OPINION OF ADVOCATE GENERAL TESAURO

delivered on 14 December 1995 *

1. Once again the Court is called upon to give a ruling on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1] ('the directive').

What is new, and certainly no small matter, is the fact that a transsexual is seeking to rely on the directive. As a result, the questions referred by the Truro Industrial Tribunal direct the Court's attention to transsexuality from the point of view of the prohibition of sex discrimination: can a transsexual, if he or she is dismissed because he or she is a transsexual, in particular when he or she undergoes gender reassignment, successfully rely on the directive?

Relevant legislation, the facts and the questions referred for a preliminary ruling

2. According to Article 1(1), the purpose of the directive is 'to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

Next, Article 2(1) of the directive states that 'the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. The application of that principle relates in particular to 'the conditions, including selection criteria, for access to all jobs or posts' (Article 3(1)) and to 'working conditions, including the conditions governing dismissal' (Article 5(1)).

3. The national legislation relevant to this case is the Sex Discrimination Act 1975 which defines — and prohibits — as direct sex discrimination, treating a woman less favourably than a man on the ground of her sex (Section 1(a)). In addition, it provides that the provisions relating to sex discrimination against women are to be read as

* Original language: Italian.

1 — OJ 1976 L 39, p. 40.

applying equally to the treatment of men, without prejudice to the special treatment afforded to women in connection with pregnancy and childbirth (Section 2). Finally, after defining 'man' as including a male of any age and 'woman' as including a female of any age, the Sex Discrimination Act provides that a comparison of the cases of persons of different sex or marital status 'must be such that the relevant circumstances in the one case are the same, or not materially different, in the other' (Section 5).

There is however no specific provision relating to the state of transsexuals, not even after they have undergone a gender reassignment operation. [2] Contrary to what is provided in some national legal systems, in the United Kingdom every person retains the male or female sex which he or she had at birth: it is therefore impossible to have the original sex attributed to a person altered in the register of births, marriages and deaths.

4. I shall now turn to the case itself, which involves the dismissal of a transsexual, on account of gender reassignment; to be more specific, the person concerned stated the intention to undergo surgery in order to change her biological sex (male) to suit her sexual identity (female). I shall refer to this person, who is identified as P. for obvious reasons of anonymity, as a female; and I would stress that I do so regardless not only of her original sex (male) as it appears on her birth certificate, but also of the moment at which, as a result of the final surgical operation, she actually changed her physical sex.

5. In April 1991 P. was taken on as a manager at an educational establishment operated at the material time by Cornwall County Council ('the Council'), the competent administrative authority for the area. A year later, P. told S., the Principal and Chief Executive of that establishment, that she intended to undergo a sex-change operation. At first S. appeared supportive and tolerant, and reassured her about her position within the establishment, but later his attitude changed. According to the national court's reconstruction of the facts, S.'s change in attitude was essentially due to the opposition of the board of governors, who at one time put

2 — This would be a suitable moment at which to make it clear that in the United Kingdom no legal formality is required for a surgical operation to change sex and all the costs are borne by the National Health Service. I would add that under English law any person may change his or her name and use the new one without any restriction or formality, with the result that a transsexual has no difficulty in changing his or her name and using the new one on documents such as his or her driving licence, passport, vehicle log book and social security and tax documents. For a complete picture of the position and rights of transsexuals in the United Kingdom, see Bradley: 'Transsexualisme — L'Idéologie, les principes juridiques et la culture politique', in *Transsexualisme, médicine et droit*, Actes du XXIII Colloque de droit européen, Vrije Universiteit Amsterdam, 14-16 April 1995, p. 63 et seq.

forward the idea that P. should continue to work for the establishment as a self-employed contractor.

In the meantime, in summer 1992 P. underwent initial surgical treatment with a view to her gender reassignment, as a result of which she was absent from work on sick leave. It was during that period that S. and the governors took the decision to dismiss her, of which she was given three months' notice, expiring on 31 December 1992. At the same time P. was asked to complete by that date a number of specific tasks which she was preparing. When P. informed them that she would be returning to work dressed as a woman, they told her that she could complete the tasks assigned to her from home, so that it was not necessary for her to attend the establishment's premises. Finally, P.'s contract of employment with the establishment terminated on the date fixed without her having returned to work.

6. P. underwent the final gender-reassignment operation on 23 December 1992, that is to say, before her dismissal took effect but after she was given notice on 15 September 1992 of the termination of her employment. On 13 March 1993 P. brought an action before the Truro Industrial Tribunal, claiming that she had suffered discrimination on grounds of sex. Both S. and the Council claimed, on the contrary, that P. had been dismissed by reason of redundancy.

The Industrial Tribunal found that, whilst there was a case for redundancy, the true reason for the dismissal was the objection on the part of S. and the Council to P.'s intention to undergo a gender-reassignment operation.

In the result, for the Court the starting point — in that this was found by the Industrial Tribunal — is that P. was dismissed solely and exclusively because of the sex change of which she first gave notice and which was later carried out before her dismissal took effect.

7. The Industrial Tribunal considers that English law provides no helpful answer in the circumstances [3] and in particular that no discrimination against P. can be identified on the basis of the Sex Discrimination Act. The Tribunal is however of the opinion that the Community directive on equal treatment for men and women may allow a broader interpretation that would cover discrimination

3 — In particular, the Tribunal notes that the termination of employment cannot be assessed from the point of view of unfair dismissal, since for that purpose in the United Kingdom a person must have been employed for at least two years. At the time of her dismissal P. had worked for the establishment concerned for only 20 months.

against transsexuals as well, inasmuch as it refers to discrimination 'on grounds of sex'. It is from exactly that point of view that it asks the Court of Justice:

'(1) Having regard to the purpose of Directive 76/207 which is stated in Article 1 to be to put into effect the principle of equal treatment for men and women as regards access to employment etc. ... does the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive?

(2) Does Article 3 of the Directive, which refers to discrimination on grounds of sex, prohibit treatment of an employee on the grounds of the employee's transsexual state?'

Transsexuality and law

8. First, what is transsexuality? Far be it from me to venture into territory requiring quite different knowledge and learning. I consider it preferable to recall the definition given in a recommendation of the Council of Europe which states that 'transsexualism is a syndrome characterized by a dual personality, one physical, the other psychological, together with such a profound conviction of belonging to the other sex that the transsexual person is prompted to ask for the corresponding bodily "correction" to be made'. [4]

The applicant has produced a great number of learned articles which claim that the causes of the condition are to be found in biological dysfunctions which are therefore present already at birth, or else in psychological disorders linked to environment. The effect is, however, the same: biological sex and sexual identity fail to coincide. [5] Let it suffice here, however, to note the fact that studies relating to transsexuality have produced highly interesting results, in any event such as to refute entirely groundless old taboos and prejudices, by turning attention away from the *moral* dimension of the question, which is entirely reductive and at times misleading, to the strictly medical and scientific.

9. What I am concerned to emphasize is that the phenomenon of transsexuality, even

4 — Recommendation 1117 of 29 September 1989 'on the condition of transsexuals', in which moreover the Council of Ministers was asked to request the Member States to legislate on the subject.

5 — For a consideration of those points in greater depth, see Reed: 'Aspects psychiatriques et psychologiques du transsexualisme', and Gooren: 'Aspects biologiques du transsexualisme et leur importance pour la réglementation en ce domaine', both in Transsexualisme, médicine et droit', cited above, at p. 25 et seq. and p. 123 et seq. respectively.

though it is not of great significance in statistical terms, [6] constitutes a reality today which has been discussed in various bodies, not only scientific but also legal, in particular from the point of view of fundamental personal rights. [7] Consequently, the law is faced with that reality — and is destined to come up against it to an increasing degree. This is inevitable. In society as it is today, in which customs and morals are changing rapidly, citizens are guaranteed ever wider and deeper protection of their freedoms and social and legal studies are increasingly taking on present-day — and, for that very reason, real — values, on the principle that it is effective to do so, it would be unjustifiable to reject out of hand the problem of transsexuality — which certainly can still be assessed quite independently in moral terms — or simply to condemn it and consider it contrary to the law.

To my mind, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role. In so far as the law seeks to regulate relations in society, it must on the contrary keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in science. From that point of view, there is no doubt that for present purposes the principle of the alleged immutability of civil status has been overtaken by events. This is so in so far as and from the time that the fact that one cannot change one's sex for bureaucratic and administrative purposes no longer corresponds to the true situation, if only on account of the scientific advances made in the field of gender reassignment.

10. A swift glance at the situation in the various Member States of the Community reveals a clear tendency, especially since the early 1980s, towards ever wider recognition of transsexuality, both by legislation and by judicial decision. That recognition is reflected in the first place by the fact that sex changes are accepted, in the specific sense that surgery to that end is now permitted, albeit subject to differing rules, in nearly all the States. [8] In the second place, the move to make sex-change surgery lawful usually goes hand-in-hand with authorization, again subject to differing rules, to rectify the sex recorded in the registers of civil status, with all the ensuing consequences.

Some States have given a legal response to transsexuality by adopting special legislation.

6 — According to figures supplied by the applicant, in Europe 1 in 30 000 males and 1 in 100 000 females seek to change sex by means of surgery.

7 — This is the case, for example, of the Council of Europe's Parliamentary Assembly, whose proceedings culminated in the adoption of the abovementioned Recommendation 1117 on the condition of transsexuals.

8 — On this point, it is worth repeating that in the United Kingdom, where it is still not possible to have the attribution of sex altered in the register of births, not only is 'transsexual' surgery permitted without any legal formality, it is moreover wholly paid for by the National Health Service.

As far as Member States of the Community are concerned, this is so in the case of Sweden, [9] the Federal Republic of Germany, [10] Italy [11] and the Netherlands. [12] The laws concerned authorize transsexuals to correct their birth certificates so as to include a reference to their new sexual identity, with the result that they have the right to marry, adopt children and enjoy pension rights according with their *new* sexual identity.

The fact that the other Member States do not have special laws on the subject does not mean that the position of transsexuals is ignored. As a matter of fact, in some States, the legality of surgery performed on transsexuals and of the resulting change of civil status is based on laws which themselves have nothing to do with the question of transsexuality. [13] In most of the other States the problem is, by contrast, resolved case by case by the courts, [14] or even, much more simply, at the administrative level. [15]

11. Transsexuality has furthermore been tackled by the Commission and the European Court of Human Rights from the twofold angle of violation of the right to respect for private life (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC)) and of the right to contract valid marriages (EHRC, Article 12).

The way was opened by a decision of the European Commission on Human Rights, which in 1979 decided unanimously that the refusal by the Belgian State to adopt measures to enable the registers of civil status to reflect lawful sex-changes constituted a violation of the right to respect for private life enshrined in Article 8(1) of the Convention. [16]

9 — Law of 21 April 1972 (SFS 1972, p. 119). See the French translation in the *Revue trimestrielle de droit civil*, 1976, p. 295 et seq.

10 — Law of 10 September 1980 (BGBl. 1980 I, p. 1654 et seq.). It is interesting to note that this law provides both for the so-called 'minor solution', which is permission to change name, and the co-called 'major solution', which provides for sex-change surgery.

11 — Law No 164 of 14 April 1982 (GURI No 106 of 19 April 1982, p. 2879 et seq.). In this regard, it should be explained that, in judgment No 161 of 24 May 1985, the Italian Constitutional Court dismissed the objection that the rules on the correction of sex were unconstitutional (*Foro it.*, I, 1985, col. 2162 et seq.).

12 — Law of 21 April 1985 (*Staatsblad* 1985, p. 243 et seq.).

13 — This is the case, for example, in Denmark, where the law of 11 May 1935 (sic!) on voluntary castration is applied by analogy. Persons authorized to undergo surgery on the basis of that law are automatically granted the right to change their civil status.

14 — This is the case in France, Belgium, Spain, Portugal, Luxembourg and Greece (although in Greece only hermaphrodites have until now been permitted to change their civil status).

15 — This is the case in Austria, where it has been settled practice since 1981 for the registrar of births, marriages and deaths to add a note of the sex-change to the birth certificate on the sole condition that the person concerned has undergone surgery, which has to be evidenced by a report drawn up by experts from the Institute of Forensic Medicine of the University of Vienna.

16 — *D. Van Oosterwijck* v *Belgium* (Application No 7654/76), Commission Report of 1 March 1979, published in *Rapport européen sur les droits de l'homme*, 1981, p. 557 et seq.

12. The approach of the European Court of Human Rights, when called upon to rule on an alleged violation by the United Kingdom of Articles 8 and 12 of the EHRC, was different. In the *Rees* case, it held that it must 'be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting those persons and the distress they suffer. The convention has always to be interpreted and applied in the light of current circumstances. (...) The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments'. [17] The same solution was later adopted in the *Cossey* case. [18]

In the subsequent case of *B.* v *France*, by contrast, the Court in Strasbourg found against France, stating that the fact that the applicant, who had undergone surgery in 1972 to become a woman also from the sexual point of view, could not adopt a feminine name or change her civil status, constituted a violation of Article 8(1) of the EHRC. [19] In reaching that conclusion — and distinguishing *B.* v *France* from *Rees* and *Cossey* [20] — the European Court explained that attitudes had changed and science had progressed and increasing importance was attached to the problem of transsexualism.

13. It is clear from this survey that at present 'transsexual' surgery is regarded as legal, even in those countries which still do not allow a corresponding change of civil status. This fact alone means that the law, as a result of scientific and social progress which has taken place in this area, is paying more and more attention to transsexuality, by regulating those aspects which are liable to have significant repercussions on relations in society. As we have seen, this is borne out by the fact that in most national legal systems it is permissible to change civil status, either by virtue of specific laws or because of judicial involvement on a case-by-case basis.

There remains the question whether there can be legal protection for persons who have changed sex or are living through the period of change when, specifically and solely on that account, they are discriminated against or, in any event, treated unfavourably in the field of employment, possibly even, as in this case, by being dismissed.

17 — *Rees* v *United Kingdom* (2/1985/88/135), judgment of 17 October 1986, paragraph 47, Series A, No 106.

18 — *Cossey* v *United Kingdom* (16/1989/176/232), judgment of 27 September 1990, paragraph 42, Series A, No 184.

19 — *B.* v *France* (57/1990/248/319), judgment of 25 March 1992, paragraph 63, Series A, No 232-C.

20 — In particular, it emerged that in France, unlike the system in force in the United Kingdom, the civil status register may be amended without any difficulty. On that point, see footnote 2 above.

Answers to the questions

14. The national court asks the Court to determine whether, in the light of the purpose of the directive, as set out in Article 1, the dismissal of a transsexual on account of a sex-change constitutes discrimination prohibited by the directive, and, more generally, whether Article 3(1) must be interpreted as also encompassing, with regard to working conditions, discrimination against transsexuals.

The national court starts from the premiss that the directive, in particular Article 3(1) in so far as it prescribes that 'there shall be no discrimination whatsoever on grounds of sex', [21] does not mean, or at least does not necessarily mean, that discrimination can exist only as between a male and a female, but may be interpreted as covering discrimination against transsexuals as well.

15. First of all, I would observe that the provisions relevant to this case are rather Article 2(1), which lays down in general terms the prohibition of discrimination on grounds of sex, and Article 5(1) of the directive, which more specifically prohibits discrimination on grounds of sex with regard to the conditions governing dismissal. The question referred must therefore be reformulated to that effect.

Having said that, it is necessary in any event to establish whether the dismissal of a transsexual because of her change of sex falls within the field of application of Community law, more specifically of the directive concerning equal treatment for men and women.

16. While it is quite true that the directive prohibits any discrimination whatsoever on grounds of sex, it is equally indisputable that the wording of the principle of equal treatment which it lays down refers to the traditional man/woman dichotomy.

In order to ascertain whether the directive can, as the Industrial Tribunal suggests, be so interpreted as to cover discrimination against transsexuals too, it must, in any event, be determined in the first place whether the unfavourable treatment of transsexuals constitutes discrimination on grounds of sex. It will then be necessary to decide whether it is only discrimination between men and women which is covered by the expression 'discrimination on grounds of sex' or, more generally, all unfavourable treatment connected with sex.

21 — In addition to Article 3(1), Article 2(1) also provides in general terms to that effect.

17. I shall start by calling to mind the proposition, which has ever stronger support in medical and scientific circles, that it is necessary to go beyond the traditional classification and recognize that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex *itself* ought rather to be thought of as a continuum. From that point of view, it is clear that it would not be right to continue to treat as unlawful solely acts of discrimination on grounds of sex which are referrable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavourably precisely because of their sex and/or sexual identity.

The argument just put forward, attractive as it is, requires a redefinition of sex which merits deeper consideration in more appropriate circles; consequently, this is not the path that I propose that the Court should follow. I fully realize that from time immemorial a person's sex has merely been ascertained, without need of the law to define it. The law dislikes ambiguities and it is certainly simpler to think in terms of Adam and Eve.

Having said that, I regard as obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, or vice versa, but denies that protection to those who are also *discriminated against*, again by reason of sex, merely because they fall outside the traditional man/woman classification.

18. The objection is taken too much for granted and has been raised on several occasions in these proceedings that the factor of sex discrimination is missing on the ground that 'female transsexuals' are not treated differently from 'male transsexuals'. In short, both are treated unfavourably, hence there can be no discrimination at all. A survey of the relevant national case-law confirms that point of view, [22] albeit with some exceptions. [23]

22 — I refer first to the judgment in *White* v *British Sugar Corporation* [1977] IRLR 121, in which an English industrial tribunal held that the Sex Discrimination Act did not apply to the case of the dismissal of a female transsexual who had not undergone any sex-change surgery but who had held herself out to be a man when she obtained the job. There are many judgments of United States courts on the issue. Nearly all held the dismissal of transsexuals to be lawful, on the ground that no discrimination on grounds of sex could be identified (see, for example, *Grossman* v *Bernards Township Board of Education*, 11 FEP Cases 1196, 1975; *Kirkpatrick* v *Seligman and Latz*, 636 F 2d 1047, 1981; *Sommers* v *Budget Marketing*, 667 F 2d 748, 1982; also *Ulane* v *Eastern Airlines*, 35 FEP Cases 1348, 1984). *Holloway* v *Arthur Anderson & Co.*, 566 F 2d 659, 1977, deserves a separate mention; that was a case exactly like this one, in which it was held to be lawful to dismiss a transsexual for starting treatment to become a woman.

23 — To that effect see the judgment at first instance in *Ulane* v *Eastern Airlines*, 35 FEP Cases 1332, 1984, in which the court held that dismissal of an employee on account of her transsexual state was equivalent to dismissal on grounds of sex. Another notable exception may be found in *Richards* v *United States Tennis Association*, 93 misc. 2d 713, 400 N. Y. S. 2d 267, 1977, relating to a tennis player who, following an operation to become (also) physically a woman, sought to take part in women's tournaments. Despite the opposition of the tennis association, which maintained that Richards, by retaining her male muscular structure, would be at an advantage, the Supreme Court of the State of New York permitted her to take part in the 1977 US Women's Open (to complete the picture, I would observe that Richards was beaten in the first round by Wade 6-1, 6-4).

I am not convinced by that view. It is quite true that even if P. had been in the opposite situation, that is to say changing from female to male, it is possible that she would have been dismissed anyway. One fact, however, is not just possible, but certain: P. would not have been dismissed if she had remained a man.

So how can it be claimed that discrimination on grounds of sex was not involved? How can it be denied that the cause of discrimination was precisely, and solely, sex? To my mind, where unfavourable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex or on grounds of sex, if that is preferred.

19. On this subject I cannot do other than recall that the prohibition of discrimination on grounds of sex is an aspect of the principle of equality, a principle which requires no account to be taken of discriminatory factors, principally sex, race, language and religion. What matters is that, in like situations, individuals should be treated alike.

Consequently, the principle of equality prohibits unequal treatment of individuals based on certain distinguishing factors, and these specifically include sex. This means that importance may not and must not be given to sex as such, so as to influence, in one way or another the treatment afforded, for example, to workers. That is the reasoning on which my Opinion in *Kalanke* [24] is based, in which, as I recall, I declared myself opposed to employment and promotion quotas for women, because I believe that the principle of non-discrimination on grounds of sex permits only those exceptions which, because they aim at attaining *substantive* equality, are justified by the objective of ensuring actual equality between persons.

In the present case, what is required is at least a rigorous application of the principle of equality so that, therefore, any connotations relating to sex and/or sexual identity cannot be in any way relevant. Moreover, in trying to justify their relevance, it would be very hard to argue, and in any event it has not been claimed, that the abilities and role of the person in question were adversely affected by her change of sex.

20. I must add that, for the purposes of this case, sex is important as a convention, a

24 — Judgment in Case C-450/93 *Kalanke* [1995] ECR I-3051.

social parameter. The discrimination of which women are frequently the victims is not of course due to their physical characteristics, but rather to their role, to the image which society has of women. Hence the *rationale* for less favourable treatment is the social role which women are supposed to play and certainly not their physical characteristics. In the same way it must be recognized that the unfavourable treatment suffered by transsexuals is most often linked to a negative image, a moral judgment which has nothing to do with their abilities in the sphere of employment.

Such a situation is still less acceptable when the social change and scientific advances made in this area in recent years are taken into consideration. Whilst it is true, as I have already said, that transsexuals are in fact not very significant in statistical terms, it is equally true that for that very reason it is vital that they should have at least a minimum of protection. On this view, to maintain that the unfavourable treatment suffered by P. was not on grounds of sex because it was due to her change of sex or else because in such a case it is not possible to speak of discrimination between the two sexes would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality.

21. It remains to be determined whether a directive whose purpose, according to its wording, is to ensure the elimination of discrimination between men and women may also cover unfavourable treatment afforded to transsexuals. In other words, in the absence of specific legislation which expressly takes transsexuals into consideration, must it be concluded that transsexuals — once they have suffered discrimination — are deprived of any legal protection whatsoever?

In this regard, a judgment of the German Constitutional Court is of some interest; the court recognized — in the absence of relevant legislation — transsexuals' right to change their civil status. The judgment stated: 'Clearly it is in the interests of legal certainty that the legislature should regulate questions concerning personal legal status connected to a change of sex and their effects. But until such legislation is adopted, the task of the courts is none other than that which arises from the principle of equality between men and women before the entry into force of a law putting them on an equal footing.' [25]

22. First, transsexuals certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by the directive, having regard also to the

25 — Bundesverfassungsgericht, 11 October 1978, in NJW 1979, p. 595 et seq.

abovementioned recognition of their right to a sexual identity. [26]

Secondly, I note that the directive is nothing if not an expression of a general principle and a fundamental right. Here I would point out that respect for fundamental rights is one of the general principles of Community law, the observance of which the Court has a duty to ensure; and that 'there can be no doubt that the *elimination of discrimination based on sex* forms part of those fundamental rights'. [27]

23. When the problem is expressed in those terms, it seems to me only too clear that the directive, which dates from 1976, took account of what may be defined as 'normal' reality at the time of its adoption. It is quite natural that it should not have expressly taken into account a question and a reality that were only just beginning to be 'discovered' at that time. However, as the expression of a more general principle, on the basis of which sex should be irrelevant to the treatment everyone receives, the directive should be construed in a broader perspective, including therefore all situations in which sex appears as a discriminatory factor.

It should, moreover, be borne in mind that the statement of reasons for the directive expressly states that 'equal treatment for male and female workers constitutes one of the objectives of the Community, *in so far as the harmonization of living and working conditions while maintaining their improvement are* inter alia *to be furthered*'. [28] The directive is thus essentially intended, with a view to attaining the economic goals prescribed by the Treaty while satisfying criteria of social justice, to ensure equal treatment as between workers. From this point of view, it seems to me only too obvious that all workers, thus including those who have changed sex as a result of surgery, are entitled to enjoy the protection conferred by the directive; and this, I would repeat, is so whenever sex is a discriminatory factor.

The European Parliament expressed itself to the same effect in a resolution on discrimination against transsexuals of 9 October 1989 in which, *inter alia*, it 'calls on the Commission and the Council to *make it clear* that Community directives governing the equality of men and women at the workplace also outlaw discrimination against

26 — See, in particular, paragraphs 10 to 13.

27 — Case 149/77 *Defrenne II* [1978] ECR 1365, paragraph 27, emphasis added. See also more recently Case T-45/90 *Speybrouck* v *Parliament* [1992] ECR II-33, in which the Court of First Instance reaffirmed precisely that: 'the principle of equal treatment for men and women in matters of employment and, at the same time, the principle of the prohibition of any direct or indirect discrimination on grounds of sex form part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure pursuant to Article 164 of the EEC Treaty' (paragraph 47).

28 — Third recital in the preamble; emphasis added.

transsexuals'. [29] The very fact that Parliament asked only for it to be made clear that the Community directives cover transsexuals also means that for that institution transsexuals should already be able to avail themselves of the protection guaranteed by the directives in question.

24. Finally, I am well aware that I am asking the Court to make a 'courageous' decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: *the irrelevance of a person's sex with regard to the rules regulating relations in society.* Whosoever believes in that value cannot accept the idea that a law should permit a person to be dismissed because she is a woman, or because he is a man, or because he or she changes from one of the two sexes (whichever it may be) to the other by means of an operation which — according to current medical knowledge — is the only remedy capable of bringing body and mind into harmony. Any other solution would sound like a moral condemnation — a condemnation, moreover, out of step with the times — of transsexuality, precisely when scientific advances and social change in this area are opening a perspective on the problem which certainly transcends the moral one.

I am quite clear, I repeat, that in Community law there is no precise provision *specifically* and literally intended to regulate the problem; but such a provision can readily and clearly be inferred from the principles and objectives of Community social law, the statement of reasons for the directive underlining 'the harmonization of living and working conditions while maintaining their improvement' and also the case-law of the Court itself, which is ever alert and to the fore in ensuring that disadvantaged persons are protected. Consequently, I consider that it would be a pity to miss this opportunity of leaving a mark of undeniable civil substance, by taking a decision which is bold but fair and legally correct, inasmuch it is undeniably based on and consonant with the great value of equality.

Finally, I would point out in the words of Advocate General Trabucchi in an Opinion now 20 years old, that 'If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot disappoint the [national] court's expectations, which are more than those of legal form'. [30]

29 — OJ 1989 C 256, p. 33; emphasis added.

30 — Opinion of Advocate General Trabucchi in Case 7/75 *Mr and Mrs F.* v *Belgium* [1975] ECR 679, at p. 697.

25. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred by the Truro Industrial Tribunal.

Articles 2(1) and 5(1) of Council Directive 76/207/EEC must be interpreted as precluding the dismissal of a transsexual on account of a change of sex.