EUROPEAN FAMILY LAW

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19th – 23rd November 2007

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CLASS INFORMATION

Attendance Policy

Students must attend all the classes and actively participate in the discussions.

Final Grade

Course grades will be calculated on the basis of three factors:

10% Class participation (active involvement)
10% Class attendance
80% Written paper (details will be discussed in the first class)

REQUIRED READING

1. ECtHR, *Marckx v. Belgium,* Application No. 6833/74, 13th June 1979
2. ECJ, *D and Sweden v. Council*, C-122/99 P and C-125/99 P, 31st July 2001
3. ECtHR, *Goodwin v. UK,* Application No. 28957/95, 11th July 2002
4. Selected provisions of European Convention on Human Rights
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COURT (PLENARY)

CASE OF MARCKX v. BELGIUM (edited)

(Application no. 6833/74)

JUDGMENT

STRASBOURG

13 June 1979

AS TO THE FACTS

A. Particular circumstances of the case

8. Alexandra **Marckx** was born on 16 October 1973 at Wilrijk, near Antwerp; she is the daughter of Paula **Marckx**, a Belgian national, who is unmarried and a journalist by profession.

Paula **Marckx** duly reported Alexandra's birth to the Wilrijk registration officer who informed the District Judge (juge de paix) as is required by Article 57 bis of the Belgian Civil Code ("the Civil Code") in the case of "illegitimate" children.

9. On 26 October 1973, the District Judge of the first district of Antwerp summoned Paula **Marckx** to appear before him (Article 405) so as to obtain from her the information required to make arrangements for Alexandra's guardianship; at the same time, he informed her of the methods available for recognising her daughter and of the consequences in law of any such recognition (see paragraph 14 below). He also drew her attention to certain provisions of the Civil Code, including Article 756 which concerns "exceptional" forms of inheritance (successions "irrégulières").

10. On 29 October 1973, Paula **Marckx** recognised her child in accordance with Article 334 of the Code. She thereby automatically became Alexandra's guardian (Article 396 bis); the family council, on which the sister and certain other relatives of Paula **Marckx** sat under the

chairmanship of the District Judge, was empowered to take in Alexandra's interests various measures provided for by law.

11. On 30 October 1974, Paula **Marckx** adopted her daughter pursuant to Article 349 of the Civil Code. The procedure, which was that laid down by Articles 350 to 356, entailed certain enquiries and involved some expenses. It concluded on 18 April 1975 with a judgment confirming the adoption, the effect whereof was retroactive to the date of the instrument of adoption, namely 30 October 1974.

12. At the time of her application to the Commission, Ms. Paula **Marckx**'s family included, besides Alexandra, her own mother, Mrs. Victorine Libot, who died in August 1974, and a sister, Mrs. Blanche **Marckx**.

13. The applicants complain of the Civil Code provisions on the manner of establishing the maternal affiliation of an "illegitimate" child and on the effects of establishing such affiliation as regards both the extent of the child's family relationships and the patrimonial rights of the child and of his mother. The applicants also put in issue the necessity for the mother to adopt the child if she wishes to increase his rights.

B. Current law

1. Establishment of the maternal affiliation of an "illegitimate" child

14. Under Belgian law, no legal bond between an unmarried mother and her child results from the mere fact of birth: whilst the birth certificate recorded at the registry office suffices to prove the maternal affiliation of a married woman's children (Article 319 of the Civil Code), the maternal affiliation of an "illegitimate" child is established by means either of a voluntary recognition by the mother or of legal proceedings taken for the purpose (action en recherche de maternité).

Nevertheless, an unrecognised "illegitimate" child bears his mother's name which must appear on the birth certificate (Article 57). The appointment of his guardian is a matter for the family council which is presided over by the District Judge.

Under Article 334, recognition, "if not inserted in the birth certificate, shall be effected by a formal deed". Recognition is declaratory and not attributive: it does not create but records the child's status and is retroactive to the date of birth. However, it does not necessarily follow that the person effecting recognition is actually the child's mother; on the contrary, any interested party may claim that the recognition does not correspond to the truth (Article 339). Many unmarried mothers - about 25 % according to the Government, although the applicants consider this an exaggerated figure - do not recognise their child.

Proceedings to establish maternal affiliation (action en recherche de maternité) may be instituted by the child within five years from his attainment of majority or, whilst he is still a minor, by his legal representative with the consent of the family council (Articles 341a-341c of the Civil Code).

2. Effects of the establishment of maternal affiliation

15. The establishment of the maternal affiliation of an "illegitimate" child has limited effects as regards both the extent of his family relationships and the rights of the child and his mother in the matter of inheritance on intestacy and voluntary dispositions.

a. The extent of family relationships

16. In the context of the maternal affiliation of an "illegitimate" child, Belgian legislation does not employ the concepts of "family" and "relative". Even once such affiliation has been established, it in principle creates a legal bond with the mother alone. The child does not become a member of his mother's family. The law excludes it from that family as regards inheritance rights on intestacy (see paragraph 17 below). Furthermore, if the child's parents are dead or under an incapacity, he cannot marry, before attaining the age of twenty-one, without consent which has to be given by his guardian (Article 159 of the Civil Code) and not, as is the case for a "legitimate" child, by his grandparents (Article 150); the law does not expressly create any maintenance obligations, etc., between the child and his grandparents. However, certain texts make provision for exceptions, for example as regards the impediments to marriage (Articles 161 and 162). According to a judgment of 22 September 1966 of the Belgian Court of Cassation (Pasicrisie I, 1967, pp 78-79), these texts "place the bonds existing between an illegitimate child and his grandparents on a legal footing based on the affection, respect and devotion that are the consequence of consanguinity ... (which) creates an obligation for the ascendants to take an interest in their descendants and, as a corollary, gives them the right, whenever this is not excluded by the law, to know and protect them and exercise over them the influence dictated by affection and devotion". The Court of Cassation deduced from this that grandparents were entitled to a right of access to the child.

(b) Rights of a child born out of wedlock and of his mother in the matter of inheritance on intestacy and voluntary dispositions

17. A recognised "illegitimate" child's rights of inheritance on intestacy are less than those of a "legitimate" child. As appears from Articles 338, 724, 756 to 758, 760, 761, 769 to 773 and 913 of the Civil Code, a recognised "illegitimate" child does not have, in the estate of his parent who dies intestate, the status of heir but solely that of "exceptional heir" ("successeur irrégulier"): he has to seek a court order putting him in possession of the estate (envoi en possession). He is the sole beneficiary of his deceased mother's estate only if she leaves no relatives entitled to inherit (Article 758); otherwise, its maximum entitlement - which arises when his mother leaves no descendants, ascendants, brothers or sisters – is three-quarters of the share which he would have taken if "legitimate" (Article 757). Furthermore, his mother may, during her lifetime, reduce that entitlement by one-half. Finally, Article 756 denies to the "illegitimate" child any rights on intestacy in the estates of his mother's relatives.

18. Recognised "illegitimate" children are also at a disadvantage as regards voluntary dispositions, since Article 908 provides that they "may receive by disposition inter vivos or by will no more than their entitlement under the title 'Inheritance on Intestacy'".

Conversely, the mother of such a child, unless she has no relatives entitled to inherit, may give in her lifetime or bequeath to him only part of her property. On the other hand, if the child's affiliation has not been established, the mother may so give or bequeath to him the whole of her property, provided that there are no heirs entitled to a reserved portion of her estate (héritiers réservataires). The mother is thus faced with the following alternative: either she recognises the child and loses the possibility of leaving all her estate to him; or she renounces establishing with him a family relationship in the eyes of the law, in order to retain the possibility of leaving all her estate to him just as she might to a stranger.

3. Adoption of "illegitimate" children by their mother

19. If the mother of a recognised "illegitimate" child remains unmarried, she has but one means of improving his status, namely, "simple" adoption. In such cases, the age requirements for this form of adoption are eased by Article 345 para. 2, sub-paragraph 2, of the Civil Code. The adopted child acquires over the adopter's estate the rights of a "legitimate" child but, unlike the latter, has no rights on intestacy in the estates of his mother's relatives (Article 365).

Only legitimation (Articles 331-333) and legitimation by adoption (Articles 368-370) place an "illegitimate" child on exactly the same footing as a "legitimate" child; both of these measures presuppose the mother's marriage.

C. The Bill submitted to the Senate on 15 February 1978

20. Belgium has signed, but not yet ratified, the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children, which was prepared by the International Commission on Civil Status and entered into force on 23 April 1964. Neither has Belgium yet ratified, nor even signed, the Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock, which was concluded within the Council of Europe and entered into force on 11 August 1978. Both of these instruments are based on the principle "mater semper certa est"; the second of them also regulates such questions as maintenance obligations, parental authority and rights of succession.

21. However, the Belgian Government submitted to the Senate on 15 February 1978 a Bill to which they referred the Court in their memorial of 3 July 1978 and subsequently at the hearings on 24 October. The official statement of reasons accompanying the Bill, which mentions, inter alia, the Conventions of 1962 and 1975 cited above, states that the Bill "seeks to institute equality in law between all children". In particular, maternal affiliation would be established on the mother's name being entered on the birth certificate, which would introduce into Belgian law the principle "mater semper certa est". Recognition by an unmarried mother would accordingly no longer be necessary, unless there were no such entry. Furthermore, the Civil Code would confer on children born out of wedlock rights identical to those presently enjoyed by children born in wedlock in the matter of inheritance on intestacy and voluntary dispositions.

PROCEEDINGS BEFORE THE COMMISSION

22. The essence of the applicants' allegations before the Commission was as follows:

- as an "illegitimate" child, Alexandra **Marckx** is the victim, as a result of certain provisions of the Belgian Civil Code, of a "capitis deminutio" incompatible with Articles 3 and 8 (art. 3, art. 8) of the Convention;

- this "capitis deminutio" also violates the said Articles (art. 3, art. 8) with respect to Paula **Marckx**;

- there are instances of discrimination, contrary to Article 14 taken in conjunction with Article 8 (art. 14+8), between "legitimate" and "illegitimate" children and between unmarried and married mothers;

- the fact that an "illegitimate" child may be recognised by any man, even if he is not the father, violates Articles 3, 8 and 14 (art. 3, art. 8, art. 14);

- Article 1 of Protocol No. 1 (P1-1) is violated by reason of the fact that an unmarried mother is not free to dispose of her property in favour of her child.

23. By partial decision of 16 March 1975, the Commission declared the penultimate complaint inadmissible. On 29 September 1975, it accepted the remainder of the application and also decided to take into consideration ex officio Article 12 (art. 12) of the Convention.

In its report of 10 December 1977, the Commission expresses the opinion:

- by ten votes to four, "that the situation" complained of "constitutes a violation of Article 8 (art. 8) of the Convention with respect to the illegitimate child" as far as, firstly, the "principle of recognition and the procedure for recognition" and, secondly, the "effects" of recognition are concerned;

- by nine votes to four with one abstention, that the "simple" adoption of Alexandra by her mother "has not remedied" the situation complained of in that "it maintains an improper restriction on the concept of family life", with the result that "the position complained of constitutes a violation of Article 8 (art. 8) with respect to the applicants";

- by twelve votes with two abstentions, "that the legislation as applied constitutes a violation of Article 8 in conjunction with Article 14 (art. 14+8) with respect to the applicants";

- by nine votes to six, that the "Belgian legislation as applied violates Article 1 of the First Protocol in conjunction with Article 14 (art. 14+P1-1) of the Convention" with respect to the first, but not to the second, applicant;

- that it is not "necessary" to examine the case under Article 3 (art. 3) of the Convention;

- unanimously, that "Article 12 (art. 12) is not relevant".

The report contains one separate opinion.

AS TO THE LAW

I. ON THE MERITS

A. On the manner of establishing Alexandra Marckx's maternal affiliation

35. Under Belgian law, the maternal affiliation of an "illegitimate" child is established neither by his birth alone nor even by the entry - obligatory under Article 57 of the Civil Code - of the mother's name on the birth certificate; Articles 334 and 341a require either a voluntary recognition or a court declaration as to maternity. On the other hand, under Article 319, the affiliation of a married woman's child is proved simply by the birth certificate recorded at the registry office (see paragraph 14 above).

The applicants see this system as violating, with respect to them, Article 8 (art 8) of the Convention, taken both alone and in conjunction with Article 14 (art. 14+8). This is contested by the Government. The Commission, for its part, finds a breach of Article 8 (art. 8), taken both alone and in conjunction with Article 14 (art. 14+8), with respect to Alexandra, and a breach of Article 14, taken in conjunction with Article 8 (art. 14+8), with respect to Paula **Marckx**.

1. On the alleged violation of Article 8 (art. 8) of the Convention, taken alone

36. Paula **Marckx** was able to establish Alexandra's affiliation only by the means afforded by Article 334 of the Civil Code, namely recognition. The effect of recognition is declaratory and not attributive: it does not create but records the child's status. It is irrevocable and retroactive to the date of birth. Furthermore, the procedure to be followed hardly presents difficulties: the declaration may take the form of a notarial deed, but it may also be added, at any time and without expense, to the record of the birth at the registry office (see paragraph 14 above).

Nevertheless, the necessity to have recourse to such an expedient derived from a refusal to acknowledge fully Paula **Marckx**'s maternity from the moment of the birth. Moreover, in Belgium an unmarried mother is faced with an alternative: if she recognises her child (assuming she wishes to do so), she will at the same time prejudice him since her capacity to give or bequeath her property to him will be restricted; if she desires to retain the possibility of making such dispositions as she chooses in her child's favour, she will be obliged to renounce establishing a family tie with him in law (see paragraph 18 above). Admittedly, that possibility, which is now open to her in the absence of recognition, would disappear entirely under the current Civil Code (Article 908) if, as is the applicants' wish, the mere mention of the mother's name on the birth certificate were to constitute proof of any "illegitimate" child's maternal affiliation. However, the dilemma which exists at present is not consonant with "respect" for family life; it thwarts and impedes the normal development of such life (see paragraph 31 above). Furthermore, it appears from paragraphs 60 to 65 below that the unfavourable consequences of recognition in the area of patrimonial rights are of themselves contrary to Article 14 of the Convention, taken in conjunction with Article 8 (art. 14+8) and with Article 1 of Protocol No. 1 (art. 14+P1-1).

The Court thus concludes that there has been a violation of Article 8 (art. 8), taken alone, with respect to the first applicant.

37. As regards Alexandra **Marckx**, only one method of establishing her maternal affiliation was available to her under Belgian law, namely, to take legal proceedings for the purpose (recherche de maternité; Articles 341a-341c of the Civil Code). Although a judgment declaring the affiliation of an "illegitimate" child has the same effects as a voluntary recognition, the procedure applicable is, in the nature of things, far more complex. Quite apart from the conditions of proof that have to be satisfied, the legal representative of an infant needs the consent of the family council before he can bring, assuming he wishes to do so, an action for a declaration as to status; it is only after attaining majority that the child can bring such an action himself (see paragraph 14 above). There is thus a risk that the establishment of affiliation will be time-consuming and that, in the interim, the child will remain separated in law from his mother. This system resulted in a lack of respect for the family life of Alexandra **Marckx** who, in the eyes of the law, was motherless from 16 to 29 October 1973. Despite the brevity of this period, there was thus also a violation of Article 8 (art. 8) with respect to the second applicant.

2. On the alleged violation of Article 14 of the Convention, taken in conjunction with Article 8 (art. 14+8)

38. The Court also has to determine whether, as regards the manner of establishing Alexandra's maternal affiliation, one or both of the applicants have been victims of discrimination contrary to Article 14 taken in conjunction with Article 8 (art. 14+8).

39. The Government, relying on the difference between the situations of the unmarried and the married mother, advance the following arguments: whilst the married mother and her husband "mutually undertake ... the obligation to feed, keep and educate their children" (Article 203 of the Civil Code), there is no certainty that the unmarried mother will be willing to bear on her own the responsibilities of motherhood; by leaving the unmarried mother the choice between recognising her child or dissociating herself from him, the law is prompted by a concern for protection of the child, for it would be dangerous to entrust him to the custody and authority of someone who has shown no inclination to care for him; many unmarried mothers do not recognise their child (see paragraph 14 above).

In the Court's judgment, the fact that some unmarried mothers, unlike Paula **Marckx**, do not wish to take care of their child cannot justify the rule of Belgian law whereby the establishment of their maternity is conditional on voluntary recognition or a court declaration. In fact, such an attitude is not a general feature of the relationship between unmarried mothers and their children; besides, this is neither claimed by the Government nor proved by the figures which they advance. As the Commission points out, it may happen that also a married mother might not wish to bring up her child, and yet, as far as she is concerned, the birth alone will have created the legal bond of affiliation.

Again, the interest of an "illegitimate" child in having such a bond established is no less than that of a "legitimate" child. However, the "illegitimate" child is likely to remain motherless in the eyes of Belgian law. If an "illegitimate" child is not recognised voluntarily, he has only one expedient, namely, an action to establish maternal affiliation (Articles 341a-341c of the Civil Code; see paragraph 14 above). A married woman's child also is entitled to institute such an action (Articles 326-330), but in the vast majority of cases the entries on the birth certificate (Article 319) or, failing that, the constant and factual enjoyment of the status of a legitimate child (une possession d'état constante; Article 320) render this unnecessary.

40. The Government do not deny that the present law favours the traditional family, but they maintain that the law aims at ensuring that family's full development and is thereby founded on objective and reasonable grounds relating to morals and public order (ordre public).

The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family; the members of the "illegitimate" family enjoy the guarantees of Article 8 (art. 8) on an equal footing with the members of the traditional family.

41. The Government concede that the law at issue may appear open to criticism but plead that the problem of reforming it arose only several years after the entry into force of the European Convention on Human Rights in respect of Belgium (14 June 1955), that is with the adoption of the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children (see paragraph 20 above).

It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions (Tyrer judgment of 25 April 1978, Series A no. 26, p. 15, para. 31). In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est".

Admittedly, of the ten States that drew up the Brussels Convention, only eight have signed and only four have ratified it to date. The European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock has at present been signed by only ten and ratified by only four members of the Council of Europe. Furthermore, Article 14 (1) of the latter Convention permits any State to make, at the most, three reservations, one of which could theoretically concern precisely the manner of establishing the maternal affiliation of a child born out of wedlock (Article 2).

However, this state of affairs cannot be relied on in opposition to the evolution noted above. Both the relevant Conventions are in force and there is no reason to attribute the currently

small number of Contracting States to a refusal to admit equality between "illegitimate" and legitimate" children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.

The official statement of reasons accompanying the Bill submitted by the Belgian Government to the Senate on 15 February 1978 (see paragraph 21 above) provides an illustration of this evolution of rules and attitudes. Amongst other things, the statement points out that "in recent years several Western European countries, including the Federal Republic of Germany, Great Britain, the Netherlands, France, Italy and Switzerland, have adopted new legislation radically altering the traditional structure of the law of affiliation and establishing almost complete equality between legitimate and illegitimate children". It is also noted that "the desire to put an end to all discrimination and abolish all inequalities based on birth is ... apparent in the work of various international institutions". As regards Belgium itself, the statement stresses that the difference of treatment between Belgian citizens, depending on whether their affiliation is established in or out of wedlock, amounts to a "flagrant exception" to the fundamental principle of the equality of everyone before the law (Article 6 of the Constitution). It adds that "lawyers and public opinion are becoming increasingly convinced that the discrimination against (illegitimate) children should be ended".

42. The Government maintain, finally, that the introduction of the rule "mater semper certa est" should be accompanied, as is contemplated in the 1978 Bill, by a reform of the provisions on the establishment of paternity, failing which there would be a considerable and one-sided increase in the responsibilities of the unmarried mother. Thus, for the Government, there is a comprehensive problem and any piecemeal solution would be dangerous.

The Court confines itself to noting that it is required to rule only on certain aspects of the maternal affiliation of "illegitimate" children under Belgian law. It does not exclude that a judgment finding a breach of the Convention on one of those aspects might render desirable or necessary a reform of the law on other matters not submitted for examination in the present proceedings. It is for the respondent State, and the respondent State alone, to take the measures it considers appropriate to ensure that its domestic law is coherent and consistent.

43. The distinction complained of therefore lacks objective and reasonable justification. Accordingly, the manner of establishing Alexandra **Marckx**'s maternal affiliation violated, with respect to both applicants, Article 14 taken in conjunction with Article 8 (art. 14+8).

B. On the extent in law of Alexandra Marckx's family relationships

44. Under Belgian law, a "legitimate" child is fully integrated from the moment of his birth into the family of each of his parents, whereas a recognised "illegitimate" child, and even an adopted "illegitimate" child, remains in principle a stranger to his parents' families (see paragraph 16 above). In fact, the legislation makes provision for some exceptions - and recent

case-law is tending to add more - but it denies a child born out of wedlock any rights over the estates of his father's or mother's relatives (Article 756 in fine of the Civil Code), it does not expressly create any maintenance obligations between him and those relatives, and it empowers his guardian rather than those relatives to give consent, where appropriate, to his marriage (Article 159, as compared with Article 150), etc.

It thus appears that in certain respects Alexandra never had a legal relationship with her mother's family, for example with her maternal grandmother, Mrs. Victorine Libot, who died in August 1974, or with her aunt, Mrs. Blanche **Marckx** (see paragraph 12 above).

The applicants regard this situation as incompatible with Article 8 of the Convention (art. 8), taken both alone and in conjunction with Article 14 (art. 14+8). This is contested by the Government. The Commission, for its part, finds a breach of the requirements of Article 8 (art. 8), taken both alone and in conjunction with Article 14 (art. 14+8), with respect to Alexandra, and a breach of Article 14 taken in conjunction with Article 8 (art. 14+8), with respect to Paula **Marckx**.

1. On the alleged violation of Article 8 (art. 8) of the Convention, taken alone

45. In the Court's opinion, "family life", within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life.

"Respect" for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally (see, mutatis mutandis, paragraph 31 above). Yet the development of the family life of an unmarried mother and her child whom she has recognised may be hindered if the child does not become a member of the mother's family and if the establishment of affiliation has effects only as between the two of them.

46. It is objected by the Government that Alexandra's grandparents were not parties to the case and, furthermore, that there is no evidence before the Court as to the actual existence, now or in the past, of relations between Alexandra and her grandparents, the normal manifestations whereof were hampered by Belgian law.

The Court does not agree. The fact that Mrs. Victorine Libot did not apply to the Commission in no way prevents the applicants from complaining, on their own account, of the exclusion of one of them from the other's family. Besides, there is nothing to prove the absence of actual relations between Alexandra and her grandmother before the latter's death; in addition, the information obtained at the hearings suggests that Alexandra apparently has such relations with an aunt.

47. There is thus in this connection violation of Article 8 (art. 8), taken alone, with respect to both applicants.

2. On the alleged violation of Article 14 of the Convention, taken in conjunction with Article 8 (art. 14+8)

48. It remains for the Court to determine whether, as regards the extent in law of Alexandra's family relationships, one or both of the applicants have been victims of discrimination in breach of Article 14 taken in conjunction with Article 8 (art. 14+8). One of the differences of treatment found in this area between "illegitimate" and "legitimate" children concerns inheritance rights on intestacy (Article 756 in fine of the Civil Code); the Court's opinion on this aspect appears at paragraphs 56 to 59 below. With respect to the other differences, the Government do not put forward any arguments beyond those they rely on in connection with the manner of establishing affiliation (see paragraphs 39 to 42 above). The Court discerns no objective and reasonable justification for the differences of treatment now being considered. Admittedly, the "tranquillity" of "legitimate" families may sometimes be disturbed if an "illegitimate" child is included, in the eyes of the law, in his mother's family on the same footing as a child born in wedlock, but this is not a motive that justifies depriving the former child of fundamental rights. The Court also refers, mutatis mutandis, to the reasons set out in paragraphs 40 and 41 of the present judgment.

The distinction complained of therefore violates, with respect to both applicants, Article 14 taken in conjunction with Article 8 (art. 14+8).

FOR THESE REASONS, THE COURT

II. ON THE MANNER OF ESTABLISHING ALEXANDRA **MARCKX**'S MATERNAL AFFILIATION

2. Holds by ten votes to five that there has been breach of Article 8 (art. 8) of the Convention, taken alone, with respect to Paula **Marckx**;

3. Holds by eleven votes to four that there has also been breach of Article 14 of the Convention, taken in conjunction with Article 8 (art. 14+8), with respect to this applicant;

4. Holds by twelve votes to three that there has been breach of Article 8 (art. 8) of the Convention, taken alone, with respect to Alexandra **Marckx**;

5. Holds by thirteen votes to two that there has also been breach of Article 14 of the Convention, taken in conjunction with Article 8 (art. 14+8), with respect to this applicant;

III. ON THE EXTENT IN LAW OF ALEXANDRA **MARCKX**'S FAMILY RELATIONSHIPS

6. Holds by twelve votes to three that there is breach of Article 8 (art. 8) of the Convention, taken alone, with respect to both applicants;

7. Holds by thirteen votes to two that there is also breach of Article 14 of the Convention, taken in conjunction with Article 8 (art. 14+8), with respect to both applicants.

Judgment of the Court of 31 May 2001

D and Kingdom of Sweden v. Council of the European Union.

Joined cases C-122/99 P and C-125/99 P

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet, V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón, R. Schintgen, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: J. Mischo,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 January 2001, at which D was represented by J.-N. Louis, the Kingdom of Sweden by A. Kruse, acting as Agent, the Council by M. Bauer and E. Karlsson, and the Kingdom of Denmark by J. Molde,

after hearing the Opinion of the Advocate General at the sitting on 22 February 2001,

gives the following

Judgment

Grounds

1. By two applications lodged at the Registry of the Court of Justice on 13 and 14 April 1999 respectively, D and the Kingdom of Sweden brought an appeal pursuant to Article 49 of the EC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the judgment in Case T-264/97 D v Council [1999] ECR-SC I-A-1 and II-1 (the contested judgment), in which the Court of First Instance dismissed the application by D, supported by the Kingdom of Sweden, for annulment of the refusal by the Council of the European Union to award the applicant the household allowance.

Legal background

2. Article 1(2) of Annex VII to the Staff Regulations of Officials of the European Communities (the Staff Regulations) provides as follows:

The household allowance shall be granted to:

(a) a married official;

(b) an official who is widowed, divorced, legally separated or unmarried and has one or more dependent children within the meaning of Article 2(2) and (3) below;

(c) by special reasoned decision of the appointing authority based on supporting documents, an official who, while not fulfilling the conditions laid down in (a) and (b), nevertheless actually assumes family responsibilities.

3. Article 1 of Chapter 1 of Lagen (1994:1117) om registrerat partnerskap of 23 June 1994 (the Swedish law on registered partnership) provides that [t]wo persons of the same sex may apply for registration of their partnership. Article 1 of Chapter 3 of the same law provides that [a] registered partnership shall have the same legal effects as a marriage, subject to the exceptions provided for ....

Facts

4. D, an official of the European Communities of Swedish nationality working at the Council, registered a partnership with another Swedish national of the same sex in Sweden on 23 June 1995. By notes of 16 and 24 September 1996 he applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations.

5. The Council rejected the application, by note of 29 November 1996, on the ground that the provisions of the Staff Regulations could not be construed as allowing a registered partnership to be treated as being equivalent to marriage.

6. The complaint against that decision brought by D on 1 March 1997 was rejected on the same ground, by a note of 30 June 1997 from the Secretary-General of the Council (the contested decision).

7. Following that rejection D, by application lodged at the Registry of the Court of First Instance on 2 October 1997, brought an action seeking that the refusal to recognise the legal status of his partnership be annulled and that he and his partner should be granted the remuneration to which he claimed entitlement under the Staff Regulations and the regulations and other general provisions applicable to officials of the European Communities.

The contested judgment

8. The Court of First Instance held, in paragraphs 14 to 18 of the contested judgment, that the pre-litigation procedure related only to the application for the household allowance and that therefore the action could seek only annulment of the refusal to grant that application.

9. In paragraphs 19 to 21 of the contested judgment, the Court of First Instance rejected the objection of inadmissibility raised by the Council with regard to some of the pleas put forward by the applicant in support of the claim for annulment.

10. With regard to the first plea, alleging infringement of the principles of equal treatment and non-discrimination, the Court of First Instance held first of all, in paragraphs 23 to 25 of the contested judgment, that Council Regulation (EC, ECSC, Euratom) No 781/98 of 7 April 1998

amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities in respect of equal treatment (OJ 1998 L 113, p. 4), which introduced Article 1a into the Staff Regulations giving officials entitlement to equal treatment irrespective of their sexual orientation, without prejudice to the provisions of the Staff Regulations requiring a particular marital status, did not enter into force until after the adoption of the contested decision and so it was not appropriate to take that regulation into consideration.

11. The Court of First Instance went on to observe in paragraphs 26 and 27 of the contested judgment that, according to its case-law, for the purposes of the Staff Regulations the concept of marriage must be understood as meaning a relationship based on civil marriage within the traditional meaning of the term (Case T-65/92 Arauxo-Dumay v Commission [1993] ECR II-597, paragraph 28) and reference to the laws of the Member States is not necessary where the relevant provisions of the Staff Regulations are capable of being given an independent interpretation (Case T-43/90 Díaz García v Parliament [1992] ECR II-2619, paragraph 36).

12. Lastly, on the basis of the case-law of the European Court of Human Rights and that of the Court of Justice (Case C-249/96 Grant [1998] ECR I-621, paragraphs 34 and 35) the Court of First Instance held in paragraphs 28 to 30 of the contested judgment that the Council was under no obligation to regard as equivalent to marriage, for the purposes of the Staff Regulations, the situation of a person who had a stable relationship with a partner of the same sex, even if that relationship had been officially registered by a national authority. It added, in paragraphs 31 and 32 of the contested judgment, that the Commission had been requested to submit proposals concerning the recognition of situations involving registered partnerships and that it would be for the Council, as legislator and not as employer, to make any necessary amendments to the Staff Regulations following those proposals.

13. In paragraphs 36 and 37 of the contested judgment, the Court of First Instance rejected as unfounded the second plea, which alleged that the applicant was entitled to respect for the integrity of his personal status as a registered partner as distinct from the status of being unmarried.

14. As regards the third plea, alleging infringement of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of First Instance held, in paragraphs 39 to 41 of the contested judgment, that the Council could not have infringed that provision since long-term homosexual relationships are not covered by the right to respect for family life protected under that article.

15. As regards the fourth plea, alleging infringement of the principle of equal pay for men and women contained in Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), the Court of First Instance merely stated in paragraphs 42 to 44 of the contested judgment that the relevant provisions of the Staff Regulations apply equally to men and women and thus do not lead to any discrimination prohibited under Article 119 of the Treaty.

16. On those grounds, the Court of First Instance dismissed the application.

The appeals

17. D and the Kingdom of Sweden claim that the Court should set aside the contested judgment and the Council's decision dismissing D's application and order the Council to pay the costs of the proceedings before the Court of First Instance and the Court of Justice, respectively, and the costs incurred by the Kingdom of Sweden in the proceedings before the Court of Justice.

18. The Council contends that the Court should dismiss the appeals as unfounded and order D and the Kingdom of Sweden to pay the costs.

19. By order of the President of the Court of Justice of 20 May 1999, the two cases were joined for the purposes of the written and oral procedure and the judgment.

20. By orders of the President of the Court of Justice of 24 September 1999 the Kingdom of Denmark and the Kingdom of the Netherlands were given leave to intervene in support of the submissions of D and the Kingdom of Sweden. They submit that the Court should set aside the contested judgment.

The plea concerning the scope of the application

21. D asserts that the Court of First Instance erred in law in considering that the dispute before it related only to award of the household allowance when, in fact, by his action D was seeking entitlement, by reason of his registered partnership, to all the benefits to which a married official would be entitled under the Staff Regulations. The Court of First Instance was wrong to consider that the pre-litigation procedure related only to the application for the household allowance when, on the one hand, D's notes dated 16 and 24 September 1996 to his administration contained no such restriction and, on the other hand, his complaint of 1 March 1997, which forms part of the pre-litigation procedure, made express reference to other entitlements and benefits besides the household allowance.

22. The Court of First Instance determined the precise subject-matter of the application made by the official to his administration on the basis of the documents in the case at first instance. It is clear that it was entitled, without any distortion of the relevant facts, to hold that in D's initial application he sought to receive the household allowance, as he himself confirmed in his note of 16 October 1996, even though his handwritten notes of 16 and 24 September 1996 did not mention this expressly, and that his complaint of 1 March 1997, lodged after the contested decision was taken, did indeed refer to other aspects but could not, as a matter of law, extend the scope of the application.

23. The plea concerning the scope of the application must therefore be rejected.

The plea alleging failure to provide adequate reasoning for the contested judgment

24. D contends that the contested judgment is inadequately reasoned because in paragraph 36 it merely dismisses as unfounded, assuming that it is different from the first [plea in the application], the second plea, alleging infringement of the principle of the integrity of a person's status. To deal with the plea in this way does not make it possible to tell, from a

reading of the contested judgment, whether the plea was rejected because the principle relied on did not exist, was inapplicable or had not been infringed.

25. In the second plea, which, it is alleged, was not dealt with satisfactorily, the applicant maintained in essence that the right of a national of a Member State to have his civil status respected throughout the Community had been infringed by the contested decision treating his situation as being equivalent to that of an unmarried official. This plea followed on from the first plea, in which the applicant alleged infringement of equal treatment and discrimination on grounds of sexual orientation in that the Council did not recognise that the legal effects of a partnership registered in Sweden should result in its being treated as equivalent to a marriage, including for the purposes of the Staff Regulations.

26. In those circumstances, it appears, given the reasoning it adopted, that the Court of First Instance considered the second plea from two separate perspectives in turn. If the plea was a restatement of the idea that national law must take precedence as regards interpretation of the term married official in the Staff Regulations, the Court of First Instance considered, quite rightly, that it had already dealt with it in its consideration of the first plea. If it was based on a separate rule that a person's civil status should be the same throughout the Community, the reply was that assessment of entitlement to an allowance provided for in the Staff Regulations does not, on any view, alter the applicant's civil status and therefore that, if there were such a rule, it would not be relevant.

27. The reasoning, though brief, is none the less sufficient to convey the grounds of fact and law on which the Court of First Instance rejected the second plea.

28. The plea alleging failure to provide an adequate reasoning must therefore be rejected.

The pleas concerning interpretation of the Staff Regulations

29. D and the Kingdom of Sweden, supported by the Kingdom of Denmark and the Kingdom of the Netherlands, assert that, since civil status is a matter which comes within the exclusive competence of the Member States, terms such as married official or spouse in the Staff Regulations should be interpreted by reference to the law of the Member States and not be given an independent definition. Thus, where a Member State has legislated to give legal status to an arrangement such as registered partnership, which is to be treated in respect of the rights and duties it comprises as being equivalent to marriage, the same treatment should be accorded in the application of the Staff Regulations.

30. That interpretation does not conflict with Community case-law, which has not so far dealt with statutory partnership and has merely distinguished between marriage and stable relationships involving de facto cohabitation, which differ essentially from the statutory arrangement constituted by registered partnership. Moreover, it accords with the aim of the Staff Regulations, which is to bring about the recruitment on a wide geographical basis of high-quality staff for the Community institutions, which entails compensation for actual family costs incurred when staff take up their duties.

31. The Council supports the more restrictive interpretation adopted by the Court of First Instance, mainly on the grounds that there is no ambiguity in the wording of the Staff

Regulations, that even in the law of those Member States which recognise the concept of registered partnership that concept is distinct from marriage and is treated as being equivalent only as regards its effects and subject to exceptions and, lastly, that a registered partnership arrangement exists only in some of the Member States and to treat it as being equivalent to marriage for the purposes of applying the Staff Regulations would be to extend the scope of the benefits concerned, which requires a prior assessment of its legal and budgetary consequences and a decision on the part of the Community legislature rather than a judicial interpretation of the existing rules.

32. The Council points out in this connection that at the time Regulation No 781/98 was adopted a request by the Kingdom of Sweden for registered partnership to be treated as being equivalent to marriage was rejected; the Community legislature chose instead to instruct the Commission to study the consequences, especially the financial ones, of such a measure and to submit proposals to it, if appropriate, and decided in the meantime to maintain the existing arrangement as regards provisions requiring a particular civil status.

33. It is true that the question whether the concepts of marriage and registered partnership should be treated as distinct or equivalent for the purposes of interpreting the Staff Regulations has not until now been resolved by the Court of Justice. As the appellants contend, a stable relationship between partners of the same sex which has only a de facto existence, as was the case in Grant, cited above, is not necessarily equivalent to a registered partnership under a statutory arrangement, which, as between the persons concerned and as regards third parties, has effects in law akin to those of marriage since it is intended to be comparable.

34. It is not in question that, according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex.

35. It is equally true that since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage.

36. It is clear, however, that apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage.

37. In such circumstances the Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. The intention of the Community legislature was to grant entitlement to the household allowance under Article 1(2)(a) of Annex VII to the Staff Regulations only to married couples.

38. Only the legislature can, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations. However, not only has the Community legislature not shown any intention of adopting such measures, it has even (see

paragraph 32 above) ruled out at this stage any idea of other forms of partnership being assimilated to marriage for the purposes of granting the benefits reserved under the Staff Regulations for married officials, choosing instead to maintain the existing arrangement until the various consequences of such assimilation become clearer.

39. It follows that the fact that, in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term married official as used in the Staff Regulations.

40. It follows from the above considerations that the Court of First Instance was right to hold that the Council could not interpret the Staff Regulations so as to treat D's situation as that of a married official for the purposes of granting a household allowance.

41. The pleas concerning the interpretation of the Staff Regulations must therefore be rejected.

The plea alleging infringement of the principle of the integrity of a person's status

42. In this plea, the appellant argues that the contested decision to treat him as being unmarried infringes the principle that all nationals of Member States are entitled to respect throughout the Community for the civil status they enjoy in their own Member State.

43. It is sufficient to state in this connection, as did the Court of First Instance in paragraph 35 of the contested judgment, that in any event, in applying to the appellant a provision of the Staff Regulations concerning an allowance, the competent institution was not taking a decision affecting his situation with regard to his civil status.

44. The plea alleging infringement of the principle of the integrity of a person's status must therefore be rejected.

The pleas relating to infringement of the principle of equal treatment, discrimination on grounds of sex and nationality and restriction of the free movement of workers

45. D contends that the contested decision, which deprives him of an allowance to which his married colleagues are entitled solely on the ground that the partner with whom he is living is of the same sex as himself, constitutes, contrary to what the Court of First Instance held, discrimination based on sex, in breach of Article 119 of the Treaty, and infringement of the principle of equal treatment.

46. It should be observed first of all that it is irrelevant for the purposes of granting the household allowance whether the official is a man or a woman. The relevant provision of the Staff Regulations, which restricts the allowance to married officials, cannot therefore be regarded as being discriminatory on grounds of the sex of the person concerned, or, therefore, as being in breach of Article 119 of the Treaty.

47. Secondly, as regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner.

48. The principle of equal treatment can apply only to persons in comparable situations, and so it is necessary to consider whether the situation of an official who has registered a partnership between persons of the same sex, such as the partnership entered into by D under Swedish law, is comparable to that of a married official.

49. In making such an assessment the Community judicature cannot disregard the views prevailing within the Community as a whole.

50. The existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union (see paragraphs 35 and 36 above).

51. In those circumstances, the situation of an official who has registered a partnership in Sweden cannot be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official.

52. It follows that the plea relating to infringement of the principle of equal treatment and discrimination on grounds of sex must be rejected.

53. D also contends that by depriving partners registered under the legislation in force in some Member States of the rights associated with their status under national law, a decision such as the contested decision constitutes discrimination on grounds of nationality and at the same time an obstacle to freedom of movement for workers.

54. The Council argues that this is a fresh plea introduced for the first time at the appeal stage and as such is inadmissible. D replies that it is not a fresh plea but a limb of the plea previously put forward alleging infringement of the principle of non-discrimination.

55. It is common ground, however, that no mention was made earlier in the proceedings of the different treatment which, as the result of a decision such as the contested decision, nationals of the Kingdoms of Denmark, the Netherlands and Sweden receive as compared with nationals of other Member States or the fact that the measure concerned might deter nationals of any of those three Member States from exercising their right to free movement.

56. Those are issues which constitute separate pleas, distinct from the plea alleging breach of the principle of equal treatment and discrimination on grounds of sex, which attack the contested decision from a different perspective and challenge its validity by reference to other rules and principles.

57. It follows that the pleas relating to discrimination on grounds of nationality and restriction of the free movement of workers must be declared inadmissible.

The plea based on the right to respect for private and family life

58. According to D, the protection for family life provided for in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms applies to homosexual relationships and, by requiring recognition of the existence and effects of a civil status acquired by law, prohibits the interference constituted by the transmission of incorrect data to third parties.

59. It is sufficient to observe that refusal by the Community administration to grant a household allowance to one of its officials does not affect the situation of the official in question as regards his civil status and, since it only concerns the relationship between the official and his employer, does not of itself give rise to the transmission of any personal information to persons outside the Community administration.

60. The contested decision is not therefore, on any view, capable of constituting interference in private and family life within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

61. The plea based on the right to respect for private and family life must therefore be rejected.

62. It follows that the appeals must be dismissed in their entirety.

Operative part

On those grounds,

THE COURT

hereby:

1. Dismisses the appeals;

2. Orders D and the Kingdom of Sweden jointly and severally to pay the costs;

3. Orders the Kingdom of Denmark and the Kingdom of the Netherlands to bear their own costs.

CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM (edited)

(Application no. 28957/95)

JUDGMENT

STRASBOURG

11 July 2002

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant is a United Kingdom citizen born in 1937 and is a post-operative male to female transsexual.

13. The applicant had a tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid-1960s, she was diagnosed as a transsexual. Though she married a woman and they had four children, her conviction was that her "brain sex" did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January 1985, the applicant began treatment in earnest, attending appointments once every three months at the Gender Identity Clinic at the Charing Cross Hospital, which included regular consultations with a psychiatrist as well as on occasion a psychologist. She was prescribed hormone therapy, began attending grooming classes and voice training. Since this time, she has lived fully as a woman. In October 1986, she underwent surgery to shorten her vocal chords. In August 1987, she was accepted on the waiting list for gender re-assignment surgery. In 1990, she underwent gender re-assignment surgery at a National Health Service hospital. Her treatment and surgery was provided for and paid for by the National Health Service.

14. The applicant divorced from her former wife on a date unspecified but continued to enjoy the love and support of her children.

15. The applicant claims that between 1990 and 1992 she was sexually harassed by colleagues at work. She attempted to pursue a case of sexual harassment in the Industrial Tribunal but claimed that she was unsuccessful because she was considered in law to be a man. She did not challenge this decision by appealing to the Employment Appeal Tribunal. The applicant was subsequently dismissed from her employment for reasons connected with her health, but alleges that the real reason was that she was a transsexual.

16. In 1996, the applicant started work with a new employer and was required to provide her National Insurance ("NI") number. She was concerned that the new employer would be in a position to trace her details as once in the possession of the number it would have been

possible to find out about her previous employers and obtain information from them. Although she requested the allocation of a new NI number from the Department of Social Security ("DSS"), this was rejected and she eventually gave the new employer her NI number. The applicant claims that the new employer has now traced back her identity as she began experiencing problems at work. Colleagues stopped speaking to her and she was told that everyone was talking about her behind her back.

17. The DSS Contributions Agency informed the applicant that she would be ineligible for a State pension at the age of 60, the age of entitlement for women in the United Kingdom. In April 1997, the DSS informed the applicant that her pension contributions would have to be continued until the date at which she reached the age of 65, being the age of entitlement for men, namely April 2002. On 23 April 1997, she therefore entered into an undertaking with the DSS to pay direct the NI contributions which would otherwise be deducted by her employer as for all male employees. In the light of this undertaking, on 2 May 1997, the DSS Contributions Agency issued the applicant with a Form CF 384 Age Exemption Certificate (see Relevant domestic law and practice below).

18. The applicant's files at the DSS were marked "sensitive" to ensure that only an employee of a particular grade had access to her files. This meant in practice that the applicant had to make special appointments for even the most trivial matters and could not deal directly with the local office or deal with queries over the telephone. Her record continues to state her sex as male and despite the "special procedures" she has received letters from the DSS addressed to the male name which she was given at birth.

19. In a number of instances, the applicant stated that she has had to choose between revealing her birth certificate and foregoing certain advantages which were conditional upon her producing her birth certificate. In particular, she has not followed through a loan conditional upon life insurance, a re-mortgage offer and an entitlement to winter fuel allowance from the DSS. Similarly, the applicant remains obliged to pay the higher motor insurance premiums applicable to men. Nor did she feel able to report a theft of 200 pounds sterling to the police, for fear that the investigation would require her to reveal her identity.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Names

20. Under English law, a person is entitled to adopt such first names or surname as he or she wishes. Such names are valid for the purposes of identification and may be used in passports, driving licences, medical and insurance cards, etc. The new names are also entered on the electoral roll.

B. Marriage and definition of gender in domestic law

21. Under English law, marriage is defined as the voluntary union between a man and a woman. In the case of *Corbett v. Corbett* ([1971] Probate Reports 83), Mr Justice Ormrod ruled

that sex for that purpose is to be determined by the application of chromosomal, gonadal and genital tests where these are congruent and without regard to any surgical intervention. This use of biological criteria to determine sex was approved by the Court of Appeal in *R. v. Tan* ([1983] Queen's Bench Reports 1053) and given more general application, the court holding that a person born male had been correctly convicted under a statute penalising men who live on the earnings of prostitution, notwithstanding the fact that the accused had undergone gender reassignment therapy.

22. Under section 11(b) of the Matrimonial Causes Act 1973, any marriage where the parties are not respectively male and female is void. The test applied as to the sex of the partners to a marriage is that laid down in the above-mentioned case of *Corbett v. Corbett*. According to that same decision a marriage between a male-to-female transsexual and a man might also be avoided on the basis that the transsexual was incapable of consummating the marriage in the context of ordinary and complete sexual intercourse (*obiter per* Mr Justice Ormrod).

This decision was reinforced by Section 12(a) of the Matrimonial Causes Act 1973, according to which a marriage that has not been consummated owing to the incapacity of either party to consummate may be voidable. Section 13(1) of the Act provides that the court must not grant a decree of nullity if it is satisfied that the petitioner knew the marriage was voidable, but led the respondent to believe that she would not seek a decree of nullity, and that it would be unjust to grant the decree.

C. Birth certificates

23. Registration of births is governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"). Section 1(1) of that Act requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. An entry is regarded as a record of the facts at the time of birth. A birth certificate accordingly constitutes a document revealing not current identity but historical facts.

24. The sex of the child must be entered on the birth certificate. The criteria for determining the sex of a child at birth are not defined in the Act. The practice of the Registrar is to use exclusively the biological criteria (chromosomal, gonadal and genital) as laid down by Mr Justice Ormrod in the above-mentioned case of *Corbett v. Corbett*.

25. The 1953 Act provides for the correction by the Registrar of clerical errors or factual errors. The official position is that an amendment may only be made if the error occurred when the birth was registered. The fact that it may become evident later in a person's life that his or her "psychological" sex is in conflict with the biological criteria is not considered to imply that the initial entry at birth was a factual error. Only in cases where the apparent and genital sex of a child was wrongly identified, or where the biological criteria were not congruent, can a change in the initial entry be made. It is necessary for that purpose to adduce medical evidence that the initial entry was incorrect. No error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

26. The Government point out that the use of a birth certificate for identification purposes is discouraged by the Registrar General, and for a number of years birth certificates have contained a warning that they are not evidence of the identity of the person presenting it. However, it is a matter for individuals whether to follow this recommendation.

G. Current developments

1. Review of the situation of transsexuals in the United Kingdom

49. On 14 April 1999, the Secretary of State for the Home Department announced the establishment of an Interdepartmental Working Group on Transsexual People with 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."

50. The Working Group produced a report in April 2000 in which it examined the current position of transsexuals in the United Kingdom, with particular reference to their status under national law and the changes which might be made. It concluded:

> "5.1. Transsexual people deal with their condition in different ways. Some live in the opposite sex without any treatment to acquire its physical attributes. Others take hormones so as to obtain some of the secondary characteristics of their chosen sex. A smaller number will undergo surgical procedures to make their bodies resemble, so far as possible, those of their acquired gender. The extent of treatment may be determined by individual choice, or by other factors such as health or financial resources. Many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives. Consideration of the way forward must therefore take into account the needs of people at these different stages of change.
>
> 5.2. Measures have already been taken in a number of areas to assist transsexual people. For example, discrimination in employment against people on the basis of their transsexuality has been prohibited by the Sex Discrimination (Gender Reassignment) Regulations 1999 which, with few exceptions, provide that a transsexual person (whether pre- or post-operative) should not be treated less favourably because they are transsexual. The criminal justice system (i.e. the police, prisons, courts, etc.) try to accommodate the needs of transsexual people so far as is possible within operational constraints. A transsexual offender will normally be charged in their acquired gender, and a post-operative prisoner will usually be sent to a prison appropriate to their new status. Transsexual victims and witnesses will, in most circumstances, similarly be treated as belonging to their acquired gender.
>
> 5.3. In addition, official documents will often be issued in the acquired gender where the issue is identifying the individual rather than legal status. Thus, a transsexual person may obtain a passport, driving licence, medical card etc, in their new gender. We understand that many non-governmental bodies, such as examination authorities, will often re-issue examination certificates etc. (or otherwise provide evidence of qualifications) showing the required gender. We also found that at least one insurance company will issue policies to transsexual people in their acquired gender.
>
> 5.4. Notwithstanding such provisions, transsexual people are conscious of certain problems which do not have to be faced by the majority of the population. Submissions to the Group suggested that the principal areas where the transsexual community is seeking change are birth certificates, the right to marry and full recognition of their new gender for all legal purposes.

5.5. We have identified three options for the future;

– to leave the current situation unchanged;

– to issue birth certificates showing the new name and, possibly, the new gender;

– to grant full legal recognition of the new gender subject to certain criteria and procedures.

We suggest that before taking a view on these options the Government may wish to put the issues out to public consultation."

51. The report was presented to Parliament in July 2000. Copies were placed in the libraries of both Houses of Parliament and sent to 280 recipients, including Working Group members, Government officials, Members of Parliament, individuals and organisations. It was publicised by a Home Office press notice and made available to members of the public through application to the Home Office in writing, E-mail, by telephone or the Home Office web site.

2. Recent domestic case-law

52. In the case of *Bellinger v. Bellinger*, EWCA Civ 1140 [2001], 3 FCR 1, the appellant who had been classified at birth as a man had undergone gender re-assignment surgery and in 1981 had gone through a form of marriage with a man who was aware of her background. She sought a declaration under the Family Law Act 1986 that the marriage was valid. The Court of Appeal held, by a majority, that the appellant's marriage was invalid as the parties were not respectively male and female, which terms were to be determined by biological criteria as set out in the decision of *Corbett v. Corbett* [1971]. Although it was noted that there was an increasing emphasis upon the impact of psychological factors on gender, there was no clear point at which such factors could be said to have effected a change of gender. A person correctly registered as male at birth, who had undergone gender reassignment surgery and was now living as a woman was biologically a male and therefore could not be defined as female for the purposes of marriage. It was for Parliament, not for the courts, to decide at what point it would be appropriate to recognise that a person who had been assigned to one sex at birth had changed gender for the purposes of marriage. Dame Elizabeth Butler-Sloss, President of the Family Division noted the warnings of the European Court of Human Rights about continued lack of response to the situation of transsexuals and observed that largely as a result of these criticisms an interdepartmental working group had been set up, which had in April 2000 issued a careful and comprehensive review of the medical condition, current practice in other countries and the state of English law in relevant aspects of the life of an individual:

"[95.] ... We inquired of Mr Moylan on behalf of the Attorney-General, what steps were being taken by any government department, to take forward any of the recommendations of the Report, or to prepare a consultation paper for public discussion.

[96.] To our dismay, we were informed that no steps whatsoever have been, or to the knowledge of Mr Moylan, were intended to be, taken to carry this matter forward. It appears, therefore, that the commissioning and completion of the report is the sum of the activity on the problems identified both by the Home Secretary in his terms of reference, and by the conclusions of the members of the working group.

That would seem to us to be a failure to recognise the increasing concerns and changing attitudes across western Europe which have been set out so clearly and strongly in judgments of Members of the European Court at Strasbourg, and which in our view need to be addressed by the UK...

[109.] We would add however, with the strictures of the European Court of Human Rights well in mind, that there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration. The recommendation of the interdepartmental working group for public consultation merits action by the government departments involved in these issues. The problems will not go away and may well come again before the European Court sooner rather than later."

53. In his dissenting judgment, Lord Justice Thorpe considered that the foundations of the judgment in *Corbett v. Corbett* were no longer secure, taking the view that an approach restricted to biological criteria was no longer permissible in the light of scientific, medical and social change.

"[155.] To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seem right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth...

[160.] The present claim lies most evidently in the territory of the family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual's private life. One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage. I would have allowed this appeal."

He also noted the lack of progress in domestic reforms:

"[151.] ...although the [interdepartmental] report has been made available by publication, Mr Moylan said that there has since been no public consultation. Furthermore when asked whether the Government had any present intention of initiating public consultation or any other process in preparation for a parliamentary Bill, Mr Moylan said that he had no instructions. Nor did he have any instructions as to whether the Government intended to legislate. My experience over the last 10 years suggests how hard it is for any department to gain a slot for family law reform by primary legislation. These circumstances reinforce my view that it is not only open to the court but it is its duty to construe s 11(c) either strictly, alternatively liberally as the evidence and the submissions in this case justify."

3. Proposals to reform the system of registration of births, marriages and deaths

54. In January 2002, the Government presented to Parliament the document "Civil Registration: Vital Change (Birth, Marriage and Death Registration in the 21st Century)" which set out plans for creating a central database of registration records which moves away from a traditional snapshot of life events towards the concept of a living record or single "through life" record:

"In time, updating the information in a birth record will mean that changes to a person's names, and potentially, sex will be able to be recorded." (para. 5.1)

"5.5 Making changes

There is strong support for some relaxation to the rules that govern corrections to the records. Currently, once a record has been created, the only corrections that can be made are where it can be shown that an error was made at the time of registration and that this can be established. Correcting even the simplest spelling error requires formal procedures and the examination of appropriate evidence. The final records contains the full original and corrected information which is shown on subsequently issued certificates. The Government recognises that this can act as a disincentive. In future, changes (to reflect developments after the original record was made) will be made and formally recorded. Documents issued from the records will contain only the information as amended, though all the information will be retained. ..."

H. Liberty's third party intervention

55. Liberty updated the written observations submitted in the case of Sheffield and Horsham concerning the legal recognition of transsexuals in comparative law (Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 2021, § 35). In its 1998 study, it had found that over the previous decade there had been an unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment. In particular, it noted that out of thirty seven countries analysed only four (including the United Kingdom) did not permit a change to be made to a person's birth certificate in one form or another to reflect the re-assigned sex of that person. In cases where gender re-assignment was legal and publicly funded, only the United Kingdom and Ireland did not give full legal recognition to the new gender identity.

56. In its follow up study submitted on 17 January 2002, Liberty noted that while there had not been a statistical increase in States giving full legal recognition of gender re-assignment within Europe, information from outside Europe showed developments in this direction. For example, there had been statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America. It cited in particular the cases of *Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 60 and *Re Kevin* [2001] FamCA 1074 where in New Zealand and Australia transsexual persons' assigned sex was recognised for the purposes of validating their marriages: In the latter case, Mr Justice Chisholm held:

"I see no basis in legal principle or policy why Australian law should follow the decision in Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to development in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society...

...Because the words 'man' and 'woman' have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person's gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in

law to say that the question can be resolved by reference solely to the person's psychological state, or by identifying the person's 'brain sex'.

To determine a person's sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she was brought up and the person's attitude to it; the person's self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage...

For the purpose of ascertaining the validity of a marriage under Australian law the question whether a person is a man or a woman is to be determined as of the date of marriage..."

57. As regarded the eligibility of post-operative transsexuals to marry a person of sex opposite to their acquired gender, Liberty's survey indicated that 54% of Contracting States permitted such marriage (Annex 6 listed Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey and Ukraine), while 14% did not (Ireland and the United Kingdom did not permit marriage, while no legislation existed in Moldova, Poland, Romania and Russia). The legal position in the remaining 32% was unclear.

III. INTERNATIONAL TEXTS

58. Article 9 of the Charter of Fundamental Rights of the European Union, signed on 7 December 2000, provides:

"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicant claims a violation of Article 8 of the Convention, the relevant part of which provides as follows:

"1. Everyone has the right to respect for his private ... life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Arguments of the parties

1. The applicant

60. The applicant submitted that despite warnings from the Court as to the importance for keeping under review the need for legal reform the Government had still not taken any constructive steps to address the suffering and distress experienced by the applicant and other post-operative transsexuals. The lack of legal recognition of her changed gender had been the cause of numerous discriminatory and humiliating experiences in her everyday life. In the past, in particular from 1990 to 1992, she was abused at work and did not receive proper protection against discrimination. She claimed that all the special procedures through which she had to go in respect of her NI contributions and State retirement pension constituted in themselves an unjustified difference in treatment, as they would have been unnecessary had she been recognised as a woman for legal purposes. In particular, the very fact that the DSS operated a policy of marking the records of transsexuals as sensitive was a difference in treatment. As a result, for example, the applicant cannot attend the DSS without having to make a special appointment.

61. The applicant further submitted that the danger of her employer learning about her past identity was real. It was possible for the employer to trace back her employment history on the basis of her NI number and this had in fact happened. She claimed that her recent failure to obtain a promotion was the result of the employer realising her status.

62. As regarded pensionable age, the applicant submitted that she had worked for 44 years and that the refusal of her entitlement to a State retirement pension at the age of 60 on the basis of the pure biological test for determining sex was contrary to Article 8 of the Convention. She was similarly unable to apply for a free London bus pass at the age of 60 as other women were but had to wait until the age of 65. She was also required to declare her birth sex or disclose her birth certificate when applying for life insurance, mortgages, private pensions or car insurance, which led her not to pursue these possibilities to her advantage.

63. The applicant argued that rapid changes, in respect of the scientific understanding of, and the social attitude towards, transsexualism were taking place not only across Europe but elsewhere. She referred, *inter alia*, to Article 29 of the Netherlands Civil Code, Article 6 of Law No. 164 of 14 April 1982 of Italy, and Article 29 of the Civil Code of Turkey as amended by Law No. 3444 of 4 May 1988, which allowed the amendment of civil status. Also, under a 1995 New Zealand statute, Part V, Section 28, a court could order the legal recognition of the changed gender of a transsexual after examination of medical and other evidence. The applicant saw no convincing reason why a similar approach should not be adopted in the United Kingdom. The applicant also pointed to increasing social acceptance of transsexuals and interest in issues of concern to them reflected by coverage in the press, radio and television, including sympathetic dramatisation of transsexual characters in mainstream programming.

2. The Government

64. Referring to the Court's case-law, the Government maintained that there was no generally accepted approach among the Contracting States in respect of transsexuality and

that, in view of the margin of appreciation left to States under the Convention, the lack of recognition in the United Kingdom of the applicant's new gender identity for legal purposes did not entail a violation of Article 8 of the Convention. They disputed the applicant's assertion that scientific research and "massive societal changes" had led to wide acceptance, or consensus on issues, of transsexualism.

65. The Government accepted that there may be specific instances where the refusal to grant legal recognition of a transsexual's new sexual identity may amount to a breach of Article 8, in particular where the transsexual as a result suffered practical and actual detriment and humiliation on a daily basis (see the B. v. France judgment of 25 March 1992, Series A no. 232-C, pp. 52-54, §§ 59-63). However, they denied that the applicant faced any comparable practical disadvantages, as she had been able *inter alia* to obtain important identification documents showing her chosen names and sexual identity (e.g. new passport and driving licence).

66. As regards the specific difficulties claimed by the applicant, the Government submitted that an employer was unable to establish the sex of the applicant from the NI number itself since it did not contain any encoded reference to her sex. The applicant had been issued with a new NI card with her changed name and style of address. Furthermore, the DSS had a policy of confidentiality of the personal details of a NI number holder and, in particular, a policy and procedure for the special protection of transsexuals. As a result, an employer had no means of lawfully obtaining information from the DSS about the previous sexual identity of an employee. It was also in their view highly unlikely that the applicant's employer would discover her change of gender through her NI number in any other way. The refusal to issue a new NI number was justified, the uniqueness of the NI number being of critical importance in the administration of the national insurance system, and for the prevention of the fraudulent use of old NI numbers.

67. The Government argued that the applicant's fear that her previous sexual identity would be revealed upon reaching the age of 60, when her employer would no longer be required to make NI contribution deductions from her pay, was entirely without foundation, the applicant having already been issued with a suitable Age Exemption Certificate on Form CF384.

68. Concerning the impossibility for the applicant to obtain a State retirement pension at the age of 60, the Government submitted that the distinction between men and women as regarded pension age had been held to be compatible with European Community law (Article 7(1)(a) of Directive 79/7/EEC; European Court of Justice, *R. v. Secretary of State for Social Security ex parte Equal Opportunities Commission Case* C-9/91 [1992] ECR I-4927). Also, since the preserving of the applicant's legal status as a man was not contrary as such to Article 8 of the Convention, it would constitute favourable treatment unfair to the general public to allow the applicant's pension entitlement at the age of 60.

69. Finally, as regards allegations of assault and abuse at work, the Government submitted that the applicant could have pressed charges under the criminal law against harassment and assault. Harassment in the workplace on the grounds of transsexuality would also give rise to

a claim under the Sex Discrimination Act 1975 where the employers knew of the harassment and took no steps to prevent it. Adequate protection was therefore available under domestic law.

70. The Government submitted that a fair balance had therefore been struck between the rights of the individual and the general interest of the community. To the extent that there were situations where a transsexual may face limited disclosure of their change of sex, these situations were unavoidable and necessary e.g. in the context of contracts of insurance where medical history and gender affected the calculation of premiums.

B. The Court's assessment

1. Preliminary considerations

71. This case raises the issue whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.

72. The Court recalls that the notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 15, § 37).

73. The Court recalls that it has already examined complaints about the position of transsexuals in the United Kingdom (see the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, the Cossey v. the United Kingdom judgment, cited above; the X., Y. and Z. v. the United Kingdom judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, and the Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, *Reports* 1998-V, p. 2011). In those cases, it held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates whose contents and nature differed from those of the original entries concerning the recorded gender of the individual could not be considered as an interference with the right to respect for private life (the above-mentioned Rees judgment, p. 14, § 35, and Cossey judgment, p. 15, § 36). It also held that there was no positive obligation on the Government to alter their existing system for the registration of births by establishing a new system or type of documentation to provide proof of current civil status. Similarly, there was no duty on the Government to permit annotations to the existing register of births, or to keep any such annotation secret from third parties (the above-mentioned Rees judgment, p. 17, § 42, and Cossey judgment, p. 15, §§ 38-

39). It was found in those cases that the authorities had taken steps to minimise intrusive enquiries (for example, by allowing transsexuals to be issued with driving licences, passports and other types of documents in their new name and gender). Nor had it been shown that the failure to accord general legal recognition of the change of gender had given rise in the applicants' own case histories to detriment of sufficient seriousness to override the respondent State's margin of appreciation in this area (the Sheffield and Horsham judgment cited above, p. 2028-29, § 59).

74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the Cossey judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the Cossey judgment, § 42; the Sheffield and Horsham judgment, § 60).

75. The Court proposes therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law).

2. The applicant's situation as a transsexual

76. The Court observes that the applicant, registered at birth as male, has undergone gender re-assignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as, *inter alia*, in the area of pensions and retirement age. For example, the applicant must continue to pay national insurance contributions until the age of 65 due to her legal status as male. However as she is employed in her gender identity as a female, she has had to obtain an exemption certificate which allows the payments from her employer to stop while she continues to make such payments herself. Though the Government submitted that this made due allowance for the difficulties of her position, the Court would note that she

nonetheless has to make use of a special procedure that might in itself call attention to her status.

77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, *mutatis mutandis*, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, § 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

78. In this case, as in many others, the applicant's gender re-assignment was carried out by the national health service, which recognises the condition of gender dysphoria and provides, *inter alia*, re-assignment by surgery, with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs. The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention. Where a 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, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads.

79. The Court notes that the unsatisfactory nature of the current position and plight of transsexuals in the United Kingdom has been acknowledged in the domestic courts (see *Bellinger v. Bellinger*, cited above, paragraph 52) and by the Interdepartmental Working Group which surveyed the situation in the United Kingdom and concluded that, notwithstanding the accommodations reached in practice, transsexual people were conscious of certain problems which did not have to be faced by the majority of the population (paragraph 50 above).

80. Against these considerations, the Court has examined the countervailing arguments of a public interest nature put forward as justifying the continuation of the present situation. It observes that in the previous United Kingdom cases weight was given to medical and scientific considerations, the state of any European and international consensus and the impact of any changes to the current birth register system.

3. Medical and scientific considerations

81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of *Bellinger v. Bellinger* was found to indicate a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, though scientific proof for the theory was far from complete. The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the Diagnostic and Statistical Manual fourth edition (DSM-IV) replaced the diagnosis of transsexualism with "gender identity disorder"; see also the International Classification of Diseases, tenth edition (ICD-10)). The United Kingdom national health service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender re-assignment possible were indeed carried out under the supervision of the national health authorities. Nor, 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 diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (Sheffield and Horsham, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger v. Bellinger* cited in paragraph 52 above; and the judgment of Chisholm J in the Australian case, *Re Kevin*, cited in paragraph 55 above).

83. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.

4. The state of any European and international consensus

84. Already at the time of the Sheffield and Horsham case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment (see § 35 of that judgment). The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition (see paragraphs 55-56 above). In Australia and New Zealand, it appears that the courts are

moving away from the biological birth view of sex (as set out in the United Kingdom case of *Corbett v. Corbett*) and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.

85. The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of Sheffield and Horsham, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

5. Impact on the birth register system

86. In the Rees case, the Court allowed that great importance could be placed by the Government on the historical nature of the birth record system. The argument that allowing exceptions to this system would undermine its function weighed heavily in the assessment.

87. It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals (a category estimated as including some 2,000-5,000 persons in the United Kingdom according to the Interdepartmental Working Group Report, p. 26) would not, in the Court's view, pose the threat of overturning the entire system. Though previous reference has been made to detriment suffered by third parties who might be unable to obtain access to the original entries and to complications occurring in the field of family and succession law (see the Rees judgment, p. 18, § 43), these assertions are framed in general terms and the Court does not find, on the basis of the material before it at this time, that any real prospect of prejudice has been identified as likely to arise if changes were made to the current system.

88. Furthermore, the Court notes that the Government have recently issued proposals for reform which would allow ongoing amendment to civil status data (see paragraph 54). It is not convinced therefore that the need to uphold rigidly the integrity of the historic basis of

the birth registration system takes on the same importance in the current climate as it did in 1986.

6. Striking a balance in the present case

89. The Court has noted above (paragraphs 76-79) the difficulties and anomalies of the applicant's situation as a post-operative transsexual. It must be acknowledged that the level of daily interference suffered by the applicant in B. v. France (judgment of 25 March 1992, Series A no. 232) has not been attained in this case and that on certain points the risk of difficulties or embarrassment faced by the present applicant may be avoided or minimised by the practices adopted by the authorities.

90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. 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 beings (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikulić v. Croatia,* no. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...). 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 requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v. Bellinger* (see paragraphs 50, 52-53).

91. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. As Lord Justice Thorpe observed in the *Bellinger* case, any "spectral difficulties", particularly in the field of family law, are both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals. Nor is the Court convinced by arguments that allowing the applicant to fall under the rules applicable to women, which would also change the date of eligibility for her state pension, would cause any injustice to others in the national insurance and state pension systems as alleged by the Government. 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 transsexuals and, as regards other possible consequences, the Court considers that 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 cost.

92. In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (see references at paragraph 73). Most recently in the Sheffield and Horsham case in 1998, it observed that the respondent State had not yet taken any steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted (cited above, paragraph 60). Even though it found no violation in that case, the need to keep this area under review was expressly re-iterated. Since then, a report has been issued in April 2000 by the Interdepartmental Working Group which set out a survey of the current position of transsexuals in *inter alia* criminal law, family and employment matters and identified various options for reform. Nothing has effectively been done to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so (see paragraphs 52-53). It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex (see paragraphs 43-45 above).

93. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

94. The applicant also claimed a violation of Article 12 of the Convention, which provides as follows:

> "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."

A. Arguments of the parties

1. The applicant

95. The applicant complained that although she currently enjoyed a full physical relationship with a man, she and her partner could not marry because the law treated her as a

man. She argued that the *Corbett v. Corbett* definition of a person's sex for the purpose of marriage had been shown no longer to be sufficient in the recent case of *Bellinger v. Bellinger* and that even if a reliance on biological criteria remained acceptable, it was a breach of Article 12 to use only some of those criteria for determining a person's sex and excluding those who failed to fulfil those elements.

2. The Government

96. The Government referred to the Court's previous case-law (the above-cited Rees, Cossey and Sheffield and Horsham judgments) and maintained that neither Article 12 nor Article 8 of the Convention required a State to permit a transsexual to marry a person of his or her original sex. They also pointed out that the domestic law approach had been recently reviewed and upheld by the Court of Appeal in *Bellinger v. Bellinger*, the matter now pending before the House of Lords. In their view, if any change in this important or sensitive area were to be made, it should come from the United Kingdom's own courts acting within the margin of appreciation which this Court has always afforded. They also referred to the fact that any change brought the possibility of unwanted consequences, submitting that legal recognition would potentially invalidate existing marriages and leave transsexuals and their partners in same-sex marriages. They emphasised the importance of proper and careful review of any changes in this area and the need for transitional provisions.

B. The Court's assessment

97. The Court recalls that in the cases of Rees, Cossey and Sheffield and Horsham the inability of the transsexuals in those cases to marry a person of the sex opposite to their re-assigned gender was not found in breach of Article 12 of the Convention. These findings were based variously on the reasoning that the right to marry referred to traditional marriage between persons of opposite biological sex (the Rees judgment, p. 19, § 49), the view that continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage was encompassed within the power of Contracting States to regulate by national law the exercise of the right to marry and the conclusion that national laws in that respect could not be regarded as restricting or reducing the right of a transsexual to marry in such a way or to such an extent that the very essence of the right was impaired (the Cossey judgment, p. 18, §§ 44-46, the Sheffield and Horsham judgment, p. 2030, §§ 66-67). Reference was also made to the wording of Article 12 as protecting marriage as the basis of the family (Rees, *loc. cit*.).

98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.

99. 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 impaired (see the Rees judgment, p. 19, § 50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32).

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court 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 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. There are other important factors – 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 belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note 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 women (see paragraph 58 above).

101. The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. 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.

102. The Court has not identified any other reason which would prevent it from reaching this conclusion. The Government have argued that in this sensitive area eligibility for marriage under national law should be left to the domestic courts within the State's margin of appreciation, adverting to the potential impact on already existing marriages in which a transsexual is a partner. It appears however from the opinions of the majority of the Court of Appeal judgment in *Bellinger v. Bellinger* that the domestic courts tend to the view that the matter is best handled by the legislature, while the Government have no present intention to introduce legislation (see paragraphs 52-53).

103. It may be noted from the materials submitted by Liberty that though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court

is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.

104. The Court concludes that there has been a breach of Article 12 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

105. The applicant also claimed a violation of Article 14 of the Convention, which provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground 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."

106. The applicant complained that the lack of legal recognition of her changed gender was the cause of numerous discriminatory experiences and prejudices. She referred in particular to the fact that she could not claim her State pension until she was 65 and to the fact that she could not claim a "freedom pass" to give her free travel in London, a privilege which women were allowed to enjoy from the age 60 and men from the age of 65.

107. The Government submitted that no issues arose which were different from those addressed under Article 8 of the Convention and that the complaints failed to disclose any discrimination contrary to the above provision.

108. The Court considers that the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's complaints under Article 14 of the Convention. These issues have been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 12 of the Convention;

3. *Holds* unanimously that no separate issue arises under Article 14 the Convention;

Selected Articles
European Convention on Human Rights

Article 8 Right to respect for private and family life

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

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 Right to marry

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.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground 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.

SELECTED PROVISIONS OF THE DUTCH CIVIL CODE

Translations taken from
I. Sumner and H. Warendorf, *Family Law Legislation of The Netherlands,*
Intersentia, Antwerp, 2003

TITLE 5
MARRIAGE

Article 30, Book 1

1. A marriage may be entered into by two persons of a different or of the same sex.
2. The rules laid down in this Book only extend to the civil effects of marriage.

Article 68, Book 1

No religious ceremonies may take place before the parties have ensured that the minister of religion has established that solemnisation of the marriage before the Registrar of Births, Deaths, Marriages and Registered Partnerships has taken place.

TITLE 5A
REGISTERED PARTNERSHIPS

Article 80a, Book 1

1. A person may only be involved in one registered partnership with one other person whether of the same or of opposite sex at any one time.
2. Persons who enter into a registered partnership may not at the same time be married.
3. The registration of a partnership shall be made by an instrument of registration of partnership drawn up by a Registrar of Births, Deaths, Marriages and Registered Partnerships.
4. Persons wishing to enter into a registered partnership must notify the Registrar of Births, Deaths, Marriages and Registered Partnerships of the residency of one of the parties and lodge information with respect to their civil status. If they have previously been involved in a registered partnership or marriage, then they must declare the names of the previous partner or spouse. If the prospective registered partners, of whom at least one possesses Dutch nationality, have their residency outside the Netherlands and wish to enter into a registered partnership in a Dutch municipality, they must notify the Registrar of Births, Deaths,

Marriages and Registered Partnerships in The Hague. Articles 43(2) to (4), inclusive, and 46 shall apply *mutatis mutandis*.

5. Enunciation of impediments to a partnership registration may take place where the parties do not satisfy the requirements for entry into the registration or where both or either or the prospective registered partners do not intend to fulfil the obligations arising from the partnership registration arising from this Book but have the intention to obtain admission to the Netherlands. Articles 51, 52, 53(2) and (3), and 54 to 56, inclusive, shall apply *mutatis mutandis* to an enunciation of impediments. The public prosecution service must make an enunciation of impediments to a partnership registration when it is aware of any of the impediments described in Articles 31, 32, 41, 80a(1) and (2). If the Registrar of Births, Deaths, Marriages and Registered Partnerships is aware of any of the impediments mentioned in the preceding sentence, he or she may not give his co-operation to a notification of registration even if no enunciation of impediments is made.

6. Articles 31, 32, 35 to 39, inclusive, 41, 44 to 49, inclusive, 58 and 62 to 66, inclusive, shall apply, *mutatis mutandis*, to a registered partnership.

7. Articles 69 to 73, inclusive, 74, 75 to 77(1), 77(2)(b) and (2)(c), shall apply *mutatis mutandis* to the annulment of a registered partnership.

8. Articles 78 and 79 shall apply, *mutatis mutandis*, to proof of the existence of a registered partnership.

Article 80c, Book 1

A registered partnership shall end:

(a) due to death;

(b) if the person gone missing, who has been declared to be presumed dead or to be dead in accordance with the provisions of Section 2or 3 of Title 18 of this Book, is still alive on the date on which the other registered partner has entered into a new registered partnership or marriage: by the solemnisation of such a registered partnership or marriage;

(c) by reason of the mutual consent of the partners by means of the registration of a dated declaration signed by both partners and one or more advocates or notaries by the Registrar of Births, Deaths, Marriages and Registered Partnerships from which it appears that and at what time, the partners have entered into a contract in respect of the termination of their registered partnership;

(d) by dissolution at the request of one of the partners;

(e) by conversion of a registered partnership into a marriage.

Article 80g, Book 1

1. If two persons have notified the Registrar of Births, Deaths, Marriages and Registered Partnerships that they wish their registered partnership to be converted into a marriage, the

Registrar of Births, Deaths, Marriages and Registered Partnerships of the residency of one of the parties may draw up an instrument of conversion in respect thereof. If the registered partners, of whom at least one possesses Dutch nationality, have their residency outside the Netherlands and wish to convert their registered partnership into a marriage in The Netherlands, the conversion shall be made at the Registrar of Births, Deaths, Marriages and Registered Partnerships in The Hague.

2. Articles 65 and 66 shall apply *mutatis mutandis*.

3. A conversion shall cause the registered partnership to end and the marriage to commence on the date of drawing up of the conversion instrument in the register of marriages. The conversion shall not change any possibly existing legal familial ties with children born prior to the conversion.

TITLE 9
DISSOLUTION OF A MARRIAGE

Article 150, Book 1

A divorce between spouses not judicially separated shall be pronounced on the petition of one of the spouses or on their joint application.

Article 151, Book 1

Divorce shall be pronounced on the petition of one of the spouses on the irretrievable breakdown of the marriage.

Article 154, Book 1

1. A divorce shall be pronounced upon the joint petition of the spouses, where this is based on the opinion of both that their marriage has irretrievably broken down.

2. Each of the spouses may withdraw the petition up until the time of the decision.

TITLE 11
PARENTAGE

Section 1
General

Article 197, Book 1

Legal familial ties exist between a child, its parents and his or her blood relatives.

Article 198, Book 1

The mother of a child is the woman who gives birth to a child or who has adopted the child.

Article 199, Book 1

The father of a child is the man:

(a) who, at the time of a child's birth, was married to the woman who gave birth to the child unless subparagraph b applies;

(b) whose marriage with the woman who gave birth to the child is dissolved as a result of his death within 306 days prior to the child's birth even if the mother remarried; if, however, the woman was judicially separated since the 306th day prior to the child's birth or if she and her spouse have lived separate since that date, the woman may declare, within one year of the child's birth, before the Registrar of the Registry of Births, Deaths, Marriages and Registered Partnerships that her deceased husband is not the father of the child. An instrument of this declaration shall be prepared. If the mother had remarried at the time of the birth, then the present spouse shall, in such case, be the father of the child;

(c) who has recognised the child;

(d) whose paternity has been established judicially; or

(e) who has adopted the child.

Section 2
Denial of Paternity by virtue of a Marriage

Article 200, Book 1

1. The paternity referred to in Article 199(a) and (b) may be denied on the ground that the man is not the biological father of the child:

(a) by the father or the mother of the child;

(b) by the child itself.

2. The father and mother may not deny the paternity referred to in Article 199(a) and (b), if the man became aware of the pregnancy prior to the marriage.

3. The father or mother may also not deny the paternity referred to in Article 199(a) and (b), if the man agreed to an act which could have resulted in the begetting of the child.

4. Paragraphs (2) and (3) do not apply to the father if the mother has deceived him as to the person who fathered the child.

5. The mother shall lodge the application to declare the denial well founded at the district court within one year after the child's birth. The father shall lodge such an application within one year after he became aware of the fact that he was presumed to be the biological father of the child.

6. The child shall lodge the application to declare the denial well founded with the district court within three years after it became aware of the fact that the man was presumed not to be his or her biological father. However, if, during his or her minority, the child became aware of this fact, the application may be lodged within three years after the child has reached the age of majority.

Article 201, Book 1

1. When the father or mother dies prior to the expiry of the period laid down in Article 200(5), a descendant of such a spouse in the first degree, or in the absence of a descendant, a parent of such a spouse may apply to the district court to declare the denial of paternity well founded. The application shall be made within one year after the date of death or after the applicant had become aware of the death.
2. When the child dies prior to the expiry of the period laid down in Article 200(6), a descendant of the child in the first degree may apply to the district court to declare the denial of paternity well founded. When the child has reached the age of majority at the time of death, the application shall be made within one year from the date of death or within one year after the applicant became aware of the death. Where the child died during its minority, the application must be made within one year after the child, had it been alive, could have independently made the application or if the applicant became aware of the death at a later time, within one year after his or her having become so aware.

Article 202, Book 1

1. After the court order declaring a denial of paternity by dint of marriage well founded has become final and binding, the paternity stemming from the marriage shall be deemed never to have had effect.
2. Rights acquired by third persons in good faith shall, however, not be prejudiced as a result thereof.
3. A declaratory ruling that the denial is well founded shall not give rise to a claim for reimbursement of the cost of care and upbringing or of maintenance and study or for reimbursement of what was enjoyed pursuant to a right of usufruct. No obligation shall further arise to reimburse proprietary benefits that were enjoyed to the extent that the person who enjoyed such benefits did not benefit thereby at the time the application was made.

Section 3
Recognition

Article 203, Book 1

1. Recognition can be made:

(a) by an instrument of recognition prepared by a Registrar of the Registry of Births, Deaths, Marriages and Registered Partnerships;
(b) by notarial instrument.

2. Recognition shall have effect from the time it was made.

Article 204, Book 1

1. A recognition is null and void, if it is made:
(a) by a man who may not enter into a marriage with the mother pursuant to Article 41;
(b) by a minor who has not yet reached the age of sixteen;
(c) where the child has not yet reached the age of sixteen, without the prior written consent of its mother;
(d) without the prior written consent of the child who is twelve or older;
(e) by a man who is married at the time of the recognition to another woman, unless the district court has held it to be plausible that there is or has been a bond between the man and the mother which may, to a sufficient degree, be regarded as sufficiently like a marriage or that there is a close personal relationship between the man and the child;
(f) while there are two parents.

2. The consent required pursuant to subparagraphs c and d of the preceding paragraph may also be given on the occasion of the preparation of the instrument of recognition.

3. The consent of a mother whose child has not yet reached the age of sixteen or the consent of a child of twelve or older may, at the request of the man wishing to recognise the child, be replaced by the consent of the district court, if the recognition would not prejudice the interests of the mother in an undisturbed relationship with the child or the interests of the child and the man who fathered the child.

4. A man over whom a curator has been appointed on account of a mental disorder may only recognise the child after consent thereto is obtained from the sub-district court.

Section 4
Judicial Determination of Paternity

Article 207, Book 1

1. The paternity of a man may be established, also where he has died, by the district court on the ground that he fathered the child or on the ground that the man, as life-companion of the mother, agreed to an act which could have resulted in the begetting of the child, on the application of:
(a) the mother, unless the child has reached the age of sixteen;
(b) the child.

2. Paternity may not be established, if: @
(a) the child has two parents;

(b) no marriage would be permitted to be entered into between the man and the mother of the child pursuant to Article 41; or

(c) the man referred to in the introduction of paragraph (1) is a minor who has not yet reached the age of sixteen, unless he died before having reached this age.

3. The application shall be lodged by the mother within five years from the birth of the child or, where the identity of the presumed begetter or his abode is unknown, within five years from the date on which the mother became aware of the identity and abode.

4. If the child dies before establishment of the paternity could have taken place, a descendant of the child in the first degree may apply to the district court for a ruling to establish the paternity provided the man referred to in paragraph (1) is still living. The application must be made within one year from the date of death or within one year after the applicant became aware of the death.

5. Provided the court order in respect thereof has become final and binding, establishment of the paternity shall have retrospective effect until the moment of birth of the child. Rights acquired by third persons in good faith shall, however, not be prejudiced thereby. No obligation shall further arise to reimburse proprietary benefits to the extent the person who has enjoyed these was not benefited at the time the application was made.

TITLE 14
CUSTODY OVER MINOR CHILDREN

Article 251, Book 1

1. During their marriage the parents exercise joint parental authority.

Article 253aa, Book 1

1. The parents shall exercise joint parental authority over a child born during a registered partnership.
2. The provisions with regard to joint parental authority shall apply hereto, with the exception of Articles 251(2), (3) and (4) and 251a.

Article 253n, Book 1

1. On the application of parents who are not married to one another or of either one of them the district court may terminate the joint parental authority referred to in Articles 251(2), 252(1), 253q(5) or 277(1), if the circumstances have changed thereafter or if its decision was based, when taken, on incorrect or incomplete information. In this case the court shall lay down which of the parents shall thereafter have parental authority over each of the minor children in the best interests of the child.
2. Article 251(4) of this Book applies *mutatis mutandis*.

Article 253sa, Book 1

1. A parent and his or her spouse or registered partner who is not the parent, exercise joint parental authority over a child born during a marriage or registered partnership, unless legal familial ties exist between the child and another parent.

Article 253t, Book 1

1. If parental authority over a child vests in one parent, the district court may, on the joint application of the parent who is charged with parental authority and a person other than the parent who has a close personal relationship with the child, jointly charge them with parental authority over the child.

SELECTED PROVISIONS OF ENGLISH LEGISLATION

Section 27, Human Embryology and Fertilisation Act 1990

(1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

(2) Subsection (1) above does not apply to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters.

(3) Subsection (1) above applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.

Section 28, Human Embryology and Fertilisation Act 1990

(1) This section applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.

(2) If—

> (a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and
>
> (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,
>
> then, subject to subsection (5) below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

(3) If no man is treated, by virtue of subsection (2) above, as the father of the child but—

> (a) the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her and a man together by a person to whom a licence applies, and
>
> (b) the creation of the embryo carried by her was not brought about with the sperm of that man,
>
> then, subject to subsection (5) below, that man shall be treated as the father of the child.

(4) Where a person is treated as the father of the child by virtue of subsection (2) or (3) above, no other person is to be treated as the father of the child.

(6) Where—

(a) the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 to this Act was used for a purpose for which such consent was required, or

(b) the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death,

he is not to be treated as the father of the child.

(b) include the parties to a void marriage if either or both of them reasonably believed at that time that the marriage was valid; and for the purposes of this subsection it shall be presumed, unless the contrary is shown, that one of them reasonably believed at that time that the marriage was valid.

(8) This section applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.

(9) In subsection (7)(a) above, "judicial separation" includes a legal separation obtained in a country outside the British Islands and recognised in the United Kingdom.

Section 1, Matrimonial Causes Act 1973

(1) Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.

(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say -

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as "two years' separation") and the respondent consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as "five years' separation").

PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PARENTAL RESPONSIBILITIES

CHAPTER I - DEFINITIONS

Principle 3:1 Concept of parental responsibilities
Parental responsibilities are a collection of rights and duties aimed at promoting and safeguarding the welfare of the child. They encompass in particular:

(a) care, protection and education;
(b) maintenance of personal relationships;
(c) determination of residence;
(d) administration of property, and
(e) legal representation.

Principle 3:2 Holder of parental responsibilities
(1) A holder of parental responsibilities is any person having the rights and duties listed in Principle 3:1 either in whole or in part.
(2) Subject to the following Principles, holders of parental responsibilities are:

(a) the child's parents, as well as

(b) persons other than the child's parents having parental responsibilities in addition to or instead of the parents.

CHAPTER II - RIGHTS OF THE CHILD

Principle 3:3 Best interests of the child
In all matters concerning parental responsibilities the best interests of the child should be the primary consideration.

Principle 3:4 Autonomy of the child
The child's autonomy should be respected in accordance with the developing ability and need of the child to act independently.

Principle 3:5 Non-discrimination of the child
Children should not be discriminated on grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, disability, property, birth or other status, irrespective of whether these grounds refer to the child or to the holders of parental responsibilities.

Principle 3:6 Child's right to be heard
Having regard to the child's age and maturity, the child should have the right to be informed, consulted and to express his or her opinion in all matters concerning the child, with due weight given to the views expressed by him or her.

Principle 3:7 Conflict of interests
The interests of the child should be protected whenever they may be in conflict with the interests of the holders of parental responsibilities.

CHAPTER III - PARENTAL RESPONSIBILITIES OF PARENTS AND THIRD PERSONS

Principle 3:8 Parents
Parents, whose legal parentage has been established, should have parental responsibilities for the child.

Principle 3:9 Third persons
Parental responsibilities may in whole or in part also be attributed to a person other than a parent.

Principle 3:10 Effect of dissolution and separation

Parental responsibilities should neither be affected by the dissolution or annulment of the marriage or other formal relationship nor by the legal or factual separation between the parents.

PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE

CHAPTER I - GENERAL PRINCIPLES

Principle 1:1 Permission of divorce
(1) The law should permit divorce.
(2) No duration of the marriage should be required.

Principle 1:2 Procedure by law and competent authority
(1) The divorce procedure should be determined by law.
(2) Divorce should be granted by the competent authority which can either be a judicial or an administrative body.

Principle 1:3 Types of divorce
The law should permit both divorce by mutual consent and divorce without consent of one of the spouses.

CHAPTER II - DIVORCE BY MUTUAL CONSENT

Principle 1:4 Mutual consent
1. Divorce should be permitted upon the basis of the spouses' mutual consent. No period of factual separation should be required.
2. Mutual consent is to be understood as an agreement between the spouses that their marriage should be dissolved.
3. This agreement may be expressed either by a joint application of the spouses or by an application by one spouse with the acceptance of the other spouse.

Principle 1:5 Reflection period
(1) If, at the commencement of the divorce proceedings, the spouses have children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by Principle 1:6, a three-month period of reflection shall be required. If they have not agreed upon all the consequences, then a six-month period shall be required.
(2) If, at the commencement of the divorce proceedings, the spouses have no children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by Principle 1:6(d) and (e), no period of reflection shall be required. If they have not agreed upon all the consequences, a three-month period of reflection shall be required.
(3) No period of reflection shall be required, if, at the commencement of the divorce proceedings, the spouses have been factually separated for six months.

CHAPTER III - DIVORCE WITHOUT THE CONSENT OF ONE OF THE SPOUSES

Principle 1:8 Factual separation

The divorce should be permitted without consent of one of the spouses if they have been factually separated for one year.

Principle 1:9 Exceptional hardship to the petitioner

In cases of exceptional hardship to the petitioner the competent authority may grant a divorce where the spouses have not been factually separated for one year.

Principle 1:10 Determination of the consequences

(1) Where necessary, the competent authority should determine:

(a) parental responsibility, including residence and contact arrangements for the children,

(b) and child maintenance.

Any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child.

(2) On or after granting the divorce the competent authority may determine the economic consequences for the spouses taking into account any admissible agreement made between them.