Constitutional developments

**Developments Correspondents**
Daphne Barak-Erez (Israel), Daniel Bonilla (Colombia), Christina Cerna (Inter-American Commission on Human Rights), Rodrigo Correa (Chile), Rohan Edrisinha (Sri Lanka), Mark Elliott (United Kingdom), Simon Evans (Australia/New Zealand), Tania Groppi (Italy), Susi Dwi Harijanti (Indonesia), Christine Langenfeld (Germany), Hector Lopez Bofill (Spain), Jibong Lim (Korea), Shigenori Matsui (Japan), Abdelaziz Nouaydi (Morocco), Wistano Orozco (Mexico), Anashri Pillay (South Africa), Xavier Philippe (France), Beate Rudolf (European Union/European Court of Human Rights), Roberto Saba (Argentina), David Schneiderman (Canada), Benny Tai (China/Hong Kong), Caroline Taube (Scandinavia/Baltic States), Li-ann Thio (Singapore), Alexei Trochev (Russia/CIS), Monica Twesiime (Uganda), Renata Uitz (Hungary), Jan Winczorek (Poland)

**European Court of Human Rights: Legal status of postoperative transsexuals**

**Beate Rudolf* **

*European Convention on Human Rights—right to respect for private life—right to marriage—legal status of postoperative transsexuals—common European standards—autonomous interpretation*

In *Christine Goodwin v. United Kingdom* and *I. v. United Kingdom*, two—largely identical—landmark decisions, the European Court of Human Rights unanimously held that the United Kingdom had violated the right to respect for private life (article 8) and the right to marry (article 12) in not legally recognizing a postoperative transsexual as belonging to her new sex. This is a surprising turnabout, given that the court had found no such violation during

* Lise-Meitner-Fellow at Heinrich-Heine University of Düsseldorf, Germany, and S.J.D. candidate, Tulane Law School, New Orleans, United States

1 Grand Chamber [GC] judgments of July 11, 2002 (applications nos. 28957/95 and 25680/94), n.y.r., available at http://hudoc.echr.coe.int [hereinafter Goodwin judgment and I. judgment, respectively].

the previous sixteen years, including as recently as four years earlier. Three considerations were decisive: an “international trend” toward legal recognition of the new sexual identity of a postoperative transsexual, and the concept of personal autonomy as, inter alia, the right to establish one’s personal identity.

The applicants in both cases had undergone gender-reassignment surgery and lived in society as females, although they continued to be considered male for legal purposes. The reason for this legal distinction is that birth certificates are based on biological criteria and, therefore, cannot be changed after an operation. The same method of determining a person’s sex is the reason why postoperative transsexuals cannot legally marry a person of the new opposite sex. The first applicant, Christine Goodwin, complained that she had to pay contributions to the National Insurance (NI) until the age of sixty-five. Had she been recognized as a woman, the obligation to pay these contributions would have ended for her at the age of sixty. She had to make special arrangements for these payments to prevent her employer from knowing about her sex change. However, her employer had been able to trace her former identity because she kept the same NI number that she had as a man. She also claimed that harassment had begun at her workplace. The second applicant (I.), a dental nurse, complained that she was unable to obtain admittance to a nursing course, or to apply for a job or student loan, without having to reveal her sex change. In all these cases, she would have had to present her birth certificate.

According to the court’s long-standing case law, the “right to respect for (one’s) private life,” as contained in article 8, not only encompasses a “negative obligation” on the part of the state, i.e., the obligation to refrain from interferences, but also a “positive obligation,” i.e., the obligation to take protective measures. Yet, the contracting states have a wide margin of appreciation as to the means of fulfilling their obligation under this provision. The court’s control is limited to finding whether the impugned domestic regulations strike a fair balance between the applicants’ rights and the public interest.

In all earlier cases concerning the United Kingdom, this wide margin of appreciation caused the court to find that the government was not obligated to alter the existing system for the registration of births. In the two cases under

---


4 Goodwin judgment, ¶¶ 85, 90, and I. judgment, ¶¶ 65, 70.


discussion, the court changed its assessment. It first noted that there was “a serious interference” with private life where “domestic law conflicts with an important aspect of personal identity.”

The court considered that this situation may cause transsexual persons to experience feelings of “vulnerability, humiliation and anxiety.” The fact that the National Health Service (NHS) paid for the gender-reassignment operation was a further factor weighing in favor of full legal recognition of postoperative transsexuals. It showed that the state recognized both the seriousness of a transsexual’s position, and the need to harmonize the transsexual’s feeling of belonging to a certain sex with the physical reality of the transsexual’s body.

The court considered the coherence of the administrative and legal practices within the domestic legal system to be an important factor in its assessment under article 8. Moreover, British courts and an interdepartmental working group of the government had found the present legal situation “unsatisfactory.”

In previous cases, the court had concluded that these considerations were outweighed by the scientific community’s continuing debate about the exact causes of transsexualism, the absence of a common European approach to dealing with the questions relating to transsexuals, and the impact of changes to the birth register. In the present cases, the court no longer found these factors decisive. Instead, it held that transsexualism was widely recognized as a medical condition, including in the U.K. and, consequently, the state of scientific knowledge about its origins was no longer a “determining consideration.” In addition, the commitment necessary for going through gender-reassignment treatment showed that the decision to change one’s sex was not capricious.

Furthermore, the court pointed to a dissenting opinion in a British judgment and an Australian decision finding it unconvincing that British law attached decisive relevance to chromosomes when determining a person’s sex. More importantly, the court stated that although a common European approach to the matter had not materialized since its last ruling in the area—there was

---


8 Id.

9 Goodwin judgment, ¶ 78, and I. judgment, ¶ 58.

10 Id.

11 Goodwin judgment, ¶ 79, and I. judgment, ¶ 59, both with reference to Bellinger v. Bellinger, 2001 EWCA Civ. 1140, cited in ¶¶ 52 and 35 of the judgments, respectively.

12 Goodwin judgment, ¶ 81, and I. judgment, ¶ 61.

13 Id.

still only an emerging consensus—it could look to the “clear trend...towards giving full legal recognition.” It further noted that the British system already allowed for exceptions to be made to the historical accuracy of the birth register, e.g., in cases of adoption, and, therefore, the relatively low number of transsexuals (2,000 to 5,000) would not be overly burdensome to include as an additional exception. These facts also weighed against a perceived need to uphold rigidly the historical truthfulness of the birth register. What conclusively tipped the balance in favor of the applicants was the consideration that personal autonomy is a value underlying article 8 and guiding its interpretation, and that it includes the “right to establish details of their identity as individual human beings.” The principle of personal autonomy, first recognized by the court less than three months earlier, derives its significance from its character as an emanation of human dignity.

With respect to the right to marry (article 12), the court reiterated its finding that the determination of a person’s sex should not be made solely on the basis of chromosomal factors. It held that the “very essence” of the applicants’ right to marry was infringed because they could not marry a person belonging to the opposite sex, as determined with respect to an applicant’s new gender. The court used two additional arguments. First, the right to marry under the new EU Charter of Fundamental Rights intentionally leaves out a reference to men and women. Second, the court emphasized that the right to

15 Sheffield, 1998-V REPORTS 2011, ¶ 35. Of thirty-seven contracting states examined, only four (including the United Kingdom) did not permit a change to be made to the birth register.

16 See Goodwin judgment, ¶¶ 56, 85, and I. judgment, ¶¶ 39, 65, referring to the statutory recognition of gender reassignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand, and forty-eight of the fifty states of the U.S.

17 Goodwin judgment, ¶ 87, and I. judgment, ¶ 67.

18 Goodwin judgment, ¶ 90, and I. judgment, ¶ 70.


20 Goodwin judgment, ¶ 100, and I. judgment, ¶ 90 and I. Judgement, ¶ 70.

21 The provision reads: “Men and women of a marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” ECHR, supra note 2, art. 12, 213 U.N.T.S. at 232.

22 Goodwin judgment, ¶ 100, and I. judgment, ¶ 80.

23 Goodwin judgment, ¶ 101, and I. judgment, ¶ 81.

24 2000 O.J. (C 364) 1. The relevant provision is article 9, which reads: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” On the legal status of the Charter, see Beate Rudolf, European Union, 1 INT’L J. CONST. L. (I·CON) 135 (2003).

25 Goodwin judgment, ¶ 100, and I. judgment, ¶ 80.
marry and the right to found a family are not connected in such a way that the inability to have a child could be regarded as, per se, depriving a couple of the right to marry. Therefore, the states cannot bar transsexuals from marrying a person of the (new) opposite sex at all, but may only keep their margin of appreciation when regulating the validity of a transsexual’s former marriage or the formalities of a future marriage.

The decisions are noteworthy for two reasons. First, they finally acknowledge the need of postoperative transsexuals for legal recognition of their acquired sex, and for their right to marry accordingly. Second, and on a more general level, the decisions mark an important step forward in the court’s autonomous interpretation of the human rights convention. Its new approach helped it to overcome precedents, to which the court is not formally bound, but from which it will depart only “with good reasons.” Purportedly, it found these reasons in “changing conditions” and the need to interpret the convention “in the light of present-day conditions.”

The real change, however, was not in the factual basis of the court’s assessment, but in the structure of the balancing process it used when determining whether a fair balance between the conflicting interests had been struck. First, it attributed a greater weight to the interference with the applicants’ rights than it had in earlier decisions. The court at last recognized the seriousness of this interference, whereas four years before it had denied such serious repercussions even in situations where the applicant had been publicly embarrassed by the forced disclosure of her sex change when appearing before a court. Second, it abandoned the view that medical knowledge about the causes of transsexualism was a “determining factor.” Third, it replaced the factor of a European standard with respect to the legal position of transsexuals with reference to an international trend. The fourth and fundamental change was in the burden of persuasion. In the previous case, the court looked at the frequency of consequences suffered from the law as it stood and asked whether these consequences “impinge to a disproportionate extent on [the applicants’] rights to respect for their private lives.”

---

26 Goodwin judgment, ¶ 98, and I. judgment, ¶ 78.
27 Goodwin judgment, ¶ 103, and I. judgment, ¶ 83.
30 Sheffield, 1998-V REPORTS 2011, ¶ 59. Only four of the seventeen judges deciding that case participated in the present decisions, two of them having belonged to the minority in 1998 (Wildhaber, Presiding J., and Palm, J.).
In the present cases, the question was whether a “concrete or substantial hardship or detriment to the public interest has been . . . demonstrated as likely to flow from any change to the status of transsexuals.” Thus, it became incumbent upon the state to show an overwhelming interest in preserving the conflict between law and social reality.

The underlying reason for these changes was the court’s consideration that the right to personal autonomy encompassed the right to establish the details of one’s own identity, including the harmonization of one’s sex and self-perceived gender. This fact rendered the consequences of the law serious, regardless of their frequency; the causes of transsexualism became unimportant; and it raised considerably the threshold for interference by the state. Simultaneously, the decision regarding personal autonomy, in this context, permitted the court to abandon the search for common European standards because their existence could only corroborate a preexisting standard inherent in the convention, and their nonexistence would be irrelevant in the face of such conventional standards. This development is commendable, since the prerequisites for a common European standard were obscure, as the previous case demonstrated. There, even a majority of thirty-three states out of thirty-seven was not enough. Looking only at the contracting states meant that a small number of them—or even a single state—could prevent the emergence of such a standard, thus depriving the convention of its effectiveness. The court could be bound to uphold a widely tolerated practice that is in breach of the convention. Therefore, instead of using mathematical formula, the better approach to an autonomous interpretation of the convention is to look to its inherent values. In the present context, the “discovery,” in earlier judgments, of personal autonomy as a guiding principle helps to shape the contours of the values underlying this provision, and thus permits a value-based autonomous interpretation of article 8.

12 Goodwin judgment, ¶ 91, and I. judgment, ¶ 71.


15 See also Jeanine Bucherer, Die Vereinbarkeit von Militärgerichten mit dem Recht auf ein Faires Verfahren [The Compatibility of Military Tribunals with the Right to a Fair Trial] (forthcoming 2003), and, less clearly, Franz Matscher, Methods of Interpretation of the Convention, in The European System for the Protection of Human Rights, supra note 33, at 63, 73.