SEXUALITY AND HUMAN RIGHTS

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Homosexuality and transsexuality are very different human problems and raise very different legal problems. But they are both aspects of a person's private life, the right to respect for which is guaranteed by Article 8 of the ECHR, and must under Article 14 be secured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. In different ways, they are both covered by the Equal Treatment Directives of the European Union. And there are controversial bills relating to both currently passing through Parliament.

Homosexuality

There is a recognised progression in the legal recognition of homosexuality.[1] The first steps are taken by the criminal law: permitting homosexual acts between male adults and then removing age and other distinctions between same and opposite sex sexual activity. The next steps are taken by the civil law: prohibiting discrimination against homosexuals in employment, and in the provision of goods, education, housing and other services. The final steps are taken by family law, extending laws applicable to unmarried heterosexual couples to homosexual couples, recognising the parental relationship between

[1] Kees Waaldijk, 'Chronological overview of the main legislative steps in the process of legal recognition of homosexuality m European countries', Appendix to 'Taking same-sex partnerships seriously: European experiences as British perspectives' (The Fifth Stonewall Lecture 2002) [2003] International Family Law 84-95. The following summary is taken from the information in that Appendix, last updated in April 2003, but the author disarmingly admits that it 'will contain inaccuracies, and may have missed recent developments'.

homosexual parents and their own, their partners' or even other people's children, providing for registered civil partnerships, and finally providing for civil marriage.

Decriminalisation of homosexual acts between male adults has now been achieved throughout the existing membership of the European Union and the other Council of Europe member states. For most countries in western Europe, this had been done long before the landmark decision of the European Court of Human Rights in Dudgeon v United Kingdom (1981) 4 EHRR 149, which meant that the newer members of the Council of Europe had to follow suit. Progress in removing all discrimination in the criminal law between homosexual and heterosexual acts has been more uneven but the removal of age discrimination is now almost complete within the European Union and Council of Europe. The United Kingdom, as usual, has not been in the vanguard: the Sexual Offences Act 2000, removing age discrimination, came into force in January 2001.

Prohibition of discrimination in employment has either arrived or is in progress in all member states of the European Union, the latecomers impelled by the Council Framework Directive 2000/78/EC providing for equal treatment in employment and vocational training. Prohibition of discrimination in other fields had already arrived for many, but is not yet even in progress in Italy, Portugal and Greece. Among the other members of the Council of Europe only Iceland, Norway and Slovenia have prohibited discrimination in both fields, although some others have gone part of the way. Others have not even begun. Once again, the United Kingdom is making slow progress. Rather than enacting comprehensive new equality legislation, the Government has chosen to use the procedure for implementing European Union measures by delegated legislation. This

means that it has done only that which it considers to be required by the Directive and no more.[2]

Progress in family law is much more uneven. Only the Netherlands and Belgium have admitted same sex couples to the institution of marriage, but Denmark, Sweden and Norway have taken all the other three steps (treating like unmarried heterosexual couples, recognising the relationship with children and providing for civil partnership) and several other European countries have some form of registered partnership.[3] Characteristically, the United Kingdom is still at the 'in progress' stage, although we have already legislated for what many might think the most dramatic step of all, adoption by unmarried same sex couples,[4] and are about to legislate for civil partnership.

It is also a fair hypothesis that there is some correlation between the distance a country is prepared to go in these matters and the religious and moral attitudes of its population. But this is much harder to prove. The European Values Study[5] shows that the countries which have made most progress towards treating homosexuals equally in the law also have high rates of acceptance of homosexuality and homosexual neighbours and comparatively low rates of belief in God and in sin. It also shows that the countries making the least progress have lower rates of acceptance of homosexuality and homosexual neighbours and higher

[2] Employment Equality (Sexual Orientation) Regulations 2003, SI 2003 No 1661.

[3] Registered partnerships are also provided for in some jurisdictions in the United States of America, Canada and Australia.

[4] Adoption and Children Act 2002, s 49(1)(a) allows an adoption application to be made by 'a couple', defined by s 144(4) as 'two people (whether of different sexes or the same sex) living together as partners in an enduring family relationship.'

[5] Loek Halman, *The European Values Study: A Third Wave. Sourcebook of the 1999/2000 European Values Study Surveys*, Tilburg University 2001.

rates of belief in God and in sin. But there are also countries, such as Finland and Spain, which have comparatively high rates of belief in God, but have nevertheless made considerable progress towards equality. And there are countries, such as Great Britain, which have lower rates of belief in God but where progress has so far been slower (for this purpose, the survey wisely separates Great Britain from Northern Ireland, the source of the Dudgeon case, where rates of belief in sin are the highest in the Union).

The turmoil within the Church of England, with its well-known anxiety to accommodate a wide range of apparently incompatible beliefs, may be one explanation. One side is exemplified by the sermon in Southwark cathedral on Christmas Day, which provoked a rare round of applause for the following (among other things):

"The nomination and forced withdrawal of our much loved Canon Jeffrey John as Bishop of Reading means we have the inestimable benefit of his ministry for longer but it is also a grave loss to the Church of his greater ministry. . . . Jesus' ministry embrac anyone that everyone else hated, the blind, the sick, the mad, women menstruating, prostitutes, convicts on the cross and all the rest. . . . Jesus worked with them all, Jesus transformed them all, Jesus conferred responsibility upon them all. . One of the hallmarks of the Church of England, as the established Church of this country since the Reformation, has been that it is here for everyone."

On the other hand are the responses to the Government's consultation on the Employment Equality regulations, cited by Anthony Lester in last year's Stonewall lecture,[6] which included the following:

"The document . . . is greatly flawed in respect of Christian teaching and morals, as no Christian Church or Organisation that holds to biblical principles and teaching would even consider employing a homosexual or lesbian in any position whatsoever."

[6] New Labour's Equality Laws: Some are More Equal than Others', Sixth Stonewall Lecture, 22 October 2003.

These responses resulted in a very widely drawn exception of employment 'for the purposes of an organised religion' [which has since survived challenge in the High Court].

As Anthony Lester points out, the present Government has committed itself to removing unjustified discrimination wherever it exists. But even without such declarations of Government commitment, legal policy is tending strongly towards the goal of equal treatment of same-sex relationships in almost everything up to the recognition of same-sex marriage. Homosexual relationships are undoubtedly an aspect of private life protected by article 8 of ECHR. Sexual activity is, as the European Court of Human Rights said in the Dudgeon case, 'a most intimate aspect of private life'. But to regard homosexual relationships as a narrow privacy issue is to deny to them the full enjoyment which other relationships take for granted. Opposite sex couples can walk hand in hand or arm in arm or even engage in closer intimacies in public: until recently same sex couples could not. Albie Sachs put the argument thus in the South African Constitutional Court:

"There is no good reason why the concept of privacy should, . . . , be restricted simply to sealing off from State control what happens in the bedroom, with the doleful subtext that you may behave as bizarrely and shamefully as you like, on the understanding that you do so in private. . . . privacy [be regarded as suggesting at least some responsibility on the State to promote conditions in which personal self-realisation can take place.

…autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act free from interference by the State. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It

acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined." [7]

The more interesting question, therefore, is whether homosexual couples and any children they may have will be regarded as having a 'family life' together which is also to be respected under Article 8. If Article 8 is about the capacity of an individual to formulate his own perception of himself and his identity, then it could also be about the capacity of those who live and see themselves as couples and families like any others to present themselves to the world in this way. There are old decisions by the European Commission on Human Rights which have been seen as denying the protection of 'family life' to stable same-sex relationships: see *S v United Kingdom* (1986) 47 DR 274; *B v United Kingdom* (1990) 64 DR 278; *X and Y v United Kingdom* (1983) DR 32, 220. But there are also cases recognising that there is a family relationship between homosexual parents and their children; and that to discriminate against homosexual parents in respect of this relationship can be a breach of Article 14 taken with Article 8: see *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47. In that case, concerning custody of the applicant's daughter, the European Court of Human Rights held that a difference in treatment based on sexual orientation was 'undoubtedly covered' by Article 14 although sexual orientation is not expressly listed there.

In *Fitzpatrick v Sterling Housing Association Ltd* [1 AC 27, the House of Lords recognised that same-sex partners can be members of one another's 'family' for the purpose of the statutory right to succeed to a tenancy of their home.[8] This might be

[7] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6, paras 116 and 117.

[8] Under paragraph 3, Schedule 1, Rent Act 1977, as amended by the Housing Act 1988.

thought a bold decision: not only would Parliament not have contemplated such an interpretation when the relevant provision was first enacted in 1920, but also, even if the legislation is 'always speaking', at the time of their Lordships' decision there was still a provision on the statute book referring to homosexual relationships as 'pretended family relationships'.[9] However, they stopped short of recognising the surviving same-sex partner as 'a person who was living with the original tenant as his or her wife or husband', which would have given him better protection than that given to a member of the family.'[10]

Since the coming into force of the Human Rights Act 1998, however, we have taken that further step in *Ghaidan v Godin Mendoza* [2004] UKHL 30; [2004] 3 WLR 113. The Court of Appeal had reached the same conclusion, anticipating the decision of the European Court of Human Rights, in *Karner v Austria*, App no 40016/98, final 24 October 2003. The Strasbourg court found that it was a breach of the applicant's rights under Article 14 taken with Article 8 to deny a surviving homosexual partner the right to succeed to a tenancy as 'lebensgefahrte' of the deceased tenant. The court did not find it necessary to determine the notions of 'private life' or 'family life' because the complaint related to the enjoyment of the applicant's right to respect for his home (para 33). It accepted (para 40) that 'protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment', but the principle of proportionality required that the difference in treatment was necessary in order to achieve that aim. The Austrian Government had not advanced any arguments which would allow of such a conclusion (para 41).

[9] Local Government Act 1988, s 28, eventually repealed by the Local Government Act 2003
[10] Under paragraph 2, Schedule 1, Rent Act 1977

Once a difference in treatment on a proscribed ground is established, there are two questions under Article 14: were the people compared in an analogous situation, ie were their cases so alike as to require like treatment; and if they were, was there an objective justification for the difference in treatment? To take the second question first, in *Ghaidan* the United Kingdom Government did not advance any arguments before the House of Lords to suggest that the discrimination in the Rent Act between heterosexual and homosexual unmarried partners pursued a legitimate aim. Protecting the traditional family might justify singling out the surviving spouse for special treatment (as was the case until 1988) but marriage is not protected by denying a benefit to those who cannot marry, especially if it has already been extended to those who could marry but do not. What is really meant is not 'protection' but encouragement of one sort of relationship and discouragement of others. But if the law goes beyond encouraging marriage into encouraging committed, responsible, stable unmarried unions, why differentiate between the two sorts of such union? Both are surely to be encouraged, and the transient, irresponsible and unstable ones discouraged, whether they are hetero-sexual or homo-sexual.

As to the first, whether the cases were really alike, before the House of Lords, the landlord withdrew the concession made in the court below, that survivors of heterosexual and homosexual relationships were in an analogous situation. He argued that the latter lacked the essential marriage-like characteristic of being capable of producing children of the relationship. The contrary argument is that there is nothing in the statute to suggest that its protection is aimed at the survivor of a couple who were capable of having children together. In the nature of things these days, survivorship usually arises after any

children have grown up and (hopefully) left home. Bringing up children together does, of course, increase the economic and social inter-dependence which is the hallmark of living together as husband and wife. But this arises whether or not the children are the biological offspring of both parties. Many lesbian couples do bring up children together, whether from a former relationship or deliberately conceived for this relationship by donor insemination. In any event, as all family lawyers know, the capacity to bear children has never been a requirement of a valid marriage.

Having decided that the orthodox interpretation of the words 'as his or her wife or husband' was incompatible with the survivor's convention rights, we decided (by a majority) that it was possible to cure the incompatibility by interpreting those words so as to include marriage like same sex unions. The dissenter considered that the words 'husband' and 'wife' are so gendered in their meaning that only a man and a woman are able to live together as such. However, as every family lawyer knows, the law no longer distinguishes between husband and wife in any significant respect and it is up to the parties themselves how they distribute the breadwinning and homemaking roles. But if it is possible to read 'a person' who was living with the deceased tenant 'as his or her wife or husband' to include the survivor of a same sex relationship, would it be possible to read 'a man and a woman' who are or were living together 'as husband and wife' in the same way? How possible is possible?

If United Kingdom law already recognises that stable homosexual partners, even without children, can be members of the same 'family' then it may already be committed to according that family unit the same respect as other family units, unless the difference can be objectively justified. The *Mendoza* and *Karner* cases have shown how difficult it

is to justify excluding homosexual couples by reference to the need to protect traditional families. Non-traditional families of many kinds are so common that it is difficult to argue that a proper way to protect the traditional family is to deny all recognition to other kinds of relationship.

But there are two separate non-discrimination issues for United Kingdom family law:

(1) Insofar as the law extends to **unmarried** heterosexual couples rights and obligations connected with their homes and family life similar or equivalent to those extended to married couples, should those same rights and obligations be extended to unmarried homosexual couples?

That is the question to which *Godin* was addressed. We can expect that the answer will generally be 'yes'; but it may be that the statutory language in which the rights and obligations are expressed is so clearly heterosexual that it cannot be interpreted to include homosexuals. Some of it Parliament is doing already without the need for creative interpretation — the Housing Bill deals with the *Godin* question; the Domestic Violence, Crimes and Victims Bill extends the definition of cohabitant in the Family Law Act 1996 to include same sex couples.

We have also already gone down a good deal of that road in relation to children. It is already possible for unmarried couples to share parental responsibility for one another's children or indeed for unrelated children who are living with them. The courts are able to make residence orders and have for some time been prepared to do this to enable, for

example, a lesbian couple to share responsibility for all the children in their household.[11] Lesbian partners are able to have children by donor insemination or other forms of assisted reproduction offered by licensed clinics. But access to both these possibilities may be uneven: some courts may be more reluctant to grant shared residence orders, or place more obstacles in the way, than do others; and some clinics are more reluctant to provide a donor insemination service for lesbian couples, placing heavy emphasis on the 'need of that child for a father' when taking into account the welfare of the child, as required by section 13(5) of the Human Fertilisation and Embryology Act 1990.

Yet under the Adoption and Children Act 2002, unmarried couples, both opposite and same-sex, will be able to adopt unrelated children; further, a married or unmarried partner will be able to adopt the other partner's child, giving one the status of adoptive parent while the other retains the status of birth parent.[12] The Adoption Law Review in 1992 saw the absence of financial responsibility between the adults as a good reason for refusing to allow unmarried couples to adopt: bringing a child into the family has such profound consequences, not only for the child but also for the adults involved, that the adults should be prepared to take on responsibility for one another as well as for the child, in the interests of them all. Otherwise a rational adoptive parent would be reluctant to reduce or give up work in order to devote herself or himself to meeting the often very complex needs of the new member of the family. Once again, however, as in most areas of family law, it is necessary to catch up with the way in which people actually behave. Adoption by one person is already possible and increasingly that person is in fact in a long-term stable relationship where both parties will be equally important in the child's

[11] *Re C (A Minor) (Residence Order: Lesbian Co-parents)* [1994] Fam Law 468
[12] 2002 Act, ss 51(2) and 144(7)

life. Refusing to recognise that fact does more harm to the child whose interests are the law's primary concern.

(2) Insofar as the law provides for heterosexual couples to contract into the special status of marriage, bringing with it numerous rights and obligations not only as against one another but also as against the State and third parties, should that same or an equivalent status be extended to homosexual couples?

It may be that while enthusiasm for contracting in is waning fast amongst the heterosexual couples who could get married, it is strongest amongst the homosexual couples who currently cannot do so. Recent groundbreaking decisions in Massachusetts and Ontario have held it unconstitutional to deny same-sex couples the right to marry.'[13] Thus far, however, the same view has not been taken of the international instruments on this matter. The United Nations Human Rights Committee has opined that the exclusion of same sex couples from marriage does not violate Article 23 of the International Covenant on Civil and Political Rights, which provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state' and that 'the right of men and women of marriageable age to marry and found a family shall, be recognised'. Similarly, while Article 8 of the ECHR protects the right to respect for 'family life', Article 12 provides that 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'. This suggests that marriage may still enjoy a special status.

[13] *Halpern v Attorney General of Canada*, 2003-06-10, NCA CC9172; *Goodridge v Department of Public Health*, 798 NE 2d 941, Mass 2003.

The Government 'has no plans to introduce same-sex marriage'.[14] But it has introduced the Civil Partnership Bill to provide for registered partnerships for same- sex couples.[15] These will have all the essential features of marriage: it will be an exclusive union between two people not within the prohibited degrees for marriage; it will be formally registered in much the same way as a civil marriage is today; it will only be dissolved by a court, on almost identical grounds to those for dissolving a marriage (adultery is omitted, no doubt because it is unnecessary given the modern interpretation of unacceptable behaviour, but perhaps also because it would be difficult to find a precise equivalent in the context of a homosexual relationship which is not marriage); the legal consequences, both during and after the marriage, will be virtually identical to those of marriage. As provided for in the Bill, it will be marriage in almost all but name.

Of course, if we legislate for civil partnerships for same-sex couples, the question will arise whether it is justifiable to deny that opportunity to opposite sex couples. Anthony Lester's Civil Partnerships Bill, introduced and withdrawn on the faith of the Government's assurances in 2002, provided for both. The main answer to this argument is that they have marriage available to them. Those heterosexual couples who cannot at present marry, either because they are already married to someone else or because they are within the prohibited degrees, would not be able to register a civil partnership under these proposals. Those who do not marry at present because they do not want to would not want to enter into this form of civil partnership either.

[14] *Civil Partnership, op cit* note 7 para 1.3
[15] Civil Partnership Bill, session 2003/04, HL Bill 53

Insofar as their objections to marriage are misconceived, based upon assumptions about its legal and social consequences which have not held good since at least the 1960s, then there is no reason for the law to pander to them. Insofar as their objections are to the legal consequences themselves, then this would argue for some lesser form of civil partnership, bringing with it some but not all of the consequences of marriage. The question whether there should be such a 'second class marriage' or 'second class partnership' open to both same and opposite sex couples is quite separate from the question whether we should try to remove the present discrimination against same-sex relationships. We should not allow the one to cloud the other, especially as all the evidence suggests that the heterosexuals' problem is not with those who would like to opt in but do not, but with those who think that there is no need to opt in at all: 59% of cohabiting couples think that there is such a thing as common law marriage which brings the same consequences as ordinary marriage after a certain length of time.

This is wrong, but understandable, as the State's view is that those to whom marriage is available should not be treated more favourably by the benefits system than those who are married. Thus hetero-sexual cohabitants can only claim the same allowance as a married couple and not the total of two single person's allowances. There is therefore a downside to having a contracted-in status available. Once registered partnership becomes available to same-sex couples, the Government is considering applying the cohabitation principle to unregistered same-sex cohabitants. Stonewall has stoically accepted the logic of this.

Thus it is that we have already reached the stage of recognising same-sex relationships for what many will think the most important purpose of regulating family relationships:

providing for the care and upbringing of the next generation. It is difficult to see an objective necessity to continue to treat such relationships differently in other ways.

Trans people

The homosexual struggle is to be recognised as a validly different way of life and family form. The trans person's struggle is to be recognised as the heterosexual person that he or she believes herself to be. In theory, it ought to have been easier for English law to do this, but in practice it was not. Again, both European Community law and European Human Rights law have come to the rescue, and rather more quickly than in the case of homosexual rights.

In the well-known case of *Corbett v Corbett (orse Ashley)* [1971] P 83, Ormrod J held that, for the purpose of the law of capacity to marry, the sex of a person was fixed at birth. Accordingly a purported marriage in 1963 between a man and a male to female trans person was void ab initio. Shortly after this, the Nullity of Marriage Act 1971 provided that a marriage taking place after 31 July 1971 is void on the ground 'that the parties are not respectively male and female.' This was later consolidated as section 11(c) of the Matrimonial Causes Act 1973. The same approach was adopted by the Court of Appeal in *R v Tan* [1983] QB 1053 for the gender specific offences in the Sexual Offences Acts (in that case, 'being a man', living off immoral earnings). The Court considered that 'both common sense and the desirability of certainty and consistency' demanded that the *Corbett* decision should apply in both contexts. Since then, it has been assumed that a person's gender is fixed at birth for the purpose of all legal provisions

which make a distinction between men and women. *Corbett* was followed without challenge in *S-T (formerly J) v J* [1998] Fam 103. And in *Bellinger v Bellinger*, before the Human Rights Act came into force, the majority of the Court of Appeal held that 'male' and 'female' in the Matrimonial Causes Act still had to be interpreted in the way in which *Corbett* had interpreted them.

Meanwhile, however, the European Economic Community was pressing ahead to implement the commitment to equality in the Treaty of Rome. The purpose of the 1976 EEC Equal Treatment Directive (Council Directive 76/207/EEC) was:

". . . to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as the principle of equal treatment."

By Article 2:

"(1) ... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."

In *P v S and Cornwall County Council* (Case C-13/94) [ICR 795, delivered on 30 April 1996, the European Court of Justice held that it was contrary to the Equal Treatment Directive to dismiss a person on the ground that he proposed to undergo or had undergone gender reassignment. The applicant was dismissed from her employment as a manager in an educational establishment because she was undergoing male to female gender reassignment treatment and surgery. She notified her superiors of her intention to do so. She was given notice after it had begun and the final operation was performed during her notice period. Her claim was resisted on the ground that a female to male trans

person would have been treated in the same way. The Court pointed out that 'the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of community law' (para 18); and that 'the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure' (para 19). Where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment (para 21). Thus the European Court of Justice was prepared to recognise this as sex discrimination, while it was not prepared to recognise discrimination against same sex couples as sex discrimination.

The Sex Discrimination Act 1975 was amended by regulation under the European Communities Act to cater for gender reassignment as a separate category of sex discrimination. But recently, in *Chief Constable of West Yorkshire Police v A and another* [2004] UKHL 21, [2004] 2 WLR 1209, we held that P v S had meant more than just that discrimination on grounds of transsexuality is discrimination 'on grounds of sex' for the purpose of the Directive. The opinion of Advocate General Tesauro was emphatic that 'transsexuals certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by the directive, having regard also to the above-mentioned recognition of their right to a sexual identity'. The 'right to a sexual identity' referred to is clearly the right to the identity of a man or a woman rather than of some 'third sex'. Equally clearly it is a right to the identity of the sex into which the trans person has changed or is changing. So we held that since that decision, in the areas

covered by the Directive, a trans person has the right to be regarded as a member of the sex to which she has been reassigned. In the light of a more recent decision in *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] IRLR 240, this included the preconditions of her community rights, including the right to be recognised in the reassigned gender for the purpose of carrying out the duties of the post. In our case, this meant the police officer's duty to conduct personal searches. So the provision in PACE that women detainees must be searched by women officers had to be read accordingly.

But this was only in the area of employment and related rights dealt with by community law. It had nothing to do with European Human Rights law. This had been edging its way towards insisting that member states recognised post operative trans people in their reassigned gender. It is remarkable that, in each of the cases brought by trans people under the European Convention on Human Rights, the European Commission on Human Rights found a breach of a relevant article, whereas the Court was slower and more selective in taking that view. As long ago as 1979, in *D Van Oosterw v Belgium* (Applic No 7654/76), the Commission found that the refusal of Belgium to enable the registers of civil status to reflect lawful sex-changes violated the right to respect for private life in article 8. In *Rees v United Kingdom* (1986) 9 EHRR 56, the European Court of Human Rights, by a majority of 12 to 3, held that the refusal of the United Kingdom to issue a new birth certificate to a post operative trans person was not in breach of its positive obligations under Article 8. The Court was strongly influenced by the fact that in this country birth registration is regarded as a matter of historical record but that thereafter a trans person can be issued with a driving licence and passport in the new name and title

and thus present herself or himself in the new gender for many practical purposes. The Court took the same view in *Cossey v United Kingdom* (1990) 13 EHRR 622, but this time by the slender majority of 10 to 8. There was a powerful dissent by Judge Martens, pointing to the increasing legislative and judicial recognition of trans people in European states and elsewhere and to the fundamental human rights involved which in his view should not be defeated by technicalities (p 648, para 2.7):

> "The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fall 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 refusal can only be qualified as cruel. But there are no such reasons."

In contrast, in *B v France* (1992) 16 EHRR 1 the Court by a majority of 17 to 1 found France to be in breach of article 8 by refusing to recognise the reassigned gender. French people are required to carry identity cards at all times, so the degree of interference with the trans person's right to respect for her private life was much greater than in the United Kingdom. However, in 1997 the European Court of Human Rights, in *X Y and Z v United Kingdom* (1997) 24 EHRR 143 refused to find that the failure of United Kingdom law to recognise a female to male trans person as the father of a donor insemination child, born to his partner and brought up as their child, was a breach of their rights to respect for their family life under article 8. This trend was continued, in *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, where the Court, by a majority of 11 to 9, again found no

violation in the refusal to recognise the reassigned gender. By this stage, 37 out of the 41 member states of the Council of Europe recognised trans people in their reassigned gender. The United Kingdom was said to be alone in allowing (and even funding) gender reassignment treatment and surgery but failing to recognise its results.

li-i all these cases, the Court emphasised that times were changing, and that member states should keep the matter under review, as there might come a time when they would no longer enjoy a margin of appreciation. The United Kingdom had until then failed to heed such warnings, but in April 1999 the Home Secretary set up an interdepartmental working group. This reported in April 2000 and suggested putting the three options identified out to public consultation. To the dismay of the Court of Appeal in *Bellinger v Bellinger* [2001] EWCA Civ 1140; [2002] Fam 150, para 96, this was not done. A year later, in *Goodwin v United Kingdom* (2002) 35 EHRR 18, the European Court of Human Rights unanimously found that English law was in breach of both article 8 and article 12.

After *Goodwin, Bellinger v Bellinger* [UKHL 21; [2 AC 467, reached the House of Lords; but it too refused to interpret section 11(c) of the Matrimonial Causes Act 1973 so as to recognise the validity of a purported marriage in 1981 between a man and a male to female trans person. At the time the marriage had taken place, European Convention law did not require us to do this. The *Goodwin* decision was prospective in nature, requiring the United Kingdom to change its law for the future. This raised many difficult questions, in particular of definition and proof, which were better dealt with by Parliament. But until then, as our law no longer complied with the Convention, it was appropriate to make a declaration that section 11(c) of the Matrimonial Causes Act 1973 was incompatible with the Convention rights.

This led to the Gender Recognition Bill currently before Parliament. This lays down a comprehensive scheme for recognising the reassigned gender of a trans person in defined circumstances. These are wider than the post-operative conditions with which the domestic and European case law has been concerned. Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made. It will no longer be a genuine occupational qualification that the job may entail the carrying out even of intimate searches. In policy terms, therefore, the view has been taken that trans people properly belong to the gender in which they live, at least if they have gone through the prescribed formalities.

Conclusion

So we can see how European Community and human rights laws have already had a profound effect upon our domestic approach to sexuality. No doubt there is more to be done. But we now have the tools and, I believe, the will to do it.