

The Charter of Fundamental Rights of the EU and Sexual Orientation

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Introduction

On 7 December 2000, the Presidents of the European Parliament, the Council and the Commission solemnly proclaimed the Charter of Fundamental Rights of the European Union.¹ The impetus for such a Charter had begun many years ago when the European Court of Justice (ECJ) declared that 'fundamental human rights [were] enshrined in the general principles of Community law and protected by the court'² and in June 1999, at the EU Summit in Cologne, delegates highlighted the need to make the 'overriding importance and relevance [of fundamental rights] more visible to the Union's citizens'.³

In the preamble to the Charter, it is stated that:

'it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter'.⁴

The aspiration is, as a consequence, aimed at reaffirming the rights as confirmed under the constitutional traditions and international obligations common to the member states.⁵ The rights themselves include the rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) but go much further and include rights, for example, based on the protection of personal data⁶ and the right to the integrity of the person.⁷

This increase in breadth and strength is unmistakably apparent in the field of anti-discrimination. Article 14 of the European Convention provides the basis of anti-discrimination protection. This Article, however, stands as a non-independent provision and can, therefore, only be invoked when the matters discriminated against relate to issues covered in one of the free-standing, independent Articles.⁸ The impact of Art 21, the anti-discrimination provision of the Charter, may well be, as a consequence, of great significance in view of the fact that the provision is independently enforceable.⁹ Since sexual orientation is included in the specified grounds, the question arises as to how this may affect the current case-law from the ECJ and the European Court of Human Rights (ECHR).

It is proposed to concentrate on three distinct trends apparent at the national, EU and European human rights level. The analysis of these three trends will provide a suitable backdrop for the analysis of the Charter with respect to the issue of homosexuality. The general trend with respect to the

protection offered to homosexuals and their partners seen in the majority of member states will be dealt with first. Since 1989, more than half of the member states have implemented some form of partnership legislation governing the registration and regulation of homosexual non-marital partnerships, as well as, in certain cases, heterosexual non-marital partnerships.¹⁰

The development of human rights case-law will then be examined by taking the jurisprudence of the ECHR. This will hopefully lead to the conclusion that the court is also becoming ever increasingly tolerant towards the plight of homosexuals. Moving onto developments at an EU level will then provide the final piece to the puzzle. Here the situation is more complex with, on the one hand, family law lying outside the scope of competence of the EU, yet, on the other hand, sometimes well within the scope of its competency, for example under the definition of spouse in the free movement of workers.¹¹ This development and growing acceptance that national substantive family law might also need to be brought within the scope of competency of the EU, if the aspiration of an internal market is to be achieved, is an equally important development in this field.¹²

By linking these three strands together through the common viewpoint of the position of homosexuals, it is hoped to be able argue that Art 21 of the Charter may be able to be used, at the very least, to require a possible rethinking of the current case-law at both national and European levels related to homosexuals and homosexuality.

National law

The systematic development of national legislation in the field of laws relating to homosexuals has often been described as a theory of 'small change'.¹³ It supposes that countries first begin with the decriminalisation of homosexuality, before tackling the issue of the equalisation of consent. Once equality is achieved in these two areas, the step to complete anti-discrimination legislation is not that great and, once this has been achieved, countries begin to tackle the sensitive issue of partnership legislation. This can probably best be seen through the use of a couple of examples.

The Netherlands

Although The Netherlands was one of the first Western European countries to legalise homosexual acts between consenting adults, the impetus for such legislation came from France.¹⁴ Even though the French detested the men they called 'pederasts',

French legal doctrine, which reflected the enlightenment philosophy of the time that a man is free to do whatever he wishes so long as he does not harm anyone else, led authorities to remove all criminal laws related to private sexual behaviour between consenting adults. It was due to the integration of these laws in the Napoleonic Empire that homosexuality was decriminalised in Belgium and Luxembourg in 1792, The Netherlands in 1811 and Spain in 1822.¹⁵

Nonetheless, this wave of decriminalisation did not prevent homophobic sentiments. In 1911, The Netherlands raised the age of consent through a process known as 'semi re-criminalisation'.¹⁶ 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 equalise the age of consent, through the repeal of Art 248bis of the Penal Code.¹⁷ 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'.¹⁸

After the insertion of the words 'or on any ground whatsoever' in 1983,¹⁹ 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 1994.²⁰ Only Norway, Sweden and Denmark prohibited homosexual discrimination earlier.²¹

The removal of these rules, which debased the position of homosexuals in society, and a range of other social developments created an arena suitable for the discussion of laws related to social partnership.²² 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.²³ 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.²⁴ An important international development also took root. The ECHR recognised that family life, as laid down in Art 8 of the European Convention, related not only to marital family life but also to de facto family life.²⁵ This recognition was not really a social change but a recognition of the aforementioned developments, as will be discussed later in this article.

These developments were also witnessed in many other Western European countries and culminated in the introduction of homosexual registration schemes throughout Scandinavia. In 1998, The Netherlands followed suit and enacted partnership legislation of its own. However, 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,²⁶ but made no ruling on whether the denial of certain legal effects of marriage was discriminatory.²⁷ 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 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 heterosexuals.²⁸ In view of an influential memorandum published in September 1995,²⁹ 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 alteration would meet complaints raised principally from the Dutch Homosexual Movement (COC) that registered partnership was, in essence, a second-class marriage.³⁰

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.³¹ 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.³² Although the majority opinion in the report suggested the opening up of marriage to homosexuals, the minority opinion was followed by the Government. In the meantime, passage of the Registered Partnership Bill continued and was eventually enacted in 1997.³³ However, after the general election in May 1998, coupled with the subsequent renewal of the Dutch 'purple coalition' government,³⁴ an agreement was reached by the coalition parties that the marriage laws would be amended and the proposals of the majority were followed, leading to the opening up of marriage to couples of the same sex on 1 April 2001.³⁵

England and Wales

A similar trend is also apparent if one studies the situation in England and Wales. Although the entire process began somewhat later in the 1960s, a similar 'small change' trend is also evident. 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 1553).³⁶ 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.³⁷ The offence was later consolidated in the Sexual Offences Act 1956³⁸ (a Bill debated in the House of Commons for only 3 minutes).³⁹ Decriminalisation 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 in private.⁴⁰ Similar statutes were passed in Scotland in 1980⁴¹ and Northern Ireland in 1982.⁴²

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.⁴³ 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 involved 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 2-year conditional discharge, appealed to the ECHR. 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 Art 8 of the European Convention.⁴⁴ This ruling now means that the 'no more than two persons rule' will have to be redrafted by the English Government. Although the criminalisation of homosexuality has ceased, some associated offences remain, including solicitation 'in a public place for immoral purposes'⁴⁵ (124 males were convicted for this offence in 1993).⁴⁶

Until 2001, the UK retained a discriminatory age of consent for sexual activity as between consenting homosexuals and consenting heterosexuals. In 1994, an attempt to equalise the age of consent at 16 was defeated in the House of Commons.⁴⁷ Nevertheless, the age of consent was reduced to 18 by s 145 of the Criminal Justice and Public Order Act 1994. The discriminatory age of consent was deplored by the European Commission of Human Rights⁴⁸ and further criticised 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.⁴⁹ In response, the House of Commons introduced the Sexual Offences (Amendment) Bill on 28 January 2000, with the aim of equalising the age of consent at 16.⁵⁰ 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 2000.⁵¹

With respect to anti-discrimination legislation, there is currently no overreaching policy in all areas. However, under the new Art 13 of the EC Treaty a directive establishing a general framework for equal treatment in employment and occupation has been introduced.⁵² It 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'.⁵³ The substantive proposals prohibit direct and indirect discrimination and harassment based, inter alia, on

sexual orientation in hiring, promotion, working conditions, vocational training, and participation in organisations of workers, employers and professionals.

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, has no legal consequences but is the 'first step' on the road to full equality.⁵⁴ In October 2001, a Bill was introduced to the House of Commons 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 lasting 10 minutes in support of a proposal.⁵⁵ Although the Bill fell through lack of time, the tabling of such a motion indicates the seriousness with which such issues are being handled.⁵⁶

In January 2002, Lord Lester of Herne Hill QC submitted a Bill to the House of Lords for first reading. The Bill received consent for its second reading on 25 January. In the explanatory notes that accompanied the Bill, it is stated that the Bill is:

'designed to remedy the lack of protection for cohabiting couples (whether opposite sex or same sex) in English law and to give them the opportunity to register a civil partnership. This will enable them to live together within a stable and coherent framework of rights and responsibilities.'

Although receiving a lengthy and emotional debate, and subsequent vote of acceptance in the House of Lords, Lord Lester of Herne Hill QC decided to remove the Bill to allow for the Government to consider the proposals. If the Government refuses to take action on the issue then Lord Lester of Herne Hill QC intended to resubmit the Bill in November 2002.⁵⁷

European human rights law

In the field of human rights law, the issue of sexual orientation has long been debated. The best place to witness the changing views of the ECHR as well as the rather stubborn insistence upon out-dated and old-fashioned criteria is by analysis of Arts 8, 12 and 14 of the European Convention.

Article 8

Article 8 protects the right to 'private life' or 'family life'. For more than 20 years, the European Commission of Human Rights had consistently rejected all complaints by homosexuals as 'manifestly ill-founded'.⁵⁸ For the first time in *Dudgeon v UK*,⁵⁹ the ECHR held that the criminalisation of homosexual acts by consenting adults did, in fact, affect the private life of the complainants – a decision that has been recently

endorsed in *X v UK*.⁶⁰ 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 Art 8. The court regarded the existence of legislation prohibiting sex with more than one person and the subsequent conviction for gross indecency to be an interference with the applicant's right to private life.⁶¹

In determining issues related to family life, the court has ruled that a number of factors may be relevant, including:

'whether a couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.'⁶²

Although the Commission has held that homosexual unions do not concern 'family life' for the purposes of Art 8,⁶³ it has now fully accepted that family life exists between cohabiting unmarried heterosexuals.⁶⁴ This distinction between the protection offered to heterosexuals and homosexuals may well come under criticism when one begins to examine provisions under the Charter, and may well provide the ECHR with an opportunity to revise the reasoning laid down by the old Commission in *S v UK*.

Article 12

In 1986, in *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 Art 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'.⁶⁵

However, the court went on to say that the interpretation of Art 12 may change in due course as the European Convention 'has always to be interpreted and applied in the light of current circumstances'.⁶⁶ However, even though the court had expressed such progressive attitudes, the same case-law was reiterated in 1990⁶⁷ and again in 1998.⁶⁸ However, in the recent judgments of *Goodwin v UK*⁶⁹ and *I v UK*,⁷⁰ the right of a transsexual to marry was upheld by the ECHR. Under the current law of the UK, transsexuals are prevented from being able to change their gender on their birth certificate. This, therefore, prevents post-operative transsexuals from celebrating a valid marriage (with a member of the opposite sex to their post-operative sex),⁷¹ since marriage is under English law still considered to be a heterosexual

institution.⁷² This reversal of previous case-law best indicates the court's increasing awareness of the need to change and update old ideas concerning marriage, biological gender and gender reassignment.

The judgment in *Rees* and the subsequent judgment in *Cossey v UK*⁷³ both indicate that the court had regarded the two parts of Art 12⁷⁴ as being closely related. However, while this was important when determining the meaning of 'marriage', it did not necessarily restrict the right to found a family to persons who are married.⁷⁵ Nonetheless, it has been argued by some commentators, McHale in particular, that Art 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.⁷⁶ The Charter of Fundamental Rights of the EU employs the phrase 'the right to marry and the right to found a family'.⁷⁷ This provision, therefore, expressly states that these rights should be considered as two separate rights. This was recently endorsed by the ECHR in *Goodwin v UK*,⁷⁸ where particular reference was made to the Art 9 provision of the Charter.⁷⁹

McGlynn also highlights the removal of the words 'men and women' from the Convention provision in the Charter.⁸⁰ She believes that this may well be of potential significance. However, it is submitted that the significance of this change in terminology must be interpreted with due regard to *D and Sweden v Council*.⁸¹ The ECJ held that it was 'not in question that, according to the definition generally accepted by the member states, the term "marriage" means a union between two persons of the opposite sex'.⁸² Consequently, if one takes this ECJ decision alongside the Charter's explanatory notes, which clearly state that the 'article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex', then the chance of Art 9 being interpreted to include same-sex marriages is slim. This is especially so when one witnesses the conservative way in which the right to family life under Art 8 has been interpreted.⁸³

Article 14

The crux of Art 14 is whether, when comparing heterosexuals with homosexuals, one is really speaking of 'similar situations'. In *Salgueiro v Portugal*, the ECHR for the first time recognised a violation of Art 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.⁸⁴ 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.

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.⁸⁵ If the trend of restricting Art 14 continues, as with *F v Switzerland*⁸⁶ where it was held that a ban on same-sex but not opposite-sex prostitution could not be challenged, then it would seem the impact of Art 14 is severely limited. Pressure would best be placed on governments to ratify Protocol 12, which allows actions to be brought based solely on an alleged Art 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 Art 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.’⁸⁷

It remains to be seen how this will be received after the Council of Ministers’ refusal to adopt the Assembly’s opinion.

European Union legislation

To many, it will seem strange that an EU Charter refers to families, especially a document that is supposedly a ‘re-affirmation’ of existing European rights.⁸⁸ Although the EU has no formal competence in the field of family law,⁸⁹ since the late 1960s the Community has been slowly increasing its regulation of families and Community law has had a growing impact on families across the board.⁹⁰

Since the end of the 1990s, the harmonisation of private law in general has undoubtedly accelerated. However, family law has been left somewhat trailing, being omitted from harmonising European legislation.⁹¹ The reason: family law’s deep roots in the social and cultural values of society, which eventually results in people regarding family law as being unsuitable for unification.⁹² Until now, the Europeanisation of family law has been sporadic to say the least. However, it is quite clear that the harmonisation of private law in areas outside the ambit of family law cannot be totally and successfully achieved without reference to family law.⁹³ The awareness of such a constraint is increasingly apparent when one examines activity at the EU level. By 2000, the scope of Community law in the domain of family law had expanded to encompass the first piece of Community law to deal with family law ‘proper’, namely the adoption of the regulation on the recognition and enforcement of judgments relating to divorce and the parental responsibility of joint children.⁹⁴

A recent report by the Council of the EU surprisingly outlines the need for the EU to undertake research into the possible areas of similarity and difference between the member states in the field of substantive family law. However, this development cannot be appreciated in isolation. The

Community institutions have, on numerous occasions, been led to consider questions affecting family law for the implementation of particular policies. Until now, this activity has been directed at resolving specific matters. The growing attention devoted by the European Parliament to this area is illustrated perfectly by the ever-increasing number of resolutions adopted.⁹⁵ This is also mirrored in the cases handled by the ECJ, which have also included questions related to the status of a person as child, dependent or spouse,⁹⁶ parental authority⁹⁷ and the right to family reunification.⁹⁸ Activity has also been seen in the Council of the EU where resolutions have been adopted in the field of family life and personal status⁹⁹ and a proposal has recently been submitted on the right to family reunification.¹⁰⁰

The other trend, which is increasingly apparent at EU level, is the increasing attention paid to the plight of homosexuals, and the ever-increasing recognition that sexual orientation needs to be protected under the provisions of the EU. A number of areas require specific attention.

Article 13 EC

The adoption of Art 13 EC, 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. First, it is not a general anti-discrimination guarantee. Unlike other areas of the EC Treaty, the general principles outlined in the first 16 Articles contain no free-standing 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 the provision against member states.

Article 13 also retains a unanimity requirement, notwithstanding the replacement by the Treaty of Nice of all but 10% of unanimity provisions with qualified majority voting (QMV).¹⁰¹ Seven member states have not yet enacted anti-discrimination legislation and so the possibility of legislating *vis-à-vis* Art 13 would seem to be remote – a proposition further endorsed by the envisaged expansion at Nice.¹⁰² If unanimity is difficult to achieve with 15 states, this will be even more so in a 27-state organisation, especially since of all the 12 candidate states, Slovenia is the only one to have enacted anti-discrimination legislation, and six retain discriminatory ages of consent. Nevertheless, a proposed para 2 of Art 13 has also been adopted which would introduce the requirement of QMV in the adoption of support actions to fight discrimination.¹⁰³ Article 13 also provides for consultation with the European Parliament. However, in the recent adoption of Directive 2000/78/EC under the auspices of Art 13, it played an almost ‘redundant role’ in the negotiation process.¹⁰⁴

Directive 2000/78/EC

Four proposals (two Directives, an Action Programme and a Communication) have already been adopted under Art 13 EC. 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,¹⁰⁵ while the second establishes a general framework for equal treatment in employment and occupation.¹⁰⁶ 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'.¹⁰⁷

The substantive proposals prohibit direct and indirect discrimination and harassment based, *inter alia*, on sexual orientation in hiring, promotion, working conditions, vocational training, and participation in organisations of workers, employers and professionals. It is not suggested that this Directive will be a stepping stone towards same-sex marriage recognition, especially since the Directive is 'without prejudice to national laws on marital status'.¹⁰⁸ However, its adoption and the subsequent duty imposed upon Governments to ensure anti-discrimination legislation is in force by 2003, adds further support to the idea that the impetus for change may well stem from Europe, rather than as a result of internal pressure.

Proposals for change

The interpretation of the word 'spouse' in Title III of the Treaty will have to be re-evaluated in light of the Dutch marriage reform. It may be that a uniform Community interpretation is adopted. If so, the concept of same-sex marriage would be excluded from the scope of the Community competence. According to Regulation 1612/68,¹⁰⁹ Community nationals entering another member state under Art 39 EC are entitled to bring their same-sex partner to live with them, if and only if the host member state recognises similar rights for its own nationals.¹¹⁰ This regulation offers no recourse to those people who wish to bring their partners into countries, such as the UK, 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 EU and their family members to move and reside freely within the territory of the member states, it is stated that 'family member' should be defined to include the spouse as well as:

'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'.¹¹¹

This would, therefore, codify the current case-law on Regulation 1612/68 but not improve the situation for homosexuals moving to countries with no partnership legislation, for example Ireland or Greece. Article 4 also lays down the principle of non-discrimination and extends this, in accordance with Art 13 EC, to discrimination based upon sexual orientation. In a similar vein, a proposal for a new Council Directive on the right to family reunification also utilises the term 'family member'.¹¹² As stated in the explanatory notes, the area of unmarried partners:

'has been recently undergoing rapid change and more and more people, often with children, are forming "de facto" couples. Furthermore, several member states have introduced a special status, with a set of rights and obligations, which cohabiting unmarried couples can register for. In the context of the right of residence, Community law cannot ignore this development, so the proposal is to treat unmarried partners as equivalent to spouses for residence purposes, where the legislation of the host member states provides for unmarried partner status and on terms of any such legislation.'

Therefore, when one takes the situation of England and Wales and considers that cohabiting heterosexual couples are often given the same legal rights as their married counterparts through the judicial interpretation of 'living as husband and wife',¹¹³ these rights must in accordance with these proposals be granted to Community nationals. However, if one then superimposes the anti-discrimination provision laid down by Art 21 of the Charter, it would seem that such extra legal protection may well have to include homosexual partnerships.

Charter of Fundamental Rights of the EU

The Nice Summit in December 2000 saw the solemn proclamation of a Charter of Fundamental Rights.¹¹⁴ 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'.¹¹⁵ The Charter itself contains express recognition of the rights to family life and private life¹¹⁶ and the right to marry and form a family.¹¹⁷ Article 21 also expressly prohibits discrimination on grounds of, *inter alia*, sexual orientation. As already stated, the difference between Art 21 of the Charter and Art 14 of the Convention is in their respective weight. Article 21 of the Charter is the first provision to be implemented at European level, which places sexual orientation on an equal footing with other forms of discrimination. Although this has also been done in terms of Art 13 EC, Art 21 is the first ever general European anti-discrimination guarantee that explicitly includes sexual orientation

as a ground for appeal. However, there are associated problems with its application.

Interpretation

According to Art 52(3) of the Charter, insofar as rights listed in the Charter correspond with rights in the Convention, the 'meaning and scope of those rights shall be same as those laid down' by the Convention. This would, therefore, tend to suggest that the restrictive and traditional interpretation associated with Art 8 of the Convention would also need to be adopted by the ECJ when dealing with the Charter. However, Art 52(3) states that this provision shall not prevent EU law from providing 'more extensive protection'. In addition to this provision, the preamble states that the aim of the Charter is 'to strengthen the protection of fundamental rights'. McGlynn poses the question as to whether the broadening of the scope of 'the family', to include cohabiting relationships, both same-sex and heterosexual, would constitute more 'extensive protection'.¹¹⁸ However, the likely extension of these rights is highly unlikely, especially since the ECJ has consistently refused to extend the protection of Art 12 to forms of family life outside of marriage.

Incorporation

Shortly before the Nice Summit, the Charter was 'solemnly proclaimed' by the president of the European Parliament and the European Commission and the acting president of the Council of Ministers. A few days after the summit, the Charter was officially published in the 'C' part of the Official Journal of the European Communities.¹¹⁹ What exactly is the status of the Charter?

The Charter is non-binding upon the ECJ, since it forms no part of the founding treaties of the EU. However, it would be wrong to think that it therefore plays no role in the thinking of the court. De Witte¹²⁰ highlights three possible ways in which the court's case-law may be affected:

- 'Freezing' effect: some provisions are based directly on case-law of the ECJ as an attempt at codification.¹²¹
- 'Expanding' effect: the court may find new general principles directly based on the provisions of the Charter.
- 'Inhibiting' effect: in some areas, the text is weaker or falls short of the current level of protection.

Whichever way the Charter influences the court, it is certain, as already has been the case, that the Charter will be used by the court in its argumentation.¹²² If incorporated into the Founding Treaties, then the ECJ would become the sole arbitrator of the disputes. The competent court at the moment in terms of human rights violations is the ECHR, whose decisions are currently non-binding upon the member states. The issues

associated with incorporation are nonetheless complex. Accession by the EU to the European Convention was firmly rejected by the Commission.¹²³ The House of Lords in the UK, for example, has recently supported accession to the Convention,¹²⁴ even though it initially rejected such proposals.¹²⁵ Incorporation of the Charter will naturally require more discussion and debate, although proponents argue that it could go some way towards reducing the democratic deficit in the EU and help towards the creation of a human rights policy.¹²⁶ The incorporation issue is already hotly debated, with the Commission stating that 'sooner or later it [the Charter] will have to be incorporated into the Treaties'.¹²⁷

Scope

Article 51(1) restricts the scope of the Charter to EU institutions and bodies, and 'member states when they are implementing EU law'. This would seem, therefore, to squarely place the Charter outside the scope of family law provisions. However, as already stated, since the late 1960s, the Community has been slowly increasing its regulation of families and Community law has had a growing impact on families within the EU.¹²⁸ So two main questions need to be answered in this vein: to whom are the rights intended and against whom can the rights of the Charter be enforced?

For whom are the rights intended?

Every provision indicates who is protected in relation to the substantive right in question. In relation to Art 21, it would appear that the substantive provision is aimed at 'everyone' (as is frequently used in other provisions throughout the Charter)¹²⁹ since a principle of anti-discrimination along a two-standard level of protection would be seemingly unjustifiable. Stating that Art 21 is valid for EU citizens but not for third-country nationals, would, therefore, imply that discrimination against third-country nationals on the basis of any of the listed grounds would, in fact, be acceptable – an idea that is almost certainly not intended.

Against whom can the Charter be used?

Article 51(1) states that:

'the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

A distinction is therefore made between the institutions of the EU, bodies of the EU and the member states. For the purposes of this article, reference will only be made to the third and final part of the definition: 'Member States when implementing Union law'.

According to the Charter's explanatory note, the Charter is intended to codify the court's law on the matter of violations by member states of

fundamental rights.¹³⁰ However, according to the wording that has been adopted, it is difficult to see how this has actually been achieved. If one takes the example of Art 21 in combination with Art 51(1), then one quickly sees that the principle of non-discrimination only applies in relation to member states when they are implementing EU law. However, there are many situations and scenarios that one can think of when the issue of discrimination might arise against member states when they are not implementing EU law. Is the Charter, then, of no advantage? This argument can also be used with reference to many other rights, for example Art 4, which secures the prohibition of torture and inhuman or degrading treatment or punishment. Is this also only applicable against member states when they are implementing EU law? If this is the case, the right granted is almost useless. Although the member states and the EU seem to be the only ones who can be held accountable for infringements of the Charter at a European level, Heringa and Verhey dispute that this signifies that the Charter is of no significance for relations between individuals.¹³¹ On the contrary, they argue that this turns out the interpretation adopted under Art 52(1). However, they do admit that, in all cases, there is reason to believe that 'the protection will be indirect'.¹³²

Conclusion

Beginning as a slow trickle from a spring in Denmark, the developments at national level have emerged as a fast flowing stream, with tributaries from all nations merging together to form a steady flow of development. At the same time, a similar rivulet in the halls of the ECHR began to emerge, ebbing and flooding over the years until it too became an unremitting flow of progress. Meanwhile, in the various corners of the EU, tributaries have also been witnessed, which too have amalgamated in the exuding river of European advancement. Recently, these three streams have found a common estuary through which to surge – an estuary of increased tolerance towards the plight of homosexuals. The Charter of Fundamental Rights of the EU provides the undercurrent necessary to keep the development moving. The question now remains of how this undercurrent may affect the other streams. It is proposed that the force of these three streams, when seen together with the added effect of the undercurrent of the Charter, can only be seen as providing a suitable basis for the reassessment of our current ideas on homosexuality. Maybe it is now the time to reassess our ideas on the basis of Arts 8 and 12 of the European Convention. Maybe it is now time to see the hypocritical nature of our current reasoning – homosexuals have no right to family life and no right to found a family, yet countries such as Sweden and The Netherlands have allowed for joint couple adoption by homosexuals. At the same time as affording unmarried heterosexual couples protection under Art 8, we consistently refuse

protection to homosexuals, despite Art 21 of the Charter prohibiting discrimination on the basis of sexual orientation.

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¹ Charter of Fundamental Rights of the EU, (2000) OJ C 364/1.

² *Stauder v Ulm* (Case 29/69) [1969] ECR 419.

³ Cologne European Council Conclusions, June 1999.

⁴ Section 4 preamble, Charter of Fundamental Rights of the EU.

⁵ Section 5 preamble, Charter of Fundamental Rights of the EU.

⁶ Article 8, Charter of Fundamental Rights of the EU.

⁷ Article 3, Charter of Fundamental Rights of the EU.

⁸ Articles 2–12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

⁹ The enforceability of provisions by citizens against the state is dealt with later in this article, since Art 51(1) states that citizens only have a right against the member state 'when the Member State is implementing union law'.

¹⁰ The EU countries and regions to introduce legislation on this issue are: Belgium (wettelijke samenwoning/cohabitation légale); Denmark (registered partnership); Finland (registered partnership); France (pacte civil de solidarité); Germany (Lebenspartnerschaftsgesetz); Luxembourg (registered partnership); The Netherlands (registered partnership); Portugal (de facto union); Catalonia, Spain (domestic partnership); Aragon, Spain (domestic partnership); Valencia, Spain (de facto union); Balearic Islands, Spain (stable partnership); Sweden (registered partnership).

¹¹ Article 10, Regulation 1612/68.

¹² This can be clearly seen with reference to the Tampere Mandate (Council report on the need to approximate member states' legislation in civil matters, Brussels, 29 October 2001, 13017/01, JUSTCIV 129); K. Boele-Woelki, 'Divorce in Europe: Unification of private international law and harmonisation of substantive law' in H. Lemaire and P. Vlas (eds) *'Met recht verkrege' Liber Amicorum for I. S. Joppe* (Kluwer, 2002).

¹³ K. Waaldijk, 'Civil developments: Patterns of reform in the legal position of same-sex partners in Europe' (2000) 17 *Canadian Journal of Family Law* 63; I. Sumner, 'Comparative analysis and assessment of the gradual recognition of homosexuality with respect to The Netherlands and England' (2002) 9 *Maastricht Journal* 1.

¹⁴ French Declaration of Rights of Man (1791), exported in Napoleonic Penal Code 1810.

¹⁵ I. Sumner, op cit, n 13.

¹⁶ K. Waaldijk, op cit, n 13, at p 69.

¹⁷ See H. Lenters et al *De familie geregeld?* (Koninklijke Vermande, 2000), at p 123.

¹⁸ Ibid.

¹⁹ 'of op welke grond dan ook', in Artikel 1 van de Grondwet.

²⁰ Wetboek van Strafrecht 1992 and Algemene Wet Gelijke Behandeling 1994.

²¹ Norway (1981), Sweden (1987) and Denmark (1987). However, these prohibitions related only to goods and services. Discrimination based on employment was later prohibited in 1996–1997 in Denmark and 1999 in Sweden.

²² Southbank University, 'Knitting Circle: Timetable of Lesbian and Gay History' (www.southbank-university.ac.uk/~stafflag/timetable.htm).

²³ W. Schrama, 'Registered Partnership in the Netherlands' (1999) 13 *International Journal of Law, Policy and the Family* 317.

²⁴ Ibid.

²⁵ *Marckx v Belgium* (A/31) (1979–80) 2 EHRR 330, para 31.

- ²⁶ In 1990 besliste de Hoge Raad dat een huwelijk tussen personen van hetzelfde geslacht niet mogelijk is. in Hoge Raad, 19 October 1990 (1992) *Nederlandse Jurisprudentie* 129.
- ²⁷ C. Forder, 'Civil Aspects of Emerging Forms of Registered Partnership' (15 March 1999, Den Haag, Fifth European Conference on Family Law), at p 24.
- ²⁸ *Kamerstukken, Tweede Kamer*, 1993–1994, 23,761 nr 3, at p 2.
- ²⁹ *Ibid*, 1994–1995, 22,700 nr 5.
- ³⁰ *Ibid*, 1994–1995, 22,700 nr 5, at p 5; *ibid*, 1995–1996, 23,761 nr 7, at p 10.
- ³¹ *Ibid*, 1995–1996, 22,700 nrs 18 and 14; *Handelingen, Tweede Kamer*, 1995–1996, at p 4883–4883.
- ³² C. Forder, 'National Report on The Netherlands' (15 March 1999, Den Haag, Fifth European Conference on Family Law), at p 9.
- ³³ *Staatsblad*, 1997, 324 tot wijziging van boek 1 van het Burgerlijk Wetboek en van het wetboek rechtsvordering in verband met opnemng daarin van bepalingen voor het geregistreerd partnerschap.
- ³⁴ Formed between members of the Partij van de Arbeid (Labour Party), Volkspartij voor Vrijheid en Democratie (People's Party for Freedom and Democracy), and Democraten '66 (Democrats '66), with the notable absence of the Christen Democratisch Appel (Christian Democratic Appeal).
- ³⁵ *Staatsblad* 2001, nrs 9 and 10.
- ³⁶ 25 Hen 8 c 6.
- ³⁷ *Ibid*.
- ³⁸ Sexual Offences Act 1956, ss 12 and 13.
- ³⁹ *Hansard* HC Debate, cols 1750–1751 (6 July 1956).
- ⁴⁰ Sexual Offences Act 1967, s 1.
- ⁴¹ Criminal Justice (Scotland) Act 1980, s 80.
- ⁴² Homosexual Offences (Northern Ireland) Order 1982.
- ⁴³ *Stonewall Media Release* (22 January 1999).
- ⁴⁴ *ADT v UK* (Application No 35765/97) (2001) 31 EHRR 33, at para 26.
- ⁴⁵ Sexual Offences Act 1956, s 32.
- ⁴⁶ www.ILGA.org/Information/legal_survey/europe/united_kingdom.htm.
- ⁴⁷ A. Barlow, *Advising Gay and Lesbian Clients* (Butterworths, 1999), at p 37.
- ⁴⁸ *Sutherland v UK* (Application No 25186/94) (1 July 1997), at para 67.
- ⁴⁹ European Parliament Resolution A5-0050/2000, at p 26.
- ⁵⁰ Age 17 in Northern Ireland.
- ⁵¹ Sexual Offences (Amendment) Act 2000.
- ⁵² Council Directive 2000/78/EC.
- ⁵³ Recital 11.
- ⁵⁴ Angela Mason, executive director of Stonewall, *Stonewall Press Release* (5 September 2001).
- ⁵⁵ The vote cast was 179 votes for to 59 votes against.
- ⁵⁶ See I. Sumner, 'Will the sky fall in above England? The proposed registered partnership bill' (2002) 1 *Tijdschrift voor Familie en Jeugdrecht* 24.
- ⁵⁷ Personal Communication, dated 8 April 2002 from Jane Gordon, Senior Parliamentary Legal Officer to Lord Lester of Herne Hill QC.
- ⁵⁸ C. Forder, 'Civil law aspects of emerging forms of partnership' (15 March 1999, Den Haag, Fifth European Conference on Family Law), at p 17.
- ⁵⁹ (A/45) (1982) 4 EHRR 149, at paras 41 and 52.
- ⁶⁰ (1997) 24 EHRR 143.
- ⁶¹ *ADT v UK*, *op cit*, n 44.
- ⁶² *X, Y and Z v UK* (1997) 24 EHRR 143, at para 36.
- ⁶³ *S v UK* (Application No 11716/85) (1986) 47 DR 274.
- ⁶⁴ *X, Y, and Z v UK* (1997) D&R II-619, at para 31.
- ⁶⁵ (1986) 9 EHRR 56.
- ⁶⁶ *Ibid*, at para 49.
- ⁶⁷ *Cossey v UK* (1991) 13 EHRR 622.
- ⁶⁸ *X, Y and Z v UK* (1997) 24 EHRR 143.
- ⁶⁹ (Application No 28957/95) [2002] 2 FLR 487.
- ⁷⁰ (Application No 25680/94) [2002] 2 FLR 518.
- ⁷¹ They are, therefore, allowed to enter into a marriage with a person of the same gender as their pre-operative sex, which means their sex change is not recognised and therefore this marriage would not be seen as a 'gay marriage' in the eyes of English law.
- ⁷² Compare with the definition under Dutch law in Art 1:30 of the Dutch Civil Code and also proposals recently laid before the Belgian Parliament *Parl St Kamer* 2001–2002, 14 March 2002, 1692/001.
- ⁷³ (1991) 13 EHRR 622.
- ⁷⁴ The right to marry on the one hand and the right to found a family on the other.
- ⁷⁵ D. J. Harris et al *Law of the European Convention on Human Rights* (Butterworths, 1995), at p 440.
- ⁷⁶ In B. Hoggett *From the test tube to the coffin* (Sweet and Maxwell, 1996), at p 67.
- ⁷⁷ Article 9, emphasis added.
- ⁷⁸ *Op cit*, n 69, at para 98.
- ⁷⁹ *Ibid*, at paras 58 and 98.
- ⁸⁰ C. McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?' (2001) *European Law Review* 582.
- ⁸¹ *D and Kingdom of Sweden v Council of the European Union* (Joined cases C122/99P and C125/99P) [2001] ECR I-4319.
- ⁸² *Ibid*, at para 34.
- ⁸³ Reference has been made to this difference by the ECHR in *Goodwin v UK*, at para 100, however, further elaboration was not undertaken.
- ⁸⁴ (21 December 1999) (Application No 33290/96), at para 36.
- ⁸⁵ *Inze v Austria* (A/126) (1988) 10 EHRR 394, at para 36.
- ⁸⁶ (10 March 1998) (Application No 11680/95).
- ⁸⁷ Opinion Number 216 (2000) on Protocol 12.
- ⁸⁸ C. McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?' (2001) *European Law Review* 582.
- ⁸⁹ W. Pintens and Du Mongh, in W. Pintens (ed) *Family and Succession Law International Encyclopaedia of Laws* (Kluwer Law International, 1997).
- ⁹⁰ C. McGlynn, 'A family law for the European Union?', in J. Shaw (ed) *Social law and policy in an evolving European Union* (Hart, 2000).
- ⁹¹ Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11 July 2001 COM (2001) 398 omitted family law from its ambit.
- ⁹² W. Pintens and K. Vanwindkelen *Casebook European Family Law* (Leuven University Press, 2001).
- ⁹³ K. Boele-Woelki, 'Divorce in Europe: Unification of Private International Law and harmonisation of substantive law', in H. Lemaire and P. Vlas (eds) *'Met recht verkregen' Liber Amicorum for I.S. Joppe* (Kluwer, 2002).
- ⁹⁴ Council Regulation 1347/2000/EC (2000) OJ L 160/19.
- ⁹⁵ European Parliament Resolution of 9 June 1983 on family policy in the European Community, (1983) OJ C 184/116; European Parliament Resolution of 14 December 1994 on protection of families and family units at the close of the International Year of the Family (1995) OJ C 18/96; European Parliament Resolution of 8 February 1994 on equal rights for homosexuals and lesbians in the European Community (1994) OJ C 61/40; European Parliament Resolution of 12 December 1996 on measures to protect minors in the EU (1997) OJ C 20/170; European Parliament Resolution of 18 July 1996 on abduction of children of bi-national marriages in the Member

- States (1996) OJ C 261/157; European Parliament Resolution of 20 January 1997 on improving law and co-operation between the Member States on the adoption of minors (1997) OJ C 20/176.
- ⁹⁶ *The Netherlands v Reed* (Case 59/85) (1986) ECR 1283.
- ⁹⁷ *Hill and Stapleton v The Revenue Commissioners and Department of Finance* (Case C243/95) (1998) ECR 3739.
- ⁹⁸ *Diatta v Land Berlin* (Case C267/83) (1985) ECR 567 and *R v Immigration Appeal Tribunal and the Secretary of State for the Home Department ex parte Singh* (Case C370/90) (1992) I-ECR 4265.
- ⁹⁹ Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (1997) OJ C 382.
- ¹⁰⁰ COM (1999) 638 final.
- ¹⁰¹ Treaty of Nice, SN/533/00, at p 1.
- ¹⁰² *Ibid*, at p 71.
- ¹⁰³ *Ibid*, at p 22.
- ¹⁰⁴ House of Lords Select Committee on the EU, 4 Report – EU Framework Directive (18 January 2001).
- ¹⁰⁵ Council Directive 2000/43/EC.
- ¹⁰⁶ Council Directive 2000/78/EC.
- ¹⁰⁷ *Ibid*, Recital 11.
- ¹⁰⁸ *Ibid*, Recital 22.
- ¹⁰⁹ Council Regulation 1612/68, Art 7(2).
- ¹¹⁰ *Op cit*, n 96.
- ¹¹¹ Proposed Article 2, COM (2001) 257 final.
- ¹¹² Proposed Article 5, COM (1999) 638 final.
- ¹¹³ *Harrogate Borough Council v Simpson* [1986] 2 FLR 91; *Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705.
- ¹¹⁴ (2002) OJ C 364/1.
- ¹¹⁵ Commission Press Release, IP/00/1148.
- ¹¹⁶ Article 7 (compare ECHR Art 8).
- ¹¹⁷ Article 9 (compare ECHR Art 10).
- ¹¹⁸ C. McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change of entrenching the status quo?' (2001) 26 *European Law Review* 582, at p 588.
- ¹¹⁹ B. de Witte, 'The legal status of the Charter: Vital question or non-issue?' (2001) 8 *Maastricht Journal* 81, at p 83.
- ¹²⁰ *Ibid*, at p 85.
- ¹²¹ For example, Art 51(1).
- ¹²² *AG Alber in TNT Traco SpA v Poste Italiane SpA and Others* (Case 340/99) (2001) ECR I-4109; *AG Tizzano in R v Secretary of State for Trade and Industry ex parte BECTU* (Case 173/99) (2001) ECR I-4881; *AG Mischo in D and Kingdom of Sweden v Council of the European Union* (Joined Cases C122/99P and C125/99P) (2001) ECR I-4319; *AG Jacobs in Z v European Parliament* (Case C270/99P) (2001) ECR I-9197; *AG Stix-Hackl in Commission of the European Communities v Italian Republic* (Case C49/00) (2001) ECR I-8575; *AG Jacobs in The Netherlands v European Parliament and Council of the European Union* (Case C377/98) (2001) ECR I-7079; *AG Geelhoed in R v Secretary of State for the Home Department ex parte Baumbast* (Case C413/99) (5 July 2001); *AG Leger in Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* (Case C309/99) (2002) ECR I-1577; *AG Leger in Council of the European Union v Hautala* (Case C353/99) (2001) ECR I-9565; *AG Geelhoed in Mulligan and Others v Minister for Agriculture and Food, Ireland* (Case C313/99) (12 July 2002); *AG Stix-Hackl in Nilsson v Länsstyrelsen i Norrbottens Län* (Case C160/00) (2001) ECR I-165, *Carpenter v Secretary of State for the Home Department* (Case C60/00) (13 September 2001), *MRAX v Belgian State* (Case C459/00) (13 September 2001); *AG Mischo in Booker Aquaculture Ltd and Others v The Scottish Ministers* (Joined Cases C20/00 and C64/00) (20 September 2001); *AG Stix-Hackl in Käseerei Champignon Hofmeister GmbH & Co KG v Hauptzollamt Hamburg-Jonas* (Case C210/00) (27 November 2001); *AG J-Colomer in Überseering* (Case C208/00) (4 December 2001).
- ¹²³ Opinion 2/94.
- ¹²⁴ House of Lords Select Committee on the EU, eighth Report – EU Charter of Fundamental Rights (24 May 2000).
- ¹²⁵ *Human Rights Re-examined*, third Report 1992–1993, House of Lords Paper 10.
- ¹²⁶ P. Eeckhout, *Charter of Fundamental Rights Lecture*, Centre for European Legal Studies, Cambridge (21 February 2001).
- ¹²⁷ Commission Press Release, IP/00/1148.
- ¹²⁸ *Ibid*, at p 12.
- ¹²⁹ For example, Art 6 on the right to liberty and security; Art 7 on the respect for private and family life; Art 17 on the right to property; Art 29 on the right of access to placement services and so forth.
- ¹³⁰ D. Curtin and R. van Ooik, 'The sting is always in the tail. The personal scope of application of the EU Charter of fundamental rights' (2001) 8 *Maastricht Journal* 102, at p 108.
- ¹³¹ A. Heringa and L. Verhey, 'The EU Charter: Text and structure' (2001) 8 *Maastricht Journal* 11, at p 21.
- ¹³² *Ibid*, at p 23.