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FOR A SAD PROCESSION:  
DOES THE EUROPEAN COURT OF HUMAN RIGHTS  
TAKE INTO ACCOUNT DIFFERENT FEMINIST  
INTERPRETATIONS WHEN DEALING WITH VIOLENCE  
AGAINST WOMEN? \*\*

ABSTRACT. *Where does the Strasbourg Court stand among the various feminist movements? Does it reflect a choice, a compromise, a third way? Does European human rights case law take into account the two latest feminist interpretations, going beyond the traditional logic of non-discrimination alone? the Strasbourg Court has long satisfied all feminists by severely punishing all cases of the most serious violations of women's physical or psychological integrity ; however, it leaves cultural and radical feminists more doubtful on the issue of abortion ; it may finally be able to reconcile all feminists on the issue of the treatment of domestic violence in Strasbourg.*

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If the title of this paper has been inspired by a novel of Laurent Gaudé, *Pour seul cortège*, it is because it fits perfectly with the general topic of this article: the litigation that the European Court in Strasbourg has to deal with concerning serious violence against the physical or psychological integrity of women... For a sad procession...

The radical views defended by *some* women on this subject today can only raise questions, as they leave no room for nuance, precision or truth. Are they so blinded by a need to protect their specificity that they risk not appearing as equal to men?

No one would dispute – unless they agree with it – that paternalism has wreaked havoc and continues to do so, but is it precisely in an exclusive – or non-inclusive, to use the current term – and communitarian way – according to a very Anglo-Saxon view of things – that it must be combated? We do not think so, especially since many men – the majority of them – understand women's issues and are already striving with them to establish relationships other than those of domination<sup>1</sup>.

No one would dispute that we are going through an unprecedented societal crisis due to the questioning of the paternalistic system and the questions it raises for criminal law, human rights and freedoms. Feminism and all its various strands can only be meaningful, however, if they emancipate themselves from the macho relationship imposed by *certain* men and if they offer a third way, that of balanced and effectively guaranteed relationships. If it is merely a repetition, reproduction or imitation of the same processes of domination and oppression, it will have failed. And liberal feminists will have no choice but to mourn its demise. Nevertheless, it is never too late to change course, to encourage the majority to come out of their reserve or silence, and to temper the excesses of a sometimes very vocal minority.

We must – and today even more than yesterday, so as not to lose our reason in these very unstable times – also remember the principles that underpin our democratic systems in Europe and promote the power of discussion, the power of words exchanged, even harsh ones, between opposing parties, especially when there is disagreement. And there can be disagreement on the subject of women, among women themselves, since different feminist currents have always existed since the movement was created. The process requires courage and lucidity, but it will lead, through a long process of conflicting opinions, to appeasement. Tolerance, pluralism, openness: this is how the Strasbourg Court has long described European democratic society. This was in its landmark ruling *Handyside v. the United Kingdom* in 1976. An essentialist ruling that

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<sup>1</sup> Eric Corbaux, alongside Gwenola Joly-Coz, is a prime example of this. Eric Corbaux and Gwenola Joly-Coz 'Mieux juger les violences faites aux femmes' (2024) *La Semaine juridique* 1917.

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has not aged a bit, as it has neither sex nor gender. Yet today, these democratic standards seem to be at odds with the brutalisation of certain political discourses, at odds with the polarity of certain opinions, at odds with the withdrawal into oneself or into one's own group that we are seeing, including with regard to women. As the Handyside case ruled, we would like to point out that democracy embodies the art of disagreement, since it sublimates discord through the emergence of peaceful channels. The subject of women must not be allowed to escape these fundamental principles of European democratic society.

The issue of violence against women cannot therefore be properly addressed without calm reflection, detached from any harmful passions, unresolved past issues or primitive resentments that lurk within each of us. The controversies that arose in France around Caroline Fourest's latest essay *Le Vertige MeToo* are interesting in that they reflect the different currents<sup>2</sup> that have always run through feminism since its origins. The term "feminism" emerged in the 19<sup>th</sup> century: initially used pejoratively to refer to unmanly men, it only took on its modern meaning at the very end of the century, thanks to the suffragettes and their demands for voting rights. Today, sociologists agree that the feminist movement is the most important social movement of modernity to have originated in the West. However, the history of feminism is discontinuous: it has unfolded in successive phases. The nineteenth century was marked by the struggle for civil rights. The second phase took place in the 1960s and 1970s. The struggles at that time focused on the freedom to control one's own body and to love. Many historians see the third phase as the struggle against intersectional oppression, while current debates are reactivating the fundamental question of desire. Christine Bard states that "*Feminism is more diverse than ever in its demands, in the generations involved, in its means of action, with an extremely broad philosophical, political and ideological spectrum*"<sup>3</sup>.

European human rights cases heard before the Strasbourg Court have not escaped this trend towards feminisation of thinking and solutions, even if this has only happened recently, as the principles of subsidiarity and exhaustion of domestic remedies have somewhat slowed this development. We need to briefly point out that the rights protected by the European Convention on Human Rights of 4 November 1950 are mainly civil and political in nature. Since the 2000s, the Court has therefore mainly

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<sup>2</sup> 'Répliques - émission du samedi 9 novembre 2024' (France Culture, 9 November 2024) <<https://www.radiofrance.fr/franceculture/podcasts/repliques/repliques-emission-du-samedi-09-novembre-2024-6277720>>; Camille Froidevaux-Metterie, *Patriarcat, la fin d'un monde* (Seuil 2024); Caroline Fourest, *Le vertige #MeToo* (Grasset 2024).

<sup>3</sup> Christine Bard (ed.), *Un siècle d'anti-féminisme (A Century of Anti-Feminism)* (Fayard 1999).

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had to rule on violence against women's bodies, but also against their minds and psyches<sup>4</sup>. Other types of violence of a social, economic or cultural nature fall more within the scope of the 1961 Turin Charter, revised in 1996, and are not, for the most part, subject to litigation before the Court in Strasbourg<sup>5</sup>, except in extreme cases of slavery, forced labour and trafficking in women, as these fall under Article 4 of the European Convention on Human Rights<sup>6</sup>.

It is mainly from the perspective of the so-called non-derogable rights of the Convention, Article 2 (right to life), Article 3 (prohibition of torture and inhuman and degrading treatment), and Article 4 (prohibition of slavery and forced labour), that violence against women is dealt with by the Strasbourg Court. This reflects the serious question of the dispute and the extreme scrutiny given to it by the Court, since these articles protect the most serious violations of human dignity and are therefore considered to be rights that cannot be restricted or derogated from under any pretext or in any circumstances. But it is also through the prism of Article 8 – the right to respect for private and family life – that other types of violence, which we will outline as we discuss the Court's case law, can be understood, not to mention the possible combination of all these articles with Article 14, the principle of non-discrimination. The European convention arsenal is therefore rich. It has been expanded by the action of the Court, without which the provisions of the Convention would never have had such scope. As Laurence Burgorgue-Larsen points out in the 4th edition of her valuable work, *La Convention européenne des droits de l'Homme*<sup>7</sup>, “*The Convention does not contain any specific provisions regarding women. It is the individual, without distinction, undifferentiated, non-communitarian and universal, who is protected by this landmark text of 1950*”. As Laurence Burgorgue-Larsen further points out, “*For liberal feminists, the non-discriminatory logic – derived from Article 14 of the Convention and now also from Article 1 of Protocol No. 12 – is sufficient to achieve what matters, i.e. equality with men. This is not the view of other feminist movements, which believe that the law – particularly human*

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<sup>4</sup> Read more on this subject in Yannick Lécuyer and Delphine Tharaud, ‘From one body to another: abuse of women in the case law of the European Court of Human Rights’ in Jimmy Charreau and Caroline Duparc (eds), *Le droit face aux violences sexuelles et sexistes* (Daloz 2021).

<sup>5</sup> The Turin Charter has its own control mechanism, which is less restrictive than that of the Court. For a very enlightening reading on this subject, see Jean-Pierre Marguénaud ‘Le comité européen des droits sociaux, un laboratoire d'idées sociales méconnu’ (2011) 3 RDP685. Tatiana Gründler ‘Social rights within the European Charter of Human Rights’ 7 International Yearbook of Human Rights, (2012-2013) 647.

<sup>6</sup> According to the provisions of Article 4 of the European Convention on Human Rights.

<sup>7</sup> Laurence Burgorgue-Larsen *The European Convention on Human Rights* (4th edn, LGDJ 2024), 62.

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*rights law – should recognise the difference and specificity of women, both in terms of reproduction (cultural feminists) and in terms of violence against women (radical feminists)."* In an article published in 2018, she further clarifies: "*This egalitarian feminism, which seeks to grant women rights beyond factual considerations by separating legal qualifications from social and, above all, natural characteristics, no longer seems sufficient for a number of women and intellectuals*"<sup>8</sup>. This first major feminist movement has its roots in the thinking of philosophers Simone de Beauvoir and Elisabeth Badinter. The second has its roots in the thinking of Antoinette Fouque, who supported the radical movement during the development of the Women's Liberation Movement (MLF) in France in 1968. As Françoise Tulkens<sup>9</sup> and Laurence Burgorgue-Larsen point out, international human rights law has been successively influenced by contemporary feminist movements, either to promote the difference between women and men (*cultural feminism*) or to fight against male oppression of women (*radical feminism*).

How does the Strasbourg Court approach violence against women in its case law? It defines it in accordance with the specific standards of international law on this subject: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 9 June 1994 and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011, CETS No. 210<sup>10</sup>. Unlike the Inter-American Court, however, it does not use the term "femicide"<sup>11</sup>. Although women are not the only victims of this type of violence, as revealed by the landmark judgments in *Selmouni v. France* of 28 July 1999 (rape of a detainee with a baton) and *Konstantin Markin v. Russia* of 22 March 2012 (refusal of parental leave to male soldiers), statistically they are the most affected<sup>12</sup>.

Where does the Strasbourg Court stand among the various feminist movements?

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<sup>8</sup> Laurence Burgorgue-Larsen, 'Women and case law, free comparative wanderings', 34 JCP (2018) 3.

<sup>9</sup> Françoise Tulkens, 'Human Rights-Women's Rights. Applicants before the European Court of Human Rights' in Lucius Caflisch and others (eds), *Liber amicorum Luzius Wildhaber. Human Rights-Strasbourg Views. Human Rights-Views from Strasbourg*, Arlington (NP Engel 2007), 423.

<sup>10</sup> Article 3(a): "violation of human rights and a form of discrimination against women, and (which) refers to all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, whether in public or private life."

<sup>11</sup> For a comprehensive study, see Luis-Miguel Gutiérrez, 'Les violences sexistes et sexuelles devant la Cour interaméricaine des droits de l'Homme' (2025) (14) RDLF <<https://revuedlf.com/droit-international/les-violences-sexistes-et-sexuelles-devant-la-cour-interamericaine-des-droits-de-lhomme/>>.

<sup>12</sup> 'Les chiffres de référence sur les violences faites aux femmes' (2023) <<https://arretonslesviolences.gouv.fr/je-suis-professionnel/chiffres-de-reference-violences-faites-aux-femmes/>>.

Does it reflect a choice, a compromise, a third way? Does European human rights case law take into account the two latest feminist interpretations, going beyond the traditional logic of non-discrimination alone?

As Laurence Burgorgue-Larsen further explains, “*In this area, the solutions of the European Court of Human Rights are not marked by consistency and are clearly conditioned by the nature of the violations alleged by women. When third parties mistreat women’s bodies, the Court is uncompromising and adopts solutions that could satisfy ‘cultural’ or even ‘radical’ feminists. On the other hand, when it comes to women being able to control their own bodies, the Court is more timid, keen to respect the customs of each society: we are aware of its difficulties in addressing the issue of abortion and its need to evolve on this subject.*”

Nevertheless, with the development of the concept of domestic violence following the adoption of the Istanbul Convention in 2011, the Court’s decisions now recognise that this is gender-based violence. This is certainly an encouraging development on the part of the Strasbourg Court, which mitigates its lack of boldness on the issue of abortion.

Ultimately, the Strasbourg Court has long satisfied all feminists by severely punishing all cases of the most serious violations of women’s physical or psychological integrity (I); however, it leaves cultural and radical feminists more doubtful on the issue of abortion (II); it may finally be able to reconcile all feminists on the issue of the treatment of domestic violence in Strasbourg (III).

## 1. *The Court's uncompromising approach to the most serious cases of violence against women*

### *A. Rape*

The Court does not particularly take into account the “specificity of women” in cases where third parties seek to appropriate women’s bodies. Perhaps it simply does not need to, given how obviously specific the violation is. It refers to the dark social construct of women as sexual objects, against which changes are now underway at several levels: political, sociological and legal.

In this regard, Laurence Burgorgue-Larsen states that “Rape is obviously the most emblematic example of this complex issue. Since the M.C. ruling (ECHR, 4 December 2003, M.C. v. Bulgaria), the Strasbourg Court has considered that the fact that a 14-year-old minor did not resist rape in any way can be perfectly explained by an infinite variety of psychological factors. It therefore imposes on the respondent State the obligation to criminalise and effectively prosecute all types of non-consensual sexual abuse, including when they reveal the victim’s lack of resistance”<sup>13</sup>. The Court highlighted the “specificity of women” more clearly when it condemned Turkey in the case of forced gynaecological examinations on very young women. (ECHR, 1 February 2011, Yasgül Yihmaz v. Turkey). After a long process of denunciation by feminists of violence against women in the 1970s, followed by the politicisation of the issue in the 1990s, it was not until the early 2000s that the first judgments were delivered in Strasbourg on violence against women. Its case law is ultimately recent and bold<sup>14</sup>. The Court does not hesitate to interpret rape in the light of today’s society, rejecting the idea that it necessarily involves violence on the part of the perpetrator or resistance on the part of the victim and that it only contravenes Article 8, the right to respect for private life. The basis for the obligation to criminalise rape now stems from the prohibition of ill-treatment, Article 3 of the Convention. The Court has therefore raised its standards, which can only be welcomed.

The Court is also unanimous in its condemnation of female genital mutilation and other inconceivable forms of violence imposed on women on religious or customary grounds<sup>15</sup>.

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<sup>13</sup> Burgorgue-Larsen, *The European Convention on Human Rights* (n 7) 62.

<sup>14</sup> M.C. v. Bulgaria, §§ 154-166, application no. 39272/98, RTD civ. 2004, 364, note Jean-Pierre Marguénaud.

<sup>15</sup> See the very poignant film *Desert Flower* (2009) by Sherry Hormann, inspired by the life of Somali model Waris

### ***B. Female genital mutilation***

It is a practice that is strongly opposed by major international organisations, which have embarked on a campaign to achieve its complete abolition. It falls within the sad category of “sexual mutilation” in a broad sense (which includes, in addition to excision in the strict sense, clitoridectomy and infibulation), which the World Health Organisation, UNICEF, the United Nations High Commissioner for Refugees and the United Nations Development Fund for Women have deemed to be tantamount to torture<sup>16</sup>. And the European Court of Human Rights, always keen to draw inspiration from international institutions and courts, followed suit in the case of *Izevbekhal and others v. Ireland* on 17 May 2011. It was also in this context that the important Istanbul Convention of 11 May 2011<sup>17</sup> was adopted by the Council of Europe. It aims to prevent and combat violence against women in general and, in particular, requires States, in Article 38, to include the criminalisation of such practices in their criminal codes. What may have been tolerated until then is no longer tolerated, either under international human rights law or under European human rights law. Nevertheless, as Laurence Burgogues-Larsen explains, the Strasbourg Court has not yet had the opportunity, in the cases brought before it, to condemn such practices *outright*: “*The particularities of the cases did not give it the opportunity to proclaim loud and clear (...) the unconventional nature of female genital mutilation and the vital need to prevent it* (ECHR, dec., 20 September 2011, *Omeredo v. Austria*).”<sup>18</sup> Only a conditional clause is used in this judgment and then repeated in the *Sow v. Belgium* judgment of 19 January 2016: “*It is not disputed that subjecting an adult, against their will, or a child to female genital mutilation would constitute ill-treatment contrary to Article 3 of the European Convention on Human Rights*”<sup>19</sup>.

In addition to such outdated practices, there is also so-called “modern” slavery, with the first observation being that this term is poorly chosen. What is “modern” about enslaving a woman?

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Dirie, who was circumcised at the age of five.

<sup>16</sup> Laurence Burgogues-Larsen, *La Convention européenne des droits de l'Homme* (3rd edn, LGDJ 2019) 65.

<sup>17</sup> See the highly informative article by Blandine Chelini Pont, ‘Rejection (or intended rejection) of the Council of Europe’s Istanbul Convention on preventing and combating violence against women and domestic violence in 2019-2020 in the name of Christian and Islamic values’ (2022) *Fides et Libertas* 46.

<sup>18</sup> Burgogues-Larsen, *La Convention européenne des droits de l'Homme* (n 16) 66.

<sup>19</sup> ECHR, 19 January 2016, *Sow*, § 62.

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### ***C. Domestic slavery***

France was unanimously condemned by seven judges for domestic slavery in 2005 in the Siliadin case (ECHR, 26 July 2005), but remained deaf to this shameful sanction, and was condemned once again in 2012 in the C.V. and V. case (ECHR, 11 October 2012). France had failed to act on its obligation to criminalise and effectively suppress all acts of slavery, servitude and forced labour for the first time. The Siliadin case sadly gave the Court the opportunity to examine the meaning and scope of Article 4 of the European Convention on Human Rights. The young Togolese applicant, who arrived in France at the age of fifteen, had been sent by her parents to live with a French national of Togolese origin. The facts of the case show that she was initially employed without pay, then “loaned” to a couple to look after their children and do all the housework, fifteen hours a day, seven days a week. After her passport had been confiscated, she was deprived of schooling and treated in an appalling manner<sup>20</sup>. On the basis of the international arsenal of the UN conventions of 1926 on the abolition of slavery and the slave trade, and of 1930 on forced labour, the Court considered “*that the young woman had at least been subjected to forced labour*”<sup>21</sup> and reduced, if not to slavery *in the strict sense of the term* – the young woman had not been objectified – then at least to servitude.

From domestic slavery to sexual slavery, there was only one step to take. The Court took that step during the dispute it had to examine in a case involving Cyprus and Russia.

### ***D. Sex trafficking***

The Rantsev v. Russia and Cyprus judgment of 7 January 2010 marked the Court’s first significant stance on a case involving the trafficking of young women forced into prostitution, “*the dark side of globalisation, where vulnerable young women – poor and poorly educated, from developing and democratising countries – are ‘exported’ abroad through highly organised networks to be sexually exploited.*”<sup>22</sup> This was the case of Oxsana Rantseva, 21, who was “imported” to Cyprus from Russia and exploited by the manager of a “cabaret” as an “artist”, a term which, we learn, refers to prostitutes in Cyprus. After she tried to escape from the owner of the cabaret where she was being exploited, the Cypriot police ended up handing her back to him... She was found dead at the foot of a building, without it being possible to determine with certainty the cause of her death

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<sup>20</sup> Siliadin v. France, ECHR, 26 July 2005, §§ 13-17.

<sup>21</sup> Siliadin (n 20) para. 122.

<sup>22</sup> Burgogue-Larsen, *La Convention européenne des droits de l’Homme* (n 16) 74.



## 2. *The Court's incomprehensible procrastination on the issue of abortion*

The Court is currently unable to satisfy cultural and radical feminists, as it still refuses to rule on the obvious issue that only women can carry a child and that they alone, therefore, should be able to decide, without pressure from anyone else.

The Court has consistently held that Article 8 cannot be interpreted as establishing a right to abortion for women (ECHR, Grand Chamber, *A.B.C. v. Ireland*, 16 December 2010)<sup>24</sup>, arguing that while women do have the right to control their own bodies, the right to procreate poses a conflict of norms, since it must also take into account the protection of the embryo, or even the foetus.

As Julie Tavernier points out in the *Thematic Dictionary of the European Convention on Human Rights*, “the Commission and the Court have always accepted the idea that the regulation of abortion constitutes an interference with women’s right to privacy, which includes, in particular, the right to personal autonomy and physical and moral integrity”<sup>25</sup>. In other words, such regulation will only be considered a legitimate restriction of the right to privacy if it is provided for by law, pursues a legitimate aim and is necessary in a democratic society, i.e. it meets a pressing social need and is proportionate to the aim pursued. However, the Court stated – and this is not without significance – that “since when a woman is pregnant, her private life becomes closely associated with the developing foetus” (*Tysiac v. Poland*, 20 March 2007)<sup>26</sup>, “the rights of the pregnant woman should be weighed against other competing rights and freedoms, including those of the unborn child” (*A.B.C. v. Ireland*)<sup>27</sup>. This statement – which we find highly debatable and which is nevertheless conditional – must be understood jointly with another statement by the Court, which “is convinced that it is neither desirable nor even possible at present to answer in the abstract the question of whether the unborn child is a ‘person’ within the meaning of Article 2 of the Convention” (*Vo v. France*, 8 July 2004)<sup>28</sup>. Similarly, the Court has so far always refused to specify whether “others”, as referred to in paragraphs 2 of Articles 8 and 10 of the Convention, “includes the unborn child” (*Open Door and Dublin Well Woman v. Ireland*, 29 October 1992)<sup>29</sup>. The European

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<sup>24</sup> § 214.

<sup>25</sup> Julie Tavernier, [MISSING] in Carine Laurent-Boutot, Yannick Lécuyer, Delphine Tharaud (eds), *Dictionnaire thématique de la Convention européenne des droits de l’homme* (Pédone 2022) 51.

<sup>26</sup> No. 5410/03, § 106.

<sup>27</sup> § 213.

<sup>28</sup> No. 53924/00, § 85.

<sup>29</sup> Nos. 14234/88 and 14235/88, § 63.

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Court of Human Rights is uncomfortable with this issue, as these statements show. As a result, its case law is far from linear, fully consistent and in line with what cultural and radical feminists advocate. All feminists may also be moved by its further statement, as Julie Tavernier points out, that “*while it cannot be ruled out that a woman’s decision to have an abortion constitutes an interference with the right to respect for the private life of the potential father, her interpretation “must above all take into account the rights of the mother”, since she is the one who is primarily concerned by the pregnancy, its continuation or its termination*”. We could not settle for less. (Boso v. Italy, 5 September 2002)<sup>30</sup>.

As mentioned above, Julie Tavernier also points out that “*Despite the existence of a consensus in Europe in favour of termination on grounds of health or well-being, the European Court of Justice paradoxically, and in contradiction with its overall reasoning, recognises a very wide margin of appreciation for national authorities, justified in particular by ‘the extreme sensitivity of the moral and ethical issues raised by the question of abortion’* (A. B. C. v. Ireland, *op. cit.*, § 233)<sup>31</sup>. Since when could sensitivity, a subjective feeling if ever there was one, support, or conversely destroy, a legal argument, which is essentially objective? There are other extremely “sensitive” subjects, moreover, on which, paradoxically, the Court has not hesitated to show boldness. In the area of transsexualism, for example, as evidenced by the Christine Goodwin v. United Kingdom judgment of 27 March 1996<sup>32</sup>. The position of the Strasbourg Court would therefore be justified by the lack of consensus on the starting point of life, as stated in § 84 of the Vo v. France judgment. However, we consider this justification to be inadmissible, since a woman’s decision to have an abortion *strictly speaking* first and foremost concerns *her* freedom to control *her own* body and live *her* life as she sees fit, and not the life of another person and its beginning. The approach could now be taken in terms of priorities or concentric circles, with the decision to have an abortion being primarily a choice for the woman or the first concentric circle, with “others” only being able to intervene in a second stage or in a second concentric circle. Given that there is a very broad consensus in Europe on the legalisation and regulation of abortion<sup>33</sup>, this should

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<sup>30</sup> No. 50490/99.

<sup>31</sup> Tavernier (n 25) 51.

<sup>32</sup> N° 17488/90, <[<sup>33</sup> Only Poland and Malta remain very resistant to abortion within the European Union. However, Poland has recently signalled its intention to regulate abortion, and Maltese legislation has somewhat relaxed the principle of prohibition. But Malta remains the only state in which abortion is prohibited. <\[>\]\(https://www.touteleurope.eu/societe/droit-a-l-avortement-les-deputes-europeens-approuvent-l-inscription-de-l-ivg-dans-la-charte-des-droits-fondamentaux/></a>; Within the Council of Europe, 40 out of 46 member states recognise and have legalised abortion. <<a href=\).](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62533%22]}></a>.</p></div><div data-bbox=)

now be the sole basis for the Court's reasoning. The Court's position on abortion is all the more difficult to follow as it does not correspond in any way to the overall reasoning it usually employs: when there is a minimum common consensus on an issue (in our case, on the regulation of abortion in Europe), the national margin left to States is in principle narrow. This is all the more incomprehensible given that on other issues where consensus was far from existing, the Court did not hesitate to take extremely bold decisions<sup>34</sup>. This reasoning from Strasbourg is all the more open to criticism as it still puts forward the rather surprising argument that women always have the option of having an abortion in neighbouring countries where the procedure is permitted<sup>35</sup>. This is true for those who have the financial means, more so than for others... Until 2018, for example, Irish women who were prohibited from having an abortion in their own country for reasons of "*extreme sensitivity of the moral and ethical issues raised by this question*" could still have an abortion in Great Britain. The Court thus considers that women "*can, without breaking the law, go abroad to have an abortion and obtain adequate information and medical care in this regard*"<sup>36</sup>. It will refrain from making further statements until it dares to enshrine the right to abortion as a matter solely for the woman's private life. However, there is only a small step left to take, because although this right still cannot be inferred from the Convention, the Court is attempting to restore balance by ensuring that women can at least have effective access to abortion when domestic law allows it. This has been commonplace in its reasoning since it clearly stated in 1978 in the *Tyrer v. United Kingdom* judgment that the effectiveness of the rights set out in the European Convention on Human Rights was an end in itself. To this end, it also established its theory of positive obligations. In other words, not only must the State refrain from infringing on a freedom, but it must also do everything in its power to guarantee and ensure its effectiveness. In relation to our subject, the Court did not hesitate to condemn Poland in the *Tysiac* judgment for failing to put in place "*effective mechanisms to determine whether the conditions for a legal abortion (in this case*

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<sup>34</sup> On the subject of transsexualism, for example.

<sup>35</sup> The ban on abortion will be removed from the Constitution by a historic referendum on 25 May 2018. Philippe Bernard, 'Irlande rompt catégoriquement avec des siècles de prohibition de l'avortement' *Le Monde* (26 May 2018) <[https://www.lemonde.fr/europe/article/2018/05/26/l-irlande-rompt-categoriquement-avec-des-siecles-de-prohibition-de-l-avortement\\_5304876\\_3214.html](https://www.lemonde.fr/europe/article/2018/05/26/l-irlande-rompt-categoriquement-avec-des-siecles-de-prohibition-de-l-avortement_5304876_3214.html)>.

<sup>36</sup> *A.B.C. v. Ireland*, § 241. It had already applied the same reasoning in its judgments in *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, *op. cit.*, and *Women on Waives and Others v. Portugal*, 3 February 2009, No. 31276/05. It persists and confirms this in the judgment *L. M. v. Poland*, 14 December 2023, <<https://hudoc.echr.coe.int/fre-press#%7B%22itemid%22:%7B%22003-7828160-10867354%22%7D%7D>> § 84.

*a therapeutic abortion) were met*<sup>37</sup>.

Julie Tavernier further clarified that, “Guided by these same requirements of effectiveness and consistency in domestic law and practice, the Court found a violation of Article 8 of the Convention due to the absence of standards for the implementation of the constitutionally guaranteed right to abortion in cases of proven danger to the mother’s life, which prevented the applicant from establishing whether she could legally have an abortion in Ireland (*ABC v. Ireland* §§ 250-268). The Court also criticised, under Articles 3 and 8 of the Convention, the impossibility for a woman, in cases of suspected foetal abnormality, to have timely prenatal genetic testing that would have enabled her to choose between continuing her pregnancy and having a legal abortion (*R.R. v. Poland*, 26 May 2011, No. 27617/04), or the impossibility of accessing, in a timely manner and without hindrance, reliable information on the conditions under which abortion is legally permitted and on the procedures to be followed in the event of pregnancy resulting from rape (*P. and S. v. Poland*, 30 October 2012, No. 57375/08)”<sup>38</sup>. In her book on *the European Convention on Human Rights*, Laurence Burgogues-Larsen particularly emphasised the breakthrough made by the Strasbourg Court in the *R.R.* judgment in 2011, as it courageously advanced the field of Article 3 and inhuman treatment. Nevertheless, she reached this conclusion in view of the very serious specificities of the case, since “*the applicant, after being informed of the likelihood of a malformation in her foetus, was repeatedly refused access to genetic testing during the period when she could have legally had an abortion. She gave birth to a child suffering from serious physical malformations due to genetic abnormalities. Her family life (she was already the mother of two children) was turned upside down when her husband left her after the birth of her disabled child. The Court, in a particularly bold move, ventured into the territory of Article 3, ruling that the state of uncertainty, tension, distress, in short, of extreme vulnerability that characterised the applicant while she was waiting for permission to proceed with prenatal testing caused her acute suffering constituting a violation of Article 3*”<sup>39</sup>. Unfortunately, it is only in the most serious cases that the Court sanctions even the most recalcitrant states in Europe for denying women the possibility of abortion, but not on the basis of respect for their private lives. This change of course has yet to materialise. Paradoxically, it may be encouraged by the issue of abortion, this time not consensual but imposed by a system, and raised by the *G. M. and others v. Moldova* judgment of 22 November 2022 in sordid circumstances. Moldovan women, interned

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<sup>37</sup> 20 March 2007, application no. 5410/03, § 124.

<sup>38</sup> Tavernier (n25)52.

<sup>39</sup> Laurence Burgogues-Larsen, *La Convention européenne des droits de l’Homme* (3<sup>rd</sup> edn, LGDJ 2019) 67; Laurence Burgogues-Larsen, *La Convention européenne des droits de l’Homme* (4<sup>th</sup> edn, LGDJ 2024) 63.

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in a psychiatric asylum for intellectual disabilities, were raped by a doctor and subjected to non-consensual abortions and contraception. The Court admitted explicitly in this case that “*forced abortion, sterilisation and contraception constitute forms of gender-based violence*”<sup>40</sup>. This ruling shows that gender, as claimed by culturalist and radical feminists, has well and truly entered the courtroom in Strasbourg, as the treatment of domestic violence already suggested. The Court should be able to reconcile all feminists on this issue, since it now recognises its gender-specific nature.

### **3. *At the point of convergence of all feminist currents: the Court’s treatment of domestic violence***

This is another contemporary manifestation of violence against women, which is multifactorial. As Kiteri Garcia writes in the *Thematic Dictionary of the European Convention on Human Rights*, “*Since the Opuz v. Turkey judgment of 9 June 2019, the Court has emphasised the variety of forms that domestic violence can take and the difficulty of understanding it, insofar as this problem, common to all Member States, does not always come to light and often occurs within the context of personal relationships or small circles. It follows that women, children and men alike must be considered as potential victims of this form of violence. Since then, European case law has intensified and developed in recent years, whether in relation to Article 8, Articles 2 and 3, these three texts taken together, in relation to Article 14 of the Convention*”<sup>41</sup>.

The plurality of these foundations that we mentioned earlier is coupled with reference to the Istanbul Convention, as the Court does not hesitate to incorporate it into the interpretation of its own provisions. According to the Convention of 7 April 2011, it should be pointed out that domestic violence corresponds to “*all acts of physical, sexual, psychological or economic violence that occur within the family or household or between former or current spouses or partners, regardless of whether the perpetrator shares or has shared the same residence as the victim.*”

In line with the case law developed by the Court concerning vulnerable persons, it does not hesitate to take into account the particular vulnerability of victims of such violence, requiring States to protect them. Laurence Burgorgue-Larsen states that the Court, in this unanimous *hard case* (*Opuz v. Turkey, op. cit.*), condemned Turkey for failing to adopt “*appropriate measures to remedy the domestic violence*” after considering

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<sup>40</sup> <<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22002-13898%22%5D%7D>> § 88.

<sup>41</sup> K Garcia, ‘Domestic violence’ in Laurent-Boutot, Lécuyer, Tharaud and others (eds) (n 25) 435.

that the violence suffered by the applicant and her mother (who had been abused and mistreated for many years by their son-in-law) should be considered as gender-based, thereby constituting “*a form of discrimination against women*”. It also added that “*while many States have pursued legislative reforms, their implementation is far from satisfactory*”. This is the case, for example, in Romania (E.M. v. Romania, 30 October 2012) and Turkey, where “*several cases have revealed the difficulty of implementing their positive obligations to protect women, whom the authorities generally know, after several complaints on their part, to be threatened in their family environment, most often by their husbands. Consequently, despite the introduction of action plans and new legislative measures to combat this endemic scourge, social reality is not changing easily or quickly*”<sup>42</sup>. For this reason, “*the Court now requires the State to put in place an appropriate legal framework to prevent and punish these acts of violence, protect victims and carry out effective investigations and prompt proceedings when such acts have been committed*” adds Kiteri Garcia<sup>43</sup>.

The Court has thus raised its standards, requiring that “*the positive obligations arising from Articles 2 and 3 are no longer triggered by the mere risk of a real and immediate threat, but by the need for the authorities to assess that threat*”<sup>44</sup>. This is now the starting point for the State’s positive obligation, which goes far beyond the mere risk of an immediate and real threat. This is particularly evident in the *Talpis v. Italy* judgment of 2 March 2017, a case of femicide, and the *Kurt v. Austria* judgment of 15 June 2021<sup>45</sup>, a case of homicide<sup>46</sup>. Kiteri Garcia adds in this regard: “*It is precisely on the issue of the effectiveness of measures to combat violence that national systems are condemned. An appropriate state response must therefore exist before it is too late. Moreover, this response cannot be based on existing but ineffective legislation. In this respect, the Court is not fooled by a range of measures that appear comprehensive but are ineffective when the authorities remain passive. Such passivity constitutes gender-based discrimination. (...) The discriminatory attitude of a State thus results from a lack of seriousness in addressing the problem of*

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<sup>42</sup> Burgogue-Larsen, *The European Convention on Human Rights*, (n 25) 66. § 200 of the Opuz judgment.

<sup>43</sup> Garcia (n 41) 436.

<sup>44</sup> Garcia (n 41) 436.

<sup>45</sup> In this Grand Chamber judgment of 15 June 2021, it confirms this position, even though Austria is not condemned in this case on the basis of a violation of Article 2. The applicant alleged that the Austrian authorities had failed to protect her and her children from her violent husband, which ultimately resulted in the murder of their son by the latter. By ten votes to seven, the Court nevertheless concluded that there had been no violation of Article 2 of the Convention. Why? Because the obligation incumbent on States under this article is an obligation of means and not of result (§159). And because Austria had not violated its obligation to put in place preventive measures to assess the threat of homicide.

<sup>46</sup> Burgogue-Larsen, *The European Convention on Human Rights* (n 7) 63.

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*domestic violence and from widespread passivity bordering on discrimination against victims (Balsan v. Romania, 23 May 2017). In its most recent judgments, the Court criticises States for their inaction, reflecting a general tolerance of domestic violence, which is considered normal by the majority of the population. The lack of awareness of the problem of domestic violence is a recurring criticism levelled by the Court at the parties. Such violence, under the pretext that it occurs within the family circle, cannot be considered a private matter. By revealing indifference at best, and tolerance at worst, as the root cause of discrimination, the Court targets the heart of the societal and structural problem posed by domestic violence. The Court is also likely to deal with this violence under Article 8 when the acts are not limited to physical violence but include psychological violence or harassment. In this sense, it recently affirmed that cyberviolence<sup>47</sup> constitutes an aspect of violence against women (Buturuga v. Romania judgment, 11 February 2020)<sup>48</sup>.*

A recent judgment by the Court shows that the fight against stereotypes also remains difficult to address. In the *Carvalho Pinto de Sousa Morais v. Portugal* judgment of 25 July 2017, Laurence Burgorgue-Larsen denounced the Portuguese Supreme Court's reduction of the amount of damages awarded to a 50-year-old woman following a failed surgical operation that left her in constant pain and permanently unable to have sexual relations. The Supreme Court had considered that she was "old" – sexual relations were no longer important at the age of 50 in its view – and that her role as a mother had already been fulfilled – her children were grown up and no longer needed her attention. Laurence Burgorgue-Larsen, a keen observer of the European Court's reasoning, pointed out that *"the latter had the courage to implement a new methodology that cannot be the traditional one derived from non-discrimination law. The first phase consists of identifying stereotypes that reveal prejudices. And to assert that, in this case, they are based on a traditional idea of female sexuality, essentially linked to the objective of motherhood and, in doing so, ignoring its physical and psychological importance for the fulfilment of women as individuals"*<sup>49</sup>. (...) *Given the harmful effect of the stereotype presented, the second methodological phase – that of contestation – was therefore set in motion. Here, according to the European Court, what matters is no longer the famous "comparability" test used in "classic" cases of discrimination, but rather the context in order to show that the application of a stereotype to a specific case is prejudicial. Such a methodology will not be easily understood by national judges, whether from developed or developing*

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<sup>47</sup> L. Burgorgue-Larsen develops this aspect of the problem in particular in the new edition of his work, Burgorgue-Larsen, *La Convention européenne des droits de l'Homme* (n 7) 63.

<sup>48</sup> Garcia (n 41) 436-437.

<sup>49</sup> ECHR, 25 July 2017, No. 17484/15, *Carvalho Pinto de Sousa Morais v. Portugal*, § 52.

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*countries, even though it has already been deciphered and promoted by academic circles<sup>50</sup>. It challenges habits and implies a different perspective on the law and its biases. There is still a long and steep road ahead in this area<sup>51</sup>.*

However, to conclude, we would like to note, along with Loïc Robert, that “*the Court’s bold and dynamic attitude in this area contrasts with a general trend towards stagnation or even regression in protection standards*”<sup>52</sup>.

All the latest decisions of the European Court of Human Rights mark progress for women, notwithstanding this sad procession, to which the Strasbourg Court is committed... That of the possibility of reconciling all feminists, and *with* them, all men who are sensitive to their cause. *Our* common cause is universal in spirit, for both men and women are essential to society.

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<sup>50</sup> The reference work, R Cook and S Cusak, *Gender Stereotyping: Transnational Legal Perspectives* (John Hopkins University Press 2010).

<sup>51</sup> Burgorgue-Larsen, ‘Les femmes et la jurisprudence, libres pérégrinations comparatistes’ (n 8) 4.

<sup>52</sup> Loïc Robert, cit., 5.

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