

# The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights

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## I. Introduction – It’s Been a Long Road...

The legal regulation of family relationships has long been formulated around a “traditional” notion of the family as a unit comprising a heterosexual married couple who conceive children within wedlock. This has resulted in the protection mechanisms of the law focusing on such family units, with other family forms such as, for example, same-sex couples, unmarried couples, couples who are unable to conceive naturally and single parents failing to have their family relationships adequately recognised and protected in law. This often included, at least initially, not recognising “non-traditional” families’ rights to respect for their family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, in recent decades there has been progress in dispelling the traditional notion of the family and in adapting the law to the modern realities of family life. One example of such progress in motion relates to the legal status of homosexual couples in Europe, which is the focus of this article.

Until the end of the 1980s there was simply no legal recognition of same-sex relationships in the European jurisdictions. That this has changed is, to a large extent, due to the effort and persistence of many organisations and individuals. Today, marriage is open to

same-sex couples in an increasing number of jurisdictions, and in others, a form of registered partnership is available or *de facto* relationships of same-sex couples are recognised. But even in Europe, particularly in Eastern and South-Eastern Europe, there are still many jurisdictions where there is no legal recognition of same-sex relationships. However, in *Schalk and Kopf v Austria*<sup>2</sup> the European Court of Human Rights (ECtHR) recognised that same-sex couples enjoy the right to “respect for family life” protected by Article 8 of the ECHR, and this article argues that this mandates some form of legal recognition of same-sex relationships by all contracting states of the ECHR and paves the way for equality in the family realm for same-sex couples.

## II. Legal Recognition through Legislation and Litigation – Europe and Beyond

Legal recognition of same-sex relationships<sup>3</sup> in Europe began in the Nordic Countries.<sup>4</sup> In 1987, *de facto*/cohabitation relationships of same-sex couples were given a similar legal status to those of opposite-sex couples in Sweden.<sup>5</sup> However, at the same time, it was not felt that there was a need (or an opportunity) for a formalisation of those relationships.<sup>6</sup> A “legal quan-

tum leap” followed in 1989 with the introduction of the registered partnership for same-sex couples in Denmark.<sup>7</sup> Other jurisdictions gradually followed Denmark’s lead, although the legal rules and technical approach of the registered partnership regimes that were introduced differed (and still differ) significantly from jurisdiction to jurisdiction. The next step in this legal evolution was the opening up of marriage in a number of jurisdictions, of which the Netherlands was the first in 2001,<sup>8</sup> followed by Belgium (2003),<sup>9</sup> Spain (2005),<sup>10</sup> Norway (2009),<sup>11</sup> Sweden (2009),<sup>12</sup> Iceland (2010)<sup>13</sup> and Portugal (2010).<sup>14</sup>

However, in many European countries, particularly in Eastern Europe, but also, for example, in Greece and Italy, there is strong opposition to the legal recognition of same-sex relationships. Interestingly, the traditional “dividing lines” of family law no longer seem to apply. It no longer seems possible to distinguish between the progressive North and conservative South as, for example, Spain and Portugal have opened up marriage to same-sex couples. Likewise, a division which is based upon the predominant religious affiliation in a given country, i.e. between somewhat more liberal Protestant and more conservative Catholic countries, does not seem appropriate any more. Apart from Spain and Portugal (as mentioned above), countries like Belgium (which also permits marriage of same-sex couples) and the Republic of Ireland (having recently introduced civil partnership for same-sex couples) invalidate such a division along religious lines. If there is such a thing as a dividing line in Europe then, today, it is really located between East and West, although one should not forget that, for example, Hungary, Slovenia and the Czech Republic have introduced a form of regis-

tered partnership for same-sex couples, and in Croatia recognition of a *de facto* union is possible.

Europe is not unique on this issue. Outside of Europe, there is similar diversity in the recognition of same-sex relationships. In the Americas, for example, Canada (2005),<sup>15</sup> Argentina (2010),<sup>16</sup> several US states<sup>17</sup> and Mexico City (2010) and the Mexican state of Quintana Roo (2011) allow same-sex marriages, and in many other jurisdictions registered partnerships are possible. However, at the same time several jurisdictions have changed their statutes and constitutions to the effect that marriage is only possible between a man and a woman, thus precluding same-sex marriages.

It is interesting to note that in the European jurisdictions<sup>18</sup> the broader legal recognition of same-sex couples was generally brought about through legislation, as a result of the efforts of organisations and political parties.<sup>19</sup> By contrast, outside of Europe, litigation based on constitutional and human rights was, more often than not, the way legal recognition of same-sex couples was effected, as, for example, in many US states and also in Brazil,<sup>20</sup> Canada,<sup>21</sup> Columbia,<sup>22</sup> and South Africa.<sup>23</sup> Here, individual litigants (usually supported by organisations), played a pivotal role. In European jurisdictions where the legislative route has not fostered progress and there is still no or incomplete recognition of same-sex couples, litigation based on national constitutions and the ECHR can, and presumably will, be utilised to bring about legal reform.<sup>24</sup>

### III. Different Forms of Recognition

The approach to the legal recognition of same-sex couples taken by the various European jurisdictions that have provided such

recognition can be broadly split into three categories: regimes in which provision for formal recognition of same-sex relationships is “inferior” to marriage; those in which it is more or less “functionally equivalent” to marriage, i.e. marriage by a different name; and those in which marriage is available to same-sex as well as opposite-sex couples.

### 1. “Inferior” Relationship?

In many jurisdictions same-sex relationships were deemed to be fundamentally different from opposite-sex relationships and in some ways “inferior”. Consequently, when a legal framework for same-sex couples was introduced, the structure looked as follows:

<i>Opposite-sex relationship</i>	<i>Same-sex relationship</i>
Marriage	
	Registered partnership
Informal relationship	

The differential treatment is apparent: same-sex couples cannot marry and the legal framework which is open to them is not of the same “quality” as marriage that is available for opposite-sex couples. Moreover, this approach is also vulnerable to challenge from opposite-sex couples who – with a good chance of success – could claim that they are

being discriminated against because the alternative to marriage, the “inferior” legal framework, is not open to them. This “problem” was pre-empted, for example, in France and also originally in the Netherlands and Belgium by the new legal regime also being open to opposite-sex couples.<sup>25</sup> The structure then looks as follows:

<i>Opposite-sex relationship</i>	<i>Same-sex relationship</i>
Marriage	
Registered partnership	
Informal relationship	

Here the differential treatment of same-sex couples is still blatantly obvious, as opposite-sex couples can choose between two ways to formalise their relationship whereas same-sex couples have only one option. The Netherlands and Belgium therefore later also opened up marriage to same-sex couples.<sup>26</sup>

### 2. Functional Equivalent

If registered partnership is designed to be the functional equivalent<sup>27</sup> of marriage, the structure looks like this:

<i>Opposite-sex relationship</i>	<i>Same-sex relationship</i>
Marriage	Registered partnership
Informal relationship	

If (and only if) the legal rules are indeed the same,<sup>28</sup> the only remaining difference is the name of the legal construct. This might appear to be a difference without legal significance and thus fall beyond the law because, at first glance, a name has no legal content as such. But it does have an immense social and cultural content. “Marriage” is much more than a mere legal construct. Societal traditions and expectations are associated with marriage – not all of which are necessarily positive. Thus, for some couples, irrespective of their genders, it would be unthinkable to enter into a marriage, because for them, marriage represents the subjugation of women and male domination. For others, marriage is the ultimate social commitment to another person. In any event, it is apparent that the term “marriage” is much more than a mere name – and that therefore, ultimately, a name is legally relevant after all.<sup>29</sup>

### **3. To Marriage via Registered Partnership?**

In some jurisdictions, for example in Denmark,<sup>30</sup> Iceland, Norway and Sweden, these considerations have led to marriage being opened up to same-sex couples (and, at the same time, registered partnership being abolished), even though a functionally equivalent legal regime was already available to same-sex couples. The view was taken in these jurisdictions that there was simply no longer any legally relevant reason for having two separate legal regimes. Thus, opening up marriage to same-sex couples was the final, logical step. This step is now being contemplated in France<sup>31</sup> and the United Kingdom<sup>32</sup> and debated in Germany.<sup>33</sup>

In many jurisdictions, registered partnerships were already legally “like a marriage”. But the converse was of course also true, as it actually is in all jurisdictions around the world: marriage in the end is nothing but

a form of registered partnership. Despite the name, what is being offered by the state through marriage is merely a legal framework. Everything that extends beyond the legal framework is cultural and social and thus also beyond immediate state regulation (although admittedly the state’s legal rules can, and will, have an impact upon the social and cultural perception of the institution).

In any event, the legal framework of marriage has changed significantly over the centuries. Each and every reform of that legal framework has been accompanied by fears that the new law would change (or even destroy) the “nature” of marriage forever, whatever that is deemed to be. But the institution of marriage has survived all these changes.

For example, one of those changes was the introduction of divorce; another, some time later, the right to remarry after divorce. Some religious denominations still do not recognise second marriages or even divorce, and the same applies to other marriage restrictions that no longer apply in the laws of most countries. While the religious denominations of the individuals who wish to marry are of no relevance for the state, they remain of central importance to some faith groups. However, the state does not impose a duty to celebrate the marriages of divorcees or persons of another religious faith upon these religious groups. Similarly, where same-sex marriages have been introduced, it has been left to individual faith groups to decide whether they wish to celebrate same-sex marriages in their congregations or not.<sup>34</sup> So notwithstanding the legal possibility of divorce and remarriage, there is scope for other concepts and understandings of marriage to be accommodated alongside the state law.

It is a fundamental value of modern democracy that faith groups should not be forced

to recognise and celebrate marriages that contradict their religious beliefs. However, the legal framework of marriage provided by the state does not intend to impose a definite view of what is the “right kind of marriage” upon everyone. The marriage framework solely deals with *state* recognition of relationships and their legal consequences and leaves it to individuals and social groups where they want to make use of it.<sup>35</sup>

But without such a legal framework it is not only legal recognition which is lacking, but also another fundamental element of freedom: the freedom to choose this framework for oneself and one’s partner – or *not* to choose it, as the case may be. Allowing everyone this freedom does not, in any way, infringe anyone else’s freedom or understanding of marriage. Hence it should be open to the state to extend the legal framework of marriage to include same-sex couples.

#### **IV. The Role of the European Court of Human Rights in Developing the Legal Recognition of Same-sex Couples**

As explained above, where same-sex couples were legally recognised on a broader scale, in Europe this generally happened through legislation rather than litigation, notwithstanding successful litigation regarding specific issues such as the succession to tenancies, etc. Here the litigants often relied on non-discrimination and equality provisions in national constitutions and statutes, but also on Article 14 of the ECHR. Article 14 prohibits discrimination against a person on the ground of a personal characteristic, in their exercise of other Convention rights, including the right to respect for family life under Article 8 ECHR. While Article 14 does not list sexual orientation explicitly as one of the protected grounds, the Court took a strict position on the is-

sue of discrimination on grounds of sexual orientation in its ruling in *Dudgeon v United Kingdom*,<sup>36</sup> in which it required evidence of “particularly serious reasons” to justify differential treatment based on sexual orientation. The Court has continued to apply this strict test in its case-law on the issue since.<sup>37</sup> However, whether same-sex couples *as such* also enjoyed the protection of their right to respect for private and family life under Article 8 for a long time was unclear.

#### **1. Private Life**

In *Niemietz v Germany* the ECtHR expressly refused to define private life, stating that it would be neither possible nor necessary to do so.<sup>38</sup> But the Court in a later decision made clear that the right to respect for private life certainly comprises the right to establish and develop relationships with other human beings.<sup>39</sup> In *Bensaid v United Kingdom*, “gender identification, name and sexual orientation and sexual life” were held to be protected by Article 8 of the ECHR as part of “private life”.<sup>40</sup> Concerning same-sex relationships, the ECtHR stated in the case of *Mata Estevez v Spain*:

“With regard to private life, the Court acknowledges that the applicant’s emotional and sexual relationship related to his private life within the meaning of Article 8 § 1 of the Convention.”<sup>41</sup>

Thus the ECtHR held that a same-sex relationship, whether formalised or “merely” *de facto*, without any doubt could be protected by the right to respect for private life under Article 8 ECHR. However, with regard to “family life” the Court sent an equally clear message in *Mata Estevez*:

“As regards establishing whether the decision in question concerns the sphere of

'family life' within the meaning of Article 8 § 1 of the Convention, the Court reiterates that, according to the established case-law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention (...). The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation."<sup>42</sup>

However, it needs to be noted that the case in question concerned a *de facto* same-sex relationship and not a formalised relationship between persons of the same sex such as a registered partnership or indeed a marriage. Hence the question as to whether formalised same-sex relationships could be considered to have "family life" and thus enjoy this protection under Article 8 ECHR as well was not answered in the case. Furthermore, *Mata Estevez* was merely a decision on admissibility and therefore this matter had not yet been considered by the Court in full.

## 2. Family Life

The opportunity to consider whether same-sex couples have "family life" arose in the somewhat unusual case of *Burden v United Kingdom*.<sup>43</sup> In the case two spinster sisters claimed that they were being discriminated against as they were in a situation analogous to a civil partnership but were precluded from entering into a civil partnership because they were sisters.<sup>44</sup> This prevented them from benefitting from the same inheritance tax bonuses available to civil partners. They therefore argued that they were treated

differently from other same-sex relationships without sufficient justification.

The ECtHR did not agree:

"The Grand Chamber commences by remarking that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members (...) The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship."<sup>45</sup>

Interestingly, the Court went on to discuss the distinction between formalised family relationships and *de facto* ones:

"Moreover, the Grand Chamber notes that it has already held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences.

Since the coming into force of the Civil Partnership Act in the United Kingdom, a homosexual couple now also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage.

As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to

incur, set these types of relationship apart from other forms of co-habitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand (...), the absence of such a legally binding agreement between the applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.”<sup>46</sup>

The Court therefore drew a clear dividing line between formalised and *de facto* relationships and in doing so equated marriage and civil partnership. This position was later confirmed in *Courten v United Kingdom*:

“The Court would note that while the Grand Chamber equated civil partnerships between homosexual couples with marriage this was on the basis that in both situations the parties had undertaken public and binding obligations towards each other.”<sup>47</sup>

Hence in the eyes of the ECtHR opposite-sex marriage and same-sex civil partnership are to be considered the same *type* of relationship. Since a married couple undoubtedly enjoy “family life”, equating marriage with civil partnership inevitably had to mean that civil partners do, too. But there was no express statement to that effect in either *Burden* or *Courten*.

The question as to whether same-sex couples have “family life” was finally resolved in *Schalk and Kopf v Austria*.<sup>48</sup> In this case Mr

Schalk and Mr Kopf claimed that they were discriminated against because they were denied the opportunity to marry or have their relationship otherwise recognised by law in Austria. When the couple first took their case to the Austrian courts the *Eingetragene Partnerschafts-Gesetz* (Registered Partnership Act)<sup>49</sup> of 2009 had not been enacted. The *Eingetragene Partnerschaft* allows same-sex couples to formalise their relationship, but the legal effects of this formalisation were and still are different from those of marriage, in a number of ways.<sup>50</sup> Still, this meant that by the time the ECtHR heard the case, Mr Schalk and Mr Kopf actually could have their relationship formalised in Austria, but “merely” as *Eingetragene Partnerschaft* and that marriage still was not open to them in Austria.

The first complaint of the applicants was that their right to marry, enshrined in Article 12 ECHR, was violated. They argued that the usage of the terms “men and women” in the Article did not imply that men and women merely have the right to marry someone of the opposite sex, but that the provision could and should be interpreted more widely to comprise the right to marry a person of the same sex.<sup>51</sup> The Austrian government (supported by an intervention of the government of the United Kingdom) argued that “the right to marry was by its very nature limited to different-sex couples”,<sup>52</sup> and while some contracting states had allowed same-sex marriages, there was no European consensus on the matter.<sup>53</sup> The applicants, supported by third-party interventions by the Fédération Internationale des ligue des Droits de l’Homme, the International Commission of Jurists, the AIRE Centre (Advice on Individual Rights in Europe) and ILGA-Europe (European Region of the International Lesbian and Gay Association), argued that:

“[I]n today’s society civil marriage was a union of two persons which encompassed all aspects of their lives, while the procreation and education of children was no longer a decisive element. As the institution of marriage had undergone considerable changes there was no longer any reason to refuse same-sex couples access to marriage. The wording of Article 12 did not necessarily have to be read in the sense that men and women only had the right to marry a person of the opposite sex. Furthermore, the applicants considered that the reference in Article 12 to ‘the relevant national laws’ could not mean that States were given unlimited discretion in regulating the right to marry.”<sup>54</sup>

In its decision the Court conceded that in the light of recent developments the right to marry enshrined in Article 12 cannot “in all circumstances be limited to marriage between two persons of the opposite sex” and it consequently could not “be said that Article 12 is inapplicable to the applicants’ complaint”. But the decision on whether or not to allow same-sex marriage was to be left to the individual contracting states, and the Court therefore unanimously held that there was no violation of Article 12 because the applicants were not allowed to marry. The Court’s central argument was that:

“[M]arriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.”<sup>55</sup>

That the Court found that there was no obligation of the contracting states to allow same-sex marriage was hardly a surprise, as it is perfectly in line with the cautious approach the Court takes in socially and cultur-

ally sensitive areas, and particularly family law.<sup>56</sup> Nevertheless it is remarkable that the Court apparently had no doubts about the matter falling within the ambit of Article 12,<sup>57</sup> which, after all, not merely comprises the right to marry, but also the right to found a family.

The second complaint of the applicants was raised under Article 14 taken in conjunction with Article 8 of the Convention, namely that they were discriminated against on account of their sexual orientation. The argument was twofold, namely that unlike opposite-sex couples they could not have had their relationship recognised by law before the introduction of the *Eingetragene Partnerschaft*, and that, in any event, the remaining differences between marriage and the legal regime now open to them was discriminatory.<sup>58</sup> Interestingly, the Austrian government not only conceded that Article 14 in conjunction with Article 8 applied as the Court had so far ruled that same-sex couples can have “private life”, but also that “there might be good reasons to include a relationship of a same-sex couple living together in the scope for ‘family life’”, with which the United Kingdom government agreed.<sup>59</sup> The non-governmental organisations in their joint comments expressly pleaded that the Court should rule on this issue, and it did with remarkable clarity:

“[T]he 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 (see *Mata Estevez v. Spain* (...)). In the case of *Karner* (...), concerning the succession of a same-sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of 'home', the Court explicitly left open the question whether the case also concerned the applicant's 'private and family life'.

The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken 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."<sup>60</sup>

Thus the Court – while dismissing the complaints in the following paragraphs<sup>61</sup> – expressly departed from its previous position in *Mata Estevez* and now fully accepted that same-sex couples enjoy the right to respect for their family life.

## **V. The Way Forward: Step by Step towards Equality**

While Mr Schalk and Mr Kopf nominally "lost" their case as their complaints were

rejected, they actually won a decisive and fundamentally important victory. The decision undoubtedly is a landmark for the rights of same-sex couples and as such will have significant impact on the future development of European family law. Because same-sex couples are now deemed to have "family life" and thus are protected by Article 8 ECHR, the decision essentially obliges contracting states to provide at least some form of legal framework, some form of legal recognition for same-sex couples and their family life. Crucially, every differential treatment of same-sex and opposite-sex couples is now subject to the Court's scrutiny to a much greater extent. As already mentioned above,<sup>62</sup> it has long been established in case law that now all contracting states must have particularly serious reasons for a differential treatment based on sexual orientation. The Court has consistently held that:

"[A] difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."<sup>63</sup>

Generally the "justification" for treating same-sex and opposite-sex couples differently was the policy aim of protecting the "traditional" family, and the Court accepts that this in principle still is a valid aim. However, the Court has made very clear in *Karner* that:

"[The] aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on

sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship.”<sup>64</sup>

Consequently the differential treatment of same-sex and opposite-sex couples must be *necessary* to protect the family in the traditional sense. This is a very high bar indeed, as this means that without the measure in question such protection cannot be achieved. Hence it needs to be proved that allowing same-sex couples the right to enter into a meaningful legal relationship, giving such couples tax benefits and the right to adopt as well as the right of access to artificial reproductive techniques<sup>65</sup> and other rights of this nature would endanger the “traditional family”. It is obvious that granting these rights and benefits to another group does not result in the groups who already had those rights and benefits losing them. Nor do such rights and benefits necessarily become “diluted” or less valuable simply because someone else receives them. As Baroness Hale has put it succinctly:

“No one has yet explained how failing to recognise the relationships of people whose sexual orientation means that they are unable or strongly unwilling to marry is necessary for the purpose of protecting or encouraging the marriage of people who are quite capable of marrying if they wish to do so.”<sup>66</sup>

Therefore it is very likely that we will see many more successful challenges of differ-

ential treatment of same-sex couples and opposite-sex couples in the future in national courts and ultimately in the ECtHR. The German experience is an excellent example for this. The German *eingetragene Lebenspartnerschaft* (a registered partnership exclusively for same-sex couples) was introduced in 2001,<sup>67</sup> but originally there were some significant substantial differences in the legal consequences of marriage and the *eingetragene Lebenspartnerschaft*.<sup>68</sup> Many of those were challenged successfully, both politically and in the courts, particularly the German Constitutional Court<sup>69</sup> and even the European Court of Justice.<sup>70</sup>

It is therefore to be expected not only that all contracting states of the ECHR will have to provide a legal framework for same-sex couples, but also that any such framework will for the most part have to be a true and full functional equivalent of marriage. Otherwise the legal provisions may fall foul of the requirements of the ECHR as explained above. The easiest (certainly technically, but perhaps not politically) way to achieve this would be to open up marriage to same-sex couples, as more and more jurisdictions in Europe and beyond do.<sup>71</sup> But whatever approach a contracting state chooses to take, it is crystal-clear that after *Schalk and Kopf* complete non-recognition of same-sex couples is no longer a viable option. That is why this decision will one day be seen as an “historic” one, as truly marking the beginning of the end of discrimination against same-sex couples and as the first step on the final metres on the road towards equality.

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2 Application No. 30141/04, 24 June 2010, (2011) 53 EHRR 20.

3 For an overview on the legal status of same-sex relationships, see e.g. Boele-Woelki, K. and Fuchs, A. (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2nd ed., 2012; Scherpe, J., “Same-sex Relationships”, in Basedow, J., Hopt, K. and Zimmermann, R. (eds.), *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012, pp. 1522-1525; Curry-Sumner, I., *All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe*, Intersentia, 2005; Wintemute, R. and Andenæs, M. (eds.), *Legal Recognition of Same-Sex Partnerships – A Study of National, European and International Law*, Hart Publishing, 2001; Basedow, J. et al., *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, Mohr Siebeck, 2000; and the contributions in *American University Journal of Gender, Social Policy & the Law*, Vol. 19:1, 2011.

4 See Dopffel, P. and Scherpe, J., “Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder”, in Basedow et al., above note 3, pp. 7-49.

5 Widegren, B. and Ytterberg, H., “Homosexuella sambor - innebörd och mottagande av en ny rättsfigur”, *Svensk Juristtidning (SvJT)* 75 (1990) pp. 491-505.

6 Cf. Stens offentliga utredningar (SOU) 1984:63, *Homosexuella och samhället, Betänkande av utredningen om homosexuellas situation i samhället*, pp. 91, 96, 99.

7 *Ibid.*; and Broberg, M., “The registered partnership for same-sex couples in Denmark”, *Child and Family Law Quarterly*, 1996, pp. 149-156.

8 See the amended Article 1:30 of the Dutch Civil Code (“A Marriage can be contracted by two people of different or the same sex.”).

9 Pintens, W., “Belgien: Öffnung der Ehe für gleichgeschlechtliche Paare”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2003, pp. 658-659.

10 Ferrer Riba, J., “Same-sex Marriage, Express Divorce and Related Developments in Spanish Marriage Law”, *International Family Law* 139, 2006; García Cantero, G., “Family Law Reform in Differing Directions”, *The International Survey of Family Law* 139, 2006, pp. 431-438; Martín-Casals, M. and Ribot, J., “Ehe und Scheidung in Spanien nach den Reformen von 2005”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2006, p. 1331 ff.

11 Frantzen, T., “Same-Sex Marriages in Norway”, *International Family Law*, 2009, pp. 220-222; Aslan, J. and Hambro, P., “New developments and expansion of relationships covered by Norwegian Law”, *The International Survey of Family Law*, 2009, pp. 375-384.

12 Jänterä-Jareborg, M., “Sweden: The Same-Sex Marriage Reform with Special Regard to Concerns of Religion”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2010, pp. 1505-1508; Singer, A., “Equal Treatment of Same-Sex Couples in Sweden”, *The International Survey of Family Law*, 2010, pp. 393-399.

13 Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög), No. 65 of 2010.

14 Lei Nº9/2010 de 31 de Maio - Permite o casamento civil entre pessoas do mesmo sexo.

15 Cf. Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 2004 SCC 79; *M v H* [1999] 2 SCR 3; *Halpern v Canada (Attorney General)* (2003), 65 O.R. (3d) 16; and finally the Civil Marriage Act (full title: “An Act respecting certain aspects of legal capacity for marriage for civil purposes”, s.c. 2005, c. 33). On the development see Davies, C., “Canadian Same-Sex Marriage Litigation: Individual Rights, Community Strategy”, *University of Toronto Faculty of Law Review*, 66, 2008, pp. 101-136.

16 Grosman, C. and Herrera, M., “Family, Pluralism and Equality: Marriage and Sexual Orientation in Argentine Law”, *International Survey of Family Law*, 2011, pp. 27-50.

17 Connecticut, District of Columbia, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont and Washington.

18 But also, for example, in Argentina, New Zealand and Uruguay, as well as some of the US states (e.g. District of Columbia, New York, Maine, Maryland, New Hampshire, Vermont and Washington).

19 However, partial recognition (for example for succession to tenancies etc.) was often achieved through litigation.

20 Brazilian Supreme Court, ADI 4277/ADPF 132.

- 21 Davies, C., above note 16.
- 22 Constitutional Court, decisions of 7 February 2007, 29 January 2009 and 26 July 2011.
- 23 *Minister of Home Affairs v Fourie*, 2006(3) BCLR 355 (CC). On this case, see De Vos, P., “A judicial revolution? The court-led achievement of same-sex marriage in South Africa”, *Utrecht Law Review*, 2008, pp. 162-174.
- 24 See below, section IV.
- 25 Pintens, W., “Partnerschaft im belgischen und niederländischen Recht”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2000, pp. 69-77.
- 26 See above, notes 8 and 9.
- 27 This term was first used in this context by Kötz, H., Dopffel, P. and Scherpe, J., “Rechtsvergleichende Gesamtwürdigung und Empfehlungen”, in Basedow et al., above note 3, pp. 391-423.
- 28 In many jurisdictions which have introduced registered partnerships or their equivalent, they are not, thus leaving room for potential challenges based of discrimination because of gender or sexual orientation. See also section IV below.
- 29 See also the (unsuccessful) challenge in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).
- 30 Scherpe, J., “Öffnung der Ehe für gleichgeschlechtliche Paare in Dänemark”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2012, pp. 1434-1437.
- 31 Proposition de loi visant à l’ouverture du mariage aux personnes du même sexe et à l’ordonnement des conditions de la parentalité, introduced on 27 August 2012, available at: <http://www.senat.fr/leg/pp11-745.html>; the National Assembly approved the bill (329 votes for, 229 votes against) on 12 February 2013.
- 32 For England, see Government Equalities Office, *Equal Civil Marriage: a Consultation*, 2012 and the Marriage (Same Sex Couples) Bill; the Bill passed its second reading with 400 votes to 175 on 5 February 2013; for Scotland, see Scottish Government, *Marriage and Civil Partnership (Scotland) Bill. A Consultation*, 2012, available at: <http://www.scotland.gov.uk/Publications/2012/12/9433/downloads>; and Scottish Government, *The Registration of Civil Partnerships: Same Sex Marriage – A Consultation*, 2011, available at: <http://www.scotland.gov.uk/Publications/2011/09/05153328/12>.
- 33 See e.g. the Draft Bill proposed by MPs and the BÜNDNIS 90/DIE GRÜNEN faction, BT-Drs. 17/6343, available at: <http://dipbt.bundestag.de/dip21/btd/17/063/1706343.pdf>. See also New Zealand’s Marriage (Definition of Marriage) Amendment Bill, available at [http://www.parliament.nz/en-NZ/PB/Legislation/Bills/2/c/4/00DBHOH\\_BILL11528\\_1-Marriage-Definition-of-Marriage-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/Legislation/Bills/2/c/4/00DBHOH_BILL11528_1-Marriage-Definition-of-Marriage-Amendment-Bill.htm); the Bill passed its first reading in August 2012, with 80 to 40 votes and one abstention.
- 34 For Denmark, see above, note 30.
- 35 For an excellent (and short) exposition of the current (and questionable) position of English law on the places where marriages can be celebrated and some very sound proposals see Eekelaar, J., “Marriage: a modest proposal”, *Family Law*, 2013, pp. 83-85.
- 36 Application No. 7525/76, 22 October 1981, (1982) 4 EHRR 149, see in particular Para 52.
- 37 See also *Smith and Grady v United Kingdom*, Applications Nos. 33985/96 and 33986/96, 27 September 1999, (1999) 29 EHRR 493; and *Karner v Austria*, Application No. 40016/98, 24 October 2003, (2004) 38 EHRR 24, in particular Para 37.
- 38 Application No. 13710/88, 16 December 1992, (1993) 16 EHRR 97, Para 29.
- 39 Cf. *Botta v Italy*, Application No. 21439/93, 24 February 1998, (1998) 26 EHRR 241, Para 32, referring to *Niemietz v Germany*, above note 38.
- 40 Application No. 44599/98, 6 February 2001, (2001) 33 EHRR 205, Para 59.
- 41 Application No. 56501/00, 10 May 2001.
- 42 In this paragraph the ECtHR referred to the previous Commission decisions regarding admissibility of complaints in *X. and Y. v the United Kingdom*, Application No. 9369/81, 3 May 1983, (1986) 8 EHRR CD298, and *S. v the United Kingdom*, application No. 11716/85, 14 May 1986. This passage was also referred to by Sir Mark Potter in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), Para 45.
- 43 Application No. 13378/05 (Grand Chamber decision, 29 April 2008), (2008) 47 EHRR 38, noted by Sloan, B., “The benefits of conjugality and the burdens of consanguinity”, *Cambridge Law Journal*, 2008, p. 484; see also

the judgment of the 4<sup>th</sup> section of 12 December 2006, (2007) 44 EHRR 51 noted by Sloan, B., “The Burden of Inheritance Tax”, *Cambridge Student Law Review*, 2007, p. 114.

44 The civil partnership was introduced for same-sex couples by the Civil Partnership Act 2004, and the same prohibited degrees of relationship apply to both marriage and civil partnership.

45 See above, note 43, Para 62.

46 *Ibid.*, Paras 63-65.

47 Application No. 4479/06, 4 November 2008, decision on admissibility.

48 See above, note 2, noted in Scherpe, J., “Same-sex couples have family life”, *Cambridge Law Journal*, 2010, p. 463; and Henrich, D., *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2010, p. 1525.

49 Bundesgesetzblatt I Nr. 135/2009, 30.12.2009. The Act entered into force on 1 January 2010.

50 See above, note 2, Paras 17-23; and Aichhorn, U., “Das Eingetragene Partnerschaft-Gesetz in Österreich - ein kritischer Überblick”, *Familie - Partnerschaft - Recht (FPR)*, 2010, pp. 217 ff.; Gröger, K., “Das Eingetragene Partnerschaft-Gesetz”, *Österreichische Juristen-Zeitung (ÖJZ)*, 2010, pp. 197 ff.

51 By contrast, Article 9 of the Charter of Fundamental Rights of the European Union, mindful of the issue of same-sex marriages, was drafted as follows: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” (See above, note 2, Paras 24-25, where the commentary to the Charter is reproduced, as well as Para 60.)

52 It is interesting to note that the current government seems to be of a completely different view, cf. the references in note 32 above.

53 See above, note 2, Para 43.

54 *Ibid.*, Para 44.

55 *Ibid.*, Paras 61-64.

56 After all, as Wikely has put it, the ECHR is an international instrument which provides “a floor of rights but not a ceiling”. (See Wikely, N., “Same sex couples, family life and child support”, *Law Quarterly Review*, 122, 2006, pp. 542-547.) See also Scherpe, J., “Family and private life, ambits and pieces”, *Child and Family Law Quarterly*, 2007, pp. 390-403.

57 But see above, note 2, the concurring opinions by Judge Malinverni, joined by Judge Kovler, who considered Article 12 inapplicable to persons of the same sex.

58 *Ibid.*, Paras 65, 76-78.

59 *Ibid.*, Paras 79 and 81.

60 *Ibid.*, Paras 92-94.

61 But only by four votes to three. It is well worth reading the powerful joint dissenting opinion of Judges Rozakis, Spielmann and Jebens.

62 See above, notes 36 and 39.

63 See above, note 39, Para 37. See also *Petrovic v Austria*, Application No. 20458/92; 27 March 1998, (2001) 33 EHRR 14, Para 30.

64 *Ibid.*, Para 41.

65 On this see the recent case of *S.H. and Others v Austria*, Application No. 57813/00, Grand Chamber decision 3 November 2011.

66 In *M v Secretary of State for Work and Pensions* [2006] UKHL 11 at Para 113.

67 *Lebenspartnerschaftsgesetz* (LPartG; Act on life partnerships) which was introduced by the *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften* (LPartDisBG) of 16 February 2001, BGBl. I 2001, pp. 266 ff.

68 For an overview of the legal development and the LPartG in general see Scherpe, J., “The Legal Status of Same-sex Relationships in Germany”, in Basedow, J., Kischel, U. and Sieber, U. (eds.), *German National Reports to the 18th International Congress of Comparative Law*, Mohr Siebeck, 2010, pp. 75-107; and Scherpe, J., “National Report Germany”, *American University Journal of Gender, Social Policy and the Law*, Vol. 19:1, 2011, pp. 151-186.

69 See e.g. Bundesverfassungsgericht (BVerfG) 21.7.2010, Entscheidungssammlung des Bundesverfassungsgerichts (BVerfGE) 126, 400 (concerning inheritance tax) and BVerfG 7.7.2009, BVerfGE 124, 199 (concerning social security law/pensions); and most recently BVerfG 19.2.2013, 1 BvL 1/11 and 1 BvR 3247/09 (on step-child adoption).

70 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, 1 April 2008, [2008] E.C.R. I-1757.

71 See above, sections II and III.1.