The Cossey Case (ECHR, 1990)

August, 1990

EUROPEAN COURT OF HUMAN RIGHTS

THE COSSEY CASE

(16/1989/176/232)

JUDGMENT

STRASBOURG

29 August 1990

In the Cossey case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court** and composed of the following judges:

Mr R. Ryssdal, President,
Mr J. Cremona,
Mr Thór Vilhjálmsson,
Mrs D. Bindschedler-Robert,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr B. Walsh,
Sir Vincent Evans,
Mr R. Macdonald,
Mr C. Russo,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr S.K. Martens,
Mrs E. Palm,
Mr I. Foighel,
Mr R. Pekkanen,
Mr J.M. Morenilla Rodriguez,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 27 April and 29 August 1990,

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

Notes by the Registrar:

---

* The case is numbered 16/1989/176/232. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

Procedure

1. The case was referred to the Court on 4 July 1989 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") and on 13 July 1989 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10843/84) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by Miss Caroline Cossey, a British citizen, on 24 February 1984.

The Government's application referred to Article 48 (art. 48) and the Commission's request to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the application and of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 12 (art. 12) and also, in the case of the request, Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant - who will be referred to in this judgment in the feminine - stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 August 1989 the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr F. Matscher, Mr B. Walsh, Mr J. De Meyer, Mrs E. Palm and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr N. Valticos, substitute judge,

replaced Mr De Meyer, who had withdrawn (Rules 22 para. 1 and 24 para. 2).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representative of the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the registry received, on 19 October 1989, the applicant's memorial and, on 20 October 1989, the Government's.

By letter of 16 January 1990, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 9 January 1990 that the oral proceedings should open on 24 April 1990 (Rule 38).

6. On 21 February 1990 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- (a) for the Government:
  Mr N. Parker, Assistant Legal Adviser, Foreign and Commonwealth *Agent*,
  Mr N. Bratza, *Counsel*,
  Mr A. Inglese, Home Office,
  Mr W. Jenkins, General Register *Advisers*;
- (b) for the Commission:
  Mr E. *Delegate*;
- (c) for the applicant:
  Mr D. Pannick, *Counsel*,
  Mr H. Brandman, *Sollicitor*.

The Court heard addresses by Mr Bratza for the Government, by Mr Busuttil for the Commission and by Mr Pannick for the applicant, as well as replies to questions put by the Court and by two of its members individually.

8. Various documents were filed by the applicant on 27 and 30 April and 22 May and by the Government on 5 June, including further particulars of the former's claim under Article 50 (art. 50) and the latter's comments thereon.

As to the facts

I. The particular circumstances of the case

9. The applicant, who is a British citizen, was born in 1954 and registered in the birth register

as a male, under the male Christian names of Barry Kenneth.

10. At the age of 13 the applicant realised that she was unlike other boys and, by the age of 15 or 16, she understood that, although she had male external genitalia, she was psychologically of the female sex.

In July 1972 she abandoned her male Christian names and assumed the female Christian name of Caroline, a change which she confirmed by deed poll (see paragraph 16 below) in March 1973. Since July 1972 she has been known under that name for all purposes, has dressed as a woman and has adopted a female role.

11. In December 1974 the applicant, who had previously taken female hormones and had had an operation for breast augmentation involving implants, underwent gender reassignment surgery in a London hospital, to render the external anatomy nearer that of the female gender.

A medical report dated 8 February 1984 describes Miss Cossey as a pleasant young woman, states that she has lived a full life as a female, both psychologically and physically, since the surgery and records that a genital examination showed her to have the external genitalia and vagina of a female. As a post-operative female transsexual, she is able to have sexual intercourse with a man.

12. In 1976 the applicant was issued with a United Kingdom passport as a female (see paragraphs 16-17 below). From about 1979 to 1986 she was a successful fashion model, featuring regularly in newspapers, magazines and advertisements.

13. In 1983 Miss Cossey and Mr L., an Italian national whom she had known for some fourteen months, wished to marry each other.

By letter of 22 August 1983, the Registrar General informed the applicant that such a marriage would be void as a matter of English law, because it would classify her as male notwithstanding her anatomical and psychological status. Her Member of Parliament advised her in a letter of 30 August 1983 that a change in the law would be required to enable her to marry. A reply on behalf of the Registrar General, dated 18 January 1984, to a further enquiry by the applicant stated that she could not be granted a birth certificate showing her sex as female, since such a certificate records details as at the date of birth (see paragraphs 18-20 below).

In 1985 - after the date of her application to the Commission - Miss Cossey and Mr L. ceased to be engaged to be married, though they remained good friends.

14. On 21 May 1989 the applicant purported to marry a Mr X, at a ceremony conducted at a London synagogue. However, their relationship terminated on 11 June of the same year.

Following a petition filed by Miss Cossey, who had been advised that this was her only means of obtaining financial relief, the marriage was, by decree nisi made by the High Court on 17 January 1990, pronounced to have been by law void by reason of the parties not being respectively male and female (see paragraphs 23-24 below). That decree was made final on 13 March 1990.

II. Relevant domestic law and practice

A. Medical treatment

15. In the United Kingdom gender reassignment operations are permitted without legal formalities. The operations and treatment may be carried out under the National Health Service.

B. Change of name

16. Under English law a person is entitled to adopt such first names or surname as he or she wishes and to use these new names without any restrictions or formalities, except in connection with the practice of some professions where the use of the new names may be subject to certain formalities (see, inter alia, Halsbury's Laws of England, 4th ed., vol. 35, paras. 1173-1176). For the purposes of record and to obviate the doubt and confusion which a change of name is likely to involve, the person concerned very frequently makes a declaration in the form of a "deed poll" which may be enrolled with the Central Office of the Supreme Court.

The new names are valid for purposes of legal identification and may be used in documents such as passports, driving licences, car registration books, national insurance cards, medical cards, tax codings and social security papers. The new names are also entered on the electoral roll.

C. Identity documents

17. Civil status certificates or equivalent current identity documents are not in use or required in the United Kingdom. Where some form of identification is needed, this is normally met by the production of a driving licence or a passport. These and other identity documents may, according to the prevailing practice, be issued in the adopted names of the person in question with a minimum of formality. In the case of transsexuals, the documents are also issued so as to be in all respects consistent with the new identity. Thus, the practice is to allow the transsexual to have a current photograph in his or her passport and the prefix "Mr", "Mrs", "Ms" or "Miss", as appropriate, before his or her adopted names.

D. The register of births

18. The system of civil registration of births, deaths and marriages was established by statute in England and Wales in 1837. Registration of births is at present governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"), which requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The particulars to be entered are prescribed in regulations made under the 1953 Act.

A birth certificate takes the form either of an authenticated copy of the entry in the register of births or of an extract from the register. A certificate of the latter kind, known as a "short certificate of birth", is in a form prescribed and contains such particulars as are prescribed by regulations made under the 1953 Act, that is the name and surname, sex, date of birth and place of birth of the individual. It omits, notably, any particulars relating to parentage or

adoption contained in the register.

An entry in a birth register and the certificate derived therefrom are records of facts at the time of birth. Thus, in England and Wales the birth certificate constitutes a document revealing not current identity, but historical facts. The system is intended to provide accurate and authenticated evidence of the events themselves and also to enable the establishment of the connections of families for purposes related to succession, legitimate descent and distribution of property. The registration records also form the basis for a comprehensive range of vital statistics and constitute an integral and essential part of the statistical study of population and its growth, medical and fertility research and the like.

19. The 1953 Act provides for the correction, by the registrar or superintendent registrar, of clerical errors, such as the incorrect statement or omission of the year of the birth, and for the correction of factual errors; however, in the latter case, an amendment can be made only if the error occurred when the birth was registered. The birth register may also, within twelve months from the date of registration, be altered to give or change the name of a child.

Statutory provision is made for the re-registration of the birth of a child who has been legitimated by the subsequent marriage of his parents. Thereafter birth certificates supplied concerning him take the form of a certified copy of the entry of re-registration; no copy of the previous entry may be given except under the direction of the Registrar General.

Under the Adoption Act 1976, where a child is adopted, an entry (not including the names of the natural parents) will be made in a separate register known as the Adopted Children Register. In addition, the original entry in the register of births will be marked with the word "Adopted". The Registrar General keeps books to make traceable the connection between the entries in the two registers but these books are not accessible to the public, save on application by the adopted person himself or by order of a court. It is open to anyone to obtain a certified copy of the entry in the Adopted Children Register or a short certificate which contains no particulars relating to parentage.

20. The criteria for determining the sex of the person to be registered are not laid down in the 1953 Act nor in any of the regulations made under it. However, the practice of the Registrar General is to use exclusively the biological criteria: chromosomal, gonadal and genital sex. The fact that it becomes evident later in life that the person's "psychological sex" is at variance with these biological criteria is not considered to imply that the initial entry was a factual error and, accordingly, any request to have the initial entry changed on this ground will be refused. Only in cases of a clerical error, or where the apparent and genital sex of the child was wrongly identified or in case of biological intersex, i.e. cases in which the biological criteria are not congruent, will a change of the initial entry be contemplated and it is necessary to adduce medical evidence that the initial entry was incorrect. However, no error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

21. Indexes are maintained of all entries in birth registers. It is open to any member of the public to search the indexes (but not the registers themselves) and obtain a certified copy of any such entry. However, identification of the index reference requires prior knowledge not only of the name under which the person concerned was registered, but also of the

approximate date and place of birth and the registration district.

22. The law does not require that the birth certificate be produced for any particular purpose, although a certificate may in practice be requested by certain institutions and employers.

A birth certificate has in general to accompany a first application for a passport, but is not needed for its renewal or replacement or for an application for a driving licence. A birth certificate is also usually (though not invariably) required by insurance companies when issuing pension or annuity policies, but not for the issue of motor or household policies nor, as a rule, for the issue of a life insurance policy. It may also be required when enrolling at a university and when applying for employment, inter alia, with the Government. In the case of a religious marriage ceremony, the celebrant is not obliged nor is there any statutory power under English law to ask the parties to produce copies of their birth certificates (see also paragraph 25 below).

E. Marriage

23. In English law, marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others (per Lord Penzance in Hyde v. Hyde (1868) Law Reports 1 Probate and Divorce 130, 133). Section 11 of the Matrimonial Causes Act 1973 gives statutory effect to the common-law provision that a marriage is void ab initio if the parties are not respectively male and female.

Under section 12 of the same Act, a marriage which is not consummated owing to the incapacity or wilful refusal of one of the parties to consummate it, is voidable.

24. According to the decision of the High Court in Corbett v. Corbett [1971] Probate Reports 83, sex, for the purpose of contracting a valid marriage, is to be determined by the chromosomal, gonadal and genital tests where these are congruent, and without regard to any operative intervention. The relevance of a birth certificate to the question whether a marriage is void only arises as a matter of evidence which goes to the proof of the identity and sex of the person whose birth it certifies. The entry in the birth register is prima facie evidence of the person's sex. It may, however, be rebutted if evidence of sufficient weight to the contrary is adduced.

25. If, for the purpose of procuring a marriage or a certificate or licence for marriage, any person knowingly and wilfully makes a false oath or makes or signs a false declaration, notice or certificate required under any Act relating to marriage, he or she is guilty of an offence under section 3(1) of the Perjury Act 1911. However, a person contracting a marriage abroad is not liable to prosecution under this Act.

F. The legal definition of sex for other purposes

26. The biological definition of sex laid down in Corbett v. Corbett has been followed by English courts and tribunals on a number of occasions and for purposes other than marriage.

In one case concerning prostitution, a male-to-female transsexual, who had undergone both hormone and surgical treatment, was nevertheless treated as a male by the Court of Appeal for the purposes of section 30 of the Sexual Offences Act 1956 and section 5 of the Sexual

Offences Act 1967 (Regina v. Tan and Others [1983] 2 All England Law Reports 12). In two cases concerning social security legislation, male-to-female transsexuals were considered by the National Insurance Commissioner as males for the purposes of retirement age; in the first case the person in question had only received hormone therapy, in the second she had involuntarily begun to develop female secondary characteristics at the age of 46, which developments were followed by surgery and adoption of a female social role some 13 years later (cases R (P) 1 and R (P) 2 in the 1980 Volume of National Insurance Commissioner Decisions). Lastly, in a case before an Industrial Tribunal a female-to-male transsexual, who had not undergone any sex-change treatment, was treated as a female by the Tribunal for the purposes of the Sex Discrimination Act 1975; the person in question had sought and received employment in a position reserved for men under the Factories Act, but was dismissed after discovery of her biological sex (White v. British Sugar Corporation Ltd. [1977] Industrial Relations Law Reports 121).

Proceedings before the commission

27. In her application (no. 10843/84) lodged with the Commission on 24 February 1984, Miss Cossey complained of the fact that under English law she cannot claim full recognition of her changed status and, in particular, is unable to enter into a valid marriage with a man. She alleged violations of Articles 8 and 12 (art. 8, art. 12) of the Convention.

28. The Commission declared the application admissible on 5 July 1985. In its report of 9 May 1989 (drawn up in accordance with Article 31) (art. 31), the Commission expressed the opinion, by ten votes to six, that there had been a violation of Article 12 (art. 12), but not of Article 8 (art. 8).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment.*

---

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 184 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

Final submissions made to the court by the Government

29. At the hearing on 24 April 1990 the Government requested the Court to "decide and declare that there has been no breach of the applicant's right to respect for private life under Article 8 para. 1 (art. 8-1) … or of the applicant's right to marry and to found a family under Article 12 (art. 12) …".

As to the law

30. Miss Cossey claimed that the refusal to issue her with a birth certificate showing her sex

as female and her inability, under English law, to contract a valid marriage with a man gave rise to violations of Article 8 and Article 12 (art. 8, art. 12), respectively, of the Convention. These provisions read as follows:

Article 8 (art. 8)

"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."

Article 12 (art. 12)

"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."

The applicant's allegations were contested by the Government. A majority of the Commission expressed the opinion that there had been a violation of Article 12 (art. 12) but not of Article 8 (art. 8).

31. The Court was confronted in the Rees case with issues akin to those arising in the present case. It therefore has to determine whether the two cases are distinguishable on their facts or whether it should depart from the judgment which it gave in the former case on 17 October 1986 (Series A no. 106; "the Rees judgment").

I. Is the present case distinguishable on its facts from the Rees case?

32. In the view of the applicant and certain members of the Commission, the present case was distinguishable on its facts from the Rees case, in that, at the time of their respective applications to the Commission, Miss Cossey had a male partner wishing to marry her (see paragraph 13 above) whereas Mr Rees did not have a female partner wishing to marry him. Reference was also made to the ceremony of marriage between the applicant and Mr X (see paragraph 14 above) which, although the marriage was declared void, was said to underline her wish to marry.

The Court is not persuaded that this difference is material. In the first place, the fact that Mr Rees had no such partner played no part in the Court's decisions, which were based on a general consideration of the principles involved (see the Rees judgment, pp. 14-18 and 19, paras. 35-46 and 48-51). In any event, as regards Article 8 (art. 8), the existence or otherwise of a willing marriage partner has no relevance in relation to the contents of birth certificates, copies of which may be sought or required for purposes wholly unconnected with marriage. Again, as regards Article 12 (art. 12), whether a person has the right to marry depends not on the existence in the individual case of such a partner or a wish to marry, but on whether or not he or she meets the general criteria laid down by law.

33. Reliance was also placed by the applicant on the fact that she is socially accepted as a woman (see paragraphs 10-12 above), but this provides no relevant distinction because the same was true, mutatis mutandis, of Mr Rees (see the Rees judgment, p. 9, para. 17). Neither is it material that Miss Cossey is a male-to-female transsexual whereas Mr Rees is a female-to-male transsexual: this - the only other factual difference between the two cases - is again a matter that had no bearing on the reasoning in the Rees judgment.

34. The Court thus concludes that the present case is not materially distinguishable on its facts from the Rees case.

II. Should the court depart from its Rees judgment?

35. The applicant argued that, in any event, the issues arising under Articles 8 and 12 (art. 8, art. 12) deserved reconsideration.

It is true that, as she submitted, the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions (see, amongst several authorities, the Inze judgment of 28 October 1987, Series A no. 126, p. 18, para. 41).

A. Alleged violation of Article 8 (art. 8)

36. The applicant asserted that the refusal to issue her with a birth certificate showing her sex as female constituted an "interference" with her right to respect for her private life, in that she was required to reveal intimate personal details whenever she had to produce a birth certificate. In her view, the Government had not established that this interference was justified under paragraph 2 of Article 8 (art. 8-2).

On this point, the Court remains of the opinion which it expressed in the Rees judgment (p. 14, para. 35): refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the original entries cannot be considered as an interference. What the applicant is arguing is not that the State should abstain from acting but rather that it should take steps to modify its existing system. The question is, therefore, whether an effective respect for Miss Cossey's private life imposes a positive obligation on the United Kingdom in this regard.

37. As the Court has pointed out on several occasions, notably in the Rees judgment itself (p. 15, para. 37), the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which

balance is inherent in the whole of the Convention.

38. In reaching its conclusion in the Rees judgment that no positive obligation of the kind now in issue was incumbent on the United Kingdom, the Court noted, inter alia, the following points (pp. 17-18, paras. 42-44).

(a) The requirement of striking a fair balance could not give rise to any direct obligation on the respondent State to alter the very basis of its system for the registration of births, which was designed as a record of historical facts, by substituting therefor a system of documentation, such as that used in some other Contracting States, for recording current civil status.

(b) An annotation to the birth register, recording Mr Rees' change of sexual identity, would establish only that he belonged thenceforth - and not from the time of his birth - to the other sex. Furthermore, the change so recorded could not mean the acquisition of all the biological characteristics of the other sex. In any event, such an annotation could not, without more, constitute an effective safeguard for ensuring the integrity of his private life, as it would reveal the change in question.

(c) That change, and the corresponding annotation, could not be kept secret from third parties without a fundamental modification of the existing system for maintaining the register of births, which was accessible to the public. Secrecy could have considerable unintended results and could prejudice the purpose and function of the register by, for instance, complicating factual issues arising in the fields of family and succession law. It would also take no account of the position of third parties, in that they would be deprived of information which they had a legitimate interest to receive.

39. In the Court's view, these points are equally cogent in the present case, especially as regards Miss Cossey's submission that arrangements could be made to provide her either with a copy birth certificate stating her present sex, the official register continuing to record the sex at birth, or, alternatively, a short-form certificate, excluding any reference either to sex at all or to sex at the date of birth.

Her suggestions in this respect were not precisely formulated, but it appears to the Court that none of them would overcome the basic difficulties. Unless the public character of the register of births were altered, the very details which the applicant does not wish to have disclosed would still be revealed by the original entry therein or, if that entry were annotated, would merely be highlighted. Moreover, the register could not be corrected to record a complete change of sex since that is not medically possible.

40. In the Rees judgment, the Court, having noted that the United Kingdom had endeavoured to meet Mr Rees' demands to the fullest extent that its system allowed - and this applies also in the case of Miss Cossey -, pointed out that the need for appropriate legal measures concerning transsexuals should be kept under review having regard particularly to scientific and societal developments (pp. 17 and 19, paras. 42 and 47).

The Court has been informed of no significant scientific developments that have occurred in the meantime; in particular, it remains the case - as was not contested by the applicant - that gender reassignment surgery does not result in the acquisition of all the biological

characteristics of the other sex.

There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No C 256, 9.10.1989, p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 - both of which seek to encourage the harmonisation of laws and practices in this field - reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the Rees judgment. Accordingly this is still, having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation (see the Rees judgment, p. 15, para. 37). In particular, it cannot at present be said that a departure from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 (art. 8) on the point at issue remains in line with present-day conditions (see paragraph 35 above).

41. The applicant also prayed in aid Article 14 (art. 14) of the Convention, which prohibits discrimination in the enjoyment of the rights and freedoms guaranteed. However, the Court does not consider that this provision assists her. She appears to have relied on it not so much in order to challenge a difference of treatment between persons placed in analogous situations (see, amongst various authorities, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 26, para. 60) but rather as a means of introducing into her submissions the notion of proportionality between a measure or a restriction and the aim which it seeks to achieve. Yet that notion is already encompassed within that of the fair balance that has to be struck between the general interest of the community and the interests of the individual (see paragraph 37 above and the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 50, para. 120).

42. The Court accordingly concludes that there is no violation of Article 8 (art. 8).

The Court would, however, reiterate the observations it made in the Rees judgment (p. 19, para. 47). It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.

B. Alleged violation of Article 12 (art. 12)

43. In reaching its conclusion in the Rees judgment that there had been no violation of Article 12 (art. 12), the Court noted the following points (p. 19, paras. 49-50).

(a) The right to marry guaranteed by Article 12 (art. 12) referred to the traditional marriage between persons of opposite biological sex. This appeared also from the wording of the Article (art. 12) which made it clear that its main concern was to protect marriage as the basis of the family.

(b) Article 12 (art. 12) laid down that the exercise of the right to marry shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right was impaired. However, the legal impediment in the United Kingdom on the marriage of persons

who were not of the opposite biological sex could not be said to have an effect of this kind.

44. Miss Cossey placed considerable reliance, as did the Delegate of the Commission, on the fact that she could not marry at all: as a woman, she could not realistically marry another woman and English law prevented her from marrying a man.

In the latter connection, Miss Cossey accepted that Article 12 (art. 12) referred to marriage between a man and a woman and she did not dispute that she had not acquired all the biological characteristics of a woman. She challenged, however, the adoption in English law of exclusively biological criteria for determining a person's sex for the purposes of marriage (see paragraph 24 above) and the Court's endorsement of that situation in the Rees judgment, despite the absence from Article 12 (art. 12) of any indication of the criteria to be applied for this purpose. In her submission, there was no good reason for not allowing her to marry a man.

45. As to the applicant's inability to marry a woman, this does not stem from any legal impediment and in this respect it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law.

As to her inability to marry a man, the criteria adopted by English law are in this respect in conformity with the concept of marriage to which the right guaranteed by Article 12 (art. 12) refers (see paragraph 43 (a) above).

46. Although some Contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date (see paragraph 40 above) cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 (art. 12) on the point at issue. 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, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.

47. In the context of Article 12 (art. 12) the applicant again prayed in aid Article 14 (art. 14) of the Convention. On this point it suffices to refer to the observations in paragraph 41 above.

48. The Court thus concludes that there is no violation of Article 12 (art. 12).

For these reasons, the Court

1. Holds by ten votes to eight that there is no violation of Article 8 (art. 8);

2. Holds by fourteen votes to four that there is no violation of Article 12 (art. 12).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 September 1990.

Signed: Rolv RYSSDAL, *President*

Signed: Marc-André EISSEN, *Registrar*

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Mrs Bindschedler-Robert and Mr Russo;

(b) joint partly dissenting opinion of Mr Macdonald and Mr Spielmann:

(c) dissenting opinion of Mr Martens:

(d) joint dissenting opinion of Mrs Palm, Mr Foighel and Mr Pekkanen.

Initialled: R. R.

Initialled: M.-A. E.

Partly dissenting joint opinion of Judges Bindschedler-Robert and Russo

(Translation)

In the instant case the Court has confirmed the opinion it expressed in its judgment in the Rees case, in which it said that the United Kindgom could not be required to adapt its system of recording civil status in such a way that a transsexual's change of sexual identity appeared in his birth certificate. However, we are no more persuaded now than we were then that the arguments advanced in support of this view are valid. It remains our view that as regards the way in which it draws up the civil-status documents in question - that is to say the birth register and birth certificate - the United Kingdom has not taken all the appropriate steps to ensure, as far as possible, that allowance is made for changes in certain persons' sexual identity; and we consider that although, as we are glad to acknowledge, it has endeavoured to meet transsexuals' demands in several other respects, it has therefore to this extent failed to respect the applicant's private life. In our opinion, a just balance could have been struck between the public interest and the interests of the individual without upsetting the present system of recording civil status; the fact that such a balance would not necessarily meet all the applicant's demands should not prevent the Court from giving it due weight in assessing whether Article 8 (art. 8) has been complied with.

As to the rest, and in order to avoid repeating ourselves, we would refer to the dissenting opinion that we expressed jointly with our late lamented colleague Mr Gersing in the Rees case.

Joint partly dissenting opinion of Judges Macdonald and

Spielmann

(Translation)

1. Like the majority, we consider that there is no violation of Article 12 (art. 12) of the Convention.

2. On the other hand, we are of the opinion that there is a violation of Article 8 (art. 8).

Whilst we can agree with sub-paragraphs 1 and 2 of paragraph 40 of the judgment, the same does not apply to sub-paragraph 3 of that paragraph, which reads:

"There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No C 256, 9.10.1989, p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 - both of which seek to encourage the harmonisation of laws and practices in this field - reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the Rees judgment. Accordingly this is still, having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation (see the Rees judgment, p. 15, para. 37). In particular, it cannot at present be said that a departure from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 (art. 8) on the point at issue remains in line with present-day conditions (see paragraph 35 above)."

We consider that since 1986 there have been, in the law of many of the member States of the Council of Europe, not "certain developments" but clear developments.

We are therefore of the opinion that, although the principle of the States' "wide margin of appreciation" was at a pinch acceptable in the Rees case, this is no longer true today.

Paragraph 42 of the judgment contains the following passage:

"The Court would, however, reiterate the observations it made in the Rees judgment (p. 19, para. 47). It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review."

This is meagre consolation for the individuals concerned. In our view, concrete measures are necessary now.

Dissenting opinion of Judge Martens

1. Introduction

1.1 Like the majority I think that neither the relevant facts nor the issues for decision in the

case of Miss Cossey differ from those in the case of Mr Rees in a way which would justify distinguishing the former from the latter.

Unlike the majority, however, I am of the opinion that the Court had indeed "cogent reasons" [1] for departing from its Rees judgment. A true reconsideration of the issues arising under Articles 8 and 12 (art. 8, art. 12) should have led it to conclude that the Rees judgment was wrong - or at least that present-day conditions warranted a different decision in the Cossey case. I am convinced therefore that the Court should have responded to the pressing invitation by the Commission's Delegate to overrule its decision in the Rees case.

1.2 To explain my opinion I propose first to make some general remarks which will outline my position on the human-rights aspects of the problem of transsexualism (section 2). I will then set out why I think that the Court should have decided the Rees case differently (sections 3 and 4). Lastly I will give further arguments for overruling that decision (section 5).

2. General remarks on transsexualism as a problem of human rights

2.1 Like Mr Rees, the applicant is a transsexual, that is she belongs to that small and tragic group of fellow-men who are smitten by the conviction of belonging to the other sex, this conviction being both incurable and irresistible.

2.2 If a transsexual is to achieve any degree of well-being, two conditions must be fulfilled:

1. by means of hormone treatment and gender reassignment surgery his (outward) physical sex must be brought into harmony with his psychological sex;

2. the new sexual identity which he has thus acquired must be recognised not only socially but also legally.

2.3 Like the Rees case, the present case concerns only the second of these conditions. Consequently, there is no need to go into the medical procedures to be followed in order to ensure that treatment - especially the surgery, which is irreversible - is applied only after very careful diagnosis. This is all the less necessary as the applicant has undergone all the requisite medical treatment which, as in the Rees case, was paid for by the National Health Service; it may therefore be assumed that all medical and medical-ethical requirements for that treatment were met, viz. that after exhaustive investigations the doctors were satisfied that their patient was a bona fide transsexual and that his well-being would be promoted by the surgery.

2.4 As to the second of the above conditions, it should be stressed that (medical) experts in this field have time and again stated that for a transsexual the "rebirth" he seeks to achieve with the assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognised by law.

This urge for full legal recognition is part of the transsexual's plight. That explains why so many transsexuals, after having suffered the medical ordeals they have to endure, still muster the courage to start and keep up the often long and humiliating fight for a new legal identity [2].

That explains also why neither Mr Rees nor Miss Cossey nor the various other transsexuals who had raised complaints against the United Kingdom were willing to be content with the comparatively advantageous situation which obtains in the United Kingdom as to the possibilities of changing one's first name and the relevant prefixes on such official documents as passports and driving licences. Both Mr Rees and Miss Cossey made it abundantly clear that what they were seeking was full legal recognition of their newly acquired sexual identity.

2.5 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 a case of transsexualism, the judgment of the High Court in the case of Corbett v. Corbett [3] - to which judgment I will have to refer again -, well illustrates this tendency: using terms which scarcely veil his distaste [4] and basing himself on a reasoning which has been severely criticised by various legal writers [5], 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 [6]. And the European Court of Human Rights has until now inscribed itself into that trend: Van Oosterwijck, Rees, Cossey, a saddening series [7].

2.6.1 Yet some legislatures and some courts have taken another course. They have realised that post-operative transsexuals are tragic human beings who have already suffered so much that their request for full legal recognition of their new sexual identity should be granted, as far as is reasonably possible.

2.6.2 In paragraph 44 of its report of 12 December 1984 in the Rees case the Commission noted that at that time the legislatures of several member States had introduced the possibility of a change of legal sex for transsexuals and had, subject to certain conditions, acknowledged their right to marry a person of their former sex. The report mentioned the Swedish Act of 1972, the German Act of 1980 and the Italian Act of 1982.

When the Rees case was pleaded before the Court [8] there was some dispute between the parties as to the situation in other member States [9]. In this context both parties referred to "recent" legislation in the Netherlands [10]. It was probably due to this dispute that the Court itself spoke vaguely of "several States" having, through legislation (or otherwise [11]), given transsexuals the option of changing their personal status to fit their newly gained identity (paragraph 37).

I will refer to this subject again in section 5 below. In the present context it suffices to note that, generally speaking, European legislatures began to take up the case of transsexuals only at the end of the seventies and at the beginning of the eighties (the Swedish legislature having set the example in 1972).

2.6.3 So much for the legislatures. As to the decisions of courts, I would only mention the 1976 judgment of the Appellate Division of the Superior Court of New Jersey [12] and the 1978 judgment of the West German Bundesverfassungsgericht [13]. Both judgments - and

their similarity is the more striking because they come from different legal traditions - make the same essential points.

Both judgments may be summarised as taking the view that the change of sexual identity which results from successful reassignment surgery should be deemed a change of sex for legal purposes.

The Bundesverfassungsgericht said:

"Human dignity and everyone's fundamental right to develop his personality freely make it imperative to assign a man's personal status to the sex to which he belongs according to his psychological and physical constitution."

It remarked in conclusion that in its opinion the refusal to change the sex of post-operative transsexuals in the register of births was not based on any public interest which could justify the interference with their fundamental rights.

The New Jersey court said:

"In so ruling we do no more than give legal effect to a fait accompli based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality."

2.7 I think that these indeed are the essential points. The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated without discrimination, on the same footing as all other females or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons, for in the light of what has been said in paragraphs 2.2 and 2.4 above such a refusal can only be qualified as cruel. But there are no such reasons.

My position may be summarised by a quotation which I borrow from a critic of the Corbett doctrine [14]:

"Refusal to reclassify the sex of a post-operative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens."

3. Why the Rees case should have been decided differently as regards Article 8 (art. 8)

3.1 Having made my position clear, I now turn to the Court's reasoning in its Rees judgment.

The first feature which strikes the reader of that judgment is its predominantly technical nature. First there is a technical discussion on the distinction between negative and positive obligations flowing from Article 8 (art. 8) of the Convention. There follows an analysis in some depth of the difficulties the United Kingdom legislature would encounter were the United Kingdom to be obliged to comply with Mr Rees' wishes as regards altering its birth-registration system.

In my opinion the Court, in allowing itself to be enticed into this course, sadly undervalued some of the essential issues in that case.

3.2 Time and again it had been stressed on behalf of Mr Rees that, although the United Kingdom's refusal to permit alteration or adjustment of the register of births was an important issue, the very essence of his complaints was that he had to live under a legal system which, for all questions where sex was legally relevant, held that only biological sex was decisive, and which - as biological sex was determined once and for all at birth - refused to recognise for legal purposes the new sexual identity which he, as a post-operative transsexual, had acquired [15].

This approach is reflected in paragraph 34 of the Court's judgment. However, it is significant that, when embarking upon its exposition on positive and negative obligations under Article 8 (art. 8), the Court already does not mention this central issue any more but turns directly to the more technical issue of the "mere" (!) refusal to alter the register of births (paragraph 35).

3.3 Mr Rees' description of the position of transsexuals under United Kingdom law is undoubtedly correct. It is true that Mr Justice Ormrod had expressly limited his decision to the determination of a person's sex for the purposes of marriage. However, since the Court of Appeal subsequently held that "both common sense and the desirability of certainty and consistency" demanded that his decision should apply for the purpose of certain provisions of criminal law [16], it is generally assumed that his test would apply whenever it is legally relevant whether one is a male or a female - for instance, in questions of inheritance, title, social insurance, pension benefits, labour relations and equal pay, tax treatment, immigration, etc. [17]. The European Court recognised this, albeit somewhat cautiously, by saying that "at the present stage of the development of United Kingdom law" [18] Mr Rees "would be regarded as a woman, inter alia, as far as marriage, pension rights and certain employments are concerned" (paragraph 40) [19].

3.4 In my opinion it follows from what has been said in paragraphs 3.2 and 3.3 above that it is at least questionable whether the Court rightly held (paragraph 35) that in the Rees case only the existence and the scope of the positive obligations flowing from Article 8 (art. 8) were at stake: the very essence of Mr Rees' complaints was not the "refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register"; the very essence of his complaints was that the legal system in force in the United Kingdom (the BSD-system) was inconsistent with his rights under Article 8 (art. 8) of the Convention [20].

In my view judgments such as those in the Marckx case, the Dudgeon case, the Malone case and the Norris case [21] may be cited as a persuasive argument for the proposition that the

maintenance in force of the BSD-system continuously and directly affected Mr Rees' private life and therefore should have been deemed to constitute a continuing interference [22].

The BSD-system keeps treating post-operative transsexuals for legal purposes as members of the sex which they have disowned psychically and physically as well as socially. The very existence of such a legal system must continuously, directly and distressingly affect their private life [23].

Sexual identity is not only a fundamental aspect of everyone's personality but, through the ubiquity of the sexual dichotomy, also an important societal fact. For post-operative transsexuals sexual identity has, understandably, a very special and sensitive importance because they acquired theirs deliberately, at a high cost in mental and bodily suffering. To be condemned to live, as far as that identity is concerned, in opposition to and thus "outlawed" by their country's legal system must therefore cause permanent and acute personal distress to post-operative transsexuals in the United Kingdom. That is to say nothing of the lifelong dread to which the BSD-system condemns them, by obliging them, every time that their sex is legally relevant, to make the painful choice between either hiding what legally is "the truth" - with all the legal consequences of such untruthfulness, such as making themselves liable to a criminal charge, dismissal or a demand for nullification of the legal act in question - or revealing that legal "truth" and facing at least the possibility of very humiliating or even hostile reactions.

3.5 If the Court - as in my opinion it should have done - had accepted that the BSD-system constitutes a continuous interference with the right of post-operative transsexuals to respect for their private life, it would have become decisive whether the United Kingdom had convincingly established that its maintenance in force of that system met the requirements of paragraph 2 of Article 8 (art. 8-2). The mere fact that several States had by then already - as the Court put it (paragraph 37) - "given transsexuals the option of changing their personal status to fit their newly-gained identity" is a strong indication that, had the Court followed this line of reasoning, it would have held that it could not be said that the United Kingdom's refusal to modify the system was "necessary in a democratic society" [24].

3.6.1 But let us, for the sake of argument, accept that the decisive question was whether the United Kingdom's failure to change the BSD-system violated a positive obligation flowing from Article 8 (art. 8). I then question whether the Court, having found

"that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage",

was right to conclude therefrom that

"this is an area in which the Contracting Parties enjoy a wide margin of appreciation." (paragraph 37)

3.6.2 I accept, of course, that the notion of "respect" is not clear-cut and that the notion's requirements will therefore vary considerably from case to case. I also accept that this means that special situations obtaining in the State concerned may have to be taken into account when assessing whether or not the failure of that State to take a specific measure may be accepted as still being compatible with due respect for the private life of an individual.

Finally I accept that this means that under some circumstances a certain margin of appreciation should be left to the State concerned.

3.6.3 I would point out, however, that in my opinion States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint [25]. Saying that the Court will leave a certain margin of appreciation to the States is another way of saying that the Court - conscious that its position as an international tribunal having to develop the law in a sensitive area calls for caution - will not fully exercise its power to verify whether States have observed their engagements under the Convention, but will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State in question are incompatible with those engagements.

It is, therefore, up to the Court to decide, in every case or in every group of cases, whether a "margin of appreciation" should be left to the State and, if so, how much. For this decision various factors may be relevant and will, at the end of the day, have to be balanced.

On the one hand, the preamble to the 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. To the extent that the number of member States increases, this side of the Court's mandate gains in weight, for 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 to be interpreted so as to reflect societal changes and to remain in line with present-day conditions [26].

Judicial self-restraint may, on the other hand, be called for by the specific features of the case or the fact that it cannot be decided without taking into consideration special situations obtaining in the defendant State. If, after careful consideration, the Court is convinced that the latter is really the case, then it may be that the State should be left a certain margin of appreciation; if not, that will be a strong indication that there is no need - and consequently no room - for judicial self-restraint.

3.6.4 In this context I recall what I have said in paragraph 3.2 above: it is true that the United Kingdom's refusal to permit an alteration or adjustment of the register of births was an important issue, but the essence of the complaints of Mr Rees was that the United Kingdom maintained - or did not change - the BSD-system.

It is true that, as the European Parliament put it in its resolution of 12 September 1989 [27], "transsexuality is … also a problem of a society which is incapable of coming to terms with a change in the roles of the sexes laid down in its culture", but there is nothing in the file that suggests that, as to the role of the sexes, the culture of the United Kingdom differs essentially from that of other member States. There is therefore no need to take into account specific features of British society or other special conditions obtaining in the United Kingdom in order to decide whether the United Kingdom's maintaining the BSD-system is compatible with its engagements under the Convention. In this context I think that it may suffice to refer to what has been said in paragraphs 2.7 and 3.4 above.

As to the specific features of the case, I note that, while the United Kingdom courts take the

view that "common sense and the desirability of certainty and consistency" demand that the Corbett doctrine - which dates from 1970 - be extended to all questions where sex is legally relevant, and while the United Kingdom Government have defended the legal system thus created, neither the criticism of the Corbett doctrine nor the initiatives of other legislatures have given the United Kingdom legislature reason to change the BSD-system.

Thus the United Kingdom transsexuals had no resource other than the European Court of Human Rights. That Court's help was, moreover, needed in an area as fundamental as respect for human dignity and private life. Other member States had already shown that, however diverse their solutions were in detail, a common standard could well be found as to the principle of full legal recognition of the new sexual identity gained by post-operative transsexuals.

It is my firm belief that the Court, by nevertheless exercising judicial self-restraint, sadly failed its vocation of being the last-resort protector of oppressed individuals.

3.6.5 For these reasons I think that the Court should not have built its reasoning on the assumption that "this is an area in which the Contracting Parties enjoy a wide margin of appreciation". I agree with what was pleaded on behalf of Mr Rees [28]: the essential question was whether maintaining or not changing the BSD-system was compatible with the United Kingdom's obligations under Article 8 (art. 8). That question can only be answered in the negative (see paragraphs 2.7 and 3.4 above). In this context there simply is no room for a margin of appreciation. That margin comes into play only when a State resolves to recognise the new sexual identity of post-operative transsexuals: then there should be room for a certain discretion as to the requirements for and the form of such recognition.

3.7 The last point brings us back to paragraphs 3.1 and 3.2 above.

It follows from what I have said there that in my opinion the Court should not have dealt with all the technical difficulties which counsel for the United Kingdom had ably expounded in order to explain why the United Kingdom could not be expected to change its birth-registration system [29]. In my view the Court should have confined itself to the essential question and should have held that the United Kingdom's maintenance in force (or not changing) of the BSD-system violates Article 8 (art. 8). If, after that, the Court had still wanted to address the United Kingdom's technical arguments, it could have added that:

(a) other legislatures had shown that in a democratic society this problem can be regulated;

(b) presumably it must be possible to do that under United Kingdom law as well and to do it in such a way that the regulation fits in with the British legal system;

(c) it is, however, not for the Court to go into technical questions as to how that should be achieved and exactly which provisions should be enacted, because the Court has only to see to it that the individual is protected against the maintenance in force of a system which is incompatible with the rights and freedoms secured by the Convention [30].

4. Why the Rees case should have been decided differently as regards Article

12 (art. 12).

4.1 I now come to a question which was less emphasised in the case of Mr Rees than in that of Miss Cossey: the question whether the BSD-system violates the right to marry as laid down in Article 12 (art. 12) of the Convention.

4.2 It follows from what I have argued in section 3 that I too [31] am of the opinion that the question whether the United Kingdom is also in violation of Article 12 (art. 12) is only of academic interest: this is because the maintenance in force of the BSD-system already constitutes a violation of Article 8 (art. 8), which requires that the new sexual identity acquired by post-operative transsexuals should be fully and in all respects recognised by the law. However, in view of the importance attached to this issue in the case of Miss Cossey, I will explain why I think that on this issue also the Court should have decided the Rees case differently.

4.3.1 In the Rees judgment the question whether the BSD-system violates Article 12 (art. 12) was answered in the negative. The Court's arguments for doing so are conspicuously succinct: they only consist of two short paragraphs, of which the first (paragraph 49) is already decisive. There the Court interprets the words "men and women" in Article 12 (art. 12) as denoting: "persons of opposite biological sex" (italics added).

4.3.2. The Court does not elucidate the term "biological sex", but the meaning of that term can be deduced from the judgment.

The arguments on which the Court's interpretation is based seem to echo those used by Mr Justice Ormrod in Corbett v. Corbett as the basis for his opinion that "sex is clearly an essential determinant of the relationship called marriage". Whilst the Court speaks of "traditional marriage", the learned Judge said that marriage "always has been recognised as the union of man and woman" and "is the institution on which the family is built". Both this conspicuous similarity of arguments and paragraph 50 of the Rees judgment - where the Court, referring to United Kingdom law, notes that under that law persons who are not of the "opposite biological sex" cannot marry - warrant the conclusion that the Court used the term "biological sex" in the very same sense as did Mr Justice Ormrod, namely as "the biological sexual constitution of an individual" which is "fixed at birth".

4.3.3 If understood this way, paragraph 49 is indeed decisive because, given that it is common ground that gender reassignment surgery does not change biological sex, a post-operative transsexual still belongs to the sex he was born into and therefore cannot derive from Article 12 (art. 12) the right to marry a person belonging to that same sex.

4.3.4 Paragrpah 50 clearly illustrates that this was indeed the Court's perception of the matter. In this paragraph the Court establishes that "it cannot be said" (emphasis added) that the BSD-system impairs the very essence of the right to marry.

Prima facie this rather strongly worded assertion comes as a surprise, because it was argued on behalf of Mr Rees that the effect of the BSD-system is to deprive a post-operative transsexual of any possibility of contracting a valid marriage [32]: after his operation not only psychological [33] but also physical factors prevent his marrying a person of the opposite biological sex, whilst his marrying a person whom he physically and psychologically is able

to marry is precluded by the BSD-system.

A rather persuasive argument, it would seem, but not one which caused the Court to substantiate its assertion under discussion. Indeed, this was not necessary with the restrictive interpretation of Article 12 (art. 12) which the Court had adopted: if Article 12 (art. 12) really confines the right to marry to persons who are of the opposite biological sex, it of course follows without further substantiation that the BSD-system does not impair the right guaranteed by Article 12 (art. 12).

4.4.1 Having ascertained how paragraph 49 should be understood, let us now consider the arguments on which the Court based its restrictive interpretation.

4.4.2 It may perhaps be inferred from the wording of the first sentence of paragraph 49 ("the traditional marriage") that the Court meant to invoke the intention of the draftsmen. If so, this argument is far from convincing. When the Convention was drafted transsexualism was, at most, a medical and ethical problem, but certainly not a legal issue (see also paragraph 38 of the Rees judgment). It cannot therefore be assumed that the draftsmen, having considered the issue, decided to deny post-operative transsexuals the right to marry.

However, even if it could be so assumed, the Court - which rightly professes that the Convention is a living instrument - should, in order to make its argument conclusive, have added that (and explained why), under current European conceptions of marriage too, there is no reason for going back on that denial. But such additional argument is conspicuously lacking. Or should one deduce from the fact that the reference in paragraph 47 to future developments is found at the end of the section devoted to the alleged violation of Article 8 (art. 8) and not at the end of the judgment that in the Court's view its restrictive interpretation of Article 12 (art. 12) is of perennial value [34]?

4.4.3 The Court's second argument is that it appears from the wording of the Article (art. 12) that it "is mainly concerned to protect marriage as the basis of the family".

This argument may, perhaps, account for the draftsmen's having regarded marriage as the traditional union between a man and a woman. For several reasons it cannot, however, serve as an argument for the Court's decision in 1986 that in this context "a man" and "a woman" can be understood only as a man and a woman in the biological sense.

The first reason is that it cannot be assumed that the stated purpose of the right to marry (to protect marriage as the basis of the family) can serve as a basis for its delimitation: under Article 12 (art. 12) it would certainly not be permissible for a member State to provide that only those who can prove their ability to procreate are allowed to marry [35].

The second reason is that it is hardly compatible with the modern, open and pragmatic construction of the concept of "family life" which has evolved in the Court's case-law since its Marckx judgment [36] to base the interpretation of Article 12 (art. 12) merely on the traditional view according to which marriage was the pivot of a closed system of family law. On the contrary, that evolution calls for a more functional approach to Article 12 (art. 12) as well [37], an approach which takes into consideration the factual conditions of modern life.

4.5.1 So much for the arguments on which the Court based its restrictive interpretation of

Article 12 (art. 12). Even if those arguments may be open to criticism, it remains, of course, possible that the Court's interpretation nevertheless has to be accepted.

It is true that Article 12 (art. 12), by speaking of "men and women", clearly indicates that marriage is the union of two persons of opposite sex. That does not necessarily mean, however, that "sex" in this context must be interpreted as "biological sex". Nor can it be maintained that "tradition" implies that "sex" in this context can only mean "the biological sexual constitution of an individual which is fixed at birth". That interpretation has, therefore, to be supported by further arguments, the more so as it is far from self-evident that, when seeking a definition of what is meant by "sex" in this context, one should choose one which depends on the situation obtaining when the would-be spouses were born, rather than when they want to marry, especially as the sexual condition of an individual is determined by several factors (viz. chromosomal factors; gonadal factors; genital factors; psychological factors) nearly all of which are (more or less) capable of changing [38].

Only the chromosomal factor is not. But why should this particular factor be decisive? Why should an individual who - although having since birth the chromosomes of a male [39] - at the moment he wants to marry no longer has testes or a penis but, on the contrary, shows all the (outward) genital and psychological factors of a female (and who is socially accepted as such), nevertheless, for the purpose of determining whether that individual should be allowed to marry a man, be deemed to be still a man himself? To attach so much weight to the chromosomal factor requires further explanation. That explanation, moreover, should be based on at least one relevant characteristic of marriage, for only then could it serve as a legal justification for the differentiation between the individual just described and an individual who is similar in all respects, save for having since birth the chromosomes of a female. The Court's judgment does not offer such an explanation. Neither does the judgment in Corbett v. Corbett, which the Court seems to have espoused.

Even if, for the sake of argument, one were to adopt Mr Justice Ormrod's view that "sex is clearly an essential determinant of the relationship called marriage", as well as his opinion that this is so because "the capacity for natural heterosexual intercourse" is essential for marriage, one cannot but treat both individuals referred to on the same footing as regards their fitness to marry a man: both are, as far as heterosexual intercourse is concerned, capable of performing the essential role of a woman [40]; for that role chromosomes are completely irrelevant [41].

In other words, it is arbitrary and unreasonable in this context to ignore successful gender reassignment surgery and to retain the criterion of biological sex.

4.5.2 This is all the more so because Mr Justice Ormrod's arguments are clearly unacceptable. Marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not "essential" for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. That is because marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties (including the authorities [42]); it is a societal bond, in that married people (as one learned writer put it) "represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence"; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at

least as essential as the physical one.

Article 12 (art. 12) of the Convention protects the right of all men and women (of marriageable age) to enter into that union and therefore the definition of what is meant by "men and women" in this context should take into account all these features of marriage.

4.6 The above considerations serve to demonstrate why I am convinced that in its Rees judgment the Court erred in holding that the right to marry guaranteed by Article 12 (art. 12) (only) refers to the traditional marriage between persons of opposite biological sex.

They also show why I think that for the purposes of Article 12 (art. 12) a transsexual, after successful gender reassignment surgery, should be deemed to belong to the sex he has chosen and therefore should have the right to marry a person of the sex opposite to his chosen one.

Finally they explain why I think that, as far as transsexuals who have undergone successful gender reassignment surgery are concerned, the effect of the legal impediment in the United Kingdom to the marriage of persons who are not of the opposite biological sex is to reduce the right to marry - which is guaranteed to these persons also - to such an extent that the very essence of that right is impaired.

5. Why the court in the Cossey case should have overruled its decision in the Rees case

5.1 In paragraph 2 of my separate opinion in the Brozicek case [43] I indicated what seem to me the most important aspects to take into account when a court - like the European Court of Human Rights in the present case - is considering overruling a previous decision.

5.2 A court should, I said, overrule only if it is convinced "that the new doctrine is clearly the better law". This condition is, of course, based on the idea that in principle legal certainty and consistency require that a court follows its own established case-law: it should therefore overrule only when the new doctrine is clearly better than the old one. Thus far I am in agreement with the majority (see paragraph 35 of the judgment).

It follows from the foregoing paragraphs that, in my opinion, this first condition was certainly met in the present case: I hope to have made it clear why I do not hesitate to say that the Rees judgment was wrong.

I may add that the judgment has in fact been criticised by a number of learned writers [44]. The Commission too was not convinced and its Delegate said at the hearing that it had referred the Cossey case to the Court in the hope of inducing it to overrule its Rees judgment.

5.3. There were, moreover, two further aspects which, in my opinion, militated strongly in favour of overruling on this occasion.

The first is that in the present case the Court was not invited to depart from a body of established case-law, but to overrule one single judgment, albeit one which was rather recent and nearly unanimous. This made overruling easier. The case for doing so was, furthermore, considerably strengthened by the fact that only a single judgment was concerned because

confirming that judgment would bar overruling for a long time to come.

The second argument which pleaded for overruling was that in this particular case it could not be said that overruling would be unjust by creating a disparity between the party who lost the first case and the one who would win the second: the fact that in both cases the United Kingdom is the defendant ensures that overruling would benefit not only Miss Cossey but Mr Rees as well. This is quite apart from the question whether, when fundamental rights of an individual are at stake, the Court of Human Rights is ever entitled to go against its convictions on the mere ground of following a precedent: where violation of a human right is at stake, should not legal certainty always give way?

5.4 The latter question can be left unanswered in this case, but it brings me to a possible argument against overruling the Rees judgment, namely that such a course would have come as a disagreeable surprise to those Governments which, like that of the United Kingdom, have felt absolved by that judgment from changing their legal system as regards transsexuals. I do not think, however, that this confidence deserved protection, if only because the Court, in paragraph 47 of its Rees judgment, had clearly indicated both that it had not yet spoken its last word on the matter and that scientific or societal developments might call for a different assessment.

5.5 This raises, of course, the question whether overruling was also justified by such developments.

It is common ground that there are no scientific developments which could warrant a different judgment in the Cossey case. But I think that one cannot say the same of societal developments.

There is an ever-growing awareness of the essential importance of everyone's identity and of recognising the manifold differences between individuals that flow therefrom. With that goes a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered "normal". With that also goes a markedly increased recognition of the importance of privacy, in the sense of being left alone and having the possibility of living one's own life as one chooses. These tendencies are certainly not new, but I have a feeling that they have come more into the open especially in recent years.

This kind of feeling is, of course, hardly capable of proof. Nevertheless, there are some facts which may at least convincingly illustrate what I mean.

I recall that the Court presumably based its Rees judgment on the assumption that only five member States had already, in one way or another, made it possible for post-operative transsexuals to have their new sexual identity fully recognised by the law (see paragraph 2.6.2 above). It is immaterial whether that assumption was then correct, for what matters is that at present it clearly is no longer so.

In addition to the Netherlands, whose legislation, apparently, was not taken into account in the Rees judgment, one may today identify as States which make provision for the full legal recognition of the new sexual identity of post-operative transsexuals [45]: Denmark, Finland, Luxemburg, Spain and Turkey; moreover the case-law in some other States (Belgium, France [46] and Portugal) has nearly achieved the same result. Today therefore legal recognition of

gender reassignment is somehow made possible in fourteen member States [47].

This shows, I think, an important "societal development", viz. a marked increase in public acceptance of transsexualism and a clearly wider sharing of the convictions set forth in section 2 of this opinion. This conclusion is strongly reinforced by the fact that both the Parliamentary Assembly of the Council of Europe and the European Parliament have recently adopted resolutions recommending that reclassification of the sex of a post-operative transsexual be made legally possible [48].

5.6.1 The Court does not deny these societal developments. But it denies that they warrant the conclusion that present-day conditions demand that, as the report of the European Parliament had put it:

"[O]nce the sex change process has been completed, it must be legally recognised."

It remains to be seen on what arguments the Court based this refusal.

5.6.2. The reason for the Court's refusal to accept the societal developments as material is given in paragraph 40 of the judgment: in the Court's opinion there is still "little common ground" between the member States, because of the "diversity of practice" revealed by the reports accompanying the above-mentioned resolutions. The Court adds that these resolutions "seek to encourage the harmonisation of laws and practices in this field".

It is true, of course, that the manner in which the various member States where a post-operative transsexual's new sexual identity is today legally recognised have regulated that recognition differs considerably from State to State. As I said before (see paragraph 3.6.5 above), there is room here for a margin of appreciation and for differences of detail. But that does not warrant the conclusion that there is still "little common ground" between these States. What is essential is that today legal recognition is somehow made possible in a considerable number of member States.

Both the Parliamentary Assembly of the Council of Europe and the European Parliament were well aware that legal recognition is one of the central issues raised by transsexualism. In their resolutions they did not ask for harmonisation of laws but for the enactment of laws which make such legal recognition possible. They did so because they both considered that, as the Parliamentary Assembly put it,

"the legislation of many member states is seriously deficient in this area and does not permit transsexuals, particularly those who have undergone an operation, to have civil status amendments made …".

Both recommended that those deficiencies be remedied by the enactment of provisions on a procedure for transsexuals to change sex, which inter alia should offer - as a minimum, the European Parliament added - legal recognition.

5.6.3 One cannot but conclude that the reasons given for the Court's refusal to accept the societal developments as material are based on a distortion of the real state of affairs and are therefore far from convincing.

The explanation may be that behind these explicit arguments lie hidden policy arguments. From judgments such as those in the Marckx case, the Dudgeon case, the Rees case, the case of F.v. Switzerland and the Cossey case [49] one gets the impression that the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously when confronted with an evolution which has reached completion in some member States, is still in progress in others but has seemingly left yet others untouched. In such cases the Court's policy seems to be to adapt its interpretation to the relevant societal change only if almost all member States have adopted the new ideas.

In my opinion this caution is in principle not consistent with the Court's mission to protect the individual against the collectivity and to do so by elaborating common standards (see paragraph 3.6.3 above). Caution is indeed called for, but in another direction: if a collectivity oppresses an individual because it does not want to recognise societal changes, the Court should take great care not to yield too readily to arguments based on a country's cultural and historical particularities.

5.7 For all these reasons I feel convinced that the Court should have overruled its Rees judgment and should have held that the United Kingdom had violated both Article 8 and Article 12 (art. 8, art. 12) of the Convention.

Notes

1. See paragraph 35 of its judgment in the Cossey case (hereinafter: "the judgment").

2. A fight which not infrequently is carried even as far as the Convention institutions!

   Apart from its decisions in the Van Oosterwijck, the Rees and the Cossey cases, the Commission has declared admissible applications nos. 6699/74 [X v. Federal Republic of Germany, decision of 15.12.1977, Decisions and Reports no. 11, p. 16; report of 11.10.1979, Decisions and Reports no. 17, p. 21]; 9420/81 [38 Transsexuals v. Italy, decision of 5.10.1982, unpublished]; 10622/83 [J. v. the United Kingdom, decision of 5.7.1985]; 11095/84 [W. v. the United Kingdom, decision of 10.10.1985] and 13343/87 [decision of 13.2.1990]. See also the Commission's report in the Rees case, paragraph 41.

   On the Commission's case-law, see, amongst others: M.R. Will, in Gedächtnisschrift für L.-J. Constantinesco, pp. 939 et seq. (Carl Heymanns Verlag (Köln), 1983); S. Breitenmoser, Der Schutz der Privatsphäre gemäss Art. 8 EMRK (1986), pp. 137 et seq. (Helbing Lichtenhahn (Basel), 1986).

3. [1970] 2 W.L.R. 1306, 1324; [1970] 2 All.E.R. 33, 48 (P.D.A.).

4. See, for example, the rather unfeeling description of the respondent: "the pastiche of feminity was convincing"; or the harsh comment on "sexual intercourse, using the completely artificial cavity constructed by Dr …" as being "the reverse of ordinary and in no sense natural". See also: J. Taitz, Anglo-American Law Review, Vol. 15 (1986), pp. 144 et seq.

5. See, amongst others: D.A.R. Green, New Law Journal 1970, p. 210; B.v.D. van

Niekerk, South African Law Journal, Vol. 87 (1970), p. 239; D.K. Smith, Cornell Law Review, Vol. 56 (1970/1971), pp. 1005 et seq.; I. McColl Kennedy, Anglo-American Law Review, Vol. 2 (1973), pp. 114 et seq.; M.L. Lupton, South African Law Journal, Vol. 93 (1976), p. 385 (with reference to a South African decision following Corbett); R.J. Bailey, Australian Law Journal, Vol. 53 (1979), pp. 659 et seq. (with reference to an Australian decision following Corbett).

6. See, amongst others, the following decisions: Cour de Cassation: 16 December 1975, D. 1976, 397; 30 November 1983, D. 1984, 165; 3 March 1987 and 31 March 1987, D. 1987, 445 (France); HR 13 December 1973, NJ 1975, 130 and HR 3 January 1975, NJ 1975, 187 (Netherlands); BGH 21 September 1971, BGHZ 57, 63 (West Germany).

7. Van Oosterwijck judgment of 6 November 1980, Series A no. 40; Rees judgment of 17 October 1986, Series A no. 106; and Cossey judgment of 27 September 1990, Series A no. 184.

8. On 18 March 1986.

9. The United Kingdom Government accepted that 5 member States had introduced legislative or administrative measures to give recognition to a "change of sex"; counsel for Mr Rees mentioned 7 member States having done so.

10. In fact the Act was dated 24 April 1985. It is not clear why the Commission did not mention this Act in its report.

11. The Commission had mentioned that in Switzerland the courts recognise a change of sex and allow a corresponding entry in the birth register with effect ex nunc, and that in Norway change of sex is acknowledged by ministerial measures.

12. M.T. v. J.T. (1976) 2 F.L.R. 2247.

13. BVerfGE 49, 286.

14. Medical Law Review, Vol. 31 (1971), p. 235.

15. For example, when counsel said at the hearing:

"The applicant has already submitted that the disclosure of his birth certificate and his sexual identity before surgery, and the embarrassment that such disclosure causes, is only part of his complaint under Article 8 (art. 8). At the heart of the complaint is the very issue of the non-recognition of the identity itself."

It is important to stress that the same point was made on behalf of Mr Van Oosterwijck and of Miss Cossey: not only because this confirms what has been said in paragraphs 2.4 and 2.7 above, but also because this shows that my criticism of the Rees judgment, as far as it is based on this point, also holds good for the Cossey judgment.

16. In R.v.Tan and Others [1983] 1 Q.B. 1053; [1983] 2 All ER 12. See, for a critical appraisal of this decision, P.J. Pace, Criminal Law Review 1983, pp. 317 et seq.

17. See, for example, Steve Cohen and Others, The Law and Sexuality (1978), pp. 72 et seq.; Terrence Walton, NLY (1984) 34, no. 6159, pp. 937 et seq.; Alec Samuels,

Med. Sci. Law (1984) 24, no. 3, pp. 163 et seq.

18. In the judgment the Court mostly speaks of "English law" instead of "United Kingdom law". I prefer, however, to follow the terminology it used in its Rees judgment, because what is at stake in these cases is the United Kingdom's responsibility with regard to the relevant part of its law, and in this respect it is immaterial whether English law is concerned or one of the other bodies of law in force within the United Kingdom.

19. For the sake of brevity, the system which, for all questions where sex is legally relevant, holds that only Biological Sex is Decisive, and which, consequently, refuses to recognise for legal purposes the new sexual identity which a post-operative transsexual has acquired will hereinafter be referred to as the BSD-system.

20. The same holds good for Miss Cossey: it is simply not correct to say, as the Court does in paragraph 36 of its judgment, that what she was arguing was "not that the State should abstain from acting but rather that it should take steps to modify its existing system". What she was arguing was essentially that she had to live under a system which was inconsistent with her rights under the Convention and it would seem obvious that an applicant who alleges that a law or a legal system is inconsistent with the Convention can only be understood as arguing primarily that the State should have abstained from enacting that law and at any rate should not have maintained it. This underlines, moreover, that it is at least unfortunate to use the way in which the applicant has formulated his grievances as an argument when explaining why a positive rather than a negative obligation of the State is at stake!

21. Judgment of 13 June 1979, Series A no. 31, p. 13, para. 27; judgment of 22 October 1981, Series A no. 45, p. 18, para. 41; judgment of 2 August 1984, Series A no. 82, p. 31, para. 64; judgment of 26 October 1988, Series A no. 142, p. 18, para. 38.

22. What these judgments have in common is that they demonstrate that the mere existence of a certain legal system may in itself amount to an interference, apart from any measures actually taken.

23. See also the analysis of the Commission in its report in the Van Oosterwijck case, paragraphs 50-52 (Series B no. 36, pp. 25-26), to which analysis reference was made in its report in the Rees case, paragraph 41.

24. See, mutatis mutandis, the Autronic AG judgment of 22 May 1990, Series A no. 178, pp. 26-28, paras. 60-63.

25. See also in this sense: M-A. Eissen in his contribution to: Conseil constitutionnel et Cour européenne des Droits de l'Homme, p. 141 (Editions STH (Paris), 1990).

26. See paragraph 35 of the judgment.

27. See paragraph 40 of the judgment.

28. See the Rees judgment, pp. 14-15, para. 36..

29. See, mutatis mutandis, the Olsson judgment of 24 March 1988, Series A no. 130, p. 37, para. 82.

30. What has been said in paragraph 3.7 relieves me from going into paragraphs 42-46

of the Rees judgment. But I cannot help noting my disagreement with the last sentence of paragraph 43 where the Court accepts one of the United Kingdom's arguments for not changing its birth-registration system: a change as demanded by Mr Rees - who had asked that annotations in the register recognising a new sexual identity should be kept secret - would, the Government argued, not take into account the position of third parties (e.g. life insurance companies) "in that they would be deprived of information which they had a legitimate interest to receive".

Of course insurers may have a legitimate interest to know that a proposer has had gender reassignment surgery, but so they have when he has undergone other kinds of drastic medical operations. Insurance law has its own ways and means of protecting that interest, mostly by obliging the proposer to inform the insurer of material facts and by empowering the insurer to nullify the contract if it appears that the insured has withheld such vital information. Nobody would imagine protecting insurers by insisting that everyone enters all medical treatment in a public register. Such third-party interests cannot justify not protecting the privacy of post-operative transsexuals.

31. See the opinion of Mr Frowein and others in paragraph 54 of the Commission's report in the Rees case.

32. See already the Commission's admissibility decision, Decisions and Reports no. 36, p. 87.

33. As a rule transsexuals are heterosexual; thus a female-to-male transsexual is attracted by heterosexual females. See W. Eicher, Transsexualismus (1984), p. 167 (Gustav Fischer (Stuttgart & New York), 1984).

34. From paragraphs 35 and 46 of the judgment it appears that this question should be answered in the negative. Paragraph 35 makes no exception as regards the Court's interpretation of Article 12 (art. 12) and paragraph 46 makes it clear that the Court would eventually be prepared to assume that a more liberal interpretation is "in line with present-day conditions", albeit only when there is evidence that "the traditional concept of marriage" has been generally abandoned.

35. See the Commission's report in the Van Oosterwijck case, paragraph 59 (Series B no. 36, p. 28).

36. Judgment of 13 June 1979, Series A no. 31.

37. But for paragraph 46 of its present judgment (see note 34), a first indication of such an approach in the Court's case-law might, perhaps, have been discerned in its F. v. Switzerland judgment of 18 December 1987 (Series A no. 128): anyhow, there the Court was prepared to verify whether national law is compatible with Article 12 (art. 12) to an extent that seems considerably greater than in the Rees case.

38. It is true that the gonadal factor cannot (yet) be changed completely, viz. in the sense of a biological man being made capable of bearing, or a biological woman of begetting a child, but it can be changed at least in the sense that it may be eliminated.

39. I take the example of a post-operative male-to-female transsexual because that is the case of the present applicant. I am, however, not quite sure that the argument also

holds good for a post-operative female-to-male transsexual, such as Mr Rees, because it is not quite certain that such a post-operative transsexual is, as far as heterosexual intercourse is concerned, capable of performing the essential role of a man. See, on the one hand, W. Eicher, Transsexualismus (1984), p. 168, who seems to imply that he is not, and, on the other hand, J. Taitz, Anglo-American Law Review, Vol. 15 (1986), p. 144, who very firmly declares that he is well capable of having sexual intercourse as a man.

40. Mr Justice Ormrod apparently thought otherwise (see note 4 above), but wrongly so: see, amongst others: D.K. Smith, Cornell Law Review, Vol. 56 (1970/1971), p. 970; W. Eicher, Transsexualismus (1984), p. 167.

41. See the following quotation from a letter from H. Benjamin (author of: Clinical Aspects of Transsexualism in the male and the female (1963)), given by Smith (see note 40), p. 966:

"The 'chromosomal sex' is merely of abstract, scientific and theoretical interest in the case of transsexuals. Nobody can see an XX or XY constellation. To insist that a person must live and be legally classified in accordance with his or her chromosomal sex violates common sense as well as humanity. It reduces science to a mere technicality and an absurd one at that."

42. In the Rees case counsel for the applicant said at the Court's hearing:

"Marriage is a fundamental institution of society and a wide variety of laws of social regulation turn upon it. The right to sponsor a spouse to come into the country, the right to succeed to a tenancy in either private or public ownership, the right to different tax allowances, differing rights on succession of property are but some of the examples of how the law treats a relationship between a man and a woman who are married wholly differently from if they were not married."

43. Judgment of 19 December 1989, Series A no. 167.

44. See, amongst others, Note P.R. Journal du Droit International 1987, p. 799; A. Drzemczewski and C. Warbrick, Yearbook of European Law, Vol. 6 (1986), pp. 429 et seq.; Zwaak, NJCM-Bulletin, Vol. 12 (1987), pp. 552 et seq.; Jacot-Guillarmod, Méthodes d'interprétation comparées, p. 123 (Editions Universitaires (Fribourg, Suisse), 1989); E.A. Alkema, note NJ 1990, 322; P.J. van Dijk, NJB 1990, p. 813.

45. Full recognition includes, of course, recognition for the purposes of marriage, so that these States permit post-operative transsexuals to marry a member of their biological sex.

46. During the Court's first deliberations I included France in this list, basing myself on reports of the European Parliament referred to in paragraph 40 of the judgment and on the excellent article of M. Gobert, Le transsexualisme, fin ou commencement, La Semaine Juridique 1988, pp. 3361 et seq. Since then the Cour de Cassation has handed down its decision of 21 March 1990 (concerning the same person who was the interested party in its above-mentioned decision of 30 November 1983). As this decision seems to be confined to the rejection of the argument based on Article 8 (art. 8) of the Convention, I do not, for the moment, feel that it obliges me to strike France off the list.

47. The growing number of States which provide for legal recognition of gender reassignment, and the ever-increasing social mobility within the member States of the EEC make it all the more necessary for the United Kingdom to abandon its BSD-system: the maintenance of that system is, if possible, still more harsh with regard to foreign post-operative transsexuals living in the United Kingdom who are nationals from such States.

48. See paragraph 40 of the judgment.

49. See the Marckx judgment, p. 19, para. 41 ("the great majority of the member States of the Council of Europe"); the Dudgeon judgment, pp. 20-21, para. 49, and pp. 23-24, para. 60 ("the great majority of the member States"); the Rees judgment, p. 15, para. 37 ("little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage"); the F.v. Switzerland judgment, p. 16, para. 33; the Cossey judgment, para. 46.

Joint dissenting opinion of Judges Palm, Foighel and Pekkanen

1. We agree with the majority that the relevant facts and issues to be decided in the Cossey case are similar to those in the Rees case. We have, however, arrived at conclusions which differ from those of the majority. Our reasons are the following.

2. In paragraph 37 of its Rees judgment the European Court of Human Rights stated with regard to Article 8 (art. 8) that in this area "the law appears to be in a transitional stage". It continued, in paragraph 47, by saying that "(t)he need for appropriate legal measures should be kept under review having regard particularly to scientific and societal developments".

This is an unusual but important and relevant statement. It underlined the fact that the question of the status of transsexuals is one where legal solutions necessarily follow medical, social and moral developments in society. It also indicated to the Contracting States that the Rees judgment might not be the Court's last word on the subject and that it might be overruled. The majority in the Rees case thus reserved its right to reconsider its opinion in the light of societal developments. These considerations should also, in our opinion, be applied in the interpretation of Article 12 (art. 12).

For these reasons it is not necessary, from the point of view of the general consistency and homogeneity of this Court's practice, to examine the Cossey case solely by reference to the decision in the Rees case.

3. Miss Cossey, like Mr Rees, belongs to that small group of people who psychologically are firmly convinced that they belong to the sex opposite to their physical sex. Miss Cossey underwent gender reassignment surgery in 1974 and she has since lived a full life as a female both psychologically and physically. She seeks full legal recognition of her new, current sexual identity. Transsexuals have, however, not been very successful in their demands that their new status be accepted by the legislature and by the courts.

This negative attitude towards transsexuals is based on deeply rooted moral and ethical

notions which, nevertheless, seem to be slowly changing in European societies. There is a growing awareness of the importance of each person's own identity and of the need to tolerate and accept the differences between individual human beings. Furthermore, the right to privacy and the right to live, as far as possible, one's own life undisturbed are increasingly accepted.

These new, more tolerant attitudes are also reflected in modern legislation as well as administrative and court practices. Several European States have accepted the possibility of recognising a change of sex on the part of transsexuals and have, subject to certain conditions, acknowledged their right to marry (Sweden 1972, Denmark 1973-75, Federal Republic of Germany 1980, Italy 1982 and the Netherlands 1985). In some States the same result has been achieved through administrative or court practice (e.g. Finland and Norway). In addition, rectification of the birth certificate following a change of sex can be obtained in some European countries (e.g. Belgium, Luxemburg, Spain and Turkey). This comprises in some States also the right to marry.

In this context it is important to note that in 1989 a stand on the question of the rights of transsexuals was taken both by the Parliamentary Assembly of the Council of Europe (Recommendation 1117/1989) and by the European Parliament (Resolution of 12 September 1989, OJ no. C 256, 19.10.1989, p. 33). The European Parliament called on the Member States "to enact provisions on transsexuals' right to change sex by endocrinological, plastic surgery, and cosmetic treatment, on the procedure, and banning discrimination against them". The procedure should offer, inter alia, legal recognition, change of first name, and change of sex on birth certificates and identity documents. The Recommendation of the Parliamentary Assembly contains similar demands. The decisions of these representative organs clearly indicate that, according to prevailing public opinion, transsexuals should have the right to have their new sexual identity fully recognised by the law.

4. With regard to the alleged violation of Article 8 (art. 8) of the Convention, the central point is that the register of births records particulars, such as the sex of the child, as at the time of the birth and cannot under English law be changed to reflect the new sex of a post-operative transsexual. As a consequence of this, Miss Cossey is forced to reveal intimate personal details whenever a birth certificate is requested, for instance by certain institutions and employers. These situations are painful and distressing for her. She is obliged to choose between either hiding her new sexual identity, with all the possible consequences, or revealing her new sex and facing humiliating and even hostile reactions. In these and similar situations Miss Cossey's right to respect for her private life is, in our opinion, violated. What is more, the present English system relating to birth certificates constitutes a continuous and direct interference in the private life of Miss Cossey.

The retention of that system cannot, in our opinion, satisfy the requirements of Article 8 para. 2 (art. 8-2) of the Convention. It is merely a question of administrative procedure which, as the examples from other democratic societies clearly show, can be arranged in several different ways so as not to violate the rights of transsexuals.

5. When drafting Article 12 (art. 12) of the Convention the draftsmen probably had in mind the traditional marriage between persons of opposite biological sex as the Court stated in paragraph 49 of its Rees judgment. However, transsexualism was not at that time a legal problem, so that it cannot be assumed that the intention was to deny transsexuals the right to

marry. Moreover, as we have tried to show above, there have been significant changes in public opinion as regards the full legal recognition of transsexualism. In view of the dynamic interpretation of the Convention followed by the Court, these social and moral developments should also be taken into account in the interpretation of Article 12 (art. 12).

Gender reassignment surgery does not change a person's biological sex. It is impossible for Miss Cossey to bear a child. Yet, in all other respects, both psychological and physical, she is a woman and has lived as such for years.

The fact that a transsexual is unable to procreate cannot, however, be decisive. There are many men and women who cannot have children but, in spite of this, they unquestionably have the right to marry. Ability to procreate is not and cannot be a prerequisite for marriage.

The only argument left against allowing Miss Cossey to marry a man is the fact that biologically she is considered not to be a woman. But neither is she a man, after the medical treatment and surgery. She falls somewhere between the sexes. In this situation a choice must be made and the only humane solution is to respect the objective fact that, after the surgical and medical treatment which Miss Cossey has undergone and which was based on her firm conviction that she is a woman, Miss Cossey is psychologically and physically a member of the female sex and socially accepted as such.

It should also be borne in mind that Miss Cossey has no possibility of marrying unless she is allowed to marry a man as she wishes. It would be impossible, both psychologically and physically, for her to marry a woman. There would certainly also be doubts as to the legality of a marriage of this kind.

6. For these reasons we are of the opinion that in the present case there is a violation of Articles 8 and 12 (art. 8, art. 12) of the Convention.