

SAME-SEX RELATIONSHIPS IN EUROPE: TRENDS TOWARDS TOLERANCE?

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Change is a funny thing. We are never quite sure what we are becoming or even why. Then one day we look at ourselves and wonder who we are and how we got that way.

Jodi Picoult (1966- present)

Introduction

In 1990, who would have thought that there would come a time when a generation of law students starting university would not even question if same-sex couples should be entitled to marry? And yet, that time has arrived. The majority of students embarking upon a legal education at a Dutch university in September 2011 were eight years old when Job Cohen, the mayor of Amsterdam, celebrated the first-ever state endorsed same-sex marriage in Amsterdam, The Netherlands in 2001. For these students, the existence of same-sex marriage is as much a given as the need to criminalize murderers or the need for a National Parliament. Yet, the road to this point in time has not been without its trials and tribulations.

In this article an attempt will be made to outline the current state of the law regarding the legal recognition of same-sex relationships in Europe. In doing so, attention will be paid to the formalized forms of relationship-recognition currently available across the European continent, namely same-sex marriage and forms of registered partnership. Attention will then shift to an analysis of the developments within European Union legislation and trends at the European Court of Human Rights, before drawing some general conclusions with regard to the future.

I. History of the Opening of Same-Sex Marriage in The Netherlands

I.1 Background

The legal journey resulting in the legislative enactment of registered partnership in the Netherlands did not go smoothly. In the beginning of the 1990s, two cases brought the legal problems facing same-sex couples to the forefront of judicial awareness. In 1989, the District Court in Amsterdam decided the first case (involving two men)¹, and in that same year the Dutch

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Supreme Court decided the second case (involving two women).² Both courts ruled against the petitioners, with the Dutch Supreme Court holding that:

Civil marriage is since time immemorial understood to be an enduring bond between a man and a woman to which a number of legal consequences are attached, which partly relate to the difference in sex and the consequences connected therewith for the descent of children. Marriage has these characteristics not only in The Netherlands but in many countries. Moreover, it cannot be said that the general opinion in the legal community has developed such that the considerations just mentioned do not justify the distinction in treatment on the grounds of sexual orientation, which can manifest itself in the impossibility to enter a relationship like marriage with a person of the same sex as oneself.³

Although the Dutch Supreme Court claimed that it was not discriminatory to deny same-sex couples the *possibility* to get married,⁴ it nonetheless made no ruling on whether the denial of the *legal effects* of marriage to same-sex couples was discriminatory. The court implied that this scrutiny was a task for the legislature and not for the judiciary.

1.2 First Kortmann Committee

The insinuation by the Dutch Supreme Court for parliamentary scrutiny was duly heeded and led to the formation of the First Kortmann Committee. The committee published its report, *Leefvormen* ('Lifestyles'), on 20 December 1991. It suggested the introduction of one of two schemes: a registration scheme at the local city council (so-called 'light registration') or a registration at the Registry of Births, Deaths and Marriages (also known as 'heavy registration'). The report also suggested that any scheme should be open to same-sex and different-sex couples as well as those within the prohibited degrees of marriage. After initial research conducted by the *Instituut voor Onderzoek naar Overheidsuitgaven* (IOV, Institute for Review of Public Expenditure), only the proposal for a 'heavy' registration scheme was maintained.⁵ Even so, a Bill submitted to Parliament in 1994 did not provide for the registration of different-sex couples,⁶ limiting registration to same-sex

¹ Rb Amsterdam 13 February 1990 (1990) *NJCM* 456-460. For the situation prior to 1990, see K. Boele-Woelki & P.C. Tange, 'De Deense Wet inzake het geregistreerd partnerschap: een voorbeeld voor Nederland?', *NJB* 1989, pp. 1537-1543.

² HR 19 October 1990, *NJ* 1992, 192. For earlier decisions see Court of Rotterdam 5 December 1988; Court of Appeal of The Hague 2 June 1989, *NJ* 1989, 871.

³ HR 19 October 1990, *NJ* 1992, 192 (author's own translation).

⁴ 'In 1990 besliste de Hoge Raad dat een huwelijk tussen personen van hetzelfde geslacht niet mogelijk is,' in: HR 19 October 1990, *NJ* 1992, 192.

⁵ K. Boele-Woelki, *Le partenariat enregistré: législation des Pays-Bays*, 26 March 1999, Paris, *Questions d'actualité en droit des personnes dans les Etats de la CIEC*, Commission d'Etat Civil, p. 3.

⁶ *Dutch Second Chamber*, 1993-1994, 23761, No. 3, p. 2 (*registratie van een samenleving/ registration of cohabitation*)

couples and those within the prohibited degrees of marriage. However, in view of an influential memorandum published in September 1995, the possibility of registration was opened to different-sex couples as well as same-sex couples (although not to couples within the prohibited degrees of marriage).⁷ It was hoped that this amendment would meet complaints raised principally from the COC (a Dutch lobby for homosexuals) which claimed that registered partnership was in essence a second-class marriage.⁸ Others, including many academics, were nonetheless extremely critical of the move.⁹

While the First Kortmann Committee was discussing a national system of partnership registration, municipalities all over The Netherlands were already tackling the problem first-hand. According to Dutch law, municipalities are allowed to maintain an unlimited number of registers. As a result, a number of city councils began to create registers for same-sex relationships, despite the fact that these registrations had no legal consequences. In 1991, the city of Deventer registered the first same-sex relationship. In the following years more than 130 municipalities established similar registers.¹⁰

I.3 Second Kortmann Committee

Despite the political activity of the early 1990s, the pressure to allow same-sex couples to marry in the same manner as different-sex couples continued to intensify.¹¹ A majority in Parliament was in favour of opening civil marriage to couples of the same sex.¹² In April 1996, this pressure led the Dutch House of Representatives to adopt two non-binding resolutions submitted by Van Der Burgh and Dittrich demanding the swift introduction of same-sex marriage.¹³ Wary of unleashing an anti same-sex marriage backlash in neighbouring countries, the Government decided instead to appoint a committee tasked with examining the issues surrounding the introduction of same-sex marriage. As a result, the Second Kortmann Committee was established on 28 May 1996, with the aim of investigating whether the institution of marriage should be opened

⁷ *Dutch Second Chamber, 1994-1995, 22700, No. 5 (Notitie Leefvormen).*

⁸ *Dutch Second Chamber, 1994-1995, 22700, No. 5, p. 5 and 23761, No. 7, p. 10.*

⁹ M.J.A. van Mourik, 'Geregistreerd partnerschap!', *WPNR* 1997-6264, pp. 225-226; P.P.M. Hoevenaars, 'Het wetsvoorstel partnerschapregistratie', *WPNR* 1997-6264, pp. 226-232; P.A. Koppen & J.G.C. Lekkerkerker, 'Geregistreerd samenwonen, verbintenis en lotsverbondenheid I', *WPNR* 1992-6067, p. 774.

¹⁰ H. van Velde, *The long road to civil marriage, Gay Krant*, 1 April 2001.

¹¹ For an English overview see N. Maxwell, 'Opening civil marriage to same-gender couples: A Netherlands-United States comparison', *Arizona JICL* 2001-18, pp. 141-207.

¹² The parties which supported the opening of civil marriage to same-sex couples were: the Labour Party (*Partij van de Arbeid*), Democrats 1966 (*D66*), Green Left (*Groen Links*) and the Party for Democracy and Freedom (*Volkspartij voor Vrijheid en Democratie*).

¹³ *Dutch Second Chamber, 1995-1996, 22700, No. 18 and 14; Handelingen, Dutch Second Chamber, 1995-1996, p. 4883.* These resolutions were supported with 81 votes to 60.

to same-sex couples. In the meantime, passage of the Registered Partnership Bill continued and the law was eventually enacted in 1997.¹⁴

In October 1997, the Second Kortmann Committee published its report. The committee agreed that whatever the eventual result, only one institution should exist and registered partnership should be abolished.¹⁵ A second area of consensus was that no familial legal ties should be created by operation of law as a result of celebrating same-sex marriage since this would involve too great an abstraction from the biological reality that same-sex couples cannot conceive children naturally.¹⁶ It was here, however, that the unanimity of the Committee floundered. Only five of the eight members supported the opening of civil marriage to same-sex couples.

Three discernible categories of arguments were put forth by the members of the Committee on both sides. The first category concerned arguments relating to the principle of equality; the second, the social meaning of the marital bond; and finally the international repercussions arising from such a move. The majority of the Committee recognised the flexible and evolving nature of marriage and stressed the importance of the principle of equality above all other issues. The minority did not see equality as an issue, believing that same-sex and different-sex couples were not equal since same-sex couples were unable to reproduce naturally. It was noted by all members that international recognition of such an institution could cause problems for those couples wishing to have their partnership recognised abroad. However, as indicated by the majority, such couples would be aware of the difficulties and eventually the opening of civil marriage in The Netherlands could have a positive rather than negative effect on international recognition.¹⁷

The Cabinet, led by Prime Minister Kok, felt that the scales were not tilted in favour of opening civil marriage to same-sex couples, although the Cabinet did agree to allow same-sex couples to adopt Dutch children. Nonetheless, after the 1998 general elections and the reappointment of the 'purple coalition',¹⁸ the Cabinet agreement stated that it would submit a proposal to Parliament before 1 January 1999 calling for the opening of civil marriage to same-sex couples. In the meantime, this proposal was sent to the Council of State along with a proposal to allow same-sex couples to adopt children. Less than two years later both the First and the Second Chamber accepted the proposals. On

¹⁴ *Neth. Staatsblad (Bulletin of Acts and Decrees)*, 1997, No. 324 "tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het wetboek rechtsvordering in verband met opnemingsdaarvan bepalingen voor het geregistreerd partnerschap."

¹⁵ Kortmann Commission, *Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht*, The Hague: Ministry of Justice 1997, p. 24, para. 5.5.

¹⁶ *Ibid.*, p. 23, para. 5.4.

¹⁷ *Ibid.*, pp. 17-21, Chapter 4.

¹⁸ The Cabinet was called the 'purple coalition' because when the party colours of the main political parties in the Cabinet are mixed, purple is the result.

1 April 2001, The Netherlands became the first country in the world to allow same-sex civil marriage.¹⁹

II. Substantive Law Comparison

II.1 Introduction

Since Denmark became the first country in the world to introduce registered partnership in 1989, the world has seen a remarkable and swift wave of legislative and judicial change with regard to the legal recognition of same-sex relationships. The debate has raged, is raging and will continue to rage on every continent of the planet. Apart from Asia, at least one country in each continent currently permits same-sex couples to register their relationship in a formal public ceremony, or celebrate their marriage.²⁰ Yet it should not be forgotten that this trend towards increased recognition must be measured against the status quo of many other countries in the world, where homosexuals risk imprisonment or even fear for their lives.²¹

II.2 Same-Sex Marriage in Europe

On 1 April 2001, The Netherlands became the first country in the world to open civil marriage to couples of the same sex. This monumental occasion heralded the start of a slow trend towards increasing acceptance of same-sex marriage, not just in Europe, but around the globe. Ten years after same-sex couples were allowed to start celebrating marriages from Amsterdam to Zwolle, seven countries in Europe currently allow for same-sex couples to get married (The Netherlands (2001), Belgium (2003), Spain (2005), Norway (2008), Sweden (2009) Iceland (2010), and Portugal (2010)) with a further three countries outside of Europe (Canada (2005), South Africa (2006) and Argentina (2010)), and numerous US states (Connecticut (2008), Iowa (2009), Massachusetts (2003), New Hampshire (2010), Vermont (2009) and Washington DC (2010)).²²

The road towards opening civil marriage to same-sex couples has also been difficult for other countries. In many jurisdictions, a long journey preceded the

¹⁹ There were of course those academics who were against the opening of marriage to same-sex couples, although these commentators represented a minority in Dutch literature, see for example A.J.M. Nuytinck, 'Het hete hangijzer van het homohuwelijk', *FJR* 1996, p. 125.

²⁰ South America: Uruguay (civil union since 2007, same-sex marriage proposed in 2011) and Argentina (same-sex marriage since 2010); North America: Canada (same-sex marriage since 2005) and various states in the USA; Africa: South Africa (same-sex marriage since 2006); Oceania: New Zealand (civil unions since 2004) and various schemes in various states in Australia; Asia: a proposal to introduce same-sex marriage has been put forward in Nepal in 2011.

²¹ As is the case in Iran, Mauritania, Saudi Arabia, Sudan, United Arab Emirates, Yemen and Nigeria (12 northern provinces that apply Shari'a law).

²² There are currently no fewer than 28 states that have constitutional bans on same-sex marriages. See I. Curry-Sumner & S.T. Curry-Sumner, 'Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA', *ULR* 2008-4 (2), pp. 236-278, at: www.utrechtlawreview.org.

final jubilant celebrations. For example, on 31 July 2009, the Portuguese Constitutional Court rejected the argument that the Portuguese Constitution demanded the recognition of same-sex relationships (although at the same time the Court also stated that the Constitution did not oppose it). The Court left the issue to the legislature; a decision that has been echoed in many jurisdictions around the world (*e.g.* The Netherlands and Vermont). Whether such a decision can be seen as a precursor to legislative change is difficult to determine. Perhaps the litmus test will be the French situation after the ruling of the French Constitutional Court of 28 January 2011 that the ban on same-sex marriage in France was not unconstitutional.²³

At the same time, alongside the trend towards recognition, it is nonetheless important to be aware of an opposing trend towards prohibition. In 2011 constitutional bans to same-sex marriage have been proposed in four jurisdictions around the world (Chile, Hungary, Jamaica and Zambia) thus far. Currently at least 25 jurisdictions worldwide provide for the constitutional limitation of marriage to one man and one woman.²⁴

II.3 Registered Partnerships

In 1989, Denmark became the first country in the world to provide same-sex couples with a public registration service, enabling them to gain virtually all the rights and responsibilities of different-sex married couples. This decision paved the way for the worldwide movement towards increasing recognition for same-sex relationships. At present, no fewer than 16 jurisdictions have introduced forms of formalized relationship registration.

The first wave of jurisdictions centred in Northern Europe, with Norway,²⁵ Sweden,²⁶ Greenland²⁷ and Iceland²⁸ becoming the second, third, fourth and fifth jurisdictions in the world to introduce forms of registered partnership. All four Scandinavian registered partnership schemes were very similar in form, that is, they were all restricted to couples of the same sex and created an institution that, with few exceptions, mirrored different-sex marriage. Although there were few internal differences (*i.e.* differences between the domestic form

²³ Decision 2010-92. The same could also be said of the Italian Constitutional Court rejection in April 2010. See K. Boele-Woelki, I. Curry-Sumner, M. Jansen and W. Schrama, *Huwelijk of geregistreerd partnerschap?*, Deventer: Kluwer, 2007, p. 177-178.

²⁴ Cuba (1976), Burkina Faso (1991), Bulgaria (1991), Vietnam (1992), Paraguay (1992), Lithuania (1992), Cambodia (1993), Belarus (1994), Moldova (1994), Ukraine (1996), Poland (1997), Venezuela (1999), Rwanda (2003), Burundi (2005), Honduras (2005), Uganda (2005), Latvia (2005), Democratic Republic of Congo (2005), Serbia (2006), Montenegro (2007), Ecuador (2008), Bolivia (2009), Cayman Islands (2009), Dominican Republic (2010) and Kenya (2010).

²⁵ Lov om registreret partnerskab nr. 40 av 30 April 1993.

²⁶ Lag om registrerat partnerskap, SFS 1994:1117.

²⁷ The registered partnership law was extended to Greenland on 26 April 1996 and is called *Inooqatigiittut nalunaarsorsimasut* in Greenlandic.

²⁸ Lög um stadfeste samvist, nr. 87 12 June 1996.

of registered partnership and the domestic form of marriage²⁹) and external differences (*i.e.* differences between the various domestic forms of registered partnership³⁰), these were minor compared to the general extension of marital rights to same-sex couples in all four countries.

One noteworthy distinction, however, concerned the rights of same-sex couples with respect to children. None of four Scandinavian jurisdictions extended the presumption of paternity to same-sex couples. As a result the woman married to the birth mother did not automatically become the legal parent of the child. Initially, adoption rights were also not extended to same-sex registered partners.³¹

The Netherlands was the next country to follow suit in 1998 with the introduction of a form of registered partnership. However, the Dutch model was fundamentally different from the Scandinavian, since the Dutch registered partnership was also open to different-sex couples. As stated above, the Dutch Government had sought to combine the claim from the homosexual community to be granted the rights and benefits of marriage with the claim from the heterosexual community for a purely secular state-recognized institution other than marriage. However, similar to the Scandinavian model, registered partnership granted partners virtually all the rights and benefits of marriage. The resulting institution of registered partnership is to this day a rather isolated institution in Europe with only The Netherlands having a registered partnership form open to both different and same-sex couples, whilst assigning virtually all the rights and duties of marriage.

The calls for recognition of same-sex relationships in France and Belgium were also beginning to become more strident. Calls for the improvement of same-sex couple rights started as early as 1989 in France after two important decisions were rendered by the French Supreme Court.³² In the first case, *Secher v. Air France*, a male flight attendant sought to obtain a plane ticket for his same-sex partner at a reduced price, which would have been available if his partner had been of the opposite sex. The Court of Appeal in Paris held that expressions such as *conjoint en union libre*, *agent et sa concubine* and *vie maritale*³³ could only be interpreted to cover the exclusive situation of one man and one woman living together as though they were husband and wife. The expressions were intended to be based upon marriage and as such could not be extended to

²⁹ For example in all four Scandinavian jurisdictions, registered partners were not permitted to register their partnership along similar lines to the State-sanctioned church weddings.

³⁰ In Denmark, for example, registered partners were initially not permitted to take each other's surname.

³¹ I. Lund-Andersen, 'The Danish Registered Partnership Act', in: K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia 2003, p. 17; M. Savolainen, 'The Finnish and Swedish Partnership Acts – Similarities and Divergencies', in: K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia 2003, p. 33-34.

³² Fr. Cass., Soc. Ch. 11 July 1989, *Bull. Civ.*, Vol. 311, No. 514 and *Bull. Civ.*, Vol. 312, No. 515.

³³ Common law spouse, official and his/her concubine and marital life.

same-sex couples.³⁴ In the second case, *Ladijka v. Caisse primaire d'assurance maladie de Nantes*,³⁵ a woman was denied the benefits of her female partner's public health and maternity insurance cover, that would otherwise have been granted had her partner been of the opposite sex. The Court of Appeal in Rennes similarly held that the concept of *vie maritale*, used in the applicable social security legislation, could only be applied to unmarried different-sex couples. The French Supreme Court affirmed both decisions.³⁶

At the same time as the French Supreme Court's decisions, a movement was taking shape in France aimed at reforming conjugal life and eliminating the discrimination faced by non-married couples. Despite the generality of its stated aim, the primary goal was legal recognition of the union between two persons of the same sex.³⁷ Indeed, it was mainly groups concerned with defending the rights of homosexuals and those active in the ever-continuing and increasing fight against AIDS who advocated law reform and rallied around various parliamentary initiatives. Prior to the enactment of the well-known *pacte civil de solidarité* (PACS), at least five different versions were submitted to the French legislature for debate (each proposal was known by the abbreviation of the institution it aimed to create, namely the CPC (*contrat de partenariat civil*),³⁸ the CUC (*contrat d'union civile*),³⁹ the CUS (*contrat d'union sociale*),⁴⁰ the CUCS (*contrat d'union civile et sociale*)⁴¹ and the PIC (*pacte d'intérêt commun*)⁴²).

These intense debates ultimately led to the introduction of a highly contentious form of partnership recognition in France. As a result of the ultimate compromises made by all parties, an institution was created somewhere in the no-man's land between status and contract. Although the PACS professed to have no impact on the civil status of the parties involved, persons who joined in PACS were not permitted to enter into a PACS with anyone else, and if they subsequently married (either each other or a third party), then the PACS would automatically be terminated. As a result, many—including the present author—argued that the PACS should ultimately be regarded as a civil status-affecting institution, regardless of whether this was the original intent of the legislature.

³⁴ Cour d'Appel Paris, 1 Civ. Ch., 11th October 1995, on appeal from Conseil de prud'hommes de Paris, 14th November 1984, Case No. 8546.008/R (1986) *D* 380.

³⁵ Cour d'Appel Rennes, 27th November 1985, on appeal from Commission de première instance de sécurité sociale de Nantes, 19th January 1984 (1986) *D* 380.

³⁶ For discussion of the decisions, see annotated case by N. Marcel Dorwling-Carter, *Gaz. Pal.* 1990, p. 216-228.

³⁷ D. Borrillo, 'The pacte civil de solidarité in France', in: R. Wintemute and M. Andenæs (eds), *Legal recognition of same-sex partnerships*, Oxford: Hart 2001, p. 476.

³⁸ French Senate, 25 June 1990 (Socialist), Act. No. 422.

³⁹ French National Assembly, 25 November 1992 (Socialist), Act. No. 3066.

⁴⁰ French Senate, 19 March 1997 (Socialist), Act. No. 274. Reintroduced in 1997: French Senate, 23 July 1997 (Socialist), Act No. 94.

⁴¹ French National Assembly, 23 July 1997 (Radical./Movement of Citizens), Act. No. 88.

⁴² See I. Curry-Sumner, *All's well that ends registered?*, Antwerp: Intersentia 2005, pp. 79-80.

After the Central European turbulence of 1998 and 1999, the beginning of the new millennium saw a return to the 'traditional' Scandinavian registered partnership schemes. Jurisdiction after jurisdiction began to introduce same-sex registered partnerships, albeit each with their own national twist: The year 2000 saw the introduction of a form of life partnership in Germany,⁴³ followed shortly by Finland with its registered partnership in 2001,⁴⁴ Switzerland with a registered partnership in 2005,⁴⁵ the United Kingdom⁴⁶ with a civil partnership in 2005, Hungary with its registered partnership in 2009,⁴⁷ Ireland with a civil partnership in 2010⁴⁸ and finally Austria with a life partnership in 2010.⁴⁹ Luxembourg and Andorra are the only exceptions since both introduced a civil partnership form in 2004 and 2005 very similar to those previously created in France and Belgium.⁵⁰

As this general trend towards the introduction of same-sex registration schemes picked up momentum across Central and Western Europe, two other trends were taking place in Southern and Eastern Europe. In 1998, Catalonia had become the first autonomous region of Spain to introduce a form of partnership registration. This registration system bore similarities to those introduced in France and Belgium. The rights afforded to same-sex couples were not the same as those of different-sex married couples. Furthermore, the *unión estable de pareja* scheme provided for three different establishment methods: a continuous period of cohabitation of two years, an undefined period of cohabitation and common children or a public declaration of the desire to be involved in such a union. This development brought in new complexities to the concept of 'registered' partnership in the sense that in Catalonia, partners could also be grandfathered into the scheme simply on the basis of a period of unregistered cohabitation. Other autonomous regions in Spain began to introduce similar schemes, although once again each with their own idiosyncrasies.⁵¹

At the same time, a second development was taking shape in Eastern Europe. In 2006 the Czech Republic and Slovenia introduced atypical forms of registered partnership.⁵² These schemes were also restricted to same-sex couples, but

⁴³ Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, BGBl I 2001, 266.

⁴⁴ Laki rekisteröidsystä parisuhtheesta, nr. 95/2001.

⁴⁵ Loi federale du 18 juin 2004 sur le partenariat enregistré entre personnes du meme sexe.

⁴⁶ England & Wales, Scotland and Northern Ireland.

⁴⁷ 2009. évi XXIX. Törvény a bejegyzett élettársi kapcsolatáról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról.

⁴⁸ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

⁴⁹ Bundesgesetz von 18 december 2009 über die eingetragene Partnerschaft

⁵⁰ Luxembourg: Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats and Andorra: Llei qualificada de les unions estables de parella (see further, K. Boele-Woelki, *et al.*, *Huwelijk of geregistreerd partnerschap?*, Deventer: Kluwer 2007, pp. 105-107.

⁵¹ See further, I. Curry-Sumner, *All's well that ends registered?*, Antwerp: Intersentia 2005, p. 354.

⁵² For more information on Slovenia see K. Boele-Woelki, *et al.*, *Huwelijk of geregistreerd partnerschap?*, Deventer: Kluwer 2007, pp. 135-138.

unlike their Western European counterparts, they were not intended to create an institution equivalent to marriage. Instead, both schemes cover the rights and duties extended to same-sex registered partners. In this sense the schemes appear to be a mix between the dualistic approach which was first adopted in the Scandinavian jurisdictions (i.e. registration is restricted to same-sex couples), together with the weak regulations that are currently applicable in countries such as France, Belgium and Spain.

II.4 Unregistered Relationship Forms

Many countries place same-sex couples on an equal footing to different-sex couples when addressing issues related to unregistered cohabitants. All European states, with the exception of Croatia, grant rights to same-sex unregistered cohabitants by providing some form of registration system, that is, those same-sex couples who wish to access certain rights and benefits are provided with an option of doing so through registration. Croatia is currently the only country in Europe to provide same-sex couples solely with an unregistered form of protection, without access to either same-sex marriage or registered partnership.

II.5 Summary

In summary it would appear that different trends are simultaneously palpable across the European continent. Firstly, there is a distinct and obvious trend across the continent towards increased recognition of same-sex relationships. Currently, more than 16 jurisdictions have introduced some form of relationship registration scheme for same-sex couples. As time progresses it would appear that the trend is moving towards creating institutions akin to marriage, or alternatively permitting same-sex couples to marry.

Secondly, there is a trend towards the recognition that, although not all different-sex couples want to get married, many do want to formalize their relationship. In some countries this has led to the introduction of registration schemes for different-sex couples. In other countries, different-sex couples have begun to complain that they are not permitted to register their partnership. In the United Kingdom and Austria different-sex couples have gone so far as to submit their case to the European Court of Human Rights.⁵³ In The Netherlands, where different-sex couples are also permitted to register their partnership, their numbers have increased steadily since the introduction of registered partnerships in 1998.⁵⁴ In 2009 there were almost 9,000 couples that

⁵³ Family Law Week, 'Heterosexual couple to take civil partnership case to European Court of Human Rights', <http://www.familylawweek.co.uk/site.aspx?i=ed52091>.

⁵⁴ In 1998: 1,500; in 1999: 1,322, in 2000: 1,670, in 2001: 3,044, in 2002: 4,305, in 2003: 4,305, in 2004: 5,148, in 2005: 5,744, in 2006: 6,315, in 2007: 6,804, in 2008: 7,450 and in 2009: 8,434.

had registered their partnership.⁵⁵ A similar increase is also evident in France with respect to the PACS.

Also noticeable is a third trend towards the recognition and/or acceptance of unmarried, unregistered couples who are (or ought to be) granted rights and benefits after a certain period of cohabitation. At present, this movement appears to have only gained a limited legislative basis in countries such as Spain and Croatia. Other countries have, however, recognized these rights for a longer period of time (e.g. Sweden).

III. European Union Law

III.1 Introduction

The European Union is confronted with family law issues in many ways, despite its lack of competency to deal with such matters.⁵⁶ This section addresses the numerous instances that family law matters have come before the judicial branch of the European Union (i.e. in the form of decisions of the European Court of Justice (ECJ)), or the executive and/or legislature (i.e. in the form of decisions of the Council, Commission or Parliament). This section will focus on the EU Staff Regulations, the directives in the field of family reunification and free movement of persons and regulations in the field of private international law. Due to space restrictions this contribution will not discuss the recent ECJ decisions in the field of pension benefits (i.e. *Maruko*).

III.2 Staff Regulations

In 2001, the European Court of Justice rendered an important decision in the landmark case *D and Sweden v. Council*, which involved a Swedish registered partner working for an EU institution, who sought spousal housing benefits according to the European Staff Regulations.⁵⁷ Since the term 'spouse' was used in these regulations, the ECJ had to determine whether the concept of registered partnership could fall under this banner. Although the ECJ did not issue a decision with respect to the recognition of same-sex marriages, it held that the concept of registered partnership could not be equated to the concept of marriage⁵⁸ because Sweden had explicitly created a new institution of registered partnership alongside marriage, separating it from domestic marriages despite having similar rights and benefits.

⁵⁵ In 2009, only 576 registered partnerships were attributable to the 'lightning divorce procedure', which has been abolished since 1st March 2009. This means that the absolute number of partnership registrations in 2009 was 9,497 (of which 9,002 were opposite sex and 8,921 involved new registrations).

⁵⁶ Article 81 Treaty on the Functioning of the European Union (TFEU) (Article 65 EC Treaty (old)).

⁵⁷ Article 1(2), Annex VII.

⁵⁸ C 122/99 and 125/99P [2001] ECR 4319, para. 43.

Amendments have been made to the Staff Regulations since the ruling,⁵⁹ which permit couples with a registered partnership to be entitled to the same benefits as married couples. As a result, the protection granted by the Staff Regulations only applies to those couples that are able to gain access to a registered partnership scheme domestically. Couples living in Latvia and Lithuania (countries without registered partnership schemes), for example, are not entitled to the benefits under the Staff Regulations. Furthermore, the Staff Regulations provide for a restriction with respect to the couple's access to marriage. According to Article 1(2)(c), Annex VII a couple is only entitled to benefits under the Staff Regulations if it has no access to civil marriage in the Member State concerned. This excludes two groups of couples, namely those involved in a registered partnership in countries where marriage is open to same-sex couples (Belgium, The Netherlands, Spain, Sweden), and all different-sex registered partners (Belgium, France, Luxembourg and The Netherlands).

III.3 Family Reunification and Free Movement

The European Union has recognized the increasing trend towards same-sex partnerships through two directives. In Directive 2004/38/EC (free movement of persons) and Directive 2003/86/EC (family reunification) explicit reference is made to the concept of registered partnership. Although neither instrument clearly defines the concept of registered partnership, both directives do offer a limited protection to those involved in registered partnerships. The *Free Movement* Directive permits EU citizens to move and reside within the EU with their spouse (although there appears to be no obligation for member states to recognize a same-sex spouse). If the host state treats registered partnerships as equivalent to marriage, registered partners have the same rights as 'spouses' under the Directive. This Directive thus creates different levels of protection, depending upon the legal situation of the couple in the host state:

(a) If the host state's national law treats registered partnerships as equivalent to marriage (e.g. Finland), individuals have the right to join their partner as if they were a 'spouse'. It is important here to recognize that registered partnership must treat married couples and registered partners as equivalent in the law of the 'host' state, regardless of the law of the 'state of origin'.

(b) If the host state does not treat registered partnerships as equivalent to marriage, the couple falls under the rules of unregistered (*de facto*) partners in a 'durable relationship'. EU law places no obligation on Member States to allow or recognize registered partnerships.

When both individuals are third-country nationals (i.e. no citizens of a EU Member State), reference must be made to the *Family Reunification* Directive. This Directive allows third-country national spouses to be united with third-country nationals residing lawfully in the territory of a Member State. Again,

⁵⁹ Council Regulation Nr. 723/2004 of 22 March 2004, L124/1, para. 97(a)(ii), amending Article 1(2)(c), Annex VII, Staff Regulations.

there is no obligation for Member States to extend these rights to same-sex marriages. Furthermore, Member States are also not explicitly obliged to extend this right to same-sex registered (or unregistered) partners.

III.4 Private International Law

The increasing Europeanization of private international law has also affected the field of family law. Two private international law regulations deal specifically with family law issues: Brussels II-bis (concerning marital dissolution and parental responsibilities) and the recent Maintenance Regulation that is due to come into force on 18 June 2011. Despite dealing with family law issues, neither of these instruments provides clarity regarding their applicability to same-sex relationships. In the absence of tools to aid uniform interpretation, it appears that Member States interpret Brussels II-bis in a non-autonomous manner. As a result, The Netherlands applies the rules to same-sex marriages, whereas Poland and Lithuania do not.⁶⁰ The Maintenance Regulation, on the other hand, states that it covers all “maintenance claims arising from a family relationship, parentage, marriage or affinity”⁶¹, thereby avoiding the need to determine whether same-sex relationships fall under the substantive scope of the Regulation; same-sex relationships therefore fall within the scope of the Regulation.

A new twist to the same-sex relationship debate is the newly proposed Council Regulation on the private international law aspects regarding property relationships between registered partners.⁶² The European Commission states:

Because of the features that distinguish registered partnerships and marriage, and the different legal consequences resulting from these forms of union, the Commission is presenting two separate proposals for Regulations: one on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and the other on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.⁶³

It is interesting to note that despite the diversity of substantive law institutions, the European Union has provided no further explanation of the definition stipulated in Article 2(b) that a registered partnership is a “regime governing the shared life of two people which is provided for in law and is registered by an official authority”. The preamble recognizes the need for a distinction between registered partnerships and *de facto* unions.⁶⁴ Although the term

⁶⁰ See further K. Boele-Woelki & C. Gonzalez-Beilfuss, *Brussels II-bis. Its Impact and Application in the Member States*, Antwerp: Intersentia 2007.

⁶¹ Article 1(1), Maintenance Regulation (Regulation Nr. 4/2009)

⁶² COM (2011) 127 final

⁶³ COM (127) final, p. 3.

⁶⁴ Preamble nr. 9

‘registered partnership’ is defined in the Regulation itself, this definition does not provide any substance to the content of the term, since the couple must satisfy the national domestic law with regard to the registration of their partnership.⁶⁵

A number of questions can be posed with respect to this definition. Translation differences are apparent with respect to the various language versions. For example, the English version utilizes the phrase ‘shared life’ (cf. French *vie commune*, German *Lebensgemeinschaft*, Spanish *vida en común*) whereas the Dutch version uses the word ‘cohabitation’ (*samenleven*). In addition, contrary to the definition proposed by this author in 2005, it appears from the definition used in the Regulation that the institution of registered partnership does not need to have repercussions on the civil status of the parties involved.⁶⁶ Furthermore, no reference is made to the legal rights and duties incumbent upon the parties to the registered partnership. As this author has previously argued, both of these components are essential should one wish to provide an all-encompassing, yet delineated autonomous definition to the term ‘registered partnership’.⁶⁷

IV. European Human Rights

IV.1 Introduction

In case law it has been established that homosexuals are protected by Article 8 of the European Convention on Human Rights (ECHR) with regard to their private life.⁶⁸ The debate surrounding the family life of homosexuals and their right to marry as protected under the Convention have, however, been much more contentious.

IV.2 Article 8: Family Life

For many years, the European Court of Human Rights (ECtHR) has consistently held that same-sex couples could not benefit from the protection of family life granted by the Convention. Time and again the Court reiterated its belief that despite the need to interpret the Convention as a living instrument, the Convention did not offer protection to unmarried cohabiting couples. In 1997, the Court signalled a departure from this position with regard to unmarried different-sex couples in *X, Y and Z v. United Kingdom*.⁶⁹ However, the Commission, and later the Court itself, consistently held that family life could

⁶⁵ Preamble nr. 10.

⁶⁶ See I. Curry-Sumner, *All's well that end registered?*, Antwerp: Intersentia 2005, p. 347 *et seq.*

⁶⁷ I. Curry-Sumner, ‘Uniform patterns regarding same-sex relationships’, *International Law Forum*, 2005-7 (3), pp. 9-14.

⁶⁸ *Dudgeon v. United Kingdom*, 22 October 1981, A-45, paras. 41, 52. See also *Norris v. United Kingdom*, 26 October 1988, *Modinos v. Cyprus*, 22 April 1993, *X v. United Kingdom*, [1997] 24 EHRR 143.

⁶⁹ [1997] D&R II-619, para. 31.

not exist between cohabiting homosexuals.⁷⁰

Nonetheless, change has been heralded in the 2010 decision in *Schalk and Kopf v. Austria*. When Austrian authorities refused to permit a same-sex couple to marry,⁷¹ and after exhausting all internal civil remedies, the couple made a complaint before the Austrian Constitutional Court (*Verfassungsgerichtshof*), alleging that the legal impossibility for them to get married constituted a violation of their right to respect for private and family life (Article 8 EHCR) and of the principle of non-discrimination (Article 14 EHCR). They argued that the concept of marriage had changed since the Austrian Civil Code was enacted in 1812 and that there was no objective justification that could be used by the state to substantiate discriminatory treatment. On 12 December 2003 the Austrian Constitutional Court dismissed the applicants' complaint stating that:

Neither the principle of equality set forth in the Austrian Federal Constitution nor the European Convention on Human Rights (as evidenced by "men and women" in Article 12) require that the concept of marriage as being geared to the fundamental possibility of parenthood should be extended to relationships of a different kind. (...) The fact that same-sex relationships fall within the concept of private life and as such enjoy the protection of Article 8 of the ECHR – which also prohibits discrimination on non-objective grounds (Article 14 of the ECHR) – does not give rise to an obligation to change the law of marriage. It is unnecessary in the instant case to examine whether, and in which areas, the law unjustifiably discriminates against same-sex relationships by providing for special rules for married couples. Nor is it the task of this court to advise the legislature on constitutional issues or even matters of legal policy. Instead, the complaint must be dismissed as ill-founded.

Although the ECtHR denied the couple's substantive claim, the Court for the first time accepted that homosexual relationships could fall within the ambit of 'family life':

...the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" but has not found that it constitutes "family life", even where a long term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation. (...) The Court notes that (...) a rapid evolution of social attitudes towards same-sex couples has taken

⁷⁰ See further, I. Sumner, 'Going Dutch? A comparative analysis and assessment of the gradual recognition of homosexuality with respect to The Netherlands and England', *MJ*-2002, p. 46.

⁷¹ According to Article 44 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), marriage is a civil contract between two persons of the opposite sex.

place in many member States. Since then a considerable number of Member States have afforded legal recognition to same-sex couples (...). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of “family” (...). In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

It should be noted, however, that this statement constitutes an *obiter dictum* that had no impact on the outcome of the case. Nonetheless, it is the strongest signal yet from the ECtHR that homosexual couples will now be afforded family life protection on the basis of Article 8 ECHR.

IV.3 Article 12: Right to Marry

Whether the refusal to permit same-sex couples to marry is a breach of the fundamental right to marry enshrined in Article 12 of the ECHR is a question that has yet to be definitively decided. Opinions vary as to whether Article 12 applies to same-sex marriage claims. In another *obiter dictum* in *Schalk and Kopf v. Austria*, the ECtHR stated that:

Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint.⁷²

However, in his concurrence, Judge Malinverni objected to this *obiter dictum* by stating that:

Article 12 is inapplicable to persons of the same sex. Admittedly, in guaranteeing the right to marry, Article 9 of the Charter of Fundamental Rights of the European Union deliberately omitted any reference to men and women, since it provides that “the right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. In my opinion, however, no inferences can be drawn from this as regards the interpretation of Article 12 of our Convention. The commentary on the Charter does indeed confirm that the drafters of Article 9 intended it to be broader in scope than the corresponding articles in other international treaties. However, it should not be forgotten that Article 9 of the Charter guarantees the right to marry and to found a family “in accordance with the national laws governing the exercise of these rights”. By referring in this way to the relevant

⁷² *Schalk and Kopf v. Austria*, Zaaknr: 30141/04, 24 June 2010 para. 61.

domestic legislation, Article 9 of the Charter simply leaves it to States to decide whether they wish to afford homosexual couples the right to marry. However, as the commentary quite rightly points out, “there is no obstacle to recognize same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages.” In my view, Article 9 of the Charter should therefore have no bearing on the interpretation of Article 12 of the Convention as conferring a right to marry only on persons of different sexes.⁷³

Although the ECtHR went to some lengths in recognizing the rights of same-sex couples and questioning whether Article 12 was restricted to different-sex couples, it did not go so far as to require Member States to allow same-sex marriage. Hopefully this question will ultimately be readdressed by the ECtHR in the pending case of *Chapin and Charpentier v. France*, in which the claimants argue that their right to marry has been breached after their marriage concluded by the mayor of Bègles was subsequently declared null and void by the courts.⁷⁴

IV.4 Articles 8 and 14: Housing Benefits

The ECtHR in *Kozak v. Poland* was confronted with a case regarding the right to housing benefits.⁷⁵ After the death of his same-sex partner, Mr. Kozak wished to continue the tenancy agreement that had originally been in his partner’s name. However, the right to extending the tenancy agreement was refused since Polish law reserved this right to different-sex couples only. A claim was brought on the basis of an infringement of the claimant’s rights under Articles 8 and 14 (non-discrimination clause) of the ECHR.

In this case, the ECtHR ruled that Mr. Kozak was treated differently than individuals in different-sex marriages owing to his sexual orientation. The Polish judges had argued that the difference in treatment was aimed at ensuring the protection of the family unit as a relationship between one man and one woman which is in accordance with the Polish Constitution. Although the Court noted that the protection of the family in the traditional sense of the word is a valid and weighty reason justifying different treatment,⁷⁶ the ECHR must be interpreted as a living instrument in the light of current circumstances.⁷⁷ The Court noted the delicate balance between the protection of the traditional definition of family with the protection that must be granted to homosexual minorities. Nonetheless, the Court regarded the exclusion of same-sex couples from the protection that is granted to different-sex couples with respect to the continuation of tenancy agreements as an unjustifiable breach of an

⁷³ *Ibid.*, para. 2, concurring opinion of Judge Malinverni.

⁷⁴ Application No. 40183/07.

⁷⁵ Application No. 13102/02, 2 March 2010.

⁷⁶ *Karner v. Austria*, appl. no. 40016/98, 24 July 2003, para. 40.

⁷⁷ *E.B. v. France*, appl. no. 43546/02, 22 January 2008, para. 92. For discussion of this case see, I. Curry-Sumner, “EB v. France: A missed opportunity?” *CFLQ* 2009, Vol. 21(3), p. 356-366.

individual's right to private life which is protected by Article 8 in conjunction with Article 14 of the ECHR.

Conclusion

Europe appears to be a very different place now than when the first registration scheme was introduced in Denmark in 1989. A majority of European Member States have introduced some form of public recognition of same-sex relationships, while the European Union itself has embarked on a number of legislative initiatives to protect the rights of registered partners. The trend is not just one of increasing tolerance towards same-sex relationships, as the brief overview of European legislation demonstrates, but various other developments are distinguishable.

There is the trend towards an increasing recognition of same-sex couples, which in some cases appears to be coupled with a desire by different-sex couples to have their relationships recognized in formal forms other than marriage. The choices made by legislatures to deal with these related, yet different claims is crucial in shaping the institution of registered partnership. Where will this ultimately lead? The author has proposed that Europe will ultimately be host to two main familial relationship systems (regardless of their sexual orientation): the pluralistic system in which couples are offered multiple choices with regard to the formalisation of their relationship, and the monistic system in which couples are allowed access to marriage as the only form of official relationship recognition. In the author's opinion, it is only a matter of time before the third option, the dualistic system (in which same-sex couples are provided with registered partnership and different-sex couples with marriage) will die out completely, either as a result of internal pressure or external pressure from Strasbourg or Luxembourg.

At present, the approach adopted by the European Union is disappointing. The protection granted to same-sex couples is limited to those with access to partnership regimes in their home states. As a result, a two-tier level of protection is being created. Same-sex couples living in countries with registered partnership schemes are protected under the Staff Regulations and the various forms of EU legislation (i.e. the Free Movement Directive, the Family Reunification Directive and the recently proposed Regulation concerning international partnership property issues), yet those living in countries where these rights have not been granted are left empty-handed. As a result, current EU policy only increases the differences between same-sex couples within the EU.

Perhaps even more illustrative is the complete lack of attention paid to the issue of recognizing same-sex marriages at the EU level. Despite proposing specific legislation with respect to registered partners and the private international law aspects of their property, the EU has not at all addressed the question of how these issues are to be regulated for same-sex married couples.

Will they fall within the scope of the proposed Regulation for married couples, or under the proposal for registered partners, perhaps even neither?

Another point of contention is the complete lack of attention for the ever increasing numbers of different-sex couples that are wedged between a rock and a hard place. Non-recognition of these relationships will draw increasing attention over the coming years and it can only be hoped that the European Union will devote as much attention to the mutual recognition of these relationships as it does to the mutual recognition of same-sex relationships. The wheel has come full circle, considering that those couples currently facing the most uncertainty in terms of recognition in Europe are registered heterosexual partners!

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