

## TRANSSEXUALS – THE ECHR IN TRANSITION?

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### 1. INTRODUCTION

In *Christine Goodwin v the United Kingdom*<sup>2</sup> and *I v the United Kingdom*<sup>3</sup> the European Court of Human Rights – sitting as a Grand Chamber – made a remarkable and significant transformation in its attitude to transsexuals, with implications which may transcend its consequences for transsexuals. In doing so it employed an innovative approach. Both cases involved a postoperative male to female transsexual, who each claimed that there had been a violation of Articles 8 (“private life”) and 12 (the right to marry) of the European Convention on Human Rights. In both cases the Court held unanimously that the refusal of the State to grant legal recognition to the new status of post-operative transsexuals infringed their right to private life, and that their right to marry had also been infringed.

The unanimity was striking,<sup>4</sup> as only four years before the majority also by a Grand Chamber in the opposite direction was 11-9 on Article 8 and 18-2 on Article 12. Following the latter cases the House of Lords made a declaration of incompatibility under the Human Rights Act 1998 of section 11(c) of the Matrimonial Causes Act 1973, which provides that a marriage is void if the parties are not respectively male and female.<sup>5</sup> Additionally, Advocate General Ruiz-Jarabo Colomer founded on the *Goodwin* case to argue before the European Court of Justice that: “. . . transsexuals have a fundamental

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<sup>1</sup> We wish to thank Ms C Lyons, Prof R Paisley and Prof P Beaumont of this law school for reading drafts of this and for helpful comments. We are indebted also to the analysis of case law in the paper by The Hon Lord Reed (Judge of the Court of Session and High Court of Justiciary, Scotland), *Splitting the Difference: Transsexuals and European Human Rights Law* (Presented to the International Bar Association Conference held in Amsterdam on 17-22 September 2000, unpublished paper referred to, and quoted from, in Liberty’s submission to the Strasbourg court in *Goodwin and I v the United Kingdom - A Comparative Study Of European, Commonwealth And International Law And Practice Regarding The Civil Status Of Transsexual People*) <<http://www.liberty-human-rights.org.uk/resources/interventions/pdfs/goodwin.pdf>> Reed’s paper, cited as in Liberty’s submission, is referred to *infra*.

<sup>2</sup> *Christine Goodwin v the United Kingdom* [GC], judgment of 11 July 2002, ECHR 2002-VI, hereafter *Goodwin*.

<sup>3</sup> *I v the United Kingdom* [GC], judgment of 11 July 2002, ECHR 2002-VI, hereafter *I v the United Kingdom*.

<sup>4</sup> See Tsang, ‘Lawyer of the week: Julia Sohrab’, *The Times* (Law) 23 July 2002, 10. Sohrab, Goodwin’s lawyer, was also struck by the Government’s half-hearted defence, and by the Court’s statements on human dignity and human freedom, and on personal autonomy. The historic shift was also noted by Sawyer, *Goodwin v United Kingdom*. IFLJ (2002) 123.

<sup>5</sup> *Bellinger (FC) (Appellant) v Bellinger* [2003] UKHL 21 in which a male to female transsexual sought recognition of a marriage conducted in her acquired gender.

right to marry on conditions which take account of their acquired sex.”<sup>6</sup> In the Strasbourg Court of Human Rights the decisions of *Goodwin* and *I* were followed in a subsequent case involving a transsexual, who successfully complained about German court proceedings being in breach of Articles 6 and 8 of the ECHR.<sup>7</sup> *Goodwin* and *I* were also referred to as “helpful” in the Family Court of Australia, in *Attorney-General for the Commonwealth v Kevin and Others*,<sup>8</sup> where the marriage of a transsexual was recognised, upholding a decision referred to by the Strasbourg Court itself.<sup>9</sup>

The decisions of the Strasbourg Court are commendable for their directness,<sup>10</sup> and sympathetic tone, and seem to reflect a disposition on the part of the Court to do what it can to alleviate the perceived plight of transsexuals.<sup>11</sup> The decisions, however, raise several issues surrounding the meaning of the right to private life and its relation to concepts of dignity and autonomy; the extent of the right to marry; and the expansive approach of the Strasbourg Court’s jurisprudence in its interpretation of the Convention. The Strasbourg Court’s use of the concepts of autonomy and dignity in interpreting “private life” is intriguing. Its reliance on the idea of dignity (nowhere mentioned expressly in the Articles in question) and its invocation of the notion of autonomy are notable features of the Court’s approach. Its willingness to recognise the right of transsexuals to marry is unprecedented in its jurisprudence and inevitably raises the question of the recognition of so-called “same-sex” marriage. Its judgments in these cases are distinguished by a willingness to adhere to what is identified as an “evolutive” approach.

The claims of the transsexuals in these cases may have provided a welcome opportunity for the Court to “transition” the ECHR from its existing state. Hence it added an interpretative gloss to reinforce broader ideas of autonomy and dignity, and broadened the accepted scope of the right to marry. It also took the opportunity to refer to the Charter of Fundamental Rights – strictly speaking a document having an exclusively EU dimension, and whose legal status was at the very least questionable<sup>12</sup> – in a way which is innovative and transforming, yet nonetheless raises questions about the level of activism displayed by the Court.

The following section examines the Court’s emphasis on the concepts of autonomy and dignity in relation to the Article 8 claim. Part 3 considers the Court’s new reading of the right to marry in Article 12, while Part 4

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<sup>6</sup> AG Ruiz-Jarabo Colomer in Case C-117/01, *KB v The National Health Service Pensions Agency and the Secretary of State for Health*, 10 June 2003, paras 68-69.

<sup>7</sup> *van Kück v Germany*, judgment of 12 June 2003, ECHR 2003.

<sup>8</sup> *Attorney-General for the Commonwealth v Kevin and Others*, 30 Fam LR 1 (2003)

<sup>9</sup> *Goodwin*, para 82; *I v the United Kingdom*, para 62: “It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger v Bellinger* cited in para 52 above; and the judgment of Chisholm J in the Australian case, *Re Kevin*, cited in para 55 above).”

<sup>10</sup> See AG Ruiz-Jarabo Colomer *ibid*, referring to the unanimity and “particularly forceful terms” as regards the Art 8 claim.

<sup>11</sup> See *Goodwin*, paras 77, 91; *I v the United Kingdom*, paras 57, 71.

<sup>12</sup> See p 234.

examines in particular its consequences for claims about the illegitimacy of bans on homosexual marriage. Part 5 comments on the “evolutive approach” to interpretation emphasised by the *Goodwin* Court, including the Court’s use of the Charter of Fundamental Rights as an interpretative tool. Part 6 contains a summary of conclusions and comment.

## 2. Article 8 and The Values Of Privacy, Autonomy and Dignity

The Court of Human Rights noted that a serious interference with private life can arise where domestic law conflicts with an important aspect of personal identity, as in this case. It stated that the “very essence” of the Convention is respect for human dignity and human freedom,<sup>13</sup> a far-reaching claim highlighted by Goodwin’s lawyer.<sup>14</sup> This eloquent phrase, full of potential, reflects the view of dissenters in the context of Article 12 in the Commission in *Sheffield and Horsham v the United Kingdom*.<sup>15</sup> It was also used in the *Dianne Pretty* case,<sup>16</sup> though not by a Grand Chamber, and is similar to a declaration made by the ECJ in *P v S and Cornwall County Council*.<sup>17</sup> The Court of Human Rights further pointed out that under Article 8, with the important underlying notion of personal autonomy – again echoing the *Pretty* case<sup>18</sup> – protection is given to the personal sphere of each individual,

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<sup>13</sup> *Goodwin*, para 90; *I v the United Kingdom*, para 70. See also *Goodwin* at para 91, *I v the United Kingdom*, para 71: “No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”

<sup>14</sup> See n 4.

<sup>15</sup> Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting, *Sheffield v the United Kingdom*, Report of 21 January 1997, Annex to *Sheffield and Horsham v the United Kingdom*, Reports of Judgments and Decisions 1998-V, referring in the context of Article 12 to the “fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom . . .”; cf. Judge Martens in *Kokkinakis v Greece*, judgment of 25 May 1993, Series A no. 260-A: “The basic principle in human rights is respect for human dignity and human freedom.”

<sup>16</sup> See *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 65

<sup>17</sup> Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, para 22: “To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.”

<sup>18</sup> See *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61: “Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”; cf. *Keenan v the United Kingdom*, judgment of 3 April 2001, ECHR 2001-III, paras 86, 91, where the UK Government referred to “the principles of individual dignity and autonomy, underlying the Convention”, and the Court referred to “autonomy”; see also Thorpe LJ in *Bellinger v Bellinger* [2001] EWCA Civ 1140, para 156, citing Judge Martens in the *Cossey* case at para 5.5. The ideas of personal autonomy or self-determination were founded on in relation to Article 8, but unsuccessfully, in the House of Lords in *R (Pretty) v DPP* [2002] 1 AC 800, counsel referring, 804,

including the right to establish details of their identity as individual human beings.<sup>19</sup> This emphasis on the idea of autonomy – underlying “personal identity” – is noteworthy. It endorses the important dissenting opinion of Judge van Dijk in *Sheffield and Horsham v the United Kingdom*, where he refers to the “fundamental right of self-determination” – not “separately and expressly included in the Convention, but. . . at the basis of several of the rights laid down therein” – and “a vital element of the ‘inherent dignity’ which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.”<sup>20</sup> This acknowledges that “self-determination” is at best implicit in the ECHR. He echoes the ringing claim of Judge Martens in the *Cossey* case that:

“The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.”<sup>21</sup>

Autonomy, like “self-realisation”, is a distinct concept from privacy in the orthodox sense of the “private” sphere – certainly in the sense of being “left alone”<sup>22</sup> or even of having “personal relationships” – although the two are closely connected in circumstances such as those at issue in this case.<sup>23</sup> The closest to this idea of autonomy/self-realisation was perhaps in the Commission Report in *van Oosterwijk*. As Reed and Murdoch point out, the Commission had already clearly rejected in a transsexual case what was called an Anglo-Saxon and French concept of private life as freedom from adverse publicity in favour of a concept that encompassed personal

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to Convention organ cases *X and Y v the Netherlands*, judgment of 26 March 1985, Series A no 91, and contrasting *Laskey, Jaggard and Brown v the United Kingdom*, judgment of 19 February 1997, Reports of Judgments and Decisions, 1997-I; see also *NHS Trust A v M; NHS Trust B v H* [2001] HRLR. 12, per Dame Butler-Sloss, para 38: “As I have already said Article 8 protects the right to personal autonomy, otherwise described as the right to physical and bodily integrity. It protects a patient's right to self-determination . . .”

<sup>19</sup> *Goodwin*, para 90; *I v the United Kingdom*, para 70; see also *van Kück v Germany*, judgment of 12 June 2003, ECHR 2003, para 69.

<sup>20</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, dissenting, at para 5.

<sup>21</sup> Judge Martens, dissenting, in *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 2.7, cited by Butler-Sloss, President, and Walker LJ, in *Bellinger v Bellinger* [2001] EWCA Civ 1140, para 79, and quoted by Lord Reed, *Splitting the Difference*, *supra* n 1, p 33. In *Cossey*, at the Commission stage, Frowein, joined by Ermacora, Gözubüyük, Rozakis, Schermers, Thune, argued for a breach of Article 8 on grounds of dignity – Annex to *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184.

<sup>22</sup> See Judge Martens below n 41.

<sup>23</sup> For a recent and comprehensive discussion of the relation between privacy and its component concepts see Solove, ‘Conceptualizing Privacy’ (2002) 90 *Calif LR* 1088.

relationships.<sup>24</sup> Reed, the Hon. Lord Reed, a Scottish judge, separately did interpret *van Oosterwijk* as adopting a concept of private life “which went well beyond any question of privacy or confidentiality, and was much closer to the concept of self-determination found in the German Basic law”, and similar to a decision of the *Bundesverfassungsgericht*.<sup>25</sup>

The Court of Human Rights had clearly accepted the idea that Article 8 extends beyond the “inner circle” and protects relationships and personal identity,<sup>26</sup> and it did in *Goodwin* and *I v the United Kingdom* characterise the breach of Article 8 as a breach of the right to establish details of the applicants’ identity as individual human beings.<sup>27</sup> It could thus simply have characterised this case as, and limited it to, an “important aspect of personal identity”,<sup>28</sup> or “to personal development and . . . physical and moral security”,<sup>29</sup> or “personal identity”,<sup>30</sup> or “gender identification”,<sup>31</sup> “identity”,<sup>32</sup> or “sexual identity”,<sup>33</sup> or perhaps “moral integrity”.<sup>34</sup> It could have focused

<sup>24</sup> See the Commission Report in *van Oosterwijk* (1981) 3 EHRR 557, 583, para 51: “The concept of private life contained in Article 8 is however wider than the definition given by numerous Anglo-Saxon and French writers, according to which it is the right to live, as far as one wishes, protected from publicity; for the Commission, ‘it comprises also to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one’s own personality’.”; Reed and Murdoch, *A Guide to Human Rights Law in Scotland*, (2001), para 6.15.

<sup>25</sup> The Hon Lord Reed, *Splitting the Difference*, *supra* n 1, at pp 24, 27 (the German case is referred to also in *van Kück v Germany*, judgment of 12 June 2003, ECHR 2003, para 29, and below at n 62). His comment on *van Oosterwijk* is referred to in *Bellinger v Bellinger* [2001] EWCA Civ 1140, per Butler-Sloss, President, and Walker LJ, para 71.

<sup>26</sup> See *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61; *Bensaid v the United Kingdom*, judgment of 6 February 2001, ECHR 2001-I, para 47; *Niemietz v Germany*, judgment of 16 December 1992, Series A no 251-B, at para 29; see also *Mikulić v Croatia*, judgment of 7 February 2002, ECHR 2002, paras 53-55. Indeed in *Botta v Italy* the Court stated that Article 8 is primarily “intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. . .” *Botta v Italy*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, para 32.

<sup>27</sup> *Goodwin*, para 90; *I v the United Kingdom*, para 70.

<sup>28</sup> *Goodwin*, para 77; *I v the United Kingdom*, para 57.

<sup>29</sup> See *van Kück v Germany*, judgment of 12 June 2003, ECHR 2003, para 69.

<sup>30</sup> Cf the reference to change of sex as part of “personality” in a case referred to by Lord Reed, *supra* n 1, p 28, Application no 9420/81, 38 *Transsexuals v Italy*, 1982, unpublished.

<sup>31</sup> See *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61, *PG and JH v the United Kingdom*, judgment of 25 September 2001, ECHR 2001-IX, para 56, *Bensaid v the United Kingdom*, judgment of 6 February 2001, ECHR 2001-I, para 47, referring to *B v France*, judgment of 25 March 1992, Series A no 232-C; see also *Peck v the United Kingdom*, judgment of 28 January 2003, ECHR 2003, para 57.

<sup>32</sup> See *van Kück v Germany*, judgment of 12 June 2003, ECHR 2003, para 56, referring to *Goodwin*, and *I v the United Kingdom*, and at para 75.

<sup>33</sup> See Commission Report in *van Oosterwijk* (1981) 3 EHRR 557, 584, para 52.

<sup>34</sup> See Feldman, ‘Human Dignity as a Legal Value—Part I’ (1999) *PL* 682, 694 (referring to *X and Y v the Netherlands*, judgment of 26 March 1985, Series A no 91, and *Costello-Roberts v the United Kingdom*, judgment of 25 March 1993,

on the difficulties of the humiliation mentioned by *Goodwin* for example or the embarrassment referred to by *Ms "I"*. But it had found that the levels of intrusion, the interference and embarrassment, did not reach the levels attained in *B v France*.<sup>35</sup> Nonetheless, it said, echoing an important dissent in *Sheffield and Horsham v the United Kingdom*,<sup>36</sup> the very essence of the Convention is respect for human dignity and human freedom,<sup>37</sup> before referring to "autonomy". This, albeit "underlying", notion of autonomy, tending to or suggesting self-realisation, or self-identification, goes further than intrusiveness in the orthodox sense, and arguably addresses the real rationale. Following *Pretty v the United Kingdom* to an extent, it restated the broader underlying notion of autonomy and that the "essence" of the Convention lies in "dignity" and "human freedom". In doing so it addressed arguably the crux of the case, the perceived need for the recognition – and affirmation – of transsexuals' self-realisation.<sup>38</sup> The Court indeed later referred to a transsexual's "freedom to define herself as a female person, one of the most basic essentials of self-determination."<sup>39</sup>

The notion of autonomy only "underlies" Article 8, but it embodies a different, more expansive, idea of the meaning of private life. It goes well beyond (negative) protection of "private life" in the sense of a personal intimate sphere, though that "inner circle" idea had been rejected somewhat already.<sup>40</sup> It extends to (positive) acts which involve expression of self-realisation, in private or not, and indeed demand public recognition by the State, though a demand for State recognition of status is not new in itself.<sup>41</sup>

Whether this is conceptually helpful is however open to question. It focuses less on "negative interference" by the State which is the primary focus of

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Series A no 247-C) suggesting that "moral integrity" is related to dignity and the freedom to make choices in decisions and life style. However the "moral integrity" in those cases concerned rather different matters than transsexualism.

<sup>35</sup> *B v France*, judgment of 25 March 1992, Series A no 232-C.

<sup>36</sup> Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting, *Sheffield v the United Kingdom*, Report of 21 January 1997, Annex to *Sheffield and Horsham v the United Kingdom*, Reports of Judgments and Decisions 1998-V, referring to the right to marry – see n 91.

<sup>37</sup> See also *van Kück v Germany*, judgment of 12 June 2003, ECHR 2003, para 69.

<sup>38</sup> Judge Martens, dissenting, in *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 3.2, n 15, referred to the argument that: "At the heart of the complaint is the very issue of the non-recognition of the identity itself."

<sup>39</sup> *van Kück v Germany*, judgment of 12 June 2003, ECHR 2003, para 73, referring to self-determination also at para 78.

<sup>40</sup> *Niemietz v Germany*, judgment of 16 December 1992, Series A no 251-B, at para 29.

<sup>41</sup> This dual dimension of the concept of privacy, combining protection for positive expressions of identity as well as a more negative protection against the disclosure of confidential information or other official intrusions into private life is emphasised by Judge Martens, dissenting, in *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 5.5, referring to "a markedly increased recognition of the importance of privacy, in the sense of being left alone and having the possibility of living one's own life as one chooses." (emphasis added); see also Thorpe LJ in *Bellinger v Bellinger* [2001] EWCA Civ 1140, para 156. Recognition of status by the State under Article 8 is not a new idea in itself – see *Markx*, judgment of 13 June 1979, series A no. 31.

Article 8,<sup>42</sup> than on positive personal realisation as a right which is regarded as more important than the State's assessment of the appropriateness of "self-realisation", at least in this area. It denotes a further shift in emphasis from negative or defensive freedom – the personal or intimate envelope<sup>43</sup> – to positive self-identity. It expresses a principle that focuses more on the individual and his/her perceptions, which is capable of growth. It focuses on the right of a person to be or become the kind of person one wants to be and have a chosen lifestyle.<sup>44</sup> This development from a negative freedom to a positive concept of freedom – not to be confused with the State's positive obligations – may be seen as welcome. The reference to "autonomy" may be seen as a change in focus on the individual rather than the State, where the enquiry starts with the individual and his/her self-realisation rather than with the limits of the otherwise legitimate power of the State.

It may be misleading or alarmist to read too much into the use of a concept apparently ideally suited to two cases about transsexualism, since, arguably, the real issue in such cases is indeed the recognition of the "autonomy" of transsexuals' in their self-realisation.<sup>45</sup> But the concept is expressed generally and also echoes not only the *Pretty* case but also individual judges' remarks previously. The idea of self-determination was not surprisingly used also in *van Kück v Germany*.<sup>46</sup> It does suggest a shift in thinking using language that has been evident elsewhere.

In the US Supreme Court Kennedy J., writing for the Court in *Lawrence et al v Texas*, claimed that:

"Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>47</sup>

Kennedy J reiterated the view that:

". . . choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept

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<sup>42</sup> See *Marckx*, judgment of 13 June 1979, Series A no 31, para 31 – ". . . the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities.", adding that there may be positive obligations also. The interpretation in that case of that Article to include positive obligations is a different matter than the scope of "private life"; cf as to the object of Article 8 Judge Fitzmaurice, dissenting, in *Marckx*, judgment of 13 June 1979, Series A no 31, at para 7.

<sup>43</sup> See n 51.

<sup>44</sup> See de Waal, Currie, Erasmus, *The Bill of Rights Handbook* (2001) p 275: "The second reason for protecting privacy is to enable individuals to develop their personalities. Put another way, the right of privacy protects the right of individuals to be or become, at the personal level, the kind of person they want to be. The implication is that the state may not compel individuals to conform to a stereotypical view of what a model citizen is. In this sense, the right to privacy issues such as the right to choose the kind of lifestyle one wants to lead." They refer to the adoption of the notion of self-realisation in the German Constitution and discuss *Bernstein*, referred to *infra*.

<sup>45</sup> See n 38.

<sup>46</sup> See n 39.

<sup>47</sup> *Lawrence et al v Texas*, 539 U.S.\_ (2003).

of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

In dissent, Scalia J wrote acerbically:

“... if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage, *ante*, at 13 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”): That ‘casts some doubt’ upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s ‘right to define’ certain concepts; and if the passage calls into question the government’s power to regulate *actions based on* one’s self-defined ‘concept of existence, *etc.*,’ it is the passage that ate the rule of law.”

Kennedy J also added:

“Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>48</sup>

In South Africa, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, Sachs J concurring, stated that:

“It has become a judicial cliché to say that privacy protects people, not places. Blackmun J in *Bowers, Attorney General of Georgia v Hardwick et al* made it clear that the much-quoted ‘right to be left alone’ should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation. Just as ‘liberty must be viewed not merely “negatively or selfishly as a mere absence of restraint, but positively and socially as an adjustment of restraints to the end of freedom of opportunity”’, so must privacy be regarded as suggesting at least some responsibility on the State to promote conditions in which personal self-realisation can take place. . . .”<sup>49</sup>

Sachs J then partly cited Ackermann J in *Bernstein and Others v Bester and Others NNO*:<sup>50</sup>

“... ‘rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s autonomous identity.’”

<sup>48</sup> Referring to *Planned Parenthood of Southeastern Pennsylvania v Casey*, 120 L Ed 2d, 674, 505 U.S. 833, 851 (1992). Scalia J responded, dissenting: “... what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution,’”

<sup>49</sup> See also Hale LJ in *Shirley Phyllis Pearce v The Governing Body of Mayfield School*, [2001] EWCA Civ 1347, CA Civil Division, 31 July 2001, para 17.

<sup>50</sup> *Bernstein and Others v Bester and Others NNO*, 1996 (2) SA 751 (CC).



He added:

“Viewed this way autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the State. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.”<sup>51</sup>

That case concerned sexual relationships, which were known to be covered already by the concept of “private life” under the ECHR. But *Goodwin and I v the United Kingdom* provide a basis to shift the focus of Article 8 jurisprudence from protection against State interference to guaranteeing individual autonomy, which favours the freedom of the individual to determine the course of his/her own life. The Court’s self-conscious elevation of the value of autonomy as self-determination to such a prominent place in its Article 8 analysis may even seem to be part of an attempt to develop or provide a basis on which to develop its jurisprudence in a direction which opens it up more fully to claims based on the notion of individuals’ freedom to choose their own lives. “Private life” is thus more than the “private” sphere not to be intruded on, and more about positive self-realisation than the negative “unencumbered self”.<sup>52</sup> Thus, arguments about access to abortion could be presented as direct appeals to the value of autonomy, which the Court took such pains to emphasise here.<sup>53</sup> So also may arguments about the freedom to engage in unorthodox sexual activities,<sup>54</sup> or possibly self sufficiency because of physical inadequacy,<sup>55</sup> or

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<sup>51</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 (SA) 6 (CC) at paras 116-117.

<sup>52</sup> See Ackerman J in *Bernstein and Others v Bester and Others NNO*, 1996 (2) SA 751 (CC), para 65.

<sup>53</sup> See Solove, *supra* n 23, 1117-1118, who refers to *Planned Parenthood of Southeastern Pennsylvania v Casey*, 120 L Ed 2d, 674 (1992), 698, where the Supreme Court refers to choices central to dignity and autonomy, and the right to determine one’s own concept of existence, noting that some critics argue that the Supreme Court’s privacy cases are really about liberty and autonomy; see also *Thornburgh v American College of Obstetricians and Gynecologists*, 90 L Ed 2d 779 (1990), 801; *Lawrence et al v Texas*, US Supreme Court 539 US\_(2003). C. Feldman, ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ (1997) 3 EHRLR 265, 273 (LEXIS), at 270: “. . . considerations of dignity and moral integrity could influence the Court to hold that Article 8 encompasses abortion rights.”

<sup>54</sup> In *Laskey, Jaggard and Brown v the United Kingdom*, judgment of 19 February 1997, *Reports of Judgments and Decisions*, 1997-I, the Court of Human Rights referred to personal autonomy, at para 44; in *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, paras 41, 74, the Court referred back to that case.

<sup>55</sup> See *Nikky Sentges v the Netherlands*, App no 27677/02, Decision on Admissibility, 8 July 2003, concerning a claim that the State provide a robotic arm which claim failed partly because there was no conceivable link with private life.

perhaps the taking of drugs.<sup>56</sup> In addition the emphasis in other cases may shift toward the individual. If Article 8 protects the fundamental freedom of the individual to determine the course of his/her own life, the State will have to be ready to provide more convincing justifications of laws which foreclose just that freedom in a range of sensitive social areas. The potential of this line of reasoning for the development of Article 8 argument is also important because it assists in the difficult distinction between public and private spheres, making it even clearer that privacy protects people as well as, or possibly indeed rather than, places.<sup>57</sup>

But the text of the ECHR protects “private life” rather than autonomy. The question arises whether this interpretative gloss was necessary and whether it is judicial creativity that is justified. It can certainly be argued that it changes the focus away from the community,<sup>58</sup> though Article 8(2) or the fair balance of interests for positive obligations does still come into play. Further, it introduces a liberal philosophy not shared by all those with an interest in the institutions and practices of human rights<sup>59</sup> and suggests a liberal approach to interpretation also not shared by all – not least Justice Scalia.<sup>60</sup>

### **Dignity**

Another core notion, which the Court invokes in its interpretation of Article 8, is “dignity”, which is apt in view of the humiliation referred to by

<sup>56</sup> See the Memorandum submitted by “Liberty”, Memorandum 36 to the Select Committee on Home Affairs, Third Report, 2001-2002, The Government’s Drug Policy: Is It Working?, Memoranda of Evidence, HC 318-II. <<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/318/318m52.htm>> referring to Art 8 of the ECHR: “In a society that respects fundamental freedoms of the individual, and in particular the right to individual autonomy and choice, general restrictions and criminalisation of taking of drugs, cannot be justified.” for the memorandum see also: <<http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2001/pdf-documents/sept.pdf>>.

<sup>57</sup> See Mole, Shaw, de la Mare, ‘Right to respect for private and family life, home and correspondence’, in Lester and Pannick, eds, *Human Rights Law and Practice* (1999), 4.8.11; *PG and JH v the United Kingdom*, judgment of 25 September 2001, ECHR 2001, para 56, and *Peck v the United Kingdom*, judgment of 28 January 2003, ECHR 2003, para 57: “There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life’.” See also n 51, and Feldman, ‘Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty’ (1994) 47(2) *CLP* 41, 59, considering autonomy and dignity in public places.

<sup>58</sup> Lord Reed, *Splitting the Difference*, *supra* n 1, p 33, and referring to Judge Martens’ approach, *supra* n 21, reflects that it could be argued that individuals cannot simply be treated as free agents as they are also members of a community, society being more than a collection of self-determining individuals, but united by prevailing ideas such as sexual identity and marriage. But he also refers to adherence to the Convention values such as tolerance and pluralism, and to the evolution of prevailing values/ideas in the Member States, in a way akin to the Court.

<sup>59</sup> Feldman, ‘Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty’, *supra* n 57, at 54, describes “autonomy” as “central to liberal theory.”

<sup>60</sup> See p 216. See also his dissent in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 120 L Ed 2d, 674, 505 US 833, at 983f (1992).

Goodwin.<sup>61</sup> The combination of the concepts of autonomy and dignity mirrors a German decision of 1978 on transsexuals, with the difference that the concept of dignity was expressed in the German Constitution.<sup>62</sup>

That is not the case with the ECHR. But the first provision in the Charter of Fundamental Rights of the European Union (and the accompanying “clarifying” *Explanations*) emphasises the primary or fundamental notion of dignity, the “real basis” of fundamental rights.<sup>63</sup> The dignity of individuals is one of the overarching principles that supports the various human rights set out in the European Convention on Human Rights.<sup>64</sup> It is also, in cases such as this,<sup>65</sup> closely connected to the ideas of autonomy and of privacy.<sup>66</sup> An individual denied the right to make fundamental decisions concerning his/her private life is thereby deprived of autonomy, and consequently suffers the indignity of being robbed of the ability to determine the course of his/her

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<sup>61</sup> See also Feldman, ‘Human Dignity as a Legal Value’, *supra* n 34, 695, referring to previous transsexual cases, stating that the production of documents or making declarations disclosing a change of gender seriously undermines dignity.

<sup>62</sup> This case (BverfGE, 11 October 1978, NJW 1979, 595) is referred to by Lord Reed, *Splitting the Difference*, *supra* n 1, and is cited here as from his paper, p 19, only: he cited the German Basic Law as protecting dignity (Article 1) and the development of personality (Article 2) and quotes the *Bundesverfassungsgericht* as stating that: “Art 1(1) BL protects the dignity of a human person as he sees himself in his individuality and self-awareness. Part of this is that the human person can make decisions for himself and can autonomously determine his own fate.”

<sup>63</sup> Charter Of Fundamental Rights Of The European Union:(OJ 2000/C 364/01) Article 1: **Human dignity**: Human dignity is inviolable. It must be respected and protected. The *Explanations* (Charter of Fundamental Rights of the European Union: Explanations relating to the complete text of the Charter, December 2000) states that “The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined this principle in its preamble: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’”; the Updated Explanations relating to the text of the Charter of Fundamental Rights, July 2003, CONV 828/03. <<http://register.consilium.eu.int/pdf/en/03/cv00/cv00828en03.pdf>> adds: “In its judgment of 9 October 2001 in case C-377/98 *Netherlands v European Parliament and Council*, 2001 ECR 7079, at grounds n° 70 - 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law.”

<sup>64</sup> See also the *Pretty* case referred to in n 16; *Refah Partisi (The Welfare Party) and Others v Turkey*, judgment of 31 July 2001, ECHR 2001-, para 43: “The European Convention on Human Rights must be understood and interpreted as a whole. Human rights form an integrated system for the protection of human dignity; in that connection, democracy and the rule of law have a key role to play.”; the Grand Chamber made no reference to this in the same case.

<sup>65</sup> See also Judge van Dijk, *supra* n 20, and Martens, *supra* n 21.

<sup>66</sup> For the connection between autonomy and dignity see Feldman, ‘Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty’, *supra* n 57, at 54-55, suggesting that respect for people as moral agents is important, and that dignity is “essential to the forms of human flourishing which depend on the exercise of autonomy” and Feldman, ‘Human Dignity as a Legal Value’, *supra* n 34, 685.

own life. The ideas of freedom and dignity are linked too in *P v S and Cornwall County Council*.<sup>67</sup>

These references to dignity supplement the idea of autonomy suggesting a theory of privacy like that of the perhaps overbroad concepts of “integrity of the personality” or “personhood”,<sup>68</sup> within which denial of an individual’s autonomy may also be a deprivation of dignity.<sup>69</sup> A principal reason for the promotion of autonomy as an individual right is that it respects and enhances the dignity of the persons who possess it. There is a view that the core of “privacy” as a civil liberty is the entitlement to dignity and autonomy within a social circle, dignity being “essential to the forms of human flourishing which depend on the exercise of autonomy”.<sup>70</sup> The need to protect dignity gives the Court a reason to promote autonomy, and in turn to read into the guarantee of “private life” a conception of privacy that seeks to harmonise ideas of dignity, autonomy and self-determination. If developed subsequently along the lines set out in *Goodwin* and *I v the United Kingdom*, the use of these underlying concepts could expand Article 8 jurisprudence significantly.

### 3. Article 12 and The Right To Marry – Expanding The Horizon

On the Article 12 argument, the Court held unanimously that refusal to permit transsexuals to marry violated the right to marry, since the *very essence* of the right to marry had been infringed. It might seem that having found that the UK had failed in a positive obligation to recognise the transsexual’s chosen sex a breach of Article 12 would follow automatically if the “new sex” – female – were not recognised for marital purposes.<sup>71</sup> The Court however noted that Article 8 is not co-extensive with Article 12, as under Article 12 conditions imposed by national laws “are accorded a

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<sup>67</sup> Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, para 22: “To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”

<sup>68</sup> See Solove, *supra* n 23, 1116f.

<sup>69</sup> See also Feldman, ‘Human Dignity as a Legal Value’, *supra* n 34, 685. He makes the point that the right to make decisions about one’s fate and to contribute to other’s decisions affecting one’s life can contribute to dignity, and that dignity can bolster individual freedom by making it desirable to enhance autonomy and moral integrity. He also makes the point that dignity is not inextricably linked to a liberal-individualist view: the State may have a view on what is required for a dignified life, and regulate in such a way as to interfere with individual choices.

<sup>70</sup> See Feldman, ‘Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty’, *supra* n 57, 55.

<sup>71</sup> See Judge van Dijk, dissenting (supported by a declaration of Judge Wildhaber) in *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, at para 8; see also Commission Report in *Rees v the United Kingdom*, judgment of 17 October 1986, Series A no 106, Annex, Opinion of Frowein, Busittil, Trechsel, Carrillo, Schermers (*cf W v the United Kingdom*, Application no 11095/84, 63 DR, 1989, Schermers, dissenting, and the dissenting Opinion of Frowein and Trechsel in the Commission Report in *van Oosterwijk* (1981) 3 EHRR 557, with the same argument), whereas Fawcett, Tenekides, Gözubüyük, Soyer, Batlinger argued that Articles 8 and 12 proceed on a different plan.

specific mention<sup>72</sup> – *i.e.* it refers to the right to marry according to the national laws.<sup>73</sup> It found that there was a breach of Article 12 because:

“The exercise of the right to marry . . . is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired . . . The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very essence of her right to marry has been infringed.”<sup>74</sup>

The *unanimous* conclusion on Article 12 is startling; the decision on Article 8 may have been predictable but this aspect was less so.<sup>75</sup> The shift from the Grand Chamber decision of *Sheffield and Horsham v the United Kingdom*<sup>76</sup>, in which the majority was 18-2 the other way, is remarkable both because the judgment is relatively brief on this issue and also because marriage is such a sensitive issue.<sup>77</sup>

In *D v Council* the ECJ indeed stated that “It is 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.”<sup>78</sup> That stress on opposite sex also indicates the scale of change in the idea of marriage represented in *Goodwin* and *I v the United Kingdom*, though the ECJ was focusing on homosexual relationships.

Before *Goodwin* and *I v the United Kingdom*, McGlynn had described the Strasbourg Court’s position on Article 12 as very strict and referred to the

<sup>72</sup> *Goodwin*, para 101; *I v the United Kingdom*, para 81.

<sup>73</sup> See also Commission Report in *Rees v the United Kingdom*, judgment of 17 October 1986, Series A no 106, Annex, Opinion of Fawcett, Tenekides, Gözubüyük, Soyer, Batlinger, but stressing in contrast the intent behind Article 12 to refer to the physical capacity to procreate, as shown in the preparatory documents and the text, thus excluding transsexuals and homosexuals; *cf* the dissent of Judge Martens in *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 4.4.3.f., 4.5.2; Commission Report in *van Oosterwijk* (1981) 3 EHRR 557, 586, para 59.

<sup>74</sup> *Goodwin*, paras 99, 101; *I v the United Kingdom*, paras 79, 81.

<sup>75</sup> See Reed and Murdoch, *supra* n 24, paras 6.02, 6.45, predicting change as regards Article 8 but not Article 12.

<sup>76</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V. It was 14-4 *against* a violation of Article 12 in *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, and *unanimously against* a violation in *Rees v the United Kingdom*, judgment of 17 October 1986, Series A no 106.

<sup>77</sup> Lord Reed, *Splitting the Difference*, *supra* n 1, p 52, pointed out that “. . . the context of marriage is especially sensitive. This is unsurprising. Marriage remains one of the central institutions of most Western societies, and it is an especially sensitive area for the expression of ethical and social values, not least because it is an institution with religious as well as legal aspects.”

<sup>78</sup> Joined Cases C-122/99 P and C-125/99 P, *D v Sweden and Council* [2001] ECR 5(B) I-4319, para 34. See also Sumner *infra* n 155.

sensitive ‘family laws’ of the Member States.<sup>79</sup> McCafferty describes the Strasbourg Court’s approach in *Goodwin* and *I v the United Kingdom* as “unusual” on the ground of the (relative) lack of consensus, although it appears that 54% of Member States permit it.<sup>80</sup> It may seem removed from the approach in a previous case on marriage:

“... the Convention must be interpreted in the light of present-day conditions . . . However, the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field – matrimony – which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.”<sup>81</sup>

The Court found that a “waiting period” before re-marriage violated the “very essence” of the right to marry. Nevertheless Judge Martens gained the impression from that and other cases that:

“... the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously when confronted with an evolution which has reached completion in some member States, is still in progress in others but has seemingly left yet others untouched. In such cases the Court’s policy seems to be to adapt its interpretation to the relevant societal change only if almost all member States have adopted the new ideas. In my opinion this caution is in principle not consistent with the Court’s mission to protect the individual against the collectivity and to do so by elaborating common standards.”<sup>82</sup>

That cautious outlook referred to by Martens has changed. But the sensitivity of marriage has not: has the Strasbourg Court been overly eager to grant the right to marry to transsexuals?

The H.L. in *Bellinger v Bellinger* also highlighted the sensitive nature of marriage. Lord Hobhouse of Woodborough noted that many transsexuals revert to their original “biological” sex, and that some alternate between the two sexes throughout their lives – which also raises the question of same-sex marriage. He stated:

“All this underlines the novelty of the idea of gender by choice and how great a departure it represents from the pre-*Goodwin* human rights law and the previous understanding of what the

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<sup>79</sup> McGlynn, ‘Families and the European Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?’ (2001) 26 *ELRev* 582, 591-592, anticipating the possible employment of Article 21 of the Charter, on non-discrimination.

<sup>80</sup> McCafferty, ‘The Right to Marry – Recent Developments’, *Human Rights*, December 2002, 219, 223, referring to the minority protection approach in *Young, James and Webster v the United Kingdom*, judgment of 13 August 1981, Series A no 44.

<sup>81</sup> *F v Switzerland*, judgment of 18 December 1987, Series A no 128, para 33.

<sup>82</sup> *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, dissenting, para 5.6.3.

words ‘respectively male and female’ meant. Similar fundamental novelties and changes in the use of language, culturally controversial, are involved in giving effect to the ECtHR’s interpretation of the word ‘marry’ in Article 12.”<sup>83</sup>

Lord Nicholls of Birkenhead also referred to marriage being an institution deeply embedded in the social and religious culture in the UK, and “deeply embedded as a relationship between two persons of the opposite sex”. He referred to “a fundamental change in the traditional concept of marriage” were the “opposite sex” requirement removed for the purposes of marriage.<sup>84</sup>

EU Council Directive 2000/78 on discrimination, including the ground of sexual orientation, as regards employment and occupation, states in its preamble expressly (paragraph 22) that it is without prejudice to national laws on marital status and linked benefits, again indicating the sensitivity of marriage.<sup>85</sup>

The consequences of the successful Article 8 claim, although likely to involve the issue of official documentation and related benefits, are likely to remain essentially private in nature. Marriage is a much more visible social institution than the system of registering births or the pension scheme, and the State can be seen as endorsing and legitimating the relationship. Marriage itself is an important institution, which has a central place in society, but this is now under challenge in its traditional form. Thus it is perhaps no surprise that pre-*Goodwin* Lord Reed referred to the greater reluctance, than under Article 8, to find a definite right to marry on the part of transsexuals,<sup>86</sup> and to the sensitivity of marriage.<sup>87</sup>

The new approach to the interpretation of Article 12 employs two distinct strands – first, the essence of the right to marry, and second, the reconsideration of what “marriage” entails – the separation of the right to marry from the right to found a family, and the allied rejection of the importance of procreation as the basis of marriage, coupled with a significant reliance on the Charter of Fundamental Rights.

#### **(a) The essence of the right to marry:**

The Court found in *Goodwin v the United Kingdom* and *I v the United Kingdom* that the applicants’ right to marry had been infringed since, in particular: “. . . the very essence of her right to marry has been infringed.”<sup>88</sup> This approach in *Goodwin* and *I v the United Kingdom* mirrors the view in *van Oosterwijk*<sup>89</sup> that the “essence of the right” must not be denied, and also

<sup>83</sup> *Bellinger (FC) (Appellant) v Bellinger* [2003] UKHL 21, para 76.

<sup>84</sup> *Bellinger (FC) (Appellant) v Bellinger* [2003] UKHL 21, paras 46–48.

<sup>85</sup> Council Directive 2000/78 EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16 – “This Directive is without prejudice to national laws on marital status and the benefits dependent thereon”.

<sup>86</sup> *Splitting the Difference*, *supra* n 1, p 26. See also *Bellinger v Bellinger* EWCA Civ 1140, para 71.

<sup>87</sup> See n 77.

<sup>88</sup> *Goodwin*, para 101; *I v the United Kingdom*, para 81.

<sup>89</sup> Commission Report in *van Oosterwijk* (1981) 3 EHRR 557, 588, para 56: (“. . . domestic law cannot authorise states completely to deprive a person or category of

other cases finding that the essence of the right to marry of prisoners had been denied, and *F v Switzerland*.<sup>90</sup> It also mirrors the view of Judge van Dijk and others in *Sheffield and Horsham v the United Kingdom*.<sup>91</sup> In

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persons of the right to marry . . . Unless one is to treat Article 12 as ineffective and redundant, one must draw the conclusion that the domestic legislation may not completely deprive anybody of the freedom to exercise this right”), a view highlighted by Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) p 436.

<sup>90</sup> In these cases reference is made to the “various substantive rules laid down by law in accordance with principles generally recognised in the European States: impediments due to close relationship, widows’ temporary impediment, etc . . . ” (Commission Report in *van Oosterwijk*, para 55) or to obstacles to marriage recognised in the public interest (*Sydney Draper v the United Kingdom*, Application no 8186/78, 24 DR 1981, paras 47-49: “As to the general question of interpretation it is clear that Article 12 guarantees a fundamental ‘right to marry’. Whilst this is expressed as a ‘right to marry . . . according to the national laws governing the exercise of this right’, this does not mean that the scope afforded to national law is unlimited. If it were, Article 12 would be redundant. The role of national law, as the wording of the Article indicates, is to *govern the exercise* of the right. The Court has held that measures for the ‘regulation’ of the rights to education (Art 2 Protocol No.1) or access to court (Art. 6) ‘must never injure the substance of the right’ (*Belgian Linguistic Case*, Judgment of 23 July 1968, Series A, No 6, p 32, para 5; *Golder Case*, Judgment of 21 February 1975, Series A, No 18, pp 18-19, para 38). In the Commission’s opinion this applies also to the national laws which govern the exercise of the right to marry. Such laws may thus lay down formal rules concerning matters such as notice, publicity and the formalities whereby marriage is solemnised. They may also lay down rules of substance based on generally recognised considerations of public interest. Examples are rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy . . . However in the Commission’s opinion national law may not otherwise deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with their exercise of the right.”; similarly *Alan Stanley Hamer v United Kingdom*, Application no 7114/75, 24 DR 1981). See also *F v Switzerland*, *supra* n 81, para 40.

<sup>91</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, para 8 of his dissenting opinion: “It cannot be denied that the ‘common ground’ among the member States of the Council of Europe for recognition of marriages between post-operative transsexuals and partners of their previous sex is less apparent than for other aspects of legal recognition of gender reassignment. At first sight, that fact would seem to justify a rather broad margin of appreciation on the part of the individual States. However, denying post-operative transsexuals in absolute terms the right to marry a person of their previous sex while marrying a person of their newly acquired sex is no longer an acceptable option would amount to excluding them from any marriage. Since no restriction of a right or freedom laid down in the Convention may affect that right or freedom in its essence (see Article 17 of the Convention), it must be concluded that such an absolute denial falls outside the margin of appreciation. That margin only allows for a certain discretion as to the modalities and requirements of the marriage of transsexuals to avoid or remedy certain legal and practical problems which such a marriage may pose. Here, again, it is not for the Court to go into different options and modalities in the abstract. I am, therefore, of the opinion that Article 12 has also been violated in the two cases.” See also Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting, *Sheffield v the United Kingdom*, Report of 21 January 1997, Annex to *Sheffield*



*Goodwin and I v the United Kingdom* the Court noted that in law the applicants, both post operative male to female transsexuals, could marry – but only a woman, a person of their “former opposite sex.” It accepted the view that this was artificial, and that they only wished to marry a man. The fact that it found that the right to marry had been denied, despite an existing (if artificial) right to marry, shows how determined the Court was to find for the applicants.

The distinction between conditions of marriage and the denial of the “very essence” is difficult. The Court’s assertion may seem tautologous, and arbitrary, as a similar claim was rejected in *Sheffield and Horsham v the United Kingdom*.<sup>92</sup> It was also arguably unnecessary if the UK recognised a change in birth certificates. Some would equate the bar to marriage of a transsexual as a condition perhaps akin to that of bigamy, polygamy, or more controversially after *Goodwin and I v the United Kingdom*, simply being of the opposite sex,<sup>93</sup> an issue avoided in these cases.<sup>94</sup>

***(b) The separation of the right to marry from the right to found a family, procreation, and the Charter***

Apart from the assertion that the essence of the right to marry had been infringed, other parts of the reasoning employ also a more liberal

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*and Horsham v the United Kingdom*, Reports of Judgments and Decisions 1998-V: “We would observe that a key principle under Article 12 is that, while the exercise of the right to marry is subject to the national laws of the Contracting States, the limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (*Rees* . . . para 50, *Cossey* . . . para 43). It must be acknowledged that the lack of legal recognition of the applicant's change of gender effectively denies her the right to marry. Under domestic law, she is regarded as male and cannot marry a man. . . . we consider that it is incompatible with Article 12 to exclude transsexuals, such as the applicant in the present case, from effectively exercising the right to marry guaranteed to everyone under the Convention. No objections, apart from the requirements of national law, have been put forward by the Government. Having regard to the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom, we are of the opinion that no convincing or objective grounds exist for such exclusion. Accordingly, our conclusion is that there has been a violation of Article 12 of the Convention.”

<sup>92</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, para 66; see *contra* the Commission Report in that case per Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting.

<sup>93</sup> See *Hamer and Draper*, *supra* n 90, referring to rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy; Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 585, paras 55-57, referring to “various substantive rules laid down by law in accordance with principles generally recognised in the European States: impediments due to close relationship, widows’ temporary impediment, etc,” and, though stating that “domestic law cannot authorise states completely to deprive a person or category of persons of the right to marry”, also stating that: “It remains that apart from any specific substantive conditions imposed by any particular domestic legislation a marriage requires the existence of a relationship between two persons of the opposite sex.” – though a violation of Article 12 was found.

<sup>94</sup> See n 135.

interpretation. The European Court of Human Rights first reviewed previous case law where the right to marry was denied to transsexuals but emphasised that it was reviewing the situation in 2002 – the evolutive approach. It noted that the right to marry is separate from the right to found a family – clearing, in an evolutive manner, the way to the Court’s abandonment of the ability to reproduce as the basis for marriage, and to the idea that the right to found a family is not tied to marriage.<sup>95</sup> The text of Article 12 suggests either one right, or two, but connected or interdependent rights – it refers to “this right” – and in any case that the right(s) belongs to married heterosexual couples. The *main* concern of Article 12 was marriage, also the basis of the family.<sup>96</sup> In *Rees*, *Cossey*, and *Sheffield and Horsham v the United Kingdom* the Court stated that Article 12 refers to the traditional marriage between persons of opposite biological sex, which appeared also from the wording of the Article that made it clear that it is mainly concerned to protect marriage “as the basis of the family”.<sup>97</sup> It was arguable that Article 12 can be interpreted to take

<sup>95</sup> The question arises whether the right to found a family is now to be regarded as having an existence independent of the marriage status of its claimants. Could a woman with fertility problems – married *or* unmarried – claim that her Article 12 right to found family is infringed by State restrictions on the availability of assisted conception? Could a gay couple assert Article 12 to challenge a law preventing them founding a family by adopting a child in their joint names? The Court has stated elsewhere that there is no Convention right as such to adopt (*Fretté v France*, Judgment of 26 February 2002, ECHR 2002-, para 32). But the Court’s insistence on isolating the right to marry from the right to found a family in *Goodwin* and *I v the United Kingdom* may have implications for the nature and extent of *both* rights. Cf *Margarita v Sijakova and Others v The Former Yugoslav Republic of Macedonia*, Decision on Admissibility, App no. 67914/01, 6 March 2003, denying a right to procreation.

<sup>96</sup> See Jacobs and White, *The European Convention on Human Rights* (2002), p 226, contrasting the wording of the Charter; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), p 613; Pannick and de la Mare, ‘Right to marry and found a family’, in Lester and Pannick, *supra* n 57, 4.12.2; Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) p 435; Clayton and Tomlinson, *The Law of Human Rights* (2000) para 13.74; Reed and Murdoch, *supra* n 24, para 6.02; Sumner, *The Charter of Fundamental Rights of the EU and Sexual Orientation* (2002) IFLJ 156 (LEXIS unpaginated version referred to). Some Commission cases treated the right to found a family differently from the right to marry in the special case of prisoners as the right to marry was denied altogether – see *Alan Stanley Hamer v United Kingdom*, and *Sydney Draper v the United Kingdom*, *supra* n 90; Cohen-Jonathan, *Respect for Private and Family Life*, in MacDonald, Matscher, Petzold (eds) *The European System for the protection of human rights* (1993), p 405, 430: “The Commission [in *Draper*] bases its decision on a definition of marriage which is separate from the right to found a family”. In *W v the United Kingdom*, Application no 11095/84, 63 DR, 1989, Schermers, dissenting, referred to two interconnected rights.

<sup>97</sup> See *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, para 66; *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 43; van Dijk and van Hoof, *supra* n 96, 613; Lester and Pannick, *ibid*; see also *Philippe Frette c. la France*, Application no 36515/97, Decision on Admissibility, 12 June 2001: “La Cour rappelle que l’article 12 de la Convention se borne à garantir le droit de se marier à l’âge nubile à deux personnes de sexes biologiques différents et ni cet article ni l’article 14 ne garantissent le droit à l’adoption . . .”

account of changes in attitudes to marriage, so that a right to found a family does not presuppose marriage.<sup>98</sup> But Article 12 in the Court's view had, pre-*Goodwin*, seemed clear.

Nevertheless, as regards the right to found a family, McGlynn and Sumner point out that the Charter of Fundamental Rights more clearly refers to two separate rights.<sup>99</sup> Indeed, the Strasbourg Judge, Fischbach, referred, post-*Goodwin*, to the "greater protection" afforded under EU law by the Charter provision, for example, of "the right to found a family"<sup>100</sup> and to the importance of Article 9 in the *Goodwin* case.<sup>101</sup> McGlynn states that it is a deliberate and important change, appearing to herald a change from the ECHR, referring to the *Explanations* to the Charter.<sup>102</sup> She concludes: "... the right to found a family may be extended to those outside of the traditional married family", a broader scope than the ECHR.<sup>103</sup> In *Goodwin* and *I v the United Kingdom* the Court, as a Grand Chamber,<sup>104</sup> found that the right to

<sup>98</sup> van Dijk and van Hoof, *supra* n 96, 613.

<sup>99</sup> Sumner, *supra* n 96, McGlynn, *supra* n 79, 593: the Charter refers to the right to marry and the right to found a family.

<sup>100</sup> *The European Convention on Human Rights and the European Union Charter of Fundamental Rights - complementary or competing?* The Council of Europe's European Convention on Human Rights and the European Union's Charter of Fundamental Rights: Judges' Symposium – Luxembourg – 16 September 2002, referring to the general possibility under the Charter of European Union law's affording greater protection than the Convention: < [http://www.coe.int/T/E/Communication\\_and\\_Research/Press/Events/6.-Other\\_events/2002/2002-09\\_Symposium\\_of\\_judges\\_-Luxembourg/Fischbach.asp](http://www.coe.int/T/E/Communication_and_Research/Press/Events/6.-Other_events/2002/2002-09_Symposium_of_judges_-Luxembourg/Fischbach.asp)>; see also n 214.

<sup>101</sup> Judge Marc Fischbach in, The Future Status of the EU Charter of Fundamental Rights, HL Paper 48, House of Lords Session 2002–03, 6th Report, Select Committee on the European Union: <<http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldcom/48/48.pdf>> Evidence, (published only in the paper version) p 45.

<sup>102</sup> The *Explanations* (see n 63) states: "This Article is based on Article 12 of the ECHR, which reads as follows: 'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.' The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides."; the *Explanations* also state that as regards Article 52(3) of the Charter, Article 9 does not "correspond" to Article 12 of the European Convention on Human Rights, because its scope may be wider as regards national law on marriage – "Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation."; see also n 155. The draft Constitution affirms that: "... the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter.": see the draft EU Constitution as of 18 July 2003: <<http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>>

<sup>103</sup> McGlynn, *supra* n 79, at 593.

<sup>104</sup> *Goodwin*, para 98; *I v the United Kingdom*, para 78: "Reviewing the situation in 2002, the Court observes that Art 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child

found a family is separate from the right to marry. Very possibly the Charter of Fundamental Rights influenced them, as they did refer to it in another context, the expression in the Charter of the right to marry without reference to men or women. Judge Fischbach indeed stressed its significance.<sup>105</sup>

Separating the two rights cleared the way to the view that Article 12 may refer to “marriage” without the ability to reproduce, accepting the argument that the right to found a family is not tied to marriage. The Court thus referred in this context to “. . . the inability of any couple to conceive or parent a child” as not precluding the right to marry. It then turned its face from previous cases, including *Sheffield and Horsham v the United Kingdom*,<sup>106</sup> where the Court has emphasised that Article 12 refers to the traditional marriage between persons of opposite biological sex, a sufficient reason to adhere to biological criteria.<sup>107</sup> It stated *inter alia* that:

“It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J in the case of *Corbett v Corbett* . . .) There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual.”<sup>108</sup>

It did not explain what the “major social changes” are. It added that there is a medical acceptance of the condition of gender identity disorder and that treatment is available.

Further, the Court referred to Article 9 of the Charter of Fundamental Rights of the European Union,<sup>109</sup> noting that it, “no doubt deliberately” (the French “et cela ne peut être que délibéré” seems stronger), makes no reference to men or women.<sup>110</sup> Finally it noted a widespread acceptance of the marriage of transsexuals within Contracting States – though a lesser consensus than on the legal recognition of the change of gender. Liberty’s survey, cited by the

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cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.”

<sup>105</sup> See n 137.

<sup>106</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V.

<sup>107</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, paras 66-67.

<sup>108</sup> *Goodwin*, para 100; *I v the United Kingdom*, para 80.

<sup>109</sup> OJ 2000/C 364/01: Article 9: **Right to marry and right to found a family.** The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

<sup>110</sup> *Goodwin*, para 100; *I v the United Kingdom*, para 80: “The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.”

Court, indicated that 54% of Contracting States permitted such marriage,<sup>111</sup> a relatively slender “consensus” upon which to base such a significant change in doctrine.

Much of the Court’s reasoning – its reference to changed social attitudes, its simple assertion of the denial of the essence of the right to marry, the separation of the right to marry and the right to found a family, and the abandonment of the idea of reproduction, is peremptory, and its reference to the Charter is questionable in the light of the apparently clear intent behind Article 12. It suggests a strong predisposition by the Court to reach a desired conclusion.

#### 4. The Implications Of Goodwin And I For Same Sex Marriage:

What are the implications for homosexual couples that wish to marry?

The situations of homosexuals and transsexuals have previously been linked by commentators, and indeed Taitz referred to “judicial fears that recognition of transsexuals’ post-operative sex may be seen as judicial license for homosexuality”.<sup>112</sup> Sharpe argued that behind the pre-*Goodwin* rulings on transsexual marriage claims was “homophobic anxiety”.<sup>113</sup> Because the Court of Human Rights had determined that “marriage” means biologically opposite sex partners, it had been observed that Article 12 did not extend to transsexuals or homosexuals.<sup>114</sup>

In 1998 the prominent commentators van Dijk (formerly judge on the Strasbourg court) and van Hoof suggested that it was safe to assume that opposite sex relationships were envisaged by the drafters of Article 12, noting the view in *van Oosterwijk* that marriage requires opposite sex partners.<sup>115</sup> But the question seemed justified “whether a more flexible

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<sup>111</sup> *Goodwin*, para 57; *I v the United Kingdom*, para 40. However the legal position in 32% of Contracting States was unclear.

<sup>112</sup> Taitz, ‘Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination’ (1987) 13 *AmJL and Med* 53, 68. For a study of homophobia and transgender jurisprudence see Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (2002), finding homophobia especially significant in the field of marriage (see p 89).

<sup>113</sup> Sharpe, *Transgender Jurisprudence*, *supra* n 112, 106, referring especially to dissents in *B v France*, judgment of 25 March 1992, Series A no 232-C, where Judge Pinheiro Farinha had stated: “After rectification of civil status, a transsexual will be able to marry a person of his true sex (original sex)” and Judge Valticos asked “And is there not thus a risk of encouraging such acts (and here it was even an operation performed without any supervision), and what is more, of seeing as a consequence half- feminised men claiming the right to marry normally constituted men, and then where would the line have to be drawn?”

<sup>114</sup> See n 97, and *e.g.* Clayton and Tomlinson, *The Law of Human Rights* (2000), para 13.78; but see now Clayton and Tomlinson, *The Law of Human Rights, Second Updating Supplement* (2003), para 13.86.

<sup>115</sup> While in *van Oosterwijk* the Commission had taken the position that States cannot completely deprive a person or category of persons of the right to marry, they also stated that marriage requires a relationship between two persons of the opposite sex – Commission Report in *van Oosterwijk* (1981) 3 EHRR 557, 585, paras 56, 57, though a violation of Article 12 was found.

interpretation is not called for . . . under the influence of changing views in society". Indeed they stated the hope that the changing attitude to transsexuals shown in *B v France*<sup>116</sup> would lead to a change in its case law on Article 12.<sup>117</sup> Equally Lord Reed, referring to the intent of the ECHR invoked in *Rees v the United Kingdom*, noting the criticism that transsexualism was not an issue at the time of drafting, suggested that the evolutive approach could lead to greater flexibility at some time in interpreting Article 12.<sup>118</sup> The van Dijk and van Hoof view in particular pre-echoes perhaps the Court's view of "major social changes in the institution of marriage since the adoption of the Convention" relied on in *Goodwin* and *I v the United Kingdom*.

Further, van Dijk and van Hoof also argued that while the statement in *Rees* that the essence of the right to marry had not been infringed<sup>119</sup> was correct in the abstract sense, it was subject to serious doubt in the concrete situation<sup>120</sup> of homosexuals and transsexuals: "Indeed, what essence of the right to marry is left to them?". They stated the hope that the Court would revise its view on Article 12.<sup>121</sup>

In *Goodwin* and *I v the United Kingdom* the Court indeed abandoned exclusive reliance on the traditional biological definition, and gave prominence to the "essence of the right" argument. Does that mean that a similar approach will be taken as regards homosexuals? Probably not, though the question is worth considering.

The Court loosened reliance on biological criteria and stated that reproductive capacity is not essential for marriage. It is true also that the Court does not refer to a right of a man and woman to *marry each other* (thus

<sup>116</sup> *B v France*, judgment of 25 March 1992, Series A no 232-C.

<sup>117</sup> van Dijk and van Hoof, *supra* n 97, 605, 609.

<sup>118</sup> *Splitting the Difference*, *supra* n 1, p 31.

<sup>119</sup> *Rees v the United Kingdom*, judgment of 17 October 1986, Series A no 106, para 50, reaffirmed in *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, para 43, and cited with approval in *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, para 66, stating briefly that: "Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind."

<sup>120</sup> This perhaps mirrors the reference to artificiality in *Goodwin* and in *I v the United Kingdom* – see *Goodwin*, para 101; *I v the United Kingdom*, para 81: "The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed."

<sup>121</sup> van Dijk and van Hoof, *supra* n 97, 607, 609.

excluding same-sex relationships), and equally Article 12 does not expressly make that explicit link<sup>122</sup> (probably because it was assumed). The Court also refers to “sexual identity” which is capable of a wider construction, though used here in relation to transsexuals’ new or chosen identity. It stressed in addition, that Member States could not in this area apply an effective bar on any exercise of the right to marry, as opposed to the conditions of marriage; here the very essence of the right to marry was infringed.<sup>123</sup>

It can also be argued that the applicants were in fact being allowed to marry their own sex by the national law under challenge, though the Court made that argument legally irrelevant by use of the Charter.<sup>124</sup>

So does the loosening of a reliance on biological criteria, in particular chromosomes, the decoupling of marriage from reproduction, the distinction of the conditions of marriage and the right to marry at all, together with the language, and the evolutive approach used in referring to the “consensus” and the change in societal views, show a green light to homosexual marriage? Is there a “fundamental right” to marry open to all?<sup>125</sup> Probably not. It is also unlikely even if the notions of “autonomy” and “dignity” used in the context of Article 8 are invoked.<sup>126</sup> It seems more likely that these

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<sup>122</sup> Wintemute, ‘Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention’ in Wintemute and Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (2001), p 713, 728, points out that the text of Article 12 does not say in terms that a man can only marry a woman and *vice versa*, and asserts that it is likely that the Court will one day modify its “opposite sex only” interpretation of Article 12 in its case law on transsexuals’ marriage so as to recognise an “emerging consensus” that restricting civil marriage to *opposite* or different sex partners is discriminatory. However he considered that it was extremely unlikely in 2001 that such an argument would succeed, given the lack of “European consensus”. McCafferty, ‘Gays, Transsexuals and the Right To Marry’ (2002) *Fam Law* 362, 364-365, suggests that Article 12 can be read so that men and women have a right to marry, or have a right to marry each other, but that, arguably, this latter view implies words into the text, indeed amends it: she further suggests that courts, because of the cautious approach of the Strasbourg court, would take this latter approach, but interestingly, invokes the “evolutive approach” of the Strasbourg court; she also considers however that such an interpretation would only come about once gay marriage is accepted in a sufficient number of countries.

<sup>123</sup> *Goodwin*, paras 101, 103; *I v the United Kingdom*, para 81, 83; *cf Hamer and Draper*, *supra* n 90; Commission Report in *van Oosterwijk* (1981) 3 EHRR 557, 585, paras 55, 57: “They must also observe the various substantive rules laid down by law in accordance with principles generally recognised in the European States: impediments due to close relationship, widows’ temporary impediment, etc. . . . It remains that apart from any specific substantive conditions imposed by any particular domestic legislation a marriage requires the existence of a relationship between two persons of the opposite sex.”

<sup>124</sup> See nn 135, 136.

<sup>125</sup> In *W v the United Kingdom*, Application no 11095/84, 63 DR, 1989, Schermers, dissenting, considered that the “fundamental human right” underlying Article 12 should also be granted to homosexual and lesbian couples, that they should not be denied the right to found a family without good reasons, and that the wording of the judgment in *Rees* left open the possibility of the marriage of persons of opposite psychological sex.

<sup>126</sup> But *cf* the view in Canada of LaForme J, cited *infra* n 165.

cases, *Goodwin* and *I v the United Kingdom*, must be confined to transsexuals. The ECJ took a similar approach in *Grant*,<sup>127</sup> confining *P v S* to its facts to avoid the conclusion that discrimination against homosexual persons was *sex* discrimination. Even Judge van Dijk – presumably an influential voice as the principal dissenter on Article 12 in *Sheffield and Horsham v the United Kingdom* – accepted the presumption that Article 12 refers to persons of the opposite sex in view of its wording, though the result was “unsatisfactory”,<sup>128</sup> and Judge Martens – dissenting powerfully – in *Cossey v the United Kingdom* also accepted the “opposite sex” view – though not necessarily opposite biological sex.<sup>129</sup> But the former used the word “presumption” and recorded his view that it is unsatisfactory as regards homosexuals.

Those views do not rule out homosexual marriage but make it seem unlikely. In *Frette v France* (Admissibility) the Court again very recently also referred to two persons of the opposite biological sex,<sup>130</sup> though this has to be read in the light of the later *Goodwin* and *I v the United Kingdom* cases.

However there are two issues that cannot go away. One question remains whether the peremptory argument that the very *essence* of the right to marry has been denied, as it was to transsexuals, may be extended to homosexuals, and a question indeed put by van Dijk and van Hoof.<sup>131</sup> If the essence of the right is denied to transsexuals why not homosexuals, as the essence is no longer producing a family? Arguably the biology of two opposite sex partners remains of the “essence”, since the Court only rejected assessing “gender by *purely* biological criteria”. The Court of Human Rights has abandoned the view that marriage is between persons of the opposite sex only to the extent that it found that biological criteria were not *wholly* determinative in the specific context of transsexuals. Yet the rationale produced in earlier cases of marriage “as the basis of the family” has gone. And the essence of two opposite sex partners does not appear in the Charter. This leads to the second issue.

More significant perhaps, the Court of Human Rights’, apparently subsidiary reference,<sup>132</sup> in the *Goodwin* and *I* cases, on the more open ended Article 9 of the Charter of Fundamental Rights raises more doubts. The Court of Human

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<sup>127</sup> Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621.

<sup>128</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, dissent, para 8: “. . . if one starts from the presumption that Article 12 has to be considered to refer to marriages between persons of the opposite sex – a presumption which still seems to be justified in view of the clear wording of the provision, although it has the unsatisfactory consequence that it denies to, or at least makes illusive for, homosexuals a right laid down in the Convention. . . .”; but see n 121.

<sup>129</sup> Judge Martens, dissenting, in *Cossey v the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 4.5.1; see also Judges Palm, Foighel, Pekkanen, dissenting, at para 5.

<sup>130</sup> *Philippe Frette c la France*, Application no 36515/97, Decision on Admissibility, 12 June 2001: “La Cour rappelle que l’article 12 de la Convention se borne à garantir le droit de se marier à l’âge nubile à deux personnes de sexes biologiques différents et ni cet article ni l’article 14 ne garantissent le droit à l’adoption. . . .”.

<sup>131</sup> See n 121.

<sup>132</sup> But see n 214.



Rights expressly noted that Article 9 “. . . departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women . . .”<sup>133</sup> (There is other evidence that the intention to remove the restriction of same-sex couples was indeed deliberate.<sup>134</sup>)

Thus, as Lord Hope astutely observed, the Strasbourg court made largely irrelevant the argument that the applicants were still the “original” sex<sup>135</sup> – thus marrying their own sex. McCafferty also drew two things from the text of Article 9 of the Charter, with its removal of a reference to men and women. First, it separates the right to marry from the right to found a family. Second, it also allows the possibility of transsexuals’ marriage – the marriage of a transsexual to a person of opposite sex to their own post-operative gender – because arguments that they are not the opposite sex are irrelevant. She considers that the Court of Human Rights accepted the second aspect in the *Goodwin* case.<sup>136</sup> But of note here also is Judge Fischbach’s observation that the Charter was useful as it does not rule out *homosexual* marriage, and his express reference to the Charter right to found a family belonging to all.<sup>137</sup>

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<sup>133</sup> *Goodwin*, para 100; *I v the United Kingdom*, para 80. Art 37 of the Charter (the protection of the environment) was also referred to in the Separate Opinion of President Costa in *Hatton and Others v the United Kingdom*, judgment of 2 October 2001, ECHR 2001; see also the Joint Partly Dissenting Opinion of Bratza, Fuhrmann and Tulkens in *Fretté v France* (Merits), Judgment of 26 February 2002, ECHR 2002, referring to Art 21 of the Charter and going on to argue that it “may therefore be reasonably argued that a European consensus is now emerging in this area” of grounds of sexual orientation.

<sup>134</sup> See Rogers, ‘From the Human Rights Act to the Charter: Not Another Human Rights Instrument to Consider’ (2002) EHRLR 343, at n 9.

<sup>135</sup> Lord Hope of Craighead, in the HL in *Bellinger (FC) (Appellant) v Bellinger* [2003] UKHL 21, para 69, interpreted the Court of Human Rights thus: “Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed what the European Court of Human Rights has now held should be the position in *Goodwin*. The court noted in para 100 of its judgment that Article 9 of the Charter of Fundamental Rights of the European Union had departed ‘no doubt deliberately’ from the wording of Article 12 of the Convention in removing the reference to ‘men and women of marriageable age.’ Article 9 of the Charter states simply that ‘the right to marry’ shall be guaranteed. The note to Article 9 says that it neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. It appears that the European Court saw that article as opening up the possibility of transsexuals marrying persons of the opposite sex to their post-operative acquired gender, as it rendered arguments about whether they were in act [sic] of the opposite sex irrelevant. By this route, which bypasses the physical problems which are inherent in the notion of a complete sex change, legal recognition can be given to the acquired gender of post-operative transsexuals.” (on this point of the irrelevance of the applicant’s sex see also n 136).

<sup>136</sup> McCafferty, ‘The Right to Marry – Recent Developments’, *Human Rights*, December 2002, 219, 222.

<sup>137</sup> “. . . there is quite a difference between this provision of the Charter and the provision in the European Convention. The European Court referred to this provision in the Charter because it wanted to go a little bit further in its jurisprudence [in *Goodwin*]. . . The Court considered the Charter as a really good source of inspiration in that case, because the Charter does not rule out *homosexual* marriages. It is stated in the Charter that everybody has the right to

The strange result of these cases may be that if the UK birth certificate system is not properly changed transsexuals have two rights to marry, as male or female, depending on whether the original birth certificate is relied on, and if it is the relationship would in effect be homosexual.<sup>138</sup> Indeed, in the House of Lords in *Bellinger v Bellinger* Lord Hope referred to the petitioner thus:

“Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed what the European Court of Human Rights has now held should be the position in *Goodwin*.”<sup>139</sup>

One of the Strasbourg judges, Fischbach, also referred to *Goodwin* thus:

“The Court considered the Charter as a really good source of inspiration in that case, because the Charter does not rule out *homosexual* marriages. It is stated in the Charter that everybody has the right found a family. That was for the Court one of the reasons which caused it to strengthen its case-law in this field.”<sup>140</sup>

That remark is of course only by one Strasbourg judge but it is perhaps indicative of the “new” thinking.

This reference to the Charter is despite its legal status being at least questionable, being non-binding, though it has been referred to a “point of reference” or a “standard of comparison”, or an expression of a “democratically established political consensus” on fundamental rights, by EU Advocates General,<sup>141</sup> and used as a source in England to reaffirm or

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found a family. That was for the Court one of the reasons which caused it to strengthen its case-law in this field.” Judge Marc Fischbach in, *The Future Status of the EU Charter of Fundamental Rights*, HL Paper 48, House of Lords Session 2002–03, 6th Report, Select Committee on the European Union: <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldcom/48/48.pdf>, Evidence, (published only in the paper version) p 45, emphasis added.

<sup>138</sup> McCafferty, ‘The Right to Marry – Recent Developments’, *Human Rights*, December 2002, 219, 223; see also McCafferty, ‘Gays, Transsexuals and the Right To Marry’ (2002) *Fam Law* 362, 366.

<sup>139</sup> See *Bellinger (FC) (Appellant) v Bellinger* [2003] UKHL 21, para 69; see also n 135.

<sup>140</sup> Judge Marc Fischbach in, *The Future Status of the EU Charter of Fundamental Rights*, HL Paper 48, House of Lords Session 2002–03, 6th Report, Select Committee on the European Union: <<http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldcom/48/48.pdf>>, Evidence, (published only in the paper version) p 45, emphasis added.

<sup>141</sup> See nn 144, 209; Jacobs, ‘Human Rights in the European Union: The Role of the Court of Justice’, (2001) 26 *ELRev*, 331, 339: “The Charter provides a convenient point of reference, to identify what rights are fundamental, to give them a lapidary formulation, to set out, very succinctly, the permissible limitations. Of course it does not answer all the questions. But it provides a Bill of Rights for the Community (perhaps in some ways, and with some of the same advantages, as the Human Rights Act does for the United Kingdom). It is up to date, in a way which the Convention even with its Protocols cannot be.”

elucidate the ECHR's content.<sup>142</sup> It contrasts – at the time of writing<sup>143</sup> – with the apparently reserved and conservative (non) use of the Charter by the ECJ (as opposed to the CFI),<sup>144</sup> though some argue that (given AG reference

<sup>142</sup> See *The Queen (on the application of The Howard League For Penal Reform) v The Secretary of State for the Home Department and The Department of Health* [2002] EWHC 2497 (Admin), per Munby J, paras 51-52, and at para 68; *The Future Status of the EU Charter of Fundamental Rights*, House of Lords Session 2002-03, 6th Report, Select Committee on the European Union, HL Paper 48, 2003 <<http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/lddeucom/48/48.pdf>> para 33. In *A and others v East Sussex County Council and another* [2003] EWHC 167 (Admin) [2003] All ER (D) 233, Munby J stated, paras 73-74: "The Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. The Charter is not at present legally binding in our domestic law and is therefore not a source of law in the strict sense. But it can, in my judgment, properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention. This approach is, I think, consistent with the approach adopted in relation to the Charter by Advocate General Jacobs in his opinion in *Case C-270/99P, Z v European Parliament* para [40], by Advocate General Tizzano in his opinion in *Case C-173/99, R (ota the Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry* [2001] All ER (EC) 647, paras [27]-[28], and by Maurice Kay J in *R (ota Robertson) v City of Wakefield Metropolitan Council* [2001] EWHC Admin 915, para [38]. It is in fact the approach which I myself adopted in *R (ota Howard League for Penal Reform) v The Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR xxx, para [52]." The use of the Charter was also referred to in the context of *Goodwin v the United Kingdom* by Lord Hope of Craighead, in the HL in *Bellinger (FC) (Appellant) v Bellinger* [2003] UKHL 21, para 69. In *Sepet v Secretary of State for the Home Department, Bulbul v Secretary of State for the Home Department*, [2003] UKHL 15, paras 15, 51, its status was regarded as undecided. Passing reference to the Charter was made in *Coppard v Customs and Excise Commissioners* [2003] EWCA Civ 511, para 38; *Regina (Robertson) v Wakefield Metropolitan District Council and another* [2001] EWHC Admin 915, para 38.

<sup>143</sup> June 2003; the Charter has been adopted by the Draft Treaty establishing a Constitution for Europe – see n 222.

<sup>144</sup> We wish to thank our colleague Carole Lyons for this observation. As regards the status of the Charter see n 142 and also, *inter alia*: Lyons, 'Human Rights Case law of the European Court of Justice', (2003) 3 *HRLRev* (2003) 157, 172. Weiler, *infra* n 209. The Charter in the European context A point of reference for the courts <[http://europa.eu.int/comm/justice\\_home/unit/charte/en/European-context-reference.html#top](http://europa.eu.int/comm/justice_home/unit/charte/en/European-context-reference.html#top)>. House of Lords Session 2002-03, 6th Report, Select Committee on the European Union, The Future Status of the EU Charter of Fundamental Rights, H.L. Paper 48, 2003 <<http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/lddeucom/48/48.pdf>>, para 30f. Secretariat Discussion Paper, Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR, 18 June 2002, CONV 116/02 <<http://register.consilium.eu.int/pdf/en/02/cv00/00116en2.pdf>>. Beaumont, 'Human Rights: Some Recent Developments and Their Impact on Convergence and Divergence of Law in Europe', in Beaumont, Lyons, Walker (eds) *Convergence and Divergence in European Public Law* (2002), pp 151, 153. Jacobs, *supra* n 141. See also AG Opinions before the ECJ, especially AG Colomer in *Case C-466/00 Arben Kaba*

to the Charter) it plays a part in ECJ findings, or expect the ECJ to refer to it.<sup>145</sup> This use of the Charter could be described as appropriate as a makeweight<sup>146</sup> in a particular context. But it is also possible that it is a very deliberate – and perhaps questionable – attempt to “modernise” the ECHR and allow its use in other cases where an “evolutive” approach is attractive. It has been suggested that:

“This important judgement shows that the Court of Human Rights is starting to use the EU Charter as a source for interpreting the European Convention.”<sup>147</sup>

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*v Secretary of State for the Home Department*, 11 July 2002, at n 74: “As regards the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), which contains a more extensive and up-to-date list of rights and freedoms than the Convention, some Advocates General, within the Court of Justice and without ignoring the fact that the Charter does not have any *autonomous* binding effect, have nevertheless emphasised its clear purpose of serving as a substantive point of reference for all those involved in the Community context (Opinion of Advocate General Tizzano of 8 February 2001 in Case C-173/99 BECTU [2001] ECR I-4881, especially I-4883, point 28), point out that it has placed the rights which it recognises at the highest level of the hierarchy of values common to the Member States and necessarily constitutes a privileged instrument for identifying fundamental rights (Opinion of Advocate General Léger of 10 July 2001 in Case C-353/99 *Council v Hautala*, not yet published in the European Court Reports, points 82 and 83), or argue that it constitutes an invaluable source for the purposes of ascertaining the common denominator of the essential legal values prevailing in the Member States, from which the general principles of Community law in turn emanate (my Opinion of 4 December 2001 in Case C-208/00 *Überseering*, not yet published in the European Court Reports, point 59).”; AG Alber in Case C-63/01 *Samuel Sidney Evans v Secretary of State for the Environment, Transport and the Regions, and Motor Insurers’ Bureau*, 24 October 2002, para. 80: “Reference should also be made to Article 47 of the Charter of Fundamental Rights, which, admittedly, does not yet have any binding legal effect. It can, however, be used as a standard of comparison, at least in so far as it addresses generally recognised principles of law.”; AG Mischo in Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd v The Scottish Ministers*, 20 September 2001, para 126. As to the CFI see *inter alia* Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International, Inc, RJ Reynolds Tobacco Holdings, Inc, RJR Acquisition Corp, RJ Reynolds Tobacco Company, RJ Reynolds Tobacco International, Inc, Japan Tobacco, Inc v Commission of the European Communities*, 15 January 2003, para 122; Case T-211/02, *Tideland Signal Limited v Commission of the European Communities*, 27 September 2002, para 37; Case T-177/01, *Jégo-Quéré et Cie SA v Commission of the European Communities*, 3 May 2002, paras 42, 47.

<sup>145</sup> Thus see: The Charter in the European context: A point of reference for the courts <[http://europa.eu.int/comm/justice\\_home/unit/charte/en/european-context-reference.html#top](http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html#top)>; see also memorandum of the Bar European Group in, *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, Evidence, (published only in the paper version) p 56; Rudolf, ‘European Union’ (2003) 1 *International Journal of Constitutional Law* 135, 138 <[http://www3.oup.co.uk/ijclaw/hdb/Volume\\_01/Issue\\_01/pdf/010135.pdf](http://www3.oup.co.uk/ijclaw/hdb/Volume_01/Issue_01/pdf/010135.pdf)>.

<sup>146</sup> But see n 214.

<sup>147</sup> The Charter in the European context: A point of reference for the courts <[http://europa.eu.int/comm/justice\\_home/unit/charte/en/european-context-reference.html#top](http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html#top)>.

One view of these cases is that:

“... the case of *Goodwin*, with its important ruling on Article 12, marks possibly the beginning of a wider approach to the definition of those able to assert their rights under the Convention. The result of the Court holding that transsexual people have a right to marry is likely to have far reaching consequences, particularly for groups previously excluded rights because of their sexual orientation. This ruling may open the way for same-sex partners to seek to demand that they too now have the right to marry, particularly in view of the fact that neither the ability to conceive nor the ability to parent a child were found to be necessary prerequisites to the right to marry.”<sup>148</sup>

It has also been suggested that, following *Goodwin* and emphasising strands of its reasoning,<sup>149</sup> including the reference to major social changes in the institution of marriage since the adoption of the Convention:

“The Court’s reasoning [in the *Goodwin* case] clearly leaves the door open to a future interpretation of Article 12 as requiring, as a result of ‘major social changes’, not only that post-operative transsexual persons be permitted to contract ‘chromosomally same-sex’ civil marriages, but also that lesbian, gay and bisexual persons be permitted to contract civil marriages.”<sup>150</sup>

In strong rebuttal of that it has been asserted however:

“It is important. . . to recognize that never has legal recognition of same-sex ‘marriage’ been imposed through judicial action . . . the fact remains that no international human rights tribunal has required member states to extend legal recognition of same-sex unions. . . Further. . . it appears unlikely that the removal of the phrase ‘men and women’ from Article 9 of the . . . E.U. Charter of Fundamental Rights will have any impact on the definition of marriage. To assure this result, the Charter’s explanatory notes explicitly indicate that ‘[the] article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex.’”<sup>151</sup>

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<sup>148</sup> Case Comment, Transsexuals: Lack Of Legal Recognition Of Transsexuals, (2002) EHRLR 796, 799.

<sup>149</sup> Its reference to the lack of need for reproduction, its statement that “There have been major social changes in the institution of marriage since the adoption of the Convention”, its reference to the Charter, and its view that the essence of the right to marry was infringed.

<sup>150</sup> See Brief of Amici Curiae International Human Rights Organizations, *et al: Hillary Goodridge at al v Department of Public Health and Koh*, before the Commonwealth of Massachusetts Supreme Judicial Court, No SJC-08860. <[http://www.glad.org/GLAD\\_Cases/International\\_Brief.pdf](http://www.glad.org/GLAD_Cases/International_Brief.pdf)>

<sup>151</sup> Brief Amicus Curiae on Behalf of Professors and Advisors of Law: *Hillary Goodridge at al v Department of Public Health and Koh*, before the Commonwealth of Massachusetts Supreme Judicial Court, No SJC-08860 section

Rogers, however, focusing on the UK, wrote pre-*Goodwin* in a manner akin to the Strasbourg court's evolutive approach, and its use of the Charter:

“Whilst a religious same sex marriage may yet be inconceivable, a challenge asserting the right to a civil marriage ceremony is not. The ECHR's confinement of this right (Art 12) to a man and a woman appears to be a final answer against same sex marriages. But, with the Charter as an interpretative influence through section 2 of the Human Rights Act, the argument is stronger. The Convention is a living instrument, society has progressed since it was drafted, it is in the interests of society to recognise all stable and loving relationships, and this was recognised by the Charter Convention in their updating of the ECHR right to reflect changed values – or so the argument would run. . .”<sup>152</sup>

As he points out, Dutheil de la Rochere took the view that Article 9 allowed for the possibility of same-sex marriage.<sup>153</sup>

Bessant also suggested that, after *Goodwin*, the court's invocation of the “living instrument” doctrine might have wider implications for non-conventional family forms.<sup>154</sup>

A different view is taken by those who emphasise the *Explanations* relating to the Charter which state that Article 9 neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex, that is, there is no grant of a right to same sex marriage, though the provision may permit recognition of national legislation giving such a right.<sup>155</sup> The

IIIA, referring to Sumner, ‘The Charter of Fundamental Rights of the EU and Sexual Orientation’, (2002) *IFLJ* 156, 159.

<sup>152</sup> Rogers, *supra* n 134, at 354-355.

<sup>153</sup> Dutheil de la Rochere, *Droits de l'Homme: La Charte des droits fondamentaux et au-delà*, <<http://www.jeanmonnetprogram.org/papers/01/013501.html>> and in *Setting the Agenda and Outlining the Options: EUROPE 2004* <[http://europa.eu.int/comm/governance/whats\\_new/europe2004\\_en.pdf](http://europa.eu.int/comm/governance/whats_new/europe2004_en.pdf)> “L'article 9 relatif au droit de se marier, par rapport à la CEDH introduit la possibilité d'unions entre personnes du même sexe.”

<sup>154</sup> ‘Transsexuals and Marriage after *Goodwin v United Kingdom*’, (2003) 33 *Fam Law* 111, 116, referring to unmarried cohabitation.

<sup>155</sup> See the *Explanations*, *supra* n 102. The *Explanations* relating to Article 52(3) confirm that the scope of Article 9 (not its meaning) may be extended where *national legislation* extends to other forms of marriage. On Article 9 see also Europarl LIBE, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs: <[http://www.europarl.eu.int/comparl/libe/elsj/charter/art09/default\\_en.htm#2](http://www.europarl.eu.int/comparl/libe/elsj/charter/art09/default_en.htm#2)> “The right to marry and the right to found a family are traditional fundamental liberties. The wording of these rights is in keeping with the traditional concept expressed in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights: ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’ Article 9 of the Charter refers to national legislation in order to take account of its diversity and cases in which these rights are more modern in scope: authorisation of marriage between persons of the same sex, founding of a family other than within marriage. This gives the article, where it is the case in national legislation, broader scope than the corresponding Article 12 of the European Convention on Human Rights.” AG Mischo in Joined Cases C-

difficulty here is that in *Goodwin* and *I v the United Kingdom* national legislation did not allow transsexual marriage, yet nonetheless fell foul of the Convention, so the lack of national legislation on same-sex marriage is apparently not crucial in determining the extent of marriage rights.

Certainly the use of the Charter in these cases might be taken as a pointer to the future. At the same time, that use of the Charter was in the context of a certain consensus in Europe, which does not exist as regards same-sex marriage.<sup>156</sup> It has been suggested that the non reference to the Charter in *D v Sweden and Council*<sup>157</sup> was partly because “. . . the Court, concerned with the potential impact upon the legal status of the Charter, may not have wanted to use it in relation to such a sensitive issue.”<sup>158</sup> The lack of European consensus on same-sex marriage seems important,<sup>159</sup> but, post-*Goodwin*, Wintemute wrote that:

“Although a same-sex marriage case under Article 12 would still be premature (given that only one of 44 European Convention countries has opened up civil marriage to same-sex couples), the Court’s new interpretation of Article 12 will prove extremely helpful when such a case is brought in the future.”<sup>160</sup>

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122/99 P and C-125/99 P, *D v Sweden and Council* [2001] ECR 5(B) I-4319, para 97, referred to Article 9 of the Charter same-sex partnership, and found, given that the clarifying *Explanations* state that Article 9 neither prohibits nor requires the grant of the status of marriage to relationships between persons of the same sex, that confirms the difference between marriage and same sex relationships; the Court did not refer to the Charter and indeed as Sumner *infra*, points out, the ECJ stated, para 34, that “It is 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.” See also McGlynn, *supra* n 79, 592-593; Sumner, *supra* n 96: “. . . 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”; the Brief Amicus Curiae on Behalf of Professors and Advisers of Law, *supra* n 151, also refers to Sumner. Duteil de la Rochere, *supra* n 153, refers to AG Mischo but states: “A vrai dire l’avocat général tire du texte de l’article 9 de la Charte et des ‘explications’ qui l’accompagnent des conclusions exactement contraires à l’esprit libéral qui inspirait les rédacteurs de la Charte; il omet par ailleurs de se référer à l’article 21 de la Charte qui interdit toute discrimination à raison de l’orientation sexuelle. C’est dire que le texte de la Charte peut faire l’objet d’interprétations divergentes.”; McCafferty, *supra* n 136, at 219, takes the view that Art 9, in the context of the *Explanations*, does not, or does not necessarily, intend to pave the way for claims by homosexuals that Article 12 should be interpreted to grant the right to marry; Caracciolo di Torella and Reid, ‘The Changing Shape of the “European family” and fundamental rights’ (2002) 27 *ELRev* 80, 83, also criticise the lack of reference (“a remarkable lacuna”) to Art 21 of the Charter.

<sup>156</sup> See as regards the EU, n 78, and for comment, McGlynn, *supra* n 79, 593.

<sup>157</sup> Joined Cases C-122/99 P and C-125/99 P, *D v Sweden and Council*, [2001] ECR 5(B) I-4319.

<sup>158</sup> Caracciolo di Torella and Reid, *supra* n 155, 89.

<sup>159</sup> See Wintemute, *supra* n 122.

<sup>160</sup> <<http://www.qrd.org/qrd/www/legal/Igln/09.2002.html>>

There are views that there is a “broad trend towards equal treatment of different-sex and same-sex couples in at least 19 industrialized democracies outside the United States”, but also a strong and well-supported view that there is no global trend toward recognition of same-sex “marriage.”<sup>161</sup> Of some note is the fact that the Human Rights Committee of the International Covenant on Civil and Political Rights has found marriage laws restricted to heterosexual couples to be consistent with the right to marry provisions of the Covenant.<sup>162</sup> The Vatican has condemned same-sex marriage.<sup>163</sup> At the same time, Belgium has become the second Contracting State to allow same-sex marriage.<sup>164</sup> Further, the Court of Appeal for Ontario in *Halpern v Canada* has found the exclusion of same sex couples from the common law definition of marriage is a violation of the provision in the Canadian Charter of Rights and Freedoms concerning equality.<sup>165</sup>

The apparent certainty that Article 12 refers only to people of the opposite biological sex (in all respects) has been shattered at least for transsexuals, partly in view of social acceptance and medical acceptance as a medical condition. Will homosexual persons be next? The “medical condition” aspect of transsexuals was evident in the section of the judgement on Article 8 and homosexuals will find that part difficult. The transsexual is now recognised in the “new sex” and so the “opposite sex” assumption behind marriage is maintained from one angle (leaving aside the “original sex”), which is not the case with homosexuals. The wording of Article 12 seems also clear. But Wintemute’s different (pre-*Goodwin*) analysis of Article 12 – interestingly anticipating first a change in attitude to Article 12 and transsexuals by the Court – should not be ignored. Of course, pre-*Goodwin* he focussed on both Article 12 and Article 14, and the Court’s reasoning in

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<sup>161</sup> See Brief of Amici Curiae International Human Rights Organizations, *et al*; Brief Amicus Curiae on Behalf of Professors and Advisers of Law, *supra* nn 150, 151.

<sup>162</sup> *Joslin v New Zealand*, Communication No 902/1999; New Zealand. 30/07/2002, CCPR/C/75/D/902/1999. (Jurisprudence), available via <<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/e44ccf85efc1669ac1256c37002b96c9?Opendocument>> See also Quitter Attorney-General, High Court Auckland, [1996] NZFLR 481. The Brief of Amici Curiae International Human Rights Organizations, *supra* note 150, argues that the decision was not persuasive, as *inter alia*, Committee was unaware of the *Goodwin* case.

<sup>163</sup> See: <[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html)>

<sup>164</sup> Marriage Watch: <<http://www.marriagewatch.org/news/020303a.htm>>

<sup>165</sup> See <<http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm>> “... it is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage. Accordingly, we conclude that the common-law definition of marriage as ‘the voluntary union for life of one man and one woman to the exclusion of all others’ violates s 15(1) of the Charter.” See also the decision of the Court of Appeal of British Columbia in *Barbeau v British Columbia (Attorney General)*, 225 D.L.R. (4th) 472; <<http://www.courts.gov.bc.ca/jdb-txt/ca/03/02/2003BCCA0251.htm>>. LaForme J. in *Halpern v Canada (Attorney General)* 95 C.R.R. (2d) 1, Ontario Divisional Court, was cited by Prowse J. in *Barbeau*, para 130: “The restriction against same-sex marriage is an offence to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied the autonomy to choose whether they wish to marry.”



these cases is not based on the same approach.<sup>166</sup> The argument under Article 14<sup>167</sup> will no doubt be subservient to that under Article 12. That argument is not considered in detail here. But it is of interest to note that in *Shackell v the United Kingdom*, the Court stated of the claim under Article 14 by an unmarried surviving cohabitee that:

“The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it . . . *marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention.*”<sup>168</sup>

Yet that was before *Goodwin* and *I v the United Kingdom*, and Wintemute’s semi-optimistic post-*Goodwin* analysis suggests that pro same-sex campaigners may yet succeed.<sup>169</sup> Judge Fischbach of the Strasbourg Court has referred to Article 9 of the Charter thus, in terms that seem to acknowledge the judicial activism practised in *Goodwin*:

“The [Strasbourg] court is not bound by the Charter. . . . However, it does not prevent the court from referring to the Charter as it refers also to other international instruments, a source of inspiration in the interpretation of the Convention. . . . I think the most significant [recent] example is...the case of *Christine Goodwin v. The United Kingdom*. There the court made a reference precisely to Article 9 of the Charter, the Article which lays down the right to marry. You know that in Article 12 of the Convention it is held that a man and a woman have the right to marry. So there is quite a difference between this provision of the Charter and the provision in the European Convention. The European Court referred to this provision in the Charter because it wanted to go a little bit further in its jurisprudence. . . . The Court considered the Charter as a really good source of inspiration in that case, because the Charter does not rule out *homosexual* marriages. It is stated in the Charter that everybody has the right to found a family. That was for the Court one of the reasons which caused it to strengthen its case-law in this field.”<sup>170</sup>

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<sup>166</sup> See n 122.

<sup>167</sup> Article 14 brings in of course *Salgueiro da Silva Mouta v Portugal*, judgment of 21 December 1999, *Reports* 1999-IX, but compare *Fretté v France*, judgment of 26 February 2002, ECHR 2002; see also *Antonio Mendoza v Ahmad Jaja Ghaidan* (CA Civ Div ) [2002] EWCA Civ 1533.

<sup>168</sup> *Joanna Shackell v the United Kingdom*, Application no 45851/99, Decision on Admissibility, 27 April 2000, emphasis added.

<sup>169</sup> See n 160.

<sup>170</sup> *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, Evidence, (published only in the paper version) pp 40, 45, emphasis added.

Article 21 of the Charter on non-discrimination<sup>171</sup> may be invoked by those arguing for recognition of same-sex marriage.<sup>172</sup> It should be noted that Article 21 of the Charter, concerning non-discrimination on the grounds of sexual orientation, appears to be freestanding,<sup>173</sup> and that there may be a European consensus on that subject.<sup>174</sup> Reliance on it however might have the effect of introducing Protocol 12 indirectly by another route.<sup>175</sup> Also it is to be noted that EU Council Directive 2000/78 on discrimination, including the ground of sexual orientation, excludes marital status.<sup>176</sup>

## 5. The “Evolutive Approach”

The Court’s enthusiasm for adjusting to change, and its express invocation of the imagery of the new century, is notable. The Court of Human Rights announced that while there are good reasons for it to follow its own case law:

“... the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved . . . It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement . . .”<sup>177</sup>

The Court’s president – Judge Wildhaber – in his speech opening the judicial year 2003 highlighted this aspect of the case.<sup>178</sup>

Hence, having also noted that it had repeatedly stressed the need to keep the need for appropriate legal measures in this area under review, it looked at present day conditions within and outside the Convention States. It noted that even in *Sheffield and Horsham v the United Kingdom*,<sup>179</sup> there was an “emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment” and relied also on a continuing *international* trend to towards legal recognition.<sup>180</sup> Here it

<sup>171</sup> See n 155.

<sup>172</sup> See n 133, 155.

<sup>173</sup> See Sumner, *supra* n 96; Lord Lester of Herne Hill, Evidence to: House of Lords Session 2002–03, 6th Report, Select Committee on the European Union, *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, published in paper version only, p 7.

<sup>174</sup> See n 133.

<sup>175</sup> See Lord Lester of Herne Hill, *supra* n 173.

<sup>176</sup> See n 85.

<sup>177</sup> *Goodwin*, para 74; *I v the United Kingdom*, para 54.

<sup>178</sup> Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, Thursday, 23 January 2003, Speech by Mr Luzius Wildhaber, President of the European Court of Human Rights, <<http://www.echr.coe.int/eng/Speeches/SpeechWildhaber.htm>>.

<sup>179</sup> *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V.

<sup>180</sup> *Goodwin*, para 85; *I v the United Kingdom*, para 65: “The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and

was strongly influenced by the observations submitted by the human rights campaign group “Liberty”. The Court was relatively dismissive of a lack of a common approach to the legal *repercussions* for transsexuals in the Contracting States and on the complexity of the issues, which it had recently emphasised in *Sheffield and Horsham v the United Kingdom*,<sup>181</sup> being more interested in the international trend toward the social acceptance and legal recognition of the new sexual identity of transsexuals. It also seems to reply to the concerns expressed in that case as to the moral social and legal complexities involved, in stating later on that:

“In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.”<sup>182</sup>

This striking and unequivocal declaration by the Court again seems to show a certain impatience by the Court,<sup>183</sup> but perhaps also its determination to adhere to an evolutive approach. The beginning of a new century is perhaps an appropriate time, in the Court’s view, to resolve issues and to hasten processes of change that were left uncompleted at the end of the last. The Court is clear that there is a sufficient consensus within the community of developed legal orders, whether or not all signatories to the Convention, to support its decision to insist on these improvements in the legal status of transsexuals. The Court’s decision not only identifies and endorses an international trend, but also reinforces the relevance to human rights jurisprudence of comparative assessments of guarantees of individual liberties. The boundaries of legal thinking governing the rights that the ECHR protects are not coterminous with those of the territories of its signatory States, because a reliance on an international trend is possible. This may reflect a view that human rights are universal.<sup>184</sup> This wide approach may be welcome as an interpretative technique, but one may indeed question whether a Pandora’s box has been opened.<sup>185</sup>

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uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”

<sup>181</sup> See *Sheffield and Horsham v the United Kingdom* [GC], judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, paras 57-58.

<sup>182</sup> *Goodwin*, para 90; *I v the United Kingdom*, para 70.

<sup>183</sup> See on the matter of impatience, Clare Dyer, ‘Landmark ruling for transsexuals forces Britain to change law’, *The Guardian*, July 12, 2002, <[http://www.guardian.co.uk/uk\\_news/story/0,3604,753920,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,753920,00.html)>

<sup>184</sup> See Contribution of Mr Fischbach and Mr Krüger, Council of Europe Observers, Draft Charter Of Fundamental Rights Of The European Union, 2000, Charte 4136/00, Contrib 29: “In order to ensure the requisite consonance between the ECHR and the Charter, it will be necessary first of all to ensure that a given right cannot be understood or construed differently, according to whether the instrument being applied is the ECHR or the Charter. That would create different standards and thus run counter to one of the cardinal features of fundamental rights: their universality.”

<sup>185</sup> Morawa, ‘The “Common European Approach”, “International Trends”, and the Evolution of Human Rights Law. A Comment on *Goodwin* and *I v the United*

Equally, the concern of the Court to adjust to change is signalled by its use of the Charter, a more “up-to-date”<sup>186</sup> version of European human rights based partly on the ECHR, where indeed Article 9 “modernised” the right to found a family.<sup>187</sup> The Charter was referred to by Judge Fischbach of the Strasbourg Court as “a source of inspiration in the interpretation of the Convention”, like other binding and non-binding international instruments or sources<sup>188</sup> – but with the difference that its legal status was very questionable. It is also a text with more potential immediacy, being both European and a more “up-to-date” European Convention on Human Rights.

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*Kingdom*’, GLJ Vol 3 No 8 – 1 August 2002 – European & International Law, paras 33-34: <[http://www.germanlawjournal.com/past\\_issues.php?id=172](http://www.germanlawjournal.com/past_issues.php?id=172)>

“The Court in *Goodwin* and [sic] I could not, or no longer, base its change in jurisprudence on a growing European consensus on how the law should treat transsexuals, since that had already emerged in the aftermath of the 1989 Parliamentary Assembly Recommendation and, as the evidence adduced in the course of the deliberations showed, there was no further development in Europe between the years 1998 (*Sheffield and Horsham*) and 2002. Instead, it relied heavily on an ‘international trend’. . . . With that, the Court displayed an attitude that should wholeheartedly be embraced, since it re-introduces – without, however, opening Pandora’s box – the borrowing of concepts that permit an evolutive interpretation of the Convention in favor of the individual from non-European legal systems and, in the first place, from other regional and the universal systems of human rights protection. While the European Court of Human Rights has a well-advanced case-law in many areas and has long served as a source of guidance and inspiration for other human rights systems, in particular the Inter-American one, one should not assume that Europe holds the lead in every respect. The issue of protecting the rights of members of minority groups and indigenous peoples is a telling example: . . . This practice, if read with due regard to the differences in history, political realities, and legal approaches between Europe and the Americas, could nevertheless serve, at the very least, as a precious source of inspiration for the human rights bodies of the old continent.

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

<sup>186</sup> See Jacobs, *supra* n 141; AG Ruiz-Jarabo Colomer, *supra* n 144; this phrase is also used and referred to by Arnulf, Evidence (published only in the paper version) to *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, p 4-5.

<sup>187</sup> See n 102; McGlynn, *supra* n 79, at 593.

<sup>188</sup> See *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, para 34, and Evidence, (published only in the paper version) at pp 40, 45, and n 170 above; for cases referring to non ECHR sources see, e.g., *Streletz, Kessler and Krenz v Germany* [GC], judgment of 22 March 2001, ECHR 2001-II, para 90 (principles of international law, particularly those relating to the international protection of human rights); *Al-Adsani v the United Kingdom* [GC], judgment of 21 November 2001, ECHR 2001-XI, paras 55, 60f. (Vienna Convention of 23 May 1969 on the Law of Treaties, and public international law on torture and State immunity in civil suit, with recognition of the (*jus cogens*) peremptory norm of a prohibition on torture); *Öcalan v Turkey*, judgment of 12 March 2003, ECHR 2003, para 203, referring to Art 5 of ECOSOC Resolution 1984/50, the decisions of the UN Human Rights Committee, and the Advisory Opinion OC-16/99 of 1 October 1999 of the Inter-American Court of Human Rights.

The Charter's usefulness to the *Goodwin* court lay principally in its express reference to it, but it may also have had in mind its declaration, in its pre-eminent provision in Article 1, that, "Human dignity is inviolable. It must be respected and protected." The *Explanations* to the Charter stresses its importance:

"The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined this principle in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted."<sup>189</sup>

Equally Munby J has stated in an English case:

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<sup>189</sup> *Explanations, supra* n 63. The Updated Explanations (see n 63) add: "*In its judgment of 9 October 2001 in case C-377/98 Netherlands v European Parliament and Council, 2001 ECR 7079, at grounds n° 70 - 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law.*" See also Europarl LIBE, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs: <[http://www.europarl.eu.int/comparl/libe/elsj/charter/art01/default\\_en.htm#2](http://www.europarl.eu.int/comparl/libe/elsj/charter/art01/default_en.htm#2)> "The principle of respect for human dignity is at the origin of any national or international text on the protection of fundamental rights. It is a conceptual principle which is present throughout the proclamation of such rights. The first article of the Charter enshrines this principle, although it is not generally included as such in other texts, where it is mentioned in the preamble, or as an objective which the rights set out or the measures provided for help to achieve. Human dignity is inviolable, there can be no exception, nor can any limit be imposed, even where law and order is concerned. It is difficult to define the outline of this principle in legal terms: is it possible for human dignity to be subject to a legal decision? Is it not the case that the violation of the majority of fundamental rights and freedoms also breaches the respect and protection of human dignity? The legal approach to this idea has changed. In many areas, it is now accepted that certain situations are liable to breach human dignity, yet legal protection may not always be available to the individuals concerned. This is the case in areas such as health (for example in terminal illness, or where the conditions for psychiatric internment are concerned), extreme poverty (for example the right to housing), the treatment of illegal aliens or of foreigners whose legal status has not yet been clarified, prison conditions (for example the mother and child relationship, the elderly, or the mentally handicapped). It is even more difficult to reach a legal definition of the idea of human dignity when dealing with the 'status' of embryos or euthanasia." AG Jacobs stated in Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, 14 June 2001, para 197: "The right to human dignity is perhaps the most fundamental right of all, and is now expressed in Article 1 of the Charter of Fundamental Rights of the European Union, which states that human dignity is inviolable and must be respected and protected."

“The recognition and protection of human dignity is one of the core values - in truth the core value - of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. . . . Not surprisingly, human dignity is extolled in article 1 of the Charter, just as it is in article 1 of the Universal Declaration.”<sup>190</sup>

Article 1 of the Charter was not expressly referred to, and has not itself been “written into” the ECHR but the Court will have been conscious of its existence, and its hierarchical status, being placed first in the Charter. It may return to it, and indeed to other provisions of the Charter such as that on disabilities,<sup>191</sup> or the protection of the environment,<sup>192</sup> though the justiciability of some Charter provisions may be questionable.<sup>193</sup> The Court has already indicated that the notions of dignity and freedom may inform “quality of life”.<sup>194</sup>

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<sup>190</sup> See n 195. See also Feldman, ‘Human Dignity as a Legal Value’, *supra* n 34, at 688f, for a discussion of dignity in international human rights law, making the point that the preamble to the ECHR refers to the U.N. Declaration on Human Rights.

<sup>191</sup> “The Union recognises and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.” In *A and others v East Sussex County Council and another* [2003] EWHC 167 (Admin), [2003] All ER (D) 233 Munby J stated, paras 93, 103: “Moreover, the positive obligation of the State to take reasonable and appropriate measures to secure the rights of the disabled under article 8 of the Convention (and, I would add, under articles 1, 3(1), 7 and 26 of the Charter) and, in particular, the positive obligation of the State to secure their essential human dignity, calls for human empathy and humane concern as society, in Judge Greve’s words, seeks to try to ameliorate and compensate for the disabilities faced by persons in A and B’s situation (my emphasis). . . . The principle which one thus sees articulated in *Botta* is expressly recognised in article 26 of the Charter, with its reference to ‘the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community’.”

<sup>192</sup> See n 133.

<sup>193</sup> See HL Paper 48, *supra* n 142, para 8, 67f; see also Jacobs, ‘EU Charter of Fundamental Rights – Are New Judicial Remedies needed?’ (2003) 4 *Human Rights & UK Practice* 15, 17; Jacobs, *supra* n 141, 339: “. . . some of the rights formulated are not yet rights, but aspirations. They may be misleading. They may not be universally agreed”; see also n 198 *infra*.

<sup>194</sup> See *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 65: “The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.” For comment see Pedain, ‘The Human Rights Dimension of the *Dianne Pretty* case’ [2003] CLJ 181, 191, making the point that “our conceptions of what amounts to a dignified life differ greatly.”

## 6. CONCLUSION AND COMMENT:

The decisions of the Court are remarkable for the change they represent in Convention doctrine, for the fact that they are unanimous and were made only four years after the Court's last consideration of the issue, where on one issue – marriage – the majority the other way was 18-2. The “decisive tilt” of the Court, and its “21<sup>st</sup> century” outlook are striking. The sensitivity of the Court to transsexuals contrasts with the previous reluctance to find the UK to be in violation of the European Convention on Human Rights.

The Court's decisions in *Goodwin v the United Kingdom* and in *I v the United Kingdom* have substituted a concern for qualities and values common to all humans (dignity, autonomy) for their former conservatism. The creative way in which the decisions were arrived at is equally remarkable.

The reference to the notion of “autonomy” is intriguing. So too is the declaration that the very essence of the Convention is respect for human dignity and human freedom, notions not obviously listed in the Convention though the idea of dignity is obviously connected to Article 3 of the ECHR<sup>195</sup>, and indeed a similar statement was made in *Pretty v the United Kingdom* in the context of Article 8.<sup>196</sup> (In *Pretty* it rejected however the application of Article 2 to “quality of life”, or self-determination in the sense

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<sup>195</sup> See *Tyrer v the United Kingdom*, judgment of 25 April 1978, Series A no 26, para 33: “. . . it is one of the main purposes of Article 3 to protect . . . a person's dignity and physical integrity.” The concept of dignity has also been referred to in several other cases involving Article 3 – e.g., *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 52; *Selmouni v France* [GC], judgment of 28 July 1999, ECHR 1999-V, para 99; *Keenan v the United Kingdom*, judgment of 3 April 2001, ECHR 2001-III, para 112; *Poltoratskiy v Ukraine*, judgment of 29 April 2003, ECHR 2003, para 132. Feldman, ‘Human Dignity as a Legal Value’, *supra* n 34, 690*f.* considers the concept of dignity over several ECHR provisions, especially Arts 3 and 8. See also for a stress on the value of dignity generally, Munby J in *A and others v East Sussex County Council and another* [2003] EWHC 167 (Admin), [2003] All ER (D) 233 paras. 86, 87: “The first [concept] is human dignity. True it is that the phrase is not used in the Convention but it is surely immanent in art 8, indeed in almost every one of the Convention's provisions. The recognition and protection of human dignity is one of the core values – in truth the core value – of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. It is a core value of the common law, long pre-dating the Convention and the Charter. The invocation of the dignity of the patient in the form of declaration habitually used when the court is exercising its inherent declaratory jurisdiction in relation to the gravely ill or dying is not some meaningless incantation designed to comfort the living or to assuage the consciences of those involved in making life and death decisions: it is a solemn affirmation of the law's and of society's recognition of our humanity and of human dignity as something fundamental. Not surprisingly, human dignity is extolled in article 1 of the Charter, just as it is in Article 1 of the Universal Declaration. . . Dignity interests are also, of course, at the core of the rights protected by Article 3.”

<sup>196</sup> *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61.

of taking one's own life).<sup>197</sup> The fertile, but opaque,<sup>198</sup> notion of dignity may become more important, though it is not expressly articulated in the ECHR. It is however placed first as Article 1, in the Charter of Fundamental Rights: "Human dignity is inviolable. It must be respected and protected" and its importance has been noted.<sup>199</sup>

The Court's willingness to embrace and in a sense incorporate in the European Convention on Human Rights concepts like "autonomy" and "dignity" adds to the impression that the Court is only too willing to use expansive, perhaps "liberal" concepts and new, perhaps unexpected, sources to meet its challenges, "transitioning" the ECHR.

The apparent change of focus by the use of the concepts of "autonomy" and "dignity", and the emphasis on self-realisation may be welcome in this context, transsexualism, or assisted suicide, but not beyond.<sup>200</sup> The Court's reference to an international (rather than European<sup>201</sup>) trend and an emerging

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<sup>197</sup> *Pretty v the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 39.

<sup>198</sup> See Weiler, Conclusions, in: Setting the Agenda and Outlining the Options: EUROPE 2004 Le Grand Debat: <[http://europa.eu.int/comm/governance/whats\\_new/europe2004\\_en.pdf](http://europa.eu.int/comm/governance/whats_new/europe2004_en.pdf)> "Clarity was a second justification often invoked to justify the exercise. The current system of looking to the common constitutional traditions and to the ECHR as a source for the rights protected in the Union is, it is argued, unsatisfactory and should be replaced by a formal document listing such rights. But would clarity actually be added? Examine the [Charter] text. It is, appropriately drafted in the magisterial language characteristic of our constitutional traditions: Human Dignity is Inviolable etc. There is much to be said for this tradition, but clarity is not one of them. When it comes to the contours of the rights included in the Charter, I do not believe that that it adds much clarity to what exactly is protected and what is not." See also <[http://www.europarl.eu.int/comparl/libe/elsj/charter/art01/default\\_en.htm#2](http://www.europarl.eu.int/comparl/libe/elsj/charter/art01/default_en.htm#2)> *supra* n 190; Smith, More Disagreement Over Human Dignity: Federal Constitutional Court's Most Recent Benetton Advertising Decision GLJ Vol 4 No 6 – 1 June 2003. <[http://www.germanlawjournal.com/current\\_issue.php?id=278](http://www.germanlawjournal.com/current_issue.php?id=278)> "The success of the German legal construct of human dignity also is apparent from its influence on the European Union's Charter of Fundamental Rights. That document likewise begins with a provision nearly identical to the Basic Law's Art 1. Human dignity is also one of the most elusive concepts in German constitutional law. . . . Elusive concepts offer judges great power because they are sufficiently malleable to mean many different things to well-meaning interpreters. The malleability of the Basic Law's human dignity concept has been prominently displayed in recent years."

<sup>199</sup> See p 245.

<sup>200</sup> See text to nn 58, 59. However the Court did refer to autonomy in the *Keenan* case – see n 18.

<sup>201</sup> See n 180. But *cf* also *Appleby and Others v the United Kingdom*, judgment of 6 May 2003, ECHR 2003, para 46: "The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately-owned property open to the public, the US Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Article 10 of the Convention."



European consensus does not alleviate these concerns – and more so in the case of marriage in particular, where “widespread acceptance” was referred to.<sup>202</sup>

The express although apparently subsidiary and passing reference<sup>203</sup> to Article 9 of the Charter of Fundamental Rights in relation to marriage and Article 12 of the ECHR, in a case where the text of Article 12 of the ECHR seemed clear, is striking and adds a piquancy and authority to the Charter’s provisions. Its use adds force to the view that the Charter has effect in the UK.<sup>204</sup>

Those who favour the need to adapt the ECHR will welcome this new “source”. But the Court’s determination to meet the challenges in these cases is not without criticism. Those who – with some good reason – disfavour so-called “judicial activism” – a concept well known to the judges<sup>205</sup> – would argue that this is unjustified, though the debate on the limits of the evolutive approach is not new.<sup>206</sup> The reference to the Charter adds a new dimension. The use of the EU Charter in particular, even just as an “inspiration”,<sup>207</sup> is curious because of its legal status, and because of the apparently clear text of Article 12 of the ECHR. Further, the Charter is not just another international instrument, being regarded from one point of view as a more up-to-date,<sup>208</sup> “transitioning”, ECHR, yet not officially accepted as such. But equally, its justification may also lie in that the Charter is, though

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<sup>202</sup> Cf the “Bulger” cases, *T v the United Kingdom* [GC], judgment of 16 November 1999, *Reports of Judgments and Decisions*, 1999-, para 75, and *v v the United Kingdom* [GC], judgment of 16 December 1999, *Reports of Judgments and Decisions*, 1999, para 77, referring to “an international tendency in favour of the protection of the privacy of juvenile defendants.” but also stating that while this trend was “one factor was to be taken into account when assessing whether the treatment of the applicant can be regarded as acceptable under the other Articles of the Convention, it cannot be determinative of the question whether the trial in public amounted to ill-treatment attaining the minimum level of severity necessary to bring it within the scope of Article 3. . . .”

<sup>203</sup> But see n 214.

<sup>204</sup> See Rogers, *supra* n 134, at Part V, and sources cited in n 144 above.

<sup>205</sup> Cf Wildhaber, ‘Human Rights and Democracy’, Paul Sieghart Memorial lecture 2001 London, 22 November 2001 <<http://www.bihr.org/pdfs/lecture-transcripts/wildhaber%20transcript.pdf>> “I do not want to enter a general debate on judicial activism versus judicial self-restraint, but I do have to react to the suggestion that human rights, at least as we understand that expression in Strasbourg and therefore as enshrined in the European Convention on Human Rights, are in some way dangerous for democracy. This is grossly to distort the purpose and effect of an instrument which came into being largely to protect democracy against the perceived totalitarian threat of the cold war years and which is founded upon the twin principles of democracy and the rule of law.”

<sup>206</sup> See van Dijk and van Hoof, *supra* n 96, 77, para 2.4, at 79. See also on the evolutive approach Clayton and Tomlinson, *The Law of Human Rights* (2000), para 6.23f and Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995), p 7f.

<sup>207</sup> See n 188.

<sup>208</sup> See n 186.

an EU document, on one level, democratic.<sup>209</sup> Notably the House of Lords Select Committee on European Union stated, before referring to *Goodwin*:

“Very much as we predicted in our earlier Report an instrument prepared by such a body as the Charter Convention and endorsed at the highest political level in the Union cannot be overlooked. Weight will inevitably be attached to it.”<sup>210</sup>

In *Goodwin* and *I v the United Kingdom* the Court used the Charter expressly in noting the lack of reference to men and women, and was perhaps<sup>211</sup> also influenced by it in “clarifying” that there is a separate right to marry and to found a family. The evolutive approach has, as McCafferty says, its own problems, in the extent to which the text can be ignored.<sup>212</sup> The interpretation, in particular, of an apparently clear text, Article 12, which effectively ignored the sex of the parties, with the use, while apparently subsidiary, of the Charter of Fundamental Rights suggests a result-oriented approach. This is also suggested indeed by the observation of Judge Fischbach, reflecting that the Court referred to the Charter “because it wanted to go a little bit further in its jurisprudence.”<sup>213</sup> The use of the Charter to extend the relatively clear meaning of the ECHR is questionable. That use may be described as subsidiary or makeweight but the organisation “Liberty”, reflecting on the *Goodwin* case, stated:

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<sup>209</sup> See AG Mischo in Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd v The Scottish Ministers*, 20 September 2001, para 126: “I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.” a remark emphasised by, *inter alios*, “Liberty”: Written Evidence of Liberty (National Council for Civil Liberties) and the British Institute of Human Rights to the to H.L. European Union Committee Sub-Committee E (Law and Institutions), at p 6. <<http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-eu-charter.pdf>> (and published in Written Evidence to The Future Status of the EU Charter of Fundamental Rights, *supra* n 144, paper version only, p 82 at 84). See also The Charter in the European context: A point of reference for the courts: <[http://europa.eu.int/comm/justice\\_home/unit/charte/en/european-context-reference.html#top](http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html#top)>. But see Weiler, *supra* n 198: “Lawyers will point out with great excitement that the Court [ECJ/CFI] is already making reference to the Charter and that it may become ‘incorporated’ in the legal order by judicial activity. I am not at all sure whether this is a positive development, both from pragmatic and normative perspectives. I wonder if a stony silence by the Court or a defiant refusal to take note of the Charter would not, pragmatically, provide greater impetus to eventual political action. I also wonder, as indicated above, whether it is proper for the Court to go very far with judicial incorporation of the Charter given the fact that it was, let us not mince words, constitutionally rejected as an integral part of the Union legal order? One cannot chant odes to democracy and constitutionalism and then flout them when it does not suit one’s human rights agenda.”

<sup>210</sup> *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, para 34.

<sup>211</sup> See Fischbach, *supra* n 140.

<sup>212</sup> McCafferty, ‘Gays, Transsexuals and the Right To Marry’ (2002) *Fam Law* 362, 365.

<sup>213</sup> See n 170: “The European Court referred to this provision in the Charter because it wanted to go a little bit further in its jurisprudence” [in *Goodwin*].

“... the Charter has... also had a decisive influence on the European Court of Human Rights”.<sup>214</sup>

In any case, after all, the applicants did have a right to marry as men, even if they did not want to marry, and while the Court found that “artificial” it is legally correct: was a legal right to marry denied? The Court would not have overlooked the possibility, discussed above, of an argument concerning same-sex marriage being based on its remarks, and was, arguably, deliberate and even also disingenuous in its reasoning, especially in its use of the Charter. The views of van Dijk and van Hoof<sup>215</sup> may yet prevail on this important issue.

There are other aspects to the use of the Charter. Judge Fischbach of the Strasbourg Court has referred to the *Goodwin* case as exemplifying possible and attractive future developments:

“The European Court of Human Rights, taking its line from the Charter, would have reason to increase protection of fundamental rights, as in its recent judgment in *Christine Goodwin v. United Kingdom*. That judgment, delivered on 11 July 2002, was concerned with an alleged breach of Article 12, which establishes the right to marry. The Court expressly referred to Article 9 of the European Union Charter of Fundamental Rights, noting that its wording diverged – and that can only be deliberate – from the wording of Article 12 of the Convention in that it left out the reference to men and women. This could be a foretaste of what might develop into an interactive relationship between the Convention and Charter on the one hand, and the Strasbourg Court and Luxembourg Court on the other, for the benefit of all. That said, although recent decisions of the Court of Justice indicate that it is tending to apply the Convention as if the Convention provisions were part of Community law, there remains a risk of the existence of two separate European instruments protecting fundamental rights – the European Convention on Human Rights and the European Union Charter of Fundamental Rights – causing growing case-law divergences.”<sup>216</sup>

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<sup>214</sup> Written Evidence of Liberty (National Council for Civil Liberties) and the British Institute of Human Rights to the H.L. European Union Committee Sub-Committee E (Law and Institutions), <<http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-eu-charter.pdf>>, at p 7, (and published in *Written Evidence to The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, paper version only, p 82 at 84).

<sup>215</sup> See nn 117, 121.

<sup>216</sup> *Supra* n 100. See also *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, at 45, where he refers to the *Goodwin* case as a “good example of a possible interactive relationship between the Charter and the Convention, or between the Strasbourg court and the Luxembourg court.”

The organisation “Liberty” stated that the *Goodwin* case, and *Mary Carpenter v Secretary of State for the Home Department*,<sup>217</sup> where the ECJ found a breach of Article 8 of the European Convention on Human Rights, had “put into practice what (some of) the judges of both Courts see as one of the main attractions of accession to the ECHR by the European Union.” It referred<sup>218</sup> to the view of Fischbach, cited above,<sup>219</sup> and ECJ President Iglesias.<sup>220</sup>

Deliberately, disingenuously, or not, the Strasbourg Court forced the more up-to-date Charter onto the legal landscape and gave it some authority at the very time its status was lacking and its future was uncertain.<sup>221</sup> The Charter was placed even more at the forefront of debate, and the Court set the agenda for a document of some controversy.<sup>222</sup> Whether the potential problem of competing ideas of human rights by the ECJ and the Strasbourg court was part of that process is a matter, to a degree, of speculation.

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<sup>217</sup> Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, 11 July 2002, stating, para 41: “The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter ‘the Convention’), which is among the fundamental rights which, according to the Court’s settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.”; see also for application of Art 8 of the ECHR, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others*, 13 May 2003, para 73f.

<sup>218</sup> Written Evidence of Liberty (National Council for Civil Liberties) and the British Institute of Human Rights to the to H.L. European Union Committee Sub-Committee E (Law and Institutions), <<http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-eu-charter.pdf>>, at p 7, (and published in Written Evidence to *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, paper version only, p 82 at 84).

<sup>219</sup> “This could be a foretaste of what might develop into an interactive relationship between the Convention and the Charter on the one hand, and the Strasbourg Court and Luxembourg Court on the other, for the benefit of all.”

<sup>220</sup> President Iglesias of the ECJ: “Thus, rather than competing with each other and creating a schism in the protection of fundamental rights in Europe, the Convention and the Charter should serve to enrich one another.” Mr Gil Carlos Rodrigues Iglesias, speech on the occasion of the opening of the judicial year, Strasbourg, 31 January 2002: The Council Of Europe’s Contribution To The European Union’s Acquis: <[http://www.coe.int/T/E/Legal\\_Affairs/About\\_us/Cooperation/SdC\\_2002\\_6E.pdf](http://www.coe.int/T/E/Legal_Affairs/About_us/Cooperation/SdC_2002_6E.pdf)>. The context of his remark was however that if, “at some point in future, the Charter is formally given normative or even constitutional validity, this could increase the risk of conflict between the case-law of the European Court of Human Rights and that of the Court of Justice” and he noted that “those drafting the Charter, conscious of the importance of the relationship between the Charter and the Convention, have inserted provisions catering for this.”

<sup>221</sup> *Goodwin* was referred to the House of Lords Report, *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144.

<sup>222</sup> It is referred to in the draft EU Constitution as of 18 July 2003: <<http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>>.

The adoption of the Charter in the Convention on the Future of Europe – and accession of the EU to the ECHR – are very real possibilities, but the contribution of the Strasbourg court should not be overlooked.