

GIRES RESEARCH PRIZE 2000

AWARDED TO DR STEPHEN WHITTLE FOR THE FOLLOWING CHAPTER IN

"TRANSGENDER RIGHTS: THE EUROPEAN COURT OF HUMAN RIGHTS AND NEW IDENTITY POLITICS FOR THE NEW AGE" IN A HEGARTY & S LEONARD "HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY", 1999 LONDON: CAVENDISH PUBLISHING

In 1995 I wrote that: though transsexuals are seeking a unique set of freedoms that are related to the process of undergoing gender reassignment or assertion, they are not seeking a new set of rights. Transsexuals are seeking for the law to acknowledge that they have rights, not as transsexuals, but as men and women who have finally become appropriately recognisable through medical intervention.¹

Three years later I would not change my view that transsexuals are seeking a set of freedoms related to gender assertion, but would now argue that the identity politics of transsexuals as a subgroup of the larger transgender community, has shifted considerably. They are no longer asking the law to recognise them simply as men and women, but rather they are seeking for the law to recognise them as transmen and transwomen - a status that goes beyond the dichotomous structures of sex and gender roles recognised within and by the law. This will be evident in the following analysis which aims to explain and analyse the early cases dealt with under the ECHR, to contextualise them and finally to explain how human rights issues in this field have evolved beyond the traditionally stereotypical, to encompass basic questions concerning recognition of the civil status of members of the trans community.

CLAIMING A LEGAL STATUS

It would be facile to say that by virtue of this new claim that the trans community wishes to be recognised as having a unique position, a third gender or rainbow gendered approach to their legal status. The massive paradigm shift within the trans community of last few years may have seen a move from claims of rights within gender roles to claims of needs regarding the expression of gender roles, but there is a pragmatic acceptance that gender roles, as defined by those outside of the community, still exist. Most importantly though, within the community itself, as we move toward the new millennium, members no longer privilege 'passing' - the ability to hide a transsexual identity in a new gender role. Passing has been, for over 50 years, the defining political movement in transsexual identity politics. This could be seen in the demands for birth certificate and identity card amendment along with the right to marry, in the 'transsexual' cases before the European Court of Human Rights (ECHR) in the 1970s and 1980s²

To date all of the applications in the transsexual cases have claimed a violation of Article 8 of the European Convention on Human Rights (the Convention) and all have in essence sought an identical solution: the legal recognition of their true gender identity (after gender reassignment) in all civil status documents, whether birth certificate or identity card. Article 8 of the Convention states:

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.

Until very recently in *X, Y and Z v UK*³ and *Roetzheim v Germany*⁴, the cases have demanded that transsexual men and women are issued with new civil documentation that recognises them as non-transsexual men and women. This relies upon the state accepting a positive obligation to appear to recognise as a fact, something that many have argued is a fiction, or if not a fiction then at the very least an assertion based on scant scientific evidence.

This call for a response to a positive obligation arises out of a possible interpretation of paragraph 1 of Article 8 of the Convention. Paragraph 2 of Article 8 appears to imply that public authorities simply have a duty not to interfere with private and family life, home and correspondence. But paragraph 1, which stipulates the right to 'respect for private and family life..' has been interpreted by the Court and the Commission 'as a basis for expanding the duties in Art.8(1)', thus giving rise to a state's possible positive obligations to fulfil its duty under Article 8⁵. The Court itself has stated:

[Article 8] does not merely compel the state to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in the effective respect for private and family life..⁶

The extent of the state's possible positive obligations under Article 8 in the 'transsexual' cases by the European Court of Human Rights has proved to be a moot point. In *Van Oosterwijk v Belgium*⁷ the Court upheld, by 13 to 4, the Belgium Government's position of 'non-exhaustion of domestic remedies', despite the fact that there was no indication that domestic remedies could in anyway resolve the problems faced by the transsexual applicant, as was pointed out by the dissenting judges. In *Rees v UK*⁸ the Court held, by 12 votes to 3, that an amendment of the applicant's birth certificate would impose new duties on the state and the rest of the population, by insisting that they recognise current civil status rather than historical record, and that the Court could not impose duties of such magnitude.

In *Cossey v UK*, the Court refused to distinguish this case from *Rees*, preferring instead to consider whether there were persuasive reasons for departing from its previous decision. By 10 to 8, the Court reiterated that the refusal to amend the applicants birth certificate, or to allow her to marry a member of the opposite gender, did not constitute an interference with her private life. The Court said that the applicant was invoking a positive obligation, and this obligation was subject to the wide margin of appreciation afforded to the differing practices of member states ie the striking of a fair balance between the general interests of the community and the interests of the applicant. In this case it was held that although there had been some social changes, the nation state had not contravened its obligations under the Convention..

All of these cases have concerned the 'traditional' transsexual person and what might be considered the traditional issues: privacy and marriage. However, the next UK case posed the questions differently. *X, Y and Z v UK* presented an alternative way for the court to look at the civil status of the transsexual. It cited Article 8 and also Article 14, which reads as follows:

The enjoyment of the rights and freedoms set forth in the 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.

The case concerned a transsexual man X, his partner Y and her birth child Z who had been conceived using donor insemination. The family had been refused permission to register X as the father of Z on her birth certificate, on the basis that only a biological male could register as the father of a donor inseminated child, albeit not biologically related. The family invoked Article 8, arguing that it had been contravened in relation to family privacy. They did not request that X be recognised as a man, nor that he be allowed to marry a woman. But they were hoping that if he could be recognised as the father of Z, then the UK government would be obliged to consider the other two issues.

The Court unanimously decided that Article 8 was applicable in this case as they considered that de facto family ties did exist between the three applicants despite arguments to the contrary by the UK government. However, did this mean that the state had a positive obligation to recognise the de facto family, through civil registration procedures? The Court, most unfortunately, went on to say that as there is little common ground amongst the member states of the Council of Europe as to whether any non-biological father should be recorded on donor inseminated children's birth certificates. Accordingly, as there is no common European standard with regard to the granting of parental rights to transsexuals, then generally speaking the law here is in a transitional stage, thus states must be allowed a wide margin of appreciation.

On the question as to whether a fair balance had been struck between the interests of the applicants and the interests of the state, the court then held that because transsexuality raises complex scientific, moral and social issues, Article 8 cannot, in this context, be taken to imply an obligation for the state to recognise as the father of a child a person who is not a biological father. That being so, the failure of UK law to recognise the relationship between X and Y does not amount to a failure to respect family life. The court further held that the complaint made under Article 14, was tantamount to a restatement of the complaint under Article 8 and consequently raised no separate issue. In view of their findings, there was no need to examine the issue again in the context of Article 14.

The case raises many issues and its failure tends to say more about the current state of the European Court of Human Rights, rather than the state of transsexual rights in the United Kingdom. In this, as in other recent decisions, the width of the margin of appreciation that the court is currently according to member states in this area, could be said to be increasing in many areas of the court's jurisdiction and this does not bode well for the future of human rights in Europe. However the case itself makes some progress, not least that the court held that Article 8 was applicable because there was a recognisable de facto family relationship in existence. The

decision though fails to recognise that in this area there are, or should be, limits imposed on the respect for fundamental rights guaranteed by the Convention. In the Cossey⁹ case, Judge Martens held in his dissenting opinion, that the refusal of a new identity in law for those who had undergone gender reassignment treatment 'can only be qualified as cruel'¹⁰

In X, Y and Z, if we look to the dissenting opinions, Judges Casadevall, Russo and Makarczyk argue that the government should accept the consequences of allowing X to have gender reassignment and of allowing Y to have fertility treatment during which X was obligated to acknowledge paternity. This they consider to positively obligate the government to take all measures needed, without discrimination, to allow the applicants to live a normal life.

Judge Thor Vilhjalmsson, also in dissent, argues that as other non-biological fathers are allowed to be registered on the birth certificates of donor inseminated children, to refuse to allow X to do so is discrimination on the grounds of sex under Article 14. Further, this also leads him to conclude that the family ties between X, Y and Z were not being respected under Article 8. The fact that the male partner is a transsexual should be irrelevant. Judge Foighal, who also dissents, argues that in Cossey the court held that, though the law was in a transitional state, legal measures should be kept under review to take account of medical, social and moral developments. He maintains that the majority decision in X, Y and Z does not reflect the changes that have taken place in recent years, although the Court was given ample

evidence of those changes. He also states that it is part of our common European heritage that governments are under a duty to take special care of individuals who are disadvantaged in any way. The government did not advance any convincing arguments with regard to competing interests, nor had they made any attempt to justify their failure to help X further by ensuring that his change of sex receives legal recognition, even though this would help him and harm no-one. These reasons lead him to conclude that in his opinion, a violation of Article 8 had occurred. Following the dissenting judgement of Thor Vilhjalmsson, he similarly finds a contravention of Article 14. Judge Gotchev also argues that a contravention of both articles has occurred, but from the standpoint of the 'welfare of the child', which should, in his opinion, be the prevailing consideration. He states that this obligates a state to allow what had been unanimously agreed upon as de facto family ties to be legally safeguarded so as to render possible from the moment of birth or as soon as practicable thereafter, the child's integration into the family. This would include recognising X as Z's father.

Nation states appear to have been afforded a wider margin of appreciation than would seem to be required as a result of recent social and legal developments within the membership of the Council of Europe and the rest of the world. Indeed, the margin appears wider than the balancing test supposedly applied by the court to its decisions, would appear to indicate. Doerfal has argued that the reason for this is that these decisions are a reflection of 'the apprehension and prejudices' of the majority of the Court's judges¹¹. Is it that the Court's judges cannot imagine recognising the transsexual person as being of equal worth to others? It is perhaps in response to this and the theoretical and social changes that transsexuals have achieved over the last decade, that X, Y and Z did not ask for X's right to marry or to have his birth

certificate changed. Rather the demand being made that the transsexual man be recognised for what he is, namely a transsexual man, but that that should not exclude him from recognition as a social and legal father. By considering these social changes and the more recent case of *Roetzheim v Germany*,¹² decided by the Commission, it is possible to see both how transsexual and transgender people are claiming a new class of civil status and the implications for sex and gender categories as we know them. The dissenting opinions in X, Y and Z give some hope in that they give possible ways forward for the future. However they also acknowledge that identity documentation is not the same as status recognition, nor will it necessarily provide privacy, personal safety, employment or relationship protection. The trans community is now arguing that it is only status acknowledgement as transsexual men and women which will afford true protection on these levels. In order to understand the change in the community's calls for status recognition we need to consider how 'passing' has no longer become the pre-eminent consideration for the trans community.

DECONSTRUCTING PASSING

Throughout the 1990s many 'pre-existent' community members, who had transitioned into their new gender roles in the 1970s and early 1980s and who initially identified as transsexual, were to re-address their personal sense of self and place. This was to result in profound changes in the trans politics of the community and its members. The reasons for this are manifold and space does not permit their exploration but Sandy Stone's 'The Empire Strikes Back: A Post-Transsexual Manifesto'¹³ is a striking example of the new look that was being taken, in the early 1990s, by the community at itself. In this, Stone called for 'A deeper analytical language for transsexual theory, one which allows for the sorts of ambiguities and polyvocalities which have already so productively informed and enriched feminist theory.'¹⁴ and she suggested '... constituting transsexuals not as a class or problematic 'third gender', but rather as a genre, a set of embodied texts whose potential for productive disruption of structured sexualities and spectra of desire has yet to be explored.'¹⁵, italics in the original. For many, in what was to become the trans-community, Stone articulated the limitations of the medical 'mental disorder' model of transsexuality that had historically arisen and which had failed so many of the community who felt that they were neither mentally ill and who were aware that the medical model had in fact ill served them. Medicine had singularly failed to afford many the ability to 'pass' and even when it did, it had often been at too great a cost: a loss of personal history, sexual sensation and ability, and without any form of legal protection within the workplace or on the streets. Stone's work was to become a rallying call for a 're-visioning of our lives' not only to the old guard - who in their positions as community leaders and spokespeople were to be very influential on new and younger community members - but also to a new school of trans academics whose work with feminist praxis, postmodernism theory and 'Queer' identity have gelled into a new framework of identity politics and a new school of theory, trans.

As such the trans-community is approaching the next century with the tools to develop a diverse and embracing acknowledgement of the many voices and lifestyles which exist as gender (or body) variant, which are oppressed because of that gender (or body) variance, and

which are, in Stone's words, potentially disruptive of structured sexualities. There can be no denial of the effect that trans theorists are having but as Riki Anne Wilchins of 'Transsexual Menace' says: Trans-identity is not a natural fact. Rather it is a political category we are forced to occupy when we do certain things with our bodies.... The regime of gender is an intentional, systematic oppression. As such it cannot be fought through personal action, but only through an organised systematic response.¹⁶ Trans theory provides the background, trans people provide the victims but organization has provided some (albeit few) victories in the struggle for gender freedoms - or should that be freedom from gender?

THE TRANS MOVEMENT

The organisational movements within the trans community that have taken place over the last ten years have seen an astonishing growth in a variety of organisations catering for the different political forms and processes in which members of this diverse community are able to feel comfortable and participate. These are not just western euro-american groups, though these do currently dominate the world of gender politics, but the interaction with political and community diversity has enabled a wide ranging set of common sites of oppression to be identified and to be acted or campaigned upon¹⁷ Self Help groups were the earliest types of trans groups often divided into specific 'camps' such as heterosexual transvestite, male to female transsexual, female to male transsexual etc. In these groups excellent knowledge and expertise of particular issues and problems faced by members was developed. These groups still participate in the main educational thrusts of trans and other people. They were also to be instrumental in the development of the Direct Action groups and the Political Lobbying groups. Direct Action groups such as 'Transsexual Menace' are instrumental in trans people and their loved ones getting over one very clear message: we are your neighbours, your friends, your co-workers and keeping trans matters alive and in the public domain, using quick response mechanisms to ensure that immediate direct, and public, action is taken in response to specific events.

The Political Lobbying groups are the politically wise face of the community. They are at the forefront of organising and co-ordinating political lobbying such as the 'Days on the Hill' which GenderPac and ITA have organised in Washington and the Downing Street Lobby in London organised by Press For Change in October 1997. They also co-ordinate legal challenges at every level and both in the United Kingdom and America have positively promoted transgender and transsexual claims through the courts.

The three types of groups; The Self-Help Groups, the Direct Action Groups and the Political Lobbying Groups have developed a 'working together' model - based on the fact that many of their 'leaders' were drawn initially from a small core of individuals who had transitioned gender roles in the 1970s and early 1980s. They were to be at the forefront of the mail and telephone help support systems that developed through the 1980s. From the numerous stories they were to hear and collect, many were then to go on to become involved in writing and theorising about the oppression that community members faced. They were to be amongst the first to develop a trans theory in which the actual sense of gender that previously was

theoretically tied to trans bodies, whether through performativity or biological essentialism, was successfully re-codified away from such limiting paradigms.

As such these paradigms still exist for the trans community, but they have been successfully deconstructed by community leaders and theorists as being irrelevant to transgender lives, other than as external mechanisms of power and oppression. This theorisation was to lead to the resultant changes in activism which were to found the direct action groups and ultimately the political lobby groups and their agendas. It is also important to understand how, as Kate Bornstein has put it, gender defenders 'bang their heads against a gender system which is real and natural and ... then use gender to terrorise the rest of us'¹⁸

The 'rest of us' are trans people for whom gender is 'real and natural' (neither merely biologically determined nor mere performativity), a concept at the heart of the newly developed transgender activism. The self with its trans identity can be now be experienced as an authentic self rather than as the medicalised paraphilia, currently imposed by physicians, attached to the body and regarded as the trans sense of identity by the rest of society.

Through its organisational processes the transgender community itself is being redefined, and the issues of importance are shifting. The personal recognition of the actual self; internally defined, as opposed to the medical self; which had been externally dictated, has meant a huge shift has already been undergone in transgender politics; the body or its performativity is no longer the dictator of gender. Gender has become who or what you experience through your experience of oppression as well as through a celebration of diversity of experience and life styles. The basis of the self-help, activist and political lobbying groups has quickened the decline of the legitimacy of the politics of 'passing' for the trans community, and has provided both the catalyst and the mechanism for that decline. Previously, as Stone put it, it was 'difficult to generate a counter-discourse if one [was] programmed to disappear.'¹⁹

One example of the frequently condemned features of a transgender life is that it abounds in stereotypes which reinforce oppressive gender roles. As Raymond puts it transgenderism [has] reduce[d] gender resistance to wardrobes, hormones, surgery and posturing --- anything but real sexual equality. A real sexual politics says yes to a view and reality of transgender that transforms, instead of conforming to, gender.²⁰

If the transgender movement were as Raymond suggests, it would indeed have little to offer, other than as a self-help network in which people are 'taught' how to reinforce the values of a white, heterosexist patriarchy. Trans women would endeavour to 'pass' as the oppressor, leaving others behind to bear the brunt of struggle and discrimination. Such a view singularly fails according to trans theory, because if it is right that there are far more transsexual women, than vice-versa, they are in fact struggling to become the oppressed, and to leave behind a position of privilege. It also assumes that a move to 'female genre' is the same as disappearance into femaleness, an experience that is very infrequent for transsexual women who rarely experience an easy transition or future acceptance as 'women born women'. The reality of an oppressed experience based on gender representation is, in fact, all too true for the majority of the transgender community. It is that oppressed experience that the community ultimately wishes to address. But for there to be a change in

understanding of what is considered oppressive, the doors had to be opened to those who were previously unable to have a voice in the politics surrounding transgender (or as it was then transsexualism) because of their social position, both within and outside of the trans community.

RECREATING THE SELF

Most members of the trans community would accept that there had been, in the 'real world', a de facto hierarchy that was very much concerned with 'passing'. 'Passing' --- some notion of feminine or masculine 'realness' --- would provide for many a physically safe, although restricted, and un-authentic, way of living. Furthermore '... the principle of passing, denying the destabilizing power of being 'read', [means that] relationships begin as lies²¹. The truth of the matter, though, was that even the most 'passable' transsexual woman could find herself vulnerable. This is what happened to Caroline Cossey (Tula) when her privacy disappeared after the 'News of the World' published an expose of her transsexual status in September 1982.

The hierarchy based on 'passing' was such that those who were the most 'non-transsexual' looking were awarded status and privilege, whilst those who were most obviously transsexual or transgender were often the butt of private jokes and exclusionary behaviour²². By default, they were also to be the front line of any political or social movement that existed. By not 'passing' they daily faced the street issues which often resulted in emotional, financial and even physical scars. The privileged few would however get to dictate the terms as to what were 'important and significant' issues. If you 'pass' then the issues are bound to be based around matters such as further privacy rights, e.g. the right to have birth certificates reissued, and further relationship rights, e.g. the right to marry in one's new gender role. Feinberg, in particular, asserted that the community could no longer afford to use this assimilationist approach to activism, seeing it as one consequence of early minority rights activism, and as far too limiting:

When a young movement forms, it gets a great deal of pressure to put forward only its best dressed and most articulate --- which is usually a code word for white.... These

'representatives' are seduced into thinking the best way to win is to not rock the boat and ask for only minimal demands. A more potent strategy relies upon unified numbers..... We need everyone and cannot afford to throw anyone overboard. After all, we could never get rid of enough people to please our enemies and make ourselves 'acceptable'.²³

The plain fact is that the majority of transgender or transsexual women²⁴ these are trans people whose sense of actual gender means that they self identify as belonging in that place in the gendered framework that most natively designated women automatically occupy, cannot and will never 'pass', and so assimilationist politics are inadequate. For these women, their issues are not necessarily going to be those of the privileged few who could seek integration. For them such rights are meaningless in the context of their lives - if you cannot pass, beyond the most casual of inspections, then any reissued birth certificate will certainly not prevent your discovery as a transsexual woman whether by prospective employers or by observers on the street

and you are very unlikely to find a relationship which is so conventional that marriage matters. It would only be by opening the forum to these people that a unified group could form which could address fully the legal issues that caused real and universal oppression. But as Stone puts it:

For a transsexual, as a transsexual, to generate a true, effective and representational counter-discourse is to speak from outside the boundaries of gender, beyond the constructed oppositional nodes which have been pre-defined as the only positions from which discourse is possible.²⁵

Deconstructing the demands of passing, just as enunciated by gays, lesbians, and people of colour in their articulation of arguments for solidarity, suggests that all transsexuals must take charge of the history of all of their community. The only way to do that is by not 'passing' and, instead, speaking from outside the boundaries of gender. Ironically, however, many of the community leaders were to be people who could have chosen to pass, and to fall victim to the politics of passing. That they have chosen not to, not only results from their experiences at the forefront of the self-help groups where the oppression that others faced was made all too clear, but the mechanisms they chose to run and co-ordinate those groups were to be instrumental in also informing the theoretical and ultimately political stance they were to take.

For Trans men the internet and cyberspace were to provide a space in which the (invariably house-bound) victims of poor surgical procedures²⁶ could talk freely about their experiences, without presenting their failed body image, and others who had not yet undergone the procedures could assess whether they wanted to take such great risks in an attempt to 'fully pass'. This opened a discussion around what makes a 'real' man, and the body was able to be dismissed as a socially controlling mechanism that dictated power roles but which in the transsexual man was shown to be an inadequate mechanism which missed their authenticity. Many transsexual men started to view the body differently and as a faltering 'sight' of 'passing' and reclaiming their identities as trans men. This combination of 'representing the body image' and the potential privacy of a public display of the personal alongside the new spatial dynamics of the internet, has contributed greatly over the last five years, to the immense change in trans politics. Many trans/gender/sexual women and men have discovered a way of possessing for themselves, entirely subjectively, an actual identity as trans.

As a result, the trans organisations have presented a safe area where body image and presentation are not amongst the initial aspects of personal judgement and social hierarchy within the transgender community, so extending the range of potential community members and voices and thus reformulating the community's understanding of gender

A NEW COMMUNITY

The denotation of the community has been re-ordered through community politics. This means that we no longer see the definitions provided by the medical profession being adopted by the community as its boundary identifiers. In 1990, the Gender Trust, a UK self help membership group for transsexuals defined its members as having:

a profound form of gender dysphoria, and persons thus affected have the conviction of being 'trapped in the wrong body' and feel compelled to express themselves in the gender to which they feel they belong.²⁷

By 1996, however the on-line TransMale Task Force defined itself as: a grassroots organization of transsexual and transgender men who are committed to creating action on major issues affecting our community. Our membership is open to all those who identify as male but were born with female anatomy. Some of us have or are seeking medical treatment to change our bodies --- others are not. Many of us live full-time as male, while others are either just beginning their process or are still considering it. We are a diverse group, comprised of all ages, races, sexual orientations, professions, and lifestyles.²⁸ The Mission Statement then goes further: The usage of the term 'transgender' has undergone a tremendous amount of change over the past decade, and is currently used in a number of different ways. Some political action and educational groups are promoting its use as an umbrella term to include transsexuals, transgenderists, cross dressers (transvestites), and other groups of 'gender variant' people such as drag queens and kings, butch lesbians, and 'mannish' or 'passing' women. However, it must be realized that many people belonging to the aforementioned groups do not wish to be included under this umbrella, and prefer to retain their distinct identities ... Some transgender people consider themselves a third sex, neither male or female but combining characteristics of both (also called an epicene or 'third'). Most commonly, transgender people live as, identify as, and prefer to be treated as, belonging to the 'opposite' sex, but do not wish to change their bodies through surgery.²⁹

In the six years between these statements we see a series of changing emphases. Firstly there is a move from a medical naive paradigm which excludes most people to a complex paradigm which is inclusive rather than exclusive. The defining process is no longer medical and the community boundaries are neither based on surgical procedures, nor even controlled in any way by physicians. Instead the boundaries are flexible, encompassing rather than prescribing. Thus the definitional limits are experientially informed by the self who chooses inclusion, rather than being medically informed. Hence inclusion is not forced upon the individual through specific medical intervention.

It is perhaps this aspect of 'choice' which is most interesting because it is a reflection of the process of re-embodiment of the self which has taken place particularly within Cyberspace. Because inclusion in the cyber-trans community is by choice it removes the need (as felt by many in the past) to aim for the status of being a 'non-trans/gender/sexual person'. Historically, the authors of 'transsexual' autobiographies have often sought hard to distinguish themselves from the rest of the trans/gender/sexual community by claiming some sort of intersex disorder such as Klinefelter's syndrome³⁰ Whether a true reflection or not of their situation, there are certainly many reasons why such people should wish to portray an identity 'in effect' in the real world.

The resulting recreation of the community, both in terms of its hierarchical structure and the prioritisation of issues has resulted in a re-evaluation of the legal issues which are important: the reality was that for most women the issues were not of individual privacy but of personal safety regardless of trans-visibility, and for most

men they were to do with expressing the actual masculinity of the self through a failed body site which would never in itself afford them a legal status as men. New forms of legal activism have followed from the new consciousness enabled through community politics.

A NEW AGENDA

Legal activism in this area has tended to concentrate on 'quality of life' issues such as the transsexual's right to birth certificate change, the right to marry and the medico-legal issues of treatment and surgery. Of recent years, the issues of concern have changed within the new community, the emphasis on birth certificates and marriage (which are to do with the further privacy of 'passing') giving way to concerns about the right to personal physical safety, about the right to keep a job regardless of a transgendered status and resultant lifestyle, about the right to be treated equally before the law particularly in the area of relationship rights and the right to medical treatment (including reassignment) ,to all of which 'passing' should be irrelevant.

The 1990s cases before the European Courts have clearly illustrated some of these trends, with cases concerning employment rights³¹ ,parenting³² , the right not to face arbitrary discrimination in areas such as cross border immigration, marriage status, employment regulation and the right not to have to disclose medical treatment except where absolutely necessary³³. However one particular application to the European Commission on Human Rights sums up the essence of the new campaign issues surrounding gender identity rights.

Roetzheim v Germany³⁴ concerned the application by Dora (formally Theodor) Roetzheim to the Commission alleging that the German government had failed in its obligations, in that its refusal to recognise her new gender for civil status purposes violated Article 8 of the European Convention on Human Rights. German law provides two remedies for transsexuals: firstly a change of forenames which does not require there to have been any surgical intervention and secondly, an amendment of public registries following surgical reassignment treatment. Particular features of the application were that Roetzheim, although living as a woman and taking female hormones, had not undergone any gender reassignment surgery and, further that she had given up a well paid job in order to work as a woman. Accordingly, she argued that her maintenance obligations to the children of a former marriage should be reduced. The local courts had held that without genital surgery there was no obligation to amend her public status and further stated that because of the lack of surgery there was no reason why she should not resume her male role and take up her former profession, hence retaining the value of her maintenance obligations.

Roetzheim had argued that the requirements of s.8 of Germany's 1980 Transsexuals Act (Transsexuellengesetz) for a change of civil status that a person must be unmarried, permanently unable to procreate and have undergone gender reassignment surgery with the consequence that the outer appearance resembles closely the phenotype of the opposite sex, was a violation of her right to respect for her private life under Article 8 of the Convention. Fundamental to Roetzheim's argument was that her gender identity should be recognised regardless of her body morphology. The Commission was to find unanimously that Roetzheim's application was ill-founded and declared it inadmissible.

Roetzheim's claims before the Commission closely mirror those made in the International Bill of Gender Rights³⁵ wherein fundamental human and civil rights are articulated from a gender perspective. The rights claimed are not to be viewed as special rights applicable to a particular interest group, but are to be regarded as universal rights both claimable and exercisable by any and every human being. These range from the right to define and have free expression of gender identity for one's self, to the right to conceive, bear or adopt children, to nurture and have custody of them regardless of a self-defined gender identity or the expression of such identity. These rights are both transformative and embedded in notions of personal liberty and free expression. They provide a framework for the claims of the new trans community and as such are increasingly being seen as the paradigms that inform the legal battles the community is undertaking. As yet they may be seen as being too revolutionary for justice systems yet they are simple truisms with which it is hard to argue. For example; 'the right to train and to pursue an occupation ... nor to be denied ... employment ... or just compensation by virtue of chromosomal sex, genitalia, assigned birth sex, or initial gender role' reflects what we might see as essential interpretations of the Equal Treatment Directive of the European Community, or the Sex Discrimination Act. Yet for trans people those rights have to be fought for and clearly articulated as was to happen in *P v S* and *Cornwall County Council*³⁶.

It can only be a matter of time before arbitrary and unfounded discrimination of any kind on the grounds of gender identity and gender expression is outlawed. This is the new agenda for the new millennium which the re-organised, newly informed and highly politicised trans community is determined to make happen. They have not flinched as yet from the battle as they are extremely determined to win the war against

gender identity discrimination, increasingly, they are using the courts and the tools of the political lobby to ensure that their issues and claims are heard and heeded.

27 March, 1998, Stephen Whittle, PhD, MA, LLB, BA
The School of Law
Manchester Metropolitan University
Hathersage Rd
Manchester M13 0JA

ENDNOTES:

1 Whittle, S, 'Legislating for Transsexual Rights: A Prescriptive Form', in Bullough, B, Bullough, V, Elias J, *Gender Blending*, 1997, pp 430-446, New York: Prometheus Books: 433.

2 *Van Oosterwijk v Belgium* [1980] Series A, No. 40, ECHR; *Rees v UK* [1986] Series A, no 106, ECHR, *Cossey v UK* [1990] Series A, no 184, ECHR, *B v France* [1992] Series A, No. 57, ECHR.

3 *X, Y and Z v UK Government* [1997] Application No. 21830/93 ECHR

4 *Roetzheim v Germany* [1997] Application No. 31177/96 ECHR

5 *Kroon and Others v Netherlands* [1994] Series C, No. 297

6 *X and Y v Netherlands* [1985] Series A, No. 91: para 23

7 *Van Oosterwijk v Belgium* [1980] Series A, No. 40

8 *Rees v UK* [1986] Series A, no 106, ECHR

9 *Cossey v UK* [1990] Series A, no 184, ECHR

10 *ibid*, dissenting judgement at para 64.

11 Doerfal, J (1998) 'Transsexuality and the European Convention on Human Rights', unpublished essay.

12 Roetzheim v Germany [1997] Application No. 31177/96 ECHR

13 Stone, S, 'The Empire Strikes Back: A Post-Transsexual Manifesto', in Epstein, J, Straub K, *Body Guards: the Cultural Politics of Gender Ambiguity*, 1991, pp 280-304, London: Routledge.

14 *ibid*, 297

15 *ibid*, 296, italics in the original.

16 Wilchins, R, 'Read My Lips: Sexual Subversion and the End of Gender', 1997, New York: Firebrand Books, 25.

17 Self Help groups were the earliest types of trans groups often divided into specific 'camps' such as heterosexual transvestite, male to female transsexual, female to male transsexual etc. In these groups excellent knowledge and expertise of particular issues and problems faced by members was developed. These groups still participate in the main educational thrusts of trans and other people. They were also to be instrumental in the development of the The Direct Action groups and The Political Lobbying groups. Direct Action groups such as 'Transsexual Menace' are instrumental in trans people and their loved ones getting over one very clear message: we are your neighbours, your friends, your co-workers and keeping trans matters alive and in the public domain, using quick response mechanisms to ensure that immediate direct, and public, action is taken in response to specific events.

The Political Lobbying groups are the politically wise face of the community. They are at the forefront of organising and co-ordinating political lobbying such as the 'Days on the Hill' which GenderPac and ITA have organised in Washington and the Downing Street Lobby in London organised by Press For Change in October 1997. They also co-ordinate legal challenges at every level and both in the United Kingdom and America have positively promoted transgender and transsexual claims through the courts.

18 Bornstein, K, *Gender Outlaw: On Men, Women and the Rest of Us*, 1994, London: Routledge, 72.

19 Stone, S, see above, 295.

20 Janice Raymond quoted in Ekins, R, King, D, *Blending Genders: Social Aspects of Cross-dressing and Sex-changing*, 1996, London: Routledge, 223.

21 Stone, S, see above, 298

22 Green, J, Wilchins, R, 'New Men on the Horizon', *FTM Newsletter*, January 1996, Iss 33. San Francisco: FTM International, 1.

23 Leshko, I, 'Determine, Define, Modify Gender', 1996, WWW: <http://planetq.com/pages/lfeinberglnt.html>

24 these are trans people whose sense of actual gender means that they self identify as belonging in that place in the gendered

framework that most nataly designated women automatically occupy.

25 Stone, S. see above, 295.

26 Phalloplasty (the surgery to create an artificial phallus) has always been extremely problematic, with a very low rate of success in terms of providing an aesthetic phallus, which could be used for voiding and sexual intercourse. Further many such attempts at these surgical procedures have resulted in ongoing long term disability for the recipients, ranging from incontinence, excessive abdominal scarring, long term catheterisation to loss of mobility in the lower limbs. See Green, J, Wilchins, R, above, 1.

27 Gender Trust Handbook, 1990, London : The Gender Trust.

28 TMTF Mission Statement, (1996), San Francisco: the Trans Male Task Force, unpublished.

29 *ibid.*

30 see, Allen, R, *But For The Grace: The True Story of a Dual Existence*, 1954, London: W.H.Allen; Cossey, C, *My Story*, 1991, London: Faber and Faber Ltd; Langley Simmons, D, *Dawn: A Charleston Legend*, 1995, Charleston: Wyrick & Company.

31 *P v S and Cornwall County Council*, [1996] IRLR 347.

32 *X,Y and Z v UK Government* [1997] Application No. 21830/93 ECHR.

33 *Sheffield v UK Govt* [1997] Application No. 22985/93 ECHR; *Horsham v UK. Government* [1997] Application No. 23390/94 ECHR.

34 *Roetzheim v Germany* [1997] Application No. 31177/96 ECHR.

35 ICTLEP, 'Proceedings from the Fourth International Conference on Transgender Law and Employment Policy', 1995, Houston: ICTLEP: viii-xi

36 *P v S and Cornwall County Council*, [1996] IRLR 347.