Going Dutch? A Comparative Analysis and Assessment of the Gradual Recognition of Homosexuality with respect to the Netherlands and England

§ 1. Introduction

With the ever-increasing reduction of discrimination based on race, sex and nationality throughout most of the Western world, 2001 has seen the enactment of legislation in the Netherlands that finally ensures non-discrimination of homosexuals in all areas of life. Now, for the first time, two people of the same sex will be able to consecrate their relationship in exactly the same way as two people of the opposite sex – in matrimony. Yet it is hardly surprising that these changes have been met with scepticism since marriage is regarded as the cement of society,¹ an “emblem of continuity and reproduction of the race”;² “as a gift of God in creation … in which man and woman become one flesh.”³

This article will trace the emergence of same-sex marriage legislation in the Netherlands and summarize the legal situation with respect to homosexuals in England.⁴ Upon analysis of the possible English and European reforms in this field, it will be argued that the ‘small change’ theory proposed by Waaldijk⁵ in relation to legislation concerning homosexuals, although conceptually feasible in the Netherlands, will be subject to adaptation when applied to England. This article will not reflect upon legal changes outside of the EU and will also not address the private international law aspects of these legislative changes.

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4. It must be noted that in most cases the legal instruments affecting English law also apply to Wales.
§ 2. Definition and Incidents of Marriage

The notion of marriage varies greatly around the world, with forms of polygamy and polyandry accepted in many nations. In a sample of 850 world societies, less than twenty percent preferred monogamy as the exemplary ideal. However, throughout this article, reference to marriage will be to a monogamous relationship.

The English legal concept of marriage can be clearly identified in the case of *Hyde v Hyde*, where Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others'. Even today the courts still draw on this definition. Yet little legal knowledge is required to understand that this definition is, at the very least, a legal fiction. The recent meteoric rise of divorce has prevented marriage from retaining its status as a 'lifelong union'. Figures indicate a steady increase in the divorce rate in England since the turn of the last century, with a peak of thirteen divorces per 1,000 married people in 1999.

Yet, marriage prevails as a powerful legal and social concept that protects and supports intimate family relationships through the provision of a unique set of rights, privileges and benefits. It is these benefits that must be examined before one can fully appreciate the legal significance that the denial of marital status imposes upon homosexuals.

One of the most significant effects of marriage in English law was that it fused the legal personalities of husband and wife. Yet the fact that the doctrine ever existed was vehemently criticized, especially by Lord Denning who asserted that ‘nowadays, both in law and fact, the husband and wife are two persons, not one’. Nevertheless, there is still evidence of affiliation between marital status on the one hand and special benefits on the other. Even though many of these benefits have also been extended to non-marital relationships, the emphasis placed on marriage remains.

The relationship of husband and wife has been held to satisfy the requirement of an obligation of confidence necessary to initiate a claim for breach of confidence. A homosexual couple in *Stephen v Avery* has now been held to satisfy this requirement, where Lord Browne-Wilkinson held that an injunction could be granted to prevent disclosure of information recounted during a lesbian relationship. Spousal privilege in criminal trials has lessened with the enactment of section 80 of the Police and Criminal Evidence Act 1984.

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7. (1866) LR 1 P&D 130.
8. Ibid., 133.
which treats spouses as competent witnesses, but compellable only for the defence, subject to section 80(4).

General provisions in the Fatal Accidents Act 1976 permit certain dependants of a person killed as the result of the defendant's wrongdoing to recover financial loss suffered as a consequence of the death. In order to substantiate a claim one must fall within the categories laid down in section 1(3), which include the relationship of husband and wife, as well as 'living together as husband and wife'. This phrase, used in legislation as wide ranging as the Child Support Act 1991, the Housing Act 1996 and the Mobile Homes Act 1983, is consistently given a heterosexual interpretation. The Law Commission's proposed reform of the Fatal Accidents Act provides a possibility for homosexual recognition. Section 2(2)(c) states that 'any person of the same gender as the deceased who has lived with the deceased for such a period in a relationship equivalent to that described in paragraph (b) [i.e. 2 years]' will obtain locus standi to bring a claim. If this provision is enacted, it will for the first time in England result in the same interpretation being given to equivalent homosexual and heterosexual cohabitation, as long as the above criteria are satisfied.

Under the Family Law Act 1996, both entitled and non-entitled applicants may seek an occupation order containing one of a number of specified provisions. Under section 36 a cohabitant or former cohabitant with no existing rights to occupy may apply for such an order. However, in accordance with section 62(1)(a) these rights are restricted to couples who live 'as husband and wife' and thus, at the moment, given a heterosexual interpretation.

§ 3. Historical Overview of Dutch Legislation

Waaldijk proposes that countries advance upon a similar standard sequence of legislative steps in an attempt to achieve full equality. Initial decriminalization of homosexuality is followed by equalization in the age of consent, after which specific anti-discrimination legislation is passed (primarily in employment) before countries finally begin to regulate partnerships. The move by the Dutch legislature to permit same-sex marriage cannot be analyzed until one examines the historical precursors to such legislation.

13. Schedule 1, Part I.
15. Section 5.
18. Section 3(1)(a).
19. An occupation order decides who should live in a home after there has been violence or harassment. For example, the court can order a person to leave the home or only live in a particular part of the home, allow someone back into the home, or exclude a person from a specific area around the home.
20. Section 33(1)(b).
Although the Netherlands was one of the first Western European countries to legalize homosexual acts between consenting adults, the impetus for such legislation actually came from France.\textsuperscript{23} Even though the French detested the men they called 'pederasts', the French legal doctrine that a man is free to do whatever he wishes so long as he does not harm anyone else, led authorities to decriminalize private homosexual activity between consenting adults.\textsuperscript{24} It was the integration of the penal code into the Napoleonic Empire that resulted in the decriminalization of homosexuality in Belgium and Luxembourg in 1792, the Netherlands in 1811,\textsuperscript{25} and Spain in 1822.\textsuperscript{26}

Nonetheless, this wave of decriminalization did not prevent homophobic sentiments. In 1911 the Netherlands raised the age of consent\textsuperscript{27} through a process known as 'semi re-criminalization'.\textsuperscript{28} Yet there was little legal development in this area until the latter half of the twentieth century. In 1971 the Netherlands became the first European State to equalize the age of consent, through the repeal of Article 248\textsuperscript{6} of the Penal Code.\textsuperscript{29} The importance of this step cannot be underestimated, for it is here that one can begin to see the emergence of the Netherlands as a forceful proponent for the advancement of homosexual rights. Indeed from this moment onwards 'most other European countries have followed the example of the Netherlands'.\textsuperscript{30}

After the insertion of the words 'or on any ground whatsoever'\textsuperscript{31} in 1983, the Dutch Constitution has implicitly prohibited discrimination on grounds of homosexuality. This prohibition was further enhanced with subsequent specific anti-discrimination legislation incorporated into the criminal law in 1992 and more generally in 1994.\textsuperscript{32} Only Norway, Sweden and Denmark prohibited homosexual discrimination earlier.\textsuperscript{33} In 2001 more than twelve European countries had enacted anti-discrimination measures. In all of these countries, with the exception of Ireland, decriminalization had occurred at least nine years before the enactment of anti-discrimination provisions. And, with the exception of Ireland, Portugal and Finland, these countries had established equal ages of consent at least three years prior.\textsuperscript{34} So one might conclude that there is indeed a strong sequential link between the steps of decriminalization and anti-discrimination.

\begin{itemize}
\item French Declaration of Rights of Man 1791, exported in Napoleonic Penal Code 1810.
\item Reflecting the Enlightenment Philosophy.
\item M. Salden, 'The Dutch Penal Law and Homosexual Conduct', 11 Journal of Homosexuality (1986), 155.
\item H. Graupner, Sexualität, Jugendabsicht und Menschenrecht, (Teil 2, P Lang, 1997), 665-666.
\item Ibid., 404.
\item 'Vervolgens was Nederland in 1971 het eerste land waar de discriminerende leeftijdsgrens weer werd afgeschaft', in H. Lenter et al., De Familie Geregeld? (Koninklijke Vermande, 2000), 123.
\item 'inmiddels hebben de meeste Europese landen dat voorbeeld gevolgd', in H. Lenter et al., De Familie Geregeld?, 123.
\item 'of op welke grond dan ook', in Artikel 1 van de Grondwet.
\item Norway (1981), Sweden (1987) and Denmark (1987). However, these prohibitions related only to goods and services. Discrimination based on employment was later prohibited in 1996-7 in Denmark and 1999 in Sweden.
\end{itemize}
§ 4. Partnership Legislation in the Netherlands

A. BACKGROUND TO REFORM

The removal of rules debasing the position of homosexuals in society and a range of social developments created an arena suitable for the discussion of laws related to social partnership. During the 1960s the escalating number of childless, unmarried couples facilitated the increasing social acceptance of extra-marital cohabitation. As homosexuality itself was no longer seen as deviant, not only did heterosexual extra-marital cohabitation become more common, but homosexual relationships also became more acceptable. Furthermore marriage itself was no longer considered to be concluded for life and the divorce rate in the Netherlands increased to one in three of all marriages. An important international development also took root. The European Court of Human Rights recognized that family life, as laid down in article 8 of the European Convention, related not only to marital family life but also to de facto family life. This recognition was not really a social change but recognition of the aforementioned developments.

These developments were reproduced across the Western world and culminated in the introduction of homosexual registration schemes throughout Scandinavia. In 1989 Denmark introduced an innovative legal regime restricted to couples of the same sex: registered partnership. This was later copied in Norway, Sweden and Iceland. In 1998 the Netherlands followed suit and enacted partnership legislation of its own.

The legal background to such legislative steps was not smooth. The Hoge Raad (Dutch Supreme Court) decided in 1990 that a marriage between same-sex couples was impossible. It held that it was not discriminatory to deny homosexuals the possibility of marriage, but made no ruling on whether the denial of certain legal effects of marriage was discriminatory. The court suggested action by the legislature, which was duly heeded and led to the formation of the First Kortmann Committee. The Committee reported in 1991 that a registration system outside of marriage should be instituted for homosexual and

37. Ibid.
41. Lov nr. 40 af 30-04-93.
42. Lag 1994:1117.
43. Number 87, 12-06-1996.
heterosexual couples, as well as couples within the prohibited degrees of marriage. However
the Bill submitted to Parliament in 1994 did not provide for the registration of heterosexu-
als.46 In view of an influential memorandum published in September 1995,47 the
possibility of registering was again opened to both heterosexual and homosexual couples
(although not to couples within the prohibited degrees). It was hoped that this altera-
tion would meet complaints raised principally from the Dutch Homosexual Movement (COC)
that registered partnership was in essence a second-class marriage.48

The pressure to allow homosexuals to marry in the same manner as heterosexuals intensified
and led in April 1996 to the adoption of non-binding resolutions which demanded the
introduction of same-sex marriage.49 These resolutions in turn led to the appointment on 28
May 1996 of the Second Kortmann Committee to investigate whether marriage should be
made available to homosexuals.50 In the meantime, passage of the Registered Partnership
Bill continued and was eventually enacted in 1997.51

B. THE ACT ON REGISTERED PARTNERSHIP

There are two types of requirement that must be met before registration can be covenanted.
The first consists of special provisions for the registration of a partnership, while the second
group embodies the normal rules that also apply to marriage.

- one partner must be a Dutch citizen or be in possession of a valid residence permit;52
- registration is allowed only with one person at the same time;53
- only two persons, regardless of their sex, can conclude a registered partnership;54
- partnership cannot be registered when one of the partners is still married;55
- the age of consent for marriage and registered partnership is 18;56
- no person who is incapable of determining his or her free will or of understanding the
  meaning of the statement, is allowed to be married or registered;57
- registration is not allowed for people who are relatives in the descending or ascending
  line, or brother and sister.58

    23,761 nr. 7, 10.
    4883-4883.
50. C. Forde, ‘National Report on The Netherlands’, (15.03.1999, Den Haag, Fifth European Conference on
    Family Law), 9.
51. Staatsblad, 1997, 324 tot wijziging van boek 1 van het Burgerlijk Wetboek en van het wetboek
    rechtsvordering in verband met opneming daarin van bepalingen voor het geregistreerd partnership.
52. Article 1:80a §1 and 2: Nordic laws require nationality.
53. Article 1:80a §3.
54. Article 1:80a §3. Nordic states only allow homosexual registration.
56. Articles 1:80a §7, 1:31 §1.
57. Articles 1:80a §7, 1:32.
One of the most significant differences between the two institutions is evident in the technique used to dissolve the partnership. Although many of the procedures to dissolve a marriage are also available to registered partnerships, the opportunity to end a registered partnership solely on the basis of mutual agreement, without having to appear before a judge, is one which is not available to spouses. This declaration must state that there has been an irretrievable breakdown of the partnership and that the parties wish to terminate. The agreement, which needs to be signed by a lawyer or notary, is subsequently registered in the civil status register at which point the registered partnership is brought to an end. This is important if one notes the fact that a marriage can now be converted into a registered partnership by virtue of article 1:77a of the Dutch Civil Code. This now means that the quickest method of bringing a marriage to an end is through the use of this provision.

The Registered Partnership Adjustment Act effected changes in more than a hundred existing statutes, which equated the notion of registered partnership with the institution of marriage. The two institutions are treated exactly the same with respect to the public sector (i.e. taxation and social security) and are effectively the same for private sector issues. Other effects are, inter alia, that the partners have obligations of fidelity, aid and assistance to one another, each partner may use each other’s name, liability for debts concerned with the household are to be shared, and the same inheritance rights apply. However, making registered partnership a clone of marriage was a step too far even for the Dutch Government and so full equality was not realized. There remain a number of distinct differences between the two systems of partnership recognition.

The first area of variance relates to parenting. This area is complex, intricate and has provided one of the most controversial and debated aspects of the registration legislation. When the Registered Partnership Act was enacted, it was deemed a step too far to also allow a lesbian partner equal rights over a child born within the registration, and as a consequence the paternity rule of articles 1:199(a) and (b) still only applied to married husbands. Nevertheless through the Shared Custody and Guardianship Act 1997 a child’s biological parent was able to share custody with another person who was not the child’s parent. However, as a consequence of a recent enactment by the Dutch Parliament, the lesbian partner of a child’s mother will, by virtue of the birth of the child during a registered partnership, have a legal relationship with the child, as if the child was born within marriage. This enactment will equally apply to children born within a lesbian marriage and

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59. Article 1:80c(c).
61. Article 1:80b.
63. Article 1:9.
64. Article 4:879a.
also within a heterosexual registered partnership. The registered partner will not be deemed to be 'the father', but will have an equal share in the parental authority over the child and in the maintenance duties towards the child. The maintenance duties owed by married spouses towards their stepchildren do not apply to registered partners. 67 However, for purposes of tax law all children are regarded as being children of the registered partner. 68

Secondly, registered partners do not have the same immigration rights as married couples. However, a foreigner without a 'residence entitlement' is not allowed to take part in a registered partnership anyway. As yet there are few rules as to what exactly amounts to a 'residence entitlement' 69 mainly because the consequences of registered partnership for immigration law have been introduced through a number of departmental circulars. 70

The final difference between registered partnership and marriage relates to pensions, whereby the surviving registered partner will be entitled to a pension, but that pension may be much smaller than that paid out to a widow or widower. 71 General fiscal legislation provides that statutory provisions that attach consequences to the conclusion, existence and termination of marriage are equally applicable to registered partnerships. 72

The Registered Partnership Act came into force on 1 January 1998. Since that date there have been over 10,000 registrations: 3,105 female-female, 3,546 male-male and 4,986 malefemale. 73 In comparison to the four Nordic countries with partnership legislation, the uptake in the Netherlands has been more substantial with an average frequency 74 of eighteen male-male registrations in the first eighteen months compared with only seven in Iceland and Norway and six in Sweden. 75 In a recent study of registered partnership in The Netherlands, Scherf has noted certain trends in relation to the length of the pre-existing relationship prior to registration and the reasons for entering into the agreement. 76 However, due to the small numbers involved in the registration process so far, the analysis of the data has proved to be of little statistical value.

68. Article 2, General Act on National Taxes, amended by the Adjustment Act Registered Partnership.
70. Vreendelingencirculaire, (02.11.1998).
71. Article 2(c) Pensions Funds Act, inserted by the Adjustment Act Registered Partnership.
74. Number of registrations per year per 100,000 inhabitants.
§ 5. Same-sex Marriage in the Netherlands

Homosexual marriage has never been possible in the Netherlands save for some eighteenth century ‘gay contracts of marriage’. It was evident by 1997 that almost all the rights open to homosexuals and heterosexuals were identical. However, this fact did not silence the call for same-sex marriage because a meaningful distinction remained – marriage itself was heterosexual. The introduction of registered partnership served to highlight the legal diversity between homosexual registration and heterosexual marriage. The perceived inequality in social status between the two institutions prevented registered partnership from becoming a homosexual version of marriage. Calls for full equality were strengthened with the publication of the Second Kortmann Committee Report only a few months after the enactment of the Registered Partnership Act.

The Committee was divided on the question of allowing homosexuals to marry. All members were, however, agreed that no more than two institutions should co-exist. Besides the institution of marriage there should either be registered partnership or a modified form of marriage for which same-sex partners would be eligible. The majority of the Committee opted for the latter, allowing a new form of marriage with no legal effects regarding the parentage of children. The minority saw no indication of discrimination in the retention of registered partnership, since they viewed heterosexual and homosexual partnerships as ‘different but equal’.

On the 6 February 1998, the Cabinet endorsed the minority’s view. However, after the general election in May and the subsequent renewal of the Partij van de Arbeid (Labour Party), Volkspartij voor Vrijheid en Democratie (People’s Party for Freedom and Democracy) and Democrat ‘66 (Democrats ‘66) coalition, with the notable absence of the Christen Democratisc Appel (Christian Democratic Appeal), an agreement was reached that the marriage laws would be amended. This would enable homosexuals to marry in accordance with the recommendation of the majority of the Committee.

The interest of heterosexual couples in registered partnership indicated that there was, at least socially, a significant difference between the two institutions. According to Scherf’s survey the reasons given by heterosexual couples for preferring partnership to marriage, not only include ‘aversion to marriage as a traditional institution’ but also that ‘registered
partnership is less binding than marriage’ and that it can be arranged ‘more quickly and at a lesser cost’.82

On 8 July 1999 two proposed laws were submitted to the Tweede Kamer, one concerning the opening up of same-sex marriage83 and the other concerning the opening up of adoption to same-sex couples.84 Both bills were enacted on 14 January 2001,85 after gaining Royal Assent on 21 December 2000. The law became effective on the 1 April 2001, after the Same Sex Marriage and Adoption Adjustment Act removed the last political obstacles.86 In the first half-year nearly 2,000 such unions have been celebrated.87

§ 6. English Legal Situation

In 1997 the Stonewall Group launched its Equality 2000 campaign with the ambitious target of full equality for homosexual Britons by the year 2000.88 With a distinct lack of any coherent anti-discrimination legislation, a furious debate over the equalization of the age of consent89 and a current battle between the UK and its overseas territories over the equalization of homosexuality,90 it would seem that these aims are far from being achieved.

The situation is, however, changing. The Government has committed itself to broad principles of equality emphatically underpinned by the adoption of the Human Rights Act 1998. This Act offers a glimmer of hope for homosexuals in England & Wales, as does the inclusion of a general ‘equality clause’ into the Northern Ireland peace agreement.91 A similar structure will be adopted here as in previous sections. Dealing first with the decriminalization of homosexuality, the equalization of the age of consent and the introduction of anti-discrimination legislation before finally dealing with the issue of partnership recognition and marriage.

A. DECriminalization of Homosexuality

Before 1885 there had not been any specifically homosexual offences in English law (what the law called ‘buggery’ had been both a heterosexual and homosexual offence since

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82. Y. Scherf, Registered Partnership in The Netherlands, 21.
86. Staatsblad, 2001, 128 and 145.
89. HL Debate volume 619 columns 9-63 (13.11.2000).
91. Public Government bodies in Northern Ireland will as a result of this peace agreement be committed to the promotion of equality in relation to various forms of discrimination, including sexual orientation, and to the establishment of a Human Rights Commission (the first enforcement agency in UK with a duty to address homosexual discrimination).
For a number of years in the late nineteenth century the legislature found it difficult to decide upon a term to describe such behaviour and used phrases such as 'the abominable crime', 'an unnatural offence', and 'the infamous crime'. In 1885, it became a criminal offence for a man to commit an act of 'gross indecency' with another man, whether in public or in private. The offence was later consolidated in the Sexual Offences Act 1956\(^\text{97}\) (a Bill debated in the House of Commons for only three minutes).\(^\text{98}\) Decriminalization arrived in the form of the Sexual Offences Act 1967 which provided that two consenting men aged 21 or over were permitted to have anal sex as long as it was done in private.\(^\text{99}\) Similar statutes were passed in Scotland in 1980\(^\text{100}\) and Northern Ireland in 1982.\(^\text{101}\)

In a recent case seven men were convicted of gross indecency for consensual sex in their own homes on the basis that there were more than two people present.\(^\text{102}\) In a subsequent case police prosecuted five men under the Sexual Offences Act 1956. Proof of the crime of group gay sex came to light through video evidence seized during a raid on the home of one of the men. All the men were consenting adults, the activity took place in private and there was no suggestion that the videos would end up in the public domain. One of the men, who was convicted of gross indecency and given a two-year conditional discharge, appealed to the European Court of Human Rights. It was decided that the police action had violated fundamental principles by 'an interference with the applicant’s right to respect for a private family life' protected under Article 8 of the European Convention on Human Rights.\(^\text{103}\) This ruling now means that the 'no more than two persons rule' will have to be redrafted by the Government.

Although the criminalization of homosexuality has ceased, some associated offences remain, including solicitation 'in a public place for immoral purposes'\(^\text{104}\) (124 males were convicted for this offence in 1993).\(^\text{105}\)

**B. EQUALIZATION OF THE AGE OF CONSENT**

In 1994 an attempt to equalize the age of consent at sixteen was defeated in the House of Commons.\(^\text{106}\) Nevertheless, the age of consent was reduced to eighteen by section 145

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92. 25 Hen 8 c.6.
93. Section 61, Offences Against the Person Act 1861.
94. Ibid. Section 62.
95. Section 11, Criminal Law Amendment Act 1885.
96. Ibid.
98. HC Debate columns 1750-1751 (06.07.1956).
99. Section 1, Sexual Offences 1967.
100. Section 80, Criminal Justice (Scotland) Act 1980.
102. For more information see <http://www.stonewall.org.uk>.
104. Section 32, Sexual Offences Act 1956.

there is no objective and reasonable justification for the maintenance of a higher minimum age of consent to male homosexual, than to heterosexual acts and that the application discloses discriminatory treatment in the exercise of the applicant’s right to respect for private life under Article 8 of the Convention.\(^\text{107}\)

The discriminatory age of consent was further criticized by the European Parliament in a resolution adopted initially by the Committee on Citizens’ Freedoms and Rights and subsequently by the Parliament as a whole.\(^\text{108}\) In response, the House of Commons introduced the Sexual Offences (Amendment) Bill on 28 January 2000 with the aim of equalizing the age of consent at sixteen.\(^\text{109}\) It received three consecutive defeats at the hands of the House of Lords, before the House of Commons used the power invested in it by the Parliament Act 1911 and enacted the law on 30 November 2000.\(^\text{110}\)

C. FREEDOM OF EXPRESSION

The sale, distribution, possession, importation and public display of sexually explicit material is governed by the Obscene Publications Act 1959. This makes it an offence to do anything the effect of which is ‘to deprave and corrupt persons who are likely to read, see or hear it’.\(^\text{111}\) Juries have in more recent times shown a greater degree of tolerance but it is still the case that homosexual material is more likely to be affected than the heterosexual equivalent.\(^\text{112}\)

Section 28 of the Local Government Act 1988 provides that it is illegal for local authorities to ‘intentionally promote homosexuality’, publish material with the ‘intention of promoting homosexuality’ or to promote the teaching in schools of ‘the acceptance of homosexuality as a pretended family relationship’. In October 1999 the Government announced proposals to repeal the law, which were later rejected by the House of Lords in February 2000. Nonetheless, in June 2000 the Scottish Parliament repealed the section.\(^\text{113}\) In response to the Government’s proposed repeal, Kent and Surrey County Councils banned the promotion of homosexuality in all of their schools.

\(\text{→} \quad \text{A. Barlow, Advising Guy and Lesbian Clients, (Butterworths, 1999), 37.}\)
\(\text{107. Sutherland v UK (01.07.1997) No. 25186/94, §67.}\)
\(\text{109. 17 in Northern Ireland.}\)
\(\text{110. Sexual Offences (Amendment) Act 2000.}\)
\(\text{111. Sections 1 and 2.}\)
\(\text{112. D. West and R. Green, Sociological Control of Homosexuality, (Plenum Press, 1997), 65.}\)
\(\text{113. In a privately organized referendum on section 28 in Scotland, 86.6\% of the voters objected to the repeal of section 28 (<http://news.bb.co.uk/b/uk_politics/newaid_848000/848699.stm>}).}\)
D. ANTI-DISCRIMINATION LEGISLATION: GENERALLY

There is currently no legislation that furnishes protection against discrimination on the grounds of sexual orientation. Nevertheless, attempts have been made to amend current anti-discrimination legislation to include sexual orientation. In May 1996 the Sexual Orientation Discrimination Bill, amending section 3 of the Sex Discrimination Act 1975 and section 1(3) of the Equal Pay Act 1970 passed through all stages in the House of Lords, but failed to achieve a majority in the House of Commons due to the Conservative party view that it was 'neither necessary nor desirable'.

E. ANTI-DISCRIMINATION LEGISLATION: EMPLOYMENT

Workers who are dismissed by an employer after more than one-year employment can bring a complaint of unfair dismissal to an employment tribunal with a right of appeal to the Employment Appeals Tribunal. Decisions of this tribunal have established precedents that it can be reasonable for homosexuals to be dismissed because of public prejudice, the prejudice of colleagues or because their job requires them to work with children. Although many of the relevant cases date from over twenty years ago, they have not yet been overruled. Trade Unions, on the other hand, have increasingly recognized the need to address homosexual equality, and some voluntary anti-discrimination policies and practices adopted by a wide range of employers have been a result of trade union initiatives.

In September 1999 two rulings of the European Court of Human Rights deemed that an outright ban on homosexuals in the armed services was discriminatory. On 12 January 2000, the Secretary of State for Defence told parliament 'we have decided that it is right that the existing ban should be lifted.' A study conducted by the military itself concluded that the removal of the ban had had 'no discernible impact' either positive or negative.

F. PARTNERSHIP RECOGNITION

There has been a trend in legislation and social policy towards broader recognition of cohabiting couples who live 'as husband and wife', but this trend has generally not been seen in relation to same-sex couples. Homosexual partners face discrimination in many

114. HL Debate volume 571 column 1731 (01.05.1996).
120. See <http://dailynews.yahoo.com/b/po/20001117/co/20001117001.html> (this site existed as of 17 November 2001).
areas of their lives, some of which is also experienced by unmarried heterosexual couples.\textsuperscript{123}

There are several areas, however, where limited recognition of homosexual couples is evident.\textsuperscript{124}

1. **Immigration**

Under a new Government policy announced in October 1997, a same-sex partner can for the first time, subject to certain conditions, be granted permission to remain in the UK.\textsuperscript{125} Until June 1999 the period of cohabitation required had been four years, but by a concession this has been reduced to two.\textsuperscript{126} Recent cases have on the other hand shown the courts’ reluctance to allow homosexuals asylum in the UK on the basis of perceived fear of homosexual persecution.\textsuperscript{127}

2. **Property Law**

Life insurance is required for most kinds of mortgage and men who are perceived as possibly homosexual are usually required to take an HIV test before being provided with cover. Consequently, they are required to pay a higher premium on the grounds that they are members of a ‘high risk group’.

The absence of any legal protection against sexual orientation discrimination permits providers of services, such as housing, to discriminate freely. Public housing provision is largely restricted to married couples and people with children. Married and unmarried heterosexual partners have the right to succeed to a local authority or private sector secured tenancy on the death of the tenant partner. In Fitzpatrick v Sterling Housing Association\textsuperscript{128} the House of Lords permitted a homosexual couple to also fall within the definition in the Rent Acts, reversing the ruling of the Court of Appeal, which had held 2:1 in favour of non-recognition. However, homosexuals are still not regarded as members of the family for the purposes of public sector tenancies.\textsuperscript{129}

3. **Pensions and Fringe Benefits**

All major statutory public sector pension schemes discriminate against unmarried partners. All private sector pension schemes, on the other hand, must conform to Inland Revenue


\textsuperscript{124} In Scotland, the Scottish Parliament has recently passed the Adults with Incapacity (Scotland) Act 2000. Section 87(2)(b) provides express statutory recognition of same-sex partnerships for the first time in the UK, although this provision has application only in Scotland.

\textsuperscript{125} HC Debate volume 336 columns 398-352 (16.06.1997).

\textsuperscript{126} Immigration Rules 2000, §595 – 595.

\textsuperscript{127} *R (on application of Rogman) v Special Adjudicator* [2000] All ER (D) 1634.

\textsuperscript{128} [1999] 4 All ER 705.

\textsuperscript{129} *Harrogate BC v Simpson* [1986] 2 FLR 91.
rules. In May 1996 the Inland Revenue issued a Practice Note which clearly stated that survivors' benefits could be payable to unmarried partners, including same-sex partners.\textsuperscript{130}

Employers who provide fringe benefits to partners may, and often do, refuse to provide the same benefits to same-sex partners. The legality of this practice was endorsed when Lisa Grant referred her case to the ECJ on whether her employer was able to refuse the benefit of free travel to her lesbian partner.\textsuperscript{131} The ECJ held that European law did not prohibit employment discrimination based on sexual orientation. However, at the end of the judgment it was indicated that this decision might now be different under the new Article 13 EC.

4. Children and Adoption

Although it has been held that a homosexual should not be prevented from adopting as an individual under section 15(1) Adoption Act 1976,\textsuperscript{132} homosexuals are still prevented from submitting a joint application.\textsuperscript{133} The previous practice in Scotland of the Official Solicitor insisting that homosexual applicants see a psychiatrist has now also been stopped.\textsuperscript{134}

Although attempts to explicitly prevent lesbians and single women having access to donor insemination services were defeated, the Human Fertilisation and Embryology Act 1990 contains provision that clinics are not allowed to provide donor insemination services without taking into account 'the welfare of any child who may be born as a result, including the need of that child for a father'.\textsuperscript{135} This provision obviously has a detrimental effect on an application by a lesbian.

5. Specific Partnership Legislation

The recent move by the Greater London Authority to create a Partnership register has fuelled the debate as to whether statutory partnership recognition is needed in England. The register, which can be signed by both homosexual and heterosexual couples, will have no legal consequences but is the 'first step' on the road to full equality.\textsuperscript{136}

On 24 October 2001, Jane Griffiths (Member of Parliament for Reading East) sought the leave of Parliament to introduce a bill that would allow any couple, homosexual or heterosexual, to register their relationship. The House approved the motion, introduced under the Ten Minute Rule in which a Member of Parliament is allowed to deliver a speech

\textsuperscript{130} J. Lewis, \textit{Equality for Lesbians and Gay Men}, 7.

\textsuperscript{131} Case C-249/96, Grant v South West Trains [1998] ECR 1-621.

\textsuperscript{132} Re W (A Minor) (Adoption: Homosexual Adopter) [1998] 2 Fam 58.

\textsuperscript{133} Section 14 (1A).

\textsuperscript{134} Re W [1997] 2 SLR 406.

\textsuperscript{135} Section 13.

\textsuperscript{136} Angela Mason, executive director of Stonewall, Stonewall Press Release, (05.09.2001).
lasting ten minutes in support of a proposal.\textsuperscript{137} The bill will now proceed to a second reading on 10 May 2002.\textsuperscript{138} Although there is only a small chance that the bill will become law, as with the majority of Ten Minute Bills, the tabling of such a motion deserves mention here.\textsuperscript{139}

As well as this proposal in the House of Commons, Lord Lester of Herne Hill also introduced a bill in the House of Lords early this year. However, it has now been decided not to proceed with the bill after its successful second reading in January of this year in order to allow the Government to complete an inter-departmental review of civil partnerships.\textsuperscript{140}

After this report has been completed, hopefully by the end of this summer, Lord Lester hopes to reintroduce the bill, potentially in an amended form and with Governmental support, or to press for the establishment of a select committee on the subject.\textsuperscript{141}

6. Marriage

According to section 11(c) Matrimonial Causes Act 1973, a marriage is void unless consecrated between one man and one woman. This section has created problems for the courts, not just in the area of homosexuals, but also with transsexuals where the courts have continually regarded the gender of a person as that deemed at birth.\textsuperscript{142}

§ 7. Road to reform: England and Wales

A. HUMAN RIGHTS ACT 1998

The Human Rights Act came into force on 2 October 2000, bringing with it an array of possible denunciations of current discriminatory legislation. Academics remain divided as to the legal consequences of its enactment, but as Jack Straw’s (former Home Secretary) own advisory committee suggested that same-sex marriage was ‘inevitable’, the possible implications cannot be underestimated.\textsuperscript{143} The Act provides recourse for individuals against public authorities\textsuperscript{144} but does not create a new cause of action as between purely private bodies. However, in all cases, whatever the nature of the parties, the court will be under a statutory duty to interpret the law to accord with the European Convention on Human Rights.\textsuperscript{145} The most important feature of the legislation is the interpretative obligation enshrined in section 3. The courts are now under an express statutory duty to interpret legislation ‘so far as it is possible to do so’ in accordance with the Convention. This will thus

\textsuperscript{137} The vote cast was 179 votes for to 59 votes against.
\textsuperscript{138} HC Debate volume 373 column 327 (24.10.2001) and HC Debate volume 375 column 640 (23.11.2001).
\textsuperscript{140} HL Debate volume 630 columns 1691-1746 (25.01.2002).
\textsuperscript{141} Personal Communication from the Senior Parliamentary Legal Officer to Lord Lester of Herne Hill, letter dated 8 April 2002.
\textsuperscript{142} Corbett v Corbett [1971] P 83.
\textsuperscript{143} M. MacLeod, chief executive of the National Family and Parenting Institute, (Daily Telegraph, 24.09.2000).
\textsuperscript{144} Section 6(1).
\textsuperscript{145} Section 2(1).
affect all cases where a Convention right is at stake, whether criminal or civil, private or public, against private legal persons or public authorities.

As the Act is extremely weak with regard to primary legislation, and most of the existing discrimination is enshrined in statutory provisions, it would seem that the opportunity for reform of these provisions is remote. In cases where primary legislation clearly discriminates on the basis of sexual orientation and a non-discriminatory interpretation is not possible, section 4 authorizes a court to make a 'declaration of incompatibility'. This declaration, which has no legally binding effect,146 allows for the continued infringement of a Convention right, unless and until the Government chooses to take action. Although the possibility of non-implementation is low, Jack Straw has said that 'it is possible that the House of Lords could make a declaration that would not be accepted'.147 The question posed is whether a decision of incompatibility in relation to homosexuality would provide such an example.

The Strasbourg method of judicial reasoning will gradually enter into English legal practice as a result of the section 2 obligation that Strasbourg case law must be taken into account. Nonetheless, the Strasbourg case law is only relevant and not binding. Since the Convention is a 'living instrument that must be interpreted in the light of the present day conditions'148 earlier decisions of the Commission (which no longer exists) and Court may need to be reconsidered. There is even a possibility that the English courts might adopt a more liberal interpretation than Strasbourg.149 The most important Convention provisions in relation to homosexual rights are articles 8, 12 and 14.

1. Article 8

This article can only apply if the claim is regarded as falling within the scope of 'private life' or 'family life'. For more than twenty years the European Commission of Human Rights consistently rejected all complaints by homosexuals as 'manifestly ill-founded'.150 For the first time in Dudgeon v UK,151 the European Court of Human Rights held that the criminalization of homosexual acts by consenting adults did affect the private life of the complainants. A decision recently endorsed in X v UK,152 the Court has extended this decision by holding that consensual homosexual sex, even if it falls outside the notion of 'private life' within the complainant's country, falls within the scope of 'private life' as defined by article 8. The Court regarded the existence of legislation prohibiting sex with

146. Section 4(6).
147. HC Debate volume 317 column 1301 (21.10.1998).
149. Fitzpatrick v Sterling Housing Association [1999] 4 All ER 705.
150. C. Forder, 'Civil Law Aspects of Emerging Forms of Registered Partnership', 17.
152. (1997) 24 EHRR 143.
more than one person and the subsequent conviction for gross indecency to be an interference with the applicant's right to private life.\textsuperscript{153}

The Court has now fully accepted that family life exists between cohabiting unmarried heterosexuals.\textsuperscript{154} However, the Commission has consistently held that family life does not exist between stable cohabiting homosexuals. On 24 January 2001, the continued denial of homosexual family life was upheld by an English Court in a refusal to allow a Brazilian to live ‘as a member of the family’ with his gay British partner.\textsuperscript{155} Mr Justice Turner believed there to have been no derogation from the right to respect for family life as was clear under both domestic and European law.

2. Article 12

In \textit{Rees v UK}, where the right of a transsexual to marry was in issue, the Court made a broad statement regarding the right to marry derived from article 12.

In the court’s view the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.\textsuperscript{156}

It has been argued by some commentators, McHale in particular, that article 12 does not actually denote two individual rights: the right to marry and the right to have children, but simply confers a single right, which in simple biological terms excludes homosexuals from the ambit of such a proviso.\textsuperscript{157} It remains to be seen whether this interpretation will now be subject to reevaluation since the adoption of same-sex marriage laws in the Netherlands.

3. Article 14

The crux of article 14 is whether when comparing heterosexuals with homosexuals, one is really speaking of ‘similar situations’. In \textit{Salgueiro v Portugal} the Court for the first time recognized a violation of article 14 in a homosexual application. It was held that the Lisbon Court of Appeal had made a distinction ‘dictated by considerations relating to the sexual orientation of the father’ which could not be tolerated under the Convention.\textsuperscript{158} This decision makes it absolutely clear that the sexual orientation of parties to an action will no longer be cited as a negative influencing factor.

\textsuperscript{155} R (on application of McCollum) v Secretary of State for Home Department [2001] All ER (D) 154.
\textsuperscript{156} (17.10.1996) A-106, §49.
\textsuperscript{157} For more discussion see B. Hoggett, From the Test Tube to the Coffin, (Sweet & Maxwell, 1996), 67.
Article 14 stands as a non-independent provision and can only be invoked when the matters discriminated against relate to matters covered elsewhere in the Convention.\textsuperscript{159} If the trend of restricting article 14 continues, as with \textit{F v Switzerland}\textsuperscript{160} where it was held that a ban on same-sex but not different-sex prostitution could not be challenged, then it would seem the impact of article 14 would be severely limited. Pressure would best be placed on the Government to ratify Protocol Number 12, which allows actions to be brought based solely on an alleged article 14 infringement. Moreover, the Parliamentary Assembly of the Council of Europe supported a proposal by the International Lesbian and Gay Association that sexual orientation should be expressly mentioned in this Protocol. The Assembly stated its belief that ‘the enumeration of grounds in article 14 is, without being exhaustive, meant to list forms of discrimination which it regards as being especially odious, and consequentially sexual orientation should naturally be added’.\textsuperscript{161} It remains to be seen how this will be received after the Council of Ministers’ refusal to adopt the Assembly’s opinion.

\textbf{B. REFORM OF CURRENT LEGISLATION}

The distinct lack of positive Strasbourg case law will be a problem for the courts when dealing with the Human Rights Act. \textit{Salgueiro} provides one of the only positive examples. However, as Commission decisions are neither binding on the European Court of Human Rights or on the UK courts, the possibility for reform of current discriminatory legislation remains.

Even though the buggery, gross indecency and solicitation offences in the Sexual Offences Act 1956 discriminate on grounds of sexual orientation they are found in primary legislation. Thus, the most a UK court is able to do is issue a non-binding section 4 declaration. Another possible impact is on the current section 28 Local Government Act 1988. However, this again faces the primary legislation hurdle but furthermore faces the problem of finding a suitable ‘victim’. It is often difficult to prove a causal link between section 28 and its harmful effects. Perhaps the greatest possibility for reform arises in the arena of anti-discrimination legislation. There is currently no primary legislation in areas such as education, housing, or employment and therefore the courts have wider powers than the non-binding section 4 declaration. The removal of the ban on homosexuals in the armed forces indicates the possible progress that may be made in the aforementioned areas.

\textquote{Wintemute suggests that the tangible effect of the Act in the private sector will be small, because employers will adopt voluntary codes of practice in order not to fall foul of possible actions thus removing the need for cases to go to court.}\textsuperscript{162} Many public authorities and even private bodies might be persuaded to change their policies voluntarily, noting the

\textsuperscript{159} \textit{Ince v Austria} (28.10.1987) A-126, §36.
\textsuperscript{160} (10.03.1998) No. 11680/95.
\textsuperscript{161} Opinion Number 216 (2000) on Protocol No. 12.
\textsuperscript{162} R. Wintemute, \textit{Lesbian and Gay Inequality} 2000, 12.
progressive attitude adopted by the ECJ and the recognition of homosexual rights under articles 8 and 14 by the European Commission and Court of Human Rights.

Overall the impact of the Human Rights Act may be insignificant. Claims based on sexual orientation will remain weaker than equivalent claims based on sexual or racial discrimination due to the non-binding nature of declarations and the Act's relatively weak stance in relation to primary legislation. For headway to be made via the legislature, executive or judiciary, not only must the courts adopt an ambitious stance with regard to the Human Rights Act, but Parliament also needs to take heed of declarations of incompatibility proffered by the courts. The House of Lords' willingness to modernize outdated notions of the family (as indicated in Fitzpatrick) is a sign of such ambition. However, it was noted by the House of Lords in that case that Strasbourg has refused to recognize homosexual family life and restricted the rights conferred by article 12 to heterosexuals. Bainham proposes that the majority decision may be seen as corroboration for the sentiments of 'value pluralism' and recognition that equal worth must be granted to varying forms of intimate relationships. As such the decision may emerge as one with greater emphasis on the human rights aspects of homosexuality than the minority would have wished.

The recent Government announcement to extend the current criminal injury compensation scheme to homosexuals may introduce the first statutory recognition of homosexual couples into English legislation. Two recent Law Commission statutory reform proposals may, if adopted, also place same-sex couples in the same legal position as unmarried heterosexual couples. The Claims for Wrongful Death Report and the Liability for Psychiatric Illness Report both include clauses providing that same-sex couples who have lived together for a period equivalent to protected heterosexual couples, i.e. 2 years, will be granted equal rights.

§ 8. Road to Reform: European Union

In 1958 only a few scattered provisions relating to social policy were deemed necessary to enhance the primary economic goals of the EEC. The endorsement of a Social Action Programme, the impetus for a single internal market and the subsequent passing of the Single European Act led to the identification of a social dimension to the EC. This culminated in 1989 with the adoption of a Community Charter of the Fundamental Social Rights of Workers. This, even though opposed by the UK at Maastricht, formed the basis of

163. Fitzpatrick v Sterling Housing Association [1999] 4 All ER 705.
164. Article 8 ECHR.
168. Law Commission Report, Number 263 (available on http://www.lawcom.gov.uk/).
169. Law Commission Report, Number 249 (available on http://www.lawcom.gov.uk/).
an Agreement on Social Policy, which was annexed to a Protocol to the EC Treaty.\textsuperscript{172} Hence, the process of economic integration has seen a growing recognition of the need for common policies in social as well as economic fields.

Modifications and insertions to the founding treaties, new directives, announcements by all the major institutions and the recent proclamation of a Charter of Fundamental Rights have all paved the way for a Europe much more focused on the social needs of its citizens, including its homosexual citizens. This section proposes to deal with the current swathe of European proposals in the area of sexual orientation.

Legislative changes and judicial decisions at European level have often, as has already been shown in the area of the equalization in the age of consent, been crucially important in initiating a subsequent change in English legislation. This section will centre on the major European initiatives in this field and assess their possible impact upon the English legal system.

A. ARTICLE 13 EC

The adoption of article 13, which contains explicit reference to sexual orientation, allows for the possible enactment of legislation to combat discrimination in a wider range of scenarios than previously endorsed. Nonetheless, there are associated limitations with the provision. Firstly, it is not a general anti-discrimination guarantee. Unlike other areas of the Treaty, the general principles outlined in the first sixteen articles contain no freestanding prohibition of discrimination. They require reference to other treaty rights: in effect they are a guarantee of equality before the law of the Treaty. The lack of direct applicability also ensures an inability for individuals to enforce against Member States.

Article 13 also retains a unanimity requirement, notwithstanding the replacement by the Treaty of Nice of all but ten percent of unanimity provisions with qualified majority voting (QMV).\textsuperscript{171} Seven Member States have not yet enacted anti-discrimination legislation and so the possibility of legislating vis-à-vis article 13 would seem to be remote. A proposition further endorsed by the envisaged expansion at Nice.\textsuperscript{172} If unanimity is difficult to achieve with fifteen states, this will be even more so in a 27-state organisation, especially since of all the twelve candidate states, Slovenia is the only one to have enacted anti-discrimination legislation, and six retain discriminatory ages of consent. Nevertheless, a proposed paragraph 2 to article 13 has also been adopted which would introduce the requirement of QMV in the adoption of support actions to fight discrimination.\textsuperscript{173} Article 13 also provides for consultation with the European Parliament. However, in the recent adoption of Directive

\textsuperscript{170}  UK adopted in 1997.  
\textsuperscript{171}  Treaty of Nice, [OJ] 2001, C-80/1.  
\textsuperscript{172}  Ibid., 71.  
\textsuperscript{173}  Ibid., 22.
2000/78/EC under the auspices of article 13, it played an almost ‘redundant role’ in the negotiation process.\textsuperscript{174}

B. DIRECTIVE 2000/78/EC

Four proposals (two directives, an action programme and a communication) have already been adopted under article 13. By far the most controversial of these were the two directives. The first implements the principle of equal treatment between persons irrespective of racial or ethnic origin\textsuperscript{175} whilst the second establishes a general framework for equal treatment in employment and occupation.\textsuperscript{176} The latter requires national legislatures to implement anti-discrimination legislation on given grounds, including sexual orientation before December 2003. It is said that discrimination on any of the grounds may ‘undermine the achievement’ of EC Treaty objectives, in particular the attainment of ‘economic and social cohesion and solidarity’.\textsuperscript{177}

The substantive proposals prohibit direct and indirect discrimination and harassment based, \textit{inter alia}, on sexual orientation in hiring, promotion, working conditions, vocational training, and participation in organizations of workers, employers and professionals. It is not suggested that this directive will be a stepping-stone towards same-sex marriage recognition in the UK, especially since the directive is ‘without prejudice to national laws on marital status’.\textsuperscript{178} However, its adoption and the subsequent duty imposed upon the Government to ensure anti-discrimination legislation is in force by 2003, adds further support to the idea that the impetus for change in England will stem from Europe rather than as a result of internal pressure.

C. OTHER TREATY PROVISIONS

The interpretation of the word ‘spouse’ in Title III of the Treaty will have to be re-evaluated in light of the Dutch reform. It may be that a uniform Community interpretation is adopted. If so the concept same-sex marriage would be excluded from the scope of the Community competence. According to Regulation 1612/68,\textsuperscript{179} Community nationals entering another Member State under article 39 are entitled to bring their same sex partner to live with them, if and only if the host Member State recognizes similar rights for its own nationals. This regulation offers no recourse to those people who wish to bring their partners into countries, such as England, which have no equivalent provision for their own nationals. Under a new proposal for a European Parliament and Council directive on the right of citizens of the

\textsuperscript{175} 2000/43/EC.
\textsuperscript{176} 2000/78/EC.
\textsuperscript{177} Recital 11.
\textsuperscript{178} Recital 22.
\textsuperscript{179} Article 7(2).
Union and their family members to move and reside freely within the territory of the Member States, it is stated that 'family member' means, as well as the spouse,

the unmarried partner, if the legislation in the host the Member State treats unmarried couples as equivalent to married couples and in accordance with the conditions laid down in any such legislation. 180

Article 4 also lays down the principle of non-discrimination and extends this, in accordance with article 13, to discrimination based upon sexual orientation.

D. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Nice Summit in December 2000 saw the solemn proclamation of a Charter of Fundamental Rights. 181 It has been endorsed by all three major EU institutions, with the Commission perceiving that 'sooner or later it will have to be incorporated into the Treaties'. 182 The Charter itself contains express recognition of the rights to family life, private life 183 and the right to marry and form a family. 184 Article 21 also expressly prohibits discrimination on grounds of, inter alia, sexual orientation. However, article 51(1) restricts its scope to EU institutions and Member States implementing EU law, therefore preventing its application to family and criminal law matters. However, although it will not be able to be used directly against the substantive family law of EU Member States, it might be able to be used to challenge the non-recognition of foreign same-sex partnerships in England.

The Charter’s significance is primarily twofold. Firstly, if incorporated into the founding Treaties, the final arbiter of disputes arising out of the Charter will be the ECJ, thus making decisions binding on the UK. However, even without incorporation, it seems the courts will draw reference from it. Advocate General Tizzano has already acknowledged that although the Charter is not formally binding, it gives 'definitive confirmation' of fundamental rights. 185 Secondly, article 21 is wider than the current 2000/78/EC Directive as it extends anti-discrimination matters to non-employment spheres.

The issues associated with incorporation are complex. Accession by the EU to the European Convention of Human Rights was firmly rejected by the ECI. 186 Nonetheless, the House of Lords has recently supported accession to the Convention, 187 even though it initially rejected

182. EC Press Release, IP/00/1148 (<http://europa.eu.int/comm/justice_home/unit/charte/en /media 02.htm>)
183. Article 7 (cf. ECHR Article 8).
184. Article 9 (cf. ECHR Article 10).
187. HL Select Committee on the EU, 8th Report – EU Charter of Fundamental Rights (24.05.2000).
such proposals.\textsuperscript{188} Incorporation of the Charter will naturally require more discussion and debate, although proponents argue that it could go some way to reducing the democratic deficit in the EU and help towards the creation of a human rights policy.\textsuperscript{189}

E. \textsc{Sex Discrimination Case Law}

As mentioned earlier, Lisa Grant was one of the first to attempt to argue that sexual orientation discrimination fell within the notion of sex discrimination. She pleaded that 'on grounds of sex' within the Sex Discrimination Act 1975 must be read as also meaning 'on grounds of sexual orientation'.\textsuperscript{190} Her alternative argument was that sexual orientation included sex. Neither argument was successful as was later confirmed in \textit{P v S}.\textsuperscript{191} However the Advocate General's opinion in \textit{P v S} appeared to suggest that a general prohibition of discrimination embracing grounds other than sex was already part of the 'great value of equality' embodied within fundamental EU principles.

§ 9. \textsc{Small Change Theory Applied}

In his thesis Waaldijk proposes that any legislative change advancing the recognition and acceptance of homosexuality will only get enacted if that change is either,

(a) perceived as small, or
(b) sufficiently reduced in impact by some accompanying legislative small change that reinforces the condemnation of homosexuality.\textsuperscript{192}

It is evidently clear that the process of homosexual recognition in the Netherlands has been achieved by the application of this formula. Gradual acceptance of one legislative step by the general public and the executive has facilitated progression to the next. The rationalization for continued restriction of rights loses force with the repeal of discriminatory legislation.

For the institution of same-sex marriage to be accepted by the legislature, judiciary and the English population, the standard sequence of steps outlined in previous chapters will probably be followed. But the impetus for change will not come from within the nation, as in the Netherlands, but instead will result from movements on the continent and more specifically from EU institutions and the European Court of Human Rights.

\begin{footnotesize}
\textsuperscript{188} Human Rights Re-examined, 3\textsuperscript{rd} Report 1992-93, HL Paper 10.
\textsuperscript{189} P. Eckhout, \textit{Charter of Fundamental Rights Lecture}, (Centre for European Legal Studies, Cambridge (21.02.2001))
\textsuperscript{190} Case C-249/96, \textit{Grant v South West Trains} [1998] ECR I-621.
\textsuperscript{192} K. Waaldijk, in R. Wintemute (ed.), \textit{Legal Recognition of Same Sex Partnerships}, 440.
\end{footnotesize}
The reasons for this small change approach have, in the Netherlands, been achieved through internal pressure from the legislature and executive. A number of propositions have been forwarded as to why the Netherlands is perceived as a leading advocate of homosexual rights. Waaldijk attributes this perception to the secular nature of the population, a tradition of accommodating all kinds of minorities and the existence of a less direct democratic system due to the absence of referendums and district based elections.193

Although equal rights and social justice for homosexuals have never been high on the political agenda of the EU, a movement towards gradual social cohesion has already been evidenced with the accession to the Social Chapter, the insertion of article 13, the adoption of the Equal Treatment Directive, and the recent signing of a Charter of Fundamental Rights. All these enactments and proposals offer substantial credibility to the argument that England will be forced into change rather than adopting modification internally. Consequently, the adoption of Community wide legislation will have a ‘spillover effect’ into UK law.

It has been argued by many academics that a new *ius commune* is taking shape across Europe.194 *This ius commune*, although far from being comprehensive, does include human rights protection and the equality of men and women. So far this *ius commune* has replaced pre-existing and divergent domestic dispositions with remarkable supranational coherence. Even if a common administrative law in Europe does not yet exist, the tendency towards its creation has already been heralded.

There are two schools of thought as to how the filtration from European-wide to national legislation will transpire. The first is that decisions at Community level, which afford protection against discrimination on the basis of sexual orientation in Community situations, will be extended to purely domestic situations. This movement is particularly striking in the administrative law arena, which has served as a testing ground for the extension of Community law remedies to purely national predicaments. The leading case of * Factortame*195 related to the granting of interim relief for Community rights. This decision was extended to purely domestic rights by the decision in *M v Home Office*.196 Similarly, the right to repayment of unlawfully levied charges under Community law, upheld in 1983,197 was later extended to English law directly in *Woolwich Building Society v IRC*.198

The alternative hypothesis is that the requirement placed upon the UK to enhance protection in one area of discrimination will be extended to all areas of discrimination, thus including sexual orientation. This hypothesis can be illustrated with the aftermath of the decision in

193. Ibid., 439.
196. [1993] 3 WLR 443.
Marshall v Southampton AHA (No 2), where limits were imposed on the compensation women were able to claim for being dismissed in breach of the Equal Treatment Directive. The UK Government was obliged to amend the Sex Discrimination Act 1975. However, consequential parallel amendments in the Race Relations Act 1976 were also enacted.

This convergence towards a single set of policies, remedies and principles has been evident in certain legal fields for some time. This 'spillover' will now transpire in relation to the new sexual orientation provisions. If the Government is required to amend a piece of anti-discrimination legislation unrelated to sexual orientation, it is likely that that amendment will be mirrored in similar sexual orientation legislation, or alternatively if a Community right is upheld at European level, then similar protection will be afforded in domestic situations too.

The equalization of the age of consent serves as a concrete example of this theory. Condemnation from the European Commission of Human Rights provided the impelling force for the Government to change the law. Sixty-six percent of the English population disagreed with the Government's policy, so it is certain that the change in the law has not been regarded as small or insignificant. On the contrary the passage of the legislation was hotly contested, especially in the House of Lords, with some perceiving homosexuality as a 'sad disorder and a handicap', believing that it should 'not be condemned, any more than schizophrenia or a tendency to alcoholism'. The recent section 28 debate also provides an indication that the majority of the English population sees the progressive attitude towards homosexuality as dangerous.

Further evidence of the spillover effect can be found in the recent cases on access to military employment. Denunciation of the rules heralded subsequent changes in the law. Without the express intervention of the European Commission and Court of Human Rights, it is probable that change would not have been implemented. This 'filtration' or 'duplication' of rights from EU to domestic level will also be evidenced in the field of anti-discrimination legislation.

With the adoption of Council Directive 2000/78/EC, the UK will be obliged to enact legislation to grant employment protection to homosexuals; European initiatives once again providing the driving force behind change rather than national proposals. A speculative submission is that the requirement placed upon the Government to afford employment protection may be extended to other areas, including housing, education and health-care. Instead of affording protection to further groups of claimants, as in Marshall, the scope of protection for existing claimants may be extended.

199. [1993] 3 CMLR 293.
201. Public Attitudes to section 28, MORI opinion poll (01.02.2000).
However, full rejection of the small change theory is not appropriate. Perhaps its greatest validity will be in the arena of anti-discrimination legislation, where judges will be more lenient in making minor changes to case law. The monumental leap to same-sex marriage would be unjustified, especially as the courts would be influenced by the absence of same-sex marriage in the EU, apart from the Netherlands and the negative Strasbourg case-law on transsexual marriage. Nonetheless, some measure of recognition of same-sex relationships is not such a large leap. In terms of succession to tenancies, recognition is already provided for in the private sector. It would be but a small step to extend similar rights to the public sector.

§ 10. Conclusions

From Ancient Greece to the EU, the Atlantic to the Pacific, governments, judges and the general public have constantly grappled with ideas of equality and notions of liberty. In many Western states exceptional societal evolution is underway, but such progression is embraced with care. The gradual recognition of the diversity of the human condition and the associated tolerance of that diversity in today’s world, has witnessed the increasing acceptance of homosexuality. Such social development often leads to adaptation of the law. Consequently, if the law is to provide protection and redress for minority groups, surely this protection should also be extended to homosexuals, as the law endeavours to reduce prejudice by discouraging behaviour in which that prejudice finds expression.

The incremental process through which homosexual recognition has been achieved is typical of the Netherlands: legal change initiated by a nation’s own citizens: law for the people being created by the people. As the twenty-first century begins to unravel, surely the time has also arrived for England to endorse the social developments seen across Europe and accept the reality of homosexuality. If protection is afforded to other minority groups, then why should homosexuals remain at a disadvantage?

The small change theory in principle will be evident as England begins to adopt anti-discrimination legislation. Yet, the reasons for its application will not be the same as those in the Netherlands. For change to be perceived as small the population must respect that change. Change in England will not flow as a result of internal pressure, but instead from decisions of the ECJ and ECHR. This will ensure the continued perception of change being embraced as a result of pressure from non-national institutions.

The impact of the recent Dutch legislative move to open up marriage to couples of the same-sex may be seen as a legislative act far removed for the legal turnings of the English judicial system, but the necessary implications upon England cannot and should not be underestimated. Perhaps now the time is ripe for the English legislature to open its eyes to


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the world outside its jurisdiction and look to the developments across Europe (and also the world) and assess whether the time is also right for England to embrace these changes and legislate in the area of homosexual relationships.