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Taking same-sex partnerships seriously:
European experiences as British perspectives?

Fifth Stonewall Lecture [1]

by Kees Waaldijk [2]

[1] London, 6 March 2002, organised by the Bar Lesbian and Gay Group, the Lesbian and Gay Lawyers Association, and the Stonewall Group. The text of this lecture aims to represent the legal situation as it was on 6 March 2002. In some footnotes some later developments (up to early 2003) have been included.

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The full text of this lecture, including an occasionally updated version of the Chronological overview, can be found at the author's website <www.emmeijers.nl/waaldijk>.

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Features

Taking Same-Sex Partnerships Seriously – European Experiences as British Perspectives?

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Key problems in legislating on same-sex partnerships

For any law maker contemplating legislating on same-sex partnerships there are several key problems. Apart from various forms of opposition, the three most important are:

- the need to take into account different types of considerations (law, justice, psychology, legal clarity and strategy);
- the selection of legal consequences; and
- the choice of legal formats.

Different types of consideration

Considerations of law

So far international human rights law does not require that the ban on same-sex marriages be lifted.[1] Presumably, this means also that certain legal consequences of marriage can still be denied to same-sex couples. However, it would be difficult to make a list of those 'deniable' consequences. For example, Art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 requires that there is no unjustified discrimination with regard to the right to respect for private and family life and for the home (Art 8), and with regard to the right to the enjoyment of property (Protocol 1, Art 1). Therefore, almost all legal consequences of marriage could be brought under the prohibition of Art 14. Surely, it will be a while before the European Court of Human Rights (European Court) will have to decide all these issues, and it may well take the court a long time to come to the conclusion that most of the legal consequences of marriages should be made available to same-sex couples too. But it is a fact that many enlightened highest courts (including those in Canada,[2] South Africa,[3] the state of Vermont,[4] Germany[5] and The Netherlands [6]) have already indicated that it is, or could be, unlawful to continue excluding gays and lesbians from benefits that are available for married opposite-sex couples. It would seem only a question of time before a European, Scottish or English court will reach such a conclusion.

Apart from the question whether it is lawful to exclude same-sex partners from marriage and/or from specific legal consequences of marriage, there is the question whether it is lawful (in the light of international and European law) to exclude same-sex cohabitants from specific legal consequences that are made available to opposite-sex cohabitants. A first case in which this question is properly presented is currently before the European Court.[7]

Finally, there is not much hope that the European Court would soon require member states to extend many of the benefits and burdens of marriage to unmarried opposite-sex cohabitants. The court takes the position that this question falls within the margin of appreciation of the member states.[8] In the absence of the possibility to marry, same-sex couples may have a better case.

Considerations of justice

However, a responsible legislature is not only guided by the minimalist requirements of law, but also by the wider demands of justice. In a democracy, laws should be enacted on behalf of all and for the benefit of all. In a secular state, religious traditions are no justification for excluding certain citizens from the enjoyment of rights given to the majority of equally loving and committed citizens. Similarly, it is utterly unjust to deny certain citizens the possibility of carrying the burdens and duties that, for other citizens, are linked to love and partnership.

Considerations of psychology

The discussion is not only about rights and duties, benefits and burdens. Those who marry do not only do so to avail themselves of the legal consequences of marriage. At least as important for many couples seems to be the opportunity, provided by the law, to publicly show affection, commitment, joy and pride.[9] Weddings (whether in church or at the registry) are not only legal events, but also public social occasions with deep psychological meaning to those involved. They can, indeed, be characterised as manifestations of pride. Therefore, the exclusion of same-sex couples from marriage cannot simply be remedied by making the legal consequences available to them. Just like many heterosexuals, many lesbian and gay couples will also want to publicly celebrate their affection, commitment, joy and pride. As long as the state is providing this symbolic service to heterosexuals, it should make a similar registration procedure, with a similar weight, available to homosexuals. This is also important for other gays and lesbians than the ones directly involved,

especially those still finding it difficult to come out. They would greatly benefit from the clear message that the state cares as much about same-sex love as it does about heterosexual love. The importance of such a message for the young of any sexual orientation should not be underestimated.

Considerations of legal clarity

When legislating on same-sex partnerships, it may be tempting to reinvent or improve the wheel. This temptation should be resisted. The problem that needs solving has been caused by the exclusion of same-sex partners from marriage. For political reasons, and because of respect for certain religious concerns, solving the problem by simply lifting the ban has not been possible in any European country, and will not soon be possible in Scotland, England and Wales either. Even in The Netherlands and Belgium, it proved necessary to first burden the legislative system with something other than the familiar notions of marriage or cohabitation. From a perspective of legislative clarity that is bad enough as it is. In the Scandinavian countries the law makers have been wise. Simple Bills were drafted stating who can enter into a registered partnership, then stating that all the rules on getting into and out of a marriage apply, as well as all legal consequences of marriage, and then listing a few exceptions to that general rule.[10] The Dutch law makers unwisely have chosen to draft two Bills on registered partnership: one contained the (in some respects different) way for getting into it, plus the (somewhat different) ways to get out of it, plus some of the legal consequences of registered partnership;[11] and the other Bill provided for most of the legal consequences by amending some 100 existing statutes (inserting the words 'or registered partner' after every mention of 'spouse', etc).[12] The idea was to amend all statutes that attached legal consequences to marriage, but, naturally, some were forgotten. Some of the mistakes and some of the smaller differences between marriage and registered partnership were later repaired by subsequent legislation. Separate statutory instruments and numerous bylaws were needed to deal with the lesser forms of written law. The French and the Germans followed the bad Dutch example (without even aiming to cover most statutory provisions relating to marriage).[13] The difficulties thus created for lawyers to grasp fully the legislation, and for ordinary citizens to get satisfactory legal advice, should not be underestimated.

The lesson from this for the law makers in the UK should be evident. Registered partnership legislation can hardly be expected to be a jewel on the statute book, but it is better to make it like Scandinavian glass, reflecting the image of marriage, than like Dutch clay or like French or German pieces of stone. And I might add in this context that the Bills introduced in Westminster by Jane Griffith MP[14] and by Lord Lester of Hernhill[15] seem to be on the stony side.

Considerations of strategy

In Britain, too, it will be a long, complicated and uncertain route from equality as a principle of justice to equality being fully embodied in law. Of course, in each jurisdiction some new and different problems will arise, but some general lessons can be learned from other jurisdictions.[16] European experiences so far suggest the wisdom of an incremental approach. After all, in the face of the almost universal strong opposition to homosexual law reform, some compromises will need to be made. On an earlier occasion, I have tried to formulate this as the law of *small change*:

> 'Any legislative change advancing the recognition and acceptance of homosexuality will only be enacted, if that change is either perceived as small, or if that change is sufficiently reduced in impact by some accompanying legislative "small change" that reinforces the condemnation of homosexuality.'[17]

This suggests that the way forward in Britain, building on progress in the fields of criminal and anti-discrimination law, will go through various stages. After the incidental recognition of cohabiting same-sex couples for certain purposes (see above), the time should be right now for including same-sex couples in all legislation that gives certain rights or duties to couples cohabiting 'as husband and wife'. That, in turn, would pave the way for registered partnership legislation (if politically necessary, perhaps first with the exclusion of some legal consequences).

No considerations of sex

At the end of this list of relevant considerations I would suggest that sexuality should not be a consideration. Whether two partners actually have sex with each other should be of no legal interest at all. In fact, that is how it is with marriage and cohabitation: non-sexual partners are allowed to marry each other, or to live 'as husband and wife' (the latter expression does not need to be understood in a sexual sense). That should not be different for same-sex partners. Whether or not their relationship is 'conjugal',[18] 'physical', or whatever other euphemism one might choose, should not be relevant for their partnership rights. For me as a foreigner it has been shocking to be reminded from time to time that sexual intercourse is still an element of English and Scottish family law. I would only hope that the practical problems of prying and the principle of privacy will be rendering it a dead letter, soon.[19]

Selecting legal consequences

By far the most important key decision to be taken in any project to improve the legal situation of same-sex partners is that about legal consequences.[20] Which of the legal consequences of marriage can,

and should, now be made available? It is also the main point where political ideals and political reality clash, head on. In fact, it is simple: the more legal consequences are involved in any piece of partnership legislation, the greater the political difficulty will be to get that legislation approved. Clearly, it is the task of the advocates of equality to push for legislation as comprehensive as would be politically possible.

In this context, it is important to point out that marriage has many types of consequences, positive and negative, material and non-material, based in private law and based in public law. It is a fallacy to think that partnership rights are just a question of family law. Many other areas of public and private law also attach legal consequences to marriage and cohabitation. In the daily life of many couples, the consequences outside the domain of family law (tax, social security, immigration) are often much more important than the classical issues of family law. In my experience, many lawyers need to be reminded of this, regularly.

I will come back to this below, when formulating my more precise recommendations for British law makers.

Choosing formats

The last, and indeed the least, of the key problems in this field is that of choosing formats for legislative recognition of same-sex partnerships. Equality of rights is far more important than equality of status.[21] It would be very wrong to make same-sex couples wait longer for any substantive rights because first a fight about their status has to be won.

So far, the law of Scotland, England and Wales provides two formats for couples: formal marriage and informal (de facto) cohabitation. In many other European countries a third format has been invented: registered partnership. In fact a whole range of subtypes of this third format has been developed in different countries. They are all based on the marriage model, ie a public status resulting from the public registration of the mutually agreed partnership of two persons. There are three basic types:[22]

- quasi-marriage (with virtually the same legal consequences as in the case of marriage, for example in the Nordic countries, in The Netherlands, and in Vermont, Nova Scotia and Quebec);
- semi-marriage (with only a limited selection of the consequences of marriage, for example in France and Germany, in Hawaii and California); and
- pseudo-marriage (a mere registration carrying no, or hardly any, legal consequences, for example in various towns in The Netherlands and Germany before the national partnership legislation was enacted, in some Spanish and British cities, and in Belgium, where the national registered partnership scheme has only a few legal consequences, notably with respect to the common residence and to costs and debts incurred for the household or for the children[23]).

As always, it would be wise to keep the law as simple as possible. It would be counterproductive to create yet another format, or to engineer a hybrid scheme that would be dependent on the couple actually living together and having formally registered their partnership.[24]

The closer a registered partnership scheme is based on the marriage model, the better the principle of equality will be served and the easier it will be for all concerned: for partners considering registration, for lawyers advising on it, for third parties having to deal with it, for courts having to adjudicate on it, for foreign authorities considering recognising it and for law makers having to legislate on it. I would, therefore, suggest that the legislatures in the UK, apart from extending cohabitation rights to same-sex partners, introduce some form of registered partnership that is as close to traditional marriage as is politically possible. And this should be so with respect to:

- the conditions of entry;
- the formalities of entry;
- the legal consequences; and
- the ways of ending it.

Recommending six pieces of legislation

I respectfully submit that the way forward in Scotland, England and Wales towards full equality in the complex field of partnership law requires six pieces of legislation. I would categorise this legislative agenda under three headings: Now, Soon, Later.

Now

- Including same-sex cohabitants in existing rules on cohabitation.

Soon

- Introducing registered partnership for same-sex couples;
- prohibiting discrimination on the basis of civil status;
- allowing transsexuals to change their legal gender, and
- increasing the scope and number of cohabitation rights.

Later

- Making both marriage and registered partnership gender-neutral.

Including same-sex cohabitants in the existing rules on cohabitation

What is needed now is legislation to include same-sex couples in all existing written rules that confer rights or duties and benefits or burdens on informally cohabiting partners. Most easily and speedily, this could be done by one omnibus Bill, as in Sweden,[25] Norway,[26] Hungary,[27] France,[28] and at federal and provincial levels in Canada.[29] In The Netherlands the same result was achieved by not excluding same-sex couples wherever cohabitation recognition was introduced since the late 1970s.[30] The Dutch approach is clearly too late for England, Wales and Scotland. A statute-by-statute approach (as now seems to be the policy in Scotland) would be unnecessarily cumbersome and slow. The risk would then be that, before all legislation will have been properly amended, the European Court (or, indeed, a court in the UK) will have ruled that discrimination between opposite-sex and same-sex cohabitants is unjustifiable under Art 14 of the European Convention (in conjunction with Art 8 of the European Convention – respect for home and private life – or Art 1 of Protocol 1 to the European Convention – peaceful enjoyment of property). In light of recent judgments of the court in Strasbourg[31] such a ruling could be given in a pending Austrian case on the right to succession in the tenancy of one's deceased partner.[32]

The legislation could be very simple and would easily gain cross-party support in the parliaments of the UK. There is no need to invent new constructions or criteria. All that work has been done when opposite-sex cohabitants got their legislative recognition. One Bill (perhaps with a Schedule attached) should be enough now.

For Scotland, England and Wales, such omnibus legislation would have to cover mostly material consequences of cohabitation (notably in tax law, social security and with respect to damages for wrongful death, plus the issue of inheritance provision for family and dependants). There are also some non-material consequences that are so far only fully available to opposite-sex couples, and which need to be extended to same-sex couples (notably tenancy succession, next-of-kin recognition for medical purposes and protection in relation to domestic violence).

Ideally, some parenting issues should also be made fully gender-neutral in case of informal cohabitation, but that may prove rather controversial. It should not be too difficult to lift the (Scottish) ban on fostering by cohabiting same-sex couples. More problematic might be a change with respect to medically assisted insemination. Perhaps the current condition with respect to the 'need for a father' could be replaced by a less exclusive condition.[33]

Introducing registered partnership for same-sex couples

After that first, relatively easy bit of legislation, there are four (related) pieces of legislation that would require the attention of the British and Scottish Parliaments soon. Each piece could be enacted independently from the other three (and, in theory, even before the above described inclusion of same-sex partners in all rules on cohabitation). However, they would strengthen each other, so one would hope that they would all be enacted in Westminster and Hollyrood within the next 3–4 years. However, it is important to distinguish them clearly. Each will cause its own brand of controversy.

After the inclusion of same-sex couples in existing cohabitation legislation, there will still be a large number of major rights and duties, benefits and burdens that in Britain are only available to opposite-sex partners. They can avail themselves of these things by getting married. Yet, hardly any item of this exclusively heterosexual list has anything to do with any intrinsic difference between same-sex couples and opposite-sex couples (arguably, only the rules on paternity can be related to such an intrinsic difference). That insight has prompted first the Danish legislature in 1989,[34] and then their colleagues in Norway, Sweden, Iceland, The Netherlands, Finland, the state of Vermont, the provinces of Nova Scotia and Quebec, to invent a form of quasi-marriage.[35] In Europe, these new, quasi-marital institutions of family law are mostly called 'registered partnerships'; in North America the term 'civil unions' seems to be preferred. The prime reason for introducing these new institutions was and is the desire to end the (discriminatory) exclusion of same-sex couples from many of the legal consequences of marriage.

In other countries, law makers have chosen not a form of quasi-marriage, but a form of semi-marriage. This is what has happened in several Spanish regions,[36] in France[37] and Germany,[38] and in Hawaii and California.[39] A semi-marriage (like the French *Pacte Civil de Solidarité* (PACS)) only entails a selection of the legal consequences of marriage. But as the Dutch saying goes, it is a better to have half an egg than to have an empty shell. (This is not to say that the empty shells of pseudo-marriage, like the one that recently became available in London, following the example of quite of number of Dutch, German and Spanish cities, are useless. They can be useful on two symbolic levels: that of the partners involved, who appreciate the chance to show their affection, commitment, joy and pride in public; and at the wider political level as one way to pave the way for a more substantial form of partnership recognition.)

In theory, an alternative to the route of registered partnership legislation would be a more comprehensive recognition of informal cohabitation. In my opinion, that would not be a recommendable route.[40] First, a system based on the occurrence of a

fact, rather than the fulfilling of a formality, would provide considerably less legal certainty to the partners involved and to any third parties. Secondly, that lack of legal certainty might make legislators very reluctant to attach the more far-reaching legal consequences of formal marriage to the informal fact of living together. Thirdly, the automatic recognition of informal cohabitation would deprive the partners of their freedom of choice (unless the legislation would provide for an opt-out system). And finally, such an automatic recognition would not satisfy the evident desire among certain same-sex couples to go through a public, legal and symbolic ceremony akin to the marriage ceremony.

For all those reasons, and for the considerations of law, justice, psychology and legal clarity discussed above, I would strongly recommend that the jurisdictions of the UK model their registered partnership both on the form of marriage (ie same conditions, same procedures) and on the substance of marriage. That would mean that a registered partnership would have all of the legal consequences attached to cohabitation (see above), plus most other consequences of marriage, including the rules on:

- joint property, alimony and inheritance;
- immigration, citizenship and surname;
- tax, social security and pensions; and
- fostering, adoption, and parental rights and responsibilities.

And finally, I think there are seven good reasons to exclude opposite-sex couples from partnership registration (here again it would be much better to follow the Scandinavian same-sex only examples than the Dutch or French example):

- If it is proposed to also admit opposite-sex couples to registered partnership, there would be loud opposition from many religiously minded people and organisations, fearing that this would encourage many heterosexual couples not to get properly married. Such opposition would endanger the adoption of the Registered Partnership Bill, and thus postpone a much-needed improvement in the legal position of lesbian women and gay men. In fact, in The Netherlands the Christian Democrats (the main opposition party during the last 8 years) voted against the legislation on registered partnership, not because they were against greater equality for same-sex couples, but because they were against providing opposite-sex couples with an unnecessary alternative to marriage.
- If it is proposed to also admit opposite-sex couples to registered partnership, there would be a lot of pressure to make the legal consequences of registered partnership much lighter than those of marriage, so as to appeal to heterosexuals who do not want to marry. This would run counter to the justified desire of gay and lesbian couples to gain access to virtually all legal consequences of marriage, not just to a light selection of those consequences. It seems that this mechanism has played a role in the debates leading up to the French PACS legislation, which covers opposite-sex couples but affects only a limited number of legal consequences.
- If registered partnership is very much like marriage, only very few heterosexuals would opt for it.[41]
- If it is proposed to also admit opposite-sex couples to registered partnership, there might well be some pressure to distinguish between the legal consequences for same-sex registered partners and opposite-sex registered partners (as has happened in the Catalonia region of Spain).[42] This would make the law very confusing.
- If opposite-sex couples are admitted to registered partnership, a separate procedure would be needed to allow such couples to convert their registered partnership into a marriage (or even vice versa).
- It is not discriminatory to exclude opposite-sex couples from registered partnership, as long as registered partnership is not more advantageous than marriage.
- If opposite-sex couples are admitted to registered partnership, and same-sex couples not yet to marriage, the symbolic inequality between homosexuals and heterosexuals would be reinforced, rather than lessened.

All legitimate interests of opposite-sex couples can be met by adequate legislation on marriage and on informal cohabitation. There is no reason to include them in registered partnership legislation.

Prohibiting discrimination on the basis of civil status

It is not only legislation that attaches legal relevance to marriage or cohabitation. Many employers, pension funds, service providers, hospitals, administrative authorities, etc, also quite frequently treat people differently depending on whether someone has a partner, on what the gender of that partner is and/or on what the legal status of the relationship is.

It is all too easy to forget this dimension of the problem. If one were to introduce registered partnership without a prohibition of civil status discrimination, many employers and service providers might continue to exclude (now registered) same-sex partners from certain spousal benefits. Probably only some civil status discrimination in the employment field would be covered by the prohibition on indirect sexual orientation discrimination (as required by the EC's Framework Directive,[43] which does not cover direct discrimination on the ground of civil status).

A prohibition of civil status discrimination[44] would outlaw discrimination between married and

registered partners, between married and unmarried/unregistered partners, and between registered and unregistered/unmarried (but the latter only if being registered as a partner would be deemed to be a civil status, as is the case in The Netherlands but not in France).[45]

Allowing transsexuals to change their legal gender

For many transsexuals, the impossibility of changing their legal gender also severely limits their possibilities of marrying. Opening up marriage to same-sex couples would, of course, solve this problem. However, that option seems far too futuristic for Britain at the moment. A much quicker solution to give transsexuals the full enjoyment of their right to marry would be the one adopted in many other European countries: the possibility to change one's legal gender.[46] I would suppose that such a solution would be much more welcome to most transsexuals, and also far less controversial in British politics than the opening up of marriage.

It would, of course, be possible that a transsexual is married already when he wants to have a change of legal gender. In such a situation the transsexual and his partner should be given the option of either dissolving the marriage, or of converting it into a registered partnership (and vice versa).

Increasing the scope and number of cohabitation rights

There are several reasons why a number of rights and duties should not only be attached to marriage (and registered partnership) but also to informal cohabitation. Such reasons include the protection of weaker partners, the protection of children, and the wish to eliminate unjustified discrimination between married and unmarried individuals. However, for reasons of legal certainty, privacy and freedom of choice, it may be wrong to attach all legal consequences of marriage to all informal cohabitation. There are two solutions out of this dilemma: either a legal system can choose to link some of the heavier legal consequences (such as comprehensive joint property, alimony after divorce and intestate inheritance) exclusively to marriage and registered partnership; or a legal system can choose to extend such legal consequences to informal cohabitants who have not opted out of them.[47] Such opt-out systems are in force in some Scandinavian countries and in Canada.[48] Most European jurisdictions, on the other hand, have kept a number of important rights and duties the exclusive domain of marriage (and registered partnership).

Whatever choice will be eventually made in any jurisdiction, at least some legal consequences of marriage should be extended to cohabitants of any gender combination:

- The protection of children is a very good reason to extend the possibilities of fostering and adoption and, indeed, of any set of parental rights and duties, to partners who are informally cohabiting. The best interest of a child, as assessed by the competent court or authority, is never dependent on the mere formality of the civil status of the two adults, or on their gender(s), who are bringing the child up or who could bring him up.[49]
- The protection of weaker partners is a very good reason to extend any rules on next-of-kin to include the informal cohabitant of the person concerned. The best interest of an incapacitated and/or hospitalised person can almost always be best assessed by the person he has been cohabiting with.

These and similar measures, if enacted before the introduction of some form of registered partnership, may also serve another purpose. They reduce the number of legal consequences that will need to be considered when the law makers finally come round to introducing registered partnership.

Making both marriage and registered partnership gender neutral

After all that legislation, there would probably still be a demand for fuller equality, now including equality of status. And at least the considerations of justice shall require that this demand will be met by the opening up of civil marriage to same-sex couples.

However, before that could successfully be considered in the UK, probably marriage law should first be made more secular, less sexual and less gendered

When? Difficult to predict. But it may help to realise how much has changed in public and political opinion about homosexuality since the late 1980s (introduction of s 28),[50] or since the late 1970s (gay sex still a criminal offence in large parts of the UK). If opinion keeps changing at a similar speed (and that can be expected, given the quite irrevocable ever-increasing degree of coming out), the time for same-sex marriages in Britain could come within decades, rather than within centuries. In his Stonewall Lecture, Robert Wintemute has predicted this for the year 2025.[51] That seems more or less in line with the Dutch and Belgian timescales: in The Netherlands marriage was opened up to same-sex couples 30 years after the equalisation of the ages of consent in 1971,[52] and the Belgians seem set to do so some 18 years after they equalised their ages of consent in 1985.[53] But why would the British be slower than the Belgians? Perhaps in Scotland, England and Wales the opening up of marriage could be part of the golden jubilee of the Stonewall uprising in 2019

Only after the opening up of marriage to same-sex couples (and consequently also of registered

partnership to opposite-sex couples) would it make sense to increase the difference in legal consequences between these two institutions. In a pluralistic society there may well be a demand for several forms of formalised relationships, available to all.

1 See, for example, UN Human Rights Committee, *Views of 17 July 2002 (Joslin et al v New Zealand, CCPR/C/75/D/902/1999*, available at www unhchr.ch, by searching for 'Joslin' under 'Treaty Bodies Database'). It was held that the exclusion of same-sex couples from marriage does not violate Art 23 of the International Covenant on Civil and Political Rights, nor any other Article of that Covenant.

2 *M v H* [1999] 2 SCR 3

3 *NCGLE v Minister of Home Affairs* (2000) (2) SA 1.

4 *Baker v State of Vermont* (1999) 744 A.2d 864.

5 Bunderverfassungsgericht 4 October 1993, [1993] *Neue Juristische Wochenschrift* (NJW) 3058.

6 Hoge Raad der Nederlanden 19 October 1990, [1990] *Nederlandse Jurisprudentie* 119

7 *Karner v Austria* (Application No 40016/98). See R. Wintemute, 'Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention', in R. Wintemute and M Andenaes (eds) *Legal Recognition of Same-Sex Partnerships* (Hart Publishing, 2001), at p 727.

8 *Saucedo Gómez v Spain*, declared inadmissible 26 January 1999.

9 For another view, see R. Bailey-Harris, *Lesbian and Gay Family Values and the Law*, Third Stonewall Lecture (25 March 1999), at p 6.

10 For Denmark see I. Lund-Andersen, 'The Danish Registered Partnership Act 1989: Has the Act Meant a Change in Attitudes', in R. Wintemute and M. Andenaes , op cit, n 7, at pp 349–356 and for Sweden see H. Ytterberg, '"From Society's Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Life" A Swedish Story of Love and Legislation', in R. Wintemute and M. Andenaes, op cit, n 7, at pp 427–436

11 This became the Registered Partnership Act of 5 July 1997 (*Staatsblad* 1997, No 324)

12 This became the Registered Partnership Adjustment Act of 17 December 1997 (*Staatsblad* 1997, No 660)

13 See D. Borrillo, 'The "Pacte Civil de Solidarite" in France: Midway Between Marriage and Cohabitation', in R Wintemute and M. Andenaes, op cit, n 7, at pp 475–492 and R Schimmel and S Heun, 'The Legal Situation of Same-Sex Partnerships in Germany: An Overview', in R. Wintemute and M. Andenaes, op cit, n 7, at pp 575–590.

14 Relationships (Civil Registration) Bill introduced in the House of Commons on 24 October 2001 (Bill 36).

15 Civil Partnerships Bill introduced in the House of Lords on 9 January 2002 (HL Bill 41)

16 See the chronological overview in the appendix at the end of this article

17 K Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in The Netherlands', in R Wintemute and M Andenaes, op cit, n 7, at p 440.

18 See the report by Nathalie Des Rosiers, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Law Commission of Canada, 2002) available at www.lcc.gc.ca.

19 In the gays-in-the-military cases the European Court of Human Rights has shown itself very critical of questioning individuals on their (non-criminal) sexual activity (*Smith and Grady v United Kingdom* (2000) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (2000) 29 EHRR 548)

20 In the report *Cohabitation. The Case for Clear Law. Proposals for Reform* (The Law Society, 2002) the emphasis rightly is on the legal consequences of cohabitation and registered partnership.

21 See R. Bailey-Harris, op cit, n 9.

22 Different classifications (of registered and non-registered partnership formats) are possible, see C. Forder, 'European Models of Domestic Partnership Laws: The Field of Choice' (2000) 17 *Canadian Journal of Family Law*, at p 375, and R Wintemute, op cit, n 7, at pp 763–767

23 See O De Schutter and A. Weyembergh, '"Statutory Cohabitation" under Belgian Law; A Step towards Same-Sex Marriage?', in R Wintemute and M. Andenaes, op cit, n 7, at p 466

24 This seems to be the case in several Spanish regions; see F. Jaurena i Salas, 'The Law on Stable Unions of Couples in the Catalonia Autonomous Community of Spain', in R Wintemute and M. Andenaes, op cit, n 7, at pp 507–508, and N. Pérez Cánovas, 'Spain: the Heterosexual State Refuses to Disappear', in R. Wintemute and M. Andenaes, op cit, n 7, at pp 501–504

25 Homosexual Cohabitees Act, SFS 1987.813

26 Joint Household Act of 4 July 1991, Act No 45

27 Article 685/A of the Civil Code, introduced by Act No 42 of 1996

28 The law of 15 November 1999 (No 99-944), which introduced the Pacte Civil de Solidarité, also extended the definition of *concubinage* to cover same-sex cohabitants.

29 At federal level: Modernization of Benefits and Obligations Act, Statutes of Canada 2000, chapter 12 (C-23). For provincial laws see R Wintemute, op cit, n 7, at p 776.

30 Unregistered cohabitation (both for same-sex and opposite-sex couples) was first recognised in Dutch legislation in a law of 21 June 1979 (amending Art 7A:1623h of the Civil Code, with respect to rent law), followed by a law of 17 December 1980 on inheritance tax due by the surviving partner from a 'joint household' Since then, many more laws have been amended so as to recognise cohabitation for a multitude of purposes, including social security, tax, citizenship and parental authority

31 *Smith and Grady v United Kingdom* and *Lustig-Prean and Beckett v United Kingdom*, op cit, n 19, *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47; and *SL v Austria* and *L and V v Austria* (unreported) 9 January 2003 In the case of *L and V* the court reiterated that just 'like differences based on sex .. differences based on sexual orientation require particularly serious reasons by way of justification' (at para 45) On 10 May 2001, the European Court of Human Rights declared inadmissible the case of *Mata Estevez v Spain* (unreported), but this was a case where all same-sex cohabitants were treated differently from a very small group of unmarried different-sex partners, namely those who were unable to marry (again) before the divorce laws were passed in 1981.

32 *Karner v Austria* and R. Wintemute, op cit, n 7, at p 727. A very similar case was recently decided by the English Court of Appeal (*Mendoza v Ghaidan* [2002] EWCA Civ 1533, [2003] 1 FLR 460), it was held that in light of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 the phrase 'living together as husband and wife' must be interpreted as including same-sex couples.

33 See R. Bailey-Harris, op cit, n 9, at p 15.

34 Law on Registered Partnership of 7 June 1989, no 372

35 See R Wintemute, op cit, n 7, at pp 761 and 775–778

36 See Pérez Cánovas, op cit, n 24, at pp 501–504

37 Law No 99-944 of 15 November 1999 introducing the Pacte Civil de Solidarite.

38 Law of 16 February 2001 (9 *Bundesgesetzblatt* 266) introducing Lebenspartnerschaft.

39 See R. Wintemute, op cit, n 7, at p 779

40 In Canada, where this route has been taken by federal and provincial parliaments, there are already problems with the constitutionality of such ascription of status and unchosen

burdens (see K. Lahey, 'Becoming "Persons" in Canadian Law: *Genuine* Equality or "*Separate* But Equal"', *in* R. Wintemute and M. Andenaes, op cit, n 7, at p 269).

41 In The Netherlands, in 1998, 1999 and 2000, the number of opposite-sex partnership registrations was even lower than that of same-sex registrations (less than two for every 100 new opposite-sex marriages). From 2001, the number of same-sex partnerships went down because of the opening up of marriage. Simultaneously, the number of opposite-sex registrations went up, but this was because an oddity in the Dutch legislation meant that married couples seeking a divorce could avoid having to go to court, by first converting their marriage into a registered partnership (which can be dissolved by mutual agreement, signed by a lawyer). For statistics, see K. Waaldijk, op cit, n 17, at p 463.

42 Jaurena i Salas, op cit, n 24.

43 Council Directive (EC) 78/2000 of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (2000) OJ L 303/16.

44 Such prohibitions exist in Belgium (*Loi tendant à lutter contre la discrimination*, entering into force in 2003), Ireland (Employment Equality Act 1998 and Equal Status Act 2000), in The Netherlands (General Equal Treatment Act of 1994). Similarly, in Luxembourg (Penal Code) and France (Penal Code and Labour Code) discrimination on the ground of 'family situation' is prohibited, and in Finland (Penal Code and Employment Contracts Act) discrimination on the ground of 'family relations'.

45 In The Netherlands there is no legal definition of 'civil status', but during the passage of the Registered Partnership Bill, it was stated by the Government that being registered as a partner is a new civil status (see *Kamerstukken II* (Parliamentary Papers of the Second Chamber) 1996–1997, 23761, No 11, at p 3). For France, see D. Borrillo, op cit, n 13, at p 475.

46 Now the European Court of Human Rights requires such legislation; see its judgments of 11 July 2002 in the cases of *Goodwin v United Kingdom* [2002] 2 FLR 487 and *I v United Kingdom* [2002] 2 FLR 518.

47 An opt-out approach has been advocated for Britain by R. Bailey-Harris in her Stonewall Lecture, op cit, n 9, at pp 6–19.

48 See C. Forder, op cit n 22, and K. Lahey, op cit, n 40.

49 See R. Bailey-Harris, op cit, n 9, at p 12. The English ban on adoption by an unmarried couple (same-sex or opposite-sex) is to be lifted by the Adoption and Children Act 2002 (chapter 38) (not yet in force).

50 Section 28 of the Local Government Act 1988 introduced the words 'homosexuality as a pretended family relationship'.

51 R. Wintemute, 'Lesbian and Gay Equality 2000: The Potential of the Human Rights Act 1998 and the Need for an Equality Act 2002', Fourth Stonewall Lecture (2000) *European Human Rights Review*, at p 626.

52 The Dutch law opening up marriage to persons of the same sex, of 21 December 2000 ((2001) 9 *Staatsblad*), entered into force on 1 April 2001. For an English translation of the law and additional information, see www.emmeijers.nl/waaldijk.

53 The Belgian law opening up marriage to persons of the same sex, of 13 February 2003 ((2003) 3 *Moniteur Belge*, at p 9880) will enter into force on 1 June 2003.

Chronological overview of the main legislative steps in the process of legal recognition of homosexuality in European countries

The overview on the following pages (last updated April 2003) is roughly based on the hypothesis that most countries, at different times and different paces, go through a standard sequence of legislative steps recognising homosexuality. The further (and sooner) a country has progressed along that sequence, the higher its place in the table. The 15 member states of the EU are classified in table 1. Twenty-one other member states of the Council of Europe are dealt with in table 2. Both tables will contain inaccuracies, and may have missed recent developments. Corrections and additions are always welcome (c.waaldijk@law.leidenuniv.nl). See www.emmeijers.nl/waaldijk for further sources and occasional updates of this overview.

Symbols used

1993 =	year in which the legislation came into force
(1993) =	the legislation has a limited scope or is implicitly worded
[1993] =	not the whole country is covered by legislation
i.p. =	legislation is in preparation or not yet in force

Table 1: EU member states

	Decriminalisation of homosexual acts between (male) adults	Equalisation of age limits in sex offences	Prohibition of discrimination (in other fields than employment)	Prohibition of employment discrimination	First legislative recognition of not-registered same-sex cohabitation	Registered partnership legislation	Joint or second parent adoption	Civil marriage
Netherlands	1811	1971	*(1983)* 1992 1994[1]	1992 1994[2]	*(1979)* 1980/1998[3]	1998	2001	2001
Denmark	1930	1976	1987	1996	*(1986)*[4]	1989	1999	—
Sweden	1944	1978	1987	1999	1988	1995	2003	—
Belgium	1792	1985	2003	2003	—	*(2000)*	—	2003[5]
Finland	1971	1998	1995	1995	—	2002	—	—
France	1791	1982	*(1985)* 2001[6]	*(1985)* *(1986)* 2001[7]	(1993) 1999	*(1999)*	—	—
Spain	1822[8]	1822	1995	1995	*(1994)*[9]	*[(1998-2002)]*[10]	[i.p.][11]	—
Luxembourg	1792	1992	1997	1997	—	—	—	—
Germany	[1968] 1969[12]	[1989] 1994	[1992/95] *[(1998)]*[13]	*[(1998)]*[14] i.p.	—	*(2001)*	—	—
Ireland	1993	—[15]	*(1989)* 2000[16]	*(1993)* 1998[17]	*(1995)*[18]	—	—	—
UK	[1967] [1980] 1982[19]	2001	i.p.	i.p.	*(2000)*[20]	i.p.	i.p.	—
Austria	1971	2002	*(1993)* *[(2000)]*[21]	i.p.	*(1998)*[22]	—	—	—
Italy	[1861] 1889[23]	1889	—	i.p.	—	—	—	—
Portugal	1945	—[24]	—	i.p.	2001	—	—	—
Greece	1950	—[25]	—	i.p.	—	—	—	—

Features

1 In the prohibition of discrimination in Art 1 of the Dutch Constitution, which entered into force in 1983, the words 'or any ground whatsoever' were added with the explicit intention of covering discrimination based on homosexual orientation (see K Waaldijk, 'Constitutional Protection Against Discrimination of Homosexuals' (1986/1987) 13 *Journal of Homosexuality* 57, at pp 59–60) In 1992, 'hetero- or homosexual orientation' was inserted in several anti-discrimination provisions of the Penal Code In 1994, the General Equal Treatment Act came into force, covering several grounds including 'hetero or homosexual orientation'

2 Ibid

3 Unregistered cohabitation (both for same-sex and opposite sex couples) was first recognised in Dutch legislation in a law of 21 June 1979 (amending Art 7A 1623h of the Civil Code, with respect to rent law), followed by a law of 17 December 1980 on inheritance tax due by the surviving partner from a 'joint household' Since then, many more laws have been amended so as to recognise cohabitation for a multitude of purposes, including social security, tax, citizenship and parental authority)

4 The surviving same-sex partner pays the same inheritance tax as surviving married spouse (Law of 4 June 1986, No 339, repealed by Law on Registered Partnership of 7 June 1989, No 372)

5 The Belgian law opening up marriage to persons of the same sex, of 13 February 2003 ((2003) 3 *Moniteur Belge*, at p 9880) will enter into force on 1 June 2003

6 With the intention of covering sexual orientation discrimination, the word 'moeurs' (morals, manners, customs, ways) was inserted in several anti discrimination provisions of the Penal Code 1985 and of the Labour Code 1986 'Sexual orientation' was added to both in 2002 (*Loi no 2001 1066 du 16 novembre 2001 relative a la lutte contre les discriminations*)

7 Ibid

8 Although the formal age limits for heterosexual and homosexual acts were equalised at the time of decriminalisation of homosexual acts in 1822, in practice, homosexual acts with minors continued to be penalised until 1988 under a general provision against 'serious scandal and indecency' (see H Graupner, *Sexualitaet, Jugendschutz und Menschenrechte*, Teil 2 (P Lang, 1997), at pp 665–666)

9 Law on Urban Housing of 24 November 1994

10 Registered partnership legislation has, so far, only been enacted in several regions Catalonia (1998), Aragon (1999), Navarra (2000), Valencia (2001), Balearic Islands (2002), Asturia (2002), and Madrid (2002)

11 The provisions on joint adoption by unmarried opposite-sex and same-sex couples have been suspended pending a challenge to the constitutional power of Navarra (v the national government) to enact them See N Perez Canovas, 'Spain The Heterosexual State Refuses to Disappear', in R Wintemute and M Andenaes (eds) *Legal Recognition of Same-Sex Partnerships* (Hart Publishing, 2001), at p 503

12 In the former German Democratic Republic (East Germany), homosexual acts between men were decriminalised in 1968 and the age limits were equalised in 1989 In the pre-unification Federal Republic of Germany (West Germany), the dates were 1969 and 1994 See Graupner, op cit, n 8, at pp 407–410

13 Anti discrimination provisions specifically referring to sexual orientation have been included in the constitution of three Lander (states) Brandenburg (1992), Thuringia (1993) and Berlin (1995) Anti discrimination legislation has been enacted in one Land Saxony-Anhalt (in force in 1998)

14 Ibid

15 For oral and non penetrative sex, the age limit is higher for male homosexual acts (17) than for heterosexual and lesbian acts (15) Since decriminalisation in 1993, the age limit for male homosexual anal sex and for heterosexual vaginal and anal sex is equal at 17 See Graupner, op cit, n 8, at pp 481 and 487

16 In 1989, only incitement to hatred was prohibited Discriminatory dismissal became unlawful in 1993, other employment discrimination in 1998, and discrimination in education, housing, goods and services in 2000

17 Ibid

18 Domestic Violence Act 1995 and Powers of Attorney Act 1995 (see L Flynn, ' From Individual Protection to Recognition of Relationships? Same Sex Couples and the Irish Experience of Sexual Orientation Law Reform', in R Wintemute and M Andenaes, op cit, n 11, at p 596)

19 Decriminalisation of most sex between two men over 21 took place in England and Wales in 1967, in Scotland in 1980 and in Northern Ireland in 1982 (see Graupner, *op cit*, n 8, at pp 711, 727 and 739)

20 In 1997, the government introduced a 'concession outside the Immigration Rules' allowing unmarried long term cohabiting partners who could not marry each other (for example because they are of the same sex) to apply for leave to enter/remain in the UK, in 2000, this concession was incorporated into the Statement of Changes in Immigration Rules (HC 395) (at paras 295A–295O) The first piece of parliamentary legislation recognising same-sex partners was enacted in 2000 by the Scottish Parliament Adults with Incapacity (Scotland) Act 2000 (s 87(2)) In 1999 and 2002, some older legislation has been interpreted so as to also cover same sex cohabitants See the judgment of the House of Lords in *Fitzpatrick v Sterling Housing Association* [1998] 1 FLR 6 and the judgment of the Court of Appeal in *Mendoza v Ghaidan* [2002] EWCA Civ 1533, [2003] 1 FLR 460

21 Sexual orientation was first included in the anti-discrimination provision of the Guidelines Ordinance for Police Forces 1993 The first law to include the term is the Youth Protection Law of the City of Vienna 2002

22 Several partner related aspects of criminal law, including the right to refuse testimony against your partner in a criminal court (see H Graupner, 'Legal Recognition of Same-Sex Partnerships in Austria', in R Wintemute and M Andenaes, op cit, n 11, at pp 557–559)

23 In several parts of Italy decriminalisation of sex between men took place before 1889 (eg in 1861 in the Neapolitan province) See H Graupner, op cit, n 8, at p 505, and F Leroy Forgeot, *Histoire juridique de l'homosexualite en Europe* (Presses Universitaires de France, 1997), at p 66

24 Between 1945 and 1995 the age limits were equal See H Graupner, op cit, n 8, at pp 597–598

Table 2: Other Council of Europe member states[25]

	Decriminalisation of homosexual acts between (male) adults	Equalisation of age limits in sex offences	Prohibition of discrimination (in other fields than employment)	Prohibition of employment discrimination	First legislative recognition of not-registered same-sex cohabitation	Registered Partnership legislation	Joint or second-parent adoption	Civil marriage
Iceland	1930[26]	1992	1996	1996	—	1996	2000[27]	—
Norway	1972	1972	1981	1998	1991	1993	2001	—
Slovenia	1977	1977	1995	1998	—	—	—	—
Czech Republic	1961	1990	*(2001)*[28]	1999/2001[29]	—	—	—	—
Switzerland	1942[30]	1992	*(1999)*[31]	—	—	*((2001))*[32] i.p.	—	—
Hungary	1961	2002[33]	*(1997)*[34]	—	1996	—	—	—
Romania	1996	2002	*(2002)*[35]	*(2002)*[36]	—	—	—	—
Turkey	1858	1858	—	—	—	—	—	—
Poland	1932	1932	—	—	—	—	—	—
Malta	1973	1973	—	—	—	—	—	—
Slovakia	1961	1990	—	—	—	—	—	—
Ukraine	1991	1991	—	—	—	—	—	—
Russia	1993	1997	—	—	—	—	—	—
Latvia	1992	1998/2000[37]	—	—	—	—	—	—
Cyprus	1998	2002	—	—	—	—	—	—
Lithuania	1993	i.p.[38]	i.p.[39]	i.p.[40]	—	—	—	—
Bulgaria	1968	—	—	—	—	—	—	—
Croatia	1977	—	—	—	—	—	—	—
Estonia	1992	—	—	—	—	—	—	—
Moldova	1995	—	—	—	—	—	—	—
Albania	1995	—	—	—	—	—	—	—

Features

25 Table 2 does not include Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Liechtenstein, Macedonia and San Marino, as well as two European states which have yet to join the Council of Europe (Belarus, Serbia-Montenegro)

26 Graupner, op cit, n 8, at p 491, assumes that decriminalisation took place in the same year as in Denmark (1930) From 1918 until 1944, Iceland was an independent kingdom in personal union with the Kingdom of Denmark

27 On 8 May 2000, the Icelandic Parliament passed an amendment allowing a person in a registered partnership to adopt the child of his registered partner (see ILGA-Europe's monthly *EuroLetter*, http //inet uni2 dk/~steff/eurolet htm, No 80, June 2000)

28 Article 49 of the Law on Misdemeanors, as amended by Law No 273/2001

29 Article 1 of the Law on Employment, as amended on 1 October 1999 by Law 167/1999, Art 1 of the Labour Code, as amended by Law 155/2000, Art 2 of the Law on Soldiers, as amended by Law 155/200

30 In five Swiss cantons sex between men had been decriminalised before the entering into force of the first national Penal Code in 1942 See Graupner, op cit, n 8, at p 640

31 Since 1999, the Swiss Constitution has included 'way of life (*mode de vie, Lebensform, modo di vita*) in the list of grounds in its non-discrimination clause, which is intended to cover 'sexual orientation'

32 The canton of Geneva adopted a limited registered partnership law in 2001, the canton of Zurich in 2002 National legislation introducing registered partnership is in preparation

33 Article 199 of the Penal Code has an age limit of 18 for homosexual acts and of 14 for heterosexual acts In 2002 the Constitutional Court ruled that this discriminatory age of consent is unconstitutional

34 In 1995 the Constitutional Court ruled that sexual orientation is covered by the words 'other situation' in the Constitution's non-discrimination clause The anti discrimination provision in the Act of Public Health of 1997 (Act No 154) explicitly mentions sexual orientation

35 The 2002 law was preceded by a Government Ordinance 137/2000 'on preventing and punishing all forms of discrimination' Of the latter it has been said that it had no practical effect because of lack of implementing regulations (A Coman, 'Romania', in T Greif and A Coman (eds), *Equality for Lesbians and Gay Men A Relevant Issue in the EU Accession Process* (European Region of the International Lesbian and Gay Association, 2001), at p 58) Whether the same applies to the 2002 law (which was published in Romania's *Official Gazette*, Part I, No 65, 30 January 2002), remains to be seen

36 Ibid

37 The age limits were equalised in by the Latvian Criminal Law of 1998 In 2000 the text was further clarified so as to make clear that for all sexual acts the minimum age is the same (16 if the other is over 18), between 1998 and 2000 it had been argued that the minimum age of 16 applied only to vaginal heterosexual acts, and that a minimum age of 14 applied to all other acts (see J L Lavrikovs, 'Latvia Criminal Law amended to Clarify that Age of Consent is Equal for All', in *Euro-Letter*, op cit, n 27, No 91, September 2001, at p 4)

38 The new Penal Code adopted in 2000 abolishes the higher age of consent of 18 years for sexual acts between men (for heterosexual and lesbian acts the age limit is 14 years) This Penal Code has yet to come into force

39 The new Penal Code adopted in 2000 contains two anti discrimination provisions that mention sexual orientation This Penal Code has yet to come into force

40 Ibid