

The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and *I v. the United Kingdom*

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I. Introduction

[1] On 11 July 2002, the Grand Chamber of the European Court of Human Rights (Eur. Ct. H.R.) ruled unanimously in the cases of *Goodwin* and *I v. the United Kingdom* (1) that the failure of British law to recognize gender re-assignment and to permit male to female transsexuals to marry persons of their newly opposite sex violated the applicants' right to privacy (Article 8 ECHR) and to marry (Article 12). These two cases, apart from constituting an explicit deviation from previous constant jurisprudence, gave the Court (sitting as a Grand Chamber) an opportunity to creatively apply its longstanding interpretative principles, including the search for a 'common European approach' – now increasingly an 'international trend' –, in order to evolve human rights law. The following observations will focus on this aspect, while paying due attention to the other implications of the present cases. Finally, the two cases will be placed in the context of the current jurisprudence of the Court which, unfortunately, does not show a consistent tendency to progressively advance human rights law.

II. The Facts (2)

[2] Both applicants are post-operative male to female transsexuals. *Goodwin*, born in 1937, was diagnosed as a transsexual in the mid-1960s. She nevertheless married a woman and they had four children, but she divorced her on an unspecified date. Until January 1985, when she began treatment in earnest (including hormone therapy), she dressed as a man for work but as a woman in her free time. Since this time, she has lived fully as a woman. In 1990, she underwent gender re-assignment surgery, paid for by the National Health Service ("NHS").

[3] *Goodwin* claimed that between 1990 and 1992 she was sexually harassed by colleagues at work. A complaint to the Industrial Tribunal was unsuccessful, allegedly because she was considered in law to be a man. She was subsequently dismissed from her employment and believes that the real reason was that she was a transsexual.

[4] In 1996, *Goodwin* started work with a new employer and was required to provide her National Insurance ("NI") number. She wanted to keep her previous sexual identity confidential and therefore requested the allocation of a new NI number from the Department of Social Security ("DSS"), but this was rejected and she eventually gave the new employer her NI number. *Goodwin* submitted that the new employer has now traced back her identity and that she had begun experiencing problems at work.

[5] The DSS also informed the applicant that she would be ineligible for retirement benefits at the age of 60, the age of entitlement for women in the United Kingdom, and that her pension contributions would have to be continued until the date at which she reached the age of 65, being the entitlement threshold for men. In April 1997, she therefore entered into an undertaking with the DSS to directly pay the NI contributions and the DSS issued her with a 'Form CF 384 Age Exemption Certificate' (a document otherwise used to inform employers that a female employee has reached, or is about to reach, the age of 60 and is entitled not to have the NI deductions made).

[6] *Goodwin* also complained of certain difficulties when dealing with the DSS, such as the marking of her files as 'sensitive' and resulting complications. She added that in a number of instances she has had to choose between revealing her birth certificate and foregoing certain advantages (loans, re-mortgage offers, etc., as well as lower car

insurance premiums applicable to women). Nor did she feel able to report a theft to the police, for fear that the investigation would require her to reveal her identity.

[7] "I", born in 1955, worked for some time as a dental nurse in the army before retiring for health reasons at the age of 33. In 1985, she had applied for a course for the Enrolled Nurse (General) qualification, but was not admitted as she refused to present her birth certificate. In 1993 and 1994, the applicant wrote letters to various institutions requesting amendments to the relevant legislation to allow the recognition of transsexuals' changed gender. Twice in 2001, when she applied for a student loan and for a job as administrative assistant in a prison, "I" was requested to submit or bring to the interview her birth certificate.

[8] Both applicants alleged breaches of their rights to private life (Article 8 ECHR), to marry (Article 12) and not to be discriminated against (Article 14). *Goodwin* also claimed a breach of her right to an effective remedy (Article 13). (3)

III. The Court's Judgment

A. The Right to Private Life (Article 8 ECHR)

[9] The decisive issue for the Court was in each case "whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant ... to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment." (4) Emphasizing the fair balance between individual and public interests that needed to be struck when determining whether or not a positive obligation exists, (5) the Court recalled the various previous British cases (6) where it had found that the laws and practices regulating the status of transsexuals were in conformity with Article 8 ECHR. (7)

[10] While noting that it would not depart "without good reason, from precedents laid down in previous cases" (8) , the Court underscored that it must have regard to the "changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved" (9) and added:

A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement. ... In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review. ...(10)

[11] Following its balancing-approach, the Court first (Step 1) took a look at the applicants' individual situations before (Step 2) examining "[a]gainst these considerations, ... the countervailing arguments of a public interest nature put forward as justifying the continuation of the present situation." (11)

[12] Step 1: Amongst the factors adversely affecting the applicants and other noteworthy facts, the Court enumerated the following:

- The continuation of the applicants' legal status as 'males' despite the fact that they live as 'females'. Being registered as men they must pay contributions to the public retirements schemes until the age of 65 while they are employed as women. In order to stop employers' contributions and to make payments themselves they must follow a "special procedure that might in itself call attention to [their] status." (12)
- The law's refusal to recognize the applicants' new sex was more than a "minor inconvenience" but "[a] conflict between social reality and law ... which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety." (13)
- The fact that gender-reassignment surgery was authorized and paid for by the NHS. (14) The failure to recognize "the legal implications of the result to which the treatment leads" was found to be "illogical" and the practices thus lacking "coherence." (15)
- The recognition of the "unsatisfactory nature of the current position and plight of transsexuals" by British courts and a governmental agency entrusted with identifying measures to reform the law (the "Interdepartmental Working Group"). (18)

[13] Step 2: Of the 'public interest' factors relevant for its balancing test, the Court identified (a) medical and scientific considerations, (b) the question whether there was any "European and international consensus", and (c) the possible impact of any changes to the current birth register system. (19)

[14] (a) The Court still could not identify any "conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain". It acknowledged, however, that transsexualism had been widely recognized on the international plane "as a medical condition for which treatment is provided in order to afford relief." The Court then subsumed two factors under 'medical and scientific considerations' that led it to conclude that the causes of transsexualism were of less relevance: Firstly, that the British

health service, in line with the vast majority of comparable European institutions, not only "acknowledges the existence of the condition" but permits and funds treatment, "including irreversible surgery." Secondly, it could not be "suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment", given the painful treatment and the "level of commitment and conviction required to achieve a change in social gender role." (20)

[15] The Court added that "the principal unchanging biological aspect of gender identity is the chromosomal element" which must not "inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals." (21) The medical considerations were thus found not to provide a definite answer as to how the law should treat transsexuals.

[16] (b) The Court noted that while at the time of the *Rees* judgment (of 1986) there had been little common ground amongst European states with respect to sex changes, when *Sheffield and Horsham* was decided (of 1998) "there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment", (22) but still a "lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law ..." (23), among them marriage. While according to the British NGO 'Liberty', which had already been admitted as *amicus curiae* in *Sheffield and Horsham* and had submitted an updated survey in the present proceedings, that had not changed in Europe in the past four years, (24) the attitude elsewhere – Australia and New Zealand are being mentioned (25) – had indeed, in particular in the context of marriage. (26) Thus, the Court ruled that despite the fact that little common ground could be made out in Europe with respect to handling the practical problems, "the clear and uncontested evidence of a *continuing international trend* in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals" (27) was more decisive.

[17] (c) Finally, the Court did not follow the government's arguments (which had been sustained in the *Rees* judgment) that allowing exceptions to the rules governing the birth record system in favor of transsexuals would undermine its function or would have detrimental effects on the rights of others. Given the statistical figures (2,000-5,000 persons in the United Kingdom) and the fact that a reform process had already been initiated domestically, it was "not convinced ... that the need to uphold rigidly the integrity of the historic basis of the birth registration system takes on the same importance in the current climate as it did in 1986." (28)

[18] On the basis of these assessments, the Court turned to striking a balance in the cases before it: Irrespective of the absence of particularly severe interferences in the applicants' cases, Article 8 guaranteed "personal autonomy" which included the right to "establish details of [one's] identity." (29) "In the Twenty-first Century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable." (30) While acknowledging that this finding might cause certain difficulties associated with changing the system of birth registration and modifications to the legal regulations in other fields, the Court could rely on the opinions of British agencies that these problems were far from insuperable. The Court found no reasons to assume that the required changes would have significant detrimental effects on third parties, and expressed its conviction "that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost." (31)

[19] Finally, the Court criticized the absence of any purposeful reform measures in Britain despite its warning, most recently in *Sheffield and Horsham*, that there was a need to keep this area under constant review. The only domestic legislative change had occurred in the field of employment law in order to comply with a 1996 judgment of the European Court of Justice. (32) The fair balance, for all these reasons, "now tilts decisively in favour of the applicant[s]." (33) Their right to respect for private life had thus been violated.

B. The Right to Marry and Found a Family (Article 12 ECHR)

[20] "Reviewing the situation in 2002", as the Court emphasized, it departed from its previous holdings limiting marriage to persons of the opposite sex and linking 'marriage' and 'founding a family'. It now accepted that the second aspect was "not ... a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision." (34) The Court acknowledged that marriage as an institution had undergone major social changes in the past 50 years. The developments in the treatment methods of transsexuals now permitted them to be "assimilate[d] ... as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender." (35)

[21] Male-to-female transsexuals, such as the applicants, could still marry a person of their former opposite sex; that, however, was considered to be an "artificial" argument by the Court (the respondent state had suggested that no absolute ban on marriage existed), since they now lived as women and wished to marry men, which was legally impermissible. That, the Court found, infringed upon "the very essence" (36) of the right to marry; no intent could be made out to change that situation on the domestic plane. (37)

[22] Turning to the question of European or international standard-setting trends, the Court acknowledged that "fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself." But it did not accept that it should therefore leave the matter entirely within the states' margin of appreciation, since that margin cannot extend to an outright prohibition of marriages involving transsexuals. "While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages ... the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances." (38) Therefore, the Court held that Article 12 ECHR was also violated. (39)

C. Damages and Costs

[23] The Court did not award *Goodwin* any compensation for pecuniary damages, finding that she had continued (albeit not quite voluntarily) to work after reaching the retirement age for women and had thus earned an income. "*I*" had retired even before lodging the application. As for non-pecuniary damages, the Court found that while both applicants had suffered anxiety and distress in the past, the essence of their complaint was legal recognition of their status as transsexuals and held that the "finding of [a] violation, with the consequences which will ensue for the future, may in these circumstances be regarded as constituting just satisfaction." The Court did, however, make awards for costs and expenses of € 39,000.00 and 23,000.00 respectively. (41)

IV. Assessment

[24] The following assessment will briefly touch upon the Court's previous practice concerning the legal recognition of transsexuals before turning to an analysis of the judgments in *Goodwin* and *I* in light of the prevailing canons of interpretation of the ECHR and the general trends in recent practice of the Court when it is called upon to recognize a change in social realities or another development that would mandate a reconsideration or, even, a change of its jurisprudence.

A. The Court's Practice Concerning Transsexuals

[25] As the Court recalls in *Goodwin* and *I*, it has previously rejected essentially similar complaints against the United Kingdom in an almost routinely fashion. In all these cases, the detrimental effects of the British authorities' traditional approach to registering births and maintaining that register had - so far - not been considered serious enough to override the state's margin of appreciation in this respect. Demands to alter the register system, to permit (confidential) annotations to the existing register or to issue new birth certificates reflecting the changed sex of the applicants had failed. The Court found that the measures taken, such as issuing identity documents with the new names and sex, while not giving full legal recognition to the sex change, were nevertheless sufficient, because they helped avoid intrusive inquiries into the private sphere of the persons concerned at least to a certain degree. In *X, Y and Z v. the United Kingdom* (of 1997) (42) it held that disallowing a transsexual's request to be registered as the father of a child did not violate Articles 8 and 14 of the Convention. Only in *B v. France* (of 1992) (43), where a male-to-female transsexual was prevented even from changing her first name to a female, did the (plenary) Court conclude by a majority that a violation of her right to private life had taken place. It noted the significant differences between the British and French systems with respect to civil status, the change of first names, and identity documents (44), which placed a much heavier burden on transsexuals, for instance by allowing them name-changes only insofar as one of the few gender-neutral first names was chosen, (45) and found that the required fair balance between individual and public interests had not been attained. (46)

[26] Ever since *Rees*, however, the Court has underscored that while "... it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals", the "need for appropriate legal measures should ... be kept under review having regard particularly to scientific and societal developments." (47) In *Sheffield and Horsham*, it said that it "needs to be kept under review", (48) rather than 'should'.

[27] The claims of *Goodwin* and *I* are identical to the earlier British complaints in their entirety. Thus, the Court's deviation from its practice is not grounded in the particular circumstances of the applicants that would distinguish them from previous ones, but in a (sudden, but not entirely unexpected) change of standards. Because of that

change, the Court was in a position to redefine the state's margin and to hold that the British approach, which had still been sustained in 1998, was no longer viable in 2002. The United Kingdom still enjoys a residual margin when selecting the "appropriate means of achieving recognition of the right", (49) i.e. full legal recognition of transsexuals. When addressing the question how the standards changed, regard must be had to the general canons of interpretation the Court has developed.

B. The Principles of Interpretation of the Convention

[28] *Goodwin and I* progressively advance the substantive rights of the Convention. The judgments follow a longstanding tradition of the Court: It has placed at its own disposal a flexible set of tools for interpretation, and it uses them creatively. Prominently among them features the *dynamic approach*, which is also relied on in *Goodwin and I*: The interpretation must be "dynamic" and "evolutive", taking into account that the ECHR is "a living instrument which ... must be interpreted in the light of present day conditions." (50) Authors have pointed out and it appears settled today (51) that the Convention has "law-making character" and should be seen as "a bill of rights that must be interpreted so as to permit its development with time" (52) and with changing "social and political attitudes." (53) The Court has, in this respect, become somewhat dynamic, although not as dynamic as society itself. (54) The Convention is, moreover, "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." (55)

[29] The Court has also routinely looked at *common European standards*: A comparative survey of both the laws and practices of member states illustrating that there is a widely accepted standard with respect to the treatment of a certain issue or procedure may be the basis for, again, a dynamic interpretation, while no or little common ground between the states parties allows a respondent state to exercise its discretion within a rather wide margin of appreciation. (56) When identifying a European standard, the Court has also frequently referred to other European treaties and the level of their acceptance as an indicator for an emerging broad or uniform practice, (57) as well as documents produced by other Council of Europe bodies, such as the Committee of Ministers and the Parliamentary Assembly. European Union law has also featured prominently on its list of precious sources, (58) and thus it does not come as a surprise that in *Goodwin and I* reference is made to the Charter of Fundamental Rights (59) which, in its Article 9 indeed does not refer to men and women as the partners in a marriage, unlike Article 12 of the Convention.

[30] *Beddard* argues: "To be *effective*, a treaty guaranteeing human rights must necessarily be *dynamic*." (60) *Frowein and Peukert* (61) rightly treat the various principles of interpretation as interacting in practice; the formulas 'practical and effective' and 'living instrument' comprise not merely the effective, but also the dynamic and favorable elements inherent in the Strasbourg Court's legal analysis and appear to govern the practice in the first place. Probably beginning with *Golder* (of 1975) (62), the Court has been applying a modern 'object and purpose'-oriented method of interpretation utilizing the most feasible of the above principles. (63) Occasionally it has been argued, of course, that such an interpretative flexibility has led to reasoning that is "unsatisfactory, little more than rationalizations of preferred outcomes." (64) That was clearly not the case in *Goodwin and I*. It appears that the Court's jurisprudence concerning the legal status of transsexuals was progressing at a rather slow pace, instead, and was lagging behind the developments in the domestic laws of the vast majority of European states, which were apparently influenced by a Recommendation of the Parliamentary Assembly of 1989. (65) In particular the United Kingdom was given not only a wide margin of appreciation, but also a lot of time to remedy the situation domestically, while the Court would likely have *preferred* a different solution at an earlier point in time.

C. *Goodwin and I* in Light of the Recent Practice of the Court

[31] The judgments in *Goodwin and I* use the flexible approach to arrive at the finding that Articles 8 and 12 ECHR were violated. The need for a dynamic, evolutive interpretation of Convention rights is emphasized. The cases stand out, however, by comparison to other recent practice: The Court here did not miss the opportunity to advance the interpretation of European human rights law by extracting new or modified standards from feasible sources. In other cases, it *did*. In *Ferrazzini* (of 2001) (66), for instance, the Grand Chamber did not consider that there had been sufficient changes in how taxes were perceived – i.e. as typical 'civic obligations' dealt with in a 'public law'-relationship between taxpayers and the authorities – permitting it to qualify tax assessment proceedings as civil within the meaning of Article 6 para. 1. Six judges dissented, suggesting that there are "no convincing arguments for maintaining" (67) the restrictive case-law, even though they stopped short of agreeing with commentators (68) who had put "the question whether it is at all possible to draw any clear and convincing dividing line between 'civil' and 'non-civil' rights and obligations based on the Court's present case-law, and, if not, whether the time has come to end that uncertainty by extending the protection under [Article 6 para. 1] to all cases in which a determination by a public authority of the legal position of a private party is at stake." (69) In *Al-Adsani* (of 2001) (70) the Court, by nine votes to eight, "while noting the growing recognition of the overriding importance of the prohibition of torture, does not ... find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of *civil* claims for damages for alleged torture committed outside the forum State" (71) and thereby missed

a unique opportunity to advance the level of acceptance itself, rather than seeking it elsewhere. (72)

[32] In other cases, the Court sought to advance, or rather, consolidate, its jurisprudence, but failed: In *Pellegrin* (of 1999) (73), to quote one of the more controversial examples that has also been subject to a scholarly discussion, the Court recognized that its existing case-law on the applicability of Article 6 para. 1 to proceedings involving civil or public servants "contains a margin of uncertainty for Contracting States as to the scope of their obligations ... in disputes raised by employees in the public sector over their conditions of service." It added that its practice did indeed "leave scope for a degree of arbitrariness." (74) When, however, it introduced the "functional criterion", – which focuses on whether a particular employee in the public sector "wields a portion of the State's sovereign power" (75) – the Court, in neglecting the very outspoken dissent of four judges (76), managed to introduce a concept that is, in part, even more restrictive and generally quite confusing: (77) Purely economic cases involving 'power-wielding' civil servants, for instance, were considered 'civil' before, but are no longer under the *Pellegrin* standard.

[33] The Court in *Goodwin and I* could not, or no longer, base its change in jurisprudence on a growing European consensus on how the law should treat transsexuals, since that had already emerged in the aftermath of the 1989 Parliamentary Assembly Recommendation and, as the evidence adduced in the course of the deliberations showed, there was no further development in Europe between the years 1998 (*Sheffield and Horsham*) and 2002. (78) Instead, it relied heavily on an "international trend", finding support for its liberal interpretation of Article 8 para. 1 ECHR in cases stemming, *inter alia*, from New Zealand and Australia. With that, the Court displayed an attitude that should wholeheartedly be embraced, since it re-introduces – without, however, opening *Pandora's* box – the borrowing of concepts that permit an evolutive interpretation of the Convention in favor of the individual from non-European legal systems and, in the first place, from other regional and the universal systems of human rights protection. (79) While the European Court of Human Rights has a well-advanced case-law in many areas and has long served as a source of guidance and inspiration for other human rights systems, in particular the Inter-American one (80), one should not assume that Europe holds the lead in every respect. The issue of protecting the rights of members of minority groups and indigenous peoples is a telling example: (81) The European bodies, for many decades, have been satisfied when governments did not show "disregard" for minorities, before the Court in *Chapman* (of 2001) established a "special consideration" (83) standard requiring a somewhat higher degree of attention that has to be paid to the particular needs of persons belonging to such groups. (84) At the same time, the Strasbourg bodies have hesitated to identify 'race' or 'ethnicity' as the reason for even egregious violations of the rights to life and physical integrity (Arts. 2 and 3 ECHR) – with the notable exception of *Cyprus v. Turkey* (of 2001) (85) –, an omission brought to our attention quite eloquently by judge *Bonello* in his partly dissenting opinion appended to the *Anguelova v. Bulgaria* (of 2002) (86) judgment. The Inter-American Commission and Court of Human Rights, on the other hand, have a longstanding tradition of adjudicating and assessing claims of indigenous peoples and have come quite far in devising appropriate remedies for past wrongs that continue to affect these vulnerable peoples, including the restoration of the rights to real property taken decades before and the states' obligations to invest in "works or services of collective interest for the benefit of" (87) complainant tribes, as is evidenced in the Inter-American Court's 2001 *Mayagna (Sumo) Awas Tingni Indians* judgment. This practice, if read with due regard to the differences in history, political realities, and legal approaches between Europe and the Americas, could nevertheless serve, at the very least, as a precious source of inspiration for the human rights bodies of the old continent.

[34] *Goodwin and I* must in any event be welcomed as decisions which finally remedy a situation that has likely been left within the margin of appreciation of certain states for too long. Beyond that, they give new life to interpretative tools that have helped shape the Convention in the past. One should hope that the Court will rely on them more consistently.

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(1) Eur. Ct. H.R., Appl. 28957/95, *Christine Goodwin v. the United Kingdom*, <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=1&Action=Html&X=731111549&Notice=0&Noticemode=&RelatedMode=0>, and 25680/94, *I v. the United Kingdom*, judgments of 11 July 2002, <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=2&Action=Html&X=731111631&Notice=0&Noticemode=&RelatedMode=0>.

(2) *Goodwin*, paras. 12 – 19; *I*, paras. 12 – 15.

- (3) <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.
- (4) *Goodwin*, para. 71; *I*, para. 51.
- (5) See *Goodwin*, para. 72; *I*, para. 52.
- (6) They are discussed *infra*, chapter IV. A.
- (7) *Goodwin*, para. 73, and *I*, para. 53, with reference to *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A, No. 106; *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series A, No. 184; *X, Y and Z v. the United Kingdom*, judgment of 22 April 1997, Reports 1997-II; and *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, Reports 1998-IV.
- (8) *Goodwin*, para. 74; *I*, para. 54, with reference to Appl. 27238/95, *Chapman v. the United Kingdom*, judgment of 18 January 2001, Reports 2001-I, § 70.
- (9) *Goodwin*, para. 74; *I*, para. 54, with reference to *Cossey v. the United Kingdom*, para. 35, and Appl. 46295/99, *Stafford v. the United Kingdom*, judgment of 28 May 2002, paras. 67 – 68.
- (10) *Goodwin*, para. 74; *I*, para. 54.
- (11) *Goodwin*, para. 80; *I*, para. 60.
- (12) *Goodwin*, para. 76; *I*, para. 56.
- (13) *Goodwin*, para. 77; *I*, para. 57.
- (14) Which goes as far as permitting the artificial insemination of a woman living with a female-to-male transsexual (*X, Y and Z v. the United Kingdom*, Reports 1997-II).
- (15) *Goodwin*, para. 78; *I*, para. 58.
- (16) *Goodwin*, para. 79; *I*, para. 59.
- (17) *Bellinger v. Bellinger*, EWCA Civ 1140 [2001], 3 FCR 1, quoted in *Goodwin*, paras. 52 et seq., and *I*, paras. 35 et seq., where the Court of Appeal held, by a majority, that the marriage between an appellant who had been classified at birth as a man and had undergone gender re-assignment surgery and a man who was aware of her background was invalid as the parties were not respectively male and female, which terms were to be determined by biological criteria as set out in the decision of *Corbett v. Corbett*, [1971] Probate Reports 83, quoted in *Goodwin*, paras. 21 et seq., and *I*, paras. 17 et seq.
- (18) The Interdepartmental Working Group is operating on the basis of the following terms of reference: "[T]o consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexuals, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue."
- (19) See *Goodwin*, para. 80; *I*, para. 60.
- (20) *Goodwin*, para. 81; *I*, para. 61.
- (21) *Goodwin*, para. 82; *I*, para. 62, referring to a dissenting judge in *Bellinger v. Bellinger* and the Australian case of *Re Kevin*, [2001] FamCA 1074, quoted in *Goodwin*, para. 56 and *I*, para. 39.
- (22) *Goodwin*, para. 84; *I*, para. 64.
- (23) *Goodwin*, para. 85; *I*, para. 65.
- (24) The Court phrases this as follows: "While this would appear to remain the case ..."; *ibid*.
- (25) 'Liberty' "while there had not been a statistical increase in States giving full legal recognition of gender re-assignment within Europe, information from outside Europe showed developments in this direction. For example, there had been statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in

Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America." *Goodwin*, para. 56; *I*, para. 39.

(26) See *Goodwin*, para. 84; *I*, para. 64.

(27) *Goodwin*, para. 85; *I*, para. 65 (emphasis added).

(28) *Goodwin*, para. 88; *I*, para. 68.

(29) *Goodwin*, para. 90, and *I*, para. 70, with reference to Appl. 2346/02, *Pretty v. the United Kingdom*, judgment of 29 April 2002, para. 62, and 53176/99, *Mikulić v. Croatia*, judgment of 7 February 2002, para. 53. See also the case note to the *Pretty* decision, by Susan Millns, forthcoming in 3 German L.J. No. 9 (1 September 2002). [The Eds.]

(30) *Goodwin*, para. 90; *I*, para. 70.

(31) *Goodwin*, para. 91; *I*, para. 71.

(32) E.C.J., Case C-13/94, *P. v. S. and Cornwall County Council*, judgment of 30 April 1996, available at: <http://www.pfc.org.uk/legal/pvs-judg.htm>.

(33) *Goodwin*, para. 93; *I*, para. 73.

(34) *Goodwin*, para. 98; *I*, para. 78.

(35) *Goodwin*, para. 100; *I*, para. 80.

(36) *Goodwin*, para. 101; *I*, para. 81.

(37) See *Goodwin*, para. 102; *I*, para. 82.

(38) *Goodwin*, para. 103; *I*, para. 83.

(39) The Court also ruled that no separate issue arose under Article 14 (non-discrimination) and found that there had been no breach of Article 13 ECHR (right to an effective remedy) in the case of *Goodwin*.

(40) *Goodwin*, para. 120; *I*, para. 95.

(41) The Court in *Goodwin* and *I* also changed its practice regarding the interest rate: Considering that the award is expressed in Euros to be converted into the national currency at the date of settlement, it held that the default interest rate should also reflect the choice of the Euro as the reference currency and established what it called "the general rule that the rate of the default interest to be paid on outstanding amounts expressed in [E]uro should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points." *Goodwin*, para. 124; *I*, para. 99. That sparked the dissent of three judges who expressed their view that the Court should have continued its practice of setting a fixed interest rate.

(42) Judgment of 22 April 1997, Reports 1997-II, paras. 52 and 56.

(43) Judgment of 25 March 1992, Series A, No. 232-B.

(44) See *ibid.*, paras. 51 – 62.

(45) See *ibid.*, para. 58.

(46) A newly admitted case, Appl. 35968/97, *Carola van Kück v. Germany*, decision on the admissibility of 18 October 2001, relates to the allegedly discriminatory treatment of a male-to-female transsexual in the course of the proceedings to assess whether the costs associated with medical gender reassignment measures should be reimbursed by a German health insurance company. The applicant here claims that the evaluation of her medical condition and whether it made the treatment necessary and/or whether she had deliberately caused the "disease" – i.e. sexual orientation – herself was arbitrary. The complaint, relying on non-discrimination, due process, privacy, and effective remedy rights, was declared admissible in its entirety.

(47) *Rees v. the United Kingdom*, Series A, No. 106, para. 47.

(48) Para. 60.

(49) *Goodwin*, para. 93, and *I*, para. 73.

(50) Eur. Ct. H.R., *Tyrer v. the United Kingdom*, judgment of April 25, 1978, Series A, No. 26, para. 31, and many others.

(51) See Franz Matscher, "Methods of Interpretation of the Convention", in: R. St. J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* 63, 66 – 67 and footnote 14 (1993), noting that dissenting judges in earlier cases objected to an extension of state obligations by means of interpretation.

(52) D. J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* 7 (1995).

(53) Francis G. Jacobs and Robin C. A. White, *The European Convention on Human Rights* 31 (1996).

(54) *But see* Matscher, "Methods of Interpretation ...", at 70, who argues that "[s]ociety may be dynamic, and so perhaps may a legislature, but not a Court." J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, at pp. 80 – 81 and 222 *et seq.* (1993), points out that the Court faces the danger of prematurely identifying, but also of overlooking a trend.

(55) Eur. Ct. H.R., *Airey v. Ireland*, judgment of 9 October 1979, Series A, No. 32, para. 24.

(56) On the margin of appreciation doctrine see Matscher, "Methods of Interpretation ...", at 75 *et seq.*; R. St. J. Macdonald, "The Margin of Appreciation", in: R. St. J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* 83 (1993), and Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996).

(57) *See, e.g.*, the reference to the European Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, adopted on June 21, 1993, E.T.S. No. 150, in *Balmer-Schafroth et al. v. Switzerland*, judgment of 26 August 1997, Reports 1997-IV, paras. 39 – 40, and especially the numerous references to Council of European and European Union legal texts in the dissent of judge *Pettiti* and others, *ibid.*

(58) *See, amongst many others*, the European Commission of Human Rights' extensive reference to the 1987 *Brussels Convention* dealing with the principle of *ne bis in idem* in relations between the criminal courts of European Union member states in Appl. 21072/92, *Bruno Gestra v. Italy*, decision of January 16, 1995, 80-B Decisions and Reports 89 (1995), the Court's incorporation of European Parliament Resolution OJ 1989 C256 as a source in its *X, Y and Z v. the United Kingdom judgment*, at para. 38, and the Resolution on the Confidentiality of Journalists' Sources of 18 February 1994, OJ C 44/34, in the 'other' *Goodwin* case, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, Reports 1996-II, para. 39.

(59) *See Goodwin*, para. 100; *I*, para. 80.

(60) Ralph Beppard, *Human Rights and Europe* 71 (1993).

(61) *See* Jochen Abr. Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention: EMRK Kommentar* 5, MN 7 (2nd ed. 1997).

(62) Eur. Ct. H.R., *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A, No. 18.

(63) *See* Scott Davidson, *The Inter-American Court of Human Rights* 133 (1992) who, when discussing the practice of the European Court of Human Rights, points out that its practice is an example for international tribunals applying a number of rules of interpretation and that that court "will often declare that [it is] applying the textual method of interpretation when close analysis reveals that [its] methods are in fact more teleological or end-oriented."

(64) Colin Warbrick, "Coherence and the European Court of Human Rights: The Adjudicative Background in the *Soering Case*", 11 *Michigan J. Int'l L.* 1073, 1079 (1990).

(65) Recommendation 1117 (1989) of 26 September 1989 on the Condition of Transsexuals. *See also* the joint partly dissenting opinion of judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk, and Voicu appended to the *Sheffield and Horsham* judgment.

(66) Eur. Ct. H.R., Appl. 44759/98, *Ferrazzini v. Italy*, judgment of 12 July 2001.

(67) *Ibid.*, dissenting opinion of judge Lorenzen, joined by judges Rozakis, Bonello, Strážnická, Bîrsan, and Fischbach, para. 9.

(68) P. van Dijk and G. J. H. van Hoof, *Theory and Practise of the European Convention on Human Rights* 406 (3rd ed. 1998).

(69) *Ferrazzini v. Italy*, dissenting opinion, para. 5.

(70) Eur. Ct. H.R., Appl. 35763/97, *Al-Adsani v. the United Kingdom*, judgment of 21 November 2001. See also the parallel cases of Appl. 31253/96, *McElhinney v. Ireland*, and 37112/97, *Fogarty v. the United Kingdom*, also decided on 21 November 2001.

(71) *Al-Adsani v. the United Kingdom*, para. 66.

(72) See the convincing dissent of judges Rozakis and Caflish, joined by judges Wildhaber, Costa, Cabral Barreto, and Vajić, *ibid.*, at para. 4, who object to the majority's reasoning that *criminal* and *civil* immunity of torturers should be treated differently: "The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial." *But see* Markus Rau, "After *Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the *Al-Adsani* Case", 3 German L.J. (No. 6, 1 June 2002), who welcomes the *Al-Adsani* ruling, available at http://www.germanlawjournal.com/past_issues.php?id=160.

(73) Eur. Ct. H.R., Appl. 28541/95, *Pellegrin v. France*, judgment of 8 December 1999, Reports 1999-VIII.

(74) *Ibid.*, para. 60.

(75) *Ibid.*, para. 65.

(76) See *ibid.*, joint dissenting opinion of judges Tulkens, Fischbach, Casadevall, and Thomassen.

(77) See Elisabeth Palm, "The Civil Servant and the New Court", in: Paul Mahoney *et al.* (eds.), *Protecting Human Rights: The European Perspective* 1065 (Studies in Memory of Rolv Ryssdal, 2000), defending the *Pellegrin* approach. Judge Palm was president of the *Pellegrin* chamber. *But see* Evert A. Alkema, "Civil Servants and Their 'Civil Rights' Under the European Convention (Art. 6 para. 1 of the Convention)", in: Michele de Salvia and Mark E. Villiger (eds.), *The Birth of European Human Rights Law* 15 (1998), who opts for an inclusive approach to the civil servants issue, leaving outside the scope of Article 6 (1) only matters relating to their appointment. The question of the scope of Article 14 (1) of the UN Covenant on Civil and Political Rights and, in particular, whether it, unlike the 'parallel' provision of Article 6 (1) ECHR after *Pellegrin*, extends to disciplinary and dismissal proceedings of all civil servants, is currently before the UN Human Rights Committee in Communication No. 1015/2001, *Perterer v. Austria*, submitted on 31 July 2001.

(78) See *Goodwin*, para. 56, and *I*, para. 39.

(79) See *already* Thomas Buergenthal, "International and Regional Human Rights Law and Institutions: Some Examples of their Interaction", 12 *Texas Int'l L.J.* 321, 323 (1977).

(80) See, *inter alia*, Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)* advisory opinion OC-5/85 of November 13, 1985, Series A, no. 5, where the Court borrowed extensively from the European Convention and the jurisprudence thereunder.

(81) See *generally* Alexander H.E. Morawa, "'Vulnerability' as a Concept of International Human Rights Law", 10 *Journal of International Relations and Development* (No. 1, 2003), chapter III. C. (forthcoming).

(82) Eur. Comm. H.R., Appl. 31006/96, *David and Rosalie Webb v. the United Kingdom*, decision on the admissibility of 2 July 1997, para. 4.

(83) Eur. Ct. H.R., Appl. 27238/95, *Chapman v. the United Kingdom*, judgment of 18 January 2001, para. 129, previously suggested by the Commission in *Buckley v. the United Kingdom*, judgment of 26 August 1996, Reports

1996-IV, para. 71.

(84) For a discussion of these and related cases see Alexander H.E. Morawa, "The Evolving Human Right to Equality", 1 *European Yearbook of Minority Issues* (2001/2), chapters IV. C. 1. and IV. D. 1. (forthcoming).

(85) Eur. Ct. H.R., Appl. 25781/94, *Cyprus v. Turkey*, judgment of 10 May 2001, para. 309.

(86) Eur.Ct.H.R., Appl. 38361/97, *Angelova v. Bulgaria*, judgment of 13 June 2002, partly dissenting opinion of judge Bonello.

(87) Inter-Am.Ct.H.R., *The Case of the Mayagna (Sumo) Awas Tingni Indians v. Nicaragua*, judgment of August 31, 2001, Series C, No. 79, para. 173, operative para. 6.