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# Great diversity and some equality: non-marital legal family formats for same-sex couples in Europe

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## 1. Introduction

The year 2013 marks the completion of a major task, while a new challenge is presenting itself.

This was not only true for Titia Loenen, but also for the European Court of Human Rights. From 2003 onwards the Strasbourg court has been developing a body of case law requiring equal treatment of same-sex and different-sex partners *outside* marriage. In 2013 it completed this by ruling that the requirement also applies to the formalisation of family life: through second-parent adoption (*X v Austria*) and through partnership registration (*Vallianatos v Greece*).<sup>1</sup> While developing this case law the Court simultaneously has been creating a new perspective, by starting to talk very affirmatively about the realities and legal needs of same-sex couples.<sup>2</sup> This perspective could become highly relevant to same-sex partners in all those countries where many rights and benefits are still the exclusive privilege of married different-sex partners.

Meanwhile, the number of European countries that legally recognize same-sex couples is growing, and so is the number of pieces of EU legislation that acknowledge non-marital partners (of any gender combination).<sup>3</sup> The result is a wide range of legal ‘family formats’ (other than marriage) that are being used in this process of recognition, each entailing their own more or less limited set of rights and obligations. The terminology used for these new legal family formats is even more varied. Authors of comparative family law

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1 See section 5, below.

2 See section 6, below.

3 See section 2, below.

have proposed various classifications of these family formats – so far without convincing each other.<sup>4</sup> The European courts in Luxembourg and Strasbourg have now been asked several times to invalidate distinctions made between same-sex and different-sex partners, and between married, registered and cohabiting partners – with mixed results.<sup>5</sup>

## 2. National legislation is extending the range of available legal family formats

For a long time, across Europe, the only available legal family format for a couple was marriage, different-sex marriage. By marrying each other, the partners triggered a range of legal rights and responsibilities, between themselves and in relation to any children and others. However, over the last four decades, new legal family formats have been created and made available to same-sex and/or different-sex couples. Examples are joint household, registered partnership, civil partnership, legal cohabitation, de facto union, etc. This has been happening in a growing number of countries, and recently ten of these countries have also opened up marriage to same-sex couples. In most member states of the European Union, and in a handful of other European countries, now at least one legal family format is available to same-sex couples (see *Table 1*).<sup>6</sup>

In spite of the lack of uniformity between the legislation of different European countries, it seems that the picture of Europe's map is becoming less diverse than a few years ago. After the recent opening up of marriage in France and England and Wales, and soon in Scotland and Luxembourg,<sup>7</sup>

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4 See section 3, below.

5 See section 5, below.

6 For sources of most data in *Table 1*, see PAOLI ITABORAHY and ZHU 2014; SAEZ 2011; WAALDIJK 2009; WAALDIJK 2005. And for developing latest news, see 'Recognition of same-sex unions in Estonia', 'Recognition of same-sex unions in Finland' and 'LGBT rights in Greenland' available at: [www.wikipedia.org](http://www.wikipedia.org).

7 In Luxembourg the law of 4 July 2014 (*Réforme du mariage*) allowing same-sex couples to marry will enter into force on 1 January 2015 (available at: [www.legilux.public.lu/leg/a/archives/2014/0125/a125.pdf](http://www.legilux.public.lu/leg/a/archives/2014/0125/a125.pdf)). See also the following four footnotes. The *Marriage and Civil Partnership (Scotland) Act 2014* of 12 March 2014 will enter into force by the end of 2014 (available at: [www.scotland.gov.uk/Topics/Justice/law/17867/samesex](http://www.scotland.gov.uk/Topics/Justice/law/17867/samesex)).

and with the introduction of registered partnership in Malta and Croatia in 2014, the situation will be as follows:

Almost all countries in Northern, Western and Central Europe (the exceptions are Estonia, Latvia, Lithuania, Poland and Slovakia) allow same-sex couples to enter into a legal format that is either called marriage or that entails most of the legal consequences of marriage. In most countries in Eastern and South-Eastern Europe (including Italy, Romania, Bulgaria and Cyprus) this is not (yet) the case; the exceptions are Malta, Slovenia and Croatia, each of which now has registered partnership for same-sex couples. Since the judgment in the *Vallianatos* case, registered partnership in Greece should also be made available to same-sex couples.<sup>8</sup> Meanwhile it seems that Poland,<sup>9</sup> Estonia,<sup>10</sup> Italy<sup>11</sup> and Serbia<sup>12</sup> have extended a small degree of legal recognition to same-sex cohabitants.

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- 8 On 7 November 2013 the ECtHR decided that it is not acceptable that registered partnership in Greece is only available to different-sex couples (ECtHR *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09, at para. 92).
  - 9 In Poland the recognition of same-sex couples, since 2012, is limited to rent law. When one of two cohabiting partners is renting an apartment and then dies, the other partner can continue the rental contract. This follows from Article 691(1) of the Civil Code ('a person who was in actual cohabitation with the deceased'), as interpreted by the Supreme Court of Poland in a decision of 28 November 2012 ([www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf](http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf); for an English summary of that case see [www.hfhr.pl/en/sn-podjal-uchwale-w-sprawie-wstapienia-w-stosunek-najmu-po-zmarlym-partnerze-homoseksualnym](http://www.hfhr.pl/en/sn-podjal-uchwale-w-sprawie-wstapienia-w-stosunek-najmu-po-zmarlym-partnerze-homoseksualnym)). The interpretation given by the Supreme Court is in line with ECtHR, *Kozak v Poland*, 2 March 2010 (Appl.no. 13102/02).
  - 10 In Estonia, Article 3 of the Citizen of European Union Act of 2006, in its definition of 'family member', speaks of 'any other person who, in the EU citizen's country of origin, is a dependant of the EU citizen or is a member of his/her household', but it is not completely certain that same-sex partners will be included under this definition (see EU AGENCY FOR FUNDAMENTAL RIGHTS 2001, at pp. 13-15).
  - 11 In Italy same-sex cohabitants may enjoy some recognition because of a judgment of the Court of Cassation of 15 March 2012 (case 4184/12). Two commentators state that 'the Court grants gay couples a right to family life on the basis of the equality/non-discrimination provision, Article 3 of the Italian Constitution, and makes clear that this right can be judicially protected, even absent any action by the Legislature' (FICHERA and HARTNEL 2012, at p. 7).
  - 12 For the (unconfirmed) applicability to same-sex couples of the legal protection against domestic violence in Serbia, see CVEJIĆ JANČIĆ 2010, at p. 81.

Table 1: Chronology of the European countries that have started to legally recognize same-sex couples\*

	Is there any legal recognition of cohabitation of same-sex couples? If so, since when?	Can same-sex couples enter into a registered partnership? If so, since when?	Do same-sex couples have access to civil marriage? If so, since when?
Denmark	1986	no longer (1989-2012)	2012
Norway	1991	no longer (1993-2009)	2009
Sweden	1988	no longer (1995-2009)	2009
Iceland	1994?	no longer (1996-2010)	2010
Greenland (DK)	?	1996	in preparation
Netherlands	1979	1998	2001
France	1993	1999	2013
Belgium	1996	2000	2003
Germany	2001	2001	no
Finland	2001?	2002	in preparation
Luxembourg	?	2004	2015
Spain	1995	no, regionally from 1998	2005
England & Wales (UK)	1999	2005	2014
Scotland (UK)	2000	2005	2014
Northern Ireland (UK)	?	2005	no
Slovenia	?	2006	no
Andorra	?	2006	no
Czech Republic	?	2006	no
Switzerland	2000?	2007, regionally from 2001	no
Hungary	1996	2009	no
Portugal	2001	no	2010
Austria	1998	2010	no
Ireland	1995	2011	in preparation
Liechtenstein	?	2011	no
Isle of Man (UK)	?	2011	no
Jersey (UK)	?	2012	no
Malta	2014	2014	no

	Is there any legal recognition of cohabitation of same-sex couples? If so, since when?	Can same-sex couples enter into a registered partnership? If so, since when?	Do same-sex couples have access to civil marriage? If so, since when?
Croatia	2003	2014	no
Serbia	2005?	no	no
Estonia	2006?	in preparation	no
Poland	2012	no	no
Italy	2012?	in preparation	no
Cyprus	?	in preparation	no

\* The order of countries is based on when either registered partnership or marriage became available nationally.

### 3. Academic literature is trying to classify the new legal family formats

Authors of comparative law and other disciplines have been struggling to find suitable classifications for this wave of new legal family formats. Several authors speak about registered partnership as a form of (unmarried, non-marital) ‘cohabitation’.<sup>13</sup> Others see cohabitation and registered partnership as two distinct alternatives to marriage.<sup>14</sup> The main problem in the many classifications that have so far been proposed (see *Table 2*), is that different criteria are being used – often simultaneously. These criteria include: the legal name used for a format (‘marriage’), the procedure that is required to use the format (‘registration’, ‘enrolled’, ‘formalized’), the place in legal doctrine that the format has been given (‘contract’, ‘civil status’), the level of legal consequences that is attached to a format (‘strong’ or ‘weak’ registration, ‘some’ or ‘most’ rights of marriage), and the degree of similarity to marriage (‘non-marital’, ‘quasi-marriage’, ‘semi-marriage’).

The ‘life partnership’ in Germany is a good example of the difficulties of classification. Introduced in 2001, it was at first mostly classified as ‘registered cohabitation’, ‘semi-marriage’ or ‘weak registration’. However, after more legal consequences had been attached to it, by legislation and by case law,<sup>15</sup>

13 BRADLEY 2001; BARLOW 2004; PERELLI-HARRIS and SÁNCHEZ GASSEN 2012.

14 WINTEMUTE 2001, at p. 764; WAALDIJK 2005.

15 See SCHERPE 2013, at p. 92.

it is now mostly seen as a ‘strong’ form of registered partnership entailing most rights of marriage.

The challenge of classification is also highlighted by Scherpe, who points out that in some jurisdictions a mix of ‘simple’ and ‘formalized’ partnership has been created.<sup>16</sup> In some regions of Spain the legal recognition applies automatically after living together for two or three years or having a child together, but it is also possible for the couple to ‘enter the institution through a private contract recorded in a public deed’.<sup>17</sup>

It is clear from *Table 2* that no consensus on classification has been reached in (legal) literature.<sup>18</sup> (In fact, some authors may not agree with how I have used their classification to group the countries at the bottom of *Table 2*.) Nevertheless, it seems that for formats not involving registration the words used most frequently are ‘cohabitation’ and ‘unregistered’. Because the word ‘cohabitation’ is easy to understand, and because ‘unregistered’ is somewhat confusing in its suggestion of a previous registration that has been un-done, I will continue to speak of ‘cohabitation’.

However, I have come to realize that the phrase ‘informal cohabitation’ that I used in 2005,<sup>19</sup> is not always correct, because in some jurisdictions certain legal consequences are only attached to cohabitation if that cohabitation has been formalized in a specific way: by contract and/or with a public notary and/or in a procedure that results in registration. If the registration does not require any period of previous cohabitation, and remains valid when the couple stop living together, one can speak of ‘registered partnership’ (see below), but if not, it would still remain a (formalized) form of cohabitation.<sup>20</sup> I now propose to use ‘cohabitation’ as the umbrella term for informal and formalized forms of cohabitation.<sup>21</sup>

16 SCHERPE 2005, at p. 582.

17 GONZÁLEZ BEILFUSS 2012, at p. 47.

18 In addition to the authors mentioned in the previous five footnotes and in the following five footnotes, *Table 2* also refers to: BELL 2004; COESTER 2002; FORDER 2000; FULCHIRON 2000; KESSLER 2004; KOLLMAN 2007.

19 WAALDIJK 2005.

20 Of course there are also informal *non-cohabiting* relationships, but neither the literature nor national legislations give much attention to these.

21 Within this category it will only rarely be necessary to distinguish between piecemeal recognition, and situations where there is one general law on informal cohabitation.

For formats that do involve registration, the phrase ‘registered partnership’ is used most frequently, and I will continue to do so (except if a period of previous cohabitation is a condition for registration, or if the registration extinguishes automatically when the couple stop living together). It should be borne in mind that the use of this phrase covers a very wide range of legal formats across Europe. Therefore it will often be useful (for example, when conducting demographic or sociological research) to distinguish between strong and weak forms of registered partnership. Curry-Sumner has proposed to call registration ‘strong’ when there is a ‘near assimilation of the legal effects attributed to registered partners and spouses’.<sup>22</sup> In other words, a ‘strong’ registration can be characterized as a ‘quasi-marriage’.<sup>23</sup> Typically, such a registration would also be very much like marriage in two other dimensions: the conditions and procedures to enter into it and the procedures to get out of it. A weak form of registered partnership, on the other hand, would entail only a limited selection of the legal consequences attached to marriage.<sup>24</sup> Typically the conditions and procedures for entering into such a weak registration (a ‘semi-marriage’) would be different from those for marriage, and it would also be easier to get out of it. Occasionally (as the example of Germany has shown) it may be difficult to decide whether the form of registered partnership enacted by a particular jurisdiction should be classified as strong or as weak.<sup>25</sup> When the level of legal consequences attached to it is somewhere between ‘a limited selection’ and ‘near assimilation’, then regard can be had to how closely the formalities resemble those of marriage.

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22 CURRY-SUMNER 2012, at p. 82.

23 WAALDIJK 2004, at p. 570.

24 WAALDIJK 2004, at p. 571.

25 See the critical remarks of CURRY-SUMNER 2005, at pp. 308-309.



Table 2: Academic classifications of legal family formats for non-marital couples

Authors	Classifications that they use or propose for non-marital family formats			
Barlow 2004	cohabitation			
Bradley 2001	unmarried cohabitation			
Perelli-Harris & Sánchez Gassen 2012	cohabitation (unregistered)		cohabitation (registered)	
Forder 2000	cohabitation protection by operation of law	optional co-habitation protection	enrolled contract	partnership registration
Fulchiron 2000	'unions libres'	'partenariats-cadres'	'partenariats-statuts'	
Kessler 2004			'partenariats contrats'	'partenariats institutions'
Coester 2002	piecemeal regulation	domestic partnership (cohabitants) legislation	registered partnership	
Scherpe 2005	simple partnership (for specific purpose(s))	simple partnership (for 'bundle' of purposes)	formalized partnership ('formalisierte Lebensgemeinschaft')	
Kollman 2007	unregistered partnership		registered partnership	
Waldijk 2005	informal cohabitation		registered partnership	
Waldijk 2004	para-marriage		semi-marriage	quasi-marriage
Wintemute 2001	unregistered cohabitation		registered cohabitation	registered partnership
Bell 2004	cohabitation		legally recognized partnership	registered partnership
Curry-Sumner 2005	unregistered forms of cohabitation		non-marital registered relationships (weak registration)	non-marital registered relationships (strong registr.)
Curry-Sumner 2012	unregistered relationship forms		registered partnership (weak registration)	registered partnership (strong registr.)
Paoli Itaborahy & Zhu 2014	some rights of marriage			most or all rights of marriage
Waldijk now	cohabitation		registered partnership	

Examples of countries with family formats in the various categories	Netherlands Denmark Iceland Hungary etc.	Sweden Croatia Portugal Slovenia** parts of Spain etc.	Iceland parts of Spain etc.	Belgium France Greece** parts of Spain etc.	Czech Republic* Slovenia*  [initially: Germany*]	Netherlands Finland* UK* Switzerland* Hungary* Austria* Ireland* Croatia* now: Germany*

\* For same-sex couples only. \*\* For different-sex couples only.

#### 4. EU legislation is cautiously following some national trends

Just like national lawmakers and legal scholars, the institutions of the European Union have not found it easy to deal with new forms and formats of family life. Family law as such is not a field in which the EU plays an important role. However, in quite a number of its fields of operation (ranging from free movement to accounting standards) family relationships do play a small or greater part. At EUR-lex.europa.eu, a search for the words ‘marriage’, ‘spouse’ and/or ‘child’ generates a list of more than 500 EU regulations and directives in force today. Only some of these also make reference to non-marital partnerships.

The overview in *Table 3* makes it very clear that the EU has not yet found one consistent approach to the topic; it uses at least ten different phrases, and these show little overlap with the categories used by scholars (see *Table 2*).<sup>26</sup> The overview also shows that – unlike national legislation in some countries – EU legislation does not distinguish between same-sex and different-sex non-marital relationships.<sup>27</sup> This is not surprising, because such a distinction would have been contrary to the well-established case law of the

26 The list includes three pieces of legislation that speak of ‘dependants’ (Directive 2004/38/EC, Regulation 632/2010, Directive 2012/29/EU). That word is capable of including partners, but it is also possible to clearly distinguish between partners and dependants. The EU Court of First Instance has suggested that the word ‘dependants’ does not include partners in a ‘union between two persons’ (Case T-58/08 P, *Commission v Roodhuijzen*, [2009] ECR II-03797, at para. 84).

27 Whether it is still permissible in EU law to distinguish between same-sex and different-sex marriages that have lawfully been entered into, is a question that has not yet been decided by the Court of Justice of the EU. However, it seems to follow from the *Maruko*, *Romer* and *Hay* cases that such a distinction would be unlawful in the field of spousal benefits in employment (see *Table 6*).

European Court of Human Rights (see *Table 5*). Some of the directives use the phrase ‘registered partnership’, but interestingly, none of the examples in *Table 3* is limited to registered partnership: forms of cohabitation are also covered, provided all substantive and formal conditions are met.<sup>28</sup> Some of the directives and regulations do indeed require some formality, but the way these are phrased (‘duly attested’ and ‘document ... of a member state acknowledging their status’) suggests that a later declaratory document is sufficient. The word ‘cohabitation’, however, does not appear in the phrases used (only the regulation on accounting standards speaks of ‘domestic partner’), but some require the relationship to be similar to marriage, ‘intimate’, stable or ‘long-term’.

Finally, it is important to point out that the listed directives and regulations hardly oblige unwilling member states to start to recognize unmarried partners.<sup>29</sup> The obligation typically only applies when the member state concerned already recognizes such partners. The only example where all member states are being forced to provide some substantial recognition is the recent Victims of Crime Directive.<sup>30</sup> The unease surrounding this novelty becomes apparent in the fact that the relationship not only needs to have a ‘stable and continuous basis’ and a ‘joint household’, but that it must also be both ‘committed’ and ‘intimate’.

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28 This is reflected in the major case interpreting the notion of ‘unmarried partner’ in Article 72 of the EU Staff Regulations: Case T-58/08 P, *Commission v Roodhuijzen*, [2009] ECR II-03797, at paras. 77, 90, 96 and 98.

29 The Staff Regulations and the Statute for Members of the European Parliament, however, do contain such an obligation for the relevant institutions of the European Union.

30 Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime.

Table 3: Main examples of EU legislation on non-marital partners\*

Area & legislative text	Article	Terms used	Restrictions
Free movement – Directive 2004/38/EC	art. 2(2)	'registered partnership on the basis of the legislation of a MS'	'if ... host MS treats registered partnerships as <i>equivalent</i> to marriage'
	art. 3(2)(a)	'any other family members ... who ... are dependants or members of the household'	MS only have a duty to ' <i>facilitate</i> entry and residence'
	art. 3(2)(b)	' <i>durable</i> relationship, duly attested'	
Family reunification for third country nationals – Directive 2003/86/EC	art. 4(3)	'duly attested <i>stable long-term</i> relationship' or ' <i>registered</i> partnership'	'MS <i>may</i> ... authorize entry and residence'
Asylum seekers – Directive 2011/95/EU	art. 2(j)	'unmarried partner in a <i>stable</i> relationship'	'where ... MS <i>concerned</i> treats unmarried couples in a way <i>comparable</i> to married couples under its law relating to third country nationals'
Jurisdiction etc. in matters relating to maintenance obligations – Regulation 4/2009	Annex VII, par. 4	'Certificate of marriage or <i>similar</i> relationship'	
	Annex VII, par. 9.3.1.7	' <i>Analogous</i> relationship to marriage'	
Staff Regulations of Officials of the EU, as amended by Regulation 723/2004	art. 72(1) & Annex V, art. 6	'unmarried partner'	'legal document ... of a MS, acknowledging their status as non-marital partners'
	art. 1d	'non-marital partnerships'	'legal document ... of a MS, acknowledging their status as non-marital partners' & 'no access to legal marriage in a MS'
	Annex VII, art. 1(2)(c)	'registered as a <i>stable</i> non-marital partner'	
Statute for Members of the European Parliament – Decision 2005/684/EC	art. 17(9)	'partners from relationships recognized in the member states'	
Implementing measures for Statute Members European Parliament – Decision of 19 May & 9 July 2008	art. 3(1)(a) & 58(2)	' <i>stable</i> non-marital partners'	'official document ... of a MS acknowledging their status as non-marital partners'
Equal treatment of men and women in self-employment – Directive 2010/41/EU	art. 2	' <i>life partners</i> '	'when and in so far as recognized by <i>national law</i> '

Area & legislative text	Article	Terms used	Restrictions
Accounting standards – Regulation 632/2010	art. 9	'domestic partner' and 'dependants'	
Victims of crime – Directive 2012/29/EU	art. 2	'the person who is living with the victim in a committed intimate relationship ... and the dependants of the victim'	'in a joint household and on a stable and continuous basis'

\* MS = member state

## 5. European courts are gradually giving more guidance

The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU, previously CJEC) have been asked several times to rule on (denied) access to certain legal family formats (*Table 4*), or to rule on controversial differentiations that have been made between same-sex and different-sex partners (*Table 5*) and between different legal family formats (*Tables 6-8*).<sup>31</sup>

As regards access for same-sex couples to civil marriage, the ECtHR has ruled that it is up to the individual countries to decide whether or not to give such access.<sup>32</sup> Even when married partners have become 'same-sex' through a sex change of one of them, the ECtHR does not (yet) consider it a human rights violation if national law forces them out of their marriage (and into a registered partnership).<sup>33</sup>

As regards access to a form of registered partnership or other form of legal recognition of same-sex couples, the ECtHR has ruled that each country enjoys a margin of appreciation 'in the timing of the introduction of legislative changes', and that the United Kingdom could not be criticized for

31 The few relevant cases decided by the UN Human Rights Committee have also been included in the following tables.

32 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04). The UN Human Rights Committee had reached a similar conclusion, by holding that marriage of a homosexual couple falls outside the scope of the right to marry as guaranteed in Article 23 of the International Covenant on Civil and Political Rights (UN HRC 17 July 2002, *Joslin v New Zealand*, Comm 902/1999).

33 ECtHR, *Parry v United Kingdom*, 28 November 2006 (Appl.no. 42971/05); ECtHR, *Hämäläinen v Finland*, 16 July 2014 (Appl.no. 37359/09). It is established case law that transsexuals should not be excluded from the right to enter into a different-gender marriage (ECtHR, *Goodwin v United Kingdom*, 11 July 2002 (Appl.no. 28957/95)).

not doing so until 2005, nor Austria for not doing so until 2010.<sup>34</sup> However, the ECtHR does not consider it acceptable to introduce a form of registered partnership for different-sex couples only.<sup>35</sup>

*Table 4: Challenges to the exclusion of same-sex couples from marriage or registered partnership*

Court/body	Case	Area	Finding of discrimination?
UN HRC 17.7.2002	<i>Joslin v New Zealand</i> 902/1999	access to marriage	No, words 'men and women' mean that only 'a man and a woman' have right to marry.
ECtHR 28.11.2006	<i>Parry v United Kingdom</i> 42971/05	continuation of marriage after change of gender	No, states have margin of appreciation in regulating effects of change of gender in context of marriage.
ECtHR 4.11.2009	<i>Courten v United Kingdom</i> 4479/06	introduction of registered partnership	No, states enjoy margin of appreciation in timing of legislative changes.
ECtHR 24.6.2010	<i>Schalk &amp; Kopf v Austria</i> 30141/04	access to marriage (and introduction of registered partnership)	No, opening up of marriage to same-sex couples is left to regulation 'according to the national laws' (and states have margin of appreciation in timing of any partnership legislation).
ECtHR 7.11.2013	<i>Vallianatos v Greece</i> 29381/09 & 32684/09	access to registered partnership	Yes, exclusion of same-sex couples from civil union amounts to discrimination in relation to family life.
ECtHR 16.07.2014	<i>Hämäläinen v Finland</i> 37359/09	continuation of marriage after change of gender	No, effects of not being able to remain married after legal change of gender are not disproportionate.

There have been many court challenges claiming that it is discriminatory to distinguish in law between same-sex and different-sex unmarried cohabitants. The only challenge so far at the CJEU was unsuccessful (*Grant*), but that outcome is no longer valid since the entry into force in 2003 of the Employment Equality Directive (2000/78/EC, confusingly also known as the 'Framework

34 ECtHR, *Courten v United Kingdom*, 4 November 2009 (Appl.no. 4479/06); ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at paras. 105-106.

35 ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at paras. 73 and 92.

Directive'). Also since 2003, the other European court (ECtHR) and the UN Human Rights Committee (UN HRC) have consistently held that to distinguish between same-sex and different-sex cohabitants is incompatible with the right to non-discrimination (see *Table 5*). In these cases (unlike the ones listed in *Table 8*) the ECtHR has no difficulty in finding that same-sex partners are 'in a relevantly similar situation to a different-sex couple'.<sup>36</sup>

*Table 5: Challenges to differentiations between same-sex and different-sex cohabitants*

Court/body	Case	Area	Finding of discrimination?
CJEU 17.2.1998	<i>Grant v SWTrains</i> C-249/96	partner benefits in employment	No, sexual orientation is not covered by prohibition of sex discrimination.
ECtHR 24.7.2003	<i>Karner v Austria</i> 40016/98	succession to tenancy after death of partner	Yes, sexual orientation discrimination with respect to home.
UN HRC 6.8.2003	<i>Young v Australia</i> 941/2000	survivor's pension	Yes.
UN HRC 30.3.2007	<i>X v Colombia</i> 1361/2005	survivor's pension	Yes.
ECtHR 2.3.2010	<i>Kozak v Poland</i> 13102/02	succession to tenancy after death of partner	Yes, with respect to home.
ECtHR 22.7.2010	<i>PB &amp; JS v Austria</i> 18984/02	sickness insurance	Yes, with respect to family life.
ECtHR 28.9.2010	<i>JM v United Kingdom</i> 37060/06	calculation of level of child maintenance	Yes, with respect to property.
ECtHR 19.2.2013	<i>X v Austria</i> 19010/07	second-parent adoption	Yes, with respect to family life, in comparison with different-sex cohabitants (but not in comparison with married couples).

Until now, the European courts have only in very specific circumstances been willing to declare differentiations between marriage and cohabitation to be discriminatory (see *Table 6* and *Table 7*). The *Petrov* judgment of the ECtHR on phone calls from prison suggests that this court may be willing to entertain further challenges to rules that exclude unmarried partners, provided there are no strong counter-arguments of the type acknowledged in the *Van der Heijden* case on giving evidence. And the *Roodhuijzen* judgment of the EU's

36 See for example ECtHR, *X v Austria*, 19 February 2013 (Appl.no. 19010/07), at para. 112.

Court of First Instance indicates that the concept of ‘unmarried partners’ as used in the EU staff regulations should not be interpreted restrictively: apart from the formal requirement of a ‘legal document recognised by a Member State’, a couple already qualifies if their ‘cohabitation is characterised by a certain stability’; it is not necessary that rights and obligations are similar to marriage, nor that their relationship is registered.<sup>37</sup>

*Table 6: Challenges to differentiations between different-sex cohabitation and marriage*

Court	Case	Area	Finding of discrimination?
CJEC 17.4.1986	<i>Netherlands v Reed</i> C-59/85	right to residence for partner of EC worker	No, in comparison with spouses. Yes, against unmarried partner of British worker, in comparison with unmarried partners of Dutch workers.
ECtHR 22.5.2008	<i>Petrov v Bulgaria</i> 15197/02	right to use prison phone to call partner	Yes, with respect to family life.
EU Court of First Instance 5.10.2009	<i>Commission v Roodhuijzen</i> T-58/08 P	sickness insurance cover for partner of EC worker	Yes, against couples who formalized their stable cohabitation by contract, in comparison with couples who did so by marriage or partnership registration.
ECtHR 3.4.2012	<i>Van der Heijden v Netherlands</i> 42857/05	right not to give evidence in criminal proceedings against partner	No, differentiation is justified for the prevention of crime.

In the case law of the ECtHR there is no full recognition, as yet, for the fact that in many countries same-sex couples cannot marry (or even register as partners) and that therefore the exclusion of unmarried partners from certain rights and benefits has a disparate impact on same-sex partners (i.e. is indirectly discriminatory on grounds of sexual orientation).<sup>38</sup> The latter argument has been tried several times. In one older case, *Estevez*, the Court responded by saying that the differentiation in question was justified by the legitimate aim of protecting the family based on marriage (see *Table 7*). In more recent cases, the typical response of the Court is that in law cohabitation

37 Case T-58/08 P, *Commission v Roodhuijzen*, [2009] ECR II-03797, at paras. 77, 90, 96 and 98.

38 JOHNSON 2013, at p. 139; WAALDIJK 2012, at paras. 10, 22, 31.



is not similar to marriage (and that therefore the right to non-discrimination is not affected). The only case (*W v Commission*) where a European court has honoured the challenge of an unmarried *same-sex* couple concerning a marital privilege (*Table 7*) must be read in the context of the fairly generously worded provision in the EU Staff Rules (see *Table 3*).

*Table 7: Challenges to differentiations between same-sex cohabitation and marriage*

Court	Case	Area	Finding of discrimination?
ECtHR 10.5.2001	<i>Estevez v Spain</i> 56501/00	survivor's pension	No, differentiation is justified for protection of family based on marriage.
ECtHR 29.4.2008	<i>Burden v United Kingdom</i> 13378/05	inheritance tax	No, situation of cohabiting sisters is not analogous with marriage.
ECtHR 4.11.2008	<i>Courten v United Kingdom</i> 4479/06	inheritance tax	No, situation of gay cohabitants is not analogous with marriage.
ECtHR 23.6.2009	<i>MW v United Kingdom</i> 11313/02	bereavement payment	No, situation of gay cohabitants is not analogous with marriage.
EU Civil Service Tribunal 14.10.2010	<i>W v Commission</i> F-86/09	household allowance for EU official	Yes, the fact that W and his Moroccan partner are not married should not be used against them, because situation regarding homosexuality in Morocco makes it unrealistic for them to marry in Belgium.

Finally, there is a growing number of cases in which same-sex registered partners have demanded to be treated in the same way as married spouses (see *Table 8*). In the first of these cases (*D & Sweden*) the Court of Justice still emphasized the incomparability of marriage and registered partnership (even in Sweden, where registered partnership was rather strong and quasi-marital). In more recent cases (*Maruko, Römer*), however, this Court has emphasized that it depends on whether the actual legal situation of registered partners and married spouses is comparable, and it suggested that – in the context of pensions law – the situation of German registered life partners should indeed be considered as comparable to that of spouses. It seems that this is also the approach of the ECtHR, but the first cases that this Court has had to decide (*Manenc, Gas & Dubois*) concerned France, and the Court concluded that – as regards pensions and as regards adoption – the legal situation of people in French civil partnership (*PaCS, pacte civil de solidarité*) is not similar to

marriage.<sup>39</sup> And in a case concerning Germany, the ECtHR came to the conclusion that – as regards birth certificates – same-sex registered partners are not in a similar situation as different-sex spouses (*Boeckel*). The CJEU, in the recent *Hay* case came to a different conclusion concerning *PaCS* – as regards benefits in terms of pay or working conditions. It held that *PaCS* and marriage are comparable. So it seems that when the comparison is with a *married* different-sex couple, the court in Luxembourg is more inclined to find comparability than the court in Strasbourg.

Table 8: Challenges to differentiations between registered partnership and marriage

Court	Case	Area	Finding of discrimination?
CJEC 31.5.2001	<i>D &amp; Sweden v Council</i> C-122/99 & C-125/99	household allowance for EU official	No, Swedish registered partnership is distinct from marriage.
CJEU 1.4.2008	<i>Maruko v Versorgungsanstalt der deutschen Bühnen</i> C-267/06	survivor's pension	Yes, assuming situation of registered partners is comparable to marriage in Germany, their exclusion from pensions amounts to direct sexual orientation discrimination.
ECtHR 21.9.2010	<i>Manenc v France</i> 66686/09	survivor's pension	No, <i>PaCS</i> in France is not analogous with marriage.
CJEU 10.5.2011	<i>Römer v Hamburg</i> C-147/08	retirement pension	Yes, situation of registered partners in Germany is comparable to marriage.
ECtHR 15.3.2012	<i>Gas &amp; Dubois v France</i> 25951/07	second-parent adoption	No, legal situation of lesbian couple in <i>PaCS</i> is not comparable to marriage.
CJEU 6.12.2012	<i>Dittrich and others</i> C-124/11, C-125/11 and C-143/11	assistance for public servants in case of illness	Yes, situation of registered partners in Germany is comparable to marriage (that point was already decided by the referring German court; CJEU was only asked if the assistance was covered by the notion of 'pay' in Directive 2000/78/EC).
ECtHR 7.5.2013	<i>Boeckel &amp; Geesink-Boeckel v Germany</i> 8017/11	registration as parents on birth certificate of child born during partnership	No, as regards birth certificates, two women in registered partnership are not in relevantly similar situation as a married different-sex couple.
CJEU 12.12.2013	<i>Hay v Credit agricole mutuel</i> C-267/12	special leave and bonus for partnership registration	Yes, as regards pay or working conditions, situation of same-sex partners who cannot marry in France and therefore conclude a <i>PaCS</i> , is comparable to married couples.

39 See JOHNSON 2013, at p. 138.

All in all, the main European courts have only provided little concrete recognition of same-sex and non-marital relationships. And the recognition they have so far offered mostly depends on whether the national legislation in question already provides some recognition of non-marital couples.

Both courts use all kinds of terms for registered forms of partnership. The Strasbourg court mostly uses ‘civil partnership’ to refer to the French *pacte civil de solidarité*, mostly ‘registered partnership’ to refer to the Austrian *Eingetragene Partnerschaft*, and mostly ‘civil union’ to refer to the Greek variety, while the Luxembourg court mostly uses ‘life partnership’ to refer to the German *Eingetragene Lebenspartnerschaft*, and mostly PACS or ‘civil solidarity pact’ to refer to the French *pacte civil de solidarité*.

## 6. Affirmative eloquence in Strasbourg

This somewhat limited judicial harvest (listed in section 5) echoes the often slow, hesitant or limited developments in national and EU legislation (listed in sections 2 and 4). It seems to contrast, however, with the eloquent and inclusive language that is often used by the European Court of Human Rights in the very same judgments, albeit mostly *obiter*.

The Court has repeatedly recognized, for example, that the right to respect for private life encompasses the ‘right to establish and develop relationships with other human beings’.<sup>40</sup> It has ruled that non-marital partnerships are also covered by the right to respect for family life,<sup>41</sup> and that this includes same-sex partnerships.<sup>42</sup> It has mentioned ‘the fact that there is not just one way or one choice when it comes to leading one’s family or private life’.<sup>43</sup> It has shown itself to be aware of the ‘rapid evolution of social attitudes towards same-sex couples’,<sup>44</sup> and has acknowledged that ‘the consensus among European States in favour of assimilating same-sex relationships to heterosexual relationships

40 See for example ECtHR, *EB v France*, 22 January 2008 (Appl.no. 43546/02), at paras. 43 and 49; on this right in general, see WAALDIJK 2013.

41 ECtHR, *Jobnston v Ireland*, 18 December 1986 (Appl.no. 9697/82), at paras. 55-56.

42 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 94.

43 ECtHR, *X v Austria*, 19 February 2013 (Appl.no. 19010/07), at para. 139; see also ECtHR, *Kozak v Poland*, 2 March 2010 (Appl.no. 13102/02), at para. 98; and ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 84.

44 ECtHR, *PB & JS v Austria*, 22 July 2010 (Appl.no. 18984/02), at para. 29.

has undoubtedly strengthened',<sup>45</sup> and that a 'growing tendency to include same-sex couples in the notion of "family"' is also reflected in EU legislation.<sup>46</sup> The Court has stressed the 'importance of granting legal recognition to *de facto* family life',<sup>47</sup> and it has held that '*same-sex couples are just as capable as different-sex couples of entering into stable committed relationships*' and that consequently they are '*in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship*'.<sup>48</sup> The Court acknowledged that for a same-sex couple 'an officially recognised alternative to marriage (would) have an intrinsic value', irrespective of its legal effects, and that '*(s)amesex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples*'.<sup>49</sup> Furthermore, it has consistently held that 'differences based on sexual orientation require particularly serious reasons by way of justification',<sup>50</sup> and that the exclusion must be shown to be 'necessary' in order to achieve the legitimate aim.<sup>51</sup> And it ruled that 'a blanket exclusion of persons living in a homosexual relationship (...) cannot be accepted (...) as necessary for the protection of the family viewed in its traditional sense'.<sup>52</sup>

All this may be seen as an indication that the European Court of Human Rights is contemplating taking more steps towards full legal recognition of same-sex and non-marital families than it has taken so far. The Court also seems to be encouraging lawmakers to extend greater legal protection and recognition to new forms of family life, and to provide access to legal family formats that meet the needs of the couples and children concerned. Recently the Court's *Grand Chamber* has implied that countries that have not enacted 'a genuine option which provides legal protection for same-sex couples' may

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45 ECtHR, *JM v United Kingdom*, 28 September 2010 (Appl.no. 37060/06), at para. 50.

46 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 93.

47 ECtHR, *X v Austria*, 19 February 2013 (Appl.no. 19010/07), at para. 145.

48 ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 99; see also ECtHR, *Eweida v United Kingdom*, 15 January 2013 (Appl.no. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 105; and ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 78.

49 ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 81.

50 ECtHR, *Karner v Austria*, 24 July 2003 (Appl.no. 40016/98), at para. 37.

51 ECtHR, *Karner v Austria*, 24 July 2003 (Appl.no. 40016/98), at para. 41.

52 ECtHR, *Kozak v Poland*, 2 March 2010 (Appl.no. 13102/02), at para. 99.

be violating the right to respect for private and family life of married spouses one of whom is needing legal recognition of an acquired gender.<sup>53</sup> That case involved a couple that would become same-sex through a legal change of the gender of one of them, but the same reasoning could apply to other same-sex couples – if the Court would take seriously what it has said about the needs of same-sex couples for legal recognition and protection.<sup>54</sup>

## 7. Conclusion

On the one hand, there is a clear trend of more equality and more diversity, in both national and European law. And this is accompanied in Strasbourg by a whole vocabulary that validates same-sex and non-marital family life, thereby encouraging lawmakers to extend greater legal protection and recognition. On the other hand, same-sex partners have mostly been unsuccessful in winning cases in the European courts (or in being included in EU legislation that has an impact on the member states), unless national law already offers some recognition to family life outside marriage.

Whenever national law does recognize different-sex couples outside marriage, the European Court of Human Rights finds it increasingly easy to use non-discrimination arguments to include same-sex partners in this recognition, even when it is about access to registered partnership (*Vallianatos*) or adoption (*X v Austria*).<sup>55</sup> In this respect the principle of equality has been very effective – both judicially and politically – in helping to realize the human rights of same-sex couples. Here the comparability test does not create a stumbling-block, so the court could move quickly to the question of justification. And in none of these cases, where the comparator is an unmarried different-sex couple, was a sufficient justification found.

Where national law does *not* yet recognize unmarried different-sex couples, both European courts have put a lot of emphasis on the test of comparability:

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53 ECtHR, *Hämäläinen v Finland*, 16 July 2014 (Appl.no. 37359/09), at para. 87.

54 See ECtHR, *Schalk & Kopf v Austria*, 24 June 2010 (Appl.no. 30141/04), at para. 99; see also ECtHR, *Eweida v United Kingdom*, 15 January 2013 (Appl.no. 48420/10, 59842/10, 51671/10 and 36516/10), at para. 105; and ECtHR, *Vallianatos v Greece*, 7 November 2013 (Appl.no. 29381/09 and 32684/09), at para. 78.

55 Presumably, the Court of Justice of the EU would do the same, but in the field of EU law such equality is already mostly given in the few relevant directives and regulations.

is the situation of unmarried same-sex couples similar to that of married different-sex couples? All cases of this type that made it to the Court of Justice of the EU involved a same-sex couple in a registered partnership claiming a material benefit related to employment, and this probably made it easier for this court to find comparability with marriage. However, in such same-sex cases that made it to the European Court of Human Rights, the comparability test has until now meant *nothing but trouble*, even if the partners had entered into a registered partnership and the case involved some material benefit.<sup>56</sup> In fact, the court in Strasbourg has invoked the lack of comparability so often in these cases that it has never had to go into an assessment of the justification of a distinction.

The most recent of these cases involved the acquisition of parenting (*Gas & Dubois; Boeckel*), and clearly the Strasbourg court was not ready – as regards legal parental status – to see enough similarities between a married heterosexual couple with a child and a registered lesbian couple with a child. Perhaps the Court would find it easier to see such similarities when other aspects of parenting are involved, or when it is about ‘mutual support and assistance’ between the partners or about ‘legal recognition and protection of their relationship’, the equal need for which the court has now recognized (most recently in *Vallianatos*). If so, then the disappointing rulings in the cases of *Courten*, *MW* and *Manenc* are already out of date. And then the court can start to translate its affirmative eloquence into real equality for same-sex couples in all those jurisdictions and situations where no legal family format is available to them.

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<sup>56</sup> But see also the one and only case where the court found that the exclusion of *all* unmarried partners (in this case of different sex) amounted to discrimination: ECtHR, *Petrov v Bulgaria*, 22 May 2008 (Appl.no. 15197/02).

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Equality and human rights: nothing but trouble?  
Liber amicorum Titia Loenen

Marjolein van den Brink, Susanne Burri & Jenny Goldschmidt (eds.)

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# Contents

List of abbreviations	ix
Introduction	1
<i>Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt</i>	
<b>Part I – Equality as a principle underlying human rights</b>	<b>19</b>
1. The crowbar to universality: implications of ‘equal in rights’* <i>Bas de Gaay Fortman</i>	21
2. Fundamentally equal but unequally protected? Human rights, unequal protection, and states as duty bearers* <i>Jos Philips</i>	45
3. Equality problems in multicultural human rights claims: the example of the Belgian ‘burqa ban’* <i>Eva Brems</i>	67
4. Troubles concerning the ‘burqa ban’: reflections from an outsider <i>Rob Widdershoven</i>	87
5. The individual case and the general rule* <i>Jeroen Kiewiet</i>	101
<b>Part II – Equality as a human right</b>	<b>121</b>
6. Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach* <i>Evelien Brouwer and Karin de Vries</i>	123

7. A tale of two boys*	147
<i>Matthijs de Blois</i>	
8. Keep the faith: the CJEU as a co-guardian of religious freedom	167
<i>Hana van Ooijen</i>	
9. Violence against women*	181
<i>Ineke Boerefijn</i>	
10. Milestone or stillbirth? An analysis of the first judgment of the European Court of Human Rights on home birth	197
<i>Fleur van Leeuwen</i>	
11. Comparators in multiple discrimination cases: a real problem or just a theory?	211
<i>Merel Jonker</i>	
12. Great diversity and some equality: non-marital legal family formats for same-sex couples in Europe*	223
<i>Kees Waaldijk</i>	
13. The equality of the (non) trans-parent: women who father children	247
<i>Marjolein van den Brink and Jet Tigchelaar</i>	
14. Parents who want to reconcile work and care: which equality under EU law?	261
<i>Susanne Burri</i>	
<b>Part III – Equality and human rights in conflict</b>	<b>281</b>
15. Freedom of religion and human rights laws – awkward bedfellows*	283
<i>Peter Cumper</i>	
16. Born here. Revocation and the automatic loss of Dutch nationality in case of terrorist activities*	305
<i>Betty de Hart and Ashley Terlouw</i>	
17. Dutch criminal law, conscience and equality	333
<i>Marloes van Noorloos</i>	

18. Ms Goldschmidt is it true that you are deaf? That would really help us to meet the quota! Positive discrimination revisited... <i>Jenny E. Goldschmidt</i>	345
19. Equality and human rights: new grounds for concern* <i>Lucy Vickers</i>	359
20. Dogs on the internet: equality and human rights <i>Tina van der Linden-Smith</i>	377
<b>Part IV – Equality and human rights: how they may come about in practice</b>	<b>385</b>
21. The roots of Dutch strategic human rights litigation: comparing ‘Engel’ to ‘SGP’ <i>Wibo van Rossum</i>	387
22. Rights and the city: does the localization of human rights contribute to equality? <i>Barbara Oomen</i>	401
About the authors	411

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Edited by  
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