9.1978, A/28 § 41; *Malone Case*, Judgment 2.8.1984, A/82 § 64; *Kruslin Case*, Judgment 24.4.1990, A/176-A § 26; *Huvig Case*, Judgment 24.4.1990, A/176-B § 25.

2 See for details, Luzius Wildhaber, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (eds. W. Karl/L. Wildhaber) Art. 8 Nos. 162-181, 457 (1992).

3 Luzius Wildhaber/Stephan Breitenmoser, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (eds. W. Karl/L. Wildhaber), Art. 8 (1992).

4 Eur. Court H.R., *Dudgeon Case*, Judgment 22.10.1981, A/45 § 60; *Norris Case*, Judgment 26.10.1988, A/142 §§ 39-47.

attitudes and the increased tolerance, there was no longer a "pressing social need" to make such acts criminal offences.

In the case of *Modinos v. Cyprus*, the only issue was whether the existence of an interference could be assumed[5]. According to the Government, the applicant ran no risk of prosecution. The legal prohibition of private homosexual acts between consenting adults was in fact no longer in force, because it was both unconstitutional and in violation of art. 8 ECHR. Moreover, the Attorney-General had not brought or permitted any such prosecution since 1981. The applicant disagreed, contending that the impugned provisions were still in force. Various Ministers of Justice had objected to the amendment of the law, thus implicitly acknowledging its validity. In addition, in 1982, the Supreme Court of Cyprus, in the case of *Costa v. The Republic*[6], had refused to abide by the European Court's *Dudgeon* judgment. It had preferred to rely on the dissenting opinion of Judge Zekia and to claim that there was no uniform European conception of morals.

Against this background, the European Court of Human Rights held that the existence of the prohibition of homosexual acts "continuously and directly affect(ed) the applicant's private life", in a way which constituted an interference with, and a breach of, art. 8 ECHR[7].

2. Transsexualism: Case of B. v. France

In the *Rees* and *Cossey* cases, the Court was confronted with the problem of transsexualism. It argued that the British refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the original entries could not be consid-

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5 Eur. Court H.R., *Modinos Case*, Judgment 22.4.1993, A/259.

6 2 Cyprus Law Reports, pp. 120-133 (1982), quoted in the Modinos Judgment, *supra* n. 5, § 11.

7 Eur. Court H.R., *Modinos Case*, Judgment 22.4.1993, A/259 §§ 17-26.

ered as an interference with the applicants' right to respect for their private life[8].

In the most recent case of *B. v. France*, the Court has now found a violation of art. 8 ECHR. It went to great lengths to explain that it did not mean to overrule either *Rees* or *Cossey*, but in fact it may well have done just that[9].

The French statutory and case law with respect to transsexuals was rather contradictory. The Court of Cassation seemed to reject the phenomenon of transsexualism in all cases which depended on voluntariness and on psychological and social factors, thus rendering a recognition of sex changes extremely difficult[10].

The European Court of Human Rights relied to a large extent on what it described as noticeable differences between French and English law. In the English civil status system, the purpose of the registers was not to define the present identity of an individual, but to record a historic fact. Their public character would make the protection of private life illusory. In France, by contrast, birth certificates were intended to be updated throughout the life of the person concerned. Only public officials had direct access to them. The Court reflected that nothing would have prevented the bringing up to date of the applicant's birth certificate. If, however, it is not the Court's function to indicate which remedy is most appropriate in French law[11], it could be said with equal conviction that it could be left to the British authorities to decide how to take into account the unfortunate situation of transsexuals in British law.

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8 Eur. Court H.R., *Cossey Case*, Judgment 27.9.1990, A/184 §§ 30-42; *Rees Case*, Judgment 17.10.1986, A/106 §§ 35-47. Compare also Wildhaber/Breitenmoser, *supra* n. 2, Nos. 208-223, 49, 59, 81, 585, 705, 736-738.

9 Eur. Court H.R., *Case of B. v. France*, Judgment 25.3.1992, A/232-C §§ 48, 63.

10 *Id.* §§ 19-28.

11 As stated *id.* § 63.

The Court also mentioned, as a relevant factor from the point of view of art. 8 ECHR, the applicant's "manifest determination" to abandon her original sex, a remark which applies to practically every transsexual[12]. Finally the Court stressed the French refusal to allow the requested change of forename, and the combined inconveniences resulting from the official documents which indicated her prior sex (e.g., computerized identity cards and driving licences, social security identification number, European Communities passport). The Court concluded that the applicant's situation, taken as a whole, was incompatible with the respect due to her private life[13].

The French Court of Cassation has in the meantime changed its prior position. In two carefully crafted decisions, it has accepted that a transsexual can claim a modification of the birth certificate, the principle of the inalienability of the status of individuals notwithstanding[14].

3. Abortion counselling: Case of Open Door and Dublin Well Woman v. Ireland

In the Irish "abortion counselling" cases, *Open Door and Dublin Well Woman v. Ireland*, the Court was confronted with court-imposed prohibitions against counselling pregnant women to travel abroad to obtain an abortion. It held that the restraint imposed on the applicant companies and women from receiving or imparting information was

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12 *Id.* § 55.

13 *Id.* §§ 49-63. Judges Matscher, Pinheiro Farinha, Pettiti, Valticos, Loizou and Morenilla dissented. The Commission reached the same result as the Court's majority, Report 6.9.1990, A/232-C §§ 29-75.

14 Cass. ass. plén. 11.12.1992, *Cases of René X and Marc X*, Conclusions Jéol, Semaine Juridique (JCP) 1993 II Jurisprudence no. 21991, with an approving note by Gérard Mémeteau: " ... lorsque, à la suite d'un traitement médico-chirurgical subi dans un but thérapeutique, une personne présentant le syndrome du transsexualisme ne possède plus tous les caractères de son sexe d'origine et a pris une apparence physique la rapprochant de l'autre sexe, auquel correspond son comportement social, le principe du respect dû à la vie privée justifie que son état civil indique désormais le sexe dont elle a l'apparence; ... le principe de l'indisponibilité de l'état des personnes ne fait pas obstacle à une telle modification ..." (*Case of Marc X*).

disproportionate to the aims pursued. But it found a breach only of the freedom of information under art. 10, not of the privacy rights under art. 8 ECHR[15].

4. Family name of married couple: Burghartz case

In the case of *Burghartz v. Switzerland*, the husband, who had agreed to use the wife's maiden name (Burghartz) as the family name, was denied the right to put his previous name (Schnyder) before the family name. Both he and his wife submitted that this amounted to discrimination based on sex and thus to a violation of art. 14 in conjunction with art. 8 ECHR. They stated that a woman who after marriage had the husband's name as the family name could put her previous name before the family name (Susanna Burghartz Schnyder), whereas a man was not allowed the same freedom of choice (Albert Schnyder Burghartz being unlawful).

Both the Commission and the Court found a violation of art. 14 in conjunction with art. 8 ECHR[16]. They did not find it necessary to examine the case solely under art. 8[17].

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15 Eur. Court H.R., *Case of Open Door and Dublin Well Woman v. Ireland*, Judgment 29.10.1992, A/246 §§ 80-83. The same case had also been submitted to the Court of Justice of the European Communities, *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, 4.10.1991, C-159/90, EuGHE 1991 I 4685, EuGRZ 1992 491. The Court decided that legal abortions were basically services and fell under the protection of art. 59 of the EEC-Treaty. However, the British abortion clinics had in no way taken part in the spreading of information, so that the free movement of services was not at stake.

16 Eur. Court H.R., *Burghartz Case*, Judgment 22.2.1994, A/280-B; Commission, Report 21.10.1992, No. 16213/90, Burghartz v. Switzerland, §§ 38-70. In a dissenting opinion, the Belgian member of the Commission Geus argued, "que la vie privée cesse là où l'individu entre en contact avec la vie publique", and that "la considération selon laquelle le droit de développer sa personnalité comprend nécessairement le droit à l'identité, et donc à un nom, est exacte mais ne paraît pas démontrer que la Convention garantit à chacun de choisir librement un nom de famille et d'en changer au gré de ses états d'âme". The German Federal Constitutional Court, in a Judgment of 5.3.1991 (BVerfGE 84, 9), found that it was discriminatory to provide that the husband's name was to be the family name whenever the couple could not agree on the choice of the family name.

17 Commission, Report 21.10.1992, A/280-B, partly dissenting opinion Norgaard, Jörundsson, Gözübüyük, Weitzel and Marxer, according to whom the case should

5. Freedom to choose one's family name: Stjerna case

In the case of *Stjerna v. Finland*, the applicant requested permission to have his surname changed to "Tawaststjerna", a name used by an ancestor who had died in 1773. He referred to practical inconveniences in using his name which, he alleged, was easily misspelt and gave rise to a pejorative nickname. He thus claimed more or less a right to choose his family name freely and without convincing or specific reasons as part of his right to respect of his private life. Such a widely conceived freedom does not exist in a majority of the European states[18]. The Court did not find that it was necessary in a democratic society to impose such a freedom on Finland. It therefore held that the refusal of the Finnish authorities to allow Stjerna to acquire the name Tawaststjerna did not overstep the margin of appreciation to be accorded to States in such cases[19].

6. Telephone tapping: Case of A. v. France

The Strasbourg case-law concerning telephone tapping is well settled. Ever since the *Klass* and *Malone* cases, it has been clear that the mere existence of legislation which permits secret surveillance measures constitutes an interference with the right to respect for private and family life and for correspondence under art. 8 ECHR[20].

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have been examined independently under art. 8 ECHR, whereupon the interference at issue could have been regarded as "necessary in a democratic society". By contrast, the dissenting judges of the Court (Thór Vilhjálmsson, Pettiti, Valticos and Russo) felt that the case was not of "sufficient severity" to warrant the finding of a breach of the Convention (Judgment 22.2.1994, A/280-B).

18 Eur. Court H.R., *Stjerna Case*, Judgment 25.11.1994, A/299-B, §§ 29-30, 39.

19 *Id.* §§ 42-45.

20 Eur. Court H.R., *Klass Case*, Judgment 6.9.1978, A/28 § 41; *Malone Case*, Judgment 2.8.1984, A/82 § 64. And see Stephan Breitenmoser, Der Schutz der Privatsphäre gemäss Art. 8 EMRK (1986) 184-204; Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme* (1989) 379-389; P. van Dijk / G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2d ed. 1990) 394-396, 528-530, 597-600; P.J. Duffy, "The Case of Klass and Others: Secret Surveillance of Communications and the ECHR", 4 *Human Rights Review* (1979) 20-40; Jean-François Flauss, "Ecoutes téléphoniques: Le point de vue de Strasbourg", 7 *Revue Française de Droit Administratif* (1991) 89-100; Louis Edmond Pettiti, "Ecoutes téléphoniques et droits de l'homme", *Festschrift Felix Ermacora* (1988) 455-474; Jacques Velu / Rusen Ergec, *La Convention*

In the cases of *Kruslin and Huvig v. France*, the Court dealt with the legal basis which is needed in case of an interference. Rejecting the argument that only statute law could constitute a legal basis, it accepted that in Continental as in common-law countries, settled case-law could not be disregarded: "In a sphere covered by the written law, the <law> is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments"[21].

In the most recent case of *A. v. France*, a certain Mr. G. informed a police officer, Mr. B., that he was aware of a plan, instigated by Ms. A., to assassinate Mr. V., who was at that time detained in prison. B. accepted that G. telephoned Ms. A. Their conversation was recorded on a tape which was kept in police records. Ms. A. brought criminal proceedings against G. and B., but unsuccessfully. On appeal, the French Court of Cassation found that Ms. A.'s conversation with G. concerning the plan to kill V. fell outside the area of private life. Both the Commission and the Court disagreed with this finding. They held that the tape-recording of the private telephone conversation constituted an interference with the right to respect of private life and thus had to be justified according to the criteria of art. 8 (2) ECHR[22].

7. Use of undercover agents: Lüdi case

The case of *Lüdi v. Switzerland* posed the problem of telephone tapping combined with the intervention of an undercover agent. Lüdi was suspected of planning to buy drugs. The investigating judge opened a preliminary inquiry against him and ordered his telephone conversations to be intercepted. The police selected one of their officers, named Toni, to pass himself off as a potential purchaser of cocaine. Lüdi was arrested, charged with unlawful trafficking in

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européenne des droits de l'homme (1990) Nos. 658, 684, 690; Wildhaber, *supra* n. 2, Nos. 287-296, 493-495, 544-547.

21 Eur. Court H.R., *Kruslin Case*, Judgment 24.4.1990, A/176-A § 29; *Huvig Case*, Judgment 24.4.1990, A/176-B § 28.

22 Commission, Report 2.9.1992, No. 14838/89, §§ 29-37 (A. v. France); Eur. Court H.R., Judgment 23.11.1993, A/277-B § 36.

drugs and sentenced to 18 months' imprisonment. The courts refused to call Toni as a witness, in order to protect his anonimity, but perused his reports and records of the telephone interceptions.

The Court held that the intervention of an undercover agent, even though combined with the surveillance of Lüdi's telephone communications, had not affected his private life within the meaning of art. 8 ECHR. The use of the undercover agent Toni took place within the context of a major cocaine deal and was aimed at arresting the dealers. Lüdi must have been aware that "he was running the risk of encountering an undercover police officer whose task would in fact be to expose him"[23].

By contrast, the Court found that there had been a violation of art. 6 (1) and 6 (3) (d) ECHR, in that the applicant's rights of defence had been excessively restricted, so that he had not enjoyed a fair trial.

III. FAMILY LIFE

1. Restrictions upon parental rights: Andersson, Rieme, Olsson (No. 2) and Hokkanen cases

In several British, Swedish and Finnish cases, the Court was confronted with various restrictions of parental rights, which led to the taking into public care of children and their placement in homes or with foster families or even for adoption[24]. Such measures constitute interferences with the right to respect for family life. They entail

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23 Eur. Court H.R., *Lüdi Case*, Judgment 25.6.1992, A/238 § 40. The Commission took a different view in its Report of 6.12.1990, A/238 §§ 53-78.

24 Eur. Court H.R., *Cases of O. v. United Kingdom*, Judgment 8.7.1987, A/120-A; *H. v. United Kingdom*, Judgment 8.7.1987, A/120-B; *W. v. United Kingdom*, Judgment 8.7.1987, A/121-A; *B. v. United Kingdom*, Judgment 8.7.1987, A/121-B; *R. v. United Kingdom*, Judgment 8.7.1987, A/121-C; *Olsson v. Sweden* (No. 1), Judgment 24.3.1988, A/130; *Eriksson v. Sweden*, Judgment 22.6.1989, A/156; *Andersson v. Sweden*, Judgment 25.2.1992, A/226-A; *Rieme v. Sweden*, Judgment 22.4.1992, A/226-B; *Olsson v. Sweden* (No. 2), Judgment 27.11.1992, A/250; *Hokkanen v. Finland*, Judgment 23.9.1994, A/299-A.

a violation of art. 8 ECHR, unless they are "in accordance with the law", have aims that are legitimate under art. 8 (2) and are "necessary in a democratic society".

More specifically, the Court found that a local authority in reaching decisions on children in its care must perforce have regard to the views and interests of the natural parents. "The decision-making process must therefore ... be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them"[25]. Art. 8 ECHR requires, in the Court's opinion, that the length of the local authority's decision-making process and of any related judicial proceedings be such "that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time"[26].

As the most recent cases of *Olsson v. Sweden (No. 2)* and *Hokkanen v. Finland* demonstrate, it is far from easy to determine what is meant by "a right for the natural parents to have measures taken with a view to their being reunited with their children ... and an obligation for the national authorities to take such measures"[27]. In the *Olsson Case (No. 2)*, the majority took into account the fact that access restrictions corresponded to the children's wishes. It also blamed the natural parents for their lack of cooperation with the social welfare authorities and the foster parents[28]. An angry dissenting minority, on the other hand, spoke of the "imperialism" of the Swedish social services and accused them of "what was almost contempt both for the national courts and the European Court"[29].

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25 Eur. Court H.R., *Cases of W. v. United Kingdom*, Judgment 8.7.1987, A/121-A § 63; *B. v. United Kingdom*, Judgment 8.7.1987, A/121-B § 64; *R. v. United Kingdom*, Judgment 8.7.1987, A/121-C § 68.

26 Eur. Court H.R., *Cases of W. v. United Kingdom*, Judgment 8.7.1987, A/121-A § 65; *R. v. United Kingdom*, Judgment 8.7.1987, A/121-C § 70.

27 Eur. Court H.R., *Olsson Case* (No. 2), Judgment 27.11.1992, A/250 § 90; also *Hokkanen Case*, Judgment 23.9.1994, A/299-A § 55; *Rieme Case*, Judgment 22.4.1992, A/226-B § 69.

28 Eur. Court H.R., *Olsson Case* (No. 2), *supra* n. 27, §§ 90-91.

29 *Id.*, partly dissenting opinion of Judge Pettiti, joined by Judges Matscher and Russo.

In the *Hokkanen Case*, the origin of the provisional transfer of care to the maternal grandparents, after the mother's death, was a private agreement. Despite this lack of an initial state action, the Court found that art. 8 ECHR was applicable[30]. It proceeded to insist that the obligation of the state authorities to take measures to facilitate reunion between father and child was not absolute, however. In the instant case, the Court accepted that the views of the child could counterbalance the inaction of the social welfare authorities and the consistent refusal of the grandparents to comply with the relevant court decisions[31]. Here again, a dissenting minority protested that ultimately the authorities had deprived the father of his natural rights[32].

2. Access rights on an uncle: Boyle case

If a parent is denied access to a minor child, this constitutes an interference with his or her right to respect for family life (cf. supra III/1). However, "family life" in the sense of art. 8 ECHR includes also the ties between near relatives[33]. The question therefore arises whether close relatives other than the parents have a right of access to a minor child under art. 8 ECHR. In the case of *Boyle v. United Kingdom*, at age 8, the applicant's nephew was removed from the care of his mother, on suspicion that he had been sexually abused by her, and placed with foster parents. Later he was freed for adoption. The applicant had had close contacts with the child since his birth. He made repeated requests for access throughout his nephew's placement in care, but was allowed only one supervised visit. Until the coming into force, in October 1991, of the Children Act 1989, he was unable to have the question of access to his nephew determined by a court. In its report, the Commission found that in the absence of any forum, mechanism or court, the applicant was not meaningfully

30 Eur. Court H.R., *Case of Hokkanen v. Finland*, Judgment 23.9.1994, A/299-A § 55.

31 *Id.* §§ 58, 60-64.

32 *Id.* partly dissenting opinion of Judge De Meyer, joined by Judges Russo and Jungwiert.

33 Eur. Court H.R., *Marckx Case*, Judgment 13.6.1979, A/31 § 45.

involved in the decision-making procedure to the degree sufficient to provide him with the requisite protection of his interest. Before the Court, a friendly settlement was reached, which took into account the views expressed by the Commission[34].

3. Placement of a child for adoption without the knowledge or consent of the natural father: Keegan case

In the case of *Keegan v. Ireland*, the Commission found a violation of both art. 8 and art. 6 (1) ECHR. Keegan had had a steady relationship with his girlfriend V. for two years and had cohabited for one year. V. gave birth to a daughter of whom the applicant was the natural father. Both had planned the pregnancy, but V. had broken off her relationship with Keegan prior to the birth. The baby was placed for adoption without his knowledge or consent, and he was not afforded even a defeasible right to be appointed guardian.

The Commission found that the applicant's links with the child were sufficient to bring the relationship within the scope of art. 8 ECHR[35]. It then proceeded to state that the natural father had "not been given sufficient recognition to and protection of his relationship with his daughter"[36]. Such greater recognition and protection did not "necessarily conflict with the primary aim of pursuing the welfare of the child concerned"[37].

The Court agreed that both art. 8 and art. 6 (1) ECHR had been violated. It stated, first of all, that the notion of "family" in art. 8 was not confined solely to marriage-based relationships. A child born to parties "living together outside of marriage" was "*ipso iure* part of that "family" unit from the moment of his birth and by the very fact

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34 Commission, Report 9.2.1993, No. 16580/90, *Boyle v. United Kingdom*; Eur. Court H.R., *Boyle Case*, Judgment 28.2.1994, A/282-B.

35 Commission, Report 17.2.1993, No. 16969/90, *Keegan v. Ireland*, § 49.

36 *Id.* § 57.

37 *Id.* § 56.

of it", "even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended"[38].

Perhaps the most interesting passages are those concerning a State's either negative or positive obligations under art. 8. Traditionally, the Court has stated that the "essential object" of art. 8 was "to protect the individual against arbitrary interference by the public authorities"[39]. It reserved the term "interference" for facts capable of infringing the State's negative obligations. When it found that an interference in this sense existed, it examined whether that interference could be justified under art. 8 (2). In addition, the Court acknowledged that there could be positive obligations inherent in an effective "respect" for private and family life. The existence of such positive obligations must be evaluated having regard to "the fair balance that has to be struck between the general interest of the community and the interests of the individual"[40]. The Court then added rather vaguely that in the sphere of positive obligations, "the aims mentioned in the second paragraph of art. 8 may be of a certain relevance"[41]. But in effect, it applied only paragraph 1 and not paragraph 2. Moreover, it insisted that the States enjoyed a wide margin of appreciation in the case of positive obligations.

I have criticized this approach as inconsistent and have suggested that the notion of "interference" should be construed so as to include

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38 Eur. Court H.R., *Keegan Case*, Judgment 26.5.1994, A/291, § 44.

39 In that sense the *Belgian Linguistic Case*, Judgment 23.7.1968, A/6 § 7, p. 33; *Marckx Case*, Judgment 13.6.1979, A/31 § 31; *Airey Case*, Judgment 9.10.1979, A/32 § 32; *Case of X. and Y.*, Judgment 26.3.1985, A/91 § 23; *Abdulaziz, Cabales and Balkandali Case*, Judgment 28.5.1985, A/94 § 67; *Rees Case*, Judgment 17.10.1986, A/106 § 35; *Johnston Case*, Judgment 18.12.1986, A/112 § 55 (c); *Leander Case*, Judgment 26.3.1987, A/116 § 51; *Cases of W., B. and R.*, Judgments 8.7.1987, A/121-A § 60, A/121-B § 61, A/121-C § 65; *Gaskin Case*, Judgment 7.7.1989, A/160 § 38; *Niemietz Case*, Judgment 16.12.1992, A/251-B § 31.

40 Eur. Court H.R., *Rees Case*, Judgment 17.10.1986, A/106 § 37; *Gaskin Case*, Judgment 7.7.1989, A/160 § 42; *Cossey Case*, Judgment 27.9.1990, A/184 § 37; and similarly *Powell and Rayner Case*, Judgment 21.2.1990, A/172 § 41; *Case of B. v. France*, Judgment 25.3.1992, A/232-C §§ 44, 63.

41 Eur. Court H.R., *Rees, Gaskin and Powell and Rayner Cases, supra* n. 40, A/106 § 37, A/160 § 42, A/172 § 41.

a breach of an obligation under art. 8 (1), whether negative or positive[42]. To my mind, the *Gaskin* and *B. v. France* cases have begun to abandon the old approach of the strict dichotomy between negative and positive obligations[43].

The *Keegan* case shows further signs of the new approach which I would advocate. The Court rightly stated that whereas the boundaries between negative and positive obligations "do not lend themselves to precise definition", nonetheless, the "applicable principles are ... similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation"[44]. Starting from that premise, the Court then added that a "State must act in a manner calculated to enable" the family tie with a child "to be developed, and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family"[45]. The fact that Irish law permitted the secret placement of the child for adoption without the natural father's knowledge or consent amounted to an interference with his right to respect for family life. In view of this, the Court found it unnecessary to examine whether art. 8 ECHR imposed a positive obligation on Ireland to confer an automatic but defeasible right to guardianship on natural fathers such as the applicant Keegan[46].

4. Paternity rights of an unmarried father: Case of Kroon, Zerrouk and M'hallem Driss v. the Netherlands

This case poses in an almost classical way the problem of a European harmonization of family law issues. The mother (Mrs

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42 Wildhaber/Breitenmoser, *supra* n. 3, Art. 8, Nos. 55-60, 74-94. And see Eur. Court H.R., *Stjerna Case*, Judgment 2.11.1994 A/229-B, concurring opinion of Judge Wildhaber.

43 *Cases of Gaskin and B. v. France*, *supra* n. 40. Also *Velu/Ergec*, *supra* n. 20, no. 650, pp. 534-535.

44 Eur. Court H.R., *Keegan Case*, Judgment 26.5.1994, A/291 § 49.

45 *Id.* § 50.

46 *Id.* §§ 51-52.

Kroon) and the biological father (Mr Zerrouk) of a child (Samir) complained that under Dutch law they were unable to obtain a legal recognition of the paternity in respect of the child. When the child Samir was born in October 1987, the mother (Mrs Kroon) was still married to Mr M'Hallem-Driss, although they had not been living together since the end of 1980. Their divorce became final in July 1988. M'Hallem-Driss had never seen Samir. His present whereabouts have remained unknown since January 1986. Mr Zerrouk and Mrs Kroon could jointly adopt Samir, but only if they first got married, and they did not wish to get married, but rather wanted to "live together apart", as they put it.

A majority of the Commission concluded that art. 8 ECHR was applicable[47]. It then characterized Dutch law as lacking in flexibility and found that the impossibility under Dutch law to contest M'Hallem-Driss's paternity and to have Zerrouk recognized as Samir's father implied a lack of respect for the applicant's private and family life contrary to art. 8 ECHR[48].

The Court reached the same conclusion. It first of all found art. 8 applicable, because it was "not confined solely to marriage-based relationships and may encompass other *de facto* 'family ties' where parties are living together outside marriage"[49]. Exceptionally, such *de facto* "family ties" could exist even where parties did not live together, provided the relationship had "sufficient constancy"[50]. Then the Court stated that "where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as

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47 Commission, Report 7.4.1993, No. 18535/91, *K., Z. and S. v. The Netherlands*, A/297-C, § 33.

48 *Id.* §§ 35-44. There were three dissenting opinions by Schermers; Soyer, Martinez, Weitzel and Gözübüyük; and Geus.

49 Eur. Court H.R., *Kroon Case*, Judgment 27.10.1994, A/297-C § 30.

50 Ibid.

soon as practicable thereafter the child's integration in his family"[51]. In the instant case, the Netherlands had violated its positive obligation to respect the family ties between Mr Zerrouk and Samir. Such respect required, in the Court's view, "that biological and social reality prevail over a legal presumption which ... flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone"[52].

5. The Catholic mother turned Jehovah's Witness: Hoffmann case

In 1980, Mrs. Hoffmann, an Austrian citizen, got married. Two children were born to the couple. All four were Roman Catholics. She then became a Jehovah's Witness. In 1983, she instituted divorce proceedings and left her husband in 1984, taking the children with her. In 1986, the divorce was pronounced. The lower court granted her parental rights, but the Austrian Supreme Court granted the parental rights to the father. It relied on an Act of 1921, according to which during the existence of the marriage neither parent may decide, without the consent of the other, that the child is to be brought up in a faith different from that shared by both parents at the time of the marriage or from that in which he or she has hitherto been brought up. It added that if the children were educated as Jehovah's Witnesses, they would depend on the mother's consent for blood transfusions and would become "social outcasts"[53]. The children's welfare required, therefore, that parental rights be transferred to the father.

In deciding this case, the Court looked only into art. 8 ECHR, not into the freedom of religion under art. 9 ECHR. It held that Mrs. Hoffmann had undergone a different treatment, solely on the ground of her religion. This treatment was discriminatory, because it lacked

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51 *Id.* § 32.

52 *Id.* § 40.

53 Eur. Court H.R., *Hoffmann Case*, Judgment 23.6.1993, A/255-C §§ 15, 32.

an objective and reasonable justification. Art. 8 taken in conjunction with art. 14 ECHR had therefore been violated[54].

6. Discrimination of illegitimate children as regards inheritance rights: Vermeire case

The judgment in the *Marckx case* of 1978[55] found that Belgian law in various respects treated illegitimate children in a discriminatory way. It took Belgium until 1987, however, to amend its legislation. The amending law provided that it was inapplicable to successions taking place prior to its entry into force.

The couple Camiel Vermeire and Irma Van den Berghe had three sons, Gérard who died in 1951 without issue, Robert who died in 1978, survived by two children from his marriage, and Jérôme who died in 1939, survived by his illegitimate daughter Astrid Vermeire. Irma Van den Berghe died in 1975, Camiel Vermeire in 1980. The two estates were distributed to the two legitimate grandchildren. Astrid Vermeire, who had been excluded under the old art. 756 of the Civil Code, brought an action to claim a share in the estates. In 1983, the Brussels Court of First Instance allowed her action, based on the *Marckx* judgment. The Brussels Court of Appeal set aside the decision in 1985, arguing that the legislature rather than the judiciary was responsible for implementing the *Marckx* judgment. No direct effect could be given to the passages in the *Marckx* judgment relating to an illegitimate child's inheritance rights. The Court of Cassation concurred with this view in 1987.

The European Court held that Belgium was under no obligation to reopen the succession to the estate of Irma Van den Berghe (who had died in 1975, prior to the *Marckx* judgment of 1978). But Astrid

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54 Id. §§ 30-38. From this judgment Judges Matscher, Walsh, Valticos and Mifsud Bonnici dissented, each one writing a different dissenting opinion. The Commission decided like the majority of the Court, Report 16.1.1992, No. 12875/87, A/255-C.

55 Eur. Court H.R., *Marckx Case*, Judgment 13.6.1979, A/31.

Vermeire's exclusion from the estate of Camiel Vermeire (who had died in 1980) violated art. 14 in conjunction with art. 8 ECHR[56].

The Court's reasoning is of the utmost interest for the well-known problem of the relationship between international and domestic law. Indeed it stated flatly that it could not see "...what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the Marckx judgment ..."[57]. "There was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins ..."[58]. "An overall revision of the legislation, with the aim of carrying out a thorough-going and consistent amendment of the whole of the law on affiliation and inheritance on intestacy, was not necessary at all as an essential preliminary to compliance with the Convention as interpreted by the Court in the Marckx case"[59].

The *Vermeire* judgment dates from the end of 1991. In fact, of course, it blames Belgium for its failure to give direct effect to the *Marckx* judgment with respect to the estate of a person who died a little more than a year after the *Marckx* judgment. The undertaking to abide by decisions of the European Court (art. 53 ECHR) seems to have gained a renewed urgency. Indeed, if the European Court "shall, if necessary, afford just satisfaction to the injured party" (art. 50 ECHR), the only logical form of just satisfaction in the case of Astrid Vermeire would seem to be the equivalent of the missed third part of the estate of Camiel Vermeire[60].

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56 Eur. Court H.R., *Vermeire Case*, Judgment 29.11.1991, A/214-C. In the same sense the Belgian Court of Arbitration in *Verryt v. Van Calster*, Judgment of 4.7.1991, in the Moniteur belge of 22.8.1991, pp. 18144, 18149, 18153.

57 *Id.* § 25.

58 *Id.* § 25.

59 *Id.* § 26.

60 *Id.* § 31; Eur. Court H.R., *Vermeire Case* (Art. 50), Judgment 4.10.1993, A/270-A.

IV. COMBINED PRIVATE AND FAMILY LIFE

1. Expulsion of "second generation"-immigrants: Beldjoudi and Lamguindaz cases

In its judgment of *Moustaquim v. Belgium*, the Court found that the expulsion of children of immigrants, who had spent practically their entire life in their host state, could amount to a violation of their family life under art. 8 ECHR[61]. A minority protested in vain that this amounted to the setting out of a completely new "rule to the effect that second-generation immigrants must not be deported"[62]. Indeed Moustaquim was 20 years old when the deportation order was served on him. Already at age 17 he had been charged with 147 offences, including 87 of aggravated theft and 5 robberies[63]. However, the Court relied on other factors. It stressed that the offences went back to when Moustaquim was an adolescent. He had no links with the state of his nationality, Morocco. He had received all his schooling in French. All his close relatives had lived in Belgium for a long while. Most of his brothers and sisters were Belgian nationals. The means of the expulsion was therefore disproportionate to the presumed aim of the prevention of crime and disorder.

The *Moustaquim* judgment has in the meantime been confirmed in the case of *Beldjoudi v. France*[64], where an Algerian national, born in France in 1950 and married in 1970 with a French national, was served with a deportation order in 1979. The order was not executed. He had committed a large number of serious offences, all of them

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61 Eur. Court H.R., *Moustaquim Case*, Judgment 18.2.1991, A/193. See also Eur. Court H.R., *Djeroud Case*, Judgment 23.1.1991, A/191-B (friendly settlement).

62 See the dissenting opinion of Soyer, joined by Sperduti and Busuttil, § 7, in Commission, Report 12.10.1989, A/193 § 61. See also the dissenting opinion of Judges Bindschedler-Robert and Valticos.

63 Eur. Court H.R., *Moustaquim Case*, Judgment 18.2.1991, A/193 § 10.

64 Eur. Court H.R., *Beldjoudi Case*, Judgment 26.3.1992, A/234-A. See also the modification of the position of the Assembly of the French Conseil d'Etat on 19.4.1991, in the cases *"Belgacem and Mme Naima Babas"*, 7 *Revue française de droit administratif* (1991) 509, commented by Ronny Abraham, ibid. pp. 497-509.

during his adult life. The sentences passed against him totalled over ten years in prison.

The Court looked at the realities of his family life rather than at his criminal record. Beldjoudi had spent his whole life - over 40 years - in France, was educated in French, did not know Arabic and had no links with Algeria. His relatives were French nationals, and he was married to a Frenchwoman. Again, therefore, the Court considered expulsion as disproportionate.

Both the French member of the Commission and the French judge protested vigorously that balancing the different interests apparently only meant examining the individual and subjective circumstances of the life of a second generation-immigrant[65]. Indirectly, this is confirmed by the concurring opinion of Judge Martens. He believed that "integrated aliens" "should be no more liable to expulsion than nationals, an exception being justified, if at all, only in very exceptional circumstances"[66]. Along the same lines, he would have relied on private rather than family life: "I think that expulsion, especially ... to a country where living conditions are markedly different from those in the expelling country and where the deportee, as a stranger to the land, its culture and its inhabitants, runs the risk of having to live in almost total social isolation, constitutes interference with his right to respect for his private life"[67].

The case of *Lamguindaz v. United Kingdom* led to a friendly settlement before the Court, but the Commission had already found a violation of art. 8 ECHR[68]. In a partly concurring, partly dissenting opinion, M. Schermers went even farther than Judge Martens in the

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65 Commission, Report 6.9.1990, A/234-A, dissenting opinion Soyer, joined by Sperduti, Gözübüyük and Weitzel; see also the dissenting opinions of Judges Pettiti and Valticos in the Court's Judgment of 26.3.1992, A/234-A.

66 *Id.*, concurring opinion of Judge Martens § 2.

67 *Id.* § 3. In the same sense the concurring opinion of Schermers, joined by Mrs. Thune, Commission, Report 6.9.1990, A/234-A.

68 Commission, Report 13.10.1992, No. 16152/90, *Lamguindaz v. United Kingdom*; Eur. Court H.R., *Lamguindaz Case*, Judgment 28.6.1993, A/258-C.

Beldjoudi case[69]. Indeed he argued that the well-established international law, which granted States full control over the entry of aliens, was undergoing a fundamental change, as a result of growing concern for human rights and a perceived need for solidarity. In addition, he thought that expulsion was a more heavy punishment than a prison sentence. Aliens were therefore more heavily punished than nationals. This constituted a violation of art. 14 in conjunction with art. 8 ECHR.

2. Corporal punishment in private schools: Cases of Costello-Roberts and Y. v. United Kingdom

The issue of corporal punishments in British private schools was before the Court in 1993. It concerned the interpretation of art. 3, 8 and 13 ECHR and also posed the problem of a possible "horizontal effect" of Convention guarantees.

Jeremy Costello-Roberts, who was then aged 7, was a pupil at a private boarding school. Upon running up five "demerit marks" for talking in the corridor and being late for bed, the headmaster of the school "whacked" him three times on his buttocks, through his shorts, with a rubber-soled gym shoe. The whacking left no visible bruising.

The Court held that the State had an obligation to secure to children their right to education under art. 2 of the First Additional Protocol. This right was guaranteed equally to pupils in State and independent schools. The State could not absolve itself from responsibility by delegating its obligations to private bodies or individuals. Therefore, although the applicant complained of the act of a headmaster of a private school, the responsibility of the United Kingdom could be engaged if the act proved to be incompatible with art. 3 or 8 ECHR[70].

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69 *Id.*, partly concurring and partly dissenting opinion of Schermers.

70 Eur. Court H.R., *Costello-Roberts Case*, Judgment 25.3.1993, A/247-C §§ 26-28.

A narrow majority of the Court considered that the punishment inflicted on Jeremy did not attain the minimum level of severity required under art. 3 ECHR[71]. The Commission had reached the same result, but had then found a violation of art. 8 ECHR. It had concluded that Jeremy's corporal punishment constituted an obvious interference with his physical integrity and a lack of respect for private life, which was not "necessary in a democratic society"[72].

The Court took a different view. It accepted that measures taken in the field of education could affect the right to respect for private life. However, "not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference"[73]. Moreover, the sending of a child to school inevitably involved some degree of interference with his or her private life. In a way, the Court did not wish to add a further category of unlawful treatment over and above those enumerated in art. 3 ECHR. As a result, it did not regard art. 8 ECHR as violated[74].

The case of *Y. v. United Kingdom* ended in a friendly settlement before the Court[75]. There a 15-year-old boy was punished for bullying fellow pupils and vandalizing a file. He was caned four times through his trousers, which left him with four wheals across both buttocks, showing heavy bruising and swelling. The Commission concluded that art. 3 ECHR was violated, and that no separate issue arose under art. 8 ECHR[76].

3. Forcible arrest of a mother in front of her child: Klaas case

A German social welfare officer, who drove home with her 8-year-old daughter, was followed by two police officers. They charged

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71 *Id.* §§ 29-32. And see the joint partly dissenting opinion of Judges Ryssdal, Thór Vilhjálmsson, Matscher and Wildhaber.

72 Commission, Report 8.10.1991, No. 13134/87, A/247-C §§ 50, 53.

73 Eur. Court H.R., *Costello-Roberts Case*, Judgment 25.3.1993, A/247-C § 36. On this point, the Court was unanimous.

74 Id. §§ 34-36.

75 Eur. Court H.R., *Case of Y. v. United Kingdom*, Judgment 29.10.1992, A/247-A.

76 Commission, Report 8.10.1991, No. 14229/88, A/247-A §§ 37-52.

her with driving through a red traffic light and arrested her in order to take her to a hospital for a blood test. She alleged that the policemen had beaten her up in front of her child and caused her serious injuries. Subsequent medical examinations confirmed the existence of injuries.

The Commission found that the mother had been exposed to inhuman and degrading treatment (art. 3 ECHR), and that no separate issue arose under art. 8[77]. As for the daughter, there had been no violation of art. 3, but one of her right to respect of her private and family life (art. 8 ECHR)[78].

The Court took a different view. It stressed that it was not normally within its province to substitute its own assessment of the facts for that of the domestic courts. In the instant case, no cogent elements had been provided which justified a departure from the findings of fact of the German courts. Accordingly the Court found no violation of art. 3 in respect of both mother and daughter. The mother's complaint under art. 8 did not call for separate complaint, whereas there had been no violation of art. 8 in the case of the daughter[79].

V. COMBINED PRIVATE LIFE AND HOME

1. Search of an attorney's office: Niemitz v. Germany

In the *Niemitz* case, the Court crafted one of the rare judgments with a strongly doctrinal approach and with a visible endeavor to define the extent of the privacy rights under art. 8.

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77 Commission, Report 21.5.1992, No. 15473/89, §§ 79-111. Norgaard, Trechsel, Danelius, Marxer and Pellonpää found that there was no violation of art. 3, but by contrast a violation of art. 8 ECHR.

78 Id. §§ 112-120. Dissenting, Norgaard, Trechsel, Danelius, Marxer, Martínez and Geus found that there was no violation of art. 8 ECHR. Loucaides found that there was a violation of art. 3 ECHR, so that consequently no separate issue arose under art. 8 ECHR.

79 Eur. Court H.R., *Klaas Case*, Judgment 22.9.1993, A/269 §§ 29-36, with dissenting opinions of Judges Pettiti, Walsh and Spielmann.

Niemitz practised as an attorney in Freiburg im Breisgau. His law office was searched by representatives of the public prosecutor's office and the police, on the basis of a warrant issued by the Munich District Court. The search was ordered in the context of criminal proceedings instituted against one Klaus Wegner for insulting a judge. Wegner had signed an insulting letter in the name of the Anti-clerical Working Group of the Freiburg *Bunte Liste*, in which Niemitz played an important role. During the search, files with data concerning clients were examined, but no materials were seized. The criminal proceedings against Klaus Wegner were later discontinued for lack of evidence.

The German Government maintained that art. 8 did not afford protection against the search of a lawyer's office. Both the Commission and the Court took the opposite view.

The Court began by rejecting the notion of an "inner circle" of "private life" (and of "home") as too restrictive. It stated that respect for private life must "comprise to a certain degree the right to establish and develop relationships with other beings"[80]. There appeared to be no reason of principle why "activities of a professional or business nature" should be excluded from the notion of "private life"[81].

It was not always possible to distinguish clearly which of an individual's activities formed part of his business life and which did not. Moreover, to deny the protection of art. 8 on the ground that certain measures related only to professional activities could lead to an inequality of treatment. Persons whose professional and non-professional activities were intermingled would enjoy the full protection of art. 8, whereas persons whose private and professional activities were distinguishable could invoke the protection of art. 8 only to a limited extent[82].

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80 Eur. Court H.R., *Niemietz Case*, Judgment 16.12.1992, A/251-B § 29.

81 *Id.* § 29.

82 *Id.* § 29.

The Court added that more generally, "to interpret the words 'private life' and 'home' as including certain professional or business activities or premises would be consonant with the essential object and purpose of art. 8, namely to protect the individual against arbitrary interference by the public authorities"[83]. Such an interpretation would not unduly hamper the States, since they could still "interfere" with business activities, if need be to a more far-reaching extent than with private activities.

After an interference with art. 8 had been established, the Court had to decide whether the search of M. Niemitz' law office was proportionate to the aims pursued. It found that the warrant was drawn in broad terms, ordering the search and seizure of "documents" revealing the identity of Klaus Wegner. The search of a lawyer's office was not accompanied by any special procedural safeguards. Having regard to the materials that were in fact inspected, "the search impinged on professional secrecy to an extent that appear(ed) disproportionate in the circumstances"[84]. The Court therefore concluded that there had been a breach of art. 8.

2. Searches and seizures by customs authorities: Funke, Crémieux and Miailhe cases

In three cases in which the Commission had found no violation[85], the Court held against certain searches and seizures by French customs officials.

The right to a fair trial under art. 6 (1) ECHR had been denied in the *Funke* case, because the customs authorities had attempted to compel the applicants themselves to provide the evidence of offences

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83 *Id.* § 31.

84 *Id.* § 37.

85 Commission, Reports 8.10.1991, No. 10828/84 (A/256-A, Funke v. France), No. 11471/85 (A/256-B, Crémieux v. France), No. 12661/87 (A/256-C, Miailhe v. France).

they had allegedly committed. This neglected their right to remain silent and not to contribute to incriminating themselves[86].

As for art. 8 ECHR, there had been interferences with the private lives and the correspondence of all applicants, and also with the homes of Mr. Funke and Mr. Crémieux. The French legislation had not afforded the applicants adequate and effective safeguards against abuse. The customs authorities had exclusive competence to assess the expediency, number, length and scale of inspections. In the *Crémieux* case, for instance, the customs authorities carried out 83 interviews and raids on the head office of the company which Crémieux managed, on his home and the homes of other people[87]. In the *Miailhe* case, the officials made searches at premises occupied by M. Miailhe, his wife and his mother, which also served as the Philippines consulate, and seized nearly 15,000 documents[88]. Given the absence of any requirement of a judicial warrant, the restrictions and conditions provided for in law appeared "too lax and full of loopholes" for the interferences in the applicants' rights "to have been strictly proportionate to the legitimate aim pursued"[89].

In so deciding, the Court confirmed what it had stated on two earlier occasions, i.e. that art. 8 (1) was the rule, and that the exceptions provided for in art. 8 (2) ECHR were "to be interpreted narrowly"[90].

3. Direct environmental damage: López Ostra case

In the case of *López Ostra v. Spain*, the applicant claimed that a waste-treatment plant situated 12 meters from her home had caused

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86 Eur. Court H.R., *Funke Case*, Judgment 25.2.1993, A/256-A §§ 41-44.

87 Eur. Court H.R., *Crémieux Case*, Judgment 25.2.1993, A/256-B § 8.

88 Eur. Court H.R., *Miailhe Case*, Judgment 25.2.1993, A/256-C § 7.

89 Eur. Court H.R., *Funke Case, supra* n. 86, A/256-A §§ 53-59; *Crémieux Case, supra* n. 87, A/256-B §§ 36-41; *Miailhe Case, supra* n. 88, A/256-C §§ 34-40.

90 Eur. Court H.R., *Funke Case, supra* n. 86, § 55. *Crémieux Case, supra* n. 87, § 38; *Miailhe Case, supra* n. 88, § 36.

both her daughter and herself health problems. She complained that the plant for the treatment of waste from tanneries was a source of polluting fumes, pestilential and irritant smells and repetitive noise. The inactivity of the municipal authorities in face of the nuisance had led first to her temporary evacuation and ultimately to the purchase of a house in a different part of the town of Lorca.

The Court accepted her submission that the right to respect for her home and her private and family life had been violated. It took the view that "severe environmental pollution may affect individuals' physical 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"[91].

As in *Keegan*, *Kroon*, *Hokkanen* and *Stjerna*, the Court left open whether the instant case should be analyzed in terms of a positive duty on the State or in terms of an interference by a public authority[92]. As I have remarked elsewhere, I would treat both these aspects along the same criteria[93].

VI. CORRESPONDENCE

1. Generalities: Pfeifer and Plankl, Herczegfalvy and Messina cases

It is well established in the Strasbourg case-law that every form of censorship, control, stopping or delaying of letters is to be considered as an interference with the right to respect for one's correspondence[94]. Such interference is subject to the limitations prescribed by

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91 Eur. Court H.R., *López Ostra Case*, Judgment 8.12.1994, A/303-C § 51.

92 *Id.*

93 *Supra* III/3.

94 Breitenmoser, Schutz der Privatsphäre, supra n. 20, 312-321, 356-361; Cohen-Jonathan, supra n. 20, 390-393; Jochen Abr. Frowein/Wolfgang Peukert, EMRK-Kommentar (1985) Nos. 33-36; Giorgio Malinverni, "Le droit des personnes privées de liberté au

art. 8 (2) ECHR. A prisoner, detainee or member of the armed forces "has the same right as a person at liberty to respect for his correspondence, the ordinary and reasonable requirements of imprisonment being of relevance in assessing the justification for any interference with that right under the exceptions permitted by art. 8 (2)"[95].

The Court has elaborated on these principles in three recent cases. In the case of *Pfeifer and Plankl*, the investigating judge had deleted certain passages in a private letter between two detainees, because they had contained jokes insulting to the prison officers[96]. The Court found this measure "disproportionate" in a democratic society[97].

In the *Herczegfalvy* case, the applicant, who was detained in a psychiatric hospital, complained of having been forcibly administered food and neuroleptics and of having been isolated and attached with handcuffs to a security bed. The Court accepted that the applicant's psychiatric illness rendered him entirely incapable of taking decisions for himself, so that no violation of art. 8 ECHR had been shown[98].

Herczegfalvy also complained that all his letters had been sent to a curator for him to select which ones to pass on. The Court held that this practice was not "in accordance with the law", as required under art. 8 (2) ECHR. It confirmed that the expression "in accordance with the law" required that the impugned measure should have some basis in national law; that the law in question should be accessible to

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respect de leur correspondance", *Mélanges J. Pictet* (1984) 78-96; van Dijk/van Hoof, supra n. 20, 392-396; Velu/Ergec, supra n. 20, 557-560; Wildhaber, supra n. 2, Nos. 491-524.

95 Commission, Report 11.10.1980, Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (Silver v. U.K.), §§ 269-270; Eur. Court H.R., *Silver Case*, Judgment 25.3.1983, A/61 83-84, 104; *Campbell and Fell Case*, Judgment 28.6.1984, A/80 §§ 109-110; *Boyle and Rice Case*, Judgment 27.4.1988, A/131 § 50; *McCallum Case*, Judgment 30.8.1990, A/183 § 30.

96 Eur. Court H.R., *Pfeifer and Plankl Case*, Judgment 25.2.1992, A/227 § 17.

97 *Id.* § 47, and similarly Commission, Report 11.10.1990, A/227 §§ 89-112.

98 Eur. Court H.R., *Herczegfalvy Case*, Judgment 24.9.1992, A/244 § 86.

the person concerned; that this person should be able to foresee the law's consequences for him; and that the national law must give some measure of protection against arbitrary interferences[99]. In the Court's opinion, these standards were lacking in Austrian law: "... in the absence of any detail at all as to the kind of restrictions permitted or their purpose, duration and extent or the arrangements for their review", the national "provisions do not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society"[100].

In the *Messina* case, a detainee claimed that he had never received some letters and a telegram. The Italian Government maintained that they had on the contrary been delivered. Both the Commission and the Court held that art. 8 ECHR had been violated, since a State could not claim to have discharged its obligations under art. 8 merely by supplying a record of a prisoner's incoming mail[101].

2. Correspondence with solicitor and the European Commission of Human Rights: Campbell case

Probably the most interesting recent judgment with respect to correspondence is that in the *Campbell* case[102]. The applicant, who served a term of life imprisonment for murder, complained that his correspondence with his solicitor and the European Commission of Human Rights was opened and screened by the prison authorities. Both the Commission and the Court held that art. 8 ECHR had been violated. The Court did not find it necessary to examine additionally

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99 Breitenmoser, Schutz der Privatsphäre, supra n. 20, 73-78, 352-356; Cohen-Jonathan, supra n. 20, CEDH 380-384, 464-469; Frowein/Peukert, supra n. 94, Vorbem. Art. 8-11 Nos. 2-9; Giorgio Malinverni, "La réserve de la loi dans les conventions internationales de sauvegarde des droits de l'homme", 2 *Revue universelle des droits de l'homme* (1990) 401-409; Franz Matscher, Der Gesetzesbegriff der EMRK, Festschrift E. Loebenstein (1991) 105-118; Wildhaber/Breitenmoser, supra n. 3, Nos. 525-586.

100 Eur. Court H.R., *Herczegfalvy Case*, Judgment 24.9.1992, A/244 § 91, and similarly Commission, Report 1.3.1991, A/244 §§ 261-273.

101 Eur. Court H.R., *Messina Case*, Judgment 26.2.1993, A/257-H § 31.

102 Eur. Court H.R., *Campbell Case*, Judgment 25.3.1992, A/233.

whether or not there was a breach of art. 25 (1) ECHR, which provides for the competence of the Commission to receive individual petitions.

As to correspondence with solicitors, the Court "recognised that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention, regard being paid to the ordinary and reasonable requirements of imprisonment"[103]. However, correspondence with lawyers, whatever its purpose[104], concerned "matters of a private and confidential character" and therefore was, in principle, privileged under art. 8 ECHR[105]. Practically this meant that a letter from a lawyer to a prisoner could be opened when there was "reasonable cause to believe that it contain(ed) an illicit enclosure"[106]. They could be read only "in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature"[107].

As to correspondence with the Commission, the Court considered the need for confidentiality in this context as overwhelming. By contrast, the risk of Commission stationery being forged was negligible. The opening of letters from the Commission was therefore not "necessary in a democratic society"[108].

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103 *Id.* § 45.

104 Judge Morenilla, in his partly dissenting opinion, distinguishes between outgoing and incoming mail, considering the opening of incoming mail as justified under art. 8 (2) ECHR. In the same sense, in the Commission, Schermers in his partly dissenting opinion.

105 *Id.* § 48, and also the Commission, Report 12.7.1990, A/233 §§ 49-63.

106 *Id.* § 48.

107 *Id.* § 48.

108 *Id.* §§ 61-64.

VII. CONCLUSION

It remains difficult to summarize the content of art. 8 ECHR in one or two catchwords. Even if such an attempt were successful, it is likely that the catchwords would have to be reinvented a decade later. Speaking of human rights protection in Europe, Nicolas Valticos has recently remarked that one could speak of diversity and movement[109]. This characterization applies also to art. 8 ECHR. Some of the Court's decisions (such as Stjerna, Lüdi, Olsson [No. 2], Hokkanen or Klaas) rely perhaps more on the subsidiarity of the European Convention and thus on the legitimate diversity of the national legal orders. Some other decisions (such as Modinos, A. v. France, Boyle, Hoffmann, Vermeire or Costello-Roberts) build on existing case-law, yet evolve it and thereby broaden the legal certainty and foreseeability of the Convention's reach. Finally, some other decisions (such as B. v. France, Burghartz, Keegan, Kroon, Moustaquim and Beldjoudi, Niemitz, Funke/Crémieux/Miailhe, López Ostra or Campbell) break new ground and establish newly protected areas. These decisions show a jurisprudence in movement, at the same time full of diversity. In sum, one can confidently predict that the privacy rights of art. 8 ECHR will continue to be highly topical and highly important.

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109 Nicolas Valticos, "Les diverses formes de la protection des droits de l'homme en Europe", in *Homenaje M. Diez de Velasco* (1993) 805.