The Van Oosterwijck case (ECHR, 1980)

Judgment of the ECHR

October, 1980

EUROPEAN COURT OF HUMAN RIGHTS

VAN OOSTERWIJCK CASE

3/1979/31/46

STRASBOURG

4 October 1980

In the Van Oosterwijck case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed to the following judges:

Mr. G. Balladore Pallieri, president,
Mr. G. Wiarda,
Mr. M. Zekia,
Mr. J. Cremona,
Mr. Thór Vilhjálmsson,
Mr. R. Ryssdal,
Mr. W. Ganshof van der Meersch,
Sir Gerald Fitzmaurice,
Mr. D. Evrigenis,
Mr. G. Lagergren,
Mr. L. Liesch,
Mr. F. Gölcüklü,
Mr. F. Matscher,
Mr. J. Pinheiro Farinha,
Mr. E. Garcia de Enterria,
Mr. L.-E. Pettiti,
Mr. B. Walsh,

and also Mr. M.-A. EISSEN, Registrar, and Mr. H. PETZOLD, Deputy Registrar.

Having deliberated in private on 25 April and on 3 and 4 October 1980,

Delivers the following judgment, which was adopted on the last mentioned date:

Procedure

1. The Van Oosterwijck case was referred to the Court by the Government of the Kingdom of Belgium ("the Government") and by the European Commission of Human Rights ("the Commission"). The case originated in an application against the Kingdom of Belgium lodged with the Commission on 1 September 1976 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian citizen, Danielle van Oosterwijck.

2. Both the Government's application and the Commission's request, to which was attached the report provided for in Article 31 (art. 31) of the Convention , were lodged with the registry of the Court within the period of three months laid down by Articles 32 par. 1 and 47 (art. 32-1, art. 47), the former on 22 June 1979 and the latter on 16 July 1979. The application referred to Article 48 (art. 48); the request referred to Articles 44 and 48, paragraph (a) (art. 44, art. 48-a), and to the declaration whereby the Kingdom of Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the application and the request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 8 and 12 (art. 8, art. 12) of the Convention.

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Palliere, the President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 20 August 1979, the President drew by lot, in the presence of Mr. Sharpe, Principal Administrative Officer at the registry, the names of the five other members, namely Mr. J. Cremona, Mr. Thór Vilhjálmsson, Sir Gerald Fitzmaurice, Mr. F. Matscher and Mr. E. García de Enterría (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr. Balladore Palliere assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government and of the Delegates of the Commission regarding the procedure to be followed. On 11 January 1980, having particular regard to their concurring statements, he decided that it was not necessary for memorials to be filed; he further directed that the oral proceedings should open on 28 March.

5. On 27 February 1980, the Chamber decided pursuant to Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, "considering that the case raise[d] serious questions affecting the interpretation of the Convention …".

6. On 21 March, at the request of the Government, the President of the Court ordered the postponement of the hearings until 24 April.

The oral hearings were held in public at the Human Rights Building, Strasbourg, on 24 April. Immediately prior to their opening, the Court had held a short preparatory meeting.

There appeared before the Court:

- for the Government:
  - Mr. J. NISET, Legal Adviser at the Ministry of Justice, *Agent*,
  - Mr. J. De MEYER, Senator, Professor at the University of Louvain, *Counsel*,
  - Mr. H. VAN KEYMEULEN, Legal Adviser at the Ministry of Justice, *Adviser*;
- for the Commission:
  - Mr. J. CUSTERS,
  - Mr. B. KIERNAN, *Delegates*,
  - Mr. D. VAN OOSTERWIJCK, applicant, Assisting the Delegates (Rule 29 par. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. De Meyer for the Government and by Mr. Kiernan, Mr. Custers and Mr. Van Oosterwijck for the Commission, as well as their replies to questions put by the Court. During the hearings, several documents were produced to the Court by those appearing before it.

As to the facts

1. The particular circumstances of the case

7. When she lodged her application, Danielle Van Oosterwijck had been working since 1963 in the Secretariat of the Commission of the European Comminities; she was at the same time studying at the Free University of Brussels and, in June 1979, obtained a degree in law (licence en droit). Subsequently, she was enrolled as a first-year pupil at the Brussels Bar; she is entered on the roll of pupils as "Van Oosterwijck D.".

8. At birth, on 23 December 1944, the applicant possessed all the physical and biological characteristics of a child of the female sex and she was entered on the birth register of the Uccle district (Brussels) as the daughter of J. Van Oosterwijck, with the forenames Danielle, Juliette, Laure, Colette.

However, according to her, from the age of five she became conscious of a dual personality: although physically female she felt herself psychologically of the male sex. After going through a period of depression on this account, she attempted suicide in 1962 and had to be treated in hospital (see paragraph 12 of the Commission's report).

9. From 1966 onwards, the applicant - who will henceforth be referred to in the masculine, the male sex being the one assumed by Danielle Van Oosterwijck for social purposes at the time the application was lodged with the Commission - sought a solution to his problem by having a "sex-change" carried out on his body.

In 1969, two specialists, Doctor Slosse and Doctor Dumont, respectively a neurologist and endocrinologist, found that the symptoms shown by the applicant unquestionably indicated transsexualism. In addition to having before them the report of a Belgian psychiatrist, they had also consulted a British psychiatrist, Doctor Randell.

Whilst the doctors considered the use of psychotherapy ineffective in this field, they concluded, in the light of American, English and Danish research, that surgical treatment offered excellent prospects of success. They also took note of the fact that the applicant had consistently refused to accept the first kind of treatment and they believed it probable that he would attempt to commit suicide if the second kind were not adopted.

Accordingly, they decided to apply hormone therapy, followed by surgery.

10. On being advised of the purposes, methods and effects of the treatment, the applicant stated his readiness to accept the risks. He therefore underwent hormone therapy which, after a few months led to appearance of the secondary sexual characteristics of a male, such as hair growth and change of voice.

In July and December 1970 in Brussels, two surgeons, Mr. Fardeau and Mr. Longrée, successfully performed on him two operations of sexual conversion (bilateral mammectomy; hysterectomy-bilateral ovariectomy). Mr. Fardeau had previously sought the consent of the Medical Association: on 8 May 1970, the Secretary of the Council of the Brabant Province Branch of the Association had sent him the following reply: "As the problem you raise is a medical one, you should act according to your conscience but we must most strongly advise you to take all possible precautions in view of the very delicate nature of this type of operation."

Subsequently, the applicant received a phalloplasty carried out in ten stages, from October 1971 to October 1973, by Professor Evans, a surgeon at Queen Mary's Hospital in London.

11. The treatment has without any doubt substituted an outwardly male physique for a female physique, but the chromosomes remain those of the female sex.

Part of the cost was borne by the Medical Service of the Commission of the European Communities; the Communities' administrative department issued the applicant with an employment card made out in the name of Mr. D. Van Oosterwijck.

12. On 18 October 1973, the applicant filed a "petition for rectification of a civil states certificate ("requête en rectification d'un acte de l'état civil"): he requested the Brussels Court of First Instance to direct that his birth certificate should henceforth read "a child of the male sex with the forenames Daniel, Julien, Laurent, born on …, son of …". He relied, inter alia, on a decision delivered on 20 October 1965 by the Ghent Court of First Instance, which had adopted a similar solution in another case (see paragraph 18 below).

The ministère public (Attorney-General's department) submitted on 13 November 1973 that the petition should be disallowed: it was argued that D. Van Oosterwijck had not established, as he was obliged to do under the legislation in force, that the initial record of his sex was tainted by an error, whereas the case decided in Ghent did concern such an error.

The Brussels Court dismissed the petition on 30 January 1974 on the ground that the petitioner had not demonstrated that the Registrar had made a mistake when drawing up the birth certificate; indeed, the petitioner's submissions showed just the opposite since he did not claim to have been "fundamentally" a man from the outset.

13. D. Van Oosterwijck appealed to the Brussels Court of Appeal on 14 February 1974. He contended that a transsexual has by definition the sex opposite to that which is apparent at the time of his birth and criticised the Court of First Instance for disregarding the concept of transsexualism. According to him, the rectification being claimed was therefore a pressing legal necessity. He also requested the Court of Appeal to be guided by equity, humanity and the interests both of society and of himself in arriving at its decision. He maintained that, on this basis, the Court would accept that he was a man who no longer possessed the characteristics of a woman; that it was inconceivable not to recognise the consequences of transsexualism where it had been duly established; that the decision under appeal led to results that were absurd and harmful to the social order, for example the possession of patently incorrect identity documents.

The parquet (Attorney-General's department) submitted that the appeal should be dismissed, relying on the following arguments. There was controversy in medical circles regarding the syndrome kmown as transsexualism. Moreover, the assertion that D. Van Oosterwijck had always belonged "fundamentally" to the male sex was not corroborated by the facts; the Registrar of Births had made no mistake in recording what outward appearances revealed. In point of fact, some lawyers questioned whether, in the absence of an error, the only conceivable legal remedy did not consist of an "action d'état préalable" (a "preliminary action pertaining to personal status"); their views probably had force, but in the present proceedings the issue had not been put in that manner. Admittedly, the appellant had an affliction which caused him considerable suffering in human and personal terms; if this were the only aspect to be considered, it might perhaps have been possible to grant his petition. From the point of view of public policy (ordre public), on the other hand, the petition prompted the most serious reservation: its acceptance might provoke numerous other petitions and it would be dangerous to encourage indirectly by this means the proliferation of treatment whose effects, being irreversible, might subsequently be regretted by the patients themselves. Finally, the perpetual calling in question of certain situations, particularly in the realm of personal status, conflicted with the requirements of a rational organisation of the community: it would tend to an increase in personal problems and engender a climate of insecurity and instability in family and social relationships.

The Brussels Court of Appeal dismissed D. Van Oosterwijck's appeal on 7 May 1974. It held that, before it could be rectified, a civil status certificate had to contain an error committed when it was drawn up and that there was no provision in the laws as they then stood that allowed "account to be taken of artificial changes to and individual's anatomy", such as those in the present case, "even if they correspond[ed] to his deep-seated psychical tendencies". However, "neither the physical examination of the appellant … nor the proposed scientific evidence as to the biological aetiology of transsexualism" were capable of evidencing the existence, from the very outset, of "physical characteristics of the male sex or even (of) transsexual tendencies".

14. D. Van Oosterwijck decided not to take his case to the Court of Cassation. According to Appendix II to the Commission's report, he had previously consulted "a number of qualified persons". In addition, Mr. Ansiaux, a lawyer practising before the Court of Cassation, advised the applicant after the event, on 20 September 1976 and in 1977, that in his view such an appeal would have had no prospects of success (see the verbatim record of the hearings of 24 April 1980 before the Court and paragraph 37 below).

15. The applicant has not, until now, sought authorisation to change his forenames, authorisation which may be granted by the Government in pursuance of an Act of 2 July 1974 supplementing the Act of 11 Germinal, Year XI - 1 April 1803 (see paragraph 20 below). He has an identity card bearing his female forenames, but with a photograph corresponding to his present outward appearance.

2. The Belgian legislation

16. In Belgium, there is no legislation dealing with transsexualism. In the only case of the kind which appears to have given rise to a criminal prosecution, the Brussels Court of First Instance held, on 27 September 1969, that sex-change treatment and operations did not of themselves constitute criminal offences. They depended on the free decision of doctors and surgeons, acting according to their conscience and with the patients' consent.

17. The drawing up of civil status certificates, including birth certificates, is regulated by the Civil Code. Under Article 55, declarations of birth have to be made before the Registrar of Births, Marriages and Deaths for the district. The certificate is drawn up immediately in the presence of two witnesses and states, amongst other things, the child's sex and forenames (Articles 56 and 57).

Rectification of civil status certificates is governed by Articles 1383 to 1385 of the Judicial Code. The person concerned has to file a petition with the Court of First Instance (Article 1383). The President of the Chamber designated to hear the matter gives directions for the petition to be communicated to the ministère public and appoints a judge-rapporteur; the petitioner is invited to appear at a hearing in order to present his case (Article 1384). The operatives provisions of any judgment ordering rectification are transmitted to the Registrar of Births, Marriages and Deaths who will forthwith enter particulars thereof on his registers and endorse them in the margin of the certificate to be amended; thereafter, the certificate will only be issued bearing the rectifications ordered (Article 1385).

The Government referred the Court to a judgment dealing with the construction of these provisions: in the case of a couple who had obtained a judicial separation but later resumed co-habitation, the Verviers Court of First Instance held on 22 September 1969 that "rectifying a civil status certificate" involves making thereto "such additions, deletions or modifications as may be necessary to cause it to be in conformity with the law and with the true state of affairs regarding the status of the person or persons it concerns", including the situation where "a certificate, though properly prepared in the first place, no longer corresponds to the true state of affairs".

18. Several Belgian courts have had the occasion to hear petitions for rectification filed by persons who had undergone sex-change treatment in circumstances varying somewhat from one case to another. The Courts of First Instance of Charleroi (8 June 1973) and Malines (17 June 1975) dismissed the actions, whereas that of Ghent (20 October 1965) upheld the petition. Another case also resulted in a favourable decision for the petitioner, although the person concerned, unlike D. Van Oosterwijck, had not received a phalloplasty (Ghent Court of First Instance, 24 April 1978).

The Court of Cassation has never been called on to consider the issue.

19. According to the Government, any civil status certificate may also be modified so as to coincide with the person's current situation by means of an action d'état (an action pertaining to personal status). This "bringing into conformity" only has effect as regards the future. Up to the present time, apparently no one has instituted such an action with a view to obtaining recognition of a new sexual identity.

20. Since 23 August 1974, the date on which the above-mentioned Act of 2 July 1974 came into force (see paragraph 15 above), any person who has grounds for changing his forenames may apply to the government authorities setting out his reasons (section 4). If the application is allowed, the government authorities grant leave for the change by Royal Decree; on request by the person concerned, the Registrar of Births, Marriage and Deaths will then enter particulars of the Royal Decree on his registers and endorse them in the margin of the birth certificate. Any shortform birth certificate subsequently issued must state the new forenames and not the former ones.

At the present time, at last seven transsexuals have taken advantage of this Act, implementation of which in a given case has no legal bearing on the persons's sex.

21. The short-form certificates of civil status which third parties may procure do not state the descent or sex of the persons concerned (Article 45 par. 1, first sub-paragraph, of the Civil Code), but only their place and date of birth, family name and forenames.

On the other hand, certified copies of the full certificate may be obtained by the individual himself, his spouse or surviving spouse, his legal representative, his ascendants, descendants or rightful heirs, the public authorities and persons having a family, scientific or other legitimate interest (Article 45 par. 1, second sub-paragraph).

Identity cards, passports and driving licences do not specify the sex of the holder.

Proceedings before the Commission

22. In his application of 1 September 1976 to the Commission, D. Van Oosterwijck invoked

- Article 3 of the Convention (art. 3), on the ground that his situation was one of "civil death" and was inhuman and degrading;
- Article 8 (art. 8), in that the application of the law obliged him to use documents which did not reflect his real identity;
- Article 12 (art. 12), since, by maintaining a distortion between his legal being and his physical being, the contested court decisions prevented his marrying and founding a family.

23. The Commission accepted the application on 9 May 1978.

In its report of 1 March 1979, the Commission concluded that there had been a breach of Article 8 (art. 8) (unanimously) and of Article 11 (art. 11) (by seven votes to three). Accordingly, it considered that it was not necessary to extend its examination to Article 3 (art. 3), having regard to the fact that the matters complained of did not appear to have the degree of serousness which the Commission usually contemplated in relation to that Article.

Final submissions made to The Court

24. At the hearings of 24 April 1980, the government invited the Court

"as [their] main submission, … to hold that, for failure to exhaust domestic remedies, the application is not admissible, or, in the alternative, to hold that the complaint is not well-founded and that it has not been shown that Belgium has violated the … Convention …".

For their part, the Commission's Delegates requested the Court,

"if [it judges that it] ought to re-examine the matter of Article 26 (art. 26), to hold that the plea based by the Government on non-observance of the rule as to exhaustion of domestic remedies is not well-founded …".

As to the law

The plea of non-exhaustion of domestic remedies

I. The jurisdiction of the Court and estoppel

25. According to the Government, domestic remedies were not exhausted in the instant case.

The Court will take cognisance of preliminary pleas of this kind insofar as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted (see the Artico judgment of 13 May 1980, Series A no. 37, pp. 12-14, par. 24 and 27).

26. The Government objected that D. Van Oosterwijck

- had not appealed on a point of law to the Court of Cassation;
- had not pleaded the Convention either at first instance or on appeal;
- had not sought authorisation to change his forenames, pursuant to the Act of 2 July 1974;
- had not instituted an action d'état (action pertaining to personal status).

The first three points were mentioned in the 1977 written observations on admissibility and must accordingly be considered by the Court.

The fourth means of redress was not expressly referred to by the Government prior to the decision of 9 May 1978 accepting the application. However, their representatives had adverted to the matter in substance at the hearing preceding that decision: in particular, they had argued that the applicant "could have sought a declaratory judgment as to his new situation and … the endorsement in the margin of the certificate, of the modification" effected; they had emphasised in addition that there existed "a fundamental difference" between "bringing the birth certificate into conformity with the actual state of affairs" in this way and "a genuine rectification" (see pages 35 and 36 of the verbatim record of the hearings before the Commission). There is thus no estoppel.

II. Whether the plea is well-founded

27. The only remedies which Article 26 (art. 26) of the Convention requires to be exercised are those that relate to the breaches alleged and at the same time are available and sufficient (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 16, par. 29). In order to determine whether a remedy satisfies these various conditions and is on that account to be regarded as likely to provide redress for the complaints of the person concerned, the Court does not have to assess whether those complaints are well-founded: it must assume this to be so, but on a strictly provisional basis and purely as a working hypothesis (see the arbitration award of 9 May 1934 in the matter of the "Finnish ships", United Nations Collection of Arbitration Awards, Vol. III, pp. 1503-1504, also cited by the Commission in its decision of 17 January 1963 on the admissibility of application no. 1661/62, X and Y v. Belgium, Yearbook of the Convention, vol. 6, p. 366).

It has to be ascertained, in the light of these principles, wheter any one or more of the remedies listed by the Government is or are relevant for the purposes of Article 26 (art. 26) and, if so, whether any special grounds nevertheless dispensed D. Van Oosterwijck from having recourse thereto.

1. Whether there existed any remedies which ought in principle to have been exercised

a) Application for authorisation to change fornames (see paragraphs 15 and 20 above)

28. In its admissibility decision of 9 May 1978, the Commission did not deal with the submissions which the Government had based on the Act of 2 July 1974. After rejecting the arguments relating to the possibility of appealing to the Court of Cassation and of pleading the Convention before the Belgian courts, the Commission concluded: "It has not been asserted that the applicant had other means of putting an end to the state of affairs he complains of." The said Act was considered by the Commission solely in its opinion of 1 March 1979 of the merits of the case (see paragraph 47 of the report).

29. The breaches alleged by D. Van Oosterwijck consist of failures to observe the prohibition on inhuman and degrading treatment (Article 3) (art. 3), the right to respect for private life (Article 8) (art. 8) and the right to marry and to found a family (Article 12) (art. 12). His contention was that these breaches stemmed from legislation and judicial decisions which, by attributing a "defintive scientific value" to the entries on a birth certificate, placed him in an intolerable legal and administrative situation.

Had the applicant successfully applied after the entry into force of the Act of 2 July 1974 for authorisation to change his forenames, third parties would admittedly have had far fewer opportunities of noticing the difference between his appearance and his civil status. However, he would not really have solved his problems in the manner claimed by the Government: he would have succeeded only in eliminating some of the consequences of the wrong of which he complained but not in eradicating either its cause, namely the respondent State's non-recognition of his sexual identity (see paragraphs 12, 13 and 21, second sub-paragraph, above) or its social consequences. The Court concurs with the applicant and the Commission's Delegates on this point.

(b) Appeal to the Court of Cassation and reliance on the Convention

30. In the Government's submission, D. Van Oosterwijck should have appealed on a point of law to the Court of Cassation to have the judgment of 7 May 1974 reversed, in particular because too narrow a scope had been given to the concept of error warranting rectification, this being a question of law which had not as yet been decided by the Court of Cassation and which was the subject of conflicting authority at the level of the lower courts (see paragraphs 14, 17 and 18 above). The non-exhaustion of remedies was also said to result from the fact that neither at first instance nor on appeal did the applicant plead the Convention, even in substance (see paragraphs 12-13 above).

31. This line of argument, which was contested by the applicant, did not find favour with the Commission for the following reasons. The Brussels Court of Appeal based its decision on findings of fact not subject to review by the Court of Cassation and it had not been contended that the Court of Appeal had acted contrary to the applicable Belgian law; a further appeal on a point of law would thus have had no real likelihood of success. In addition, both the appeal made on 14 February 1974 and the submissions presented by the ministère public (see paragraph 13 above) showed that D. Van Oosterwijck did prosecute in Belgium the complaints he subsequently brought before the Commission. He did not, it is true, seek at that stage to base his complaints on the Convention, but no blame could be attached to him for that since the relevant clauses in the Convention were not "sufficiently precise in character to be considered as conflicting with the rules of the … Civil Code or Judicial Code, whose immediate purpose (was) a very different one"; had the Belgian courts nonetheless found incompatibility with Article 8 (art. 8), they could not have gone so far as simply to set aside the domestic law without thereby "creating an intolerable legal void".

32. The Court observes that the judgment of 7 May 1974 was grounded not only on points of fact but also, as a separate matter, on points of law: in the judgment, the Court of Appeal stated

- that the birth certificate "in principle settles defintively" the person's sex, this being "a component of [his or her] status";
- in substance, that rectification of the certificate presupposed the presence of an error committed when the certificate was drawn up;
- that "there is no provision in current legislation that allows account to be taken of articifial changes to an individual's anatomy, even if they correspond to his deep-seated psychical tendencies" (see paragraph 13 above).

It should also be noted that when construing the same texts other Belgian courts had arrived at divergent conclusions (see paragraphs 17 in fine and 18 above).

The Court of Cassation, while not taking cognisance of the actual merits of a case (Article 95 of the Constitution), does have jurisdiction to state the law and thereby set the course for subsequent judicial decisions. There is thus nothing to show that an appeal to the Court of Cassation on grounds of the national legislation stricto sensu would have been obviously futile.

33. As far as the application lodged with the Commission is concerned, its sole legal basis is provided by the Convention. However, D. Van Oosterwijck did not plead the Convention at first instance or on appeal, neither, did he appeal further to the Court of Cassation. Yet the Convention forms an integral part of the Belgian legal system in which it has primacy over domestic legislation, whether earlier or subsequent (Court of Cassation, judgment of 27 May

1971 in the case of Fromagerie Franco-Suisse Le Ski, Pasicirisie belge, 1971, I, pp. 886-920*). Furthermore, Article 8 (art. 8) of the Convention is directly applicable, as has been held by this Court (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 46, par. 95) and by courts both in Belgium (Court of Cassation, judgment of 21 September 1959 and 26 September 1978, Yearbook of the Convention, vol. 3, pp. 624-628, and Pasicrisie belge, 1979, I, pp. 126-128) and in other States (see, for the Netherlands, Hoge Raad, judgment of 18 January 1980, Nederlands Jurisprudentie, 1980, no. 462; and for the Grand-Duchy of Luxembourg Supreme Court of Justice, judgment of 2 April 1980, Journal des Tribunaux, 1980, p. 491). The applicant could thus have relied on Article 8 (art. 8) in his own country and argued that it had been violated in his respect.

---

* Note by the registry: For an English translation, see [1972] Common Market Law Reports 330.

The Court rejects the objection that in this context the Convention lacks the precision required for the exercise of an effective domestic remedy. The wording of Article 8 (art. 8) appeared sufficiently clear to the Commission for it to uphold in large measure the arguments put to it by D. Van Oosterwijck - arguments that the Court must deem correct for the purposes of Articles 26 (art. 26) (see paragraph 27 above). It is impossible to discern what might have prevented the applicant from making the same submissions before the Belgian courts and those courts from reaching the same conclusion and even from determining what was required as a consequence in order to give effect the right being claimed.

Undoubtedly, in domestic proceedings the Convention as a general rule furnishes a supplementary ground of argument, to be prayed in aid if judged suitable for achieving an objective which is in principle rendered possible by other legal arguments (see the Commission's decision of 11 January 1961 on the admissibility of application no. 788/60, Austria v. Italy, Yearbook of the Convention, vol. 4, pp. 166-176). In certain circumstances it may nonetheless happen that express reliance on the Convention before the national authorities constitutes the sole appropriate manner of raising before those authorities first, as is required by Article 26 (art. 26), an issue intended if need be, to be brought subsequently before the European review bodies (decision of the Commission, 18 December 1963, on the admissibility of application no. 1488/62, X v. Belgium, Collection of Decisions, no. 13, pp. 93-98).

34. Whether or not that be the position in the present case, in his own country D. Van Oosterwijck did not even plead in substance the complaints he later made in Strasbourg; before the Belgian courts he relied neither on the Convention nor on any other plea to the same or like effect (see the above-mentioned decision on the admissibility of application no. 1661/62, p. 367; the Commission's decision of 28 May 1971 on the admissibility of application no. 4464/70, National Union of Belgian Police, Series B no. 17, p. 79). He thereby denied the Belgian courts precisely that opportunity which the rule of exhaustion is designed in principle to afford to States, namely the opportunity to put right the violations alleged against them (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 29, par. 50; the Airey judgment of 9 October 1979, Series A no. 32, p. 10 par. 18).

(c) Action d'état (action pertaining to personal status)

35. There is a connection between the above reasoning and the observations prompted by the fourth and final limb of the Government's preliminary objection (see paragraph 26 above).

In Belgian academic writings, legislation and judicial practice a distinction is drawn between actions d'état and actions for rectification. The former deal with issues of substance in that their purpose is to establish, modify or extinguish personal status. The latter are brought solely in order to make good any error or omission appearing in the documents serving as proof of status. Some appreciable, consequences in law, which are set forth in the Judicial Code (Articles 92 par. 1, 569 and 764), flow from this difference in the nature of the two actions.

An action d'état would have allowed the applicant not only to plead the Convention but also to procure a prior adjudication by the courts of his own country on the issue he raised before the Commission and thereafter before the Court, and to set this issue in its proper dimensions from the very outset, It is for those courts to determine, should the occasion arise, whether the action d'état is still available to the applicant.

However, in the absence of any decided cases in Belgium on this point, no blame can be attached to D. Van Oosterwijck for having omitted up till now to bring such an action. The rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (compare the Stögmüuller judgment of 10 November 1969, Series A no. 9, p. 42, par. 11; the Ringeisen judgment of 16 July 1971, Series A no. 13, pp. 37-38, par. 89 and 92; the above-mentioned Deweer judgment, p. 17, par. 29 in fine).

2. Whether there existed any special grounds capable of dispensing the applicant form exercising the remedies taken into consideration by the Court

36. It remains to be ascertained, in the light of the "generally recognised rules of international law" to which Article 26 (art. 26) refers, whether there were any special grounds dispensing the applicant from utilising one of the means of redress taken into consideration at paragraphs 32 to 34 above.

37. D. Van Oosterwijck asserted that he decided not to appeal on a point of law to the Court of Cassation only after he had consulted "a number of qualified persons"; he stated that they were "unanimous" in dissuading him from "taking such a step" which they considered pointless since in their view the judgment of 7 May 1974 was neither contrary to the law vitiated by procedural irregularity (Article 608 of the Judicial Code). Mr. Ansiaux, a lawyer practising before the Court of Cassation, gave similar advice on 20 september 1976 and in 1977 - that is, after the expiry of the statutory time-limit of three month (Article 1073 of the Judicial Code) and after the reference of the matter to the Commission (1 September 1976).

The Court does not consider that a negative opinion of this kind can of itself justify or excuse failure to exercise a remedy (see, for example, the Commission's final decision of 5 April 1968 on the admissibility of application no. 2257/64, Graf Soltikow v. the Federal Republic of Germany, Yearbook of the Convention, vol. 11, p. 224): at the very most, such an opinion may tend, when combined with other factors, to show that the remedy in question would in

all probability be ineffective or inadequate (see the Commission's decision of 12 July 1978 on the admissibility of application no. 7907/77, Mrs. X v. the United Kingdom, Decisions and Reports, no. 14, p. 210).

In the present proceedings, the documents in the case-file do not disclose on what precise grounds in law the qualified persons mentioned by the applicant based their opinions. There is no evidence before the Court to show that they dealt with the matter in the light of all relevant aspects, including the Convention. On this point, the Court therefore perceives nothing liable to disturb the conclusion following form paragraphs 32 to 34 above.

38. The applicant also pleaded his financial difficulties but the Court notes, as did the Government, that he has supplied no proof of this and that, besides, he did not seek free legal aid for the purposes of an appeal to the Court of Cassation (see the Commission's decision of 6 March 1957 on the admissibility of application no. 181/56, Yearbook of the Convention, vol. I, p. 140).

39. D. Van Oosterwijck argued finally that the Belgian courts were bound by the principle jura novit curia to apply the Convention even though he had not requested them to do so and that this was the case more especially as the Convention was a matter of public policy (ordre public) in Belgium.

The Court is not persuaded by this argument. The fact that the Belgian courts might have been able, or even obliged, to examine the case of their own motion under the Convention cannot be regarded as having dispensed the applicant from pleading before them the Convention or arguments to the same or like effect (see, mutatis mutandis, the Commission's unpublished decision of 4 September 1958 on the admissibility of application no. 342/57, X. v. the Federal Republic of Germany). Whether the obligation laid down by Article 26 (art. 26) has been satisfied has to be determined by reference to the conduct of the victim of the alleged breach. In addition, the manner in which the applicant presented his case to the Brussels Court of First Instance and Court of Appeal scarcely afforded them an opportunity of taking the Convention into account.

40. The issue had, furthermore, never come before the Court of Cassation for decision (see paragraph 18 above), with the result that there was not even any case-law which could be regarded as likely to render obviously futile an appeal based on the Convention or on arguments to the same or like effect (see, mutatis mutandis, the above-mentioned De Wilde, Ooms and Versyp judgment, p. 34, par. 62).

41. Accordingly, domestic remedies were not exhausted in the instant case.

For these reasons, The Court

Holds, by thirteen votes to four, that by reason of the failure to exhaust domestic remedies, it is unable to take cognisance of the merits of the case.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this sixth day of November, one thousand nine hundred and eighty.

For the President
Signed: Gérard WIARDA, *Vice-President*

Signed: Marc-André EISSEN, *Registrar*

The following separate opinions are annexed to the present judgment in accordance with Article 51 par. 2 (art. 51-2) of the Convention and Rule 50 par. 2 of the Rules of Court:

- concurring opinion of Mr. Thór Vilhjálmsson;
- partly concurring opinion of Mr. Ganshof van der Meersch;
- joint dissenting opinion of Mr. Evrigenis, Mr. Liesch, Mr. Gölcüklü and Mr. Matscher.

Initialled: G. W.

Initialled: M.-A. E.

Concurring opinion of Judge Thór Vilhjálmsson

For the reasons given at paragraph 32 of the judgment, I have, together with the majority of the Court, found that in this case domestic remedies were not exhausted as required by Article 26 (art. 26) of the Convention. In my opinion, the reasons contained in that particular paragraph suffice. I do, however, entertain some doubts as concerns the grounds set out in the succeeding paragraphs of the judgment.

Partly concurring opinion of Judge Ganshof van der Meersch

(Translation)

I voted, along with the majority of my colleagues, for the failure to exhaust domestic remedies. I thus agree with the operative provisions of the judgment.

I regret, however, that I cannot agree with certain of the reasons stated in support of this decision.

I.

1. In its judgment, the Court considers in turn the four remedies said by the Belgian Government to have been available to Mr. Van Oosterwijck to “redress” the state of affairs about which he was complaining.

The Court lists these "means of redress" and notes that Mr. Van Oosterwijck had not had recourse to them:

- he had not appealed on a point of law to the Court of Cassation from the judgment of the Brussels Court of Appeal;
- he had not pleaded a breach of the Convention either at first instance or on appeal;
- he had not sought authorisation to change his forenames by relying on the Act of 2 July 1974;
- he had not brought an action d'état.

2. From amongst these "means of redress", the Court rules out Mr. Van Oosterwijck's omission to apply for permission to change his forenames. The reason given by the Court is that "he would not really have solved his problems …: he would have succeeded only in eliminating some of the consequences of the wrong of which he complained but not in eradicating … its cause …". I concur unreservedly with the Court's viewpoint on this issue.

3. On the other hand, the Court holds it against Mr. Van Oosterwijck that he neglected to utilise two of the three other "domestic remedies".

I agree with the reasoning employed by the Court with regard to the failure to plead a breach of the Convention and to the omission to make an application pertaining to his personal status by means of an action d'état, although I have allowed myself the privilege of formulating a few remarks on the latter point.

4. On the other hand, I am unable to agree with the Court's reasoning in support of its decision that domestic remedies have not been exhausted insofar as it is based on failure to appeal on a point of law to the Court of Cassation from the judgment of the Brussels Court of Appeal.

---

5. For the purposes of evaluating Mr. Van Oosterwijck's obligation to appeal on a point of law to the Court of Cassation in order to exhaust the remedies open to him, the Court cannot do other than refer back to domestic law in accordance with the doctrine of renvoi. It must decide by reference to the Belgian domestic law, this being the law governing cassation proceedings, that is, in the instant case, the rules on the admissibility of and the grounds for an appeal to the Court of Cassation.

6. It is admittedly correct, as the Court observes, that the Brussels Court of Appeal judgment sets out not only points of fact but also points of pure law.

This is so when the Court of Appeal states: "Whereas every individual must be treated as belonging to either the male or the female sex, which sex must be mentioned in the birth certificate; whereas that certificate in principle settles definitively this component of the individual's status." In so holding, the judgment refers to what it describes as current Belgian law.

The same applies to the next reason: "Whereas there is no provision in current legislation that allows account to be taken of artificial changes to an individual's anatomy, even if they corrrespond to his deep-seated psychical tendencies."

7. It can be seen that neither of these reasons involves a mixed question of law and fact. They both invoke a general principle of law.

8. However, in order to assess the prospects of success of an appeal by Mr. Van Oosterwijck on a point of law to the Court of Cassation from that judgment, based on one or both of these reasons in law, it is necessary to turn to the remainder of the judgment. In fact, it is not enough to take into consideration the reason in law enouncing the rule that is believed to be wrong. It must be ascertained whether the Court of Appeal's decision is not justified by other reasons. And it can be clearly seen that this is the case.

9. Indeeed, the Court of Appeal expressly states: "Whereas, accordingly, it is not established that the appellant (Van Oosterwijck) belongs fundamentally, as she maintains, to the male sex." Why "accordingly"? Because this finding is the conclusion drawn from a line of argument expressed by the Court of Appeal in the form of four reasons of fact, each of which suffices to show that, in that Court's view, it is not proved that Mr. Van Oosterwijck has fully acquired the male sex. These reasons thus provide a justification in law for the operative provisions of the Court of Appeal's judgment.

10. The reason in law, to which the European Court refers in order to decide that Mr. Van Oosterwijck had not exhausted domestic remedies because he did not appeal to the Court of Cassation, is obiter (surabondant). Yet, according to the settled case-law of the Belgian Court of Cassation, a plea contesting an obiter dictum in the decision under appeal is not an admissible ground of appeal (judgments of 10 March and 14 April 1978, Pasicrisie, 1978, I, pp. 773 and 912). The terms used by the Court of Cassation when laying down this rule have sometimes varied, according to the case. Thus: A plea to the effect that the court erred in law, when such error does not affect the correctness in law of the operative provisions under appeal, is inadmissible since there is no prejudice to the appellant (judgment of 2 December 1977, Pasicrisie, 1978, I, p. 387). Or again: A plea challenging only some reasons in the decision under appeal, when the operative provisions are justified in law by another reason, is inadmissible since there is no prejudice to the appellant (judgments of 10 March and 16 June 1978, Pasicrisie, 1978, I, pp. 773 and 1178).

11. The appeal on a point of law that Mr. Van Oosterwijck might have lodged was doomed to failure. The remedy would not have been admissible. No blame can therefore be attached to him for not having had recourse to it.

It is wrong to base the operative provisions of the Court's judgment, in order to decide that domestic remedies have not been exhaused in the present case, on the fact that the applicant did not appeal on a point of law to the Court of Cassation from the judgment of the Brussels Court of Appeal.

II.

12. There is another reason why the Court should not have based the failure to exhaust domestic remedies as is required by Article 26 (art. 26) of the Convention on the fact that Mr. Van Oosterwijck did not appeal on a point of law to the Court of Cassation from the Brussels Court of Appeal judgment which confirmed the order dismissing his petition.

If he had appealed to the Court of Cassation, he would not have been able to obtain satisfaction, even on the assumption that his appeal had been held admissible. The proceedings he had instituted were no more than a petition for rectification of his birth certificate. The object of the petition would have been binding on the Court of Cassation and would have circumscribed its jurisdiction, just as it circumscribed the jurisdiction of those courts which did have to rule on the petition. The Court of Cassation would have been obliged to remain within the framework of a petition which could not achieve the object sought by Mr. Van Oosterwijck. And even assuming that an appeal to the Court of Cassation had succeeded, the lower court judge, on having the case referred back, would have been ruling ultra petita had he purported to replace a request for rectification of the applicant's birth certificate by a request for modification of his status.

13. In fact, as the Court itself rightly observes in its judgment, the two actions are fundamentally different: "The former [actions d'état] deal with issues of substance in that their purpose is to establish, modify or extinguish personal status. The latter [actions for rectification] are brought solely in order to make good any error or omission appearing in the documents serving as proof of status."

14. The action for rectification simply raises a question of evidence, that is to say the correctness and regularity of the documentary proof afforded by the certificate recording a person's civil status. Unlike the action d'état, the action for rectification is not exclusively personal. It can be instituted on the initiative of any interested party or of the ministère public; the latter has the responsibility of inspecting and supervising the civil status registers, and this is done at least once every year. The number of rectifications of civil status certificates is countless, especially as regards civil status registers in less populous districts where the officers in charge of the registers (échevins de l'état civil) do not always have the full training required for drawing up such certificates. Unlike the situation that obtains in an action d'état, in an action for rectification the status of the individual concerned is not the subject of any dispute.

15. The action d'état, on the other hand, does raise the issue of the individual's true status. It takes the form of a dispute over or a claim concerning his civil status. It is always the very existence of that party's status that constitutes the object of the action, the action being the means by which the request is presented.

16. The Court's judgment is right to point out that the procedure in an action d'état is laid down in detail in the Judicial Code. In fact, from the procedural point of view, there is a parallel that corresponds to the fundamental difference in kind between the two actions.

17. The action for rectification of a civil status certificate has the advantage of a speedy procedure, the interests at stake being relatively minor; there is nothing more than a procedure by way of petition.

18. On the other hand, the action d'état follows the "ordinary", contentious procedure. It is strictly personal to the party concerned and cannot even be brought by the ministère public. Only courts of first instance have jurisdiction over such an action; it must be heard by a chamber of three judges and notice thereof must be given to the ministère public: these are exceptional guarantees which are prescribed by the Judicial Code on account of the importance of the subject-matter for the social order. Academic writings stress the fact that it would be improper to disguise an action d'état as an action for rectification of a civil status

certificate in order to take advantage of the simpler procedure offered by the latter. The action for rectification of a civil status certificate is the automatic consequence of a successful action d'état.

19. A person's status is inalienable. Questions of public policy are involved. It is inconceivable that a question of status should be dealt with by means of a procedure which, like that followed in actions for rectification of a civil status certificate, is set in motion by no more than a petition and does not even have to be contentious in form. Status is not negotiable or a matter for personal determination. It is personal to the individual and he cannot dispose of or modify it by agreement.

20. The action d'état must be availabe whenever an aspect of a person's status is the subject of a dispute or a claim. This applies, for example, to affiliation, the question whether a child is legitimate or illegitimate, disavowal of paternity, divorce, separation and annulment of marriage. It must also be available when an individual seeks recognition of his sexual identity.

21. The aspects of a person's status which have just been mentioned are fully dealt with in the Civil Code, the only exception being the question of sex, even though it cannot be contested that that also is an aspect of status; whilst there are admittedly no special rules in the Code on that question, it is not entirely lost sight of since it bears on the conditions on which marriage may be contracted. At the same time, it should not be forgotten that Article 14 (art. 14) of the Convention, which lays down the prohibition on any discrimination on the ground of sex, is also a rule of Belgian positive law, that Article (art. 14) being directly incorporated into domestic law.

22. A man or woman who is unable to obtain recognition of his or her sexual identity, an aspect of status which is inseparable from his or her person, will be unable to play his or her full role in society. As has been said, the right to such recognition is a general principle of law.

23. Even though it may not be enounced in any legislation, a general principle of law forms, in Belgian domestic law, part of the legal system. According to the case-law of the Belgian Court of Cassation, a general principle of law is an autonomous source of law, having the same force as positive law (1). A court must ensure that that principle is respected (2). Reference has been made to a general principle of law in numerous judgments rendered by the Court of Cassation in civil cases, an area in which an appeal on a point of law must, if it is not to be inadmissible, state the legal provision or provisions which has or have been violated. Yet appeals on a point of law, notably those concerning a violation of the right of defence - a matter which is not the object of a general rule of positive law -, frequently do no more than indicate a general principle of law without citing a specific legal provision (judgments of 22 December 1977, Pasicrisie, 1978, I, p. 472, and of 11 April 1978, ibid., I, p. 892). The same applies where, without any reference to legislation, violation of a general principle of law is relied on as a ground of which the court should take notice of its own motion (judgment of 31 October 1972, Pasicrisie, 1979, I, p. 265). The Court of Cassation has accepted the correctness of this procedure.

(1) and (2). W. Ganshof van der Meersch: Observations on legislative texts and the general principles of law, Journal des Tribunaux, 1970, pp. 557 et seq. and 581 et seq.

---

24. There is no difference in kind between an action d'état instituted in an area governed by one or more provisions of civil law and an action d'état grounded on a general principle of law. Any action in the latter category would be instituted against the ministère public.

25. It follows from the above that an action d'état brought by a person in order to obtain recognition of his sexual identity is fundamentally different in both its nature and its purpose from an action for rectification of his civil status certificate; the latter concerns only the regularity and correctness of the documentary proof recording particulars of his civil status.

26. An appeal on a point of law from the judgment confirming the dismissal of Mr. Van Oosterwijck's petition for rectification of his birth certificate would thus, for a further reason in law, have been necessarily doomed to failure. It was not a sufficient remedy.

27. For the reasons given in both chapters of this opinion, the Court, in order to decide that Mr. Van Oosterwijck had not exhausted domestic remedies before applying to the Commission, should not have based the operative provisions of its judgment on the failure to appeal on a point of law to the Court of Cassation.

Joint dissenting opinion of Judges Evrigenis, Liesch, Gölcüklü and Matscher

(Translation)

1. We regret that we are unable to share the opinion of the majority of our colleagues that domestic remedies were not exhausted in the instant case.

2.According to the Court's established case-law, the rule of exhaustion is applicable only if domestic remedies relating to the alleged breaches are available and sufficient (see paragraph 27 of the judgment).

It is further settled that the burden of proving the existence of the available and sufficient domestic remedies lies upon the State invoking the rule (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 15, § 26).

3. It follows that a preliminary objection of non-exhaustion can be grounded neither on the theoretical and highly contested existence in positive law of a domestic remedy, nor on the indication of a remedy which does exist but is insufficient to provide redress in the particular case.

4. It is in the light of these principles and considerations that it has to be determined whether the two means of redress specified by the Belgian Government and taken into consideration by the Court are relevant under Article 26 (art. 26) and, if so, whether any special circumstances dispensed D. Van Oosterwijck from having recourse to them.

5. The applicant is in particular criticised for not having taken his case to the Court of Cassation in order to have the Brussels Court of Appeal's judgment of 7 May 1974 reversed.

6. On the question of this remedy, our views differ from those of the majority of the Court.

The petition filed on 18 October 1973 by the applicant with the Brussels Court of First Instance sought in fact the "rectification of a civil status certificate" (see paragraph 12 of the judgment) in pursuance of the relevant provisions in the Judicial Code (see paragraph 17).

The ministère public (Attorney-General's department) submitted that the petition should be dismissed because D. Van Oosterwijck had not established that the initial record of his sex was tainted by error.

The Brussels Court found against the petitioner since he had not demonstrated that the Registrar of Births, Marriages and Deaths had made a mistake when completing the birth certificate; furthermore, the petitioner's submissions showed just the opposite since he did not claim to have been "fundamentally" a man from the outset (see paragraph 12).

7. The Brussels Court of Appeal upheld this decision on the grounds that before it could be rectified a civil status certificate had to contain an error committed when it was drawn up and that there was no provision in the laws as they then stood that allowed "account to be taken of artificial changes to an individual's anatomy", such as those in the present case, "even if they correspond[ed] to his deep-seated psychical tendencies". However, "neither the physical examination of the appellant … nor the proposed scientific evidence as to the biological aetiology of transsexualism" were capable of evidencing the existence, from the very outset, of "physical characteristics of the male sex or even [of] transsexual tendencies" (see paragraph 13).

8. Insofar as any appeal were to take issue with the Court of Appeals's findings of fact, it would be inadmissible since the Court of Cassation reviews only the application of the law.

It would still be inadmissible, as involving a mixed question of fact and law, to the extent that it challenged the conclusion drawn from the decision on the facts.

Likewise assessment of the weight to be given to a proposed item of evidence falls within the sovereign domain of the judges invested with jurisdiction over the merits and this is not subject to review by the Court of Cassation.

It should further be noted that even on the supposition of a successful appeal to the Court of Cassation on a point of law, the lower court judge, on having the case referred back, could not, without ruling ultra petita, have converted an action for rectification of the applicant's civil status certificate into an action for modification of his status, for the jurisdiction of the courts hearing the case is circumscribed by the initial object of the action.

Finally, the statement that Belgian case-law on the matter was uncertain and that the Court of Cassation could have overturned the lower court's decision as being in conflict with the law governing rectification of civil status certificates would appear to be pure legal speculation (see paragraph 32 of the judgment); in point of fact, any such analysis can be regarded as no more than simple assertion in that it is totally unsupported by any legal consideration sufficiently founded in Belgian positive law.

Prior to the Brussels Court of Appeals's judgment of 7 May 1974 there was, so it would seem, only one Belgian decision (delivered by the Ghent Court of First Instance on 20 October 1965) dealing with a comparable case and going the other way, whereas two other judgments which were more recent (Charleroi in 1973 and Malines in 1975) had taken the same view as the Brussel's Court of First Instance and Court of Appeal.

Admittedly, in the meantime attitudes as to transsexualism and, consequently, the trend in court decisions on the matter in various European countries have evolved. Nonetheless, it was only in 1978 that a judgment by the Ghent Court of First Instance - which moreover has apparently remained an isolated authority - granted a petition for rectification in a case of a claimed sex-change.

It must be inferred from this that at the time when the applicant filed his petition the relevant Belgian case-law, far from being uncertain, argued against proceeding by way of rectification.

In these circumstances, no criticism can be made of the applicant's decision, based on the opinion of his advisers and, not to try his luck before the Court of Cassation.

9. The non-exhaustion of remedies is also said to result from the fact that neither at first instance nor on appeal did the applicant plead the Convention, even in substance (see paragraphs 30 and 34).

On this point as well, we are bound to express our disagreement with the Court's conclusion.

10. In the first place, the notice of appeal, dated 14 February 1974, from the order refusing rectification of his birth certificate shows quite clearly that while he did not rely directly on the Convention, the applicant did nevertheless adduce arguments to the same or like effect (see paragraph 34); in particular, the notice stated that "the Court should be guided by equity, humanity and the interests of both society and of the appellant in arriving at its decision; and that it is evident that Van Oosterwijck is a man" (see the Guzzardi judgment, paragraph 72).

11. In the second place, it is recognised that Article 8 (art. 8) of the Convention produces direct effects in the domestic legal system in Belgium and that litigants may rely before the Belgian courts on the general right to respect for their private life.

However, having regard both to the abstract terminology of Article 8 (art. 8) and to the lack of judicial precedents, no blame can be attached to the applicant for not having expressly pleaded it before the Belgian courts in the context of proceedings for rectification of his birth certificate, these being proceedings subject to rather special legal technicalities.

In point of fact, the application in the instant case of the rule of exhaustion of domestic remedies as a pre-condition for submission of the matter to an international tribunal prompts the following observations.

The rule contemplates primarily the situation where the alleged breach of a norm of international law (be it customary or treaty law) is referable to an administrative or judicial act. In such circumstances, the respondent State should be allowed a prior opportunity to redress the alleged grievance by its own means within the framework of its own domestic legal system.

It is otherwise when the alleged breach of the international norm results from the substantive content of a provision of domestic law or from a gap in such a provision. In that event, it is only exceptionally that the state of affairs complained of can be remedied by having recourse to a higher court.

In the present case, we are confronted with a situation falling within the second category. The process of bringing of domestic law into conformity with international law can in fact be carried through only by means of an adaptation of domestic law, something which the private individual is normally neither qualified nor able to bring about.

12. Having regard to the principle of the separation of powers, it is indeed somewhat unlikely that the national judge could, either of his own motion or at the request of the applicant, have remedied a gap in the legislation, seeing that the issue involved was a fundamental one affecting personal status and that Article 8 (art. 8) hardly afforded the judge any precise indications in this respect.

Be that as it may, a remote possibility of this kind cannot be taken as a sound basis for applying the rule of exhaustion without disregarding the purpose served by this rule within the Convention system.