

## Abstract

*The problem of changing the civil status of transsexuals has been tackled in different ways in various European countries. Six applications made by transsexuals have led to judgments by the European Court of Human Rights. These cases illuminate some specific aspects of the relationships between health, law, and human rights, including criteria used to determine gender and the impact of authorities' refusal to modify civil status, which may be seen as violating the right to be free from inhuman or degrading treatment; respect for the private and family life of transsexuals; and the right to marry. Only one Court decision found a State party (France) to be in violation of the ECHR for refusing a transsexual the right to change civil status. This judgment, however, has left open a number of outstanding issues.*

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*Le problème du changement de l'état civil des transsexuels a été l'objet d'approches diverses dans les différents pays d'Europe. Six requêtes de la part des transsexuels ont abouti à des jugements à la Cour Européenne des Droits de l'Homme (CEDH). Ces cas illustrent certains aspects spécifiques des rapports entre la santé, le droit et les droits de la personne y compris les critères de détermination du genre et l'impact du refus de la part des autorités de modifier l'état civil, ce qui peut être considéré comme une violation du droit de ne pas subir de traitement dégradant ou inhumain, du droit au respect de la vie privée et de la vie de famille des transsexuels et du droit au mariage. Un seul jugement de la Cour a déclaré qu'un état (la France) avait manqué aux règles de la CEDH pour avoir refusé à un transsexuel le droit de changer son état civil. Néanmoins ce jugement n'a pas répondu à de nombreux autres questions qui ont été laissées en suspend.*

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*El problema de cambiar la condición civil de los transexuales se ha abordado de diferentes maneras en distintos países europeos. Seis solicitudes hechas por transexuales han requerido dictámenes por parte de la Corte Europea de Derechos Humanos. Dichos casos sirven para esclarecer algunos aspectos específicos de la relación entre salud, legislación y derechos humanos tales como los criterios utilizados para determinar el género y el impacto producido por el rechazo de las autoridades a peticiones de modificar el estado civil. Este rechazo puede ser visto como una violación al derecho de no sufrir un trato inhumano o degradante, al respeto por la privacidad y la vida familiar de los transexuales, y al derecho a casarse. Solamente en uno de estos casos, la Corte encontró que un Estado signatario (Francia) había violado la CEDH al denegar el derecho de un transexual a cambiar su estado civil. Éste dictámen, sin embargo, deja sin resolver un amplio espectro de asuntos.*

# HUMAN RIGHTS ASPECTS OF TRANSSEXUALISM

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**T**ranssexualism has long been recognized throughout the world, although cultural responses to it have differed greatly.<sup>1</sup> In the West to date, transsexualism remains classified as a mental illness in international diagnostic classifications such as the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) and *International Statistical Classification of Diseases and Related Health Problems* (ICD 10). The term “transsexual” may be broadly defined to include all individuals who hold the deep conviction that the body into which they were born does not represent or reflect the gender they feel themselves to be. The source of this conviction, however, can differ from individual to individual: it can arise from a perceived physical anomaly, an unrelated mental disorder, or even a particularly compelling social situation. It is therefore necessary for our purposes to apply the term “transsexualism” only to a specific, restrictively defined, gender dysphoria.

Transsexualism is defined by the DSM-IV under the heading Gender Identity Disorder as: “(criteria A) a strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex); (criteria B) persistent discomfort with [one’s] sex or sense of inappropriateness in the gender role of that sex; (criteria C) the disturbance is not concurrent with a physical intersex condition; (criteria D) the disturbance causes clinically significant

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distress or impairment in social, occupational or other important areas of functioning."<sup>2</sup>

Transsexual patients who have expressed a desire for gender reassignment have long met with skepticism on the part of medical authorities. A first step toward improving conditions for transsexuals has been the progressive recognition of the merits of medical and surgical treatment.<sup>3</sup> Two concomitant necessities, however, have rapidly arisen: first, to provide a multidisciplinary approach to treatment involving psychiatric assessment, endocrinological control, surgery, and social support, and, second, to assure that post-treatment transsexuals receive social and judicial recognition of their changed physical status.

One vital element in this process of recognition is governmental acceptance of transsexuals' requests for an official change in civil status (from male to female or vice versa) to reflect the therapeutically advised physical change of their gender characteristics. Ideas about civil status may vary by country. In the U.K., for example, the Registry of Births and Death records sex (determined only by biological criteria), date of birth, and first names and surname for each individual. The birth certificate issued from this Registry documents not current identity but historical facts. An amendment can be made only if a clerical or factual error occurred when the birth was registered. On the other hand, under English law a person is entitled to adopt such first names or surname as he or she wishes. The new names are valid for purposes of legal identification. In French law, the birth certificate records the day, time, and place of birth; the sex of the child; and the names given. Persons cannot dispose of their civil status at will; civil status at birth is considered to be inalienable. The law allows for rectification only in the event of an error or omission.

Civil status is essential to the dignity of individuals because it affirms their membership in a community and constitutes a strong element of social life. For transsexuals, the discrepancy between physical appearance and civil status forces them to reveal and explain their health status in various everyday situations such as when applying for a job; at identity checks, polling stations, and post offices; or to civil status authorities. The documents they must produce in these

situations reveal private matters such as their original gender dysphoria, the treatments they have received, and the modifications of their physical appearance. The applicants cited in this article believed that being thus obliged to reveal aspects of their health status represented a violation of their private life.

Within Europe, legislative provisions concerning transsexuals vary widely at the national level. In some countries, e.g., Sweden, Germany, and Italy, the authorities have recognized the need to allow transsexuals to modify their civil status, thus facilitating their rehabilitation and social integration.<sup>4</sup> In other European countries, authorities have refused transsexuals' requests to modify their civil status, and national courts have rejected appeals.

Legislative variation occurs outside Europe as well, and there seems to be no general agreement on any given continent as to the judicial recognition of transsexuals. South Africa; Australia; Québec, Canada; Panama; and certain states in the U.S. have adopted legislation in favor of such recognition.<sup>5</sup>

In Europe, general efforts are underway to use a supranational organization such as the Council of Europe as a means to harmonize legislative decisions in various countries. To date this effort has not been successful with respect to the status of transsexuals, notwithstanding a Recommendation concerning the status of transsexuals adopted by the Parliamentary Assembly in 1989 and decisions by the Court and the Commission attached to the European Convention of Human Rights (ECHR).

This article will present and discuss six separate applications presented by transsexuals to the European Commission of Human Rights (the Commission) and the European Court of Human Rights (the Court).<sup>6</sup> These two bodies interpret and apply the provisions of the ECHR. The Court's case law is binding on domestic legal interpretations and can oblige governments to modify legal procedures or legislation. Although other European judicial bodies such as the European Court of Justice have ruled on violations of the rights of transsexuals, this article focuses on the ECHR because the Commission and the Court are the only such bodies in Europe exclusively devoted to the enforcement of human rights.

The applicants in these cases were from three countries: Belgium, the U.K. (four applicants), and France. Each application concerned nonrecognition by the state of the applicant's gender change at the civil status level. As civil recognition of gender can have a strong impact on mental health, the six applications represent an opportunity to consider the ways in which legal recognition of gender is determined. Although the Court found no violations of the ECHR in five of the cases filed, it did acknowledge a violation regarding the protection of private life in the French case.<sup>7</sup> This decision made it necessary for France to modify relevant national legislation, thus improving the situation for transsexuals.

This article begins with a brief discussion of the rights in question in each case and of the procedures of the Commission and the Court, followed by a brief summary of the medical and legal aspects of each case. These cases are then used to examine the current legal framework available to transsexuals within the European system. The discussion will be broken down according to the relevant rights, with particular attention given to the characteristics used to determine gender; inhuman and degrading treatment within the framework of transsexualism; respect for the private and family life of transsexuals; the right of transsexuals to marry; and the consequences of a judgment against a particular country based on its violation of the right of transsexuals to a private life.

### **The Legal Background**

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on November 4, 1950.<sup>8</sup> It has been ratified by 40 European states and is commonly known as the European Convention of Human Rights (ECHR). It is remarkable not for the originality of the rights protected (most are also acknowledged in United Nations human rights instruments), but because its provisions are enforceable by supranational legal procedures that are accessible to individuals to an extent not available in other parts of the world.

The ECHR, like much international human rights law, is inspired by the United Nations' Universal Declaration of

Human Rights. Indeed, the Preamble states that the ECHR seeks to “take the first steps for collective enforcement of certain rights stated in the Universal Declaration.”<sup>9</sup> To achieve this goal, the ECHR established procedures for examining complaints of violations of provisions in the substantive articles of the ECHR.

### **Procedures Established by the ECHR**

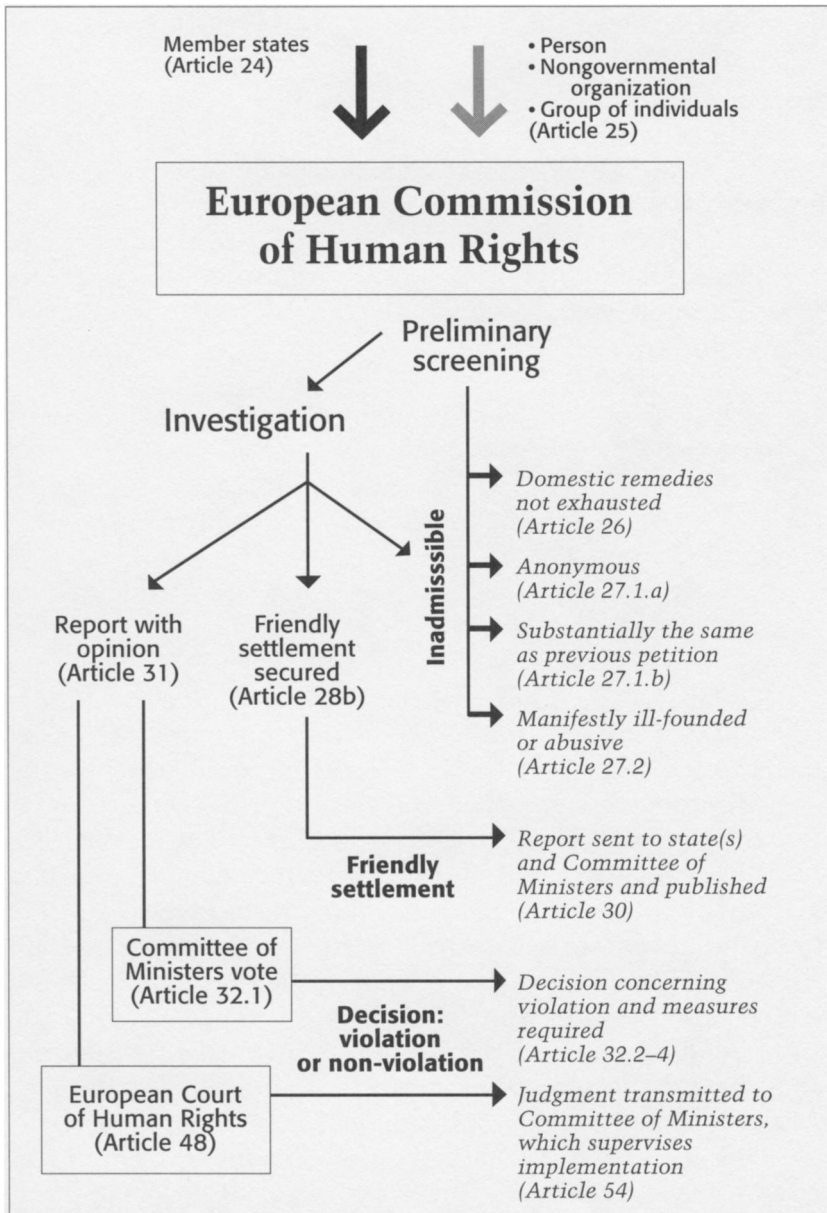
All of the applications discussed in this article were examined using the bicameral system of a European Commission and a Court of Human Rights.<sup>10</sup> The Commission occupies a key position: it is both a gatekeeper to the Court and the examiner of complaints made by an individual or a State party. As gatekeeper, it screens all complaints, finding a complaint admissible if:

1. possible domestic remedies have been exhausted (Article 26);
2. the complaint is not anonymous (Article 27.1.a);
3. the complaint is not identical to a previous complaint (Article 27.1.b); and
4. the complaint is not manifestly ill-founded or abusive (Article 27.2).

A majority of complaints received are declared inadmissible through this preliminary screening process. Complaints that survive this screening are investigated further by the Commission, leading either to rejection or to two other possible outcomes. In the first of these additional outcomes, the Commission successfully arranges what is called a friendly settlement between the parties and communicates its terms to the member state and to the Committee of Ministers. Such an outcome may be reasonably interpreted as an admission that the ECHR’s provisions have been breached and that the government concerned is willing to take appropriate action both toward the individual concerned and toward the prevention of further instances of abuse.<sup>11</sup>

The second possible outcome arises if no friendly settlement can be reached. In that case, the Commission issues a report setting out the facts of the case and indicating its conclusions. Two possible procedures may then be followed: First, the Commis-

sion or the member state concerned may communicate the case to the Court, which hears evidence and arguments by the complainant and the member state concerned and carries out a thorough legal analysis.<sup>12</sup> Second, if neither the Commission nor



**Figure 1.** Procedures of the European Commission and Court of Human Rights, 1994–1998 (prepared by the authors).

the member state concerned refers the case to the Court within three months, the matter is automatically taken up by the Committee of Ministers (see Figure 1).

The Court is not bound by the Commission and has different and greater political powers. It is considered by some observers to be more conservative.<sup>13</sup> The Court's decisions and rulings are final and are regarded as definitive interpretations of the ECHR's provisions. The Court's proceedings are public, and it decides by majority vote on each alleged infringement of the ECHR. The Court communicates its decision to the Committee of Ministers, which then supervises the application of the decision. Thus, while Commission reports significantly contribute to the devolution of protection under the ECHR, the Court's decisions as the highest judicial body have greater impact and can reverse the Commission.

### **Relevant Articles of the ECHR**

In the six applications of transsexuals in question, most of the alleged violations concerned Articles 3, 8, and 12 of the ECHR. Interestingly, arguments that could be made under the nondiscrimination provision of Article 14 have not played a significant role in transsexual cases as yet.

Article 3 reads as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.<sup>14</sup>

This fundamental principle is the only right defined in the ECHR that allows no limitations. It is directly related to the notions of human dignity and personal integrity. The Commission and the Court generally interpret the provisions of Article 3 fairly narrowly—for example, in regard to the physical underpinnings of mental anguish. Although the complaints raised the question of whether the impacts of nonrecognition of civil status rose to the level of inhuman or degrading treatment, neither the Commission nor the Court found the difficulties encountered by the transsexual complainants to constitute violations of Article 3. This outcome is not surprising in that, to date, the interpretation of Article 3 has been focused in its application on the psychological results of and the use of physically directed acts, such as violence or other forms of ill treatment against persons



principally in detention, at arrest, or subject to disciplinary measures.

Article 8 reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The notion of “respect” is primarily understood to confer a negative obligation on states to refrain from all interference with the exercise of this right.<sup>15</sup> The Commission and the Court, however, had also interpreted Article 8 as compelling states to act in a positive fashion to ensure the respect of such rights.

“Family life” is understood to be limited to a close circle of individuals. It had been defined by the Commission and the Court in contrast to public life, which can be known to all, as follows: “Family life” is “at least the relation between immediate relatives, who can play a considerable role—for example, between grandparents and grandchildren.”<sup>16</sup>

The Commission did further define this right in one of the transsexual cases. In a decision relevant to the lives of transsexuals throughout Europe, it stated that “[t]he right to respect for private life is the right to live as one desires sheltered from the stares of others. It equally includes, to a certain extent, the right to establish and maintain affective relations for the development and fulfillment of one’s personality.”<sup>17</sup> The Commission found violations of Article 8 in five of the six cases discussed; the Court, however, found a violation in only one case.

This right remains closely tied to the right to marry and to found a family guaranteed by Article 12, which reads:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

This article is directly relevant to the situation of transsexuals because most European national legislation authorizes marriage only between persons of opposite gender. In light of Article 12, therefore, civil status recognition of gender modification for transsexuals opens their right not only to marry but also to found a family, which could then open the question of adoption of children. Although the Commission found a violation of Article 12 in one case (Cossey), the Court found no violations of this article in any of the six cases. (See below for further discussion.)

### **Six Cases Concerning Transsexualism Heard by the Commission and the Court**

Following are brief descriptions of the medical and legal aspects of each of the cases under discussion.

#### **Van Oosterwijck v. Belgium<sup>18</sup>**

The applicant, a Belgian citizen, was born in 1944 and was entered in the birth register as a female. She had been conscious since childhood that, though morphologically female, she felt male psychologically. At the age of 18, after a period of depression culminating in an attempted suicide, she was briefly hospitalized. In 1969, two doctors specializing in neurology and endocrinology, in consultation with two psychiatrists, established that the applicant's symptoms unquestionably indicated transsexualism. They therefore decided on hormone therapy followed by surgery. The operations were performed between 1970 and 1973 in Belgium and England.<sup>19</sup> The costs were assumed by the applicant's employer, the Commission of European Communities. Although holding a work permit in the name of Mr. van Oosterwijck, on October 18, 1973 the applicant submitted a "petition for ratification of a civil status certificate" to change civil status from female to male.<sup>20</sup> The petition was refused by both the Brussels Court of First Instance and the Brussels Court of Appeal because the applicant could not prove that there had been an error in the initial record of his gender.<sup>21</sup> Mr. van Oosterwijck abandoned his appeal to the Court of Cassation. He did not pursue civil action or seek to change his given name.<sup>22</sup>

On September 1, 1976, he submitted an application to the European Commission, alleging violations of his rights

not to be subjected to inhuman or degrading treatment or punishment (Article 3), to respect for a private life (Article 8), and to marry and found a family (Article 12). In March 1979, the Commission's report acknowledged violations of Article 8 (unanimously) and Article 12 (7 votes to 3).<sup>23</sup> The Belgian government and the Commission then submitted the case to the Court, which addressed only the matter of its admissibility. The Court reproached the applicant first for not having mentioned the ECHR before the Belgian courts and second for not having submitted the case to the Court of Cassation.<sup>24</sup> It is possible that the Court would not necessarily have dismissed Mr. van Oosterwijck had it been given a chance to hear the case, as it did recognize that a change of given name would not have resolved his problem.

### **Rees v. United Kingdom**<sup>25</sup>

The applicant, a British citizen, was born in 1942 and exhibited all the physical and biological characteristics of a female infant. He was entered in the birth register as Brenda Margaret Rees. However, from early childhood Mr. Rees displayed masculine behavior and his physical appearance was ambiguous with respect to gender. Having learned that transsexualism was medically recognized, he sought treatment in 1970 and was prescribed the hormone methyltestosterone to promote the appearance of male secondary sexual characteristics. Gender reassignment surgery began in May 1974 with a bilateral mastectomy to remove external female secondary sexual characteristics. The National Health Service assumed the costs of medical care, including the operations.

Mr. Rees made his first request for an official change of name in 1971, followed by a second in 1977.<sup>26</sup> At that time, he obtained a passport with his new name. On April 18, 1979, Mr. Rees submitted an application before the Commission alleging violation of Articles 3, 8, and 12. The Commission allowed the application with regard to the right to a private life and to the right to marry and found unanimously that while the right to a private life had been violated, the right to marry had not.<sup>27</sup> When the Court heard the case, it determined that British legislation recognizing only marriages between two individuals of opposite biological gender did not

violate the substance of Article 12. With respect to whether the U.K. had sufficiently fulfilled its positive obligation under Article 8 to respect the applicant's family and private life, the Court considered that the efforts implemented by the U.K. were sufficient in that any adjunction to or modification of the civil status register would have necessitated new legislation and would risk generating further problems.<sup>28</sup> In 1980, Mr. Rees's solicitor sent the Registrar General an official written request for modification of the birth registry. A medical report was appended to the request, but it was rejected by the Registrar General. From 1984 on, however, his passport identified him with the title of Mr.

### **Cossey v. United Kingdom<sup>29</sup>**

The applicant, a British citizen born in 1954, was entered in the birth register as a male, under the name Barry Kenneth Cossey. At the age of 15, Ms. Cossey realized that although her external genitalia were male, she was psychologically female. In 1972, she abandoned her male name and assumed the name Caroline. From that time on, she dressed as a woman and adopted a female role in society. In December 1974, Ms. Cossey underwent gender reassignment surgery in a London hospital in order to make her external genitalia more like that of a female. She had previously taken female hormones and had had surgical implants to augment her breasts. A 1984 medical report described Ms. Cossey as a pleasant young woman who, since the surgery, had lived a full life as a female, both psychologically and physically. The report notes that examination showed her to have female external genitalia and a vagina and that she was able to have sexual intercourse with men.

Ms. Cossey confirmed her 1972 abandonment of her male given names by deed poll.<sup>30</sup> In 1976, she was issued a U.K. passport as a female. From about 1979 to 1986, she was a successful fashion model. In 1983, Ms. Cossey and her partner, a Mr. L, wished to marry. The Registrar General informed her, however, that such a marriage would be void because English law would classify her as male regardless of her anatomical and psychological status. On February 24, 1984, the applicant submitted an application before the Commission. Ms. Cossey went through a religious marriage ceremony with

another man, Mr. X, on May 21, 1989, but their relationship soon terminated. In 1990 the High Court pronounced the marriage null and void by reason of the parties not being respectively male and female.

Before the Commission, Ms. Cossey's complaint was that under English law, she could not claim full recognition of her new female status or be authorized to marry a man. She alleged violations of Articles 8 and 12 of the ECHR, as well as of Article 14.<sup>31</sup>

In the Commission's opinion, there had been a violation of Article 12 but not of Articles 8 or 14.<sup>32</sup> With respect to Article 8, the Court recognized that there had been a certain evolution in the law of various member states of the Council of Europe to accept and grant legal recognition to transsexuals who had been surgically treated. It rejected the alleged violation of Article 8, however, for the same reasons they had rejected the violation in the Rees case. It found that no significant scientific developments had occurred, and, in spite of developments in the law of some countries, there is little common ground between them, and the ECHR leaves states a wide margin of appreciation. In both the Rees and Cossey cases, the Court held that there had been no interference with the right to a private life by a public authority and therefore no positive obligation for the government to modify its existing system.

Contrary to the opinion of the Commission, the Court held that the situation in the Cossey case did not imply violation of Article 12 by the internal law of the U.K. It did, however, recognize that "[a]lthough some Contracting States would now regard as valid a marriage between a person in Ms. Cossey's situation and a man, developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage. . . . It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage."<sup>33</sup>

#### **B. v. France**<sup>34</sup>

The applicant, a French citizen born in 1935 in Algeria, was registered at birth as a male under the name Norbert

Antoine B. Ms. B., the eldest of five children, exhibited feminine behavior from a very early age. Her brothers and sisters regarded her as a girl, and she is said to have had difficulties coping with a wholly segregated scholastic environment. She completed her military service in Algeria as a man, and her behavior at the time was noticeably female.

Distressed by her gender dysphoria, Ms. B. suffered from attacks of nervous depression. She left Algeria in 1963, settled in Paris, and worked in a cabaret under an assumed name. She received hormone therapy, which rapidly developed her breasts and feminized her appearance, and adopted female dress from then on. She underwent surgery in Morocco in 1972 to remove the external male genitalia and to create a vaginal cavity. At the time she filed charges, Ms. B. had been living with a man and claimed to have been unable to find employment because people reacted to her with hostility.

In 1978, Ms. B. wished to marry and applied to the Tribunal de Grande Instance in Libourne to have her birth certificate changed. The Tribunal refused to accept her request because the discrepancy did not result from a false declaration at birth but from the applicant's voluntary change of gender, and therefore changing the certificate would affect the principle of the inalienability of the status of individuals. In 1985 the Bordeaux Court of Appeal upheld the decision. Ms. B. appealed to the Court of Cassation, invoking the ECHR and the subsequent developments of the Commission concerning the Van Oosterwijk case. The appeal was unsuccessful.

On September 28, 1987, Ms. B. appealed to the Commission alleging violation of Articles 3, 8, and 12. The complaint based on Article 12 was ruled inadmissible, and the Commission expressed the opinion that Article 3 had not been violated but that Article 8 had indeed been violated.<sup>35</sup>

The Commission presented the case to the Court.<sup>36</sup> The Court agreed that her right under Article 8 had been violated because it had been established that Ms. B. daily faced a climate that was incompatible with respect for her private life. The Court deemed that Ms. B.'s determination to change her civil status constituted, in this case, an element sufficiently important to be taken into account with respect to Article 8. It based its finding on three points:

1. Ms. B.'s gender reassignment operation took place abroad without the medical and psychological guarantees presently required in France and irreversibly removed all traces of her original gender. (For further discussion of this point, see below.)

2. The refusal to allow Ms. B. to change her given name also constitutes a pertinent element with respect to Article 8.

3. The inconveniences experienced by the applicant were of a magnitude sufficient to merit consideration with respect to Article 8.<sup>37</sup>

While the court found a violation of Article 8, it did not dictate the measures that France must take to remedy the situation. It did, however, award monetary damages that were paid by the French Government.

### **X, Y, and Z v. United Kingdom<sup>38</sup>**

A female-to-male transsexual, Mr. X had lived in a permanent relationship with Ms. Y since 1979. In 1990, X and Y applied for permission to undergo artificial insemination by donor (AID). This treatment was approved in 1991 by a hospital ethics committee, which stipulated that X should acknowledge himself to be the father. A child, Z, was born to X and Y on October 13, 1992. X and Y attempted to register jointly as the father and mother of Z. The authorities, however, did not permit X to register as the child's father, arguing that only a biological man could be regarded as a father for the purposes of registration. Nevertheless, Z was given X's surname in the register.

The applicants complained to the Commission, alleging violations of Articles 8, 12, 13, and 14 of the ECHR.<sup>39</sup> Only the complaints under Articles 8 and 14 were declared admissible. The Commission expressed the opinion that the failure to permit X to register as the child's father constituted a violation of Article 8 (respect for family life).

The Court, however, disagreed with the Commission, finding no violation of Article 8. The Court's opinion stated that "transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally

shared approach among the Contracting States. . . ." In this context, Article 8 cannot be taken "to imply an obligation for the respondent State formally to recognize as the father of a child a person who is not the biological father."<sup>40</sup>

### **Sheffield and Horsham v. United Kingdom<sup>41</sup>**

Ms. Sheffield and Ms. Horsham, two male-to-female transsexuals who were both British citizens born in 1946, filed this case jointly.

Prior to gender reassignment surgery, Ms. Sheffield had been married and had a daughter. Upon determining that she wished to undergo the surgery, her consulting psychiatrist and her surgeon informed her that she would be required to obtain a divorce as a precondition to the surgery. Thereafter, her former spouse applied to prevent her from having any contact with her daughter, and, according to the ECHR transcripts, the judge "granted the application on the basis that contact with a transsexual would not be in the child's interests."<sup>42</sup>

Ms. Horsham left Great Britain in 1971 and had been living in the Netherlands since 1974. In 1992, she underwent gender reassignment surgery in Amsterdam. She requested that her original birth certificate in the U.K. be amended to record her change of gender, but U.K. officials refused this request because there was no provision in U.K. law allowing new information to be inscribed on a birth certificate. Although Ms. Horsham and her male partner wanted to marry and return to live in the U.K., the U.K. Office of Population Censuses and Surveys informed her that her marriage would be considered invalid, whether it "took place in the Netherlands or elsewhere"; under English law, marriages must be between a man and a woman, as determined by biological criteria without surgical intervention.<sup>43</sup>

The Commission found that there had been a violation of respect for the private and family lives of these individuals under Article 8 of the ECHR, but the Court did not.<sup>44</sup> While it recognized that the U.K. had taken no measures to adapt its legal system to better protect the rights of transsexuals since the Rees and Cossey cases, "the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency which



	ALLEGED VIOLATIONS OF ECHR	VIOLATION(S) ADMITTED BY THE COMMISSION	VIOLATION(S) ADMITTED BY THE COURT
VAN OOSTERWIJCK v. BELGIUM	Articles 3, 8, 12	Article 8 (unanimously) Article 12 (7 votes to 3)	—
REES v. UNITED KINGDOM	Articles 3, 8, 12	Article 8 (unanimously)	—
COSSEY v. UNITED KINGDOM	Articles 8, 12, 14	Article 12 (10 votes to 6)	—
B. v. FRANCE	Articles 3, 8, 12	Article 8 (17 votes to 1)	Article 8 (15 votes to 6)
X, Y, AND Z v. UNITED KINGDOM	Articles 8, 12, 13, 14	Article 8 (13 votes to 5)	—
SHEFFIELD AND HORSHAM v. UNITED KINGDOM	Articles 3, 8, 12, 13, 14 and Protocol No. 4, Article 3	Article 8 (15 votes to 1)	—

**Table 1.** Summary of Decisions.

could be said to impinge to a disproportionate extent on their right to respect for their private lives.”<sup>45</sup> The Court found no violation of Article 12. Although Ms. Sheffield appears to have been punished via the prevention of contact with her daughter, the Commission had ruled this point inadmissible for failure to comply with filing timetables. (See Table 1 for a summary of the outcomes of the six cases.)

## Discussion

### Gender Determination Criteria in Relation to Civil Status

Four constituents are commonly held to determine biological sex and resulting assignments of gender: chromosomal biological sex (chromosomes 46 XY or 46 XX), gonadal anatomical sex (male or female gonad structure), apparent bio-

logical sex (the primary sex characteristics of internal and external genital organs and the secondary sex characteristics of pilosity, breast, morphology, etc.), and psychological gender. An individual's civil status does not take psychological gender into account.<sup>46</sup> It is meant only to reflect the sex declared at birth based on the visual appearance of the newborn's external genitalia. Such "sex" verification obviously does not take into account either the infant's chromosomal or gonadal characteristics, nor can it consider secondary sex characteristics or psychological gender, both of which appear later in life.

Transsexuals who have access to medical and surgical treatment may choose to modify certain of the constituents of gender determination so that their external appearance more accurately reflects their psychological gender. The Commission and the Court have voiced different opinions on whether governments have an obligation to change civil status following such modification.

While the Court recognized a violation of the respect for private and family life only in Ms. B.'s case, the Commission affirmed that it had been violated in the van Oosterwijck, Rees, and Cossey cases as well. The Commission seems to have been consistent in recognizing that a change in external appearance resulting from gender reassignment should be taken into account when determining gender for the purpose of civil status registration. The Court, however, timidly came around to this opinion in the B. case alone. Nevertheless, it must be noted that the Court and the Commission only briefly discussed practical modalities in States and the associated consequences that would result from acknowledgment of gender reassignment in civil status registries. This leaves States a great deal of latitude in determining how and to what extent they will modify civil status regulations.

### **Inhuman and Degrading Treatments in the Framework of Transsexualism (Article 3, ECHR)**

Three of the applicants claimed that a change in their social status or gender without a corresponding change of civil status amounted to inhuman and degrading treatment, thus constituting a violation of Article 3 of the ECHR.

In the van Oosterwijck case, the applicant argued that "any individual prevented from marrying and founding a fam-

ily is deprived of a fundamental right, and thus is a victim of inhuman treatment. Any individual who can exercise certain civil rights (transfer before notary, employment, reception of registered mail) only under condition of first confiding medical information, is placed in a degrading and humiliating situation." While the Commission considered that the grievances detailed by Mr. van Oosterwijck formed the basis of an examination within the framework of Articles 8 and 12, it did not consider the situation sufficiently severe to warrant extending the examination to Article 3.

In the Rees case, the applicant alleged that he had suffered inhuman and degrading treatment as a consequence of the failure of the government of the U.K. to legally recognize his new gender. The Commission did not find that this allegation was sufficient to find a violation of Article 3.

In the B. case, the applicant stated that it was inhuman and degrading (1) to have to acknowledge past gender dysphoria and (2) to keep essentially clandestine the results of treatment, given that her new identity was not recognized by civil status registration. The Commission did not find this to be a violation of Article 3. Although they recognized that the applicant's situation was certainly awkward, and while it was of a nature to create feelings of fear, anguish, and inferiority, the Commission held that this did not constitute inhuman treatment at a level understood to be prohibited under Article 3.

### **Respect for the Private Life of Transsexuals (Article 8, ECHR)**

The applicants in the cases above claimed that the discrepancy between their physical appearance and their civil status generated a continuing obligation in many different situations to reveal aspects of their health status, which constituted a violation of their right to private life. The contracting states' obligation regarding Article 8 is fundamentally one of abstention; that is, the state should not interfere in the private life of individuals. However, additional positive obligations inherent in the effective observance of private life may be understood to exist, although the choice of specific steps may be left to the states' discretion.<sup>47</sup>

In the four cases in which the Court made a judgment

on Article 8 (Rees, Cossey, B., and Sheffield and Horsham), it admitted that states have a large margin of appreciation in regard to matters such as this. With respect to the Rees, Cossey, and Sheffield and Horsham judgments, the Court admitted that, taking into account the traditional grant of discretionary margin given to states to determine the specific measures they take to implement rights, as well as the weight of public and individual interests, the U.K.'s positive obligations did not include a requirement to modify civil status documents. With respect to the B. judgment, the Court ascertained that the circumstances in this case did distinguish it from the Rees and Cossey cases, as Ms. B. was indeed placed daily in a situation incompatible with Article 8. The Court therefore admitted that "even with regard to the state's margin of appreciation, the fair balance which has to be struck between the general interest and the interest of the individual" had not been obtained.<sup>48</sup> The Court did not, however, stipulate any specific actions required to correct this violation, a failure particularly notable with respect to the guarantee of other rights outlined by the ECHR such as the right to marry (Article 12).

While a step forward, this decision does not seem to put the Rees and Cossey judgments into question because there is a relative difference in circumstances: due to legislative differences in the countries at issue, change of name is very difficult in France but quite easy in the U.K.

### **The Right of Transsexuals to Marry (Article 12, ECHR)**

In the van Oosterwijck case, the Belgian government opposed the requests of transsexuals to marry only on the indirect grounds that, according to the general theory of rectification of civil status documents, Mr. Van Oosterwijck's birth certificate could not be modified to reflect his change of gender. The Commission did find a violation of Article 12 because the government had failed to examine the right to marry more thoroughly. The Commission did acknowledge that problems could arise if a transsexual with children from a preoperative marriage were to remarry, or if the transsexual were not willing to undergo full gender-reassignment surgery.<sup>49</sup> In the case of Sheffield and Horsham, Ms. Sheffield had been married and had one daughter from that marriage.

Before the European Commission she “complained that she was coerced by underhand methods into divorcing and is prevented from having contact with her daughter.” The Commission declared Ms. Sheffield’s application admissible “with the exception of her complaint regarding her divorce and contact with her daughter which had been declared inadmissible . . . for failure to comply with the six-month time-limit under the Convention.”<sup>50</sup> Consequently, the European Court did not examine this complaint.

Elsewhere, the Commission had held that the capacity to procreate is not a fundamental condition of marriage. A family can be founded with adopted children; in addition, sterility has never been considered a justification for invalidating a marriage, although impotence has.<sup>51</sup> In contrast to their findings in the van Oosterwijck case, the Commission unanimously held that there had been no violation of Article 12 in the Rees case. This unanimous decision, however, was based on two quite different arguments: Five members of the Commission considered the grievance concerning Article 12 to be identical to the grievance concerning Article 8.<sup>52</sup> That is, if the applicant could not marry a woman, it was because legislation did not permit recognition of his gender change. However, in the opinion of the other five members, Mr. Rees’s right to be recognized as a male did not imply that he had the right to marry in the sense of Article 12.<sup>53</sup> Indeed, they found that the provisions of this article guarantee the right to marriage only “in accordance with national legislation,” which could impose specific conditions on marriage.<sup>54</sup>

When the Court considered the Rees case, it adopted a restrictive position concerning the possibility of marriage for transsexuals, repeating one of the arguments of the Commission (that of Fawcett et al.) in affirming that “Article 12 ECHR refers to the traditional marriage between persons of opposite biological sex. In the wording of the article, it appears that it is mainly concerned to protect marriage as the basis of the family.” The Court also noted that while U.K. legislation did hinder rectification of transsexuals’ birth certificates, it did not infringe on the substance of the right to marry and consequently did not constitute a violation of Article 12.

Although the Commission stated that Article 12 refers “to the traditional marriage between persons of opposite bio-

logical sex," it did not therefore conclude that the capacity to procreate is a prerequisite for the right in question: "Men or women, who are unable to have children, enjoy the right to marry just as other persons. Therefore, biological sex cannot for the purpose of Article 12 be related to the capacity to procreate."<sup>55</sup> Thus, the differing interpretations of Article 12 have been based on two different concepts of marriage. One concept is of "traditional" marriage between two persons of opposite biological gender in order to procreate and found a family. The other concept is of marriage as association, a bond of legal solidarity between a man and a woman. The Commission oscillated between these two concepts, while the Court has remained attached to the traditional concept.<sup>56</sup>

### **The Judgment against France and the Medico-Legal Procedural Conditions Necessary for the Treatment of Transsexualism**

On March 25, 1992, the Court held that there had been a violation of Article 8 of the ECHR in the case of *B. v. France*. Although it did not prescribe government action to remedy this state of affairs, it did award damages of FF100,000 to Ms. B., to be paid by the French government. In its focus on respect for Ms. B.'s private life, this judgment was a decisive event in the evolution of French law with respect to transsexuals.<sup>57</sup> Before that date, the debate had generally been limited to questions concerning the inalienability of individual status and the respect for physical integrity. In French law persons cannot dispose of their civil status at will. The Civil Code allows for rectification only in the event of "error or omission." The long list of decisions made by the French courts and accepted by the public authorities, however, shows that it is indeed possible in French law for statements relating to sex in civil status registers to be amended. With the decision of the ECHR, French courts are now obligated to consider the change of sex of a transsexual as a valid reason to modify the civil status register. Judge Morenilla of the ECHR, however, has warned that this new situation could encourage legal claims for rectification of civil status based on the "fait accompli" of an operation performed without first verifying its irreversible necessity or without medical guarantee of success.<sup>58</sup>

The first gender reassignment operation officially per-

formed in France, with the consent of the National Medical Council, was in 1979.<sup>59</sup> The protocol for the care of transsexual patients has been based on this first operation.<sup>60</sup> Medical authorities seek to provide the treatment to transsexuals that will offer them the best possible psychosocial integration.<sup>61</sup> From this perspective, French doctors caring for a transsexual patient consider a request for change in civil status to be part of the treatment.<sup>62</sup>

In France, the protocol for care of transsexuals involves a series of official steps: an observation phase, hormonal treatment, surgical treatment, a judicial evaluation, and finally a request for change of civil status. French civil courts issue a declaration only after a judicial evaluation. Prior to 1992, however, observance of the protocol did not guarantee the transsexual a change in civil status, because certain courts of law continued to oppose such a change on the principle of the inalienability of the status of individuals. Every time that such a case had reached the French Court of Cassation, they found against the right of transsexuals to change their civil status. The effect of the judgment of the European Court of Human Rights, however, was positive and immediate: since December 11, 1992, the Court of Cassation has ordered a change in civil status for one transsexual and reversed a Court of Appeals decision refusing a civil status change for another.

### **Issues for the Future**

The judgments of the ECHR represent an official recognition of the claims of a small minority in a matter of human rights. Some commentators, however, are concerned that the legal strides concerning the civil status of transsexuals may have problematic consequences. Concerns have been raised about possible judicial consequences of increased recognition of the rights of transsexuals both to marry and found a family and to apply for civil status changes. Some issues regarding the first of these concerns, the right to marry and found a family, have already been raised in the dissenting opinions of certain judges on the ECHR. Judge Pinheiro Farinha noted:

[A]mong the situations which could arise from the application of the present judgment, I shall mention two:

- an illegitimate child wishes to start proceedings in research of paternity, but after his birth, the man who begot him has had a sex change operation and had his civil status rectified; he is asking for a woman to be acknowledged as his father!
- after rectification of civil status, a transsexual will be able to marry a person of his “true sex,” [but the Court] finds . . . that attachment to the traditional concept of marriage provides sufficient reasons for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage [and] in the Court, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex: Article 12 is mainly concerned to protect marriage as the basis of the family.<sup>63</sup>

A logical step in a transsexual’s integration into a new identity would be the right to found a family. In the case of Ms. B., the Attorney General of the Court of Nîmes opposed her right in noting that gender reassignment surgeries “remove the reproductive capabilities of a transsexual” so that “all possibility of procreation is abolished.”<sup>64</sup> This argument would not, however, seem to represent an obstacle to marriage since, according to the legal scholar Gobert, the capacity to fulfill conjugal obligations and to procreate are “requirements foreign to the usual conditions to marriage under French law.”<sup>65</sup>

The legal problems posed for offspring of transsexuals are manifold.<sup>66</sup> Consider children born before the gender reassignment surgery of a parent. Their situation poses parallel psychological and legal questions: is it psychologically and legally conceivable for a child to have two fathers or two mothers? The Sheffield and Horsham case certainly raised this question—one that is perhaps especially salient in Europe, given that European countries have not yet established the legal right of gay or lesbian couples to adopt children. In the matter of child adoption by a married couple, one of whom is a transsexual, the paramount question would seem to concern the couple’s capacity to meet the requirements for adoption, in practical and concrete terms. Even if questions of morality are considered, it is not obvious how a partner’s transsexualism could constitute an objective argument against adoption.



A transsexual's admission to and follow-up within a treatment protocol can trigger a chain of consequences, some of them occasionally indirect, that must be taken into account from the start. In their dissenting opinions in the *B. v. France* case, several ECHR judges mentioned the risk of seeing applications for change of civil status multiply. Judge Pinheiro Farinha noted: "I fear that there will be serious consequences, in particular the trivialization of irreversible surgical operations instead of suitable psychiatric treatment."<sup>67</sup> In this respect, strict observance of the medical protocol for the treatment of transsexuals constitutes both a guarantee and a risk—a guarantee that the procedure is long enough and precise enough to ensure that the diagnosis is correct and the patient's real wishes are known, a risk that a considerable number of patients will want to evade such a strict protocol by seeking treatment clandestinely or abroad.

Following the ECHR decision against France, Judge Pettiti framed the above concern as follows:

[B]y taking a generous and wide interpretation of Article 8, it might be considered that a true transsexual who has been operated on in France, after going through the entire period of tests according to the document issued by the National Medical Council, should be allowed rectification of civil status. . . . This is not so in the case of B. The existence of transsexualism was not verified in accordance with the medical practice statement and the operation took place abroad under unknown conditions. . . . Certain countries unfortunately have places where false transsexuals are exploited, opening the way to procuring and transvestite prostitution. Among those asking for treatment, there is a considerable number of persons in this category.<sup>68</sup>

Thus, the Court's position has been that changes of civil status can trigger unforeseeable human and social consequences and cannot be granted solely on the basis of a desire, however strong, to change one's gender identity. Despite the Court's weak insistence on this point, it seems essential that a medico-legal protocol be a prerequisite to and concomitant with treatment of transsexuals in order to prevent transsexuals from receiving inadequate medical treatments. Such a protocol should contain mechanisms to confirm the diagnosis and to evaluate the strength of the transsexual's wishes. It

should further stipulate that the operations and treatments should take place in a public hospital, with costs borne by the state. These precautions would help to preserve the right to respect for private life and to prevent mistakes with irreversible consequences.

## **Conclusion**

The European Court of Human Rights has ruled on six complaints filed by transsexual individuals whose requests to change their civil status had been refused by national authorities. An analysis of these decisions leads to the following conclusions:

First, the Court's attitude has not evolved over time. A violation of Article 8 of the ECHR was recognized for the first time only in the decision in *B. v. France*. However, the Court itself noted that the circumstances of B.'s application differed somewhat from the earlier applications in which no violation of Article 8 had been found. In France it is not possible to change names and surnames, whereas such changes are possible in the U.K.

Second, the Court's decision in the *B. v. France* case should encourage recognition of the right of individuals to change their gender when there is a therapeutic basis for surgical and hormonal intervention. Despite this decision, however, the Court seemed to accept a considerable degree of freedom for each member state in interpreting the relation of Article 8 to laws on changing transsexuals' civil status. This issue is critical: while people may have the right to change their gender identity, many of their rights may be violated if they lack the corresponding ability to change their civil status.

Finally, after a medical treatment, a change in civil status is necessary to give transsexuals a means to preserve their fundamental rights such as privacy, helping them to lead normal personal, social, and professional lives. Several important related questions, however, have yet to be resolved: the possibility of marriage for transsexuals; the possibility for a couple, one or both of whom is a transsexual, to adopt a child; and the relationship between individuals who change their civil status and children born to them prior to gender reassignment.

Protecting the health of transsexuals requires not only medical treatments and surgical interventions, but also recognition of their human rights. It is the duty of governments to take this problem into account. While the number of people directly affected will be small, progress in human rights for this minority will have positive effects for all the community.

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2. *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* (Washington, DC: American Psychiatric Association, 1994), pp. 537–38.
3. J. E. Doek, General Report, presented at the XXIIIrd Conference on European Law (see note 1).
4. See J. J. Silveira Nunes, "Problèmes de diagnostic du transsexualisme," *Annales Médico-Psychologiques* 1990, 148: 789–92, and D. Brahams, "Transsexuals and the Law," *The Lancet* 1990, 336: 1181–82. The Commission had previously declared application 6699/74 X v. Federal Republic of Germany (*Decisions and Reports* No. 11, p. 16; No. 17, p. 21), submitted by a transsexual applicant, to be founded. In this case, a friendly settlement was finally achieved.
5. A. Rogers, "Legal implications of transsexualism," *The Lancet* 1993, 341: 1085–86; D. Van Iterson, Aspects internationaux des décisions de changement de sexe [International aspects of the decisions of change of sex], presented at the XXIIIrd Conference on European Law (see note 1); M. R. Wil, Legal Conditions of Sex Reassignment by Medical Intervention—Situation in Comparative Law, presented at the XXIIIrd Conference on European Law (see note 1).
6. H. Delvaux, Legal Consequences of Sex Reassignment in Comparative Law, presented at the XXIIIrd Conference on European Law (see note 1).
7. D. van Iterson, International Aspects of Issues Related to Transsexualism, presented at the XXIIIrd Conference on European Law (see note 1).
8. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature by the Council of Europe on November 4, 1950; entered into force on 3 September 1953.
9. ECHR (see note 8), Preamble.
10. T. W. Harding, "The Application of the European Convention of Human Rights to the Field of Psychiatry," *International Journal of Law and Psychiatry* 1989, 12: 245. In November 1998, this structure was replaced by a new Permanent Court. See Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Restructuring the Control, Machinery Established Thereby, Strasbourg, 11.V.1994, which entered into force on November 1, 1998.
11. See note 5.
12. Prior to 1994, individual petitioners could not bring cases before the Court. ECHR Protocol 9, which entered into force on October 1, 1994,

specifies that the Court may receive applications from any person, non-governmental organization, or group of individuals that have lodged a complaint with the Commission.

13. F. Rigaux, "Les transsexuels devant la Cour européenne des droits de l'homme: une suite d'occasions manquées," *Revue Trimestrielle des Droits de l'Homme* 1998, 33: 131–44.

14. Vade-mecum de la Convention Européenne des Droits de l'Homme [Vademecum of the European Convention on Human Rights] (Strasbourg: Les éditions du Conseil de l'Europe, 1991).

15. Belgian Linguistic Case, Eur. Court H. R., decision of 23 July 1968, Series A, No. 6.

16. *Marcx v. Belgium*, Eur. Court H. R., decision of 13 June 1979, Series A, No. 31.

17. *Van Oosterwijck v. Belgium*, Eur. Court H. R., decision of February 27, 1980, Series A, No. 40.

18. *Van Oosterwijck v. Belgium* (see note 17).

19. The surgeons had previously sought agreement from the National Medical Council, which replied as follows: "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."

20. In French: "requête en rectification d'un acte de l'état civil."

21. According to Belgian law, a civil status document may not be modified unless an error was made at the time it was created (Commission's Report, para. 20).

22. According to an act applicable as of August 23, 1974, permission to modify names may be granted by the Government. Any birth certificate extract later issued shall mention the new given names and shall not refer to former ones. It must be noted that neither extracts of civil status certificates issued to third parties nor identity cards and passports indicate the bearer's gender (Commission's Report, para. 22; Court Judgment, paras. 16ss and 35). Nevertheless, a certified copy of the birth certificate is required for the purchase of real estate before a notary (Commission's Report, para. 49).

23. The appendix of the Commission's Report contains two dissenting opinions concerning Article 12 and one separate opinion concerning Article 8.

24. G. Cohen-Jonathan, *La Convention Européenne des Droits de l'Homme* (Aix-en-Provence: Economica, Presses Universitaires d'Aix-Marseille, 1989), p. 116. In the *van Oosterwijck* case, the Court found against a decision of the Commission for the first time. If the Court had followed the Commission's Report, many contracting parties would have had to revise their internal laws. In the opinion of C. Cohen-Jonathan, the Court demonstrated a strict attitude in the *van Oosterwijck* case.

25. *Rees v. United Kingdom*, Eur. Court H. R., decision of January 24, 1986, Series A, No. 106.

26. In English law, each person can choose any surnames or given names that they wish and use them freely (although the use of new names may be subject to certain formalities for the practice of certain trades). In order to avoid any doubts or ambiguity that could result from the change of

name, the applicant can place a deed poll (application for change of name), which can be recorded at the Central Office of the Main Court.

27. The Commission's decision concerning Article 12 ECHR was made unanimously. The judges were, however, divided on the arguments. Their opinions appear in the appendix of the report (see below for a discussion of the right of transsexuals to marry).

28. In the dissenting opinion appearing in the appendix to the Court's judgment, Judges Bindschedler-Robert, Russo, and Gersing deemed that the U.K. should enable the updating of the applicant's civil status—for instance, by means of a note on the birth register.

29. *Cossey v. United Kingdom*, Eur. Court H.D., decision of September 27, 1990, Series A, No. 184.

30. See note 26.

31. Article 14 stipulates that "The exercise of rights and freedoms recognised in this convention should be ensured, without any discrimination whatsoever, regardless of gender, race, color, language, religion, political opinions or any other opinions, national or social origin, inclusion in national minority, wealth, birth or any other situation."

32. See paragraph 37 in the Commission's Report. The Commission observed that Ms. Cossey's application differed from that of Mr. Rees in the following sense: "it is recognised, according to their declarations, that the applicant has a male partner who wishes to wed her." The Commission also declares that the capacity to reproduce is not a mandatory requirement in the terms of Article 12 ECHR. Furthermore, it was certified by a medical expert that "the applicant is anatomically no longer of male sex." It is on these grounds that the Commission deemed that, by virtue of Article 12 ECHR, the applicant should no longer be considered to be of male gender and must therefore have the right to conclude a marriage with the man she had chosen to be her husband (para. 46, opinion of the Commission). Note, however, that there are three dissenting opinions in the appendix to the Commission's Report.

The violation of Article 14 was dismissed by the Court because no difference of treatment between two persons in the same situation was distinguished. In the appendix to the Court's judgment may be found two partially dissenting opinions and two dissenting opinions.

33. *Cossey v. United Kingdom* (see note 29), para. 46.

34. *B. v. France*, Eur. Court H.R., decision of June 28, 1991, Series A, No. 232 C.

35. In the appendix to the Commission's Report, the dissenting opinion expressed by Mr. Geus, joined by Mr. Thune and Mr. Rozakis, concerns Article 3, which, according to them, should be considered as violated.

36. The Court first examined two elements that concern the admissibility of an application: the nonexhaustion of domestic remedies and the delay in filing the application. The Court held that neither of these factors eliminated the case from consideration.

37. In the appendix to the Court's judgment, there are two consenting opinions, two dissenting opinions, and one separate opinion.

38. *X, Y, and Z v. United Kingdom*, Eur. Court H.R., decision of April 22, 1997.

39. Article 13 reads: "Everyone whose rights and freedoms as set forth in

this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

40. X, Y, and Z v. United Kingdom (see note 38), para. 52.

41. Sheffield and Horsham v. United Kingdom, Eur. Court H.R., decision of 30 July 1998.

42. Sheffield and Horsham v. United Kingdom (see note 41), para. 15.

43. Sheffield and Horsham v. United Kingdom (see note 41), paras. 25, 27.

44. Ms. Sheffield and Ms. Horsham both alleged violations of Articles 8, 12, 13, and 14 of the ECHR; in addition, Ms. Horsham alleged a violation of the Fourth Protocol to the ECHR, Article 3, which reads:

1. No one shall be expelled, by means either of an individual or of a collective measure from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

45. Sheffield and Horsham v. United Kingdom (see note 41), para. 59.

46. D. Marcelli, *Psychopathologie de l'enfant* (Paris: Abrégé Masson, 1993).

47. In the van Oosterwijck case (Commission's Report, para. 52), this positive obligation of governments by virtue of Article 8 ECHR is only implicit; it was later to be expressly stated by the Court in the Rees decision (Rees v. United Kingdom [see note 25], para. 35).

48. B. v. France (see note 34), para. 63, p. 53.

49. Van Oosterwijck v. Belgium (see note 17), paras. 61–63, p. 28.

50. Sheffield and Horsham v. United Kingdom (see note 41), paras. 12, 36.

51. Van Oosterwijck v. Belgium (see note 17), para. 59.

52. These members were Frowein, Busuttil, Trechsel, Carrillo, and Schermers.

53. These members were Fawcett, Tenekides, Gözübüyük, Soyer, and Batliner.

54. G. Cohen-Jonathan (see note 24), pp. 355–57.

55. Cossey v. United Kingdom (see note 29), para. 45.

56. In the case of B., the Court did not rule on the right to marry. The possible consequences for Article 12 of the acknowledgement of the violation of Article 8 ECHR will therefore remain unknown.

57. F. Flipo, "Conclusions sur la Jurisprudence 21588," *La Semaine Juridique* 1993, 49: 54–59; M. Jéol, "Conclusions sur la Jurisprudence 21991," *La Semaine Juridique* 1993, 5: 41–46; R. Massip, "Rapport sur la Jurisprudence 21588," *La Semaine Juridique* 1993, 49: 51–54; G. Mémèteau, "Note sur la Jurisprudence 21991," *La Semaine Juridique* 1993, 5: 46–50.

58. B. v. France (see note 34), p. 44.

59. J. Breton, "Conditions du traitement médico-chirurgical des transsexuels et le transsexualisme," in: *Le transsexualisme* (Paris: Masson, 1984).

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61. C. Mate-Kole, M. Freschi, A. Robin, "A Controlled Study of Psychological and Social Change after Surgical Gender Reassignment in

- Selected Male Transsexuals," *British Journal of Psychiatry* 1990, 157: 261–64.
62. J. Breton (see note 59).
63. B. v. France (see note 34), pp. 61–62.
64. Cited in M. Gobert, "Le transsexualisme ou de la difficulté d'exister," *La Semaine Juridique*, Doctrine 3475, 1990, 49: 45–56.
65. Gobert (see note 64).
66. D. C. Bradly, *Transsexualisme, l'idéologie, les principes juridiques et la culture politique*, presented at the XXIIIrd Conference on European Law (see note 1).
67. R. Massip (see note 57), p. 63.
68. R. Massip (see note 57), pp. 63–65.