Same-Sex Relationships: A Comparative Assessment of Legal Developments Across Europe

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I. Introduction

The reflections about same-sex relationships in this article begin with a quote taken from an English decision, the well-known case *Hyde v. Hyde* of 1866: 'Marriage is the voluntary union for life of one man and one woman to the exclusion of all others.' This statement is typical of the traditional definition of marriage found in the Western world. The principle that the partners to a marriage ought to be of the opposite sex was so self-evident to some European legislators, such as the German, that is was not even mentioned in statutes.

As is well known, things have changed dramatically within a very short period of time. The revolution came quickly though in increments. First, moral liberalization and social pluralism led to the abolition of criminal sanctions for homosexual activities. This made it possible for homosexuals and same-sex couples to 'come out'. In a somewhat interactive process, the increased social visibility of homosexuals and an improving knowledge of social, biological, and psychological facts have contributed to a growing acceptance of homosexuality in social and public life. Social acceptance, in turn, has encouraged same-sex couples to ask for more. Thus, claims were made for legal privileges, until now attached exclusively to marriage, and an overall equality of treatment under the law was demanded. Beyond the question of specific legal rights, the ultimate claim of same-sex couples, however, goes a step further: they wish to be given the right to marry as any heterosexual couple. To be sure, not *all* homosexuals agree on this last point. An English advocate for homosexual rights has put it this way:

> 'We certainly do not believe that queers should copy a fundamentally flawed heterosexual institution ... The most serious campaigners for marriage are now

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European Journal of Law Reform, Vol. 4, No. 4

> conservative gays and religious fundamentalists ... Having enjoyed the greater life style choices and sexual freedom that go with being gay, we'd be crazy to don the straightjacket of wedlock.'[1]

This conflict of views should not be considered irritating. It simply mirrors the split attitudes of *heterosexuals* towards marriage, that is, towards an all-embracing, binding lifetime commitment. The fact remains, however, that the question of legal recognition of homosexual rights and status is on the agendas of European legislatures.

Some States have already come up with answers: In the first wave there is Denmark with its 1989 law on registered partnerships.[2] This has been followed by most of the other Scandinavian States that have adopted similar statutes.[3] The second wave of legislation took place in the late 1990s. This wave involved Hungary,[4] France,[5] Belgium,[6] the Netherlands,[7] and the autonomous Spanish regions of Catalonia, Aragon, and Navarra.[8] This legislation produced very different models of regulation – these will be addressed in some detail below.

The 21st century has seen some more enactments. In 2001, Germany followed more or less the pattern of the Scandinavian States.[9] Finland was the last to join the other Scandinavian States with a statute that entered into force on 1 March 2002.[10] And the Netherlands, not fully satisfied with its own partnership law of 1998, became the first State in the world to open the institution of marriage to all partners regardless of their sex.[11]

Some British observers may try to find comfort in the thought that these are aberrations typical of the European Continent, but not likely to spill over to other parts of the world like the UK. Indeed, it looked this way until very recently. As recently as 1998, Professor Michael Freeman, when asked by the German Government about the situation in the UK, noted: 'There is little demand as yet

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1 Peter Tatchell, <http://www.tatchell.freeserve.co.uk/unmaract.htm>; *see* also M.A.Glendon, 'State, Law and Family: The Withering Away of Marriage' in (1976) 62 *Virginia L.Rev.* 663 at 684: '...those exercising the "right to marry" may find that life on the other side of the door they have tried so hard to open is not much different from life on the outside. In passing through the door, however, they may encounter an unlooked-for intimacy with the State.'

2 Act no. 372 of 7 June 1989, amended by Act no. 360 of 2 June 1999.

3 Norway: Act no. 40 of 30 April 1993; Sweden: Act 1994:1117, eff. 1 January 1995; Iceland: Act no. 87 of 12 June 1996.

4 Act no. 42 of 1996; *see* also art. 578/G and 685/A Hungarian Civil Code.

5 Act no. 99-944 of 15 November 1999 (Pacte Civil de Solidarite, PACS).

6 Act of 23 November 1998 (eff. 1 January 2000) (Cohabitation Legale).

7 Art. I: 80a – 80f Dutch Civil Code.

8 Catalonia Act no.10/1998 of 15 July 1998; Aragon Act of 26 March 1999; Navarra Act no. 6/2000 of 3 July 2000.

9 *Lebenspartnerschaftsgesetz* of 16 February 2001, eff. 1 August 2001; *see infra note* 47.

10 Act no. 950 of 9 November 2001.

11 Art. I: 30 (1) Dutch Civil Code.

for gay marriages and no real discussion in the UK of the registered partnership concept ... Despite moves ... in so many European countries this remains for the time being of no concern to British public opinion.'[12] Others in Britain, however, took a different view and stated that there was 'a dramatic mismatch between community acceptance of lesbian and gay life styles and the pattern of formal legal regulation in this country'.[13]

Most recently Lord Lester's Private Member's Bill on civil partnerships, which had its second reading in the House of Lords on 25 January 2002, has made it clear to the public at large that the ball has also started rolling in this country. (The Bill has, nevertheless, been repealed in the meantime).

To complete the picture, it should be added that the trend seen in Europe has also reached the other side of the Atlantic. The Supreme Court of Vermont, in its decision *Baker v. State of Vermont* (1999), took notice of the Scandinavian statutes when it required the legislature 'to extend to same-sex couples the common benefits and protections that flow from marriage'.[14] The Vermont legislature was quick to oblige.[15]

II. European law

Before taking a closer look at the various approaches of *national* laws across Europe, it is appropriate to consider briefly the stance of *European* law on this subject.[16]

1. Since the English Human Rights Act, 1998, the ECHR has acquired even greater significance in this country. For present purposes, the most relevant

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[12] Freeman, 'United Kingdom Law and the Gay with Special Reference to Gay Marriages' in *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (Basedow, Hopt, Kötz, and Dopffel(eds)) (Tübingen 2000) at pp. 173, 184–185.

[13] Bailey-Harris, 'Same-Sex Partnerships in English Familiy Law' in *Legal Recognition of Same-Sex Partnerships* (Wintemute & Andenæs (eds)) (Oxford & Portland 2001) at pp. 605, 608. The community acceptance is mirrored in the registration of partners by the City of London (see www.london.gov.uk/mayor/partnerships/index.htm). The registration has only symbolic effect. A similar practice had been employed earlier in Hamburg (Germany) and in Geneva (Switzerland). For England, *see* generally Barlow, *Cohabitants and the Law* (London 2001); Probert & Barlow, 'Cohabitants and the Law: Recent European Reforms' in (2000) *DeuFamR* 76. For Scotland, *see* the Scottish Law Commission, White Paper on Parents and Children (2000). For Northern Ireland, *see* Law Reform Advisory Committee, Matrimonial Property 2000 (Belfast).

[14] *Baker v. State of Vermont*, [1999] 744 A. 2nd 864 (Vt. S. Ct. 1999).

[15] Act relating to Civil Unions 15 Vermont Statutes Annotated, chap. 23, §1201 ss, effective 1 April 2000.

[16] Not discussed are instruments of public international law; as to the UN Human Rights Convention see the articles of Helfer and of Walker in Wintemute & Andenæs (eds), *supra* note 13 at pp. 733 and 743, respectively.

are Article 8, which requires respect for private and family life, Article 12, concerning the right to marry and to found a family, and Article 14, forbidding any discrimination. While the European Court of Human Rights in Strasbourg has held that heterosexual couples with children, even if not married, are protected by Articles 8 and 14,[17] it has not yet had the opportunity to rule on same-sex couples or families. The former Commission of Human Rights, however, persistently denied equal protection to same-sex couples under the Convention.[18] It is an open question whether the Court itself will follow this line of reasoning or whether it will – impressed by the intervening legal developments in many Member States – adopt a view more favourable to same-sex unions.[19]

2. The impact of European Community Law on this issue is difficult to determine. In 1994, the European Parliament passed a resolution in favour of equal rights for homosexuals – including the right to marry –[20] but this resolution has no binding effect on national legislatures. However, there is binding Community Law providing for gender equality. In this respect, the European Court of Justice (ECJ) held in 1998, in *Grant v. South-West Trains*, that travel concessions which were granted to spouses and *de facto* spouses of the employees of a railway company did not have to be extended to a same-sex partner.[21] European Community Law was said to forbid any discrimination because of sexual identity, but not because of sexual orientation.[22] The Court referred to the 1997 Treaty of Amsterdam, which introduced the new Article 13 into the EC Treaty. This article calls on the institutions of the Community to take 'appropriate action' against discrimination based on, *inter alia*, sexual orientation. Similarly, the European Court of First Instance has decided that a family allowance, which was part of the salary of employees of the Brussels' administration, did not have to be paid to a Swedish employee who lived in a same-sex partnership registered under Swedish law.[23] However, the situation

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[17] *Johnston and others v. Ireland*, ECHR (1986) series A. no. 112, par. 156.
[18] *X and Y v. UK*, (1983) 32 DR 220.
[19] For details see Wintemute, 'Same Sex Partners and Parents under the European Convention' in (Wintemute & Andenæs (eds)) *supra* note 13 at 711; van Dijk, 'The Treatment of Homosexuals under the European Convention on Human Rights' in *Homosexuality: A European Community Issue* (Waaldijk & Clapham (eds)) (1993) at pp. 179–206.
[20] Resolution of 28 February 1994, OJ 1994 C61/40.
[21] Judgment of 17 February 1998 in Case C-249/96, *Grant v. South-West Trains*, [1998] ECR I–621; cf. Ellis, in (2000) 37 *Common Market Law Review* 1403, 1412–1413; in the author's view the comparison between the Court's attitude and Hitler-Nazism seems inappropriate, but *see* Koppelmann, 'The Miscegenation Analogy in Europe, or, Lisa Grant meets Adolf Hitler' in Wintemute & Andenæs (eds), *supra note* 13 at 623. For a similar case in France *see* Cons. d'Etat 4 May 2001, D. 2001, Inf. rap. p. 1851.
[22] The Advocate General had taken a different view.
[23] Judgment of 28 January 1999 in Case T-264/97, *D v. Council of the European Union*, [1999] ECR Ia–1.

may have changed since the legislative bodies of the EU reacted promptly. More precisely, two instruments of December 2000 are relevant: The Charter of Fundamental Rights of the European Union, solemnly proclaimed in Nice, and the Directive against various forms of discrimination in employment, including discrimination because of sexual orientation.[24] The Member States have until December 2003 to implement this Directive. Both instruments forbid any discrimination on the basis of the sexual orientation of a person,[25] thus filling the gap which the ECJ had already discovered to exist in European Law on equal protection. We do not have to decide whether and to what extent the Charter of Human Rights or the Directive already has legal force.[26] However, it can be safely stated that European Union law granting equal protection to homosexuals is *ante portas*; and national legislatures are well advised to take this fact into account.

III. Models of legal regulation

If one were to take a closer look at the regulatory schemes of those States which have already enacted statutes on same-sex relationships, a wide variety of approaches, as well as differences in matters of detail, is found. To avoid confusion, it is helpful to reduce the multitude of rules to four basic types of legislative responses to the problem of same-sex relationships.[27]

1. Piecemeal regulation

The most cautious approach would be the establishment of some specific rules for cohabitating partners. Such rules could, for example, relate to the common home, to social security, liability for debts incurred by their partners, inheritance rights, and so on. Following this approach, the law would take account of social and economic realities, and thereby mitigate hardships which result from the fact that the law puts the long-term partner of a person on the same footing as a stranger.

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[24] EC Directive 2000/78/EC, OJ 2000 L303/16; *see* Waddington/Bell, 'More equal than others: Distinguishing European Union Equality Directives' in (2001) 38 *Common Market Law Review* 577–611.

[25] Art. 21(1) Charter.

[26] The Charter is obviously not binding law, but is widely attributed persuasive force, *see* Goldsmith in *Common Market Law Review*, ibid. at 1201, 1214/15 ('useful guiding resource'); Hilf, 'Die Charta der Grundrechte der Europäischen Union' in (2000) 49 (supp.) *NJW* 5; Lenaerts & de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *Common Market Law Review* 273.

[27] For similar classification *see* Bailey-Harris, *supra* note 13, 607; Muscheler, *Das Recht der eingetragenen Lebenspartnerschaft* (Berlin 2001) at p. 28.

This piecemeal approach is the first step away from the old dichotomy 'marriage/non-marriage' with its inherent all-or-nothing approach. Although many of the existing provisions apply to heterosexual cohabitants only,[28] there is a tendency to extend them to same-sex couples as well. In Hungary, for instance, the Constitutional Court forced the legislature to extend the law to same-sex cohabitants.[29] Likewise, it is argued in Germany that, after the enactment of the statute on registered partnerships, the distinction between the two types of cohabitants cannot be upheld any longer.[30]

2. Domestic partnership (cohabitants) legislation

The second model of regulation is domestic partnership legislation. Rather than opt for a regulatory patchwork, inconsistent and incomplete, the legislature could decide to enact a coherent set of rules for cohabitants. The focus of such law would not be on the sexual relationship of the partners or on their commitment to a lifetime union, but on the fact that they form, or had formed, a stable union in life.

Such legislation can be found, for example, in Sweden and the Spanish regions of Catalonia, Aragon, and Navarra. In all these jurisdictions the law applies, more or less equally, to hetero- and homosexual partners. Sweden has enacted two parallel statutes; the Spanish regions have one single law for both types of unions.

One major difficulty in drafting such cohabitation legislation is the definition of 'cohabitants', or – in other words – to define the *personal scope of application*. First, should the law, for reasons of certainty, require a formal declaration or a certain duration in the cohabitation before the legal rules become applicable? The law of Catalonia, for example, establishes a two-year waiting period for heterosexual couples (Art. 1(1)), unless they, as a couple, have children (Art. 1(2)), while same-sex couples must produce a formal declaration that they wish their relationship to be governed by the statute. The French legislature, by contrast, along with its enactment on the Solidarity Pact, provided a general definition: each couple living 'in a stable union', regardless of gender, is considered a '*concubinage*'.[31] This makes it

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[28] For England, *see* sec. 62(1)(a) Family Law Act 1996, which defines 'cohabitants' as 'a man and a woman' who live together. For France, *see* Cass. civ. 17 December 1997, D.1998, p. 111; Cons. D'Etat 4 May 2001, D.2001, Inf.rap. p.1851. For Germany, *see* BGH FamRZ 1995, 344; BVerfGE 87, 234, 264.

[29] Decision of 13 March 1995, implemented by Statute no. XL 17/1996; see Jessel-Holst, 'Ansätze für eine rechtliche Gleichstellung der gleichgeschlechtlichen Lebensgemeinschaft in Ungarn' in Basedow, Hopt, Kötz & Dopffel (eds), *supra* note 12, at 167, 168–169; Farkas, 'Nice on Paper: The Aborted Liberalisation of Gay Rights in Hungary' in Wintemute & Andenæs (eds), *supra* note 13 at pp. 563–574.

[30] *See* Muscheler, *supra* note 27, at p. 255.

[31] Art. 515-8 Code Civil, as amended by Act no. 99-944 of 15 November 1999; a similar definition has been established by the Constitutional Court in Germany, BVerfGE 87, 234, 267.

difficult in a given case to determine whether the parties involved are governed by the cohabitation regulation or not.[32]

Secondly, should only sexual or at least emotional relationships be included which in their factual appearance resemble a marriage? All of the aforementioned legislatures have taken this approach explicitly or implicitly. However, cohabitation arrangements of siblings or of other relatives have been discussed in many countries and in some States regulations for this special type of cohabitation can be found – sometimes separate, but essentially equal to other cohabitants.[33] This point shall be considered later in this paper.

With respect to its *substance*, the cohabitation legislation may be more or less comprehensive. Sometimes it tries to address nearly all aspects which are also regulated in the law related to marriage. This, for instance, is true of the statute of Aragon, which covers the internal and external relations of the ongoing union and the consequences of the various forms of dissolution. Swedish law comes close to this, while the scope of regulation in Norway or Hungary is confined to certain economic aspects. The appropriate degree of regulation appears to be a problem: a lesser degree offers lesser protection, while comprehensive regulation has been criticized as 'making "free love" unfree' – as being reactionary instead of progressive.[34]

3. Registered partnerships

This leads to the third model of regulation, the registered partnerships. Even the most comprehensive cohabitation legislation falls short of creating a legal status for the cohabitants – it only confers upon them a bundle of rights and obligations.

That is exactly the point which makes activists for homosexual rights unhappy. They do not merely ask for specific rights or privileges – even if merged into a coherent statutory framework – they seek public recognition of their relationship as

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[32] The Property (Relationships) Act 1976 of New Zealand, as amended 2000, lists 9 factors which the courts are to take into account in determining a '*de facto* relationship' (section 2 D of the Act, modelled after section 4 of the New South Wales Property (Relationships) Act 1984). But the factors are not determinative, the decision of the court depends on the individual factors of each case. This promotes uncertainty and litigation; cf. Atkin, 'Reforming Property Division in New Zealand: From Marriage to Relationships' in (2001) 3 *European Journal Law Reform* 349, 361, who indicates that even the desired outcome of a case could influence the court's characterization of the relationship.

[33] Hungary, art. 685/A Civil Code; Catalonia, Act 19/1998 (including cohabitation of more than two persons); Norway, Cohabitation Statute of 1991; Capital Territory of Australia, Domestic Relations Act 1994 (restricted to two persons).

[34] Krause, 'Marriage for the New Millennium: Heterosexual, Same Sex – Or Not at All?' in (2000) 34 *Fam.L.Q.* 271, 298. *See* also M.A.Glendon, *State, Law and Family* (London/Amsterdam/New York 1977) at p. 91: 'The legitimate family prevails after all: In appearance, it has certainly lost ground, but in fact it has imposed the matrimonial model on those who have declined to marry.'

such, very much like the recognition of marriage as a highly-esteemed social institution. Since social acceptance depends to some extent on legal recognition, this recognition is called for first (with reference to the equality principle). Since the prevailing view in Western societies is not yet prepared to grant marital status to same-sex partners, the registered partnership model seems to be a compromise between what the homosexuals desire and what most societies are currently willing to concede.

This model has turned out to be the favourite solution not only for European legislatures. It has been enacted, in one form or another, in all Scandinavian States, in France, Belgium, the Netherlands, Germany, and in Vermont; the latter is, for the time being, the only state in the US with such legislation. The terminology may vary (registered partnership, civil partnership or civil union, solidarity pact), but despite these variations in terminology the basic concept remains the same: the partnership statutes create a *legal status* analogous to marriage. Like marriage, the partnership status is equipped with several statutory rights, privileges, and responsibilities, but also leaves room for contractual arrangements.

A comparative survey shows that legislatures which consider establishing registered partnerships face some fundamental choices. The first is whether the partnership status should be reserved to same-sex couples, thus being a substitute for the inaccessible marriage status, or whether it should be open to heterosexual couples as well, thus giving them the choice between the old fashioned 'primary marriage' and an alternative status similar in substance, but less burdened with traditions and preconceptions. In Scandinavia, Germany, and Vermont the institution of registered partnerships is reserved to same-sex partners, while the Netherlands, France, and Belgium allow also heterosexuals to enter into such partnership. Lord Lester's Bill in the UK would follow this second approach.

The second fundamental choice relates to the legislative technique. The easiest and most egalitarian way would be to establish the new status, combined with an overall reference to law related to marriage as to the formation, the effects, and the dissolution of the partnership, perhaps to the exclusion of some specific questions like child-related matters (filiation, parental authority, adoption). This technique has been chosen by most Scandinavian States, the Netherlands, and Vermont.

The alternative would be to formulate a separate set of rules. This approach can take account of the specifics of same-sex relationships and marks a difference between marriage and partnership. France and Belgium, for example, have used this opportunity to downgrade the new institution. Consequently, the French Solidarity Pact hardly resembles law related to marriage. It leaves most questions to autonomous regulation of the partners and to avoid any confusion with marriage from the outside, the relevant provisions are inserted not in the family law sections of the civil code, but in the section dealing with persons and civil status.[35]

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[35] Art. 515-1 – 515-8 Code Civil; *see* Rubellin-Devichi, 'L'état de la réforme du droit français de la famille en 2001', *European Journal Law Reform* 3 (2001) 243, 270/271; Borillo, 'The

By contrast, Sweden and Germany, which follow the same basic approach, have by and large copied or paraphrased law related to marriage, with only few modifications or omissions. The Bill of Lord Lester in the UK follows a similar tendency. This well-intended technique has its specific dangers: the more marriage-like the provisions on partnerships are drafted, the more likely are comparisons with law related to marriage and the more obvious become the remaining differences. This might provoke attacks on grounds of unequal treatment. One might consider the following example. With respect to the consequences of a breakdown of the relationship, German law puts ex-spouses and ex-partners very much on a level footing, as regards the dissolution of the relationship by court decree, the distribution of property, the allocation of the family home, or the allowance of alimony. Omitted in the partnership statute, however, is the splitting of pension rights, which is mandatory upon the divorce of spouses. The Ministry of Justice will have difficulties in justifying this difference should the partnership statute be attacked on this point before the Constitutional Court or the European Court of Human Rights.[36]

4. Same-sex marriage

Since, from a liberal point of view, it might be difficult to justify any legal difference between heterosexual and homosexual couples, the Dutch legislature, three years after the enactment of its law on registered partnerships, decided to go a step further and make the institution of marriage available also to same-sex partners. Article 30(1) of the Dutch Civil Code, which came into effect on 1 April 2001, reads as follows:

> 'A marriage can be contracted by two persons of different sex or of the same sex.'

Three questions are of special interest to foreign observers. First, what are the remaining differences, if any at all, between a heterosexual and a homosexual marriage? Secondly, how does Dutch law handle the international implications and

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"Pacte Civil de Solidarite" in France: Midway between Marriage and Cohabitation', in: Wintemute/Andenæs (eds) (*supra* note 13) 475–492; Hauser, 'Nichteheliche Lebensgemeinschaften in Frankreich: Der "Pacte Civil de Solidarité" (PACS) nach dem Gesetz Nr. 99-944 vom 15. November 1999', *DEuFamR* 2000, 29. Similar approach in Catalonia, *see* Roca, 'Same-Sex Partnerships in Spain: Family, Marriage or Contract?' *European Journal Law Reform* 3 (2001) 365, 379/380. Belgium considers its regulation as part of property law (arts 1575–1579 code civil), *see* DeSchutter/Weyemberg, 'Statutory Cohabitation' under Belgian Law: A Step Forward to Same-Sex Marriage?, in: Wintemute/Andenæs (eds) (*supra* note 13) 465–474.

[36] Cf. The Supreme Court of Vermont (*supra* note 14) with regard to the Danish and Norwegian Statutes: 'We do not ... endorse ... the referred acts, particularly in view of the significant benefits omitted from several of the laws,' 744 A.2d 864, 887 (1999).

complications caused by its law? Thirdly, how do same-sex marriage, registered partnership, and factual cohabitation relate to each other?

As to the first question, the answer is as follows. Substantial differences between the two types of marriage exist only as regards children. If one of two women who are married to each other gives birth to a child, the other woman is not by law considered the other parent unless she adopts the child. In principle, the same applies to two men: The (extramarital) parenthood of one of them has to be established as usual, by recognition or court decree; then the partner may apply for a step-parent adoption. Even without such an adoption, the partners were allowed by the law, as originally enacted, to apply for a court order granting them joint parental authority. A reform statute, however, which became effective on 1 January 2002, now provides for automatic joint custody in all lesbian marriages or partnerships and in all heterosexual partnerships.[37] As a result, there is now a different treatment of unions between women from those between men with regard to parental authority. Finally, couples are allowed jointly to adopt a child if they have lived together for at least three years. But – in contrast to heterosexual couples – same-sex spouses are confined to the Dutch adoption market. As in Denmark, which allows only for step-parent adoptions, the Dutch legislature feared that, if Dutch same-sex couples would appear on the international adoption scene, Dutch applicants as a whole would be the subjects of discrimination.[38]

This leads us to the second question: the international implications.[39] The same-sex marriage is open to foreigners, provided one partner is a Dutch national, or at least one of the partners is habitually residing in the Netherlands, or both partners simply live there. In these cases, the national law of the foreign partners will be disregarded. The Dutch legislature, though, is aware of the fact that same-sex marriages are unlikely to be recognized in other countries. Applicants for such a marriage are explicitly reminded of this fact and are encouraged to obtain legal advice about the countries they belong to or to which they consider moving.

The third question concerns the relationship between marriage, registered partnership, and cohabitation agreements. Dutch law offers all three options for all couples regardless of sex. Cohabitation agreements are enforced by law, but may be drafted according to the wishes of the partners. They have effect only for their internal relations. Registered partnerships and marriages are interchangeable. The Dutch law provides for a conversion in one or the other direction (Article 77a Civil

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[37] Statute of 4 October 2001.

[38] Adoption by same-sex couples is considered a very delicate issue in most countries. Statutes on registered partnerships normally do not allow joint adoption (more liberal art. 10 of the Navarra act, *see* Roca, *supra* note 35 at 376. The Danish legislature amended its partnership statute of 1989 in 1999 and allowed at least step-parent adoption (para. 4(1) of the Partnership Statute). Sweden, which – for the time being – does not allow any adoption by same-sex partners, is considering changing its law and abolishing any restrictions in this respect.

[39] As to registered partnerships, *see infra* s. V.1.

Code).[40] Taken together with the private international law provisions mentioned above, the following cases could happen. A same-sex couple, which has entered a registered partnership in Germany, could go to the Netherlands and upgrade their status to a marriage, while the spouses to an English marriage could go to the Netherlands and have a downgrade. The difference is essentially one of name, but the conversion may, substantially, affect child-related matters or the dissolution of the relationship. The co-existence of marriage and registered partnership is considered by the Dutch legislature as an experiment. Since a substantial number of heterosexual couples has opted for registered partnerships since 1998,[41] the legislature did not wish to deny this alternative. The intention, however, is to evaluate the situation in five years time, after the introduction of same-sex marriage, and then to reconsider the issue.[42] The outcome of the evaluation will be interesting for all of us. Perhaps, though not very likely, heterosexual couples will continue to abandon the sinking ship of marriage and seek refuge in the life boats of partnership and cohabitation, while the same-sex couples take over the vacated vessel.

IV. Statistics and Social Effects

Having reviewed, albeit briefly, the basic models of legal approach to the problem of same-sex relationships, it is time now to add some remarks and conclusions. However, before this point is considered, a brief look at statistics might be illuminating as to the quantitative dimensions of the subject.

Consideration of this will be confined to two important States, Denmark and the Netherlands. The number of male partnerships is in both countries substantially higher than the one of lesbian partnerships. After an initial phase of two years after the introduction of the partnership statutes the numbers of new partnerships tended to drop significantly. Denmark, with a population of little more than 4 million, has a total number of marriages of somewhat less than 1 million.[43] After ten years of registered partnerships (1989–1998), there existed a total number of 4,337 such partnerships. The annual rate of new partnerships has levelled out at around 350. The Netherlands has 15 million inhabitants. Nearly 50 per cent of them are married, which accounts for a total number of marriages of 3.5 million. In the first two years

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[40] Van der Burght & Doek, *The Netherlands: Family and Succession Law*, Part II no. 87 (Suppl. 18 of February 2002): 'The (joint) wish of the married couple is sufficient. The Registrar draws up a deed of conversion and the registered partnership starts on the day when the deed has been included in the official register of registered partnerships; on that same day the marriage ends.'

[41] For statistical data *see infra* s. IV.

[42] Explanatory memorandum, Parl. Paper 26672, no. 3 of 8 July 1999, s. 3.

[43] <http://www.dst.dk>.

of registered partnerships (1998–2000), 6,371 partnerships have been entered into by same-sex couples, and 4,433 by couples of the opposite sex.[44] Unofficially it is reported that within the first six months after the introduction of same-sex marriage, 2,000 such marriages have been entered into in the Netherlands.

Although these numbers of same-sex partnerships appear small compared to traditional marriages, amounting to no more than 2-4 per cent, they are not insignificant. Same-sex partnerships or marriages have become visible. Danish experts find there is general satisfaction with the new law in Denmark; even sceptics have adopted an affirmative view by now. The public acceptance of same-sex relationships has improved substantially.[45] Recently a minister of the Danish government appeared at a banquet of the Danish Queen with his registered partner; it is said that this did not attract much attention.[46]

V. Conclusions

Turning now to the conclusions, for the sake of brevity, these will be presented as seven statements.

1. *The scope of legislative discretion* as to whether to act or not is not very broad. The principles of equality and social justice are fundamental to all civilized legal systems, and they call for legislative action on behalf of those unions who are socially stable and wish to be governed by law. Constitutional guarantees for marriage and family, although heavily relied upon by the opponents of partnership laws, have been found not to be violated by the French *Conseil Constitutionnel*.[47] As widely expected, there was a similar decision from the German Constitutional Court.[48] Beyond national law, European Community law reinforces this tendency. Since the Treaty of Amsterdam, sexual orientation has become under Community law what Americans would call a 'suspect classification', and if it is recalled how vigorously the ECJ has enforced Community law on sexual equality, for example in labour law,[49] the national legislatures should be under no illusions

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[44] <http://www.cbs.nl/figures/keyfigures>.

[45] Lund-Andersen, 'The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?' in Wintemute & Andenæs (eds), *supra* note 13 at pp. 417–426.

[46] Scherpe, 'Zehn Jahre registrierte Partnerschaft in Dänemark' in (2000) *DEuFamR* 32, 36.

[47] Dec. of 9 November 1999, <http://admi.net/jo/19991116/CSCL9903826S.html>; *see* Battes, (2000) *DEuFamR* at 55–58.

[48] BVerfG 17 July 2002 (NJW 2002, 2543), upholding the *Lebenspartnerschaftsgesetz* (majority vote 5:3).

[49] Cf. Hepple, 'Equality and Discrimination' in (Davies et al. (eds)) *European Community Labour Law: Principles and Perspectives* (1996) 237–259; *see* Waddington & Bell *supra* note 26.

about the stand the Court will take as regards the Anti-Discrimination Directive of 2000. Finally, a practical consideration: As has been seen in the context of the Dutch same-sex marriage, the rules of private international law are quite liberal, even foreigners are allowed to make use of the new institution. The same is true with the conflict-of-law rules in States which have enacted registered partnership statutes.[50] As a consequence, registered same-sex partners or spouses will spread all over Europe anyway.[51] Instead of trying to erect barriers against the inevitable, it would be a more sensitive approach to provide meaningful regulation for these couples.

2. Mere cohabitation legislation, for example like the one found in New Zealand,[52] even if systematic and comprehensive, will not suffice.[53] The *legislature must offer a secure status* with a complete set of rights and responsibilities. The legal status is more than the sum of various rights and obligations. It not only reassures the partners in their internal relationships and helps them to gain social acceptance, it also helps the administration and the courts because it furnishes a clear and reliable basis for the application of the law. The status model is not only called for by reason of equality, but also by reason of policy: Those who wish to transform their relationship into a status belong to the serious and constructive sector of the population – they should be integrated into the social and legal order instead of being excluded or being the subject of discrimination.

   As to the substance of partnership legislation, the principle of equal protection must be the starting point. Each difference in treatment will have to be justified in light of this principle.

3. The *status* for same-sex couples (or any other cohabitants) *should not be marriage*. This is an agonizing issue. Admittedly, it is hard to find differences between same-sex and opposite sex couples which could justify a different legal treatment. The allegation that same-sex unions tend to be less stable is not supported by empirical evidence. Even procreation and children do not make a substantial difference. Marriage does not depend on the ability or willingness to procreate.[54] As for the rest, the judgement of the Supreme Court of Vermont can be cited: 'Today, many children are raised in same-sex families ... the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to

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[50] Art. 17 b German EGBGB; Denmark, par. 2 Act on Registered Partnerships; similar in the other Scandinavian States.

[51] *See* Guild, 'Free Movement and Same Sex Relationships: Existing EC Law and Art. 13 EC' in Wintemute & Andenæs (eds), *supra* note 13, at pp. 677–689.

[52] *See* Atkin, *supra* note 32; Christie, 'The New Zealand Same-Sex Marriage Case: From Aotearoa to the United Nations' in Wintemute/Andenæs (eds), *supra* note 13, at pp. 317–335.

[53] For a different view, *see* Bailey-Harris, 'Lesbian and gay family values and the law' (1999) *Family Law* 560, but apparently revised in a later publication (*see supra* note 13).

[54] A different approach is to be found in Canon Law.

conceive and to raise children.'[55] But still: Anthropology, biology and culture are facts as well. Heterosexual marriage has been a structural element of human societies from the very beginning of history.[56] Although history knows of societies with widespread and socially accepted homosexuality, there has – as far as is known – never been an opening up of the institution of marriage for such unions.[57] We should be slow to alter, and thereby possibly to weaken, the structures which have endured for thousands of years all over the world. Perhaps people today all too easily equate 'being progressive' with 'making progress'.

There is one more aspect to be discussed. Legal sociology teaches us that the acceptability of a law must be taken into account by any legislature if its rules are to be effective. In most European countries, it would appear, people are simply not yet ready to accept the idea of same-sex marriages. They are ready to accept that the serious commitment for mutual sharing and caring should be honoured, regardless of gender. But this should not be confused with marriage, which means something special. To decide otherwise would – in light of the statistics – look like the tail wagging the dog.[58]

As an interim result, the model of registered partnerships appears to be a better solution than same-sex marriages. Contrary to the opinion of the conservative party in the UK,[59] the author does not believe that the creation of registered partnerships would undermine traditional marriage. In fact, it may even serve as an instrument to avert same-sex marriage. This has been clearly seen by the legislature of Vermont, which in one Act established the 'civil unions' for same-sex couples and simultaneously adopted the Defense of Marriage Act (DOMA), thereby reaffirming the principle that only heterosexual partners may marry.[60]

4. The status of *registered partnerships* should serve as a *substitute to marriage* for those who are not allowed to marry; it is *not* appropriate to make it

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[55] *Baker v. State of Vermont*, 744 A. 2nd 864, 881/882; cf. Orentlicher, 'Beyond Cloning: Expanding Reproductive Options for Same-Sex Couples' in (2000–2001) 66 *Brooklyn L.Rev.* 651–683.

[56] Cf. M.A.Glendon, 'State, Law and Family' *supra* note 34 at p. 3: ' Family and marriage are pre-legal institutions. They were not invented by, but are inherent in the human species.'

[57] The woman-to-woman marriage in Tanzania (*mokamona*-marriage) should not be considered a same-sex marriage, it serves specific social functions; see Coester-Waltjen & Coester, *Formation of Marriage, International Encyclopedia of Comparative Law* Vol. IV chap. 3 (Tübingen 1997) no. 73–75.

[58] According to the German Constitutional Court (BVerfG 17 July 2002, *supra* note 48), the introduction of same-sex marriage would violate Art. 6 I of the German Constitution.

[59] Cf. 'Tories in gay policy change', *The Times*, 26 January 2001, at p. 4.

[60] *See* Vermont Stat. Ann. Title 15: Chap. 1 §8 (DOMA) and Chap. 23 §§1201–1207 (Civil unions).

available *for heterosexual couples*. Although, especially in the Netherlands, there seems to be some demand for 'a marriage-like institution devoid of the symbolism attached to marriage',[61] there is no real need for it. Those who are serious about their relationship may marry. It is no justification for a complicated status law, which allows for multiple choices and conversions back and forth, that some people just want another label on the same package. And if the packages are not the same, the legislature by offering a 'soft marriage'[62] to heterosexual couples runs the risk of weakening the traditional marriage, which is still the principal foundation of social stability.[63] If it should turn out that the regulatory scheme of marriage law appears too rigid and controlling to many couples, the adequate reaction of the legislature should be to make law related to marriage more flexible, to leave more room for autonomous arrangements and modifications of the statutory scheme.

5. The current wave of partnership statutes across Europe and other parts of the world displays an *inappropriate fixation on status*. To avoid confusion, the author still supports the statement that a status of registered partnerships ought to be established. But this will not solve all problems. As it has been said before, a binding mutual commitment – in contrast to mere factual cohabitation – appeals to serious and conservative couples. They may still be the majority of heterosexual couples, but whether this is also the case for same-sex couples seems doubtful. There will, at any rate, be a large number of couples, regardless of their sexual orientation, who will decide against becoming registered. It follows that *de facto* cohabitation remains a mass problem, and the law will have to cope with it. As an English gay activist has pointed out: 'Partnership laws help few, and do nothing for many.'[64] Non-regulation of *de facto* unions cannot be justified by the argument that the partners did not want their relationship to be regulated by law. There is not always free will in this respect on both sides, and even if the matter has been freely decided, it is still an acknowledged function of the law to secure fundamental rights and to protect even the careless or thoughtless persons from gross injustice. Consequently, the legislature is called upon to establish a two-tiered system of regulation. It will be indispensable – in addition to the

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[61] Explanatory memorandum, *supra* note 42.

[62] Other expressions used in the literature: secondary marriage, pseudo-marriage.

[63] For this reason, the German Constitutional Court (*see supra* note 48) has indicated that registered partnerships for heterosexual couples would be unconstitutional. Cf. Rubellin-Devichi (*see supra* note 35) at 270: 'une heresie choquante', pointing to the fact that under French law partners even have advantages over spouses.

[64] Tatchell, *supra* note 1; Cf. Schlüter, Heckes & Stommel, 'Die gesetzliche Regelung von außerehelichen Partnerschaften gleichen und verschiedenen Geschlechts im Ausland und die deutschen Reformvorhaben' in (2000) 1 *DEuFamR* 12 with further references; Muscheler, *supra* note 27, at pp. 252–255.

establishment of registered partnerships – to provide a basic framework for *de facto* cohabitation. This could be accomplished by piecemeal legislation, as, for example, the actual reform of civil registration in the UK.[65] However, the author, being German, would prefer a more systematic approach. In this respect, the Swedish legislation could serve as a model for good law: The Swedes have established a dual system of regulation, one for *de facto* cohabitants, the so called sambor-statutes, and one for couples who have opted for a formal status, with the subcategories of marriage or registered partnership. A legislature, which contents itself with the establishment of registered partnerships, has not done its homework properly. And certainly it is not sufficient merely to enact a statutory definition for *de facto* unions while adding nothing to the substantive regulations, as the French legislature did.[66]

6. The current reform movements and the discussions show an *inappropriate fixation on sexual relationships*. Such relationships matter as far as human procreation is concerned. As for the rest, the law is called upon to regulate the consequences of long-term cohabitation, that is, the community of lives, households and budgets, and the consequences of a formal mutual commitment to such cohabitation. In this respect, the sexual relations are quite irrelevant.[67] Why should close relatives, like brother and sister, be excluded from the benefits of the law?[68] Or parents who devote their life to the care for their grown-up, but handicapped child? Or old-aged friends who have decided to share and care for the rest of their lives?[69] The political pressure from the gay movement has caused an unfortunate narrowing of the public discussion and of the focus of legislative reform on sexual or marriage-like relations. Consequently, in nearly all partnership statutes the partnership impediments are formulated by way of analogy with law related to marriage, excluding close relatives and unions of more than two persons.[70] This is an ill-

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[65] *See The Times*, 28 January 2002, at p. 1; other relevant regulations in English law can be found in s. 17 Housing Act 1988; Schedule 7 to the Family Reform Act 1996; s. 1(a)(ba) and 1(1A) of the Inheritance (Provision for Family and Dependants) Act 1975.

[66] *See supra* note 31; *see* Rubellin-Devichi *supra* note 35 at 265.

[67] Cf. Whittle, 'Sex: Has it any place in modern marriage?' in Wintemute & Andenæs (eds), *supra* note 13 at 693.

[68] The French draft bill of the PACS included unions of siblings ('fratries'), Assemblee National no. 1138 of 14 October 1998, p. 27 et seq.; but this part of the draft has been dropped by the legislature.

[69] And does it really matter if such a symbiotic union consists of more than two persons? *See* Rees-Mogg, 'Caring, sharing and a very nearly good law', *The Times*, 21 January 2002, at p. 14.

[70] This is true also as regards to Statutes which do not require a sexual relationship or a certain sexual orientation of the partners, such as, e.g., the Swedish Statute, chap. 1 s. 1 and 3.

The Norwegian Statute is even more explicit and requires a 'homophile' relationship between both partners (§ 1 Statute on Registered Partnerships 1993).

conceived approach. What is needed is a sex-free concept of the registered partnership. It should provide a secure and recognized status for all persons who are excluded from marriage, but want to express a binding commitment for an all-embracing union of life.[71]

7. By way of conclusion, another guideline for law reform may be considered. It has been proposed by experts in several countries, including very recently by *Harry Krause* in Illinois,[72] but has not yet been taken into account by legislatures. The *decisive line* is not to be drawn between homosexuals and heterosexuals, or between status and *de facto* unions – it is *between couples and families*. Many of the privileges of marriage are based on the traditional equation of marriage with offspring and family. But that is to a large extent not true anymore: There are many marriages without children and many children in families not based on marriage. Status as such has lost its function of being indicative of families, and consequently should be dropped as the decisive criterion for family-oriented privileges, especially in tax law and social security law. The regulation of this status, be it marriage or partnership, should provide a legal framework for cohabitating adults. Privileges for families, however, and the highest degree of protection the State has to offer, should be reserved for those who raise or have raised children – the sexual orientation or the status of the parents is of little importance in this context.

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[71] For a few countries which have adopted such an approach, *see supra* note 33. The German Constitutional Court, *supra* note 48, has taken the position that the German Constitution does not prohibit the regulation of such unions ('*Einstandsgemeinschaften*'), but it does not compel it either (Judge Haas in her dissenting opinion expresses some doubts, referring to the equality principles).

[72] Krause, *supra* note 34 at pp. 298–300; *see* also M.A.Glendon, *supra* note 34 at p. 4: 'Family is the primary institution' (i.e., not marriage).