

Roundtable on Strategic Litigation of Transgender Rights in Europe

London, 26 – 27 March 2010

Updated on 19 January 2011

COMPILATION OF JURISPRUDENCE ON TRANSGENDER RIGHTS

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I. European Court of Human Rights

A. *Judgments in which a violation was found*

B v. France (Application no.13343/87) [25 March 1992]

Complete lack of recognition in law of post-operative gender constituted a violation of Art. 8.

Miss B is a male-to-female French transsexual who underwent gender re-assignment surgery in 1972. She is in a functional relationship with a man who she wishes to marry. Miss B sought a judgement amending the original sex recorded on her birth certificate but was denied the rectification.

Although similar on its face with previous *Rees* and *Cossey* cases, the Court held that this case was distinguishable on factual grounds. Under French law, it was forbidden at the time to bear a surname or a forename other than those recorded on the birth certificate. Miss B was thus facing constant humiliation in her every day life as she could only produce documents showing the name corresponding to her former sexual identity. The Court also noted that the applicant’s “*manifest determination*” in pursuing sex change treatment, including gender-reassignment surgery abroad, constituted a significant element in this context. The Court held by 15 votes to 6 that there had been a violation of Art.8 as a fair balance had not been struck between the interests of the individual and those of the society.

Goodwin and I. v. United Kingdom (Application no. 28957/95) [decided by the Grand Chamber on 11 July 2002]

Denial of legal recognition of post-operative gender amounts to a violation of Article 8. Barring post-operative transsexuals from marrying into their acquired gender is a violation of Article 12.

The facts

Christine Goodwin is a post-operative male-to-female transsexual. She complained that she faced discrimination with regard to the payment of her National Insurance contributions: as legally she was a man, she had to continue paying these until the age of 65, whereas if she had been recognised as a woman, she would have ceased to be liable at the age of 60. As a result, she had to enter into a special arrangement to continue paying her contributions directly so as to avoid questions being raised by her employers. I. is a male-to-female post-operative transsexual. I. was denied the amendment of her birth certificate. She was unable to obtain admittance to a nursing course because she did not want to face the humiliation of producing a birth certificate that did not match her present situation.

The law

Both applicants complained about the lack of legal recognition of their post-operative gender and about the legal status of transsexuals in the United Kingdom.

The Court noted that transsexuals suffered from “stress and alienation” as a result of “*the discordance between the position in society assumed by a post-operative transsexual and the status imposed by the law which refuses to recognise the change of gender*”. The Court criticized the incoherence of the British legal and administrative practices. While allowing and funding the treatments necessary for transsexuals, ‘*the UK refused to recognise the legal implications of the result to which the treatment leads.*’

With regard to the state of medical and scientific knowledge, the Court noted that “*transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief*”. Furthermore, considering the intrusiveness and extent of procedures involved and the level of personal commitment required, it can not be “*suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment*”. Finally, the Court noted that the chromosomal element could not be automatically be considered as decisive “*for the purposes of legal attribution of gender identity for transsexual*”.

The Court then observed a ‘*continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals*’.

While acknowledging the extensive consequences that full legal recognition would entail, in the field of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance, the Court noted that no concrete and substantial detriment to the public interest could be determined. The Court concluded that the failure to ensure full legal recognition represented a breach of Art. 8, but at the same time left the choice as to the appropriate means necessary for achieving legal recognition to the discretion of the State.

Concerning Art.12, the Court considered that given the major social changes in the institution of marriage, the term ‘men and woman’ do not only refer to a determination of gender by purely biological criteria. The Court held that a complete bar on any exercise of the right to marry could not be justified, and therefore there was a violation of Art. 12.

Van Kück v. Germany (Application no. 35968/97) [decided on 12 June 2003]

Burden on applicant to prove medical necessity of gender reassignment and genuine nature of her transsexualism during court proceedings was unreasonable. Violation of Articles 6 and 8.

The facts

The applicant is a male-to-female transsexual who sued her health insurance company for refusing to reimburse the cost of her hormone treatment. She further requested a declaratory judgement stating that the company was liable to reimburse 50% of the cost of gender reassignment surgery (that was not undergone yet). The Berlin Regional Court misinterpreted the expert’s opinion, rejecting the request on the grounds that hormone treatment and gender reassignment could not be seen as necessary medical treatments. The Court of Appeal upheld the Regional Court’s decision insinuating that the applicant was not entitled to be reimbursed as she had deliberately caused her condition. The applicant had undergone surgery in the meantime as she could not wait until the end of the proceedings for her suffering to be relieved. The applicant invoked Art.6 § 1, Art.8 and Art.14.

The law

The Court concluded that the proceedings as a whole were not fair, in breach of Art.6§1, on account of the manner in which domestic courts determined the medical necessity of gender reassignment measures in the applicant’s case and also the cause of the applicant’s transsexualism to the first aspect, the Court stated that “*determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition*”. Considering that “*gender identity is one of the most intimate areas of a person’s private life*”, the burden placed on the applicant to prove the medical necessity of treatment, including irreversible surgery was disproportionate and unreasonable.

In relation to the second aspect, the Court held that it could not be said that there was anything arbitrary or capricious in a decision to undergo gender re-assignment surgery. Further, the applicant had already obtained legal recognition of her acquired gender and had undertaken gender reassignment. The approach adopted by domestic courts to question the causes of the applicant’s transsexualism was therefore inappropriate and unreasonable given that a) the courts could not have sufficient information and medical expertise to assess such complex questions; and b) no conclusive scientific findings as to the cause of transsexualism were available.

As to Art.8, the Court held that the case concerned “*the applicant’s freedom to define herself as a female person, one of the most basic essentials of self-determination*”. The central issue here was “*the impact on the court decisions on the applicant’s right for her sexual determination as one of the aspects of the right to private life*”. Domestic courts, “*on the basis of general assumptions as to male and female and female behaviour substituted its views on the most intimate feelings and experiences for those of the applicant, and this without any medical competence*”. It “*thereby required the applicant not only to prove that this orientation existed and amounted to a disease necessitating hormone treatment and gender reassignment surgery, but also to show the “genuine nature” of her transsexualism although “the essential nature and cause of transsexualism are*

uncertain". This approach upset the balance between the interests of the private health insurer and those of the applicant, in breach of Article 8.

Once again, the Court found that Art.14 did not give rise to a separate issue, although the Court reiterated the position of principle that "*where domestic courts base their decisions on general assumptions which introduce a difference of treatment on the ground of sex, a problem may arise under Article 14*".

Grant v. United Kingdom (Application no. 32570/03) [decided on 23 May 2006].

Refusal to grant retirement pension to mtf transsexual at the age of 60. Violation of Article 8.

The applicant is a post-operative male-to-female transsexual. She was registered as a woman on her National Insurance card and paid the contributions to the NI pension scheme at the female rate. In 1997, at the age of 60, she applied for her retirement pension but was informed that she would be entitled to a state pension from the retirement age of 65 applicable to men. The applicant complained of the refusal of the Department of Social Security to pay her a retirement pension at the age of 60 as was the case for other women.

Following the *Goodwin* judgment, the Court found a breach of Art.8 of the Convention. The Court held that the applicant '*may claim to be a victim of the lack of legal recognition from the moment, after the judgment in Christine Goodwin, when the authorities refused to give effect to her claim, namely, from 5 September 2000*'. No violation of Articles 1 of protocol 1 and 14.

L. v. Lithuania (Application no. 27527/03) [decided on 11 September 2007]

Absence of legislation regulating full gender-reassignment surgery. Absence of facilities in Lithuania to carry out gender-reassignment surgery. Violation of Article 8. No violation of Articles 3, 12, 14.

The facts

L is a female born Lithuanian citizen. After being diagnosed as a transsexual, L was officially prescribed a hormone treatment. In 2000, given the imminent adoption of the new Civil Code granting the right to undergo gender re-assignment surgery, L underwent partial gender-reassignment surgery. The Law supposed to regulate the gender re-assignment procedure as required by the new Civil Code was never passed. L contends that the government decided to drop the Bill following pressures by the Lithuanian Catholic Church. L decided to change his name but was forced to choose a gender neutral name. Despite this change, L still faced humiliations because the personal codes indicating his gender on his ID documents had not been changed and could only be change after gender re-assignment surgery.

The law

Concerning Art.8, the Court found '*that the circumstances of the case revealed a limited legislative gap in gender-reassignment surgery, which leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity*'. The applicant was left in "*the intermediate position of pre-operative transsexual*", including with regard to the fact that he did not enjoy full recognition of his chosen gender. In the absence of adequate legislation, it was not possible to assess to what extent the necessary medical facilities to carry out gender-reassignment surgery existed in Lithuania. Funding surgery carried out abroad

would not represent an excessive financial burden for Lithuanian authorities considering small estimated number of transsexuals in the country (approx. 50). Therefore there was a breach of Article 8.

The Court found no violation of Art.12 as the applicant did not complete the gender-reassignment procedure. The Court found no violation of Art.3, as the threshold of intensity required was not reached in the applicant's case. The alleged breach of Art.14 was not examined.

The Court ordered the Lithuanian Government to adopt the required legislation in three months after adoption of the judgment, or alternatively, pay the applicant 40000 Euros in pecuniary damages, representing the costs of undertaking the necessary gender reassignment treatment abroad. The Court also awarded the applicant with 5000 Euro as non-pecuniary damages.

Implementation

As of March 2010, Lithuania has not yet fully implemented the judgment of the Court. Thus, the government failed to adopt the required legislation within three months as requested by the Court, but did pay the applicant costs of undertaking treatment abroad. The Government indicated to the Committee of Ministers that it intended to repeal the provision from the Civil Code recognising to right to undergo gender reassignment surgery, and opined that transgender rights would enjoy adequate protection through judicial proceedings. The Committee of Ministers will assess the practical effects of the measures taken by the Lithuanian authorities during its meeting on 1 June 2010.

Schlumpf v. Switzerland (Application no. 29002/06) [Decided on 8 January 2009]

Validity of judicially-imposed two years waiting time requirement before a claim for coverage of costs associated with gender reassignment surgery may be satisfied. Violation of Articles 6 and 8.

The Facts

The applicant is a male-to-female transsexual. Although she had experienced gender identity disorder since childhood, the applicant lived in the male gender role until the death of her wife in 2002. From this date, the applicant decided to live as a woman. In 2003, the applicant began hormonal therapy and psychiatric and endocrinological treatment. In 2004, she was issued with a medical certificate confirming the diagnosis of gender dysphoria and stating that the conditions for gender-reassignment surgery were satisfied. She thus asked her health insurer to reimburse the cost of the operation, only to have her request turned down.

This decision was based on two rulings of the Federal Insurance Court dating from 1988 where it was held that gender reassignment surgery will only be reimbursed in cases of 'real transsexuality' which could not be established until there had been an observation period of two years during which the person concerned had to undertake psychiatric and endocrinological treatment. The applicant decided to proceed with the operation and appealed to the insurer to reverse its previous decision. The appeal was rejected. The applicant then initiated administrative proceedings against the insurer. The Cantonal Insurance Court annulled the insurer's decision but the case was brought before the Federal Insurance Court. The Federal Court refused to hold a public hearing with expert witnesses and rejected the applicant's appeal in a cursory manner. In doing so, the Federal Court applied its previous case law, and held that the two year requirement was obligatory and was not satisfied by the applicant.

The Law

The Court referred to the *Van Kück* judgment where it held that ‘*determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition*’. Here, the Court considered that it was disproportionate not to accept expert opinions especially since the applicant’s transgender status was not disputed. By refusing to allow the applicant to adduce such evidence, on the basis of an abstract rule which had its origin in two of its own decisions, the Federal Insurance Court had substituted its view for that of the medical profession. The Court thus concluded to a violation of Art.6§1. The Court also found a separate violation of Art.6§1 in that the applicant was not afforded a public hearing.

The Court recalled that the Convention guaranteed the right to personal self-fulfilment and reiterated that the concept of "private life" could include aspects of gender identity. It noted that the state benefited from a narrow margin of appreciation considering that the issues involved in the case concerned one of the most intimate aspects of the applicant’s private life. The Court held that the Swiss authorities applied the two-year rule in an overly-rigid fashion, failing to take into consideration the applicant’s individual circumstances, namely her advanced age (i.e. 67 years old), and the strong medical arguments in favour of swift gender reassignment surgery. The Court considered that the delay with which the applicant opted to transition to her preferred gender was justified by concern for her family (wife and children) and therefore could not place in question the genuine nature of her transformation. The Court thus concluded to a violation of Art.8.

Implementation

The implementation of this judgment by the Swiss government is currently being examined by the Committee of Ministers. On 14 September 2009, Switzerland sent the Committee an Action Report, which however has not been made public yet on the Committee’s website.

B. Pre-Goodwin and other negative judgments/decisions

Van Oosterwijk v Belgium (Application no. 7654/76) [inadmissibility decision of 6 November 1980]

The case concerned a female-to-male Belgian transsexual who underwent surgery in 1973. He filed an application with the Belgian Registrar of Births for a rectification of the civil status certificate made at birth. Under Belgian law the certificate could only be changed if an error was made when it was drawn up. The applicant was denied rectification by the registrar of birth and consequently took the case to the Court of Appeal. The applicant decided not to take the case to the Court of Cassation as he had been advised that this would be fruitless. The applicant invoked Art.8, 12 and 3 of the Convention. The Commission declared the case admissible and found that the Art.8 and 12 of the Convention had been violated. The Court did not go into the merits of the case as it found that the condition of the exhaustion of local remedies required by Art.26 of the Convention had not been met.

Rees v. United Kingdom (Application no. 9532/81) [19 October 1986]

This case concerned a female born British national who underwent surgery to become a man. Although he was issued identity documents containing his new name and the prefix “Mr.”, Rees applied for a modification of his birth certificate to the Registrar of Birth. The applicant’s request was denied because, according to the Births and Deaths Certificates Act 1953, the sex mentioned

in the certificate can only be amended if a 'factual' or a 'clerical' error had occurred when drawn up at birth. The applicant argued that the failure to recognise his post-operative status was in contravention with article 3, 8 and 12 of the Convention. He emphasized the humiliation suffered whenever he had to produce a birth certificate that did not match his present sexual identity and argued that his right to marry had been impaired.

The Court held that although Art.8 expressly prohibits unjustified interferences with the right to privacy, it can also involve positive obligations incumbent on contracting States. But whenever a positive obligation is involved, States are afforded a wide margin of appreciation given the transitional state of the law in this area. A fair balance has thus to be struck between the rights of the individual and the countervailing public interest. The Court thus ruled that the '*positive obligation cannot be extended as far as requiring the UK to adopt a new Civil Status system given the wide margin of appreciation afforded.*' By 12 votes to 3, the Court found no breach of Art.8.

As to the alleged violation of Art.12, the Court recalled that the right to marry is subject to the national law applicable. In the UK, only opposite-sex marriages are permissible and following the *Corbett v Corbett* decision, sex is to be determined by biological criteria only. The Court found no breach of Art.12.

Once again, the Court and the Commission reached different conclusions.

Cossey. v. United Kingdom (Application no. 10843/84) [27 September 1990]

The facts of this case are very similar to the *Rees case*. Cossey is a male-to-female British transsexual. Having undergone sex-reassignment surgery, she wished to change the sex mentioned on her birth certificate. At the time of her application, she was in a functional relationship with a man with whom she wished to get married. Cossey argued that the non-recognition in UK legislation of her post-operative sexual identity led to distressing and humiliating situations whenever she had to produce her birth certificate.

The Court disregarded the argument that this case was distinguishable from the *Rees case* although the issue of transsexual marriage was indisputably more salient here. By 10 votes to 8, the Court found no breach of Art.8 and Art.12 reaching the same conclusion as in the *Rees case*. However, given social and scientific progress, the Court nonetheless urged the respondent State to keep the law under review.

Sheffield and Horsham v. United Kingdom (Applications nos. 22985/93 and 23390/94) [decided on 30 July 1998]

Kristina Sheffield is a British male-to-female transsexual who underwent gender re-assignment surgery. She changed her name by deed poll and her new name is recorded on her passport and driving licence. Although these documents do not disclose her former sexual identity, Kristina complains that the lack of recognition of her post-operative status (the impossibility to obtain a modification of her birth certificate) gave rise to violations of Art.8, 12, 14 and 13 of the Convention.

Miss Horsham is a British citizen who acquired Netherlands citizenship in 1993. She underwent gender-reassignment surgery in 1992. Following the surgery she was issued with a Dutch birth certificate recording her new sexual identity and a new British passport showing her new name. Miss Horsham wishing to marry and live with her male partner in the UK requested the

rectification of her UK birth certificate. Her request was denied and she was informed that a valid marriage in the Netherlands would be considered void in the UK. Miss Horsham argues that she is forced to live in exile because her new sexual identity cannot be legally recognised in the UK.

Concerning the alleged violation of Art.8, the Court did not depart from the position taken in *Rees* and *Cossey* despite the increasing social acceptance of transsexualism. The detriment suffered by the applicants was not sufficiently serious to engage Article 8, and the authorities had taken measures to minimise it. The Court noted however that no steps were taken by the respondent State to keep abreast of appropriate legal measures in this area under review despite the Court's view to that effect in *Rees* and *Cossey* judgments.

As for the alleged violation of Article 12, the Court recalled that the exercise of the right to marry is subject to the provisions of national law. Under British law, sex for the purpose of marriage refers to the biological sex (*Corbett v Corbett*). The Court then noted that the issue at stake in Miss Horsham's case was not the right to marry per se, but the conditions governing the recognition under British law of a foreign marriage.

Under Article 14, although it found a differential treatment to exist, it held that this was supported by "reasonable and objective justifications".

X., Y. and Z. v. United Kingdom (Application no. 21830/93) [decided on 22 April 1997]

Refusal to recognize a ftm transsexual as the father of his partner's child born through artificial insemination did not constitute a violation of Article 8. This finding was overruled by the Goodwin case.

The case concerned a female-to-male transsexual, X., who was denied the right to be registered as the father of his partner's birth child conceived using donor insemination. The only justification given was that only a biological male, although not biologically related to the child could be registered as father on the child's birth certificate. The family invoked Art.8 and Art.14 claiming that this was an unlawful contravention of the right to family privacy and that X was discriminated on the grounds of sex.

The Court unanimously held that Art.8 was applicable in this case as family not only refers to the *de jure* traditional family but also to *de facto* family ties. The Court nonetheless considered that little common ground existed amongst contracting States in this area and reached its usual conclusion. A wide margin of appreciation was to be afforded to the respondent State. The Court considered that the disadvantages suffered by the applicants were not substantial and therefore no breach of Art.8 was found. Concluding to no violation of Art.8, the Court did not find it necessary to consider any violation Art.14.

Roetzheim v. Germany (Application no. 40016/98) [Commission decision of inadmissibility 23rd October 1997]

Validity of conditions to complete sex reassignment surgery and lack of ability to procreate in order to achieve legal recognition of acquired gender.

The applicant is a male-to-female transsexual who refuses to undergo sex reassignment surgery, while maintaining her ability to procreate. In 1994, the applicant's request for the rectification of his birth certificate was dismissed on the grounds that the conditions required by the 1980 Transsexuals Act (namely the inability to procreate and the necessity to undergo surgery) were not met. The German Federal Constitutional Court held that '*the legislator was not required to*

treat persons, who, according to physical factors, still belonged to the original sex and were still able to procreate as member of this sex, in every respect as members of the other sex, corresponding to their psychological situation’.

The Commission declared the application inadmissible endorsing the restrictive approach adopted by the German Federal Court.

Parry v. United Kingdom (Application no. 42971/05) [Decided on 28 November 2006]

Validity of condition that a previous marriage be dissolved before recognition of acquired gender takes place. Inadmissibility decision.

This case concerned a married couple. They remained together after the husband, a male-to-female transsexual, underwent gender reassignment surgery and was recognised in his new gender. The husband applied for a Gender Recognition Certificate (GRC) but was told she could not obtain a full certificate unless she sought the annulment of her marriage. Both applicants have strong religious beliefs and neither wishes to annul their marriage.

The Court accepted that the husband had to choose between living in her preferred gender role and her marriage. This constituted a “direct and invasive effect on the applicants’ private and family life”. The Court ruled however that the application was manifestly ill-founded under Article 8 as the annulment precondition stemmed from the prohibition in English law of same sex marriages. The system establishing the possibility of a civil partnership was deemed to strike a fair balance between the applicants’ interest and the public interest.

As for the alleged violation of Article 12, the Court observed that following the *Goodwin* judgement, the determination of sex is no longer limited to biological criteria but can derive from a gender recognition procedure. However, Art.12 still refers to opposite-sex marriage and same sex-marriages are not permitted under British law.

No violation of Articles 9, 1 of Prot. 1, or 14.

P.V. v. Spain (Application no. 35159/09) [decided on 30 November 2010]

Restriction of contact arrangements between a transsexual and her six-year-old son was in the child’s best interests and did not constitute a violation of Articles 8 and 14.

The facts

The applicant is a Spanish male-to-female transsexual who, prior to her gender reassignment, had a son with P.Q.F. in 1998. When they separated in 2002 the judge approved the amicable agreement they had concluded, by which custody of the child was awarded to the mother, parental responsibility to both parents. The agreement also laid down contact arrangements for the applicant, who was to spend every other weekend and half of the school holidays with the child.

In May 2004 P.Q.F. applied to have P.V. deprived of parental responsibility and to have the contact arrangements suspended, arguing that the father had shown a lack of interest in the child and adding that P.V. was undergoing hormone treatment and usually wore make-up and dressed like a woman. The judge decided to restrict them rather than suspend them entirely, since ordinary contact arrangements could not be made on account of P.V.'s lack of emotional stability, as acknowledged by a psychologist report, and a gradual arrangement was put in place from

February to November 2006 "until [P.V.] undergoes surgery and fully recovers her physical and psychological capacities".

In December 2008 an amparo appeal by the applicant was dismissed. The Constitutional Court held that the ground for restricting the contact arrangements had not been P.V.'s transsexualism but her lack of emotional stability, which had entailed a real and significant risk of disturbing her son's emotional well-being and the development of his personality. The court held that in reaching that decision, the judicial authorities had taken into account the child's best interests, weighed against those of the parents. The applicant complained about the restrictions ordered by the judge, relying on the assumption that it had violated article 8 taken in conjunction with Article 14.

The law

The Court agreed that once they had learned of P.V.'s gender emotional instability, the Spanish courts had adopted contact arrangements that were less favourable to her than those laid down in the separation agreement. The Court emphasised that, although transsexualism was a notion covered by Article 14, the decisive ground for the restriction had been the child's best interests, the aim being that the child would gradually become accustomed to his father's gender reassignment.

The Court therefore considered that the restriction of the contact arrangements had not resulted from discrimination on the ground of the applicant's transsexualism and concluded that there had been no violation of Article 8 taken in conjunction with Article 14.

C. Pending cases

P. v. Portugal (Application no. 56027/09)

The applicant is a postoperative mtf transsexual born in 1977. She commenced hormonal treatment in 2008, in Finland. During the same year she returned to Portugal where she was diagnosed with gender dysphoria. In February 2009, the applicant undertook gender reassignment surgery in Malaysia. Subsequently the applicant sought to have her post-operative gender recognised, absent which she suffered considerable problems on a daily basis. The court seized with this matter decided to subject the applicant to a medial examination in order to determine if she now belonged to the female sex. Portugal does not have any specific regulation governing the legal recognition of transgender persons into preferred gender. This process has been driven so far by courts, on a case-by-case basis. The complaint was communicated to the Portuguese Government on 3 December 2009 under Article 8 of the Convention.

Hämäläinen v. Finland (Application no. 37359/09)

The applicant, a postoperative mtf transsexual, was born in 1963. In 1996 she married a woman and in 2002 they had a child. In April 2006 she was diagnosed as a transsexual and since then she has lived as a woman. In September 2009 she underwent gender re-assignment surgery. On 7 June 2006 the applicant changed her first names and renewed her passport and driver's licence. The applicant asked the courts for official recognition of her preferred gender and consequently for her former male identity number to be changed to a female identity number. The courts however refused to grant her request on the basis that the relevant conditions imposed by the Finnish laws were not fulfilled: respectively either that the person concerned is not already married or in a civil partnership or that the person's partner concerned consents to the sex change, in which case the marriage would be turned ex lege into a civil partnership. The case was

communicated to the Finnish Government and are related mainly to the lawfulness of the aforementioned conditions under Articles 8 (right to private life) and 12 (right to marriage) of the Convention.

II. European Court of Justice

***P v. S and Cornwall County Council* (C-13/94) [decided on 30 April 1996]**

In April 1991, P was hired as general manager of an educational establishment operated by the Cornwall County Council. P was thus taken on as a male employee. A year later, P informed her boss S that she was intending to have a gender reassignment preceded by a 'life test'. In the summer, P took a sick leave for initial surgical treatment. P was dismissed in September 1992.

The ECJ held that transsexuals can rely on the 76/207/EEC directive providing for the equal treatment for men and women as regards access to employment. Article 3 of the Directive specifically prohibits discrimination on grounds of sex. And Art 5 (1) reiterates this prohibition with regard to the conditions governing dismissal. The court disregarded the contention that no discrimination could be established as the requirement for an adequate comparator could not be met. 'Sex' is thus to be given a broad meaning that encompasses the gender reassignment process. '*The scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one sex or the other sex.*'

***K.B v. NHS Pensions Agency* (C-177/01) [decided on 7 January 2004]**

KB is a woman who worked for 20 years for the NHS and is thus a member of the NHS Pension Scheme. She is in a functional relationship with a female-to-male transsexual who has had gender reassignment surgery. KB and her partner wish to marry but are legally unable to do so (only opposite sex marriage is valid under British law and sex refers to what is enshrined in the birth certificate which cannot be modified). The NHS Pension Scheme Regulation Act 1995 provides for the allocation of a survivor's pension for the widower of a pension's member. KB was informed by an NHS agency that her partner would not be able to benefit from the scheme as they are not married.

The ECJ held that pension schemes fall within the scope of article 141 EC which establishes the principle of equal pay for men and women. The 75/117/EEC directive pertaining to the elimination on all discrimination on grounds of sex with regard to all aspects and conditions of remuneration is also applicable here. While recognising the right of Member States to restrict the allocation of certain benefits to married couples, the Court also noted that discrimination can stem from the legal inability to fulfil the necessary precondition for the grant of the pension. KB and her partner were treated less favourably than heterosexual couple whose right to marry allow them to benefit from the pension scheme. The ECJ referred to the *Goodwin* judgment of the ECHR but abstained to try this particular case and ruled on principle.

***Richards v. Secretary of State for Work and Pensions* (C-423/04) [decided on 27 April 2006]**

The case concerns Ms Richards, a male-to-female transsexual who underwent surgery in 2000. In 2002, Ms Richard was denied the payment of her retirement pension on the grounds that she was not eligible to receive the payment until the age of 65 (men eligible age for retirement pension). Ms Richard was thus still legally considered as a man even after her sex reassignment. Ms Richards made an appeal before the Social Security Appellate Tribunal arguing that she was

treated less favourably than non-transsexual women who are entitled to claim their retirement pension at the age of 60.

The ECJ was asked to determine the scope of the Directive 79/7/EEC pertaining to the implementation of the principle of equal treatment in the field of social security. While recognising the right of national legislators to prescribe differential pensionable ages for men and women, the Court reaffirmed its previous understanding of the notion of 'sex'. The court thus ruled that the directive also applied to discrimination arising from gender reassignment and held that *'the national legislation which precludes a Trans in the absence of recognition of his new gender from fulfilling a requirement which must be met in order to be entitled to a right protected by EC law must be regarded as, in principle, incompatible with EC Law'*.

III. Australia

Abrams and Minister for Foreign Affairs and Trade [2007] AATA (Administrative Appeal Tribunal of Australia) 1816; (2007) 98 ALD 438 (28 September 2007)

The applicant, Ms Abrams, is an Australian citizen born male. On September 2005, the applicant married her present partner. Prior to the marriage, the applicant had started a gender reassignment process which was completed in October 2005. In April 2006, the applicant applied for an Australian passport indicating her female gender identity. As a married person, Ms Abrams was unable to obtain from the Registrar an alteration of the record of her sex in the registration of her birth, on account of the provisions in section 32B of the Births, Deaths and Marriages Registration Act 1995 (NSW). The respondent refused to issue the new passport as a result of the applicant's failure to provide an amended birth certificate.

The Tribunal noted that although gender is an element of identity, it is only one element and one way in establishing that a person has the identity specified in an application made for a passport (§18). The Tribunal then held that it is not the intent of the Passports Act and the Manual setting out the policy to be applied, to prevent an Australian citizen obtaining a passport (§20). The Tribunal rejected the assertion that it is undesirable for the personal details recorded in the passport to be inconsistent with the ones on the birth certificate; the birth certificate being the 'cardinal document'. It was held that: *the "relevant register" in the present instance does not accord with the actual situation. [thus] it is inappropriate for a decision-maker to be guided in the decision making process by "contents of" a register which is currently not correct* (§21). The Tribunal went as far as suggesting that [...] *the State Legislation needs to be amended to accord with the reality* (§21). Being satisfied that the applicant is an Australian citizen and his now of female gender, the Tribunal concluded that the applicant's inability to provide a birth certificate is not a valid ground for rejecting her passport application when her identity could have satisfactorily been established by other means.

Secretary Department of State v SRA, [1992] AATA 770 (4 September 1992)

This case concerned a pre-operative male-to-female transsexual. In 1982, the applicant was diagnosed with gender dysphoria. In 1983, the respondent started taking hormones and presenting as a woman. She has never presented or dressed as a man since that time. The respondent is willing to undergo SRS but cannot afford the cost of the surgery. In 1984, the respondent started to receive unemployment benefit in a female name. The same year, she met her partner B and moved in with him. She was later advised by an officer of the department of social security that wife's pension rather than unemployment benefit was the appropriate payment

for her. She did not inform the officer that she was a transsexual. Wife's pension was granted from 1985. In 1987, the applicant found out that the respondent was born male. The applicant submitted that the respondent is not a woman for the purposes of s 37 of the Social Security Act and that the respondent and B therefore are not in a de facto relationship because the respondent is not a person of the opposite sex to B.

The tribunal took the view that the factor most relevant for the determination of sex of transsexuals is psychological sex. It also found that *'the emphasis by the tribunal in Re HH on sex reassignment surgery was correct as an indicator of psychological sex but not conclusive of its existence. Surgery per se has no effect upon a transsexual's psychological sex, that is their inner belief as to their own identity. Post-operative transsexuals may receive a psychological boost in that their outward anatomical appearance now conforms more closely to their inner belief about their sex, but it is not a determining factor in every case'* (§24). The Tribunal went on to hold that the Social Security Act is a beneficial legislation which, in the case of wife's pension, uses the nature of a particular relationship to allocate resources. *Incidental to the question of the nature of the relationship is the question of gender* (§27). The tribunal noted that the majority in *Re HH* had been influenced by *R v Harris and McGuinness* which held a pre-operative male to female transsexual was a "male person" for the purposes of that Act but found that social policy can be distinguished from criminal law and thus be interpreted more liberally. The Court then held that *'a requirement that a person undergo expensive surgery before being eligible to receive benefits is unduly onerous and is not in accord with the aims and purpose of the legislation. There may be a number of reasons why a person is unable to undergo such surgery, the most obvious being lack of the necessary financial resources or perhaps a particular medical condition which makes surgery inappropriate'*(§31). The tribunal concluded that the respondent could be considered as a woman for the purposes of the Social Security Act.

This decision was overturned by the Federal Court of Australia¹ which found no justifiable reason to depart from the ordinary meaning of the words used in the Act (*it would be going well beyond the ordinary meaning of the words in question to conclude that a pre-operative male to female transsexual, having male external genitalia, is a "woman" for the purposes of the Social Security Act and may be a "wife" as that expression is defined in the Act*). Had she undergone a successful SRS, the applicant would have been considered a woman for the purposes of the Act.

Re: Alex [2009] FamCA 1292 (6 May 2009)

This case concerned a female-to-male transsexual teenager: Alex. After his mother remarried, Alex was placed under the guardianship of the Government Social Department and went to live with a relative. Alex was subsequently diagnosed with gender dysphoria. When Alex reached thirteen, his guardian sought a judicial declaration allowing him to consent to Alex undergoing hormone treatment and start psychotherapy. The Court granted this permission in a 2004 decision². This decision also provided that the child be known and referred to as Alex. Alex's guardian seeks a declaration allowing him to consent to Alex undergoing SRS (notwithstanding that Alex is not yet 18 but 16) and to amend Alex's birth certificate.

The Court noted that *'the evidence is that there have been significant improvements in major facets of Alex's life following the commencement of hormonal treatment and that Alex has responded positively to the physical changes arising from the administration of testosterone. Alex has neither exhibited nor verbalised anything other than an enduring wish to continue to live as a*

¹ Secretary, Department of Social Security v Sra [1993] FCA 573

² Re Alex : Hormonal Treatment for Gender Identity Dysphoria [2004] FamCA 297 (13 April 2004)

man. Alex is an intelligent, thoughtful, reflective and creative young person with well developed adaptive skills.’ After having considered a number of relevant factors, the Court took the view that it would be in Alex’s best interest to undergo SRS. Thus the Court issued the orders requested.

IV. Germany

Federal Constitutional Court decision 1 BvL 10/05, 27 May 2008

The applicant is a female-to-male transsexual born in 1929. The applicant has been married for 56 years and is the father of three children. From an early age, the applicant has felt that she belonged to the female gender. In 2001, the applicant obtained a court ruling allowing her to hold a female forename. In 2002, the applicant underwent gender reassignment surgery. The applicant then sought the amendment of her birth certificate and petitioned for the recognition of her new gender at the local administrative office. According to § 8.1 no. 2 of the German Transsexual Act (TSG), however, the determination and legal recognition of the other gender affiliation is contingent on the person concerned not being married.

The couple wishes to remain married as their relationship is intact.

The Court first recalled that the right to recognition of self-determined identity is a constitutional right guaranteed by the German Basic Law. However the Court noted that this right can only be exercised if the person concerned is not married. This forces the person to face a dilemma: either obtain legal recognition of her/his new gender at the detriment of his/her marriage or remain married but having to endure the daily humiliations resulting from the discrepancy between his/her legal status and her/his physical appearance.

While the Court recognised that the aim of securing opposite-sex marriage is legitimate, it found that the impairment imposed by §8.1 no.2 of the TSG is not proportionate. Hence, the Court recalled that the institution of marriage is protected by Art.6.1 of the Basic Law. This protection is not removed by virtue of the fact that the transsexual spouse adjusts his or her external sexual characteristics to the perceived gender during marriage. Thus, the impairment runs counter to the structural characteristic of marriage as a lasting partnership and community of responsibility. The Court also underlined the impairment incurred by the spouse of the transsexual who could end up losing the legal security associated with marriage. The Court then noted that the principle of different sexuality is only marginally affected in view of the small number of Transsexuals in this specific situation.

Thus, the Court concluded that the conflict of fundamental rights entailed by the legislation was unconstitutional. To remedy the unconstitutionality, the Court suggested that the legislature drop the unmarried requirement in the TSG or make sure that the marriage of transsexuals can at least be continued as a legally secured community of responsibility (such as a life partnership) offering the same guarantees and benefits as marriage.

V. U.S.A

M.T v J.T, 140 N.J. Super 77 (1976)

This case concerned the validity of a marriage between a man and a post-operative male to female transsexual.

The New Jersey Superior Court, Appellate Division, rejected the test for determining sex for the purpose of marriage established in *Corbett*. In place of the *Corbett* standard, which used three criteria -chromosomal, gonadal and genital- the Court recommended using two criteria: anatomy and gender. The Court held that: *the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards* (§87). Although this constitutes a positive departure from *Corbett*, it still placed the biological criteria in a prevalent position. Hence, the Court held that *'A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which will coincide with the person's gender. If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or a female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for the purpose of marriage to the sex finally indicated'* (§89).

Price Waterhouse v Hopkins. US Supreme Court (1989)

Ann Hopkins had been an extremely successful manager at the accounting firm of Price Waterhouse. She had worked at the firm for five years when her name was put forward as a candidate for partnership. She was the only woman being considered for partnership at Price Waterhouse. She had been described by both supporters and detractors as having traditional male characteristics such as independence, decisiveness, intellectual clarity, intelligence, strength and so on. The board responsible for promotions placed her promotion on hold. The man who conveyed to Hopkins the reasons behind her failure to make partner advised her to 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewellery. Hopkins complained she had been discriminated against for not being female enough.

The Supreme Court held that a woman could not be discriminated against for failing to act like a woman. The Court stated that *'we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group'*. The Court thus concluded to a violation of Title VII of the 1964 Civil Rights Act which prohibits employers to discriminate on the basis of sex.

This decision suggested that gender identity, not just biological sexual identity, was protected under Title VII and thus emboldened the Federal courts to find that Title VII protected transgender people against discrimination.

Smith v Salem Ohio, 6th Circuit Court (2004)

The applicant is employed by the City of Salem, Ohio, as a lieutenant in the Salem Fire Department. The applicant was born male and was diagnosed with gender identity disorder (GID). After being diagnosed with GID, the applicant began expressing 'a more feminine appearance on a full time basis' which led to sarcastic comments from his co-workers. The Chief

of the fire department found out about the applicant's condition and decided to use her transsexualism as a basis for terminating her employment. He thus arranged for the Salem Civil Service Commission to require the applicant to undergo three separate psychological evaluations with physicians of the City's choosing. He hoped that the applicant would either resign or refuse to comply. If he refused to comply, he could terminate Smith's employment on the ground of insubordination. Concerned by this situation, the applicant sought and obtained legal representation. Soon after, the applicant was suspended.

The Court recalled that '[b]y holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms'. The Court found no justifiable reason to distinguish between the discrimination found in Price Waterhouse and discriminations involving transsexuals. The Court went on to hold that 'sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.' The Court thus concluded that the applicant had been discriminated against on the basis of sex.

Rosa v Park West Bank and Trust Co, 1st Circuit Court (2000)

This case concerned Lucas Rosa: a male who went to a bank dressed in female attire to request a loan. The bank employee he spoke with asked to see identification. Rosa gave her three pieces of photo identification, one of which depicted Rosa dressed in traditionally masculine clothing. The bank employee refused to give Rosa a loan application or process his request until Rosa 'went home and changed' into men's clothing. Rosa sued the bank under the Equal Credit Opportunity Act (ECOA) arguing that the Bank's refusal amounted to sex discrimination under the Act.

The First Circuit Court rejected the federal district court's conclusion that no discrimination had occurred because the basis for discrimination in this case was not Rosa's sex but his style of dress. The Court held that '*it is reasonable to infer that [the bank employee] told Rosa to go home and change because she thought that Rosa's attire did not accord with his male gender: in other words, that Rosa did not receive a loan application because he was a man, whereas a similarly situated woman would have received the loan application*'. The Court looked to Title VII case law to interpret ECOA's definition of sex discrimination and concluded that Rosa had a valid claim under *Price Waterhouse*.

Christian v Randall, Colorado Court of Appeals (1973)

(I could not find the full text of this judgment)

The Court refused to remove custody from a female-to-male transsexual parent. The court held that the mother's transition from female to male and subsequent marriage to a woman did not justify a change of custody to the father, where there was no evidence that the children had been adversely affected. The court reaffirmed the longstanding principle in Colorado jurisprudence that the 'court shall not consider conduct of a proposed custodian that does not affect his relationship with the child'.

Pinneke v Preisser, 8th Circuit Court (1980)

The applicant is a male-to-female transsexual. In 1976, the applicant underwent gender reassignment surgery. The applicant was eligible for benefits under the Medicaid program and thus applied for funding of her SRS. The funding was refused on the ground that the State of Iowa Medicaid plan specifically excludes coverage for sex reassignment surgery. The applicant claimed that her constitutional rights to equal protection and due process and her statutory right to Medicaid benefits had been denied.

The Court noted that *'the consensus of medical literature is that psychoanalysis is not a successful mode of treatment for the adult transsexual. The only medical procedure known to be successful in treating the problem of transsexualism is the radical sex conversion surgical procedure'* (§9). The Court thus found that *'a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition must be considered an arbitrary denial of benefits based solely on the diagnosis, type of illness, or condition'*. The Court went on to hold that *'the decision of whether or not certain treatment or a particular type of surgery is medically necessary rests with the individual recipient's physician and not with clerical personnel or government official'* (§17). The Court thus concluded that the applicant's surgery must be covered under the state's Medicaid plan unless not medically necessary.

Kosilek v. Maloney, District Court of Massachusetts (2002)

This case concerned a male-to-female transsexual serving a life sentence. The applicant has been diagnosed with gender dysphoria. Although she sought to receive treatment for her condition, she has not received any form of treatment (psychotherapy, hormone treatment or SRS) since being incarcerated. The applicant claimed she was being denied adequate medical care for her serious medical need in violation of the Eighth Amendment of the United States Constitution (which prohibits the infliction of pain on a prisoner, either intentionally or because of the deliberate indifference of the responsible prison official). She thus filed a complaint against the Massachusetts Department of Corrections (DOC) and sought an injunction to be provided with SRS. Soon after, the commissioner of the DOC adopted a policy aimed at 'freezing' a transsexual in the condition she/he was prior to incarceration.

The Court noted that the commissioner of the DOC is not qualified to make medical judgement but nonetheless adopted a rigid policy preventing the relevant professionals to consider the applicant's condition. The Court acknowledged that this was done in consideration of security reasons since the applicant is living as a woman in a male prison. However, the Court found that the guidelines set out in the commissioner's rigid policy prohibit forms of treatment that are necessary to provide [the applicant] any real treatment. Thus the court concluded that the applicant had not been offered adequate treatment for her serious medical need. The Court finally held that *'it is permissible for the DOC to maintain a presumptive freeze-frame policy. However, decisions as to whether psychotherapy, hormones, and/or sex reassignment surgery are necessary to treat [transsexuals] adequately must be based on an 'individualized medical evaluation' [...] rather than as a result of a blanket rule.*

Hernandez Montiel v INS, 9th Circuit Court (2000)

This case concerned a Mexican national. At the age of 12, the applicant began dressing and behaving as a woman and had realised he was attracted by people of the same sex as early as 8. In Mexico, the applicant was harassed and persecuted by his family, and was sexually assaulted by the Mexican police on two occasions. He was subsequently attacked with a knife by a group of

young men because of his sexual orientation. The applicant applied for asylum in the United States.

The issue at stake here was to determine whether the applicant was persecuted on account of his membership to a particular social group.

The Court defined a particular social group as *'one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that those members either cannot or should not be required to change it'*. The Court took the view that *'sexual orientation and sexual identity are immutable and that they are so fundamental to one's identity that a person should not be required to abandon them. Sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance'*. The Court concluded that the applicant belonged to the particular social group of 'homosexual men with female identities' and granted asylum to the applicant.

Schwenk v Hartford. 9th Circuit Court (2000)

This case concerned a preoperative male-to-female transsexual planning to undergo sex reassignment surgery. Although never diagnosed with gender dysphoria, the applicant had felt she belonged to the opposite gender as early as childhood. In 1994, the applicant was incarcerated in an all male state penitentiary. The applicant alleged that a prison guard Robert Mitchell and other prison officials harassed her sexually and raped her. The applicant filed a complaint under the Gender Motivated Violence Act 1994.

The GMVA was enacted as part of the comprehensive Violence Against Women Act. The Act provides a civil cause of action for victims of gender-motivated violence defined by the Act as 'crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender'.

The issue at stake here was whether a person who is genetically male was covered under the Act. The Court dismissed Robert Mitchell's argument that the act could not apply as the crime was not motivated by the victim's gender. It based its approach on the analysis of discrimination on the basis of sex developed under Title VII. Referring to *Price Waterhouse*, the Court noted that Title VII protected against discrimination *'based on gender as well as sex. Indeed, for purposes of these two acts, the terms "sex" and "gender" have become interchangeable.'* Thus, the Court concluded that the applicant was covered under the GMVA.

VI. Canada

Vancouver rape relief society v Nixon, [2003] BCSC

This case concerned a male-to-female transsexual-Kimberly Nixon -who went through a screening process in order to be accepted into the Vancouver Rape Relief Society's rape counsellor program. After passing the screening process, she was asked to leave the first training session as one of the training facilitator identified Kimberly as a transsexual. The society argued that 'only a woman, born so, and who grew up understanding what it means to be a girl and a woman in an oppressive society, could understand [its] political view of male violence and, therefore qualify as a peer for Rape Relief purposes'. The applicant argued that the respondent violated s.8 (discrimination relating to employment) and 3 (discrimination based on sex in the provision of a public service) of the British Columbia Human Rights Act.

The Court had to assess whether the requirement that the applicant be born a woman was a bona fide occupational requirement of a rape counsellor. In order to do so, the Court used the three part test established in *Meiorin*:

- Did the society adopt the standard for a purpose that is rationally connected to the function being performed?
- Did it adopt the standard in good faith, in the belief it is necessary for the fulfilment of the goal?
- Is the standard reasonably necessary to accomplish its purpose in the sense that the respondent cannot accommodate persons with the characteristics of the complainant without incurring undue hardship?

The tribunal was satisfied that the requirement was rationally connected to the function of rape counsellor and had been adopted in good faith. However, the Tribunal held that the society had not demonstrated that the requirement was necessary. In the view of the Tribunal, the requirement to be born a woman ‘assumes that all the women who access Rape relief for services and who provide services have a homogenous common life experience [...] If women requiring counselling services come from diverse backgrounds, it is hard to see how requiring counsellors to have a uniform background with regard gender identity is necessary’ (§203). The tribunal also held that the society had made no attempt to accommodate the applicant in a way that would allow her to be included in the training program and the activities of the centre.

The Tribunal rejected the respondent’s argument that as a non profit organisation promoting the interests of an identifiable group of persons, the society was entitled to grant a preference to members of this group as provided by S.41 of the Human rights code. The Tribunal noted that no evidence could establish the existence of a shared life experience that is common to all non-transsexual women and thus concluded that the society did not promote the interests of an identifiable group and thus could not take advantage of the exemption in s.41. The tribunal found that the applicant had been discriminated against and awarded her compensation for the moral damage sustained.

This decision was later overturned by the BC Court of Appeal³ who took the opposite view that women born as women could be considered as an identifiable group under section 41.

M.L and Commission des droits de la personne et des droits de la jeunesse du Québec v Maison des jeunes, Tribunal des droits de la personne du Québec [1998]

This case concerned a male-to-female transsexual who served as a street worker at the Maison des jeunes. When she came out as a transsexual to her employer and notified them of her desire to transition, the applicant was fired. The applicant complained she had been discriminated against on the ground of sex.

The human rights tribunal acknowledged that ‘*the discriminatory ground of sex is not solely limited to the biological dimension which distinguishes the sexes from each other*’ (§103). Thus, the tribunal held that sex based discrimination also included discrimination based on ‘*the process of unification of disparate and contradictory sexual criteria*’ (§114). The tribunal went on to hold that the applicant’s sex was not rationally connected to the work that the applicant was undertaking. The applicant was awarded compensation for the damage sustained.

³ Vancouver Rape Relief Society v Nixon, 2005 BCCA 601.

***Mamela v Vancouver Lesbian Connection*, B.C.H.R.T.D [1999]**

This case concerned a pre-operative male-to-female transsexual. The applicant was a member of Vancouver Lesbian Connection (VLC) -an association seeking to 'organize as self-identified/queer women to end lesbian oppression'. The applicant also volunteered as a librarian at the VLC centre. In 1997, the applicant was quoted in a newspaper as saying that she identified as a lesbian but not as a woman, because the term woman was a social construct to which she objected. After the publication of the article, the applicant was confronted by two members of the VLC Board of Directors who felt that her comment would erase women's experience of themselves. Soon after, her VLC membership was revoked. The applicant complaint she was discriminated against regarding employment on the basis of sex (S.13 of BC Human rights Code) and regarding a service customarily available to the public (S.8).

While the tribunal held that the relationship between VLC and the applicant was not an employment relationship, membership of in the VLC and the use of its facilities were deemed to be services customarily available to the public. The tribunal concluded that discrimination on the basis of the applicant's identity as a transsexual was a form of sex discrimination and that the applicant's status as a transsexual, specifically her self-identification as female, was a factor in the decision to suspend her membership and prohibit her from attending the VLC centre and VLC events.

***Sheridan v Sanctuary Investments Ltd* [1999] B.C.H.R.T.D**

This case concerned a male-to-female transsexual who had not yet undergone SRS at the time of the complaint. The applicant decided to file a complaint after several incidents that occurred in a bar called B.J's Lounge. The applicant was summoned not to use the women's bathroom or she would be asked to leave. In a subsequent incident, she was turned away from the bar because her picture identification depicted her with traditional male characteristics and with a male name that did not correspond to the applicant's appearance or name at the time.

The tribunal held that regardless of whether the discrimination suffered by the applicant was the result of the fact that transsexual identity fell outside the dualism of man/woman or the result of the fact that a male-to-female transsexual was female, discrimination on the basis of gender identity was sex-based discrimination. The tribunal went on to hold that failure to allow the applicant access to the women's washroom constituted a failure to accommodate the transsexuals and to provide her with a facility customarily available to the public. Finally the tribunal stated that '*if any inquiries by an employee of [B.J's Lounge] need to be made to verify that an individual is a transsexual in transition, such inquiries must be made in a dignified, private, and non confrontational manner, keeping in mind the immediate nature of the service required.*'

***Waters v. British Columbia (Ministry of Health Services)* BCHRT (2003)**

The applicant is a female-to-male transsexual. The applicant decided to undergo SRS. The applicant was then formally approved for phalloplasty and as a result presumed that the surgery would be paid for. However, phalloplasty was subsequently deemed to be experimental and was accordingly not covered by the new policy establishing higher reimbursement rates for procedures obtained outside BC. The applicant left British Columbia for the first and second stages of phalloplasty because there was no one performing this surgery in BC. The Ministry paid the physicians' fees but only at the rate that would have been paid if the surgery had been performed in British Columbia. This was substantially less than the amount charged to the applicant. Due to the financial cost, the applicant has yet to complete the third-stage of the

phalloplasty procedure. The applicant claimed the ministry discriminated against him and denied him a service or facility customarily available to the public because of his sex and sexual orientation contrary to s. 8 of the Human Rights Code.

The Tribunal acknowledged that discrimination based on sex includes discrimination based on transsexualism. It also recognised that *'the denial of payment at the usual and customary rate adversely affects [the applicant's] ability to obtain the medical service he requires'*. Thus the Court ruled that the applicant had *'established a prima facie case the ministry discriminated against him regarding a service that was available to other transgendered patients because she was a FTM transgendered patient and the surgery required by her was phalloplasty. If he had been a MTF transgendered patient and approved for vaginoplasty, this procedure would have been paid for at the usual and customary rates and not at BC rates'*. The Tribunal took the view that the respondent would not have occurred undue hardship by paying for the applicant's SRS and concluded that the applicant had been discriminated against on the basis of sex.

VII. Nepal

2NJJ (2008) 261-286- Nepalese Supreme Court

This case was brought by the director of the Blue Diamond Society and other petitioners on behalf of lesbian, gay, bisexual and intersex (LGBTI) people. The Blue Diamond Society is an organisation seeking to protect the rights and interests of sexual minorities and the third gender community in Nepal. The petitioners complain that as a minority, LGBTI people are denied the enjoyment of the fundamental rights enshrined in the Constitution. They further contend that nothing is done to remedy the ongoing violence and discrimination that LGBTI people face daily because of their sexual orientation or gender identity. The state's failure to address this situation and to grant LGBTI people legal recognition leads to the marginalisation of LGBTI people from the Nepalese society. In reaction to the State's inaction, the petitioners request

- *the issuance of an order for the protection and acquisition of fundamental rights*
- *the issuance of an order to enact legislation protecting LGBTI people from discrimination and granting transgender people citizenship certificates reflecting their chosen gender*
- *the issuance of an order requiring the state to make reparations to LGBTI victims of state violence*

Being satisfied that the petitioners had the *locus standi* to file the petition, the Court went on to analyse whether the identification as a homosexual or a transgender person happens naturally or because of a 'mental perversion'. After reviewing the relevant international standards and case-law pertaining to sexual orientation and gender identity, the Court observed that *'the traditional norms and values in regards to sex, sexual orientation and gender identity are changing gradually. The concept that homosexuals and third gender people are not mentally ill but leading normal life-style is in the process of entrenchment.'* The Court thus concluded that the identification as a LGBTI is the result of a natural process rather than to a mental perversion. The Court then had to determine whether the state had discriminated against LGBTI people on the basis of gender identity or sexual orientation. The Court recalled the existence of a provision in Nepalese law that criminalizes same-sex marriage and suggested that *'it is an appropriate time to think about decriminalizing and de-stigmatizing same-sex marriage'*. The Court paralleled the prohibition of discrimination on the basis of race and religion to discrimination on the basis of sexual orientation and gender identity. It held that *'non-discrimination on the basis of sex is a fundamental right of every citizen'*. The Court also acknowledged that *'only two sexes are being*

recognized on the basis of sex in traditional society' but the Court emphasised that the rights enshrined in the Constitution are guaranteed to all citizens and thus these rights are vested in the 'third gender' people. The Court specified that the right to privacy is fundamental and that the issues of gender identity and sexual orientation fall under the definition of privacy. Thus '*when an individual identifies her/his gender identity according to the self-feelings, other individuals, society, the state or law are not the appropriate ones to decide as to what type of genital s/he should have, what kind of sexual partner s/he needs to choose and with whom s/he should have marital relationship. Rather, it is a matter falling entirely within the ambit of the right to self-determination of such an individual*'. The Court ascertained that the Nepalese laws and rules concerning citizenship, passport (etc.) *have not only refused to accept the identity of 'third gender' people but also declined to acknowledge their existence* thus the Court concluded to the existence of discrimination. The Court decided to issue the orders requested by the petitioners and, inter alia, urged the legislature to enact laws guaranteeing non discrimination on the ground of gender identity.

VIII. South America

(According to information available on the Human Rights Watch website <http://www.hrw.org/en/news/2009/05/25/jurisprudence-about-lgbt-human-rights>)

1999 Correctional Court No 1 in Bahia Blanca, Argentina

The Correctional Court No 1, in Bahia Blanca (Buenos Aires Province), declared that Article 92.3 of the province's Code of Misdemeanors to be unconstitutional. Article 92.3 criminalizes individuals who dress and attempt to pass as a person of the opposite sex. The Court stated that Article 92.3 contravenes Article 19 of the National Constitution, which protects an individual's private and intimate life, as well as other aspects of her/his spiritual or physical personality, such as her/his: bodily integrity, image, and free choice of lifestyle.

2006 Constitutional Court of Peru: name modification on identity documents

In April 2006, the Constitutional Court of Peru emitted a favorable sentence to Karen Mañuca Quiroz Cabanillas. However, the sentence of the Constitutional Court only alluded to the name change of the plaintiff, but not to the modification of sex; therefore, her identity card remained masculine.

2007 Fourth Court of Letters of Antofagasta, Chile: name and gender modification on identity documents

The Judge of the Fourth Court of Letters of Antofagasta, Susana Pamela Brave Tobar, determined that she had right to change her name and sex in the birth registry, without undergoing gender re-assignment surgery.

2007 Civil Court of Rancagua, Chile: name and gender modification on identity documents

The Civil Court of Rancagua acceded to his request to change his sex and name, although the process of sexual reassignment was not yet finalized.

2008 Constitutional Court of Colombia - Sentence T-912 de 2008: gender assignment

The Court ruled that a five year old intersex child had the right to choose his/her own gender, against the family's wishes. The Court indicated that an interdisciplinary group must be formed so that they could educate and assist the intersex child in the decision about gender assignment surgery and provision of hormonal treatments. In case that the child's answer was affirmative and in agreement with the group of doctors, the institution must conduct the operation.

2009 Mexico Supreme Court of Justice: gender modification on identity documents

The Supreme Court of Justice unanimously decided to grant protection to a transsexual by ordering that a new birth certificate be granted to him. Also, the Court indicated that the constitutional principle of non discrimination and protection of human dignity had to be preserved. Therefore, it declared the unconstitutionality of Article 138 of the Civil Code for Federal District.