

# X, Y and Z v UK: amicus brief from Rights International

*Before the*

## **European Court of Human Rights**

No. 75/1995/581/667

X., Y. and Z.,  
*Applicants,*  
—v.—

The United Kingdom,

*Respondent.*

Written Comments

Submitted by

**Rights International,**  
**The Center for International Human Rights Law, Inc.**

Under Rule 37 § 2 of the Rules of Court A

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## Introduction

Pursuant to Rule 37 § 2 of the Rules of Court A, **Rights International**, The Center for International Human Rights Law, Inc. ("RI"), submits these written comments having received permission from the President of the Chamber, Mr. R. Bernhardt, by letter dated 9 May 1996 from the Deputy Registrar of the Court, Mr. Paul Mahoney. In compliance with the European Court's directions, RI's comments will "be confined to the laws and jurisprudence of various European and other democracies on the extent to which transsexuals are permitted to gain and exercise parental rights."

### **I. The law recognizing transsexual rights is crystallizing as courts and legislatures are identifying and abandoning falsehoods surrounding persons with gender dysphoria.**

From the outset, Amicus notes that there is no international and little domestic law strictly about the rights of transsexuals to exercise parental rights in part because of misunderstanding and prejudice about the condition of gender dysphoria in general.

Transsexuals face systemic adverse discrimination in a wide variety of contexts. In the face of this widespread discrimination, there is an emerging trend to ameliorate their condition *vis-a-vis* the law.

Issues surrounding parental rights usually are settled according to the child's best interest. 2 CORPUS JURIS SECUNDUM, *Adoption of Persons*, § 49. "In determining custody, the primary considerations are the best interests and welfare of the child. ... In determining the best interest of the child, the court considers several factors, such as the conduct of the parent in meeting the responsibility of establishing a significant relationship with the child and of providing for the child. In connection with this determination, the court may consider the fact that one of the natural parents gave consent to an adoption by a third party as evidence of that party's parental attitude." 14 CORPUS JURIS SECUNDUM, *Children*, § 34. Amicus will examine transsexual rights in different contexts in order to suggest how the Court should approach transsexual parental rights in particular.

### **A. Law from European and Other Democratic Countries**

Several individual European states already have domestic legislation or case-law recognizing gender reassignment on civil status documents. Five European states have legislation allowing gender reassignment: Sweden (Law of 21 April 1972), Germany (Law of 10 September 1980), Italy (Law of 14 April 1982), the Netherlands (Law of 14 April 1985), and Turkey (Art. 2, Law of 12 May 1988). H. Delvaux, *Legal Consequences of Sex Reassignment in Comparative Law*, in TRANSSEXUALISM, MEDICINE AND LAW, Proceedings from 23rd Colloquy on European Law, Vrije Universiteit Amsterdam 14-16 Apr. 1993 (1995) (hereinafter, TML) 75, 81. Under former Czechoslovakian law, (Law No. 20/1966), treatment for gender dysphoria was allowed; as of 1993, the new Czech Republic was incorporating provisions of this former law into more detailed legislation. *Id.* at 158.

Prof. Doek has noted the legal implications of such legislation: the legislation does not change law concerning child custody, child support, and inheritance. J. Doek, *General Report*, in TML, 203, 218. Most importantly, Prof. Doek notes that this legislation implicitly recognizes the right to marry and to adopt children. *Id.* at 219. Indeed, German law expressly allows a transsexual to remain in their marriage. Under German law, not only can persons who do not undergo gender reassignment legally change their name while remaining married, a post-operative transsexual can have their civil status documentation changed and also marry. M. Will, *Legal Conditions of Sex Reassignment by Medical Intervention — Situation in Comparative Law*, in TML. Polish law appears also to allow transsexuals to marry. "Second Ever Transsexual Couple Weds in Poland," Polish Press Agency, 31 August 1992 (*cited in* newspaper, ZYCIE WARSZAWY).

Besides legislation, courts in Belgium, Spain, France, Poland, Portugal, and Switzerland have allowed gender reassignment on birth registers. Will, *supra*, at 90; Doek, *supra*, at 219. Under Greek case-law, alteration of civil status regarding gender for hermaphroditism is allowed after an operation. Delvaux, *supra*, at 161. In Finland, the Supreme Administrative Court recognized gender reassignment as reflected in a transsexual's social security documents. Will, *supra*, at 82. And, Romania has allowed gender reassignment surgery. *See* "Romania: Romania Court Clears Transylvanian Sex Change," Reuters News Service, 19 April 1995 (*cited in* newspaper, TINERETUL LIBER) (Romanian court regarded transsexualism as disability requiring sex reassignment).

In the United Kingdom, strikingly enough, a Court of Appeal in 1981 allowed a transsexual visitation rights with his daughter. *G. v. G.* (1981) 11 *Family Law* 149 (CA) (1981). However, the Court of Appeal held that if, when visiting with his daughter, he “dressed in a way which [was] bizarre or aggressively feminine ... it will be shown that his appreciation of the child’s welfare [was] defective.” *Id.* at 49 (cited in D.C. Bradley: *Transsexualism — Ideology, Legal Policy and Political Culture*,” in TML, at 64).

European regional law increasingly is recognizing the rights of transsexuals in general. The European Court of Justice just recently extended sex discrimination to cover transsexuals in the context of employment, holding that “to tolerate such discrimination would be tantamount ... to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.” Case C-13/94, *P. v. S. and Cornwall County Council*, Eur.Ct.Justice, Judgment of 30 April 1996 at 22 (slip opinion). And, the Parliamentary Assembly of the Council of Europe has recommended the introduction of legislation giving legal recognition to gender reassignment. Recommendation No. 1117 on the Condition of Transsexuals (29 Sept. 1989). The European Parliament also has called upon the Council of Europe to enact a convention for protecting transsexuals. Resolution on Discrimination Against Transsexuals. Doc A3-16/89, OJ No C 256, 9 Oct. 1989. And, this Court’s jurisprudence appears to be moving towards a greater recognition of the rights of transsexuals as reflected in the narrowing vote margins of the Court. *See Rees v. United Kingdom*, 106 Eur.Ct.H.R. (ser. A) (1986) (12-3 vote against finding birth registration system incompatible with Art. 8); *Cossey v. United Kingdom*, 184 Eur.Ct.H.R. (ser. A) (1990) (10-8 vote against finding birth registration system incompatible with Art. 8); *B. v. France*, 232 Eur.Ct.H.R. (ser. A) (1992) (15-6 vote for recognition of new gender in integrated, updatable civil status registration system).

Canadian law allows the change of forename and other aspects of civil status. Arts. 71-74, Civil Code of Québec of 1991. Delvaux, *supra*, at 158. South Australian law authorizes gender reassignment treatment and surgery as well as allows the modification of civil status documents. Sexual Reassignment Act, No.49 (1988) (S. Austl. Stat.).

## **B. United States Law**

Compared to European domestic and regional law, US legislators and judges historically have embedded myths and hostility towards transsexuals into US law, as discussed below.

### **1. Constitutional Guarantee of Equal Protection of the Law**

The Fourteenth Amendment to the US Constitution guarantees equal protection of the law. Discrimination against transsexuals implicates two types of discrimination: gender and disability. Therefore, Amicus will examine the law governing disability and gender discrimination.

The US Supreme Court has held that governmental discrimination on the basis of disability need only meet the requirements of a minimal rational basis test. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). In *Cleburne*, the US Supreme Court held discrimination on the basis of handicap will be presumed to be valid if it is rationally related to a legitimate governmental interest. In applying a minimal rational basis test to disability discrimination, the US Supreme Court based its decision on the fact that this discrimination had been motivated by a protective concern for mentally retarded persons.

[T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that *belies a continuing antipathy or prejudice* and a corresponding need for more intrusive oversight by the judiciary.

*Id.* at 443. It is important to note that the reasoning in *Cleburne* thus does not support the application of the rational basis test to discrimination toward people with gender dysphoria, since unlike much discrimination toward the mentally retarded, discrimination against people with gender dysphoria is not paternalistic or protective. “[I]f equal protection of the laws’ means anything, it must at least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Romer v. Evans*, 64 U.S.L.W. 4353, 4356 (U.S. 21 May 1996) (striking down state law prohibiting civil rights for gays and lesbians). Furthermore, *Cleburne* makes evident that government discrimination against a group can fail even under the minimal rational basis test. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (lack of rational basis for requiring special use permit for home for mentally retarded held violative of Equal Protection guarantee).

Gender discrimination must meet the more difficult requirements of a “heightened rational basis test:” *viz*, legislative classifications based on gender must be substantially related to a sufficiently important governmental interest. *Craig v. Boren*, 429 U.S. 190 (1976). Like disability discrimination, gender discrimination historically has been paternalistic — not necessarily motivated by malice. However, as the US Supreme Court noted in *Frontiero v. Richardson*, 411 U.S. 677 (1973), even paternalistic discrimination can be just as harmful as malicious discrimination: “Traditionally, [gender] discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage.” *Id.* at 684.

Unlike much of both gender and disability discrimination in general, discrimination against transsexuals has been irrational and malicious, and adverse discriminatory use of such a class is suspect. Examples of suspect classifications include racial and ethnic classifications. A suspect class generally has the following characteristics: a history of purposeful adverse discrimination, prejudice unrelated to performance, a defining innate or immutable characteristic of its members, and/or a lack of political power. As a class, transsexuals share all these characteristics, as discussed in the cases below.

Suspect classifications must receive strict judicial scrutiny. The “strict scrutiny test” traditionally is formulated as requiring a narrowly tailored means to achieve a compelling state interest. *Cleburne*, 473 U.S. at 440. To be narrowly tailored requires that the means is neither under-inclusive nor over-exclusive in obtaining the proffered governmental goal. As discussed in *Cleburne*, suspect classifications are so seldom related to a legitimate state interest that laws based on them are presumed to be motivated by antipathy, malice, and prejudice. Therefore, Amicus argues that as a matter of principle, a strict scrutiny test should be applied against discrimination against transsexuals.

US federal constitutional law now is beginning to reflect a more correct understanding of transsexualism. In a case last year, *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995), a US Court of Appeals examined the failure of prisons to provide hormone treatments to transsexual prisoners. The plaintiff challenged the prison’s failure on the basis that this failure was unlawful discrimination on the basis of sex. The Appeals Court looked at previous

discrimination cases dealing with transsexuals. In one case, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), a Court of Appeals had held that transsexuality did not meet “traditional indicia of a suspect classification because transsexuals are not a discrete and insular minority, and because the plaintiff did not establish that “transsexuality is an immutable characteristic determined solely by the accident of birth’ like race, or national origin.” *Id.* at 971 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d at 663). However, the US Court of Appeals in *Brown v. Zavaras* observed that “[r]ecent research concluding that sexual identity may be biological suggests reevaluating *Holloway*.” *Id.* at 971.<sup>[1]</sup> **Although the *Zavaras* court did not find transsexuals a suspect class, it declined to do so because the plaintiff’s allegations were too conclusory to allow a proper equal protection analysis. The Court, however, did find a violation of the constitutional right against cruel and unusual punishment. See also *Phillips v. Michigan*, 731 F.Supp. 792 (W.D.Mich. 1990) *aff’d* 932 F.2d 969 (6th Cir. 1991) (same).**

## 2. Americans with Disabilities Act.

The Americans with Disabilities Act (“ADA”) prohibits disability discrimination; however, Congress expressly excluded “transsexualism” from the ADA’s coverage. How members of Congress incorrectly understood gender dysphoria is best reflected by noting with what other excluded disorders Congress placed gender dysphoria. The ADA lumped pedophilia, exhibitionism, voyeurism, and transvestism together with gender dysphoria. 42 U.S.C. § 12211(b). In light of the substantial consensus among the medical/psychiatric communities,<sup>[2]</sup> **Congress’ exclusion of gender dysphoria strongly suggests that the exception was motivated more by irrational prejudices than appropriate social policy concerns.**

**Indeed, legal scholars have criticized Congress’ exception of gender dysphoria. See e.g., A. Hegel, *The ADA as a Moral Code*, 94 Colum L. Rev. 1451 (1994) (ADA effectively identifies sexual “deviant” as new pariah). Most significantly, Sen. Jesse Helms, who has consistently opposed anti-discrimination legislation, led the Senate forces in successfully excluding gender dysphoria from the ADA’s coverage. Despite the contrary findings of the American Psychiatric Association, Sen. Helms stated that transsexualism as well as other sex-related differences were, “ ’moral problems, not mental handicaps;’ that they are ’addictions’ with ’moral content’ whose presence might render an individual unfit for working life.” *Id.* at 1476-77 (citing 134 Cong. Rec. 2401 (daily ed. 17 March 1988)).**

## 3. Title VII of the Civil Rights Act of 1964

Title VII prohibits sex discrimination in employment. In nearly every Title VII case involving transsexualism, the court either failed to acknowledge that gender dysphoria was a legitimate medical and psychiatric disability or failed to recognize the current gender of a post-operative transsexual. See e.g., *Ulane v. Eastern Airlines, Inc.* 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (Title VII definition of “sex” does not include transsexualism); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982) (same); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977) (transsexualism considered sexual orientation — not gender status). In these and other Title VII cases, judges incorrectly conflated sex, gender, and sexual orientation, which lead to unnecessary, non-principled, underinclusive, and unjust results. F.Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 Cal. L. Rev. 1 (1994).

#### 4. State Law

Thirteen states expressly allow changes for gender reassignment on birth registrations: Alabama, Arizona, California, Hawaii, Illinois, Louisiana, Maryland, Michigan, New Jersey, North Carolina, Pennsylvania, Virginia, and Texas. Will, *supra*, at 81. Only Tennessee and Ohio do not. Remaining states approach the issue by means of case or administrative law. In the area of family law, a New Jersey state court held that a marriage between a man and a post-operative female transsexual was valid. *M.T. v. J.T.*, 140 N.J. Super. 77 (1976) (rejecting *Corbett* holding that biological sex is “fixed at birth” and immutable).

In the area of child custody, two states have reached different conclusions. In Colorado, the Appellate Court in *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973) reversed a lower court ruling that had withdrawn child custody from a pre-operative transsexual. The court stated that in determining the best interests of the child, “the court shall not consider the conduct of a proposed custodian which does not affect his relationship with the child.” *Id.*, at 134 (citation omitted). The Appellate Court held that in view of the stability of the relationship that the transgendered parent had maintained with the child, transsexualism could not be used to withdraw custody.

In *Daly v. Daly*, 715 P. 2d 56 (Nev. 1986), *cert. denied*, 479 U.S. 876 (1986), a mother successfully sought to terminate custody rights of her child’s father, who had undergone gender reassignment surgery. The Nevada Supreme Court cited the child’s “revulsion” over her father’s new gender. *Id.* at 59. It also cited the supposed problems inflicted upon the child by the father’s unusual choice, having heard testimony from psychological expert that there would be a “risk of serious maladjustment, mental, or emotional injury [to the child].” *Id.* at 63. Accordingly, the court held that termination of her father’s visitation rights was permissible.

However, the strong dissenting opinion argued that there was insufficient showing of clear and convincing evidence that the parental rights should be terminated. Mr. Justice Gunderson pointed out that expert concluded the risk to the child would occur “only if visitation was forced upon Mary.” *Id.* at 63 (emphasis provided). Yet, the majority, ignoring both the legal position of the father as well as the facts, concluded there would be a risk of harm to the child “if visitation were permitted.” *Id.* at 63 (emphasis provided). Mr. Justice Gunderson also stated in his dissent:

the fact that the appellant father has suffered emotional problems which are foreign to the experience of this court’s members ... does not justify a total and irrevocable severance of appellant’s formal legal tie to a child he cares about and desires to help nurture. By holding that such a severance is justified in these facts, it seems to me, *we are being unnecessarily and impermissibly punitive to the exercise of a medical option we personally find offensive, thereby depriving a child of a legal relationship which might well be to the child’s advantage in the future.*

715 P. 2d at 64 (Gunderson, J. dissenting) (emphasis provided).

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## **II. Because discriminatory treatment against transsexuals is based on suspect disability and gender classifications, state parties should enjoy only a narrow margin of appreciation in limiting transsexual parental rights.**

The European Court has stated that it “is conscious of the seriousness of the problems facing [transsexuals] and the distress they suffer.” *Rees v. United Kingdom*, 106 Eur.Ct.H.R. (ser. A) at § 47 (1986). Persons with gender dysphoria face not only emotional suffering because of their dysphoria but also social ostracization. As Judge Martens has observed,

The endeavours of transsexuals to obtain legal recognition of what they feel as their attaining the sex to which they have always belonged have, however, often met with a marked aversion on the part of the authorities. It seems that the transsexual’s attempts to ‘change sex’ infringe a deeply rooted taboo. At any rate, the first reactions of authorities as well as of courts have been almost instinctively hostile and negative.

The United Kingdom decision in ... *Corbett v. Corbett* ... well illustrates this tendency: using terms which scarcely veil his distaste and basing himself on reasoning which has been severely criticised by various legal writers, the learned judge simply refused to attach any legal relevance to reassignment surgery. The reactions of the highest courts in other countries have not been more helpful.

*Cossey v. United Kingdom*, 184 Eur.Ct.H.R. (ser. A) at § 2.5 (Martens, J. dissenting). Accordingly, the European Parliament has stated its regret that “transsexuals everywhere are still discriminated against, marginalised and sometimes even criminalised.” Resolution on Discrimination Against Transsexuals. Doc A3-16/89, OJ No C 256, 9 Oct. 1989 (*as cited in* M. Killerby, *Speech*, in TML, 13, 15.); *see also* F. Valdes, *supra* (discussing social and legal antipathies towards transsexualism in the US).

The members of this Court, the European Court of Justice, and the domestic law of several European countries have evidenced great sensitivity to the plight of transsexuals. US legislators and judges generally have not — although this now appears to be changing. Inasmuch as the European Court of Justice has held discrimination against transsexuals is a form of sex discrimination in *P. v. S. and Cornwall County Council* and this Court has held that heightened judicial scrutiny must be applied to sex-based classifications in *Abdulaziz, Cabales and Balkandali*, 94 Eur.Ct.H.R. (ser. A) (1985), this Court should at the very least apply a heightened scrutiny test to discrimination against transsexuals. Given the social and legal reality of discrimination against transsexuals caused by ignorance and/or malice, it would be more appropriate as a general principle to use a narrow margin of appreciation (or “strict scrutiny test,” as in US law) — *a fortiori* in cases where other fundamental ECHR rights, such as the Article 8 right to respect for family life, are implicated.<sup>[3]</sup>

**Governments should not use suspect classifications — even to protect a child from possible harmful effects of bigotry as a means of ensuring the child’s best interests. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), a divorced father tried to take custody of his daughter away from her mother after the mother began cohabiting with an African-American. Under an equal protection analysis, the US Supreme Court rejected the state’s interest in preventing possible harmful effects arising from the child’s living in a racially-mixed household.**



**The question ... is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials ... may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice ... ."**

***Id.* at 433. As in the case of using racial prejudice, the state's interest in preventing possible harm to a child arising from societal hostility towards transsexuals is illegitimate.**

### **III. The issue of parental rights of transsexuals should be examined in light of whether a state's domestic legal order is in line with the domestic law of other European states and whether it is developing within the discipline of European convention law.**

This Court repeatedly has declared that there is no legal obligation to make the ECHR part of domestic law. R. Bernhardt, "The Convention and Domestic Law," *The European System for the Protection of Human Rights* 25, 29 (R. St. J. Macdonald *et al.* eds., 1993). However, this issue is different from the Court's obligation to provide effective European supervision in determining the appropriate margin of appreciation to be enjoyed by state-parties. To ensure a democratic society and legal order, the internal legal order of a state-party must be able to check (through constitutional or other mechanisms) the tyranny of majorities exercising their will at the expense of vulnerable minorities. "[D]emocracy does not simply mean that views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position." *Young, James and Webster v. United Kingdom*, 44 Eur.Ct.H.R. (ser. A) (1980) at § 63. Absent such checking mechanisms, it appears appropriate for the European Court to apply a narrower margin of appreciation. As suggested below, non-incorporation of Strasbourg law can impact upon the rights of transsexuals to exercise parental rights.

#### **A. It is Necessary to Consider Whether a State-Party's Internal Legal Order Incorporates Strasbourg Law to Ensure a Coherent European Consensus and Unity.**

The margin of appreciation doctrine allows a state-party to enjoy a wide margin where the laws of state-parties are divergent on a particular subject. In allowing a state-party to enjoy a wide margin in such cases, this doctrine creates a reasonable expectation that as a state-party develops its particular institutions and practices in adaptation to its particular social conditions, these institutions and practices will be developed in a manner responsive to, if not governed by, ECHR law and this Court's concerns. European unity as professed in the ECHR Preamble necessitates this presumption.

[T]he preamble to the European Convention, which recalls the aim of achieving greater unity between member States and stresses that Fundamental Freedoms are "best maintained" by a "common understanding and observance of ... Human Rights," seems to invite the Court to develop common standards ... in such a larger, diversified community the development of *common standards* may well prove the best, if not the only way of achieving the Court's professed aim of ensuring that the Convention remains a living instrument.

*Cossey v. United Kingdom*, 184 Eur.Ct.H.R. at 28 (Martens, J., dissenting).

If a state-party's internal legal order does not incorporate ECHR law, then the state-party's institutions and practices are likely to be substantially less responsive to this Court's concerns as compared to other state-parties incorporating ECHR law. "It is obvious that [for incorporating states] the influence of Strasbourg case-law is far more important than in those countries where the Convention has only the status of international law." J. Polaciewicz & V. Jacob-Foltzer, *The European Convention on Human Rights in domestic law: The impact of the Strasbourg case-law in States where direct effect is given to the Convention* (first part), 12 H.R.L.J. 65, 66 (1991). Government officials in non-incorporation states lack incentives for developing a domestic legal order consistent with ECHR law — unless faced with a case-challenge before the European Commission or Court of Human Rights. If the internal legal order of one state-party is not developing within the discipline of Strasbourg law, then its domestic law may develop along a divergent path from other state-parties that do incorporate ECHR law.

As noted in Part I, there is a growing consensus among European states and regional institutions toward recognition of greater rights for transsexuals. See L. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell Int'l L. J. 133 (1993) (discussing consensus issue as applied to transsexual rights issues). Accordingly, a narrower margin of appreciation is warranted in cases where a state-party's internal legal order has not developed along the lines of the domestic law of other European states. Furthermore, given that consensus development is essential to determining the appropriate margin of appreciation, it is important to consider whether the state-party incorporates ECHR law.

### **B. It is Necessary to Examine Whether a State-Party's Internal Legal Order Incorporates Strasbourg Law in Order to Avoid Additional Harms Accruing to Other Associated Rights.**

Besides posing an obstacle to consensus development, allowing a non-incorporation state-party to enjoy a wide margin of appreciation, can endanger other rights. ECHR law serves to limit harms to other rights associated with a case. This problem is made clearer where a narrow margin of appreciation is enjoyed. For example, in the Article 6(1) area of prisoner legal access where state-parties are given a narrow margin of appreciation, the European Court and Commission have found repeated violations by the UK of not only identical rights but also associated rights, such as those guaranteed by Article 8. See e.g., *Golder v. United Kingdom*, 18 Eur.Ct.H.R. (ser. A) (1975) (denial of access to solicitor through mail and meetings violated Art. 6(1)); *Hilton v. United Kingdom*, Application No. 5613/72, Eur.Cm.H.R., 3 EHRR 104 (1981) (denial of access to solicitor); *Silver v. United Kingdom*, 61 Eur.Ct.H.R. (ser. A) (1983) (Art. 6(1) and 8 violations for stopping mail between solicitor and prisoner); *Campbell and Fell v. United Kingdom*, Eur.Ct.H.R. (ser. A) (1984) (associated right to privacy of meetings violated Arts. 6(1) and 8). When a non-incorporation state-party repeatedly violates the same or associated rights, this suggests that non-incorporation itself encourages harms to associated rights. It also suggests that non-incorporation can lead to an unnecessary taxing of the Court and Commission's resources by causing unnecessary litigation.

Accordingly, giving a wide margin of appreciation to state-parties who do not incorporate ECHR law into their domestic legal orders not only poses obstacles to the development of European consensus but it also fails to discourage harms to other rights. European

supervision should operate in such a manner so that no one state-party acquires advantages over other state-parties because of its peculiar internal legal order; this is particularly important when the advantage of receiving a wide margin of appreciation results in the detriment of fundamental rights recognized by the ECHR, such as the right to respect for family life and, specifically, the exercise of parental rights.

### **C. Effective Operation of Margin of Appreciation Doctrine Requires Consideration of the United Kingdom's Non-Incorporation of Strasbourg Law.**

Three of the five European Court cases challenging a state-party's failure to recognize transsexual rights have come from the United Kingdom. Two of these three cases dealt with the Article 8 right to alter one's own birth certificate. The instant case addresses an associated Article 8 right to indicate the *de facto* parent on a birth certificate. Since there is no reason to believe that there are a disproportionate number of transsexuals in the UK generating cases, this phenomenon suggests that the UK's internal legal order should be examined because (i) wide margins of appreciation have been allowed previously and (ii) the UK does not incorporate ECHR law into its domestic law.

Under UK domestic law, Parliament is presumed to legislate in accordance with international law. A. Clapham, *Human Rights in the Private Sphere*, at 24 (1993). When a statute is in opposition to a treaty, the statute must prevail. When UK judges have used Strasbourg law, it has been used as an aid to statutory interpretation and only where governing law is "straightforward," as reflected in domestic and international law. An example is *ex post facto* criminal legislation *Id.*; see e.g., *Regina v. Miah*, 1 W.L.R. 683 (1974) (first use of ECHR in regard to retrospective criminal legislation). In another case, *Derbyshire County Council v. Times Newspapers Ltd. and Others*, 1 All England Reports 1011 (1993), the UK Court of Appeals addressed the issue of whether a newspaper can be held liable for publishing articles critical of government entities. While the Court of Appeals used Article 10 as the principal reference for its reasoning — rather than mere secondary support — the House of Lords found no need to refer to the ECHR and upheld the decision under the common law of England. *Id.* at 1021. Note also that the case hardly addressed a controversial legal issue from an international law point of view. See *Schwabe v. Austria*, 242-B Eur.Ct.H.R. (ser. A) (1993) (criticism of politician); *Castells v. Spain*, 236 Eur.Ct.H.R. (ser. A) (1992) (criticism of government); *Oberschlick v. Austria*, 204 Eur.Ct.H.R. (ser. A) (1991) (criticism of politician); *Lingens v. Austria*, 103 Eur.Ct.H.R., (ser. A) (1986) (criticism of politician); *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, Inter-Am. C.H.R. 1994 at 197, OEA/ser. L./V./11.88, doc.9 rev. (Feb. 17, 1995).

It is insufficient that highly-placed government officials, such as Law Lords or the Home Secretary, provide assurances that English law will not violate the Convention. It is doubtful that such good intentions can filter down to those persons responsible for enforcing or interpreting English law consistent with ECHR law in the absence of more effective controls. It is much less comforting when sixty-six Parliament members vote for a bill aimed at giving Parliament the right to overrule European regional Court rulings. See T. Shaw & G. Jones, "Transsexual Wins Euro Court Case," *The Daily Telegraph*, 1 May 1996, at 1. To allow the police, bureaucrat, or trial judge a wide margin of appreciation is an ineffective means of allowing law that is in transition to develop in a fashion consistent with the values of the European community.

Amicus is not arguing that the UK's internal legal order or any other non-incorporation state (*viz.*, Denmark, Iceland, Ireland, Norway, and Sweden) is inherently incompatible with the regimen of the ECHR,<sup>[4]</sup> **nor that non-incorporation is wholly dispositive of determining the appropriate level of deference to be given national authorities. The peculiar characteristics of a country's legal culture should be respected as a reflection of the peculiar social, economic, and political conditions obtaining in that country.**<sup>[5]</sup> Indeed, Amicus recognizes the important contributions that English law has made to the protection of human rights.

**Nevertheless, in order for the European Court's margin of appreciation doctrine to function effectively, the Court should take into consideration whether a state-party's domestic legal order minimalizes the possibility of additional harms to associated rights and promotes European consensus and unity. This consideration is especially compelling given the fact that the European Court cannot order state-parties to alter their domestic legislation.**

## Conclusion

It appears inevitable that as societal ignorance about gender dysphoria is eliminated that a person's ambiguous gender status will become less relevant. This Court can take a courageous stand with this sorely misunderstood group of people and further break down societal ignorance by recognizing disabled persons' rights and duties as parents.

Respectfully submitted,

Dated: 28 June 1996

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Francisco Forrest Martin, President

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## Footnotes

<sup>1.</sup> Indeed, in 1981 the French Regional Court of Toulouse in referring to researchers' discovery of a tissual antigen, recognized gender change as resulting from irreversible pre-existing factors as well as therapeutical surgery. According to Delvaux, many courts have recently accepted that gender change is "not the result of the intention of the person concerned, who is constrained by innate characteristics to undergo treatment and operations." Delvaux, *supra*, at 163.

<sup>2.</sup> See *e.g.*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994).

<sup>3.</sup> In previous cases dealing with gender dysphoria, the European Court was not faced with a family of applicants.

<sup>4.</sup> The mere formal incorporation of ECHR law also can be insufficient, as evidenced by the Italian Government's repeated failures to conform its criminal procedures to the requirement of Articles 5 and 6, and the dilatoriness of its proceedings. J. Polaciewicz & V. Jacob-Foltzer, *supra*, at 84.

5. In the US under its federal scheme of government, states are seen as important laboratories for testing social policy and developing law which is in transition. Nevertheless, even federal-state comity interests recognize that the US Constitution, federal statutory laws, and treaties are the “supreme law of the land.” U.S.Const. art. 6(2). Therefore, this federal constitutional law is given direct effect by the states.