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Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law

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INTRODUCTION

In the final third of the last century (i.e. since the 1960s), an increase in the legal recognition of homosexuality could be seen in almost all European countries. Four trends appear to be characteristic of this process of legal recognition *at the national level* (i) steady progress, (ii) standard sequences, (iii) small change, and (iv) symbolic preparation. The purpose of this chapter is to assess how these trends might also operate *at the supranational level* of the European Union. The assumption is that a comparative analysis of national legislation may provide useful guidance about what recognition of same sex partners to expect (and to demand) from the legislative bodies of the European Community—and when.

COMPARATIVE OVERVIEW

For thirty-six member states of the Council of Europe, I have summarised the process of legal recognition of homosexuality by listing (in the Appendix, Tables 1 and 2, pp. 649–50) the years of the main *legislative* steps in that process. The structure of both tables is based on my perception of the trends of *steady progress* and of *standard sequences* (see below). The idea is that almost all (European) countries go, at different times and paces, through a standard sequence of steps recognising homosexuality. After decriminalisation (followed or accompanied by an equalisation of the ages of consent), more or less specific anti-discrimination

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legislation will be enacted, to be followed by legislation institutionalising same-sex partnership (and parenthood).[2]

Table 1 ranks the fifteen member states of the European Union according to the number of steps they have taken in their legislation, and according to how long ago a particular country legislated its last step. Table 2 gives a ranking, based on the same criteria, of twenty-one other member states of the Council of Europe. By presenting these two groups of countries separately, it becomes evident that the pattern of legal reform among EU countries is similar to that among non-EU countries.

Both tables are of course a gross simplification. Judicial, administrative, local and non-governmental forms of (legal) recognition have not been incorporated. In the two columns on criminal law, no distinction has been made between laws only applying to sex between men, and laws also applying to sex between women. Earlier periods of equality in criminal law have not been taken into account.[3] Legislative recognition of unregistered same-sex cohabitation (eg Hungary) is absent from this overview, as are the possibilities for same-sex couples to have joint authority over the children of one of the partners (eg United Kingdom, the Netherlands, Iceland).

FOUR TRENDS

The four trends characteristic of the process of legislative recognition of different aspects of same-sex love, can be witnessed in so many (European) countries that it is tempting to formulate them as "laws". In the absence of falsification so far, I will indeed speculatively formulate the third and fourth trends as "laws".[4] The notable exceptions to the first two trends, however, prevent me from phrasing them as general truths.

The Trend of Steady Progress

Since the 1960s, almost all European countries have made some legislative progress in the legal recognition of homosexuality. The tables in the Appendix show four exceptions to this trend of steady progress. In Greece, the last round of progressive legislation relating to homosexuality took place a little earlier (in 1950). And the other three exceptions (Turkey, Italy and Poland) happen to be

[2] K Waaldijk, "Standard Sequences in the Legal Recognition of Homosexuality—Europe's Past, Present and Future", (1994) 4 *Australasian Gay and Lesbian Law Journal* 50, "Civil Developments Patterns of Reform in the Legal Recognition of Same-Sex Partners in Europe", (2000) 17 *Canadian Journal of Family Law* 61

[3] The most recent example of such a period was in Portugal from 1945 until 1995 See H Graupner, *Sexualitaet, Jugendschutz und Menschenrechte*, Teil 2 (Frankfurt, P Lang, 1997) at 597–8

[4] I hope to challenge readers to try to falsify my hypotheses

the three European countries with by far the longest uninterrupted history of full equality in criminal law.[5] In most countries, one step of legislative recognition of homosexuality was followed some years later with one or two other steps in the same direction.

Furthermore, since the 1960s, hardly any country has introduced new anti-homosexual legislation. Luxembourg did so in 1971 by introducing a higher minimum age for homosexual sex,[6] and Portugal did it (inadvertently) in 1995 by introducing a lower minimum age for heterosexual sex.[7] The only other example that I know of is the (ineffective) British law of 1988 prohibiting local authorities from "promoting" homosexuality.[8]

The Trend of Standard Sequences

A *standard sequence* may be seen in the typical order of the changes in those countries that do make progress. Legislative recognition of homosexuality starts (most probably after some form of association of homosexuals and information on homosexuality has become legal) with (1) decriminalisation, followed or sometimes accompanied by the setting of an equal age of consent, after which (2) anti-discrimination legislation can be introduced, before the process is finished with (3) legislation recognising same-sex partnership and parenting. This trend is quite strong, both inside and outside the European Union. This can be seen in Tables 1 and 2 in the Appendix

- In only thirteen of the thirty-six countries was the decriminalisation of homosexual acts accompanied by the setting of an equal age of consent.[9] In most countries, the step of decriminalisation was (or will have to be) followed by a later step of equalising the age limits.
- With the exceptions of Ireland and Finland, all countries that have so far enacted anti-discrimination provisions, had decriminalised homosexual activity and had established equal ages of consent at least three years before.[10] Furthermore, only four of the twelve countries with equal ages of consent for

[5] Turkey and Italy lead in this way (with 143 and 112 years respectively) Poland (with 69 years) is also far ahead of countries like the Netherlands and Norway

[6] From 1971 until 1992, the minimum age for sex between women or between men was eighteen, whereas the heterosexual age limit was fourteen, since 1992, it has been sixteen for all See Graupner, *supra* n 3, at 531

[7] In 1995, the minimum age for heterosexual sex was lowered from sixteen to fourteen, whereas the homosexual age limit was left at sixteen, Graupner, *supra* n 3, at 597–8

[8] Local Government Act 1988, s 28 (now only England and Wales, repealed for Scotland in 2000)

[9] However, in five of these countries (Netherlands, France, Belgium, Luxembourg and Portugal), different age limits were introduced many years after the initial decriminalisation

[10] Finland equalised its age limits three years *after* the introduction of specific anti-discrimination legislation

more than a decade, have so far *not* enacted anti-discrimination provisions Belgium, Poland, Italy and Turkey.

- All twelve countries with some form of national or regional registered partnership legislation in force or in preparation have already equalised their ages of consent in criminal law. And ten of them also have in force national constitutional or legislative anti-discrimination provisions intended to cover sexual orientation. The two apparent exceptions are Belgium and Germany (but see p. 767, and note the provisions in four German *Lander*). Furthermore, only three of the thirteen countries with such anti-discrimination provisions do not have some form of national or regional registered partnership legislation in force or in preparation Ireland, Luxembourg and Slovenia.

The "Law of Small Change"

A *"law of small change"* can be formulated to capture the fact that legislative change on homosexuality is seldom big, legislation advancing the recognition and acceptance of homosexuality only gets enacted if it is perceived as a small change to the law, or if it is sufficiently reduced in impact by some accompanying legislative "small change" that reinforces the condemnation of homosexuality.[11]

The "Law of Symbolic Preparation"

Finally, I would submit, the process is governed by a *"law of symbolic preparation"*. A legal system that has been oppressing homosexuality, will only move to legislation that actually protects and supports lesbian women and gay men, after first passing some symbolic legislation reducing the condemnation of homosexuality (e.g. by advancing its acceptance). The main examples of the working of this law are decriminalisation (which seldom is more than the repeal of criminal rules that were hardly ever applied, because almost all forbidden acts take place in private, or because the authorities had already decided to no longer prosecute under these rules) and anti-discrimination legislation (which mostly consists of rules that are hardly ever applied, because the forbidden grounds often remain undetected and unprovable in the mind of the discriminator, or because the victims of the discrimination frequently have good reasons *not* to start proceedings).

This is not to say that criminal and anti-discrimination provisions do not have any practical effects. In certain individual cases they will be used, and they will serve generally to deter or justify certain behaviour. It seems that only after decriminalisation and anti-discrimination legislation have been enacted, will national law-makers pass legislation that is of more direct practical importance to the lives of greater numbers of lesbian women, gay men and their children.

[11] For illustrations of this "law" at work in the Netherlands, see Waaldijk, chap 23

The primary importance of the intermediate symbolic legislation may well lie in its paving the way for such practical legislation on partnership and parenting. Jurisdictions (and their judges, legislators, and electorates) seem to need time to get used to the idea that homosexuality is neither a crime, nor a good reason for refusing employment or housing.

PREDICTING DEVELOPMENTS IN EUROPEAN UNION LAW

I will now try to use these four trends and "laws" to predict the process of legal recognition of homosexuality, and especially same-sex partnership, in the European Union as such.

Steady Progress in the European Union

If most EU countries are making progress in the legal recognition of homosexuality, then it may be assumed that the EU as such will make similar *steady progress*. Furthermore, the European Parliament repeatedly,[12] the Commission and Council occasionally,[13] and the collective of member states once,[14] have given some evidence that homosexuality is slowly getting more favourable treatment in EC law. All this is not surprising, given the fact that the EU is becoming very much like a European state. The most recent example is Article 21 (Non-discrimination) of the (non-binding) Charter of Fundamental Rights of the European Union (the "EU Charter"): "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, language, genetic

[12] See eg "Resolution on sexual discrimination at the workplace", Official Journal (OJ) [1984] C 104/46; "Resolution on equal rights for homosexuals and lesbians in the EC", OJ [1994] C 61/40 (calls on the Commission to draft a Recommendation seeking to end "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework" and guaranteeing "the full rights and benefits of marriage, allowing the registration of partnerships"); "Resolution on respect for human rights in the European Union (1998–1999)", 16 March 2000, A5–0050/00, http://www.europarl.eu.int/plenary/default_en.htm ("57. . . . calls on the Member States . . . to amend their legislation recognising registered partnerships of persons of the same sex and assigning them the same rights and obligations as exist for registered partnerships between men and women; . . . to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender; . . . rapid progress should be made with mutual recognition of the different legally recognised non-marital modes of cohabitation and legal marriages between persons of the same sex in the EU"). See also p. 725, n. 70.

[13] Notably by including anti-homosexual harassment in the notion of sexual harassment in the non-binding "Commission Recommendation of 27 Nov. 1991 on the protection of the dignity of women and men at work", endorsed by a Council Declaration of 19 Dec. 1991 (OJ [1992] L 49/1, C 27/01). See A Byrne, "Equality and Non-Discrimination" in Waaldijk & Clapham (eds.), *Homosexuality: A European Community Issue* (Dordrecht, Martinus Nijhoff Publishers, 1993) 211 at 214–5; M Bell, "Equal Rights and EU Policies", in K Krickler (ed.), *After Amsterdam: Sexual Orientation and the European Union* (Brussels, ILGA-Europe, 1999) at 30–1, http://www.ilga-europe.org (Policy Documents). See also *infra* n.24.

[14] By including the ground of "sexual orientation" in the new Art. 13 of the EC Treaty, which empowers the Council to combat discrimination on various grounds.

features, political or other opinion, religion or belief, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited".[15] Just like other European states, the EU is gradually recognising homosexuality in law.

Following the Standard Sequence?

If the EU then may be following the trend of steady progress, the expectation should be that it will also follow the standard sequence. Here, the problem is that the EU as such has no history of anti-homosexual criminal law, because criminal law has generally been a competence of the member states. So for the first steps, we have to look at the individual member states. All have decriminalised. Eleven have equalised their ages of consent. Four member states still have unequal age limits,[16] and at least one of them, Austria, is still actively using the higher age limit for gay sex to imprison people.[17] This may not be a total bar to any anti-discrimination or indeed partnership legislation by the EC, after all, Ireland and Finland have shown that anti-discrimination legislation may be enacted before full equality in criminal law has been reached.[18] Furthermore, the age limit discrimination in the criminal law of two countries is limited (to oral and manual sex in Ireland and to seduction in Greece), and in Portugal the age limit for gay sex is not higher than it is for heterosexual sex in most other countries.[19]

Hopefully, a future ruling of the European Court of Human Rights will establish that age limits in criminal law must not discriminate on the basis of sexual orientation. Such a ruling (most likely in a future case against Austria)[20] would probably result in a further reduction of the number of member states with discriminatory age limits. And that in turn would help to pave the way for more comprehensive anti-discrimination measures being unanimously adopted by the Council of the EU.

With a majority of the member states having national anti-discrimination legislation covering sexual orientation by 1997,[21] the time had come for the

[15] Solemn Proclamation, signed by the Presidents of the European Parliament, the Council, and the Commission in Nice on 7 Dec 2000, OJ [2000] C 364/1 (emphasis added)

[16] See App , Table 1

[17] See H Graupner, "Austria", in D West & R Green (eds), *Sociolegal Control of Homosexuality A Multi-Nation Comparison* (New York, Plenum Press, 1997) 269 at 273

[18] See p 637

[19] See App , Table 1

[20] In *Sutherland* v *UK* (No 25186/94), the European Commission of Human Rights has already reached this conclusion (Report of 1 July 1997, http //www echr coe int/hudoc) That the European Court of Human Rights will follow the Commission seems likely, given three cases recently decided by the Court *Smith & Grady* v *UK* and *Lustig Prean & Beckett* v *UK* (27 Sept 1999), *Salgueiro da Silva Mouta* v *Portugal* (21 Dec 1999), *A D T* v *UK* (31 July 2000) Three challenges to an unequal age limit, *S L* v *Austria* (No 45330/99), *G L* v *Austria* (No 39392/98), and *A V* v *Austria* (No 39829/98), were communicated by the Court to the respondent on 30 Jan 2001 See Graupner, chap 30

[21] See App , Table 1

adoption of EC rules outlawing at least certain forms of discrimination. These could be based on the new Article 13 in the EC Treaty (added in October 1997 and in force since May 1999), which enables the Council (acting unanimously) to prohibit discrimination on eight grounds, including *sexual orientation*.[22] The Commission did not waste much time in preparing some implementation of Article 13 on 25 November 1999, it presented a "Proposal for a Council directive establishing a general framework for equal treatment in employment and occupation",[23] which would prohibit employment discrimination on all Article 13 EC grounds (including sexual orientation, but excluding sex, already covered by other directives). The proposal made swift progress and was adopted by the Council on 27 November 2000.[24]

This new "Framework Directive" could (together with the no doubt growing number of countries with some sort of same-sex partnership legislation) greatly help to prepare the ground for later EC legislation recognising same-sex partnership, in such diverse fields as freedom of movement or the EC staff regulations. The Directive could also provide the much needed extra justification for the Court of Justice to interpret the numerous references in EC law to "spouses" in a less traditional way.[25] One of the key dynamics of the standard sequence seems to be, that once a jurisdiction has prohibited others (e.g. employers) from distinguishing on the basis of sexual orientation, the legislature and judiciary will have to ask themselves whether it is justifiable that the law itself continues to distinguish on the same, now suspect ground.[26]

Small Change in the EU

That the EU in this field is following the *"law of small change"* is only too evident. The first mention of homosexuality in a legal anti-discrimination document can be found in the *explanatory* part of the *non-binding* "Commission Recommendation of 27 November 1991 on the protection of the dignity of

[22] See M Bell, "The New Article 13 EC Treaty A Sound Basis for European Anti-Discrimination Law?", (1999) 6 *Maastricht Journal of European and Comparative Law* 5, L Flynn, "The Implications of Article 13 EC—After Amsterdam, Will Some Forms of Discrimination Be More Equal than Others?", (1999) 36 *Common Market Law Review* 1127 See also Krickler, *supra* n 13

[23] COM (1999) 565, OJ [2000] C 177 E/42 See Bell, chap 37

[24] Council Dir 2000/78/EC of 27 Nov 2000 establishing a general framework for equal treatment in employment and occupation, OJ [2000] L 303/16 Two grounds (racial or ethnic origin) were deleted because they were covered by a separate directive See *infra* n 33

[25] At the very least, any distinction between married heterosexual spouses and homosexual registered partners should be classified as a distinction based on sexual orientation The first chance for the Court of Justice to rule on this point came when it had to decide *D* v *Council*, Cases C 122/99 P, C 125/99 P (appeals from a 28 Jan 1999 decision of the Court of First Instance in Case T-274/97, in his Opinion of 22 Feb 2001, Advocate General Mischo urged the Court of Justice to dismiss the appeals, the Court of Justice agreed in its Judgment of 31 May 2001, see Conclusion, pp 767–69) See also Bell, chap 37, L Flynn, "Equality between Men and Women in the Court of Justice", in Eeckhout & Tridimas (eds), (1998) 18 *Yearbook of European Law* 259 at 285–26

[26] See Waaldijk (2000), *supra* n 2, at 85

women and men at work".[27] What followed were facilities for same-sex partners of European Parliament staff to use restaurants and language courses.[28] And the new anti-discrimination clause in the Staff Regulation does indeed include the ground of sexual orientation.[29] However, the clause renders itself virtually meaningless with regard to the partners of gay and lesbian staff by providing that distinctions based on marital status are unaffected.[30]

These small changes indicate that it is more than probable that EC legislation protecting or supporting lesbian women and gay men will take relatively short steps, reflecting the caution or prejudice of perhaps only a few of the many individuals and countries involved in producing EC rules. The new Article 13 of the EC Treaty itself, although politically important, is already an example of that it is only an enabling clause, it has no direct effect, it can only be implemented by a unanimous Council, and the ground of sexual orientation is not accompanied by that of civil status.[31] Similarly, Article 21 of the new EU Charter is not binding.

Of the first two directives adopted by the Council on the basis of Article 13 EC, only the Framework Directive deals with sexual orientation discrimination, and that directive only covers the field of employment.[32] That restriction is in sharp contrast with the much wider directive prohibiting racial discrimination in employment, social security, healthcare, education, and the provision of goods and services, including housing (the "Race Directive").[33] And the potential impact of the Framework Directive may be further reduced by the following pieces of "small change"

- As to the ground *sexual orientation*, the Commission's explanatory memorandum claims that "a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour, which is not".[34] This is of course a nonsensical claim. no such dividing line can be made, because in most cases of anti-homosexual discrimination, the difference of treatment is based on *the sexual orientation of certain behaviour*. Hardly anyone will be denied employment because he or she has had sex (or lives) with another person, nor because of his or her unexpressed sexual preferences the denial of employment will far more often be based on the sexual orientation of the sexual activity or on the sexual orientation of the

[27] See *supra* n 13

[28] On 25 Feb 2000, a similar measure was adopted at the Court of Justice non pecuniary spousal benefits are now available to unmarried (same-sex or different sex) partners of employees of the Court A more generous scheme, including pecuniary benefits such as pension entitlements, was adopted on 17 Aug 1995 at the European Monetary Institute in Frankfurt, and subsequently at the European Central Bank

[29] Council Regulation 781/98 of 7 April 1998, OJ [1998] L 113/4, Art 1a

[30] See Bell, *supra* n 13, at 31

[31] See *supra* n 22

[32] See *supra* n 24

[33] Council Dir 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ [2000] L 180/22, Art 3

[34] *Supra* n 23, para 5 at Art 1

cohabitation, i.e. on the fact that the person's behaviour was oriented towards someone of the same sex.[35] Nevertheless, the statement in the explanatory memorandum could be (wrongly) interpreted (at the national level) as implying that employers will be allowed to continue discrimination against *practising* homosexuals. Fortunately, the Court of Justice does not use explanatory memoranda when interpreting directives.

- The explanatory memorandum also claims that "this proposal does not affect marital status and therefore it does not impinge upon entitlements to benefits for married couples".[36] Preambular paragraph 22 repeats this claim: "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon." This claim is in direct contradiction to the proposed prohibition of indirect discrimination. It is evident, in the words of Article 2(2) of the Directive, that the "apparently neutral" criterion of marital status "puts . . . at a particular disadvantage" gay and lesbian couples, because they are barred from marriage. Of course, neither the explanatory memorandum nor the preamble can introduce an exception to the operative part of the Directive. Nevertheless, these statements could be (wrongly) interpreted as implying that employers will be allowed to continue the most common form of *indirect* anti-homosexual discrimination—even if there is no objective justification for it.
- Article 4(2) of the Directive allows for an exception for "public or private organisations the ethos of which is based on religion or belief". Under certain conditions such organisations would then be permitted to base a difference of treatment on "a person's religion or belief" (but not another ground),[37] and "to require individuals working with them to act in good faith and with loyalty to the organisation's ethos." Applying the "loyalty to the ethos" requirement, certain religious organisations could claim to have the freedom to continue discriminating against lesbians and gay men.

These three, dangerously vague, potential restrictions of the proposed prohibition of sexual orientation discrimination in employment seem to have been politically necessary to achieve the unanimous adoption of the directive as a whole.

[35] In view of *Grant* v. *South-West Trains*, Case C-249/96, [1998] European Court Reports I-621, it will be difficult to deny that to discriminate between same-sex and different-sex partners is indeed sexual orientation discrimination. Under the Dutch General Equal Treatment Act, the main problems of anti-homosexual discrimination are in fact related to the non-availability for same-sex couples of marital status and marital advantages: since 1994, two-thirds of the more than thirty-five "homosexual cases" brought before the Equal Treatment Commission have been about such partner-discrimination. See http://ruljis.leidenuniv.nl/user/cwaaldij/www/ (overview in Dutch).

[36] *Supra* n.23, para. 5 at Art. 1.

[37] The Commission's original proposal permitted discrimination based on a "relevant characteristic related to religion or belief", which seemed capable of being interpreted as covering sexual orientation. *Ibid.*, para. 5 at Art. 4.

Symbolic Preparation for Further Reforms in EU Law

As far as the *"law of symbolic preparation"* is concerned, the question must be whether the EU can properly be called a legal system that has been oppressing homosexuality. I think it can. Firstly, the EU is mainly the continuation, in a growing number of fields, of national legal systems that have oppressed homosexuality in many ways, and that are only slowly replacing the oppression with some recognition. Secondly, the directives and regulations of the EC are full of references to "marriage" and "spouse", thus excluding all homosexual partners from various advantages in many fields, especially that of free movement.[38] In a sense, the EC has its own—very traditional and therefore exclusively heterosexual—family law. Therefore, it may well be necessary to get some symbolic preparation enacted, before this legal system is up to the task of replacing its oppression with recognition.

As mentioned above, some such symbolic legislation has already been enacted in the context of the EC. Article 13 of the EC Treaty "stands out as conspicuously and deliberately neutered".[39] Nevertheless, the process of adopting the text of Article 13, including the words "sexual orientation", may have served to get the member states used to the idea that in the context of the EC they will occasionally have to address the rights of lesbian women and gay men. Thus, Article 13 "which at present stands as a rhetorical gesture may unexpectedly give additional content to the concept of (European) citizenship".[40] The rather limited Framework Directive on employment discrimination, and the non-binding Article 21 of the EU Charter, will serve as further symbolic legislation, preparing the field for more practically relevant laws. For example, it remains to be seen whether enough political power can be mobilised to make the Framework Directive as strong as the Race Directive, and whether the Framework Directive will (some day) be interpreted as prohibiting indirect discrimination via the so-called "neutral" criterion of marital status.[41]

For the European Union itself, opening up marriage or introducing registered partnership is not an option, because it has no competence relating to civil status in particular or family law in general, which is left to the member states.[42]

[38] The Dutch Government's "Commission on the opening up of civil marriage to persons of the same sex" made an inventory of EC regulations and directives explicitly referring to "marriage" or "spouse" In its report (*Rapport Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht*, The Hague, Ministry of Justice, Oct 1997, at 34), it produced a list of seventeen such regulations and twenty four such directives from very diverse fields, including the free movement of persons (notably Council Regulation 1612/68/EEC), social security, tax law, employment, agriculture (including Commission Regulation 2568/91/EEC on olive oil), fisheries (including Council Dir 78/659/EEC on water quality for fish), transport (including Commission Dir 91/662/EEC on the behaviour of the steering wheel), and insurance

[39] Flynn, *supra* n 22, at 1133

[40] *Ibid* , at 1151–2

[41] See p 643

[42] The institutions of the EU cannot provide EU citizens with a civil status (more or less equivalent to marriage) However, as employers, the institutions of the EC could establish a register of staff

Therefore, there are three forms of partner-discrimination which can be eliminated by—and in—EC law:

(1) discrimination between unmarried different-sex partners and unmarried same-sex partners (direct discrimination on the basis of sexual orientation);
(2) discrimination between married different-sex spouses and registered same-sex partners (direct or indirect discrimination on the basis of sexual orientation);[43]
(3) discrimination between married different-sex spouses and unmarried same-sex partners (indirect discrimination on the basis of sexual orientation).

The third form represents the biggest problem in most countries. However, if full equality (in employment) between unmarried same-sex couples and married different-sex couples remains too big a step for the Court of Justice, in interpreting the Framework Directive, then at least the other two forms of partner-discrimination need to be included in it. Both inclusions will be only of limited application in most member states (because they do not recognise unmarried different-sex partners or do not have registered partnership for same-sex partners), but they would be highly relevant as symbolic preparation for adjusting EC legislation to the existence of same-sex couples. This would lead to two principles to be incorporated in the interpretation of the Framework Directive:

- *Principle 1 (Employment). Where an employer provides spousal benefits to the unmarried different-sex partner of an employee, this employer should provide the same benefits to the unmarried same-sex partner of an employee.*

  (This of course is the principle that the Court of Justice refused to adopt, applying EC sex discrimination law, in *Grant* v. *South-West Trains*.[44]) This principle would only affect employers who are both too modern to deny the existence of heterosexual cohabitation, and too traditional to recognise gay and lesbian cohabitation. The huge majority of employers in Europe are

who have registered their unmarried partner for the purposes of claiming "spousal" rights and obligations under the Staff Regulations. See chap. III.1, Commission's consultative document of 29 Nov. 2000, SEC(2000)2085/4, discussed in *Egalité Newsletter*, Issue 31, Winter 2001, pp. 3–4). The EC has also entered the field of "free movement of civil status" through Council Regulation 1347/2000/EC of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

[43] A fourth form of discrimination could emerge, if any national body or an EC institution refused to recognise a same-sex marriage (e.g., one contracted in the Netherlands) as equivalent to a different-sex marriage.

[44] *Supra* n.35. The Court misstated the issue in that case when it: "considered the position of unmarried same-sex couples in relationship to unmarried *and married* opposite-sex couples, where in fact, the only circumstance directly relevant to this case was the position of unmarried opposite-sex and unmarried same-sex couples. Lisa Grant's claim was centred on the fact that other *unmarried* couples enjoyed the travel concession". M Bell, "Shifting Conceptions of Sexual Discrimination at the Court of Justice. From *P* v. *S* to *Grant* v. *SWT*", (1999) *5 European Law Journal* 63 at 72.

probably either more modern, or more traditional than that.[45] So they would not be bothered by this interpretation of the Framework Directive.[46]

- *Principle 2 (Employment). Where an employer provides benefits to the married different-sex partner of an employee, this employer should provide the same benefits to the registered (or married) same-sex partner of an employee.*

  (This of course is the issue which the Court of Justice had to address in *D. v. Council*.[47]) This principle would only affect employers who happen to employ persons who have already registered with (or married) their same-sex partners, e.g. in a Nordic country or the Netherlands.[48] For most employers in other countries, it will be some time before this will be the case. However, given the *Grant* judgment, it can hardly be denied that to distinguish between different-sex marriage and same-sex registered partnership (or marriage) is (direct) discrimination on the basis of sexual orientation.

Then at some later stage the third principle could be added:

- *Principle 3 (Employment). Where an employer provides benefits to the married different-sex partner of an employee, this employer should provide the same benefits to the partner of an employee who cannot marry the employee because they are of the same sex, and cannot register with the employee because there is no registered partnership legislation.*

It will then be up to the employer whether or not to provide the same benefits also to the unmarried different-sex partner of an employee who *has chosen* not to marry. Alternatively, employers could be required (by European or national law) to give equal treatment to married and *all unmarried* couples (i.e. including different-sex cohabitants).

Once Principles 1 and 2 (and perhaps 3) have been incorporated into the interpretation of the Framework Directive, the time will definitely have come to start amending (or re-interpreting) all the EC regulations and EC directives that favour married spouses. Because there are no EC rules that favour different-sex cohabitees over same-sex cohabitees, it will not be necessary to first apply Principle 1 to those regulations and directives. The incorporation of Principle 1 into the interpretation of the Framework Directive should make it politically possible to prevent spousal benefits in EC rules from being extended to *heterosexual* unmarried partners only.

In the absence of a move towards full equal treatment of married and unmarried partners (Principle 3), the process of amending or interpreting all those EC

[45] See pp 642–43

[46] For this reason (and because *Grant* was only about equal pay and not about other aspects of employment), I would disagree with M Bell (*supra* n 44, at 75, 79) and L Helfer ((1999) 93 *American Journal of International Law* 200 at 203), who have both argued that *Grant* may have been lost because the Court was asked to do too much

[47] *Supra* n.25

[48] For numbers of registered partners, see Waaldijk, chap 23, App VI

rules could therefore cautiously start with Principle 2 (countering the second form of partner-discrimination)

- *Principle 2 (All EU Law). Where a directive or regulation provides for a benefit for married spouses, it should be interpreted as applying to same-sex married spouses, and interpreted or amended so as to make that benefit available to registered partners.*

That principle will probably be first applied to the staff regulations of the EC, because there the parallel with the Framework Directive is most evident. After that, the various directives and regulations in the economic field could be adjusted.[49] Obviously, such an extension of partnership rights would be more controversial in some fields of EC law than in others. The immigration rights of the registered same-sex partners of EU citizens (and especially of non-EU citizens) may well be the last to be recognised.[50]

Until Principle 2 is incorporated into most EC rules, it would seem unlikely that Principle 3 would be applied to them. Principle 2 is far less controversial, because it simply reflects and respects changes in national family law, which are taking place as and when a member state feels ready to make a quasi-marital civil status available to same-sex couples. The recognition of same-sex registered partnerships (and marriages) in EU law would be a good incentive for other countries to create such a status for their own citizens, without encroaching on the competence of the Member States in the field of family law. However, because it seems improbable, in the next ten years, that every member state will legislate some form of partnership registration, the third principle will remain necessary to guarantee full equality for all European citizens in same-sex relationships. So the final step in recognising same-sex partners would need to be the incorporation of Principle 3 in all fields of EU law·

- *Principle 3 (All EU Law). Where a directive or regulation provides for a benefit for married spouses, it should be interpreted or amended so as to make that benefit also available to partners who cannot marry each other because they are of the same sex, and cannot register as partners because there is no equivalent-to-marriage registered partnership legislation.*

Obviously one way to incorporate that principle would be to extend the benefits to all (same-sex and different-sex) cohabitants.

CONCLUSION RECOGNISING THE RECOGNITION OF SAME-SEX PARTNERSHIPS

One of the many ways in which the European Union resembles its member states is in its tradition of having numerous special rights for heterosexual couples.

[49] See *supra* n 38

[50] See K Waaldijk, "Towards Equality in the Freedom of Movement of Persons", in Krickler, *supra* n 13, 40 at 46–7

However, the EU also mirrors those member states in having slowly started to legally recognise homosexuality. The fact that four member states have not yet fully completed the decriminalisation of homosexual activity could slow down progress in the EU. Nevertheless, like the majority of member states, the EU has started on the road of explicit prohibition of anti-homosexual discrimination. An important, but largely symbolic step, was the inclusion of sexual orientation as a non-discrimination ground in Article 13 of the EC Treaty. The first directive implementing the non-discrimination principle of Article 13 with respect to sexual orientation, the Framework Directive, is only a small step because of its limited scope (although it is certainly of great symbolic importance). Whether the Directive will be interpreted by the Court of Justice as covering all direct and indirect discrimination between same-sex and different-sex partners is uncertain. If not, amending directives will be necessary to extend its scope to equality between same-sex and different-sex cohabitants, between married spouses and registered partners, and eventually between married spouses and unmarried/unregistered same-sex partners.

Full recognition of same-sex partners in fields other than employment seems even further away, especially with respect to free movement of persons. It seems likely that here, too, the EU will follow the standard sequence followed by the member states: only after making it unlawful for (private) employers to discriminate on the basis of sexual orientation will the legislative bodies start to scrutinise their own products for distinctions on the same ground. Almost all anti-homosexual discrimination contained in EC regulations and directives takes the form of special benefits for married spouses. It is submitted that these numerous regulations and directives could first be extended, by interpretation or amendment, to cover registered (and married) same-sex partners; in other words, *the EU should first recognise any national recognition of same-sex partnerships*. Thus, the EU would be merely reflecting the changes that are taking place in the family law of a growing number of member states. And then at a later stage, a more comprehensive revision of EC regulations and directives could become feasible: extending all spousal benefits to all partners who cannot marry each other because they are of the same sex, and cannot register as partners because there is no equivalent-to-marriage registered partnership legislation.

APPENDIX

HISTORICAL OVERVIEW OF THE MAIN LEGISLATIVE STEPS IN THE LEGAL RECOGNITION OF HOMOSEXUALITY IN EUROPEAN COUNTRIES

This overview is based on the hypothesis that almost all countries go, at different times and paces, through a standard sequence of legislative steps recognising homosexuality.[51]

Symbols Used

1993 = year in which the legislation came into force
(1993) = limited or implicitly worded legislation
[1993] = legislation applying in part(s) of the country only
i.p. = legislation in preparation or not yet in force

Table 1 EU Member States

	Decriminalisation of male (+ female) homosexual acts	Equalisation of age limits in sex offences	Specific anti-discrimination legislation	Registered partnership legislation	Joint or second-parent adoption	Civil marriage
Netherlands	1811	1971	(1983), 1992, 1994[53]	1998[52]	2001	2001
Denmark	1930	1976	1987, 1996[54]	1989	1999	—
Sweden	1944	1978	1987, 1999[55]	1995[56]	i p.	—
France	1791	1982	(1985, 1986), i p.[57]	(1999)	—	—
Germany	[1968], 1969[58]	[1989], 1994	[1992, 1993, 1995, 1997][59]	(2001)	—	—
Spain	1822	1822[60]	1995	[(1998, 1999, 2000, 2001)][62]	[i p][61]	—
Finland	1971	1998	1995	i.p.	—	—
Luxembourg	1792	1992	1997	—	—	—
Ireland	1993	—[63]	(1989), 1993, 1998, 2000[64]	—	—	—
Belgium	1792	1985	—	(2000)	—	i p
Italy	1889[65]	1889	—	—	—	—
UK	[1967, 1980], 1982[66]	2001	—	—	—	—
Portugal	1945	—[67]	—	—[68]	—	—
Greece	1950	—[69]	—	—	—	—
Austria	1971	—	(1993)	—	—	—

Table 2 Other Council of Europe Member States[70]

	Decriminalisation of male (+ female) homosexual acts	Equalisation of age limits in sex offences	Specific anti-discrimination legislation	Registered partnership legislation	Joint or second-parent adoption	Civil marriage
Iceland	1930[71]	1992	1996	1996	2000[72]	—
Norway	1972	1972	1981, 1998	1993	—	—
Slovenia	1977	1977	1995	—	—	—
Czech Rep	1961	1990	2001	1 p	—	—
Switzerland	1942[73]	1992	(1999) [74]	[(2001)],[75] 1 p	—	—
Turkey	1858	1858	—	—	—	—
Poland	1932	1932	—	—	—	—
Malta	1973	1973	—	—	—	—
Slovakia	1961	1990	—	—	—	—
Ukraine	1991	1991	—	—	—	—
Russia	1993	1997	—	—	—	—
Latvia	1992	1998	—	—	—	—
Estonia	1992	1 p	—	—	—	—
Lithuania	1993	1 p	1 p	—	—	—
Hungary	1961	—	(1997)	—[77]	—	—
Romania	1996	—	(2000)[76]	—	—	—
Bulgaria	1968	—	—	—	—	—
Croatia	1977	—	—	—	—	—
Moldova	1995	—	—	—	—	—
Albania	1995	—	—	—	—	—
Cyprus	1998	—	—	—	—	—

[51] See *supra* n.2 and pp. 637–38. A general source for the information in this table is the *World Legal Survey* of the International Lesbian and Gay Association, http //www.ilga.org, as well as ILGA-Europe's monthly *EuroLetter*, http //inet.uni2.dk/~steff/eurolet.htm. See also Graupner, *supra* n.3, at 361–759, and "Sexual Consent The Criminal Law in Europe and Overseas", (2000) 29 *Archives of Sexual Behavior* 415 (decriminalisation), R Wintemute, *Sexual Orientation and Human Rights* (Oxford, Oxford University Press, 1997) at viii, xi, 265–6 (anti-discrimination legislation) (updated in Appendix II to this book), the other chapters in this book (partnership and adoption) Corrections and additions are always welcome (c.waaldijk@law leidenuniv.nl).

[52] Unregistered cohabitation has received legislative recognition since the late 1970s. See Waaldijk, chap. 23.

[53] In the prohibition of discrimination in Art. 1 of the Dutch Constitution, which entered into force in 1983, the words "or any ground whatsoever" were added with the explicit intention of covering discrimination based on homosexual orientation (see K Waaldijk, "Constitutional Protection Against Discrimination of Homosexuals", (1986/1987) 13 *Journal of Homosexuality* 57 at 59–60) In 1992, "hetero- or homosexual orientation" was inserted in several anti-discrimination provisions of the Penal Code. In 1994, the General Equal Treatment Act came into force, covering several grounds including "hetero- or homosexual orientation" (see Appendix II, p. 786).

[54] Anti-discrimination legislation extended to cover employment discrimination in 1996.

[55] Anti-discrimination legislation extended to cover employment discrimination in 1999.

[56] Legislation on unregistered cohabitation came into force in 1988. See Ytterberg, chap. 22.

[57] With the intention of covering sexual orientation discrimination, the word "*moeurs*" (morals, manners, customs, ways) was inserted in several anti-discrimination provisions of the Penal Code (1985) and of the Labour Code (1986). "Sexual orientation" is expected to be added in 2001. See Appendix II, p. 784.

[58] In the former German Democratic Republic (East Germany), homosexual acts between men were decriminalised in 1968, and the age limits were equalised in 1989. In the pre-unification Federal Republic of Germany (West Germany), the dates were 1969 and 1994. See Graupner, *supra* n.3, at 407–10.

[59] Anti-discrimination provisions specifically referring to sexual orientation have been included in the constitutions of three *Lander* (states) Brandenburg (1992), Thuringia (1993) and Berlin (1995). Anti-discrimination legislation has been enacted in at least one *Land* Saxony-Anhalt (1997).

[60] Although the formal age limits for heterosexual and homosexual acts were equalised at the time of decriminalisation of homosexual acts in 1822, in practice homosexual acts with minors continued to be penalised until 1988 under a general provision against "serious scandal and indecency" (see Graupner, *supra* n.3, at 665–6).

[61] The provisions on joint adoption by unmarried different-sex and same-sex couples have been suspended pending a challenge to the constitutional power of Navarra (vs. the national government) to enact them. See Pérez Cánovas, chap. 26.

[62] Limited registered partnership legislation has so far only been enacted in four regions Catalonia (1998), Aragon (1999), Navarra (2000) and Valencia (2001).

[63] For oral and non-penetrative sex, the age limit is higher for male homosexual acts (17) than for heterosexual and lesbian acts (15). Since decriminalisation in 1993, the age limit for male homosexual anal sex and for heterosexual vaginal and anal sex is equal at 17. See Graupner, *supra* n.3, at 481, 487.

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

[65] In several parts of Italy decriminalisation of sex between men took place before 1889 (e.g. in 1861 in the Neapolitan province). See Graupner, *supra* n.3, at 505, and F Leroy-Forgeot, *Histoire juridique de l'homosexualité en Europe* (Paris, Presses Universitaires de France, 1997) at 66.

[66] Decriminalisation of most sex between two men over 21 took place in England and Wales in 1967, in Scotland in 1980 and in Northern Ireland in 1982 (see Graupner, *supra* n.3, at 711, 727, 739).

[67] See *supra* n.3.

[68] Legislation on unregistered cohabitation came into force in 2001. See p. 762.

[69] In the case of "seduction", the age limit for sex between men is higher (17) than for lesbian or heterosexual sex (15). See Graupner, *supra* n.3, at 466.

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

[71] Graupner (*supra* n.3, at 491) assumes that decriminalisation took place in the same year as in Denmark (1930). From 1918 until 1944, Iceland was an independent Kingdom in personal union with the Kingdom of Denmark.

[72] On 8 May 2000, the Icelandic Parliament passed an amendment allowing a person in a registered partnership to adopt the child of his or her registered partner. See *EuroLetter*, *supra* n.51 (No. 80, June 2000).

[73] In five Swiss cantons, sex between men had been decriminalised before the entering into force of the first national Penal Code in 1942. See Graupner, *supra* n.3, at 640.

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

[75] The canton of Geneva adopted a limited registered partnership law in 2001.

[76] Executive ordinance only.

[77] Hungary does have legislation on unregistered same-sex cohabitation. See Farkas, chap. 31.