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International Human Rights Law Concerning Women: Case Notes and Comments

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ESSAY

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ABSTRACT

This Essay addresses the application of international human rights law to women. Most of the cases addressed in this Essay involve alleged discrimination based on sex or marital status. Professor Cook notes that international, regional, and national courts have applied human rights principles to ensure that women's human rights are upheld, although not always to the full extent originally envisioned under the Universal Declaration of Human Rights. To illustrate this point, Professor Cook reviews cases arising under international, regional, and specialized treaties, including the International Covenant on Civil and Political Rights, and the extent to which such discrimination interferes with the right to enjoy private or family life, attain resident status, receive social security, and receive equal protection of the law.

Professor Cook further analyzes cases involving unmarried women and spousal rights arising under the European Convention on Human Rights, alleging violations of the right of respect for family and private life, or the right to nondiscrimination. Professor Cook then briefly reviews other legal instruments that may provide opportunities to apply human rights principles to the advances of women, including the American Declaration of the Rights and Duties of Man, the American Convention on

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Human Rights, the European Economic Community Treaty, and the International Convention on the Elimination of All Forms of Discrimination Against Women.

Professor Cook concludes that, despite progress in this area, courts have not yet fully recognized women's human rights. This is due in part to the entrenched perceptions of women's role in society that may cause courts to view discrimination merely as differential treatment based on "objective and reasonable criteria." Professor Cook urges the expanded use of such international, regional, or national fora to ensure that women's actual human rights are consistent with the conception of those rights as expressed in the Universal Declaration of Human Rights.

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I. INTRODUCTION

The forty-second anniversary of the Universal Declaration of Human Rights[1] (Universal Declaration) affords an opportunity to assess the extent to which the aims of the Universal Declaration's drafters have been advanced and obstructed. The record shows that the first steps have been taken, but many more remain. This particularly is true with regard to the advancement of women's rights. The signatory states to the Universal Declaration have not sufficiently promoted it as an instrument to achieve women's equality. The 1979 adoption of the Convention on the Elimination of All Forms of Discrimination Against Women[2] (Women's Convention) reinforced the sex equality provisions of the Universal Declaration and reinspired human rights activists to seek true human equality. Article 1 of the Women's Convention defines discrimination as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.

This Essay outlines a number of decisions that apply international human rights principles to improve women's status.[3] These cases indicate the disadvantaged status that women have faced and the discrimination suffered on grounds either of sex or of the legal or civil disabilities associated with their marital status. The Women's Convention prohibits discrimination that exists in the express terms of legislation, and that

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1. U.N. Doc. A/810, G.A. Res. 217 (III) at 71 (1948).

2. G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 710.46) at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981).

3. *See* Bayefsky, *The Principle of Equality or Non-discrimination in International Law*, 11 HUM. RTS. L.J. 1 (1990); Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*, 32 NETH. INT'L L. REV. 419 (1985); Cook, *The International Right to Nondiscrimination on the Basis of Sex*, 14 YALE J. INT'L L. 161 (1989); Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990).

which exists in the effect of legislation not discriminatory on its face. Most of the decisions are concerned only with legislation alleged to be discriminatory on its face.

The cases do not arise under the Universal Declaration itself, but under the implementing treaties designed to give legally binding effect to the Declaration, namely the International Covenant on Civil and Political Rights[4] (Political Covenant) and the International Covenant on Economic, Social, and Cultural Rights[5] (Economic Covenant). Beyond these international instruments, regional conventions exist that are designed to achieve uniform observance of human rights principles among countries sharing common regional traditions. These instruments include the European Convention for the Protection of Human Rights and Fundamental Freedoms[6] (European Convention), the American Convention on Human Rights[7] (American Convention), and the African Charter on Human and Peoples' Rights[8] (African Charter). In addition to these international and regional human rights instruments, many states have ratified such specialized treaties as the Women's Convention, the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention),[9] and the European Economic Community Treaty (Common Market Treaty).[10] These regional conventions afford further opportunities to apply human rights principles to women.[11]

Most of the cases identified in this Essay have proceeded through the committees specifically established by the human rights treaties. For ex-

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4. G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 53-56, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976).

5. G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49-50, U.N. Doc. A/6316 (1967) (entered into force Jan. 3, 1976).

6. European Convention, 213 U.N.T.S. 222, 232 (entered into force Sept. 3, 1953).

7. O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, Doc. 21 Rev. 6 (1979) (entered into force June 1978).

8. O.A.U. Doc. CAB/LEG/67/3/Rev.5 (entered into force Oct. 21, 1986) *reprinted in* 21 INT'L LEGAL MATERIALS 59 (1982).

9. Convention on the Elimination of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 45 (entered into force Jan. 4, 1969).

10. European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

11. *See, e.g.*, K. O'DONOVAN & E. SZYSZCZAK, EQUALITY AND SEX DISCRIMINATION LAW 193-213 (1988); A. BYRE, LEADING CASES AND MATERIALS ON THE SOCIAL POLICY OF THE EEC (1989); D. PANNICK, SEX DISCRIMINATION LAW 122-44 (1985); S. PRECHAL & N. BURROWS, GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY (1990); Harvey, *Equal Treatment of Men and Women in the Work Place: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany*, 38 AM. J. COMP. L. 31 (1990).

ample, the Optional Protocol to the Political Covenant[12] has empowered the Human Rights Committee to act on individual complaints, and the European Convention has empowered its Commission to consider individual complaints. In addition, some treaties, such as the American Convention, empower their respective courts to give advisory opinions with respect to the application of certain international human rights principles. Finally, states that are parties to international human rights treaties are obligated to protect international human rights principles through their own national courts and legislation. As a result, some cases protecting internationally recognized human rights have arisen in national courts.

French President Francois Mitterand has stated that "[o]ur conception of human rights does not vary with latitudes or circumstances."[13] The reality of women's exercise of human rights, however, does vary significantly according to latitudes and circumstances. The cases below illustrate how courts have closed the gap between the conception and reality of women's human rights for some women in a variety of fora.[14]

II. JUDICIAL DECISIONS: INTERNATIONAL

The cases addressed in this section delineate the extent of protection to which women are guaranteed in the exercise of their human rights under applicable international instruments. This involves analysis of cases arising before the Permanent Court of International Justice, the Human Rights Committee, and the Committee on the Elimination of all Forms of Racial Discrimination.

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12. G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 59. UN Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

13. President Francois Mitterand made this statement on the eve of his trip to the Soviet Union. Le Monde, May 17, 1984 at 1, col. 5. ("Notre conception des droits de l'homme ne varie pas selon les latitudes ni les circonstances.").

14. For procedures involved in bringing cases before international and regional tribunals, *see, e.g., T. Buergenthal, J. Norris, & D. Shelton,* PROTECTING HUMAN RIGHTS IN THE AMERICAS (3d ed. 1990); Coliver, *United Nations Machineries on Women's Rights: How They Better Help Women Whose Rights are Being Violated,* in NEW DIRECTIONS IN HUMAN RIGHTS 25-49 (E. Lutz, H. Hannum, & K. Burke eds. 1989). Cohen, *International Fora for the Vindication of Human Rights Violated by the U.S. International Population Policy,* 20 N.Y.U. J. INT'L L. & POL. 241 (1987); Weston, *Regional Human Rights Regimes: A Comparison and Appraisal,* 20 VAND. J. TRANSNAT'L L. 585 (1987). The cases discussed will be addressed chronologically in each section.

A. *The Permanent Court of International Justice*

In the Advisory Opinion on the Interpretation of the Convention of 1919 Concerning Employment of Women During the Night,[15] the United Kingdom, as a State Party to the 1919 Convention Concerning the Employment of Women During the Night (1919 Convention), sought an Advisory Opinion from the Permanent Court of International Justice (PCIJ) to determine whether British women engineers were precluded from holding managerial positions in electrical companies because such positions required women to work at night. Article 3 of the 1919 Convention clearly prohibited women from working at night in any public or private industrial undertaking, but whether article 3 applied to women in all positions or just those involving manual labor was unclear.

The PCIJ, in a six to five decision, found that "the Convention concerning employment of women during the night . . . applies . . . to women who hold positions of supervision or management and are not ordinarily engaged in manual work."[16] Therefore, the PCIJ concluded that article 3 prohibited women from working at night regardless of their position. This opinion prohibited all women from working at night and, in many cases, from being paid extra for night work. Subsequent revisions to the 1919 Convention in 1934 and in 1948 exempted women in managerial positions from this prohibition and developed a more flexible definition of "night."[17]

B. *The Human Rights Committee*[18]

In *Lovelace v. Canada*,[19] Sandra Lovelace, a Canadian Maliseet Indian, lost her status and rights as an Indian in accordance with Canada's Indian Act when she married a non-Indian. Upon her subsequent divorce, Lovelace sought the right to return to her tribe. The tribe, however, prevented her from doing so because of the loss of her Indian status. Pointing out that an Indian man who marries a non-Indian woman does not lose his Indian status, she claimed that the Act discriminated on

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15. 1932 P.C.I.J. (ser. A/B) No. 50, at 365 (Nov. 15).

16. *Id.* at 382.

17. *See, e.g.*, N. HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 16 (1983).

18. For a general overview of the Human Rights Committee in this context, see the Human Rights Committee's *General Comment 18(37)* on non-discrimination. U.N. Doc. CCPR/C/21/Add.1/Rev.1 (1989).

19. Communication No. R.6/24, 36 U.N. GAOR Supp. (No. 40) at 166, U.N. Doc. A/36/40, *reprinted in* 2 HUM. RTS. L.J. 158 (1981) [hereinafter The *Lovelace* Decision].

the basis of sex and thus violated the Political Covenant.

The Human Rights Committee (Committee) recognized that many of the Political Covenant's articles were directly at issue in the case: article 12, which established the right to choose one's residence; articles 17, 23, and 24, which established the rights for protection of private and family life and children; and articles 2, 3, and 26, which established the right of nondiscrimination on the basis of sex. The Committee, however, declined to rule on the sex discrimination aspects of the case, because Lovelace married before the Political Covenant came into force in Canada.[20] The Committee did state, however, that "to deny Sandra Lovelace the right to reside on the reserve is [neither] reasonable [n]or necessary to preserve the identity of the tribe."[21] Thus, the Committee concluded that the government's refusal to recognize her as a member of the Indian tribe was an unjustifiable denial of her right to enjoy her own culture as preserved by article 27 of the Covenant.[22]

In *In re Aumeeruddy-Cziffra & Nineteen Other Mauritian Women*,[23] Aumeeruddy-Cziffra and nineteen other Mauritian women petitioned the Human Rights Committee, claiming that the Mauritius Immigration Amendment Act of 1977 and the Deportation Amendment Act of 1977 promoted unlawful sex discrimination under the Political Covenant. Both of these acts limited the rights of foreign husbands to attain Mauritian resident status, but did not contain similar provisions governing foreign wives. The Human Rights Committee held that the Acts violated articles 2(1), 3, and 26 of the Political Covenant as related to articles 17(1) and 23(1) of the instrument.[24] Under article 2(1), a State party is obligated

> to respect and ensure the rights of the Covenant "without distinction of any kind, such as . . . (i.e.) sex", and more particularly under article 3 "to ensure the equal right of men and women to the enjoyment" of all these

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20. The *Lovelace* Decision, *supra* note 19, paras. 11, 12, 18.

21. *Id.* para. 17.

22. Article 27 of the Covenant requires a state to protect ethnic and linguistic minorities. *Id.* para. 13.2; *see also* Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, 20 CAN. Y.B. INT'L L. 244 (1982); Pentney, Lovelace v. Canada: *A Case Comment*, CAN. LEGAL AID BULL. (1982).

23. Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. R.9/35, 36 U.N. GAOR Supp. (No. 40) at 134, U.N. Doc. A/36/40 (1981), *reprinted in* 2 HUM. RTS. L. J. 139-43 (1981) [hereinafter The *Aumeeruddy-Cziffra* Decision].

24. *Id.* para. 10.1; *see also* Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990).

> rights, as well as under article 26 to provide "without any discrimination" for the "the equal protection of the law."[25]

Article 17 prohibits arbitrary or unlawful interference with the family unit and article 23(1) requires that the family be protected.

The Committee reasoned that the protection of a family cannot vary based upon the sex of the spouse. Though the Committee stated that Mauritius justifiably could restrict the access of aliens to their territory and could expel them for security reasons, it viewed the legislation as discriminatory and not justified by national security concerns, because it subjected foreign spouses of Mauritian women to the restrictions, but not foreign spouses of Mauritian men.[26] The Committee concluded that "an adverse distinction based on sex" existed that adversely affected "the alleged victims in their enjoyment of one of their rights," and that no sufficient justification for the difference had been advanced.

In *Broeks v. The Netherlands*,[27] S.W.M. Broeks, a Dutch citizen, petitioned the Human Rights Committee claiming violations of article 26 of the Political Covenant and article 9 of the Economic Covenant. Article 26 of the Political Covenant ensures all persons equal protection of the law, and article 9 of the Economic Covenant recognizes the right to social security. Broeks had been dismissed from her job because of a disability. She received unemployment payments at first, but the government discontinued the payments because she was not the "breadwinner" in her household as required by the Netherlands Unemployment Benefits Act. The Human Rights Committee held in Broeks' favor, both because the statute placed no similar burden on married men, and because it found the differentiation unreasonable. The Committee explained that article 26 of the Political Covenant requires that once a state adopts social security legislation, it must provide the benefits equally. The Committee stated further that the discrimination provisions of the Political Covenant "would still apply even if a particular subject matter is referred to or covered in other international instruments such as The Women's Convention."[28]

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25. The *Aumeerudddy-Cziffra* Decision, *supra* note 23, para. 9.2(b)2(i)5.

26. *Id.* para. 9.2(b)2(ii)3.

27. Communication No. 172/1984, 42 U.N. GAOR Supp. (No. 40) at 139, U.N. Doc. A/42/40 (1987).

28. *Id.* para. 12.1; *see also* Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769 (1989). The facts and holding in *Broeks* are similar to Zwaan-de Vries v. The Netherlands. Communication No. 182/1984, 42 U.N. GAOR Supp. (No. 40) at 160, U.N. Doc. A/42/40 (1987).

Ato del Avellanal v. Peru[29] involved the compatibility of article 168 of the Peruvian Civil Code with the non-discrimination provisions of the Political Covenant. Peruvian Civil Code article 168 stated that only a husband could represent matrimonial property before the courts. The complainant, a married woman, sued in her own name to recover arrears of rent from tenants of buildings she acquired in 1974, which were included in the couple's matrimonial property. Though successful at trial, the plaintiff lost on appeal to the Superior Court on the basis of article 168. The Peruvian Supreme Court then upheld the decision of the Superior Court. The Human Rights Committee subsequently concluded that the Peruvian law violated article 3 of the Political Covenant, requiring non-discrimination in the enjoyment of rights, article 14(1), establishing the right to equality before the courts, and article 26, mandating equality before the law and equal protection of the law, and called on the Peruvian government to remedy these violations.

In *Vos v. The Netherlands*,[30] Hendrika Vos claimed the Netherlands Government discriminated against her on the basis of sex and marital status. She alleged a violation of article 26 of the Political Covenant, which, among other things, established the right to non-discrimination on the basis of sex. Vos had been receiving an allowance under the Netherlands' General Disablement Benefits Act (Disablement Act). Following the death of her ex-husband, however, the government discontinued payment of the disability allowance because she was then entitled to payment under the General Widows and Orphans Act. Under the latter, she received less payment than she had received under the Disablement Act.

Vos argued that article 32 of the General Disablement Benefits Act makes an improper distinction on the basis of sex. Under the Act, when a disabled man's wife dies, he retains the right to a disability allowance; however, when a disabled woman's husband dies, she does not retain the right to a disability allowance, but is provided a smaller allowance under the General Widows and Orphans Act. Vos claimed that she should be treated primarily as a disabled person and not as a widow.

The Netherlands Government explained that the purpose of the General Widows and Orphans Act is to provide widows and orphans with a sufficient means of subsistence. At the time of the Act's passage, husbands generally were the primary income earners for families. Because

29. Communication. No. 202/1986, 44 U.N. GAOR Supp. (No. 40) at 196, U.N. Doc. A/44/40 (1989).

30. Communication No. 218/1986, 44 U.N. GAOR Supp. (No. 40) at 232, U.N. Doc. A/44/40 (1989) (views adopted on Mar. 29, 1989 at the 35th Session).

married women increasingly began working outside the home, the Netherlands Government explored possible amendments to the Act. This involved assessing whether the privileged position women enjoy under the Act was still justified.

The Government contended that the Acts contained provisions governing overlapping entitlements because of the necessity to ensure that individuals do not qualify to receive benefits from two social insurance acts, each of which is intended separately to provide a full income at subsistence level. The Netherlands Legislature decided subsequently that if an individual was entitled both to general disablement benefits and general widows and orphans benefits, they would receive only the latter. The general widows and orphans benefits generally exceed the General Disablement benefits to married women, because most married women work part-time and therefore receive only partial disability payments.

The Government also argued that the question of whether the application of article 32 of the General Disablement Benefits Act leads to a disadvantageous result for a particular individual is irrelevant for purposes of assessing whether the Act violates article 26 of the Political Covenant. The difference in position between a disabled widower and a disabled widow arises because disabled men are ineligible for general widows and orphans benefits. The problem of overlapping benefits does not arise for men, and thus it is inappropriate to compare the effect of the rule on men and women.

The Human Rights Committee found no violation of article 26 in the *Vos* case. The Committee held that in light of the legislative history and the purpose and application of the Acts, the unfavorable result of which Vos complained followed from the application of uniform rules implemented to avoid overlapping in the allocation of social security benefits. The Committee concluded that the differential treatment was based on objective and reasonable criteria—especially since both Acts were aimed at ensuring that all individuals who qualify for benefits receive subsistence level income—and that Vos had not been discriminated against within the meaning of article 26 of the Political Covenant.[31]

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31. *See Rasmussen v. Denmark* (upholding differential treatment), *infra* Part III.A.4; *Application No. 9639/82 v. Germany*, *infra* Part III.B.1; *Lindsay v. United Kingdom*, *infra* Part III.B.3.

C. *The Committee on the Elimination of All Forms of Racial Discrimination*

In the case of *Yilmaz-Dogan v. The Netherlands*,[32] Yilmaz-Dogan, a Turkish national residing in the Netherlands, petitioned the Committee on the Elimination of Racial Discrimination (Race Committee) claiming a violation of the International Convention on the Elimination of all Forms of Racial Discrimination (Race Convention). Dogan was terminated from her job in a textile factory in a manner she alleged was racially motivated. Dogan alleged that, had she been Dutch and not Turkish, she would not have been dismissed from her employment. She unsuccessfully protested her dismissal in the Dutch Courts. Because of her lack of satisfaction in the Dutch judicial system, she petitioned the Race Committee.

Dogan alleged her rights were violated under article 5(e)(i) of the Race Convention, which guarantees the rights to gainful work and protection against unemployment. She asserted that the Dutch governmental authorities endorsed the termination of her employment contract on racially discriminatory grounds. Dogan alleged further that her rights were violated under article 6, which guarantees adequate protection against race discrimination, the provision of legal remedies, and due process of law. She noted that the racially motivated termination of her employment contract was not reviewed by a higher court. She also argued that she unsuccessfully had sought penal prosecution of her former employer for the discriminatory practices of which she claimed to have been a victim. Because the prosecutor did not initiate proceedings against the employer for allegedly discriminatory practices, Dogan claimed a violation of article 4 of the Race Convention, which requires state parties to eliminate manifestations of racial discrimination.[33]

The Race Committee concluded that Dogan's right to work under article 5(e)(i) had not been protected. In reviewing the dismissal, the Race Committee found that the Dutch authorities failed to address directly the alleged discrimination. The Committee held, however, that a government is not required to prosecute actively every claim of alleged discrimination. It need prosecute only those it considers expedient to pursue—provided that the government's decision was subject to judicial review.[34] After deciding that Dogan's right to work had not been protected adequately, the Committee recommended that the Dutch government in-

32. Communication No. 1/1984, CERD/C36/D/1/1984 (Aug. 15, 1988), 1-8.
33. *Id.* para. 2.4.
34. *Id.* para. 9.3.

vestigate whether Dogan now had adequate employment and, if not, assist her in securing employment, or "provide her with such other relief as may be considered equitable," or both.[35]

III. JUDICIAL DECISIONS: REGIONAL

The cases discussed in this section involve the application of international legal principles embodied in regional human rights instruments. This involves analysis of cases arising before the European Court of Human Rights, the European Commission of Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights.

A. *The European Court of Human Rights*

1. Marital Status and Motherhood

In *Marckx v. Belgium*,[36] Paula Marckx, an unmarried journalist residing in Antwerp, challenged a Belgian law that required unmarried mothers to register and officially adopt their own child, contrary to the European Convention. The Belgian registration procedure was contrary to the principle *mater semper certa est* (the identity of the mother is always certain), which was applicable at the time in most member states of the Council of Europe.[37] The European Commission of Human Rights and then the European Court of Human Rights held the Belgian law contrary to articles 8 and 14 of the European Convention and article 1 of the First Protocol to the Convention. Article 8 established respect for private and family life, and article 14 required nondiscrimination as between legitimate and illegitimate children, as well as between married and unmarried mothers. Article 1 of Protocol Number 1 establishes a right to peaceful enjoyment of possessions.[38]

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35. *Id.* para. 10.

36. 31 Eur. Ct. H.R. (ser. A) (1979).

37. The court stated that we "cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim *'mater semper certa est'*." *Id.* para. 41.

38. *See, e.g.*, Bossuyt, *L'arret* Marckx *de la cour européenne des droits de l'homme* (The *Marckx* Decision of the European Court of Human Rights), 15 REVUE BELGE DE DROIT INT'L (BELGIAN INT'L L. REV.) 322-25 (1980-82); Mahoney, *Judicial Activism and Judicial Self-Restraint in The European Court of Human Rights: Two Sides of The Same Coin*, 11 HUM. RTS. L.J. 57 (1990); De Hondt & Holtrust, *The European Convention and the Marckx-Judgment Effect*, 14 INT'L J. SOC. LAW 317 (1986); A. DRZEMCZEWSKI, THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME

In March 1974, Marckx brought an application both on her own behalf and on that of her daughter, Alexandra, who was born on October 16, 1973. Marckx recognized her on October 29, 1973 and then adopted her on October 30, 1974. The application put at issue the status of the term "illegitimate children" in the context of Belgian legislation on the establishment of parental links, the effects of natural and adoptive links, the right of inheritance, and the capacity to receive legacies.

The applicants alleged that the law amounted to a loss or curtailment of a person's status (*capitis diminutio*) and was contrary to article 8, article 14, and also alleged that natural children and single mothers were victims of degrading treatment that violated article 3. Finally, the applicants also contended that preventing an unmarried mother from disposing of her property in favor of her natural child by gift or by bequest violated article 1 of Protocol Number 1 to the European Convention.

In its report, the Commission concluded that the Belgian law of which the applicants complained constituted an unjustified interference with their right to respect for private and family life, and was discriminatory within the meaning of article 8 of the European Convention read alone and in conjunction with article 14. The Commission stated further that discrimination had deprived Marckx's right to peaceful enjoyment of possessions under article 1 of Protocol Number 1 read in conjunction with article 14 of the European Convention. The Commission emphasized its concern with the legal status of illegitimate children and the relationship between these children and their unmarried mothers.[39] The

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AND CORRESPONDENCE (1984); Duffy, *The Protection of Privacy, Family Life and Other Rights Under Article 8 of the European Convention on Human Rights*, 1982 Y.B. EUR. 191-238; A. HEYVAERT & H. WILLEKENS, BEGINSELEN VAN HET GEZINS—EN FAMILIERECHT NA HET MARCKXARREST. DE THEORIE VAN HET MARCKXARREST EN HAAR WEERSLAG OP HET GELDEND RECHT (Principles of Nuclear and Extended Family Law after the *Marckx* Decision. The Theory of the *Marckx* Decision and its Application to Operative Law) (1981); J. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (1988); Rigaux, *La loi condamnée. A propos de l'arrêt européenne du 13 juin 1979 de la cour européenne des droits de l'homme* (The Condemned Law: Concerning the June 13, 1976 decision of the ECHR-Court), 1979 *Journal des Tribunaux* (Court Reporter) 513-24; Salzberg, *The* Marckx *Case: The Impact on European Jurisprudence of the European Court of Human Rights' 1979* Marckx *Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights*, 13 DEN. J. INT'L L. & POL'Y 283 (1984).

39. In contrast, the Commission was not concerned with the rights and obligations that arise in the relationship between the illegitimate child and its known or presumed father. The Commission also was not concerned with questions arising in the case in which the claims of an illegitimate child were competing with those of the legitimate

Commission, however, found no other breaches of the European Convention.

In addressing the issues arising under article 8 of the European Convention, the Commission noted that, under Belgian law, the birth itself failed to establish a legal relationship between the unmarried mother and her child, and that recourse to the recognition procedure was necessary for the child to acquire status as a family member. The Commission found " '[r]espect' for a family life so understood implies an obligation for the State to act in a manner calculated to allow . . . ties [between near relatives] to develop normally."[40] Thus, the Committee concluded that Belgian law ignored the principle of *mater semper certa est*, and therefore constituted a lack of respect for family life within the meaning of article 8 of the European Convention.[41]

The Committee also found an unlawful restriction of the concept of family life and, therefore, a breach of article 8 in the context of illegitimate children. In this context, the Commission referred to a dilemma with which the unmarried mother was faced: under article 908 of the Belgian Civil Code, an unmarried mother who recognizes her child cannot bequeath her property in its entirety to her child, but an unmarried mother who does not recognize her child can bequeath her property in its entirety to her child in the same manner as she would to a stranger. If the mother does not recognize her child, however, no legal familial bond with the child will exist. In the Commission's opinion, the applicant's alternative of adoption after recognition did not remedy the situation, because this procedure only improved the status of the child's relationship with the mother, but did not make the child a member of her family.[42] The commission found that the legislation in question did not benefit the "legitimate" family and, further, unjustifiably penalized the illegitimate family. In addition, the government "put forward no special

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children of the child's mother subsequent to marriage.

40. *Marckx*, 31 Eur. Ct. H.R. (ser. A) para. 45.

41. "[T]he development of the family life of an unmarried mother and her child whom she has recognised may be hindered if the child does not become a member of the mother's family and if the establishment of affiliation has effects only as between the two of them." *Id.*

42. In *Marckx*, the Commission concluded further that distinctions existed in the law's treatment of married and unmarried mothers. It also noted distinctions between legitimate and illegitimate children regarding proof of descent and limiting without objective or reasonable justification, the child's relationship with its family. The court found that until she was adopted, the daughter had the capacity to receive property from her mother which was "markedly less than that which a child born in wedlock would have enjoyed." *Id.* para. 55.

argument" supporting this disparate treatment.[43]

On appeal, the European Court of Human Rights held that the provisions of the Belgian Civil Code in question infringed upon articles 8 and 14 of the European Convention and article 1 of Protocol Number 1 read in conjunction with article 14.[44] The court noted specifically that article 8 of the European Convention applies as equally to the "family life" of an "illegitimate" family as it does to that of the "legitimate" family. Furthermore, the court held that when a state determines the law governing certain family ties, it must act in a manner calculated to allow those concerned to lead a normal family life and avoid "any discrimination grounded on birth." The court held that the interest of "illegitimate" children in establishing a maternal bond is as significant as that of "legitimate" children. Although recognizing the aim pursued by the Belgian legislation—protection of the child and of the traditional family—was valid, the court stated that in the achievement of this end, the government could not use measures whose object or result prejudices the "illegitimate" family.[45] The court was persuaded by the evolution in the domestic law of a majority of the member states of the Council of Europe towards equality between "legitimate" and "illegitimate" children.[46] The court found that the distinction contained in Belgian law lacked objective and reasonable justification and therefore violated article 14 when taken in conjunction with article 8.

The court noted further that article 8 of the European Convention does not guarantee a mother complete freedom to give or bequeath her property to her child. The court concluded, however, that the distinction in the Belgian legislation between unmarried and married mothers lacked objective and reasonable justification and, with respect to Paula Marckx, was contrary to article 14 when taken in conjunction with arti-

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43. *Id.* In particular, the Commission noted that:

> In view of Article 14 of the Convention, the court fails to see on what "general interest," or on what objective and reasonable justification, a State could rely to limit an unmarried mother's right to make gifts or legacies in favour of her child when at the same time a married woman is not subject to any similar restriction.

Id. para. 65.

44. The court further decided that there had been no breach of articles 3 and 12 of the European Convention.

45. The court acknowledged that at the time the European Convention was drafted, many European countries regarded a distinction between the "illegitimate" and the "legitimate" family as permissible.

46. The court referred to the official statement of reasons accompanying the Bill introduced by the Belgian Government before the Senate on February 15, 1978. This statement asserted that "lawyers and public opinion are becoming increasingly convinced that the discrimination against [illegitimate] children should be ended".

cle 8 of the Convention.

The court found the necessity of Paula Marckx to resort to a voluntary act of recognition by declaration to establish maternal affiliation thwarted the normal development of family life and violated article 8. The court also examined this issue under article 1 of Protocol Number 1 which, according to the court, substantively guarantees the "traditional and fundamental . . . right to dispose of one's property." The court noted that this fundamental interest may induce a legislature to control the dispositions of property inter vivos or by will. Consequently, the court stated that the limitation complained of by Paula Marckx did not conflict with article 1 of Protocol Number 1. The court concluded, however, that the Belgian legislation's limitation applied only to unmarried mothers and lacked objective and reasonable justification. The court, therefore, found a breach of article 14 taken in conjunction with article 1 of Protocol Number 1.[47]

2. Domestic Violence and Marital Separation

In the case of *Airey v. Ireland*,[48] Airey, an Irish national, lodged an application with the European Commission of Human Rights against Ireland. The Commission subsequently referred the case to the European Court of Human Rights. Mrs. Airey alleged that her husband was an alcoholic who frequently threatened her with, and occasionally subjected her to, physical violence. In January 1972, Mr. Airey was convicted and fined for assaulting his wife. Since June 1972, Mr. Airey had lived apart from the applicant and paid her support irregularly rather than weekly as he had been required. During this time, Mrs. Airey had attempted to obtain legal separation from her husband on the grounds of alleged physical and mental cruelty to her and her children. Because of the prohibitive cost of applying to the High Court of Ireland, Mrs. Airey's attempts at legal separation were unsuccessful.

Mrs. Airey claimed that the state failed to protect her from her allegedly violent husband by not detaining him for treatment as an alcoholic after the January 1972 hearing. She also claimed that the state failed to protect her by not ensuring that her husband was current with support payments and by allowing the prohibitive cost of the proceedings to prevent her from obtaining a judicial separation. Mrs. Airey submitted that the prohibitive cost of the proceedings, because it inhibited her ability to

47. With regard to article 50 of the Convention, the court concluded that, in this case, it need not afford the applicants any just satisfaction, other than that resulting from the findings of several violations of their rights. *Id.* para. 68.

48. Airey Case, 32 Eur. Ct. H.R. (ser. A) (1979).

receive a judicial resolution, violated several articles of the European Convention. These articles included article 6(1),[49] which assures the right of access to an appropriate court, and article 8, which establishes the right to respect for private and family life. The violated articles also included article 13, which establishes the right to an effective remedy, and article 14, which sets forth the right of nondiscrimination in conjunction with article 6(1). The Commission held unanimously, however, that the state's failure to ensure Mrs. Airey effective judicial access to obtain a legal separation from her husband amounted to a breach of article 6(1). Therefore, the Commission did not examine the case under articles 8, 13, or 14.

The European Court of Human Rights, in a five to two decision, agreed with the Commission that there had been a breach of article 6(1), and that examination of the case under articles 13 and 14 was not necessary. The court found that the fulfillment of a duty under the European Convention, in some circumstances, "necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive . . . ."[50] The court determined that the obligation "to secure an effective right of access to the courts falls into this category of duty."[51] The court read article 6(1) as compelling the state to provide legal assistance to individuals financially unable to attain representation. The court stated that providing a lawyer to such individuals is "indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."[52]

The court, however, disagreed with the Commission and found that the state had violated article 8. Noting that article 8 does not just compel the state to abstain from interference, but that positive obligations must be undertaken to protect the respect for private or family life, the court stated that the entitlement to a decree of judicial separation recognizes that protection of private or family life may, under Irish law, involve a husband and wife being relieved of the duty to live together.[53] Since this protection was not effectively accessible to Mrs. Airey because of the

49. "Article 6 § I secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal." *Id.* para. 22.

50. *Id.* para. 25, citing the *Marckx* case, 31 Eur. Ct. H.R. (ser. A) (1979).

51. 32 Eur. Ct. H.R. (ser. A) para. 25.

52. *Id.* para. 26.

53. *Id.* para. 33. The court recognizes that both positive and negative obligations exist. *See, e.g.,* X & Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985); *Marckx v. Belgium, supra* note 36 (positive obligation with respect to private and family life).

prohibitive costs of applying to the High Court, Ireland had failed to give effective respect for private or family life and therefore violated article 8.[54]

3. Sex Discrimination and Paternity Challenges

A Danish case addressed sex discrimination in the context of paternity challenges. In *Rasmussen v. Denmark*,[55] the applicant, Mr. Rasmussen, and his wife had been married since 1966. In 1971, the wife had a child. Mr. Rasmussen doubted the child's paternity, but to preserve the marriage, he did not challenge paternity at that time. In 1975, the applicant and his wife divorced and entered into an agreement whereby she waived all claims for maintenance of the child, and he agreed not to challenge the child's paternity. In 1976, Rasmussen's now former wife applied for maintenance, claiming that she was not bound by their earlier agreement. Rasmussen then instituted proceedings to determine paternity. The Danish court refused his application because Rasmussen had not brought the action within the applicable statute of limitations.

Rasmussen challenged this law as sex discriminatory, because the time limit to challenge paternity applied only to husbands, and not to wives. Rasmussen claimed that this disparate treatment violated article 14 of the European Convention, which ensures the right to nondiscrimination, in conjunction both with article 6, which guarantees the right to a fair determination of an individual's civil rights and obligations, and article 8, which establishes the right of respect for private and family life.

In 1982, the Danish Government amended the law so that it imposed a three year time limit on paternity challenges for both husbands and wives. This amendment did not, however, prevent the court from hearing Rasmussen's case, nor did it influence the court's decision.

The Danish Government presented three primary arguments in the *Rasmussen* case. First, it argued that the difference in treatment between men and women was not discriminatory because the husband and the wife had different interests in the paternity proceedings: the mother's interests coincided with those of the child, but the husband's interests were more independent. Second, the time limit for paternity challenges was necessary to protect the mother from the husband's potential use of

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54. The court concluded: "Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto." 32 Eur. Ct. H.R. (ser. A) para. 33; *see also* A. DRZEMCZEWSKI, *supra* note 38; Duffy, *supra* note 38, at 191; J. MERRILLS, *supra* note 38.

55. 87 Eur. Ct. H.R. (ser. A) (1984).

paternity proceedings to escape maintenance obligations. Third, the government argued that the applicable law allows contracting states a "margin of appreciation" when the extent to which differences in otherwise similar situations justify a different treatment under the law.

The court held first that article 6 applied to the case because an action contesting paternity is a family law matter that includes a determination of "civil rights and obligations."[56] The court also held article 8 applicable because the determination of paternity falls within "private life."[57] The main issues, however, involved whether the difference in treatment had an objective and reasonable justification and whether the goals of the legislation were proportionate to the means. Under article 14, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification,' that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised."[58] The court concluded unanimously that Danish authorities reasonably could believe that the desire to ensure legal certainty and to protect the best interests of the child justified the introduction of time limits that applied only to husbands in paternity proceedings. Specifically, the court noted that

> [t]he difference of treatment established on this point between husbands and wives was based on the notion that such time-limits were less necessary for wives than for husbands since the mother's interests usually coincided with those of the child, she being awarded custody in most cases of divorce or separation.[59]

The court held that since the Danish legislation was reasonably justified and proportional to the aims sought to be achieved, no discrimination had occurred under article 14 in conjunction either with article 6 or article 8 of the European Convention.[60]

4. Disparate Treatment of Foreign Wives

The European Court of Human Rights also addressed charges of disparate treatment of foreign wives under British law. In *Abdulaziz, Cabales & Balkandali v. United Kingdom*,[61] Mrs. Abdulaziz, Mrs.

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56. *Id.* paras. 31-32.
57. *Id.* para. 33.
58. *Id.* para. 38, *citing Marckx*, 31 Eur. Ct. H.R. (ser. A) (1979).
59. 87 Eur. Ct. H.R. (ser. A) para. 41.
60. *Id.* para. 42; *see also* Andrews, *Cases Before the Court of Human Rights*, 10 EUR. L. REV. 295 (1985); Merrills, *Decisions on the European Convention on Human Rights During 1985*, 1985 BRIT. Y.B. INT'L L. 335; J. MERRILLS, *supra* note 38.
61. Case of Abdulaziz, Cabales & Balkandali, 94 Eur. Ct. H.R. (ser. A) (1985).

Cabales, and Mrs. Balkandali petitioned the European Commission of Human Rights alleging sex discrimination in the Rules of the United Kingdom Immigration Act of 1971 (Immigration Act) in violation of the European Convention on Human Rights. The Immigration Act required that foreign women who were settled lawfully in the United Kingdom either be citizens of the United Kingdom, born in the United Kingdom, or have at least one parent born there before their foreign husbands could join them there. Foreign men who were settled lawfully in the United Kingdom, however, could have their foreign wives settle with them without restriction.

The applicants argued that the immigration rules violated article 8, establishing the right to respect for private or family life, alone and in conjunction with article 14, which recognizes the right to non-discrimination. The applicants also argued that the disparate immigration rules violated article 3, which ensures the right to be free from torture or inhuman or degrading treatment, and article 13, which establishes the right to an effective remedy. The Commission unanimously found a breach of article 13 and a breach of article 8 in conjunction with article 14, but found no breach of article 3 or article 8 taken alone.[62]

The European Court of Human Rights unanimously affirmed the decision of the Commission. The court found no disrespect for family life and thus no breach of article 8 taken alone, because the applicants knew or should have known the effect of the immigration rules. Furthermore, they did not show that obstacles existed to establishing family life in their own or in their husband's home states.[63] Even though no violation of article 8 alone had occurred, the facts of the case were such that article 14 was applicable.[64] Although the court rejected the applicants' arguments that there had been discrimination on the grounds of race and birth, it found that the applicants had been victims of sex discrimination, which violated article 14 taken in conjunction with article 8.[65]

The court stated that because sexual equality is a major goal of the member states of the Council of Europe, "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."[66] Although the

62. *Id.* para. 56.

63. *Id.* para. 69.

64. According to the court's established law, "Article 14 complements the other substantive provisions of the Convention and the Protocols. . . . [and] has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions." *Id.* para. 71.

65. *Id.* para. 83.

66. *Id.* para. 78.

Act's aim of protecting the domestic labor market "was without doubt legitimate," it did not establish the legitimacy of the difference made in the Act on the basis of sex.[67] Thus, the court held that the immigration rules were disproportionate to the purported aim of the measure.[68]

Since the United Kingdom's domestic law had not incorporated the European Convention, the court was unable to provide an effective remedy as required by article 13. The court could not effect recourse if the discrimination resulted from a misapplication of the immigration rules. Because the allegations in this case were that the rules themselves, not merely their application, were discriminatory, no effective remedy existed. Thus, the lack of an effective remedy violated article 13 of the European Convention.

The court, stating that the difference in treatment complained of was not "degrading," rejected the applicant's article 3 argument.[69] As a result of the *Abdulaziz* decision, the British Parliament tightened the immigration rules subjecting foreign wives seeking to join their husbands in the United Kingdom to the more stringent conditions that applied to foreign husbands seeking to join their wives.[70]

5. Sexual Assault of the Mentally Impaired

The European Court of Human Rights also addressed the issue of protecting mentally handicapped females from sexual assault. In the case of *X & Y v. The Netherlands*,[71] Miss Y, a mentally handicapped sixteen year-old, was living in a privately run home for mentally handicapped children. She alleged that she was sexually assaulted by Mr. B, the son-in-law of the institution's director. The next day, Miss Y's father, Mr. X, lodged a complaint with the local police on behalf of his daughter, because her mental condition rendered her incapable of doing so herself. The authorities decided not to prosecute, however, because the victim had not lodged the complaint herself. Mr. X then appealed this decision to the Arnhem Court of Appeal.

The relevant articles of the Netherlands Criminal Code provided that

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67. *Id.*

68. *Id.* para. 77.

69. *Id.* para. 91.

70. *See, e.g.*, Byrnes, *Recent Cases*, 60 AUSTL. L.J. 182, 185 (1986); Cvetic, *Immigration Cases in Strasbourg: The Right to Family Life Under Article 8 of the European Convention*, 36 INT'L & COMP. L.Q. 647 (1987); Merrills, *supra* note 60, at 352-56; J. MERRILLS, *supra* note 38; Mullen, *Nationality and Immigration*, in THE LEGAL RELEVANCE OF GENDER, 146, 146-49 (S. McLean & N. Burrows eds. 1988).

71. 91 Eur. Ct. H.R. (ser. A) (1985).

a legal representative may lodge a complaint on behalf of an assault victim only if the victim is under the age of sixteen or is over the age of twenty-one and has a legal guardian. The court of appeal held that Mr. X's complaint was an insufficient substitute, even though Miss Y was mentally incapable of lodging the complaint herself. Thus, a gap in the Netherlands Criminal Code made it impossible to prosecute Mr. B.

Mr. X brought suit on behalf of himself and his daughter. He claimed that Miss Y had been subject to inhuman and degrading treatment contrary to article 3 of the European Convention, which ensures the right to be free from torture or inhuman or degrading treatment. Mr. X also claimed that with regard to both him and his daughter, there had been a violation of article 8, which recognizes the right to respect for private and family life. Mr. X claimed to have suffered from breaches of article 13, which ensures the right to an effective remedy, and article 14, which establishes the right to non-discrimination.

The court noted that although article 8 primarily is concerned with protecting individuals from arbitrary interference by public authorities, it also may impose positive obligations on contracting states to ensure effective respect for private and family life.[72] The court acknowledged that the choice of the means designed to achieve compliance with article 8 is a matter that falls within the contracting state's margin of appreciation.

While there are different means of ensuring "respect for private and family life," which indicates that recourse to criminal law is not necessarily the only answer, civil law remedies were insufficient in this case. Effective deterrence was crucial, because the *X & Y* case involved fundamental values and essential aspects of private life. The state, however, could achieve such deterrence only through criminal law provisions. This claim is underscored in that other states normally regulate this area of the law under criminal statutes. Thus, the court held unanimously that since the Netherlands Criminal Code failed to provide Miss Y with practical or effective protection from this sort of assault, the state had violated article 8 of the European Convention.[73]

The court further concluded that it need not examine the case under article 14, because it already had determined a violation of article 8 alone. The court held that, when a state violates an article enshrining a

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72. *Id.* para. 24. The court indicated that in addition to the negative obligation of abstaining from interference, "there may be positive obligations inherent in an effective respect for private or family life." *Id.* para. 23, *citing* The Airey Case, 32 Eur. Ct. H.R. (ser. A) (1979).

73. The court, assessing damages on an "equitable basis," awarded Miss Y 3000 Dutch Guilders. 91 Eur. Ct. H.R. (ser. A) para. 40.

right, examination under article 14 is not required unless a "clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case . . . ."[74] Similarly, the court held that it was not necessary to examine the case under articles 3 or 13.[75]

6. Divorce and Remarriage

The case of *Johnston v. Ireland*[76] addressed the human rights implications of the indissolubility of marriage under Irish law. The applicants, Roy Johnston and Janice Williams-Johnston, protested their lawful inability to marry in Ireland following the disintegration of Roy Johnston's previous marriage. The couple had been cohabiting for fifteen years and had a daughter, Nessa, who was the third applicant in the case. Although divorce is a common prelude to remarriage and the establishment of new family relationships, remarriage is impossible in Ireland because the Constitution prohibits divorce. The couple claimed that this prohibition denied their rights to family life and to freedom of religion, and disadvantaged them, and their child, in matters of support obligations, succession, and taxation of inheritances.

Ironically, the government's defense cited the tranquil and stable domestic life of the applicants as evidence against the discrimination claim on the grounds that the complaints of disadvantage were purely hypothetical and that there was no demonstrable victimization. Apparently, the government attributed the harmony of the applicant's domestic environment to the innocuous character of its legislation rather than to the applicant's personal qualities. It is speculative whether the government would have accepted responsibility for any disharmony arising from the applicants' insecure legal status in their prevailing and prospective relationships.

The court concluded that a right to divorce could not be derived from the right to marry and deemed the Johnstons a "family" as established by article 12 of the European Convention based on article 16 of the Universal Declaration.[77] Article 16 provides that "[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal

74. *Id.* para. 32.

75. *Id.* paras. 34, 36; Andrews, *supra* note 60, at 295; Merrills, *supra* note 60, at 344-46; J. MERRILLS, *supra* note 38; Byrnes, *Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalization*?, AUSTL. Y.B. INT'L L. (forthcoming).

76. Case of Johnston & Others, 112 Eur. Ct. H.R. (ser. A) (1986).

77. *Id.* para. 52.

rights as to marriage, during marriage and at its dissolution."[78] The European Convention takes a narrower approach and provides in article 12 that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[79] Furthermore, article 8, which concerns the right to respect for private and family life, precludes public authorities' interference with this right unless "in the interests of national security, public safety or . . . for the protection of health or morals . . . ."[80]

The court found that the constitutional prohibition of divorce did not contravene the above-mentioned provisions of the European Convention. The court reasoned that:

> there may in addition be positive obligations inherent in an effective "respect" for family life. However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.[81]

The court noted further that the couple was free to cohabit and establish a de facto family subject to legal disabilities. The court observed that the state's rejection of divorce was not absolute, because it recognized the divorces of Irish citizens who had established matrimonial domicile in other countries, and that these citizens' remarriages would be recognized in Ireland. Nonetheless, the court found that the distinction between citizens resident in Ireland and domiciled or formerly domiciled in other countries did not constitute a breach of the European Convention.

The court, however, did find a breach concerning legal disabilities to which the state subjected the daughter, Nessa, by virtue of her illegitimate status. Her status could interfere with her legal rights to support and inheritance, and prejudice her in civil and social capacities, including stigmatization at school. Referring to *Marckx*,[82] the court held unanimously that the legal treatment of Nessa violated article 8 of the European Convention with regard to all three applicants, and ordered Ireland to pay compensation to the three, including legal costs and expenses

78. *Id.*
79. *Id.* para. 49.
80. *Id.*
81. *Id.* para. 55 (citation omitted).
82. *Marckx*, 31 Eur. Ct. H.R. (ser. A) (1979).

before the Commission and the court.[83] The court did not explain why they found a right to family life for the daughter, but not a right of her parents to marry in order to improve family life for themselves and their daughter.[84]

The European Court of Human Rights also addressed a Swiss case that involved a temporary prohibition on remarriage. In *F v. Switzerland*,[85] F, a Swiss national, challenged a three year temporary prohibition on marriage that a Swiss civil court imposed on him. Article 150 of the Swiss Civil Code prohibits remarriage for up to three years if a spouse is held responsible for the breakdown of the marriage. To decide the case, the divorce court had assessed F's past conduct, which included three previous marriages and "unacceptable" behavior that had led to the breakdown of his fourth marriage.

F argued that this prohibition on remarriage violated article 12 of the European Convention, which guarantees to men and women the right to marry in accordance with the national laws governing the exercise of this right. The Swiss Government argued that its application of article 150 of the Civil Code was justified as it was designed to protect the institution of marriage, the rights of the person affected by the prohibition, and the rights of others.

The court noted that even though the post-divorce waiting period before remarriage had been abolished in other contracting states and that the European Convention was to be interpreted in light of present-day conditions, "the fact that, at the end of a gradual evolution, a country finds itself in an isolated position . . . does not necessarily imply that that aspect [of the legislation] offends the Convention."[86] The court held, however, that while article 12 does give national legislatures some discretion to impose restrictions on marriage, the Swiss measures in this case impaired the very essence of the right to marry.[87]

In a nine to eight decision, the court concluded that the imposition of a waiting period for remarriage unjustifiably restricted the right to marry and violated article 12. The court found that while the stability of marriage is a legitimate aim in the public interest, the means used by the

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83. 112 Eur. Ct. H.R. (ser. A) paras. 72-76, 86.

84. *See, e.g.*, Note, *Divorce and Remarriage As Human Rights: The Irish Constitution and the European Convention on Human Rights at Odds, in* Johnston v. Ireland, 22 CORNELL INT'L L.J. 63 (1989); J. MERRILLS, *supra* note 38.

85. F v. Switzerland, 128 Eur. Ct. H.R. (ser. A) (1987).

86. *Id.* para. 33. The court found this particularly true with regard to matrimony which "is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit." *Id.*

87. *Id.* paras. 38-40.

Swiss Government were disproportionate to that purpose.[88] The court rejected the government's submission that the rights of others, such as F's future wife, were protected in this case, since F's wife was neither under age nor insane. The court also dismissed the argument that a waiting period protected the divorcing person from himself when the divorcing spouse is, as was F, of full age and in possession of his mental faculties. The court concluded that "the disputed measure, which affected the very essence of the right to marry, was disproportionate to the legitimate aim pursued."[89]

B. *The European Commission of Human Rights*

1. Abortion

The application of *Bruggemann & Scheuten v. Federal Republic of Germany*[90] concerned a criminal statute in the Federal Republic of Germany involving the termination of pregnancy. In 1975, the West German Federal Constitutional Court ruled that the provisions in the Fifth Criminal Law Reform Act that permitted unrestricted abortion during the first 12 weeks of pregnancy were void. As a result of that decision, the Fifteenth Criminal Law Reform Act was passed in 1976, preserving the criminality of abortion, but providing that it would not be punishable if carried out within twenty-two weeks of conception by a doctor with the woman's consent, or if the situation involved one of several specified situations of distress for the woman.

The applicants, two West German women, submitted that the 1975 judgment and the subsequently enacted 1976 abortion law interfered with the right of respect for their private life. The applicants claimed that this interference was contrary to article 8(1) of the European Convention, which ensures the right to respect for private and family life, in that they were not permitted to terminate an unwanted pregnancy. The Commission found that pregnancy does not pertain uniquely to the sphere of private life, because when a woman is pregnant, her private life becomes closely connected with the fetus. The Commission stated

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88. *Id.* para. 36.

89. *Id.* para. 40. *See generally* M. ERICKSON, THE RIGHT TO MARRY AND TO FOUND A FAMILY (1990).

90. 3 Eur. H.R. Rep. 244 (1977). *See generally*, Doswald-Beck, *The Meaning of "The Right to Respect for Private and Family Life" Under the European Convention on Human Rights*, 4 HUM. RTS. L.J. 283 (1983). *See also* Case of Plattform Artze fur das Leben, 139 Eur. Ct. H.R. (ser. A) (1988) (upholding compulsory sex education in state school); Kjeldsen, Busk Madsen and Tedersen v. Denmark, 1 Eur. H.R. Rep. 711 (1976) (upholding right to demonstrate for and against abortion).

that "[a]rticle 8(1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother."[91] The majority of the Commission thus rejected the applicants' allegations and found that the laws restricting the availability of abortion did not constitute an interference with their right to respect for their private life, and did not violate article 8 of the European Convention.

The dissenting opinion of Mr. J.E.S. Fawcett started from the premise that "private life" in article 8(1) did cover pregnancy, its commencement, and its termination in that "it would be hard to envisage more essentially private elements in life."[92] Given that pregnancy and its termination is a part of private life, Mr. Fawcett reasoned that any intervention has to be justified under article 8(2). Mr. Fawcett concluded that these restrictive changes intrude unjustifiably in private and family life in contravention of article 8(2).[93]

The separate dissenting opinion of Mr. T. Opsahl, agreeing with Mr. Fawcett, explained that "punishment for unlawful abortion, or the threat of it, cannot be justified on any of the grounds set out in Article 8(2)."[94] Mr. Opsahl's opinion, with which Mr. C. Norgaard and Mr. L. Kellberg concurred, indicated that the self-determination of the woman "is the one most consistent with what we think a right to respect for private life in this context ought to mean in our time."[95] The dissenters qualified their statements, however, by adding:

> Nevertheless, we must admit that such a view cannot easily be read into the terms of Article 8. The problem is not a new one and traditional views of the interpretation and application of this Article have to be taken into account, notwithstanding the rapid development of views on abortion in many countries. We are aware that the reality behind these traditional views is that the scope of protection of private life has depended on the outlook which has been formed mainly by men, although it may have been shared by women as well.[96]

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91. *Id.* para. 61.

92. *Id.* para. 1 (Fawcett, dissenting).

93. *Id.* para. 7 (Fawcett, dissenting).

94. *Id.* para. 4 (Opsahl, dissenting).

95. *Id.* para. 2 (Opsahl, dissenting).

96. *Id.* para. 3 (Opsahl, dissenting). *See also* Cook, *U.S. Population Policy, Sex Discrimination, and Principles of Equality Under International Law*, 20 N.Y.U. J. INT'L L. & POL. 93 (1987); Duffy, *supra* note 38, at 191.

2. Retaining Maiden Name

In *Hagman-Husler v. Switzerland*,[97] the Commission addressed the case of a woman who, under the Swiss Civil Code, was required to bear her husband's family name. The applicant relied on article 8 of the European Convention, which secures the right of respect for private and family life. Hagman-Husler argued that article 8 was broad enough "to derive from it a general right to protection of personality."[98] The Commission found that a majority of European states consider it necessary for a family, "that is to say the spouses and their children (at least when they are minor) to be easily identifiable vis-à-vis third parties."[99] The Commission held that this purpose was reasonable and concluded that "the obligation placed on spouses to bear the same name (in this case, that of the husband) constitutes a suitable measure, proportionate to the aim it sought to realise."[100] The Commission found it persuasive that under the authority of the Canton of Solothurn, where the applicant resided, the applicant was provided the option of adding her maiden name after the name of her husband. The Commission indicated that under this option, the applicant could identify herself with her family, while also retaining her maiden name.[101] The Commission refused to grant the applicant damages and found no violation under the European Convention.[102]

The European Commission of Human Rights also addressed the issue of a husband's attempts to prevent his wife from having an abortion. In *Paton v. United Kingdom*,[103] Mr. Paton appealed the decision of the Family Division of the English High Court of Justice that precluded him from preventing his wife from having an abortion pursuant to the British Abortion Act of 1967.[104] Mr. Paton alleged that his inability to regulate his wife's decision or to be consulted on the issue was a violation of his right to respect for family life under article 8(1) of the European Convention. The European Commission of Human Rights dismissed Mr. Paton's appeal, explaining that the British decision, "insofar as it

97. 12 Eur. Comm'n H.R. 202 (1978).

98. *Id.* at 205.

99. *Id.* at 206. Interestingly, the applicant wanted to retain her maiden name precisely because this was the manner in which she believed she would be most readily identifiable to third parties. *Id.*

100. *Id.*

101. *Id.* at 205.

102. *Id.* at 206.

103. 19 Eur. Comm'n H.R. 244 (1980).

104. Paton v. British Pregnancy Advisory Serv. Trustees, [1979] Q.B. 276.

interfered in itself with the applicant's right to respect for his family life, was justified under paragraph (2) of Article 8 as being necessary for the protection of the rights of another person."[105] In addressing Mr. Paton's alleged right to be consulted, the Commission found that the husband could not claim that his rights of privacy and respect for his family life were violated, thus allowing him to interfere with his wife's plans to have an abortion.[106]

3. Unwed Mothers and Child Custody

A case in Germany arose over whether an unwed mother was entitled under German law to sole custody of her illegitimate child. In *Application No. 9639/82 v. Germany*,[107] the issues and decision were identical to those that had arisen earlier in *Application No. 9519/81 v. Germany*,[108] *Application No. 9558/81 v. Germany*,[109] and *Application No. 9530/81 v. Germany*,[110] except that in the instant case, the Commission also considered and rejected applications brought by the applicant's child and by his partner.

The applicants in *Application No. 9639/82 v. Germany* were an unmarried, cohabiting couple and their son. According to German law, the mother of a child born out of wedlock holds the right to care and custody over the child. The father can obtain the right to care and custody only by marrying the mother, by adopting the child, or by being appointed as guardian. The applicant parents sought a joint right to care and custody of their child. They contended that German law discriminated against an unwed father, because a married father shares the right to care and custody with the mother, and a divorced father may continue to share this right in agreement with the mother. The applicants argued that the German law violated article 8, which ensures the right to respect for family life, separately and in conjunction with article 12 of the European Convention, which guarantees the right to marry and found a family.

The German Government countered that article 6, paragraph 5 of the German Basic Law states that illegitimate children have the same oppor-

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105. 19 Eur. Comm'n H.R., para. 26.

106. *Id.* para. 27; *see also* Cook, *Reducing Maternal Mortality: A Priority for Human Rights Law*, in LEGAL ISSUES IN HUMAN REPRODUCTION 185 (S. McLean ed. 1989); Cook, *supra* note 96, at 93; Cook & Maine, *Spousal Veto over Family Planning Services*, 77 AM. J. PUB. HEALTH 339 (1987); Duffy, *supra* note 38, at 191.

107. 7 Eur. H.R. Rep. 135 (1984).

108. 6 Eur. H.R. Rep. 599 (1984).

109. 6 Eur. H.R. Rep. 605 (1984).

110. 7 Eur. H.R. Rep. 144 (1985).

tunities for development as legitimate children, which implies that the well-being of the child takes judicial priority over the parents' interests. The government argued that the different situations facing legitimate and illegitimate children may justify treating illegitimate children more favorably to achieve the goal of equal opportunity for development.

The European Commission of Human Rights first dismissed the application of the mother, since, according to article 25 of the European Convention, the Commission is competent only to examine an application of a person claiming to be a victim of a violation of the European Convention. Because the mother's situation was not affected directly, her application was incompatible with the provisions of the European Convention and was rejected. The Commission also rejected the application of the child as manifestly ill-founded.

With respect to the father's application, the Commission held that article 8 was not violated, because the applicable German law did not in itself prevent the father from enjoying his family life or from maintaining a normal parent-child relationship. Only the couple's free decision not to marry precluded this father from having all the privileges that a married father would have since article 12 gives greater protection to families based on marriage.

Because a strong bond generally forms between mother and child from birth, and because the mother usually maintains the family tie when the father may not be willing to assume obligations to his illegitimate child, the legislation granting the mother the right to care and custody corresponds to the situation of many illegitimate children. Thus, the Commission held that the German legislation, which gives special consideration to the illegitimate child and is thought to be in the child's best interests, is justified and constitutes a reasonable balance between conflicting interests. The Commission concluded that since the special situation of illegitimate children is a legitimate and reasonable justification for the legislation, no discrimination against the father occurred under article 14 of the European Convention.

4. Sex Discrimination and Taxation

A case in the United Kingdom raised the issue of disparate tax treatment of married men and women. In *Lindsay v. United Kingdom*,[111] the applicants filed a complaint urging that United Kingdom law, by taxing married couples as a single taxable unit, bore unfavorably on married women as opposed to married men with regard to taxation of investment

111. 9 Eur. H.R. Rep. 555 (1986).

income. The applicants claimed that the tax law constituted sex discrimination contrary to article 14 of the European Convention. They also claimed that the tax treatment of married couples' income acts as a deterrent to marriage and family life, insofar as it disadvantages married individuals in comparison to unmarried individuals. This unequal treatment, the applicants contended, violates article 8.

The United Kingdom defended the legislated distinction between married and unmarried women on the historical ground that while men traditionally were the family income earners, the government encouraged married women to work outside the home by offering them an earned income allowance equivalent to a single person's allowance to set off against earned income, as opposed to investment income.[112] The applicants argued that the rule rendering husbands liable in tax for their wives' investment income was too much of a "blunt tool" for the government to use in furtherance of the objective to eliminate all forms of discrimination against women.[113]

The Commission rejected the application, stating that national authorities should be able to determine the tax aims and the means by which they are to be pursued. The Commission noted that the margin of appreciation that states must have to determine the means to pursue their tax goals must be wider in this area than in many others, because systems of taxation inevitably differentiate among different groups of taxpayers.[114] The Commission did note that a tax advantage would have existed if the woman had been the primary income earner and the man the care taker; however, they gave no serious consideration to the implications of treating married women's investment income more disadvantageously than that of married men.

The Commission could have held that the investment tax structure further perpetuated "prejudices and . . . practices which are based on the idea of inferiority or on the stereotyped roles for men and women." This structure violates article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), which calls for a modification and eventual elimination of such social and cultural patterns of conduct. Despite that the United Kingdom had signed the Convention in 1981, and therefore was obligated not to act inconsistently, the government's authority to treat the investment income of married couples as a family unit prevailed.

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112. *Id.* at 558.

113. *Id.* at 559.

114. *Id.*; *but see* Case of Abdulaziz, Cabales & Balkandali, 94 Eur. Ct. H.R. (ser. A) (1985).

5. Disparate Treatment of Foreign Spouses

In *Application No. 11278/84 v. The Netherlands*,[115] the European Commission of Human Rights found interference with a Dutch woman's right to family life, as provided in article 8(1) of the European Convention, when the government prevented her foreign spouse from joining her in the Netherlands. The applicants complained that the Act on Dutch Citizenship allowed a foreign wife of a male Dutch citizen to obtain Dutch nationality by "mere declaration of her wish to do so to the local mayor."[116] This procedure, however, was not available to a foreign husband of a female Dutch citizen. Thus, the government prevented a Dutch woman's husband from joining his wife in the Netherlands. The Commission first rejected the applicants' argument under article 14 of the European Convention taken in conjunction with article 8. The Commission stated that "the right to acquire a particular nationality is neither covered by, nor sufficiently related to [these] or any other provision of the Convention."[117] The Commission then noted that the exclusion of a person from a state in which that person's close relatives live could violate article 8.[118] Under this analysis, the Commission discussed the possibility of the family following the husband to his state of nationality and determined that, in this case, it was unreasonable to force a Dutch woman to move her children to the husband's home in Hong Kong. The Commission, however, found that analysis was unnecessary in this case and cited article 8(2), which provides in part that:

> there may be interference by a public authority with the exercise of this right [to family life], if such interference is in accordance with the law and is necessary in a democratic society for the prevention of disorder and crime, for the protection of health and morals or for the protection of the rights and freedoms of others.[119]

The Commission then held that the interference involved was justified under article 8(2), because Dutch authorities found the applicant's husband guilty of heroin dealing, and therefore was declared an undesired alien in accordance with the Aliens Act.[120]

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115. 8 Eur. H.R. Rep. 95-96.
116. *Id.* at 95.
117. *Id.*
118. *Id.* at 96.
119. *Id.*
120. *Id.*

C. *The Inter-American Court of Human Rights*

In the Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica,[121] Costa Rica, as a state party to the American Convention, sought an Advisory Opinion from the Inter-American Court on Human Rights on a number of proposed amendments to the naturalization provisions of the Costa Rican Constitution. One of the proposed amendments would have distinguished between foreign women and foreign men marrying Costa Rican citizens. The court noted that the proposed amendment followed the formula adopted in the current Constitution, which gave women, but not men, who marry Costa Ricans special status for purposes of naturalization. "This approach . . . was based on the so-called principle of family unity and is traceable to two assumptions . . . . [One is that] all members of a family should have the same nationality."[122] The other derives from the notion that paternal authority over minor children was, as a rule, vested in the father.

Thus, it was the husband on whom the law conferred a privileged status of power, giving him authority, for example to fix the marital domicile and administer the marital property. Viewed in this light, the right accorded to women to acquire the nationality of their husbands was "an outgrowth of conjugal inequality."[123] The court held unanimously that the proposed naturalization amendments constituted discrimination incompatible with article 17(4), which provides for equality of rights and responsibilities within marriage, and article 24, which requires equal protection of the law.[124]

D. *The Inter-American Commission on Human Rights*

Case 2141,[125] involved a petition by several complainants who alleged that the United States and the Commonwealth of Massachusetts violated an aborted male fetus' "right to life" under article 1 of the American Declaration of the Rights and Duties of Man (American Declaration) and article 4 of the American Convention. Article 1 of the American Declaration states that "[e]very human being has the right to life, liberty and the security of his person." Article 4 of the American Convention

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121. 5 HUM. RTS. L.J. 161 (1984).
122. *Id.* para. 64.
123. *Id.*
124. *See, e.g,* Cook, *supra* note 24, at 643.
125. Case 2141, Inter-Am. C.H.R. 25, OEA/ser. L./V./1154, doc. 9 rev. 125 (1981).

provides that "[e]very person has the right to have his life respected . . . [which] right shall be protected by law and, in general, from the moment of conception . . . . No one shall be arbitrarily deprived of his life."[126] The petitioners alleged that the United States Supreme Court's decision in *Roe v. Wade*, by limiting the legal protection of the unborn, set the stage for the deprivation of the male fetus' right to life.

The Commission, relying on the *travaux préparatoires* of the American Declaration, rejected an interpretation of article 1 that would have protected unborn life more stringently than United States law under *Roe v. Wade*. The Commission decided that article 1 of the American Declaration did not incorporate the notion that the right to life exists from the moment of conception since the drafters chose not to adopt language which clearly stated that principle. In dismissing the petitioners' claim under article 4, the Commission stated that it would be impossible to interpret an article so as to impose an international obligation based upon a treaty that such state has not duly accepted or ratified. [127]

E. *The African Charter on Human and Peoples' Rights*

To date, article 2 of the African Charter has not specifically been applied to promote the equality of women.[128] Article 2 provides that "every individual shall be entitled to the enjoyment of the right and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as . . . sex . . . ."

IV. JUDICIAL DECISIONS: NATIONAL[129]

The cases analyzed in this section demonstrate the important use of international norms in domestic courts. This is illustrated by national courts' application of the European Convention, the European Economic

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126. The United States has signed the American Declaration but has not ratified the American Convention on Human Rights. The OAS rules allow petitions concerning the interpretation of the American Declaration to be brought before the Inter-American Commission.

127. *See, e.g.*, Cook, *supra* note 96, at 93; Shelton, *Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy,"* 2 HUM. RTS. L.J. 309 (1981).

128. *See, e.g.*, Langley, *The Rights of Women, The African Charter, and the Economic Development of Africa*, 7 B.C. THIRD WORLD L.J. 215 (1987); Comment, *Real Protection for African Women? The African Charter on Human and Peoples' Rights*, 2 EMORY J. INT'L DISPUTE RESOLUTION 425 (1988).

129. While this section necessarily concentrates on a small selection of cases, many other cases in the various national systems exist. *See, e.g.*, A. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW (1983).

Community Treaty (Common Market Treaty), and the Women's Convention.

A. *Domestic Application of the European Convention on Human Rights and the European Economic Community Treaty*

1. Abortion

The Constitutional Court of Austria applied article 2 of the European Convention[130] in its Judgment of October 11, 1974.[131] This case addressed the legality of the abortion provisions of the Reform Act of the Austrian Penal Code (Code). Specifically, section 96 of the Code provides that both the doctor who performs an abortion and the woman on whom the abortion is performed are liable for punishment. Section 97(I), however, provides an exemption from section 96 in that termination of the pregnancy is not punishable if performed within the first trimester and with the woman's consent.

The Salzburg Provincial Government applied to have section 97(I) invalidated on the ground that it was unconstitutional. It argued that section 97(I) violated the basic human right to life and the right to equality before the law. The Salzburg Provincial Government contended that the right to life was guaranteed by constitutional provisions based on international conventions, such as article 2 of the European Convention, which ensures that everyone's right to life shall be protected by law.

The Constitutional Court of Austria upheld the legality of section 97(I). The court found that because the European Convention did not specify at what point life is considered to begin, protection of an unborn child cannot be read into article 2. The court reasoned that this international treaty cannot, in doubtful cases, be interpreted in such an expansive way to protect unborn life, because laws of states parties to the European Convention currently do not recognize a right to life for unborn beings. Thus, the court concluded that the exemption from punishment, prescribed by section 97(I) of the Austrian Penal Code, with respect to a termination of pregnancy within the first trimester, was not contrary to the right to life guaranteed in article 2 of the European Convention.

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130. European states that have incorporated the European Convention into their national law include Austria, Belgium, Cyprus, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, Turkey, and Germany.

131. *Europaische Grundrechte-Zeitschrift* 74 (A. Blecksmann ed. 1975); Judgment of 11 October 1974, 39 ERKENNTNISSE UND BECHLUSSE DES VERFASSUNGSGERICHTSHOFES (Nr 7400/1974).

2. Private and Family Life

In his article on the *Marckx* case,[132] Marc Salzberg describes three reported domestic cases that cite the *Marckx* decision and invoke article 8 of the European Convention.[133] In one of the cases, the Supreme Court of the Netherlands decided that a Dutch law which prohibited an aunt from adopting her deceased sister's illegitimate daughter violated articles 8 and 14 of the European Convention.[134]

In another case, the Civil Tribunal of Ghent refused to apply a Belgian law that would have prohibited a granddaughter from inheriting from her grandmother, because the mother was an illegitimate daughter.[135] Citing *Marckx* and invoking articles 8 and 14 of the European Convention, the Tribunal permitted the granddaughter to inherit as if her mother had been legitimate. Similarly, the Civil Tribunal of Turnhout declared that a Belgian law, prohibiting the establishment of paternity or maternity of an illegitimate child born in an adulterous relationship, violated articles 8 and 14 of the European Convention.[136]

3. Unequal Wages

In *Pickstone v. Freemans*,[137] the United Kingdom's highest court, the House of Lords, applied the Common Market Treaty. The Common Market Treaty contains an equal pay provision in article 119 that is clarified by article 1 of the Economic Community Council Directive 75/117. The provision entitles men and women not only to equal pay for the same work, but also to equal pay for work to which equal value is attributed, irrespective of whether there is another person of the same sex currently engaged in the same work who is complaining of unequal treatment. *Pickstone* arose when five female warehouse workers complained that although they were paid the same as male warehouse workers, their work was of equal value to that performed by a male warehouse checker who was better paid. The female workers argued that the British legislation, while intending to give effect to the Common Market Treaty and Directive, had failed to realize the goal of those instruments.

The House of Lords upheld their claim on the basis that, although the women were being paid the same as men doing the same work, the as-

132. Salzberg, *supra* note 38, at 294-98.
133. *Id.* at 295-96.
134. Hoge Raad, 1980 NJ 1460.
135. Burgerlijke Rechtbank Te Gent, 1980 RECHTSKUNDIG WEEKBLAD 2328.
136. Burgerlijke Rechtbank Te Turnhout, 1982 RECHTSKUNDIG WEEKBLAD 1590.
137. Pickstone v. Freemans. [1988] 2 All E.R. 803.

sertion that the women's work was of equal value to that done by a more highly paid man was legitimate. Impliedly, injustice existed not only to women applicants, but also to the men paid at their rate. It is instructive, however, that the means used to subject the lack of appropriate job classification to judicial scrutiny was a claim of sex discrimination.

B. *Domestic Application of the Convention on the Elimination of All Forms of Discrimination Against Women*

1. Property Ownership

In *Ephrahim v. Pastory*,[138] the High Court of Tanzania cited the Women's Convention and the African Charter, both of which have been ratified by the Tanzanian legislature, in determining that Tanzanian law provided women protection against sex discrimination.[139] The respondent, a woman, inherited a plot of clan land from her father by a valid will and then sold the land to a non-clan member. Soon after, another member of the respondent's clan sought to void the sale under a Haya customary law that limited women's rights to inherit, own, and sell clan land.[140] The court found, however, that the Haya customary law in question "fl[ew] in the face of [the Tanzanian] Bill of Rights as well as the international conventions to which [Tanzania is a] signator[y],"[141] and held that the Haya customary law was modified to provide men and women with equal rights to inherit, own, and sell clan land.[142]

2. Sexual Harassment in the Workplace

In *Aldridge v. Booth*,[143] the Federal Court of Australia held that provisions of the Commonwealth Sex Discrimination Act of 1984, making sexual harassment in employment unlawful, were valid as an appropriate manner to implement Australia's obligation under article 11, which guarantees employment equality. The court held that sexual harassment of women was a form of sex discrimination within the meaning of the Women's Convention.[144]

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138. (PC) Civil Appeal No. 70 of 1989 (unreported).
139. *Id.* at 4.
140. *Id.* at 1.
141. *Id.* at 4.
142. *Id.* at 13.
143. Judgment of the Federal Court of Australia, CCH, Austl. & N.Z. Eq. Opp. Rep., EOC 77, 085-77, 098 (1988).
144. *Id.* Damages of $7000 were awarded as compensation for loss and indignities suffered by Lynette J. Aldredge.

In *Attorney-General of Canada v. Stuart*,[145] the Canadian Federal Court of Appeal denied application of article 11 of the Women's Convention. Article 11 states that "[i]n order to prevent discrimination against women on the ground of . . . maternity and to ensure their effective right to work, state Parties shall take appropriate measures . . . to introduce maternity leave with pay or with comparable social benefits without loss of former employment, security or social allowances."[146] In the *Stuart* case, Bernadette Stuart filed an application under Canada's Unemployment Insurance Act for benefits arising from a hospitalized illness resulting in her inability to work. Under the Act, Stuart was entitled to receive regular unemployment insurance benefits because of her illness.[147] At the time she was hospitalized, however, Stuart was pregnant and thus under the specific application of the Act, was not eligible for maternity benefits.[148] Stuart contended that "to deny a pregnant person . . . access to sickness benefits for non-pregnancy related illness on the ground that she is at a certain stage of her pregnancy, is contrary to the impact of Canada's international obligations . . . ."[149] In determining that the Women's Convention did not apply, the court determined:

> [t]he effect of Canada's signature to this Convention is that Canada undertakes to do things provided for in the Convention. The Convention cannot be used by this court in construing and interpreting sections of the *Unemployment Insurance Act 1971*, particularly in cases where a definitive interpretation has been made by the Supreme Court of Canada.[150]

The Court remanded the case with the instruction that Stuart was not entitled to unemployment benefits because of her non-pregnancy related illness.[151]

In *In Re Australian Journalists Association*,[152] the Australian Conciliation and Arbitration Commission (ACAC), the independent federal body that has conciliation, arbitral, and quasi-judicial powers and which plays a major role in the industrial relations system in Australia, chose not to invoke article 4 of the Women's Convention, which addresses af-

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145. 137 D.L.R.3d 740 (1982).
146. *Id.* at 748.
147. *Id.* at 742.
148. *Id.* at 742.
149. *Id.* at 748.
150. *Id.* at 748-49; *see also* Cohen & Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. B. REV. 265 (1983).
151. *Id.* at 749.
152. Australian Conciliation and Arbitration Commission, CCH, Austl. & N.Z. Eq. Opp. Rep. EOC 77, 124-77, 127 (1988).

firmative action, of the Women's Convention. The case arose out of an attempt by the Australia Journalists Association (AJA) to adopt a mild affirmative action plan to remedy the underrepresentation of women in the governing body of the union, the Federal Council. The plan involved amending the union's rules to ensure that each branch sent a minimum number—at least a third of the total delegates sent—of women delegates to the Federal Council.

The AJA challenged this amendment to the union's rules on several grounds, including that it violated the Sex Discrimination Act. Section 33 of the act, clearly intended as an affirmative action provision, provides that measures taken to ensure that persons of one sex enjoy equal opportunities with members of the other sex, are not to be considered unlawful. Such a provision is consistent with Australia's obligations under article 4, allowing for the adoption of temporary special measures by state parties to ensure that women enjoy equal opportunities with men.[153] The ACAC, however, held that, because there were no formal barriers to women's membership in the Federal Council, the proposed affirmative action plan could not be characterized as "ensuring equal opportunities," since these already existed.

V. CONCLUSION

The cases discussed in this Essay delineate the extent to which the Universal Declaration of Human Rights, in the forty-two years since its adoption, has been applied to the advancement of women's rights. These cases indicate the disadvantaged status women have faced and address the discrimination imposed upon them on the basis of gender and marital status. The court decisions contained in this Essay specifically note that states have positive obligations to ensure an effective right to private and family life, and not merely negative obligations to remove legal barriers to the enjoyment of such rights.

The implementing of treaties and conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women, indicate that there has been some progress in the area of protecting women's rights under international human rights law. As of 1990, at least 104 states are parties to the Women's Convention. Under the Women's Convention, state parties agree "to pursue by all appropriate means and without delay a policy of eliminating discrimination against women" and "to ensure the full development and advancement of

153. *See* Aldridge v. Booth, CCH, Austl. & N.Z. Eq. Opp. Rep. EOC 77, 085-77, 098 (1988).

women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men." Despite this progress, however, courts have failed to apply these conventions' non-discrimination provisions to the fullest extent possible. This juridical failure results from the existing, deep-rooted perceptions of women's role in society. Furthermore, many courts view the claimed discrimination as reasonable and objective differential treatment.

The cases in this Essay involve discrimination claims based on the express language of disputed legislation. The more subtle and complex issue courts must now address is whether states have discriminated against women through implementation of apparently non-discriminatory legislation. States should not wait for legislation to be challenged before international regional or national tribunals before implementing change. These states must begin changing those laws that are similar to the legislation challenged in cases contained in this Essay. The challenge facing the advancement of women's rights is to build on these cases and expand the use of international, regional, and domestic fora to ensure that the conception of human rights, as developed in the Universal Declaration of Human Rights, and women's exercise of these rights, does not vary according to latitude and circumstance.