

Sensible Policy, Excellent Practice: Challenging the ‘Common Sense’ of Legal Recognition for Transsexual People

Prof. Stephen Whittle, s.t.whittle@mmu.ac.uk

Whittle S (forthcoming) Sensible Policy, Excellent Practice: Challenging the ‘Common Sense’ of Legal Recognition for Transsexual People. In Andy Chiu Man-chung ‘Transforming the Law’, (2016) Red Corp. WanChai Road, Hong Kong

(Final Version)

1. Comparing the life of Trans People in HK to that in UK, prior to 2013

When I first visited Hong Kong (HK) in 1997, HK’s law took a very similar position to that in the United Kingdom (UK). UK law still looked to the 1971 English Court of Appeal case, Corbett v Corbett¹ in which Ormrod LJ had held that transsexual people were always to be regarded as members of the gender ascribed to them at birth. It did not matter how their family, friends, employers, or colleagues knew them, or what they wore; the law continued to ignore their new gender identities.²

Prejudice and discrimination were rife, and trans people in HK lived mostly marginal lives, struggling to raise the money needed to access basic health care, and other treatments such as beard removal. Even when they had undergone extensive gender reassignment treatments or surgeries, they were regarded as if still of the gender ascribed to them at birth. For example; a trans woman who was prosecuted for a crime would be prosecuted as a man, and if convicted, placed in a male prison. If she had previously led a private life where very few knew about her change of gender, on discovering a woman treated as a man by the court, the newspapers would exploit the story. Soon her neighbours, her employer, and her local shopkeepers would know her trans status. Even if acquitted, she would return home to find she had no job, no friends, and no apartment.

A mediation decision in 2004, by the HK Equal Opportunities Commission had resulted in HK’s trans community being able to have their name and gender altered on school leaving certificates, to facilitate access to employment.³ However, for most day-to-day activities, trans people in HK need to be able to request a change of name and gender marker on their Identity Card, Driving Licence and Passport. This has been possible since 1994, but for the request to be successful, then the person must be able to provide medical proof, which should indicate that they have completed all of the core gender reassignment surgeries available to change their primary sex characteristics. A (female to male) trans man must show there has been the removal of the uterus and ovaries, and the construction of a phallus resembling a penis; and a (male to female) trans woman must

¹ Corbett v Corbett [1971]

² This paper refers to Gender Identity – a person’s awareness of their own sense of gender, and Gender Role – the way a person presents their gender identity to the outside world, i.e. whether they are recognised by others as being a person who is a man (or woman) or who wants to be recognised as a man (or woman).

³ --,-- [2004] Hong Kong transsexual wins right to use female name, The Advocate, 14 Oct, acc. 21/10/2014, at <http://www.advocate.com/news/2004/10/15/hong-kong-transsexual-wins-right-use-female-name-14061>

show there has been the removal of the penis and testes, and the construction of a neo- vagina.⁴

Whilst gender reassignment surgery has been available in Hong Kong at the Princess Margaret Hospital since as far back as 1981, the number of surgeries performed each year are minimal, with Knott (2013) providing a table from the Hospital Authorities showing a maximum of 3 per gender group in each of the years between 2008 and 2013.⁵ This is a tiny drop in the ocean of people who are trans in Hong Kong. By comparison, the Gender Identity Clinic in London, which provides for a similar sized population group⁶ and which has been providing treatment since the late 1960s for trans people, is currently seeing 60 plus new patients each month. The London clinic receives over hundred new referrals each month, and currently has a patient population of almost 5000. Between eight and ten (male to female) transsexual women at the London clinic will receive genital reconstruction in any month, around one hundred patients each year. (Female to male) Transsexual men are referred to a specialist surgical team within another health service Trust, and again about one hundred will commence genital reconstruction surgery in any year.^{7, 8}

The HK requirement that individuals undergo gender reassignment surgery in order to obtain basic identity documents in their preferred gender is problematic. Gender reassignment surgery is no simple panacea, turning Robert to Roberta and vice versa during a quick stay in hospital.⁹ Whilst gender reassignment surgery rarely produces a fatality, aspects of these surgical procedures can and do go wrong. Even the most skilled of gender reassignment surgeons will confirm that these surgeries are as much an art as a science and most if frank will point out that there is no specialist training, nor are there any existing pre-surgical assessment standards, other than those ensuring the patient has gender dysphoria.¹⁰ Neither are there any post-surgical protocols for the care of patients. If there are complications with the surgical results, techniques for remedial care are not formally documented within the medical literature, because surgeons do not write up the results of their mistakes, and they would have to do that in order to admit having to develop techniques in response to the personal disasters their patient's experience. Generally, follow-up literature on transsexual people after genital surgery is very poor¹¹ Furthermore; about 50% of male to female and 20% of female to male transsexual people lose sexual sensation and the ability to orgasm after genital reconstruction surgery, and a small percentage have problems with pain and a lack of sensation, clearly a serious consequence for anyone.¹²

⁴ Winter, S (2014) Identity affirmed - Identity denied. Transgender people at the margins in Hong Kong, Equal Opportunities Commission, acc. 25/10/2014. At <http://www.eoc.org.hk/eoc/otherproject/lgbti/materials/SamWinter.pdf>

⁵ Knott (2013)

⁶ London: 8 million, Hong Kong 7.1 million – latest population figures

⁷ --, (2014a).

⁸ Genital reconstruction surgery for transsexual women is normally completed within one surgical procedure, whereas genital reconstruction surgery to create a phallus for transsexual men is far more complex, and will require anything between five and 10 different surgical procedures, normally performed over a period of two to three years.

⁹ Bowman and Goldberg [2006] pp 4-26

¹⁰ Coleman, et al. [2011]

¹¹ Day [2002] p13

¹² De Cuypere, et al. [2005] p 686

Notably gender reassignment surgery for trans men to create a phallus is still very much in its infancy, and extremely costly as it requires numerous surgical procedures.¹³ Though phalloplasty surgery has improved a great deal in recent years, most trans men, worldwide, will seek to have surgery to create a masculine chest but do not seek phalloplasty, citing cost, complexity, and variable results. Furthermore, many female partners of trans men do not see phalloplasty as essential, and would rather not have their trans partner working every hour to save money for a surgery which would not, in their opinion, greatly enhance their sexual life.¹⁴

Hong Kong is by no means unique in demanding gender reassignment surgery before identity documentation is re-issued, many other nation or federal states also make similar demands.¹⁵ The UK has extremely experienced gender reassignment surgeons but it is clear from the figures above that many transsexual people choose to forgo genital reconstruction surgery. That might be for medical or other health reasons, or because they have a disability,¹⁶ or simply because during the long wait for surgery, they discover they can live their life without these otherwise still problematic and demanding procedures. Consequently, the UK's Gender Recognition Act 2004 does not require a person to have undergone any medical or surgical procedures before they can obtain recognition for all legal purposes in their preferred gender role.

2. Being Trans in the UK

In the late 1980s, as in Hong Kong, trans people had no legal protection in European or UK law. They faced high levels of prejudice, persecution and violence throughout their daily lives, and would be discriminated against in their employment, or when accessing services and other facilities including housing and healthcare, or when buying goods. Until available gender reassignment, treatments could enable them to, successfully, 'pass' in their preferred gender role, their daily life experience was very poor.¹⁷ When, (and if) they could present themselves as being as if always a member of their preferred gender role, they would live with constant vigilance, and fear of discovery, so as to protect their personal history private, whenever possible.

In the 1980 and 90s trans people's levels of unemployment were unacceptably high.¹⁸ Obtaining gender reassignment healthcare was difficult, and poor practices of the gender reassignment healthcare that existed meant many would experience related chronic health problems.¹⁹ In other areas of health, doctors would refuse, or simply not offer treatments, leaving trans people with a lifetime legacy of ill health.²⁰ Trans people inevitably lived in the poorest housing stock, with the least housing security²¹, and their treatment at the hands of the courts, or in prison, was so unjust that trans people became amongst the most law abiding citizens of the

¹³ If paid for privately outside of the NHS system, current Phalloplasty cost in the UK, is £35-£40,000.

¹⁴ Whittle [2000] p 10

¹⁵ Whittle, Turner and Combs [2008]

¹⁶ Whittle, Burns, et al. [2000]

¹⁷ Whittle, Turner and Al-Alami [2007]

¹⁸ Whittle, New'isms': Transsexual People and Institutionalised Discrimination in Employment Law [1999]

¹⁹ Whittle, Respect and Equality: Transsexual and Transgender Rights [2002]

²⁰ Supra note 17

²¹ Supra note 15

UK.²²

Gender variant children and adolescents experienced high levels bullying and abuse from teachers as well as other children in schools. They were frequent victims of domestic violence from members of their own families – often their parents.²³ When older and living independently, they would fear leaving their homes because of high levels of transphobic violence in both their neighbourhoods and city centres.²⁴ In 1992, many trans people felt life was not worth leaving and serious attempted suicide levels were as high as 1 in 3, both under the age of 21 and again, after that age.²⁵ The only thing that reduced the consequent loss of life was when trans people finally accessed gender reassignment treatments, especially hormone therapy, and treatment for otherwise very visible secondary sexual characteristics.²⁶

3. Early Challenges to UK Law in the European Court of Human Rights

3.1 Rees v the UK Government [1986] ECHR²⁷

In the mid-1980s, Mark Rees A (female to male) trans man filed a case at the European Court of Human Rights. It alleged a contravention of his right to privacy and right to marry by the UK government. He argued, in relation to the European Convention on Human Rights that Article 8 afforded individuals “The Right to Privacy for one’s home and correspondence,” and that:

As the country’s legal system makes no provision for legally valid civil-status certificates, (transsexual) persons have on occasion to establish their identity by means of a birth certificate, which is either an authenticated copy of, or an extract from the birth register. The nature of this register, which furthermore is public, is that the certificates mention the biological sex, which the individuals had at the time of their birth.²⁸

However, the Court held that whilst Article 8 refers to a positive obligation with respect to a person’s private and family life:

In determining whether 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,²⁹

As such, the mere refusal (of the state) to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register cannot be considered as interferences.³⁰

²² Whittle and Little, *The Praxis and Politics of Policing: Problems Facing Transgender People* [2002]

²³ *Supra* note 15

²⁴ *Supra* note 17

²⁵ *Supra* note 17

²⁶ McNeil, et al. [2012]

²⁷ *Rees v UK* [1986]

²⁸ *Ibid* para 40

²⁹ *ibid* para 37

³⁰ *ibid* para 35

Rees also argued, in relation to Article 12 of the Convention, which affords individuals the Right to Marry and found a family, that whilst his birth certificate recorded him as female, though he was recognised as a man in all social situations, he was unable to marry a woman. The Court responded by saying:

... the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. ... Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right 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 is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.³¹

Consequently, The Court held by twelve votes to three there was no violation of Article 8, and by a unanimous vote that there was no violation of Article 12. In making its decision, the Court also used what is known as the 'Margin of Appreciation.' This allows the Court to evaluate what other contracting states to the Convention do in the same situation. At the time, they found little evidence to show that other countries provided a mechanism for the legal recognition of trans people, and there appeared to be no momentum within Europe for such a move.

Of note though, in the Court's decision was a set of fundamental misunderstandings as to what the applicant Rees was asking of them. The Court stated that Rees had "*also asked that the change, and the corresponding annotation (to the birth register) be kept secret from third parties*".³² This was not the case, Rees had never asked for secrecy. Following the wording of Article 8, he had merely asked that such a change be kept private; that is not available to the public. Rees was happy for it to be available to whichever government department might need the information, such as the Tax or Pensions offices, and if he had a partner he wished to marry he would tell them of his history and his current trans status.

3.2 **Cossey v the UK Government [1990] ECHR**³³

In 1990, the European Court of Human Rights heard the case of Cossey and the Trans community was more hopeful of a positive outcome. Caroline Cossey was a very successful and very attractive model, well known, and was engaged to marry her male partner. Furthermore, the Commission, which examined the case initially to determine its eligibility for hearing by the full Court, had held that whilst they agreed (as the Court had decided in Rees³⁴):

in principle, with the Court, that Article 12 refers to the traditional marriage between persons of opposite

³¹ Ibid para 49 and 50

³² Ibid para 43

³³ Cossey v UK [1990]

³⁴ Supra note 27 para 50

biological sex,³⁵ (and) is mainly concerned to protect marriage as the basis of the family,³⁶

they did not agree with the emphasis that had been placed by the Court in the Rees Judgement on the capacity to procreate being an essential part of marriage. As they pointed out many marriages were childless, some by choice and some by circumstance. The Commission held by 10 votes to 6, that there had been a violation of Article 12 as:

It is certified by a medical expert that the applicant is anatomically no longer of male sex. She has been living after the gender reassignment surgery as a woman and is socially accepted as such. In these circumstances it cannot, in the Commission's opinion, be maintained that for the purposes of Article 12 the applicant still has to be considered as being of male sex. The applicant must therefore have the right to conclude a marriage ... with the man she has chosen to be her husband.³⁷

Unfortunately, the Court disagreed with the Commission. Again using the Margin of Appreciation, they found no violation of Article 8 by ten votes to eight and no violation of Article 12 by fourteen votes to four, maintaining there was still a lack of movement towards the provision of marriage rights for transsexual people in the European states.

There were, however notable dissenting decisions in the case, in particular that of Judge Martens, who was:

of the opinion that the Court had indeed "cogent reasons" for departing from its Rees judgment.³⁸

Martens argued 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. 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.³⁹

Martens went on to argue that:

The principle which is ... 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. ... In doing so he goes through long, dangerous and painful medical treatment ... After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created.

This is a request which the law should refuse to grant only if it truly has compelling reasons for ... such a

³⁵ C v The United Kingdom [1989]

³⁶ Supra note 27 para 49

³⁷ Supra note 35 para 45 and 46

³⁸ Supra note 33 dissenting Judgment of Martens J., para 1.1

³⁹ Ibid Judgment of Martens J., para 2.4

refusal can only be qualified as cruel. But there are no such reasons.⁴⁰

In particular, Martens called attention to:

important "societal development", viz. a marked increase in public acceptance of transsexualism ... This conclusion is strongly reinforced by the fact that both the Parliamentary Assembly of the Council of Europe⁴¹ and the European Parliament⁴² have recently adopted resolutions recommending that reclassification of the sex of a post-operative transsexual be made legally possible.⁴³

The societal development argument raised by Martens was to prove important in the further transsexual applications that came before the Court in the 1990s, and was key to the gradual acceptance by the court of the Human Rights of transsexual people under Articles 8 and 12 of the Convention.

4. The UK Trans Campaign 1992-2001: Pressing for Change

After losing his case at the European Court of Human Rights, Mark Rees was determined to fight on, and in 1992, arranged for a few trans community members to meet the then Human Rights Barrister and Member of Parliament, Alex Carlile (now Lord Carlile of Berriew) in his office at the House of Commons. Alex Carlile explained to the group the things that might get someone in parliament to read about their issues, and possibly take their concerns seriously.⁴⁴

Immediately after the meeting, the group committed to starting a campaign to create change in the law, and founded the organisation Press for Change.⁴⁵ Their first task was to write to every Member of Parliament elected in the 1992 spring General Election, and seek their support changing the law. Using the national and local transgender support groups that existed, they also asked trans people to write to the constituency MP and explain the problems they experienced because of being trans.

With the support of members of Parliament who were sympathetic to the problems experienced by trans people in their constituencies, a Parliamentary Forum for transsexual people's concerns was created. In the Forum Press for Change Trans activists, clinicians from the Gender Identity Clinics, lawyers with trans clients, and Members of Parliament met every 2 to 3 months to address how to advance the campaign. The campaign took a three-stranded approach to creating change.

4.1 Changing Hearts and Minds

Firstly, Press for Change sought to create change in the public's understanding of transsexual people through social education. Historically, newspapers had been willing to pay large fees to obtain stories that facilitated the 'outing' of a transsexual person in the most sensational and lurid way possible. Press for Change activists

⁴⁰ *ibid* dissenting Judgment of Martens J., para 2.7

⁴¹ Council of Europe [1989]

⁴² European Parliament [1989]

⁴³ *Supra* note 33 dissenting Judgment of Martens J., para 5.5

⁴⁴ The author was one of the people to attend this meeting

⁴⁵ Press For Change www.pfc.org.uk

reversed the rules. They rang the newspapers and magazines, particularly those with social, health or women's pages and asked if they would like a story about a trans person. When asked how much they wanted, the reply was "For free ... but we expect a sympathetic article, and the person concerned wants to have a right to read before publication, to ensure their words are placed in context". It would take some reassurance that the subject of the article was not seeking a right to edit, but once an agreement was reached, the journalist would ask whom the subject was, and would be astonished to then hear the reply "It's me". Never before had trans people been willing to work with the press.

Two of the most high profile trans people to seek publicity in this way were Rachel Padman and Gwyneth Flower. In 1996, Rachel Padman, a physicist who was born male, was admitted as a Fellow of Newnham College, the last all women's college at Cambridge University. Founded in 1871, the College statutes required that all fellows be women. Dr Padman was open about her trans history to the appointment panel, but the interviewers did not appear to regard it as relevant. However, the following summer someone leaked her trans history and Dr Germaine Greer, feminist author and also a fellow at the college campaigned to have Dr Padman's appointment revoked. Greer who has written that she regards gender reassignment surgery as a form of mutilation, argued:

what is the point of having clear statutes if we just ignore them? We should have answered these questions before her appointment. We have to be true to the spirit of the original bequest to the college as a women's college for women ... frankly, we feel we have been made monkeys of.⁴⁶

Dr Padman decided to speak publicly about her past, not just in the college but also on several news programmes, and to the news media generally, saying:

If I thought there were any significant number of women in the college who were, despite what I perceived, unhappy about me being there because of my past, then I would resign. Obviously, I don't want to go because it would be losing something I love. It is an exhilarating feeling being surrounded by clever and intelligent women.⁴⁷

The college, its staff, fellows and students in the majority supported Dr Padman, and it was Dr Greer who resigned.

Gwyneth Flowers, a former army officer in the Royal Engineers had been appointed by the UK Government to lead the Y2K Information technology project, to ensure the continuation of computer systems after the millennium. Flowers had originally been 'outed' by a few tabloid newspapers in 1995 after she appeared on BBC's Question Time programme,⁴⁸ but in 2000 she chose to come out again in a major Sunday newspaper article;⁴⁹ an incredibly significant action for a person at the top of her profession, and so close to the centre of Government.

During this period, many transsexual people chose to talk to the press about their real lives, what it was like for

⁴⁶ Wilkins [1997]

⁴⁷ Ibid

⁴⁸ Ayres [1998]

⁴⁹ Mills [2000]

them, their families and their partners to experience the transition of a family member, and their experiences of prejudice and discrimination particularly in the workplace. During the period 1992 to 1998, the British Press wrote millions of words about transsexual people and gradually the ‘common sense ‘sex-change sexual pervert’ discourse’ was turned on its head, and trans people became quite ordinary men and women within every walk of life in British society.

4.2 Effective Government Lobbying.

Secondly, Press for Change sought to change the law using the process of lobbying parliament. Throughout the 1990s, Press for Change activists worked to create dialogue with Government. The Conservative Government (1992-1995) made it quite clear that they thought any proposal for recognising the change of gender of transsexual people was a move too far. In 1997, with the election of a Labour Government, after 20 years of Conservative rule, activists were much more hopeful. Good relationships had been built at constituency level with many trans people meeting their local Labour MP and becoming volunteers helping in the 1997 election campaign. However, new Governments have plenty to do, and there did not seem space in which to raise the issues.

Earlier in 1996, Alex Carlile won the Private Member’s Ballot, which meant he could bring a new Bill before Parliament. He chose to bring the Gender Identity (Registration and Civil Status) Bill 1996.⁵⁰ The Bill was drafted by the solicitor; Terence Walton, who had acted for the transsexual woman April Ashely, the applicant in Corbett v Corbett.⁵¹ Thankfully, as far as Press for Change was concerned, a Private Member’s Bill would rarely be passed. Walton was very much out of touch with the transsexual community of the 1990s, and he modelled the Bill on the issues raised in the 1971 case. Twenty years later, thinking had very much moved on. For example, the Bill required an individual who sought legal recognition of their preferred gender role to have undergone genital surgery. Press for Change was quite clear that this was not acceptable to them. Legislation would only be acceptable if it was truly inclusive of all of the community. This would mean being inclusive of those trans men and women who for health or disability reasons were unable to have genital reconstruction surgery. It would also have to be inclusive of trans men who chose not to undergo what was, at the time, very poor quality, aesthetically unacceptable, phalloplasty surgery.⁵² Fortunately, the Bill ran out of time, but it did mean that for thirty-five minutes, honourable members of Parliament seriously discussed the problems and issues faced by transsexual people in the UK.

The issues were now put well and truly onto the agenda, and good relationships with Ministers and MPs were established. Press for Change activists recognised the difficulty any government would have in addressing their issues – it was not exactly a vote winner. Instead of shouting, they chose to work with Civil servants, and MPs to create the circumstances in which change could take place, and to maintain a well-mannered reasonable dialogue at all times.

Ironically, it was a fictitious transsexual person whose problems ultimately forced the Government to address

⁵⁰ Hansard, 1996

⁵¹ Supra note 1

⁵² Supra note 16

the problems experienced by trans people in the UK. In the mid-1990s, Press for Change activists had organised small groups to visit the bars, regularly, where scriptwriters from the nation's leading TV soaps would meet after their weekly meetings. There were 4 such soaps filmed in various settings around the country, but it was to be writers the country's oldest soap, Coronation Street who, having regularly met and become friends with the group of transsexual people at the bar, decided to introduce a transsexual woman as a character.

Hayley Patterson first appeared on British televisions in January 1998, and was the globe's first transgender character in a British soap, and the first permanent trans character in any serialised TV show. Coronation Street screens three times a week, with a weekend omnibus showing. By 1998, between 11 and 20 million people were watching each episode.⁵³ Julie Hesmondhalgh, a non-trans woman, who played the character, worked with Press for Change to ensure the authenticity of her performance, and that her on-screen life was realistic and plausible. Hayley became a regular character on the show, despite early opposition from some parts of the public. Hesmondhalgh also provided significant moral support for the Press for Change campaign.

In 1999, Coronation Street viewers wrote hundreds of protest letters about Hayley's inability to be able to legally marry her TV partner, Roy Cropper, another of the show's characters.⁵⁴ The protest combined with the work of Press for Change resulted in Jack Straw, the Home Secretary announcing in April 1999 that:

My officials will chair an inter-departmental Working Group on transsexuals. This will have the following terms of reference: "To consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexuals, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue."⁵⁵

In 2000, the inter-departmental Working Group report was published, and it recognised that:

transsexual people are conscious of certain problems which do not have to be faced by the majority of the population.⁵⁶

The Working group recommended action be taken by the British Government, stating they

were very doubtful whether there could be a halfway house between the present position (*no legal recognition*) and full legal recognition for all purposes.⁵⁷

⁵³ --, 2014b.

⁵⁴ In 2005, after the Gender Recognition Act 2004 came into force, the character Hayley became a woman for all legal purposes, and finally married Roy in 2010. The character Hayley, took her own life in January 2014, not because she was trans; but because she had terminal pancreatic cancer. During the week in which the show screened Hayley's suicide, and with the support of the actor, Julie Hesmondhalgh, a petition to government to increase funding for research into pancreatic cancer reached the 100,000 needed for a parliamentary debate. Not many actors have had the opportunity to increase significantly parliamentary and social awareness of a major social problem. Julie Hesmondhalgh, playing a trans woman, has made the most of the opportunity twice in her character's career. She was recognised for not just her acting but also her commitment to justice for trans people and cancer sufferers in the 2014 National Television Awards earlier this year.

⁵⁵ Hansard, HC Deb 14 Apr 1999 : cc 257 [1999]

⁵⁶ --, [2000] para 5.4

⁵⁷ *ibid* para 5.5

4.3 Taking Government to Task

Thirdly and finally, Press for Change sought to create new legal precedents by taking cases to both the national and the European Courts. In order to ensure the cases taken had a good chance of creating legal precedent, Press for Change activists 'brain stormed' the issues that would be best raised before the courts. They would then use the (at the time) new Internet access that was available to home computer users to advertise for trans people who had experienced those concerns.⁵⁸ Trans people who wished to become applicants and pursue their cases, had to be prepared to risk losing their privacy (though every effort would be made to safeguard it, if they so wished) and ready for a 4 to 5 year period during which their case progressed from the lower to senior courts. They had to be on a low income or unemployed to qualify for Legal Aid, as Press for Change did not have anything other than minimal funding through community donations. In addition, the applicant had to aware that their case might be unsuccessful. It was a lot to demand from community members, and initially many were loath to take those risks. However as the campaign progressed, and the community realised that the injustices they experienced should and could be resolved by the law, more trans people volunteered to have their cases taken forward.

5. The First Steps: Rights at the European Court of Justice

The very first case Press for Change activists pursued involved Employment Law, and consequently was referred to the European Court of Justice which, as the Court of the European Economic Community (the EU) deals with economic matters. In the past, the UK courts had held that following the decision in Corbett, trans people were to be regarded as members of their birth sex for all legal purposes, to ensure legal consistency throughout the courts. At this time, employment was particularly problematic for trans people. Without employment protection, and with most employers demanding sight of an employee's birth certificate to enrol them in a compulsory pension scheme, (that almost all of the Public Sector, and much of the Private Sector, required) it was almost impossible for a trans person to avoid being 'outed' at work.⁵⁹ Inevitably, that would lead to dismissal from the post. Though the Sex Discrimination Act 1975 had made discrimination between the sexes unlawful, Employment Tribunals had taken the view that so long as an Employer would treat both trans men and trans women in the same way, that was equality – even though that meant they were only equal with each other, and no other employees.

5.1 P v S and Cornwall County Council [1996] ECJ⁶⁰

In P v S and Cornwall County Council [1996], P, a (male to female) trans woman told her employers that she was commencing the process of gender reassignment, and would be returning to work after her summer holiday, in her preferred gender role. On her return from holiday, she received a letter saying she was being made redundant. The Tribunal, at the first instance, found that the real reason for P's dismissal was not her redundancy, but because she was intending to commence gender reassignment.

The decision was made to ask the Tribunal to request clarification of the position of trans employees under the

⁵⁸ Whittle, *The Trans-Cyberian Mail Way* [1998]

⁵⁹ *Supra* note 27 para 25

⁶⁰ *P v S and Cornwall County Council* [1996]

European Equal Treatment Directive 76/207/EEC (the ETD) “on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions”. The ETD not only provided rules within the European Community, but required national legislation in each member state to impose the same standard of protection from discrimination between the sexes. In the UK, the Sex Discrimination Act 1975 was that national legislation. As such, if the ETD was found to provide protection for Trans people, the Sex Discrimination Act 1975 would have to be read as providing the same level of protection within the UK.

On referral for clarification, to the European Court of Justice, the Court found in favour of P. The applicant argued that the ETD states that

For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever **on grounds of sex**⁶¹

and surely that must, therefore, cover the case where a person ‘changes their sex’.⁶²

The Court held that:

in view of its purpose and the nature of the rights which (the ETD) seeks to safeguard, the Directive also applies to discrimination based essentially, if not exclusively, on the sex of the person concerned⁶³

and as such, “Article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment”.⁶⁴ Importantly, in light of later decisions at the European Court of Human Rights, the European Court of Justice stated that “transsexuals certainly do not constitute a third sex”.⁶⁵

6. Recognising the Trans Family in Europe

Between 1992 and 2002, a number of cases were filed in the national Courts, employment tribunals, and the European Courts, The second type of case to be brought to Europe addressed the contravention of those rights in the European Convention on Human Rights. Again, the ‘right’ cases to take were brainstormed as applicants needed to obtain a statement from a UK barrister that their application would be unsuccessful even if brought before the UK’s final court of appeal, the House of Lords⁶⁶ before they could apply to have their case heard at the European Court of Human Rights.

6.1 X, Y and Z v the UK Government [1996] ECHR⁶⁷

The first case brought by Press for Change activists was the X, Y and Z case. The daughter (Z) of Y (Z’s birth

⁶¹ European Communities [1976] art. 2.1

⁶² The phrase ‘Change of Sex’ or ‘Sex Change’ were commonly used prior to the late 1990s to refer to trans people.

⁶³ Supra note 60 para 20

⁶⁴ Ibid: The Facts.

⁶⁵ Ibid: para 22.

⁶⁶ The House of Lords has since been re-constituted and re-named and is now known as the Supreme Court of the United Kingdom

⁶⁷ X,Y & Z v The United Kingdom Government [1997]

mother) requested the right to have X named as her father on her birth certificate. X was a (female to male) trans man who had lived with Y, to all appearances as her husband since 1979, and had effectively fulfilled the role of Z's father since birth. X had been Y's associated partner during the donor insemination treatment leading to Z's conception. The case was lost; with the Court once again citing the margin of appreciation, saying there was no common European standard as to whether a non-biological partner would be recorded as the father of a child conceived using fertility treatment. However, in obiter, the court unanimously held that the family concerned (in this case; a transsexual man, his female partner and their child conceived by donor insemination) were a "de facto family" and therefore Article 8 was applicable as family ties did exist between the applicants X, Y and Z. The Court held that family life could be determined through many different relevant factors. In this case, the couple had demonstrated their commitment to each other by having a child together. This was the first time the European Court of Human Rights acknowledged the possibility of an LGB or T family.

The Court went on to hold that the disadvantages suffered by the applicants did not outweigh the general interest in maintaining a secure system of family law throughout Europe, which prioritised the best interests of the child. Given the facts of case, in particular that X was not prevented from acting as Z's father in a social sense and could, with Y, apply for a joint residence order in respect of Z, it was not possible to see what benefit would be given to children conceived by fertility treatment, by changing the law.

However, the Court failed to take account of the fact that a joint residence order in the UK was only of benefit whilst the parents of the child were living together in the same house. As the law stood, if the parents separated and either party left the house, or if one parent died, the joint residence order would vanish. For example; If Y (the mother) died, then X would become a stranger in law to the four children they had by the time the case was heard. As such, the children would become orphans. Even if Y made a will, naming X as the guardian of her children in the event of her death, Children's Social Services, which have the responsibility to protect children from harm or neglect, would be obliged to take the children into foster care. There would have to be an assessment as to whether it would be in the children's best interest for X to act as their guardian. X and Y were extremely concerned that if for any reason the children's mother (Y) died, the worst thing that could happen to the children, at such a traumatic time, would be their removal from the family home and the person (X) who they know as their father.

Consequently, X, Stephen Whittle⁶⁸ and Y, Whittle's partner, Sarah Rutherford, both activists in Press for Change, had decided that whatever the decision in the case, they would use it as an opportunity to demonstrate to the world as to how ordinary their family was. They wanted to continue the campaign on behalf, not just of Whittle, but also the wellbeing of the children. They chose to work with national television and radio news and prepared a short film including their children for showing alongside any news report. This was a huge step. Making the decision to come 'out' as a family with a trans man as the father was unheard of, and Whittle and Rutherford were not without trepidation.

Fortunately, Whittle, a legal academic, knew he had the support of his employers, and Rutherford was not working, having chosen to take time out from nursing to care for the children whilst they were young. They had made the decision when they had their children to be open and honest with them about Whittle's background,

⁶⁸ Whittle (X) is the author of this article

and how they were conceived – arguing that if they appeared ashamed of his history, then their children would never be proud of what their father had achieved. They realised that if you are going to tell your children the ‘big secret’ it will not remain a secret for very long. They knew they already had the support of the children’s school and their close neighbours and friends, whom they had already informed about Whittle’s trans status.

The day of the Court decision, which came at 08.00 was, otherwise, a ‘slow’ news day, consequently national radio and television news featured the facts of X, Y & Z extensively throughout the day, alongside the short film of the family. The very few negative voices mostly came from the Christian Evangelical Institute, an offshoot minor organisation from the main churches,⁶⁹ and the family received a particularly positive response from the national press and the public at large. Katherine Johnson describes the article in the Guardian newspaper that day as:

illustrated with two photos: one of Stephen and Sarah, and one of Stephen cradling their baby daughter. The caption reads "Sarah Rutherford and Stephen Whittle: Battling to have a normal family life". Stephen and Sarah's loving relationship and secure family home is deployed to appeal to the sensibilities of middle England in an attempt to attain political change.⁷⁰

The Guardian also gave over part of the page for a short article authored by Whittle’s partner, Sarah Rutherford. Even the Daily Mail, a tabloid newspaper generally given over to a position which abhors the idea that transsexual people should be able to get gender reassignment treatments from the NHS, included a long quote from Rutherford, which summed up what it felt for her not have one’s most important family relationship recognised in law:

Both of us wanted children and a normal family life. Yet it seemed impossible... I never stopped loving Stephen, but I hated the complications he had brought to my life. What I disliked most of all was the feeling that society did not recognise our relationship... All Stephen and I want now - for our children's sake more than our own - is the right to marry one another. I, too, feel I am being forced into being a common law wife when I would like to be a proper one. Stephen has lived as a man and is now a father. Why can't he also be my husband?⁷¹

In a society in which 42% of all marriages are estimated to end in divorce,⁷² Sarah Rutherford and Stephen Whittle have now been partners for 36 years, and married for ten of those years. Their four children are now either at, or on the way to University. There was then, and still is, no doubt that the majority of British people regard their family as an example to all of what a normal, happy family can and should be like.⁷³

⁶⁹ The Christian Institute fought to maintain the status quo throughout the campaign, and the parliamentary process for the Gender Recognition Act 2004

⁷⁰ Johnson [2001] p. 217

⁷¹ Campbell [1996]

⁷² Office for National Statistics [2014]

⁷³ Arnott [2007]

7. The Growth in Public Awareness through Cases brought to Europe

Despite the loss of major cases such as Cossey and X, Y & Z the awareness campaign being spearheaded by Press for Change was having significant effect on public knowledge of the lives of trans people in the UK. Increasing numbers of trans people were 'coming out'; some did so unintentionally via the more prurient Tabloid Press. The former brother, local gardener, and now transsexual sister of the Government minister Shaun Woodward MP found herself featured in several newspapers in 1999, when her relationship to the minister was discovered.⁷⁴ Other trans people came out with deliberate intention, after a great deal of thought. For example, Conservative local party chair, Christine Burns came out as a trans woman, by speaking about the injustices experienced by trans people at the Conservative Party Conference.

Change was clearly in the air. Woodward, a self-made millionaire, and former Conservative MP who had courted publicity once already when he had crossed the floor to become a member of the Labour party, citing his reason as being his opposition to the Conservative legislation known as s.28 which forbade schools from promoting gay families as normal.⁷⁵ He could easily have turned his back on his new sister, but instead chose to be open and proud of her achievements, and to speak publicly about the prejudice and discrimination she had suffered. He also chose to be a speaker at an International Conference organised by Press for Change in 2002.

7.1 Sheffield and Horsham v the United Kingdom Government [1998] ECHR⁷⁶

By the time the cases of Kristina Sheffield and Rachel Horsham, reached the Court of Human Rights, numerous states; Germany, The Netherlands, Denmark, Sweden, and Belgium had created administrative systems whereby transsexual people could be recognised as if members of the sex opposite to their natal sex.

Kristina Sheffield had been an airline pilot before her transition, and had a daughter from her marriage. During her assessment for gender reassignment, her consultant psychiatrist and her surgeon informed her that she was required to obtain a divorce as a precondition to surgery taking place. After Sheffield transitioned, she lost her job, and found no European Airline would employ her. She was unable to hide her transsexuality, because security requirements for airline jobs required the production of birth certificate. Also, the English Family court had terminated Sheffield's contact with her daughter on the basis that contact with a transsexual would not be in the child's interests.

The Court of Human Rights did address these issues under Article 8; the right to privacy, but once again found the transsexual person's confidentiality had not been unduly compromised however, the court did say:

The fact that a transsexual is able to record his or her new sexual identity on a driving licence or passport or to change a first name are not innovative facilities. They obtained even at the time of the Rees case. Even if there have been no significant scientific developments since the date of the Cossey judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court

⁷⁴ Chapple [1999]

⁷⁵ Duffy [2014]

⁷⁶ Sheffield and Horsham v The United Kingdom Government [1998]

reiterates that this area needs to be kept under review by Contracting States.⁷⁷

This was clearly a warning shot to the British Government; the Court was clearly beginning to tire of receiving these repeat complaints from UK based transsexual people.

Joined with Sheffield's application to the Court was that of transsexual woman Rachel Horsham. Horsham once again encountered legal problems due to her altered gender status, though of a slightly different nature. As a British born citizen she held a British Birth certificate, but she also held a Dutch 'Certificate of Reassignment' by virtue of her treatment and residence in Holland. Consequently, she could lawfully marry her male partner. However, if she and her spouse then returned to the UK, her marriage would become void - that is, it would automatically disappear in law. Unfortunately, in its judgment, the ECHR barely touched on this matter, stating that

The Court is not persuaded that Miss Horsham's complaint raises an issue under Article 12 which engages the responsibility of the respondent State since it relates to the recognition by that State of a post-operative transsexuals' foreign marriage rather than the law governing the right to marry of individuals within its jurisdiction. Furthermore, it cannot be said with certainty what the outcome would be were the validity of her marriage to be tested in the English courts.⁷⁸

This was a surprising decision, as it left European Marriage law in a position of untenable uncertainty. Rachel Horsham could marry her non-EU national male partner in the Netherlands. Her spouse could then obtain derivative rights in European Union law exercisable theoretically upon the couple moving to another member state. However, should she move to the UK, her marriage would be declared void and the state would hold that her partner could no longer claim the rights that derived from his spousal and family status under European Union law and seek his extradition to his national state. Alternatively, she could use her new passport to marry her non-EU national partner in the UK. Though the marriage was void, the couple could then move to Holland where he still would not have gained a right to EU citizenship unless he then married Ms Horsham again in the Netherlands. They could then move to Spain, which would recognise a marriage from the Netherlands, but would not recognise a British marriage in these circumstances, and would not allow them to contract a valid marriage in Spain. However if they went to Italy, the marriage from the Netherlands would be recognised, the British marriage would not be recognised, and nobody would be sure at all if an Italian marriage would be recognised.

A Grand Chamber of 20 judges heard the case and decided by eleven votes to nine that there had been no violation of Article 8 of the Convention. Nevertheless, it demonstrated its annoyance with the British Government saying:

the Court cannot but note that despite its statements in the Rees and Cossey cases on the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal developments (see, respectively, pp. 18–19, § 47, and p. 41, § 42), it would appear

⁷⁷ Ibid para 60

⁷⁸ Ibid para 69

that the respondent State has not taken any steps to do so⁷⁹

and yet, despite its earlier remarks on Horsham's complaint, the Court unexpectedly held by only a tiny margin of eighteen votes to two that there had been no violation of Article 12.

8. Europe tolls the Death Knell for Corbett

8.1 Goodwin, and I v the United Kingdom Government [2002] ECHR⁸⁰

Finally, Press for Change was to reach the fulfilment of its determination to use the Courts to obtain respect and equality for members of the trans community in the two cases of Goodwin v the UK Government and I v UK Government [2002] at the European Court of Human Rights. These cases highlight the way in which the institutional European Courts have combined the principles of Roman law in allowing the person to 'choose' their own sex/gender, with the Common Law based precedent system of the European Court of Human Rights. It provides a fine example of the steering of Europe's moral compass by the Court.

Though the decisions in Goodwin and I v UK Government were given together, the court unusually provided two separate decisions, which though very similar address the different issues raised by the applicants.

Article 12: Men and women of marriageable age have the right to marry and to found a family.

In Goodwin, the applicant, Christine Goodwin had argued that her legal sex should no longer be determined by considering traditional or historical criteria but by holding that the matter – the change of sex - was a 'fait accompli' that the state had enabled, and should therefore recognise, saying the:

State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, ..., it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads⁸¹

and as such the state presumably considers a change of gender a reasonable thing for its medical services to provide. In response, the court held that an important factor in its decision was:

the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong⁸²

Secondly, the Court stated that it:

is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of Corbett v. Corbett, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and

⁷⁹ *ibid* para 69

⁸⁰ Christine Goodwin v The United Kingdom Government, [2002] and I v. The United Kingdom Government, [2002]

⁸¹ Christine Goodwin v The United Kingdom Government, [2002] para 78

⁸² *ibid* para 100

science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual.⁸³

As to what this would mean for marriage, the primary matter in that original decision of Corbett, the court noted that

Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women⁸⁴

And as such were persuaded that the 'margin of appreciation' no longer existed. The court held that as

The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.⁸⁵

And in the joined case of I the court stated that:

The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but 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 is impaired⁸⁶

as such, in both Goodwin and I, the court held unanimously that there had been a violation of Article 12 of the Convention.

Article 8: Everyone has the right to respect for his private and family life, his home and his correspondence.

As for the right to privacy contained in Article 8 of the Convention, the court held that transsexual people should no longer be left with a 'no-sex', 'intermediate sex' or 'both sex' legal status. The court held as it had in Goodwin that the 'Corbett' test⁸⁷ for congruent biological factors: gonads, genitals and chromosomes was no longer acceptable. The Court effectively upheld the Civil Law principle that a line has to be determined somewhere, and there would be factors which determined where that point was, but it said that:

given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of

⁸³ *ibid* para 100

⁸⁴ *ibid* para 100

⁸⁵ *ibid* para 101

⁸⁶ *I v The United Kingdom Government*, [2002] para 79

⁸⁷ In the English case of *Corbett v Corbett* [1971] 2 All E.R. 33, 48; 2 W.L.R. 1306-1324, Ormrod LJ devised a test for deciding a person's sex based on three factors i. the chromosomal, ii. the gonadal and iii. the genital features at the time of birth of the individual concerned. Psychological sex was not to be included in any determination of legal sex.

diminished relevance⁸⁸

Put simply, any idea that gender reassignment is a matter of personal 'choice' or 'fancy' is no longer viable. Any debate on the aetiology of transsexualism was of no great importance. Fundamentally, transsexual people exist in our societies, the cause of their condition is irrelevant when discussing their Human Rights, in fact:

society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost⁸⁹

The Court determined that:

In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable⁹⁰

and as such, in both Goodwin and I, the court held unanimously that there had been a violation of Article 8 of the Convention.

The court effectively, then created a new set of two determining factors. The first of these was a state's allowing of gender reassignment treatment, with the Court using the term 'treatment' as a generic term. This means a state would have to ban all gender reassignment treatment, including assessment and hormone therapy, before they could avoid having to afford the recognition of the 'new' sex of a transsexual person. However, that in itself could be a contravention of the person's rights under the Convention, as the court had already stated that:

Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings⁹¹

The second factor was that a state would have to demonstrate substantial hardship, and as:

No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals⁹²

then

It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the applicant's, and other transsexuals', right to respect for private life and right to marry in compliance with this judgment.⁹³

⁸⁸ Supra note 86 para 61

⁸⁹ Ibid para 71

⁹⁰ Ibid para 70

⁹¹ Ibid para 70

⁹² Ibid para 71

⁹³ Ibid [2002] para 95

As such, when determining 'legal sex', the Court's endorsement of the human rights basis for legal recognition of the new sex of transsexual people who had undergone some form of gender reassignment treatment became a minimum line behind which the UK government could not retreat. The authorities had to provide a legal registration system, or stop all gender reassignment treatment. The registration system would have to enable trans people to enforce their Convention rights to privacy and to marriage to a member of the same natal sex. However, as a minimum line, it was perfectly possible for a government to go one-step further and to make legal recognition available to those who are unable to undergo gender reassignment treatments and thus include those trans people who for health, disability or other reasons are unable or unwilling to undergo surgical intervention. This is exactly what the UK's Gender Recognition Act 2004 (GRA) was to do.

8.2 **Bellinger v Bellinger [2003] HL⁹⁴: The Last Nail in the Coffin for Corbett**

Throughout this time, the case of Bellinger v Bellinger [2003] had been slowly making its way to the House of Lords. At the time of the Bellinger hearing, Goodwin and I⁹⁵ had been decided, but the UK government was still in the consultative stages of the Gender Recognition Bill and did not seem to be in any mood to hurry as they prepared a draft Bill.

Elizabeth Bellinger, a trans woman wished to have a prior wedding ceremony to her partner, Mike Bellinger, retrospectively recognised as being valid for the purposes of marriage. The couple were to lose the case, not least, because it would have been legally reprehensible at that time, to recognise the marriage of someone who had technically committed perjury in order to obtain it. There were many other trans people and their partners, in the same position, who had abided by the law and simply lived as same sex couples (albeit they looked for all social purposes as opposite sex couples). There could be no recompense for the losses they had incurred by doing so.

Whilst Tirohl and Bowers⁹⁶ and the Law Reporter in the All England Law Reports⁹⁷ have argued that the House of Lords upheld Corbett in their decision in Bellinger for the purposes of marriage, there is no doubt that Lord Justice Nicholls did not intend to do that. He held that deciding a person's sex needs addressing in the wider context of sex determination for many other activities where it is a factor. Nicholls held that rather than Ormrod's three determinants of sex, there were now at least seven, his new four being the internal sex organs other than the gonads, hormonal patterns including secondary sexual characteristics, style of upbringing including daily gender presentation, and self-perception.⁹⁸ Therefore, there would be times when, according to Tirohl and Bowers,⁹⁹ following the suggestion of Laura Cox, Q.C. in the earlier Court of Appeal hearing, it would be 'impossible to identify gender at the moment of the birth of a child'.

On the question of sex determination for the purposes of marriage, however, Lord Nicholls went on:

⁹⁴ Bellinger v Bellinger [2003]

⁹⁵ *Supra* note 80

⁹⁶ Tirohl and Bowers [2006] p 83

⁹⁷ *Supra* note 94 [2003]

⁹⁸ *Supra* note 94 para 6

⁹⁹ *Supra* note 96 p 85

(the) recognition of a change of gender for the purposes of marriage would require some certainty regarding the point at which the change takes place. This point is not easily ascertainable. At what point would it be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the opposite sex to that which he or she was correctly assigned at birth? This is a question for Parliament, not the courts¹⁰⁰

It is clearly the case that their Lordships did not think that Corbett was the answer; rather it was complex issue and therefore could only be determined by a proper consultative parliamentary process. As such, Corbett was clearly no longer good law, even at the common law. The Court went on to call for a change in the law, declaring section 11(c) of the Matrimonial Causes Act 1973¹⁰¹ incompatible with articles 8 and 12 of the Human Rights Act 1998 (which embodies the European Convention on Human Rights into UK Law) as it makes no provision for the recognition of gender reassignment. The UK Government now had to get a move on, as UK marriage law had been declared by the highest Court in the land, as inherently causing a contravention of the Human Rights of transsexual people.

8.3 KB v NHS Pensions Agency & the Secretary of State for Health, [2004] ECJ¹⁰²: Forcing the Government's Hand

Shortly afterwards, the European Court of Justice was to give its decision in the case of KB v (1) National Health Service Pensions Agency and (2) Secretary of State for Health, [2004]. In their decision, the Court acknowledged the unmarried partner of a transsexual man as his 'wife'. The couple had undergone a church blessing of their relationship, but they were not able to marry in law, as KB's partner was a transsexual man. KB was a nurse in the UK's National Health Service. This meant she had to contribute a portion of her salary to the NHS's compulsory pension scheme. However, the scheme only allowed employees, on death, to leave a survivor pension benefit to a married partner. Consequently, being unmarried, KB had no one she could leave that portion of her pension benefit. The Court held that KB was in effect, the de facto wife of her trans partner, and that the UK government's failure to afford a mechanism whereby she could leave that benefit to her partner, on her death, contravened her rights under the Equal Treatment Directive 1976/207.¹⁰³

This decision left the government in a tricky position. They had not completed the process of preparing the draft Gender Recognition Bill to put before parliament, but they had to recognise KB as the wife of a trans man for the purpose of pension benefits. They fudged the question by agreeing with KB and her partner RB, that whilst the Gender Recognition Bill was before parliament, they would recognise KB as RB's wife, for the purpose of survivor pension benefits only; so long as KB and RB formalised their marriage as soon as possible after the Gender Recognition Act 2004 came into force.

¹⁰⁰ Supra note 94 para 18

¹⁰¹ section 11(c) of the Matrimonial Causes Act 1973 had embodied the decision in Corbett v Corbett [1971] 2 All ER 33 in statutory law, making a marriage unlawful if the parties were not 'respectively male and female'.

¹⁰² KB v (1) National Health Service Pensions Agency and (2) Secretary of State for Health, [2004]

¹⁰³ European Communities (1976)

9. The Gender Recognition Act 2004 - at last

In April 2005, the Gender Recognition Act 2004 (GRA) came into force. As the UK's government's response to the European Court of Human Rights' decisions in the cases of Goodwin v UK and I v UK Government, and the European Court of Justice's decision in KB v NHS Pension Trust, and the House of Lords decision in Bellinger, the Act created a system for the recognition of a transsexual person's preferred gender role. The system of Gender Recognition provided means that a successful applicant must be treated as of their new gender/sex for all legal purposes, including family relationships, marriage, employment, welfare benefits, health and social care. The Act is intended to enable trans people to have their rights acknowledged once their commitment is evident, by providing a two year waiting period during which the trans person must permanently live in their preferred gender role.

The Act also acknowledges the very long waiting lists for surgical reassignment within the UK's National Health Service, so gender reassignment treatments are not required, nor is genital reconstructive surgery. As such, we now have a country in which some women have a penis and yet are legally married to a man, and (more commonly because of the limitations of surgery to create a penis) some men have a vagina and yet are legally married to a woman. At the time of the Gender Recognition Act 2004 going through Parliament, there were estimated to be 15,000 transsexual people in Britain, of whom around 6-8,000 were living permanently in their new gender role. Within six months of implementation of the Act, over eight hundred transsexual people were awarded Gender Recognition Certificates (GRC's) under the temporary fast track provisions of the GRA. This provision recognised that many people had changed their gender role many years earlier, and had undergone gender reassignment surgery. That the system devised should allow them to take precedence in the application process was seen as only fair. From October 2005, the first applications for a legal change of gender using the standard track application process were processed, and as of September 2014, full Gender Recognition Certificates have been awarded to more than 5,000 people.¹⁰⁴

10. HK Changes: W v the Registrar of Marriages [2013] HKSC¹⁰⁵.

In 2013, HK's Court heard the Final Appeal in W v the Registrar of Marriages. The court had found for W. a transsexual woman, holding that:

that the right to marry guaranteed by (HK's) constitution extends to the right of a post-operative transsexual to marry in the reassigned capacity. This means, without any need to rely on freedom from arbitrary or unlawful interference with privacy, that the legislation concerned would be unconstitutional unless the words of gender therein are read to include gender acquired by sex reassignment surgery.¹⁰⁶

In other words, there is a guarantee of the right to marry for post-reassignment transsexual people within HK's Constitution as it stands, and the court called upon the HK Legislative Council to amend Marriage Ordinance to ensure this was available. As such, the decision mirrors some aspects of the 2002 decisions of European Court of

¹⁰⁴ Tribunals Service [2014]

¹⁰⁵ W. v the Registrar of Marriages [2014]

¹⁰⁶ Ibid: Chief Justice Ma and Mr Justice Ribeiro PJ. para 309

Human Rights in the cases of Goodwin v UK, and I. v UK¹⁰⁷ but by no means all. The use of 'sex reassignment surgery' and 'post-operative' is very problematic, as has been seen, and the UK had ,after extensive debates, decided to not require genital reconstruction surgery because of the risks associated with it. Undoubtedly, the decision follows the processes for previous document changes used by the HK Legislative council. However, bearing in mind this is an island where only six genital reconstruction surgeries are undertaken each year, the proposal becomes a barrier rather than an enabling decision, the exact opposite to what has been achieved in the UK.

Already decisions are being taken in HK to file further cases; a trans man unable to order phalloplasty surgery and a trans woman unable to undergo vaginoplasty surgery for health reasons, will both seek the right to marry. However, bear in mind the decision in W, which seems to have completely missed the point of what the European Courts set out to achieve, and have achieved. In the battle for respect, equality, and their right to develop themselves and their lives in a manner, which acknowledges their right to personal autonomy, the trans community in HK has a long way to go. Unless they wish to spend many more years before the courts, they must now look to the Legislative Council. Yet, it will be a brave council which decides to follow the rule of law, and ensure they maximise the liberties, and minimise the unnecessary hardships, for HK's trans community.

The End © S. Whittle 10th February 2014.

¹⁰⁷ Supra note 80

Case List

Bellinger v Bellinger [2003] House of Lords, UKHL 21

C v The United Kingdom [1989] Commission of the European Court of Human Rights, Application no. 10843/84

Corbett v Corbett [1971] Court of Appeal, 2 All E.R. 33, 48; 2 W.L.R. 1306-1324

Cossey v the United Kingdom Government [1990] Commission of the European Court of Human Rights, Application no. 10843/84

Christine Goodwin v. UK Government, [2002] European Court of Human Rights, Application No. 28957/95 and I v. UK Government, [2002] European Court of Human Rights (Application No. 25608/94)

KB v (1) National Health Service Pensions Agency and (2) Secretary of State for Health, [2004] European Court of Justice, case no. C-117/01

P v S and Cornwall County Council [1996] European Court of Justice , (Case no. 13/94) Industrial Relations Law Reports 347

Rees v the United Kingdom Government [1986] Commission of the European Court of Human Rights, Application no. 9532/81

Sheffield and Horsham v the United Kingdom Government [1998] European Court of Human Rights, Applications Nos. 31–32/1997/815–816/1018–1019)

W. v the Registrar of Marriages [2012] (Civil) (Hong Kong Court of Final Appeal (FACV 4/2012)

X,Y & Z v the United Kingdom Government [1997] European Court of Human Rights, Application no. 21830/93

Bibliography

--, --. "Current Waiting Times & Patient Population For NHS England Gender Identity Services."

www.uktrans.info. UK Trans Info. December 2014a.

<http://uktrans.info/attachments/article/341/PatientPopulationSept14.pdf> (accessed December 18, 2014).

--, --. Report of the Interdepartmental Working Group on Transsexual People. London: Home Office, 2000.

—. Viewing Figures. Quantcast. Last Update June 2014b

http://coronationstreet.wikia.com/wiki/Viewing_Figures (accessed December 12, 2014).

Arnott, Chris. "Stephen Whittle: Body of work." In *The Guardian*, 17 April 2007.

Ayres, Chris; "Mission impossible attracts Britain's bug-catcher in chief; In the hot seat." In *The Times*. London, 7 Nov 1998. 26.

Bowman, Cameron, and Joshua Goldberg; Care of the Patient Undergoing Sex Reassignment Surgery (SRS). Vancouver, B.C.: Transgender Health Program, 2006.

Campbell, Clare. "Why I want to marry a man who was born a woman." In *Daily Mail*, 09 October 1996: 28.

Chapple, Victor. "Blonde Was Once A Balding Fella: Tory turncoat Shaun Woodward's sister used to be a mister." In *The Sun*, 20 December 1999: 1.

Coleman, Eli, Walter Bockting, Stephen Whittle, and et al. "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, version 7." In *International Journal of Transgenderism* 13 (2011): 165–232.

Council of Europe Parliamentary Assembly "Recommendation 1117 on the condition of transsexuals." 1989.

Day, Peter. Transgender Reassignment Surgery. New Zealand Health Technology Assessment, Department of Public Health and General Practice,, Christchurch School of Medicine, Christchurch: NZHTA, 2002.

De Cuypere, Griet, et al. "Sexual and Physical Health after Sex Reassignment Surgery." in *Archives of Sexual Behavior* 34, no. 6 (December 2005): 679-690.

Duffy, Nick. "Shaun Woodward MP: Activist Paul Cottingham welcomed me to Labour to fight for gay rights." In *Pink News*, 24 October 2014.

European Communities, Council Directive 76/207/EEC On the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. 9 February 1976.

European Parliament, "Resolution on discrimination against transsexuals." In *Official Journal of the European Communities*, no. C256 (October 1989): 0033.

Hansard. "House of Commons Debates: Gender Identity (Registration and Civil Status) Bill,." In *Hansard* 270 February 1996. Cc 1282-90

Hansard. "House of Commons Debates: Transsexuals: 14 Apr 1999" In *Hansard*, April 1999. cc 257

I v the United Kingdom. (Application no. 25680/94) (ECHR, 2002).

Johnson, Katherine. "Being Transsexual: self, identity and embodied subjectivity (Thesis unpublished)." 2001. http://eprints.mdx.ac.uk/6635/1/Johnson-Being_transsexual.phd.pdf (accessed November 12, 2014).

Knott, Kylie. "Hong Kong starts to embrace transgender issues." in *South China Morning Post: Lifestyle*. 25 June 2013. <http://www.scmp.com/lifestyle/arts-culture/article/1265976/hong-kong-starts-embrace-transgender-issues> (accessed Oct 24, 2013).

McNeil, Jay, Louis Bailey, Sonja Ellis, James Morton, and Maeve Regan. *Trans Mental Health and Emotional Wellbeing Study*. Edinburgh: The Equality Network, 2012.

Mills, Eleanor. "Eleanor Mills meets Gwynneth Flower: All in a good century's work: Flowers's battle with the millennium bug, like her sex change, was a challenge." in *The Sunday Times*. London, 9 January 2000.

Office for National Statistics. "Statistical bulletin: Divorces in England and Wales, 2012." In *Statistical Bulletin*, Office for National Statistics, 2014.

Tirohl, Blu, and Imogen Ruth Bowers. "Opposite Sex – A Discussion of Rights Under the Gender Recognition Act." in *The Journal of Gender Studies*, 2006.

Tribunals Service, *Tribunals and Gender Recognition Statistics tables: July to September 2014*. London: Ministry of Justice, 2014.

Whittle, Stephen. "New'isms': Transsexual People and Institutionalised Discrimination in Employment Law," in *Contemporary Issues in Law* 4, no. 3 (1999): 31-52.

Whittle, Stephen. *Respect and Equality: Transsexual and Transgender Rights*. London: Cavendish Publishing, 2002.

Whittle, Stephen. "The Trans-Cyberian Mail Way." in *Journal of Social and Legal Studies* 7, no. 3 (1998): 389-408.

Whittle, Stephen. *The Transgender Debate: The Crisis Surrounding Gender Identities*. Reading: South Street Press, 2000.

Whittle, Stephen, and Catherine Little. "The Praxis and Politics of Policing: Problems Facing Transgender People." In *QUT Law & Justice Journal* 2, no. 2 (2002).

Whittle, Stephen, Christine Burns, et al. "Gender Registration: The Requirement of Sterility." In Report of the Interdepartmental Working Group on Transsexual People, by The Home Office, 45-48. London: the Home Office, 2000.

Whittle, Stephen, Lewis Turner, and Maryam Al-Alami. *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*. London: Cabinet Office, 2007.

Whittle, Stephen, Lewis Turner, and Ryan Combs. *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care*. Brussels: Ilga-Europe, 2008.

Wilkins, Emma. "Fellow who had sex change divides all-women college." In *The Times*. London, 24 June 1997. 1.
